

No. SC87968

IN THE MISSOURI SUPREME COURT

Dianna Reagan, et al.

Respondents/Cross-Appellants

vs.

St. Louis County

Appellant/Cross-Respondent

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,
MISSOURI
21st Judicial Circuit
Honorable Kenneth Romines, Division 10**

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of St. Louis County, Missouri, Division 10, the Honorable Kenneth Romines, which was rendered following a bench trial on Respondents/Cross-Appellants Dianna Reagan's and M.T.C. Construction, Inc.'s, d/b/a K. Bates Steel Services, Inc.'s ("Respondents" or "Reagan") claim for inverse condemnation under Missouri law and claim for violations of substantive due process rights brought under 42 U.S.C. §1983, which judgment held for Respondents and against Appellant/Cross-Respondent St. Louis County ("Appellant" or "County") as to the count claiming inverse condemnation and dismissed all other counts with prejudice.

This appeal originated in the Missouri Court of Appeals, Eastern District. On October 26, 2006, this Court granted Plaintiffs/Cross Appellants' application for transfer pursuant to Rule 83.04. Jurisdiction is proper in this Court pursuant to Mo. Const. Art. V, §10.

STATEMENT OF FACTS

Dianna Reagan (“Reagan”) purchased a long, narrow, 4.7 acre strip of land composed of two lots known and numbered as 4261 Chott Lane and 6212 Hawkins Road (“the Property”) on April 23, 1999, for \$134,000. Tr.260-261¹, Tr.Ex.Vol.III, Ex.12 & Tr.Ex.Vol.V, Ex. 56 & 57. Reagan also owned a business named M.T.C. Construction, Inc. d/b/a K. Bates Steel Services, Inc (“MTC, Inc.”), which was a subcontractor specializing in the employment of iron workers doing steel reinforcing, post tensioning cables and assembly and disassembly of tower cranes. Tr. 247-248. Reagan planned to build an office building on the Property and move MTC, Inc. into that office building. Tr. 257.

Before Reagan purchased the Property, the most recent use was for single-family residences and that use was compatible with the surrounding area. Tr. 57, 339 & Tr. 108 & Tr.Ex.Vol.III, Ex.7 & 8². There were attempts during the 1970’s and 1980’s to develop the Property as residential so as to not leave it as the sole industrial tract in the area, but

¹ Citations to the trial transcript appear as “Tr. Page:Line”

² The table of contents in Trial Exhibits Volume III incorrectly lists Exhibit 7 as the Rezoning Report dated 6/19/01 and Exhibit 8 as the Planning Commission Report of June 4, 2001. These references are reversed. Actually, Exhibit 7 is the Planning Commission Report dated June 19, 2001 and Exhibit 8 is actually the Planning Department Report dated June 4, 2001. All references to the Planning Commission Report are cited as Exhibit 7, and all references to the Planning Department Report are cited as Exhibit 8.

those property owners were not interested in being included in some of the petitions and parcels that were assembled. Tr.338. By 1999, when Reagan purchased the Property, it had become a small parcel with “M-1” Industrial zoning imbedded in much larger area zoned for residential uses and mostly developed for residential purposes. Tr.107:14 to 108:4 & 117:7. There were over thirty parcels zoned and used for residential purposes in the two subdivisions adjacent to the Property. Tr.Ex.Vol.III, Ex.12.

At the time Reagan bought the Property, it had been zoned “M-1” Industrial District” (“M-1 District”) since the county-wide rezoning of St. Louis County (“County”) in 1965. Tr.Ex.Vol.III, Ex.7& 8, p.2 & Tr.242. On July 3, 2001, the County rezoned the Property to “R-3” Residence District (“rezoning”). Tr.Ex.Vol.III, Ex.6 & S.Apdx.A-13. That rezoning is the focus of Reagan’s taking claim in Count III of the Second Amended Petition.

. St. Louis County is a charter county deriving its zoning authority from its home-rule charter adopted by authority of Article VI, Section 18(c) of the Missouri Constitution. *Casper v. Hetlage*, 359 S.W.2d 781, 789 (Mo. 1962). Section 2.180 23 of the St. Louis County Charter, adopted by the voters of St. Louis County on November 6, 1979 (“Charter”), authorizes the County to exercise legislative power pertaining to zoning in the unincorporated part of the county. Pursuant to the Charter’s authority, the County enacted Chapter 1003 of the St. Louis County Revised Ordinances (hereafter the “zoning code”). S.Apdx.A-47³ The zoning code is intended to promote the health, safety,

³ Citations to “S.Apdx” refer to Appellant’s Substitute Appendix.

morals, comfort, and general welfare; to secure economic and coordinated land use; and to facilitate the adequate provision of public improvements. SLCRO § 1003.011 S.Apdx.A-48⁴ & Tr.Ex.Vol.I, Ex. 2 & Tr.312. The zoning code achieves these purposes by establishing the various zoning district boundaries and classifications of property, as well as applicable procedures and regulations. Sections 1003.010 –1003.210. Tr.Ex.Vol.I, Ex1. Section 1003.300 in general provides for the amendment of the zoning code, the zoning district boundaries or the classification of property, including regulations pertaining to filing petitions, resolutions, public hearings and notices, and the powers of the St. Louis County Planning Commission (“Planning Commission”) and the St. Louis County Council (“Council”) with respect to such changes. S.Apdx.A-49 Section 1003.300 specifically provides that the reclassified of property from one zoning district to another may “be initiated by a resolution of intention by the Planning Commission or the County Council, or by a verified application of one or more of the owners” or their representatives. Section 1003.300 2 S.Apdx.A-49.

In January of 2001, neighbors surrounding the Property began calling their County Council representative, John Campisi, regarding possible development of the Property. Tr.Ex.Vol.V, Ex. 38. On April 11, 2001, Campisi asked the County Counselor to prepare a resolution of intention for reclassification of the Property then zoned “M-1” Industrial District pursuant to Section 1003.300 to consider whether a residential zoning would be more appropriate due to the residential neighborhood in which it was located.

⁴ Citations to the Appellant’s Substitute Appendix are “S.Apdx. page.”

Tr.Ex.Vol.V, Ex. 37. A resolution was prepared and placed before the County Council.

Tr.Ex.Vol.Vol.III, Ex.13.

On April 17, 2001, the County Council adopted Resolution 4385. S. Apdx.A-12. Resolution 4385 was a resolution of intention whereby the County Council initiated consideration of amending the zoning district maps to change the zoning classification of the property from “M-1” Industrial to a “R” Residence district. S.Apdx.A-12

Pursuant to Resolution 4385, on May 21, 2001, the Planning Commission held a public hearing regarding the potential rezoning. The Planning Commission heard comments from both proponents and opponents of the potential rezoning including Reagan. Tr.Ex.Vol.III, Ex. 7 & 8. The Planning Department then performed a site inspection of the Property and surrounding property, reviewed the applicable general plans and area studies, took into consideration the proceedings at the Planning Commission’s public hearing, and prepared a Planning Department report dated June 4, 2001. Tr 70,98, 316 & Tr.Ex.Vol.III, Ex.8. The Planning Department report, which recommended that the Property be rezoned from “M-1” Industrial District to “R-3” Residence District, was forwarded to the Planning Commission. Tr.Ex.Vol.III, Ex.7 & 8. The Planning Commission, after due consideration of the Planning Department report and the public hearing proceedings, issued its report dated June 19, 2001. Tr.Ex.Vol.III, Ex.7. That report detailed the history of rezonings and development in the area that began with the County’s intention in 1965 to preserve the area for expected industrial development through the actual development of the area into predominantly residential uses. Tr.Ex.Vol.III, Ex.7. The Planning Commission, by a unanimous vote of 8-0,

recommended to the County Council that the Property be rezoned from “M-1” Industrial to “R-3” Residential. Tr.Ex.Vol.III, Ex.7.

On July 3, 2001, the County Council adopted and the County Executive signed the rezoning ordinance. Tr.Ex.Vol.III, Ex.6. & S.Apx.A-13. The rezoning ordinance followed the recommendations of the Planning Department and Planning Commission. Tr.Ex.Vol.III, Ex. 7 & 8. The next month, in August 2001, Reagan filed this action. LF.1.

During the rezoning process, on May 14, 2001, Reagan first submitted a site development plan (SDP) for the Property. Tr. 103:8. That SDP only addressed the portion of the Property located at 6212 Hawkins Road. Tr.Ex.Vol.V, Ex.18. This submission came almost one month after adoption of Resolution 4385, and just a week prior to the May 21, 2001 public hearing. (TR. 103-4; Tr.Ex.Vol.III, Ex. 13; Tr.Ex.Vol.V, Ex.18; and S.Apx,12. At that point Reagan had owned the Property for over two years. Tr.260-261. Once submitted, the SDP had to go through the process of review and resulting edits by Reagan, but it was processed promptly and approved on June 28, 2001, a mere five days before the Property was rezoned. Tr.Ex.Vol.V, Ex.18; and Tr.Ex.Vol.VII, pp.62-66 Tr.Ex.Vol.III, Ex. 6, S.Apx.A-13.

On June 7, 2001, Reagan first filed a permit application center (PAC) form. Tr.Ex.Vol.V, Ex, 21. The County’s Public Works Department noted on Reagan’s form that Reagan was required to submit a building permit application and four sets of plans. Tr.Ex.Vol.III, Ex. 6. Reagan needed a building permit to build an office building on the Property. Tr.87/19-11. No building permit applications were ever received, and no building permits were ever issued. Tr. 111-112 & Tr.Ex.Vol.III, Ex. 21.

Reagan sold the Property on September 9, 2002 for \$171,969. Tr.Ex.Vol.IV, Ex.61. After that sale, this case went to trial on the Count III inverse condemnation claim of a taking under Article I, Section 26, Missouri Constitution and the Count IV substantive due process claim. LF. 1. After a bench trial, the trial court entered judgment of \$65,300 in favor of Reagan on the remaining taking claim of Count III but found in favor of County on the substantive due process claim of Count IV. S.Apdx.A-6 & 7.

The County appealed the entry of judgment in favor of Reagan on the inverse condemnation claim of Count III. LF. 1. After briefing and argument, the Missouri Court of Appeals for the Eastern District reversed the trial court and held that the rezoning of the Property did not effect a taking of Reagan's property in violation of Article I, Section 26 of the Missouri Constitution. The Court of Appeals also upheld the trial court's entry of judgment in favor of St. Louis County on Reagan's substantive due process claim of Count IV.

Property Valuation

Reagan purchased the Property on April 23, 1999, for \$134,000.00. Tr. 258-260; Tr.Ex.Vol.V, Ex.56. Reagan testified that she paid a fair market price for the Property. Tr. 295. After the rezoning, Reagan had the Property listed for sale. Tr. 300-301. On February 7, 2002, Reagan and a purchaser executed a sales contract, and the Property then sold to that purchaser for \$171,969.31 on September 5, 2002. Tr.Ex.Vol.VI, Ex. 61 & Tr. 300. Reagan admitted that she got a fair market price for the Property. Tr. 302 & Tr.Ex.Vol.V, Ex. 53; & Tr.Ex.Vol.VII, Ex. C. Thus, Reagan was able to sell the Property within approximately three years of its purchase for almost \$38,000.00 more than her

purchase price, even though the Property had been rezoned from “M-1” to “R-3” after she purchased it. The purchaser of the Property put in all site improvements necessary for a residential development and sold the Property to a homebuilder who then built houses on the Property. Tr. 7-9.

At trial, Michael Andrew Green testified as a valuation expert on behalf of Reagan. Tr. 190-246. The trial court specifically held that it believed the testimony of Mr. Green. LF. 267 Mr. Green testified that the value of the Property on July 3, 2001, if zoned as “M-1” Industrial, was in the range of \$190,000 to \$210,000. Tr. 198:10. Mr. Green further testified that the value of the Property, if zoned as residential on July 3, 2001, was in the range between ten percent (10%) more and ten percent (10%) less than its value if zoned as “M-1” Industrial on the same date. Tr. 225:18 – 226:3.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN FINDING THAT COUNTY'S ORDINANCE THAT REZONED RESPONDENTS' PROPERTY CONSTITUTED A TAKING UNDER ARTICLE I, SECTION 26 OF THE MISSOURI CONSTITUTION BECAUSE THE ORDINANCE DID NOT IMPOSE A SEVERE IMPACT ON THE PROPERTY UNDER A *PENN CENTRAL* ANALYSIS OF THE ECONOMIC IMPACT OF THE ORDINANCE, THE EXTENT TO WHICH IT INTERFERED WITH INVESTMENT-BACKED EXPECTATIONS AND THE CHARACTER OF THE COUNTY'S ACTION.

Penn Central Transportation Company v. City of New York, 438 U.S. 104, 123 (1978).

Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074 (2005).

Clay County ex rel. County Com'n v. Harley and Susie Bogue, Inc., 988 S.W.2d 102, 107 (Mo App. W.D. 1999).

Vatterott v. City of Florissant, 462 S.W.2d 711, 715 (Mo. 1971)

Article I, Section 26, Missouri Constitution

St. Louis County Charter, Section 2.180

St. Louis County Revised Ordinances, Chapter 1003

POINT II

THE TRIAL COURT ERRED WHEN IT FOUND REAGAN WAS DAMAGED IN THE AMOUNT OF \$65,300.00 BECAUSE THE COURT CALCULATED DAMAGES USING FIGURES NOT SUPPORTED BY THE EVIDENCE AND BECAUSE THE COURT USED AN INCORRECT MEASURE OF DAMAGES.

State ex rel Missouri Highway And Transportation Commission v. Horine, 776 S.W.2d 6, 8 (Mo. banc, 1989).

Shelton v. M&A Electric Power Coop., 451 S.W.2d 375, 378 (Mo. App. S.D. 1970).

Missouri Approved Jury Instruction (MAI) No. 9.02

Missouri Approved Jury Instruction (MAI) No. 16.02.

POINT III

THE TRIAL COURT ERRED IN ORDERING THE COUNTY TO PAY RESPONDENTS' ATTORNEY FEES AND COSTS BECAUSE THE COUNTY IS NOT LIABLE FOR ATTORNEY FEES OR COSTS UNLESS A STATUTE EXPLICITLY PROVIDES FOR SUCH, AND THE COURT FAILED TO APPLY THE "AMERICAN RULE" THAT BARS THE PAYMENT OF ATTORNEY FEES AND COSTS IN THIS CASE.

Baumli v. Howard County, 660 S.W.2d 702 (Mo. Banc 1983).

David Ranken, Jr. Technical Institute v. Boykins, 816 S.W.2d 189, 193 (Mo. 1991).

Stephenson v. First Missouri Corp., 861 S.W.2d 651, 658 (Mo.App. W.D. 1993).

DCW Enterprises, Inc. v. Terre du Lac Ass'n, Inc., 953 S.W.2d 127, 132 (Mo.App. E.D. 1977).

Article X, Sections 16-24, Missouri Constitution.

Article I, Section 26 of the Missouri Constitution.

Section 527.100 R.S.Mo, 1978.

42 U.S.C. §1983

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT COUNTY'S ORDINANCE THAT REZONED RESPONDENTS' PROPERTY CONSTITUTED A TAKING UNDER ARTICLE I, SECTION 26 OF THE MISSOURI CONSTITUTION BECAUSE THE ORDINANCE DID NOT IMPOSE A SEVERE IMPACT ON THE PROPERTY UNDER A *PENN CENTRAL* ANALYSIS OF THE ECONOMIC IMPACT OF THE ORDINANCE, THE EXTENT TO WHICH IT INTERFERED WITH INVESTMENT-BACKED EXPECTATIONS AND THE CHARACTER OF THE COUNTY'S ACTION.

Standard of Review.

In a court-tried case, the decision of the trial court should not be reversed “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.”

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976).

Argument

Reagan claimed in Count III of her Second Amended Complaint that the rezoning ordinance took her property in violation of Article I, Section 26 of the Missouri Constitution. The trial court entered judgment in favor of Reagan in the amount of \$65,300. Thus Reagan alleged a regulatory taking.

Federal courts have long recognized that regulations can be so onerous that they are “tantamount to a direct appropriation or ouster,” and thus require compensation to the landowner. *Lingle v. Chevron, U.S.A. Inc.*, 125 S.Ct. 2074, 2081 (2005). When a court finds that a regulation has gone so far as to constitute a taking, the court is essentially concluding that the public at large should bear the burden of that exercise of the police power rather than impose that burden on a single landowner. *Clay County ex rel. County Comm’n v. Harley and Susie Bogue, Inc.*, 988 S.W.2d 102,106 (Mo. App. W.D.1999) and *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 123 (1978). However, the constitutionality of the government action is assumed for taking analysis. *Lingle*, 125 S.Ct. at 2084.

Courts have recognized that government regulations inherently adjust rights between citizens for the public good and that government could not function if governments had to pay compensation to property owners every time a change in the law diminished the value of someone’s property. *Lingle*, 125 S.Ct. at 2081. Governments, therefore, are permitted to enact zoning laws that adversely affect the economic value of property. *Penn Central*, 438 U.S. at 124. The United States Supreme Court has held that land-use regulations that have destroyed or adversely impacted the values of real estate are not takings. *Id.* Further, the mere showing that a regulation prevents a use of property that the owner had previously believed was permissible does not amount to a “taking”. *Id.* 438 U.S. at 130. Likewise, diminution in property value caused by land-use regulations that are reasonably related to advancing the general welfare, is not enough to constitute a taking. *Id.* 438 U.S. at 131. Thus a 75% diminution in property value

caused by a zoning regulation did not constitute a taking. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Similarly, a 87.5% diminution in value caused by a land-use regulation did not constitute a taking. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

The unifying principle of federal takings jurisprudence in cases involving regulations is:

to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of [the] tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Lingle, 125 S.Ct. at 2082. Thus the focus of a takings inquiry is on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. *Penn Central*, 438 U.S. at 130-131. A taking occurs where the government regulation has a severe impact on the landowner's property. *Penn Central*, 438 U.S. at 136.

Missouri courts likewise recognize that a regulation that goes too far can arise to a regulatory taking. *Clay County*, 988 S.W.2d 106. However, this Court has not yet decided a case in which it found a zoning regulation has gone so far as to constitute a taking under Article 1, Section 26 of the Missouri Constitution. When that issue has confronted the Missouri Courts of Appeals, those courts have looked to federal law deciding Fifth Amendment takings questions and have specifically relied upon the factors enunciated in *Penn Central*, 438 U.S. at 123; *Clay County*, 988 S.W.2d at 107; *Schnucks*

Markets, Inc. v. City of Bridgeton, 895 S.W.2d 163 (Mo. App. E.D. 1995). There are no clear formulas or bright lines to determine when a regulation goes too far. *Penn Central*, 438 U.S. at 124. Rather, the court must usually make that determination based upon an inquiry into the specific facts of the case. *Id.*⁵

Penn Central Factors

Missouri courts have used the *Penn Central* factors as guideposts in the difficult, case-specific analysis of when a regulation goes too far. *Clay*, 988 S.W.2d at 107; *Schnuck Markets*, 895 S.W.2d at 165. Those factors are “(1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.” *Clay County*, 988 S.W.2d at 107, citing *Schnucks Markets*, 895 S.W.2d at 168; *Penn Central*, 438 U.S. at 124. None of these factors are singularly dispositive. *Tahoe-Sierra*

⁵ There are two limited situations where courts find *per se* regulatory takings without the case specific analysis. *Clay County*, 988 S.W.2d at 106-107. The first exception is where “a regulation causes a physical invasion of property. *Id.* The second exception is “when a regulation denies all economically beneficial or productive use of land.” *Id.* Since neither of those situations constituting a *per se* taking is present in this case, this Court should inquire into the specific facts of the case to determine whether a taking has occurred. *Id.*, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Penn Central*, 438 U.S. at 124.

Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 N.23 (2002).

Economic Effect of Rezoning on Property Owner.

The Supreme Court in *Lingle* noted that the case-specific approach under the *Penn Central* factors depends largely, but not exclusively, on the magnitude of the economic impact of the regulation and the degree to which it interferes with legitimate property interests. *Lingle*, 125 S.Ct. at 2082. The extent of the rezoning ordinance's impact is "resolved by focusing on the uses the regulations permit." *Penn Central*, 438 U.S. at 131. Here, the rezoning ordinance changed zoning of the Property to the "R-3" Residence District. Before trial, Reagan sold the Property and it was actually developed for residential purposes.

Reagan acquired the Property in 1999 at a cost of \$134,000 when it was zoned M-1 Industrial. Tr.258-260: Reagan Tr. Ex. 56. Reagan sold the Property in April of 2003 when after it was rezoned to "R-3" Residence District for \$171, 969. Thus, Reagan realized a profit of almost \$38,000 or a 28% return over the years she owned the Property. A 28% return is a reasonable rate of return. See *Long v. Board of Adjustment of City of Columbia*, 856 S.W.2d 390, 393 (Mo. App. W.D. 1993)(profit of \$25,900 over twenty years is reasonable return). In *Penn Central*, the Court weighed heavily the fact that, as statutorily restricted, the property owner was capable of earning a reasonable return. See also *Dorman v. Township of Clinton*, 269 Mich. App. 638, 714 N.W.2d 350 (2006); *Georgetown v. Sewell*, 786 N.E.2d 1132 (Ind. App. 2003). This Court should

likewise weigh heavily the fact that Reagan made a reasonable return on the sale of her property.

In the case of a permanent taking, the economic impact of the rezoning is established by the difference in the value of the property immediately before and immediately after the taking. See Point II. Michael Green, Reagan’s expert, testified that the value of the Property zoned for residential use on July 3, 2001, was somewhere in the range of plus or minus ten percent of its value if zoned as “M-1” on that same date.⁶ Tr.225:18-226:3. The trial court specifically held that it believed the testimony of Mr. Green. LF.267 & S.Apx.A-8 & LF.267.

Mr. Green testified that the value of the Property on July 3, 2001, if zoned as M-I Industrial, was in the range of \$190,000-210,000. Tr.198:10. Thus according to the testimony that the trial court stated it believed, the Property could have been worth up to \$21,000 more if zoned in the “R-3” Residence District than its highest value zoned as “M-1” Industrial District.⁷ However, even taking the worst-case scenario under Mr.

⁶ By inference then, Mr. Green testified that the value of the Property zoned for residential uses on July 3, 2001 would fall between \$171,000 to as much as \$231,000. [$\$190,000 - (10\% \times 190,000)$] to [$\$210,000 + (10\% \times \$210,000)$]

⁷ The top half of Mr. Green’s range comports with the testimony of the County’s appraisal expert that the Property had a greater value on July 3, 2001 when zoned for residential uses than it had on the same date for industrial uses. Tr.363:6.

Green's testimony, the Property only lost ten percent of its value as a result of the rezoning or twenty-nine (29%) according to the trial court's judgment.⁸

In comparison, the United States Supreme Court has found that no taking occurred when a zoning change caused a seventy-five percent (75%) diminution in property value. *Euclid*, 272 U.S. at 365. Likewise, in *Hadacheck*, 239 U.S. at 394, the U.S. Supreme Court found that an eighty-seven and one-half percent (87.5%) diminution in property value caused by a zoning change did not constitute a taking. This Court has found that a zoning change from commercial to residential that caused the value of property to fall from \$119,000 to \$24,000 was not confiscatory zoning. *Vatterott v. City of Florissant*, 462 S.W.2d 711, 715 (Mo. 1971) (79.8% reduction in value with zoning change). Clearly, even a substantial reduction in property value, standing alone, is not enough to constitute a taking.

Thus, a ten percent (10%) decrease or even a twenty-nine percent (29%) decrease in the value of the Property all pale in comparison to the seventy-five percent (75%) and eighty-seven and one-half percent (87.5%) reductions in property values that the United States Supreme Court found did not constitute a taking. Clearly, the first and most weighty of the *Penn Central* factors favors the County.

⁸ The trial court found the value of the Property was diminished by \$65,300 or twenty-nine percent (29%) using figures that were not supported by the record and based upon an incorrect measure of damages. LF.268 & S.Apdx.A-6. See Point II for discussion of errors in measure of damages and calculation of damages.

Reasonable Investment-Backed Expectations.

The second *Penn Central* factor is the impact the rezoning had on Reagan's reasonable, investment-backed expectations. *Penn Central*, 438 U.S.124. In essence, this Court must decide what investments are both reasonable and so significant that they must be considered in the calculus of what constitutes a taking.

This Court should consider that real estate development is an endeavor that is widely regulated in Missouri. The zoning code is one level of regulation on real estate development. Tr.Ex.Vol.I, Ex.I. Everyone is presumed to know the law, including the ordinances of St. Louis County which provide for the rezoning of property. *Schnucks Markets*, 895 S.W.2d at 168. Additionally, landowners must be charged with knowledge of information in the public record regarding the zoning history of their property and the surrounding area. In this case, Reagan should have been aware that the "M-1" Industrial District in which the Property was located had started out in 1965 as a much larger area, but that all the surrounding properties were subsequently rezoned to residential uses. Tr. 55-57, 67, 107, 117, 329-331, 333, 337, 343 & 345 & Tr.Ex.Vol.III, Ex.7 & 8 (rezonings discussed) & 12. This sea-change in zoning over the ensuing thirty-six (36) years should put any reasonable person on notice that a long, narrow, 4.7 acre island of "M-1" Industrial District imbedded into a larger area of contiguous residential uses was out of date, inconsistent and subject to reconsideration. A review of the zoning code would have informed Reagan that the Property could be rezoned, including a rezoning to a residential district. Tr.Ex.Vol.I, Ex.1, Section 1003.300 & S.Apx.A-49 & Tr.Ex.Vol.I, Ex.1. That is especially true since the public record was replete with examples of neighboring

property that was rezoned from “M-1” Industrial District to residential uses.

Tr.Ex.Vol.III, Ex. 7 & 8 (rezonings detailed therein) & 12. Further, a simple look around the neighborhood would suggest that the surrounding properties were actually developed for residential uses. Missouri law had stressed the importance of the character of the neighborhood and the surrounding uses in zoning questions for over thirty (30) years by the time that Reagan purchased the Property. *Desloge v. St. Louis County*, 431 S.W.2d 126, 132 (Mo. 1968). All these considerations suggest that a reasonable person would not rely on the then-current zoning to last forever.

Similarly, a reasonable investment-backed expectation could not be based upon discussions with County officials not charged with the authority to enact land use ordinances. In this case, Reagan testified that she talked with County zoning officials before she bought the Property and they told her the Property was zoned “M-1” Industrial and that she could build an office building on the Property. While those statements were true at the time made, that time was two or more years before Reagan ever filed a site development plan. But Reagan never considered the critical question of how long she could expect that zoning to remain in effect. If she researched that question, the zoning ordinance would have informed her that the County is free to enact reasonable zoning at any time. S.Apx.47 and Tr.Ex.Vol.I, Ex.1.

Significantly, there is no evidence that Reagan ever talked with a member of the County Council much less a majority of the Council. Only the Council itself is charged with the authority to zone and rezone property. S.Apx.A-47 (Section 2.180.23) Likewise, only the Council has the discretion to decide policy issues regarding land use

and to finally determine the legislative facts that inform land use ordinances. Other County officials, like employees in the Planning Department, have no authority to enact zoning and cannot handcuff the discretion of elected officials. Early discussions with County officials who merely advise of the *status quo* but lack the final authority to decide land use issues cannot form the foundation for a reasonable investment-backed expectation.

Further, the list of permitted uses in an “M-1” Industrial District as listed in the Zoning Ordinance should have put any reasonable person on notice that “M-1” Zoning was not appropriate for the parcel.⁹

In addition to County ordinances, existing state law informs reasonable investment-backed expectations. At the time that Reagan bought the Property, existing

⁹ Permitted uses that could be incompatible with nearby residential uses include business, professional, and technical training schools; laundries and dry cleaning plants; manufacturing, fabrication, assembly, processing or packaging of any commodity from semi-finished materials, except explosives or flammable gases or liquids; printing and duplicating services; research laboratories and facilities; sales and renting of equipment and vehicles used by business, industry, and agriculture, excluding retail automobile sales; terminals for trucks and buses; wholesaling or warehousing of manufactured commodities; and yards for storage of contractors’ equipment, materials, and supplies. Section 1003.151 SLCRO, Tr.Ex.Vol.I, Ex.1.

state law informed Reagan that if the zoning changed, she would not become a pre-existing lawful non-conforming use unless she had taken substantial steps toward her office building including applying for a building permit, receiving a building permit, and actually starting construction on the office building. *State ex rel Great Lakes Pipe Line v. Hendrickson*, 393 S.W.2d 481, 484 (Mo. 1965) (pumping station was non-conforming use because owner had acquired site, completed portion of the structure and obligated itself to the extent of over \$64,000); *Storage Masters-Chesterfield, L.L.C. v. City of Chesterfield*, 27 S.W.3d 862, 866 (Mo.App. E.D. 2000) (holding that mere intention of landowner does not create non-conforming use; and owner must take substantial step beyond mere preliminary work to constitute a non-conforming use); *Carolan v City of Kansas City, Missouri*, 813 F.2d 178, 181 (8th Cir. 1986) (no property interest in building permit unless city lacks discretion to issue to applicant who complies with the statutory requirements and the applicant has fulfilled the requirements).

County ordinances also informed Reagan that she could not begin construction until she satisfied the requirements for a building permit and actually applied for such a permit. Tr. 87/19-11. Since Reagan never actually applied for a building permit, she could not have had a reasonable investment-backed expectation that she could build her office building. Tr.Ex.Vol.V, Ex.21.

The zoning history of the surrounding area and the Property itself, the long hiatus since the last zoning inquiry regarding the Property, County ordinances allowing rezoning, state law regarding non-conforming uses and the list of permitted uses in an “M-1” Industrial District that are inconsistent with such a small lot surrounded by

established residential uses, all informed Reagan that she could not have a reasonable, investment backed expectation that the “M-1” zoning of the Property would not change and/or that she could always build the office building that she envisioned. Therefore, the second *Penn Central* factor favors the County.

Character of government action.

The third *Penn Central* factor is the “character of the government action.” *Penn Central*, 438 U.S. at 124. The United States Supreme Court has explained this factor when it observed that :

A taking may more readily be found when the interference with the property can be characterized as a physical invasion by the government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. at 124 (internal citations omitted). In this case, the rezoning does not effect a physical invasion of the Property. Rather, it is a simple rezoning action that adjusts the benefits and burdens of economic life between property owners. The rezoning resulted in one contiguous group of residential uses that included the Property. Each property owner in the contiguous group of residential uses benefited from the compatibility of neighboring residential uses. At the same time, each landowner was burdened by the same limitation on non-residential uses. Thus, the rezoning had the effect of allocating the benefits and burdens of residential uses most immediately among the property owners who formed the contiguous group of residential uses, albeit the community as a whole also benefited from desirable residential neighborhoods that

resulted. The Property was actually developed for residential uses after Reagan sold it, so this adjustment of the benefits and burdens of economic life favors the County under the third *Penn Central* factor.

For the foregoing reasons this Court should find that the application of the *Penn Central* factors to the unique circumstances of this case weigh in favor of the County, and compel the conclusion that the rezoning did not constitute a taking of the Property.

Conclusion

The rezoning ordinance did not constitute a taking and therefore, the trial court erred when it entered judgment in the amount of \$65, 300 in favor of Reagan on Count III of the Second Amended Complaint.

POINT II

THE TRIAL COURT ERRED WHEN IT FOUND REAGAN WAS DAMAGED IN THE AMOUNT OF \$65,300.00 BECAUSE THE COURT CALCULATED DAMAGES USING FIGURES NOT SUPPORTED BY EVIDENCE AND BECAUSE THE COURT USED AN INCORRECT MEASURE OF DAMAGES.

Standard of Review.

In a court tried case, the decision of the trial court should not be reversed “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law” *Murphy*, 536 S.W.2d at 32.

Discussion

For the reasons stated in Point I of this brief, County’s rezoning of the Property from M-I Industrial to “R-3” Residential on July 3, 2004, did not result in a taking of the Property. However, even if a taking had actually occurred, the trial court used an incorrect measure of damages when it entered judgment in the amount of \$65,300.00 in favor of Reagan on her inverse condemnation claim pled in Count III of the Second Amended Petition. The measure of damages used by the trial court was:

“... the difference between the price for which the sale was forced after rezoning, and the value of the property as appropriately zoned “M-1”. That

amount is the difference between \$220,000.00 and \$154, 700.00 to wit:
\$65,300.00, plus attorney fees and costs.”

Judgment A-25.

However, the proper measure of damages in inverse condemnation cases is the same as the measure of damages in condemnation cases which is the difference in fair market value of the entire tract immediately before and immediately after the appropriation. *State ex rel Missouri Highway And Transportation Commission v. Horine*, 776 S.W.2d 6, 8 (Mo. banc, 1989) and *Shelton v. M&A Electric Power Coop.*, 451 S.W.2d 375, 378, fn. 1 (Mo.App.S.D. 1970). That measure of damages is also set forth in Missouri Approved Jury Instruction (MAI) No. 9.02 which provides as follows:

You must award defendant such sum as you believe is the difference between the fair market value of the defendant’s whole property immediately before the taking on (date of appropriation) and the value of defendant’s remaining property immediately after such taking, which difference in value is the direct result of the taking and of the uses which plaintiff has the right to make of the property taken.

MAI 9.02.

MAI 16.02 then defines “fair market value” to be:

The phrase “fair market value” as used in these instruction(s) means the price which the property in question would bring when offered for sale by one willing but not obligated to sell it, and when bought by one willing or desirous to purchase it but who is not compelled to do so. In determining

fair market value you should take into consideration all the uses to which the property may best be applied or for which it is best adapted, under existing conditions and under conditions to be reasonably expected in the near future.

MAI 16.02.

In this case, Plaintiffs claim that the rezoning of the Property from “M-1” Industrial District to “R-3” Residence District was so onerous that it effected a taking of their property. Count III, Second Amended Complaint. The Property was rezoned to “R-3” Residence District on July 3, 2001. Re. Ex. 6, Apdx. 18. Accordingly, the date of taking, if any taking in fact occurred, was July 3, 2001.

Yet the trial court based its judgment on values of the Property that were far removed from the date of the alleged taking and in one case, not even mentioned in the record. Specifically, the trial court measured Reagan’s damages using a 2002 sale price of \$154,700. LF.268 & S.Apdx.A-. Interestingly, the figure \$154,700 does not appear anywhere in the record. +¹⁰

¹⁰. It appears that the trial court arrived at the \$154,700 figure by using numbers from a closing statement Reagan put into evidence and a simple math error. Trial Exhibits, Volume VI, Tab 61. That closing statement showed Reagan sold the property on September 9, 2002, for \$171,969 with settlement charges of \$16,313.41. Trial Exhibits, Volume VI, Tab 61. The trial court may have attempted to subtract the \$16, 313.41 from

Yet, notwithstanding a possible math mistake, it is clear the trial court did not use a sale price from the date of the alleged taking. There is absolutely no evidence of a sale price as of July 3, 2001. Likewise, there was absolutely no evidence that the value as of July 9, 2002, had any bearing on the value of the Property on July 3, 2001.

In its *nunc pro tunc* Order, the trial court expressly found that it believed the testimony of Mr. Green, Reagan's appraisal expert. LF.267 and S.Apdx.A-8. Mr. Green testified that the Property, if zoned "R-3" on July 3, 2001, would range from ten percent more to ten percent less than the value of the Property if then zoned industrial. Tr.225-226. Accordingly, the evidence that the trial court believed regarding the value of the Property zoned as "R-3" Residential on the alleged date of taking is either ten percent more or ten percent less than its value on the same date for "M-1" Industrial. Mr. Green testified that the value of the Property zoned as "M-1" Industrial on July 3, 2004, was somewhere between \$190,000 and \$210,000. Trial Trans 198/10. By inference then, Mr. Green valued the Property zoned as "R-3" Residential on July 3, 2001, to fall within a range from \$171,000 (10% less than \$190,000) to \$231,000 (10% more than \$210,000). Clearly, the \$154,700 value of the Property when zoned as "R-3" Residential does not fall within that range. Therefore, the \$154,700 value of the Property used by the trial court is not supported by the evidence.

the sale price of \$171,969 and erroneously arrived at \$154,700. ($\$171,969 \div 1.1 = \$156,335.36$).

The trial court further erred when it found the Property would have been worth \$220,000 if zoned “M-1” Industrial District . The only evidence offered by Reagan that might support a value of \$220,000 is Mr. Green’s estimate of value of the Property zoned as “M-1” Industrial as of April 2003. Tr. 196/16-18. However, estimates of value of the Property as of April 2003 are irrelevant to an alleged taking occurring on July 3, 2001. Mr. Green also testified that the value of the Property zoned as “M-1” in July of 2001 was between \$190,000 and \$210,000. Tr. Trans. 198:10. Clearly, the \$220,000 value used by the trial court is not supported by the evidence.

Thus the trial court used before and after values that are irrelevant to the value of the Property immediately before and immediately after the alleged taking. Further, the trial court used an incorrect measure of damages and values that are not supported by the evidence.¹¹ Accordingly, this Court should reverse the trial court’s judgment of \$65,300.00 on Plaintiffs’ inverse condemnation claim of Count III of the Complaint.

¹¹ The trial court compounded its valuation errors when it subtracted commissions from the \$171,969 sales price, but did not subtract commissions from the \$220,000 estimate of value of the Property with “M-1” zoning as of April 2003. So when the trial court subtracted its \$155,655.90 after rezoning value from its \$220,000 before rezoning value, it compared apples and oranges. More importantly, no case has been cited and County has not found any case holding that fair market value is reduced by real estate commissions to arrive at a net figure. Fair market value is as defined in MAI 16.02. That fair market price

subsumes many variables considered by both the buyer and the seller including real estate commissions, if any. Thus, the “net-of-commissions” value of the Property based upon its 2002 sale price that the trial court used as the “after rezoning value” is not a fair market value, and cannot support the trial court’s award of \$65,300 in damages.

POINT III

THE TRIAL COURT ERRED IN ORDERING THE COUNTY TO PAY RESPONDENTS' ATTORNEY FEES AND COSTS BECAUSE THE COUNTY IS NOT LIABLE FOR ATTORNEY FEES OR COSTS UNLESS A STATUTE EXPLICITLY PROVIDES FOR SUCH PAYMENTS AND THE COURT FAILED TO APPLY THE "AMERICAN RULE" THAT BARS THE PAYMENT OF ATTORNEY FEES AND COSTS IN THIS CASE.

Standard of Review.

In a court tried case, the decision of the trial court should not be reversed “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law” *Murphy*, 536 S.W.2d at 32.

Discussion

The trial court held that Reagan could not be made whole, and would not be in the same economic position as she was prior to the action, unless her attorney fees and costs were assessed against County. (LF. 268-269, Apx. 17). The trial court then entered judgment for attorney fees in the amount of \$103,763.75 and a judgment for costs in the amount of \$7,591.50. A-18-19. The entry of both of these judgments is unlawful and contrary to the longstanding precedent of this Court. The entry of judgment for attorney

fees against St. Louis County also violates the American Rule which is clearly established in Missouri.

This Court has specifically held that counties are not liable for attorney fees and costs. *Baumli v. Howard County*, 660 S.W.2d 702 (Mo. Banc 1983). In *Baumli*, a taxpayer brought a declaratory judgment action to have certain statutes granting counties the discretionary authority to raise the compensation of certain county officials declared unconstitutional. Petitioner also sought an award of attorney fees under either Article X, Sections 16-24, Missouri Constitution (Hancock Amendment) or Section 527.100 R.S.Mo. The trial court found that the statutes under attack were constitutional, but it awarded the petitioner's attorney fees. LF.268. On appeal, this Court noted that Section 527.100 R.S.Mo. provides for the recovery of "costs" including attorney fees when a court finds that to be equitable and just.¹² However, this Court went on to hold that no costs are assessable against the state in the absence of a statute explicitly providing for such assessment. *Baumli*, 660 S.W.2d 705.¹³ This Court further held that: "[i]t is fundamental that a county is but a subdivision of the state, created as a matter of administrative convenience." *Id.* at 705. Therefore, since there was no specific statutory language identified in *Baumli* providing for the assessment of attorneys fees and costs

¹² This Court also rejected petitioner's claim for attorney fees predicated on the "Hancock Amendment."

¹³ In *V.M.B. v. Missouri Dental Board*, 74 S.W.3d 636 (Mo. App. 2002), the Missouri Court of Appeals followed the holding in *Baumli*.

against the state or Howard County, costs could not be assessed against Howard County. *Id.* at 705. Just as in *Baumli*, Reagan has not identified any statutory authority for the trial court's award of attorney fees or costs in her favor. Therefore, this Court should reverse the trial courts judgment awarding Reagan attorney fees and costs.

However, even in the absence of the holding in *Baumli*, the trial court erred when it entered its judgment ordering County to pay Reagan's attorneys fees. Missouri follows the American Rule which provides that "absent statutory authorization or contractual agreement, with few exception, each litigant must bear his own attorney's fee." *David Ranken, Jr. Technical Institute v. Boykins*, 816 S.W.2d 189, 193 (Mo. 1991). In the case at bar, there is no evidence of a contract between the parties, and Reagan has not identified any statutory authority for the trial court' award of attorney fees. Accordingly, in the absence of other rare exceptions to the American Rule, the trial court erred when it entered its judgment ordering County to pay Reagan's attorney fees.

The only other exceptions to the American Rule are cases "where the natural and proximate result of a breach of duty is to involve the wronged party in collateral litigation" or "cases involving very unusual circumstances" *Id.* at 193. The first of these exceptions is inapposite because this action was not a collateral action. Rather, Reagan asserted a taking claim under Article I, Section 26 of the Missouri Constitution and a claim of substantive due process violations brought pursuant to 42 U.S.C. §1983. Likewise, the "very unusual circumstances" exception to the American Rule is inapposite. Missouri courts rarely find the existence of "very unusual circumstances" justifying an award of attorney fees. *Id.* at 193. In fact, "[s]uch fees have been denied in

cases of an improper tax assessment, when a defendant tendered a check on insufficient funds with an intent to defraud, when defendants tortiously conspired and threatened to wrongfully foreclose on notes and deeds of trust, and when defendants fraudulently concealed the existence of an outstanding deed of trust on a house. *Id.* at 193.¹⁴ In Ranken, the Plaintiff/Respondent claimed “unusual circumstances” justified an award of attorney fees because of reckless and punitive assessment of a license fee. Although the trial judge who awarded attorney fees stated he had a “feeling” that Ranken was the victim of a deliberate city scheme, this Court noted the record was devoid of any facts that would support very unusual circumstances. *Id.* at 194. This Court then reversed the trial courts award of attorney fees.

Further, “unusual circumstances” means an unusual type of case or unusually complicated litigation. *Stephenson v. First Missouri Corp.*, 861 S.W.2d 651, 658 (Mo.App. W.D. 1993). “Very unusual circumstances” has also been interpreted to mean an unusual type of case, or extremely complicated litigation wherein the legal actions taken by the parties significantly differ from other actions taken by other parties in

¹⁴ In *Stephenson v. First Missouri Corp.*, 861 S.W.2d 651, 658 (Mo.App. W.D. 1993), the Missouri Court of Appeals set forth the same four exceptions to the American Rule when it held that, “any exceptions fit one of four categories: (1) recovery of fees pursuant to contract, (2) recovery provided by statutes, (3) recovery as an item of damage to a wronged party involved in collateral litigation, and occasionally (4) reimbursement when ordered by a court of equity to balance benefits.” *Id.* at 659.

similar situations, or by others trying to achieve the same result. *Chapman v. Lavy*, 20 S.W.2d 610 (Mo.App.E.D. 2000). In addition, it is the nature of the lawsuit, not the facts, which determine whether a case is unusual. *Id.* The case at bar went to trial on an inverse condemnation claim of Count III and a claim for violations of Fourteenth Amendment substantive due process rights brought pursuant to 42. U.S.C. § 1983. None of these counts are unusual or novel. Finally, the trial only lasted a few days and ended with the trial court entering judgment only on the inverse condemnation claim of Count III. Thus the case was not exceptionally complicated. Significantly, there is no case finding “very unusual circumstances” on similar facts. This Court should therefore find that the facts of this case are not the “very unusual circumstances” that justify an award of attorney fees under the exception to the American Rule.

Certainly the facts of the case at bar are significantly different than the facts in *DCW Enterprises, Inc. v. Terre du Lac Ass’n, Inc.*, 953 S.W.2d 127, 132 (Mo.App.E.D. 1977) where the Court of Appeals found “very unusual circumstances” that were an exception to the American Rule. *Id.* In DCW the Court of Appeals held “very unusual circumstances” existed in that case because a defendant had intentionally left plaintiff’s name off a list of property owners filed with its zoning application thereby depriving plaintiff of a method to challenging a rezoning affecting plaintiff. The court found these circumstances entitled plaintiff to recover attorney fees from the defendant who engaged in the intentional misconduct, but at the same time it did not assess fees against other defendants who did not engage in intentional misconduct. *Id.* The cases cited in *DCW* only awarded attorney fees where intentional misconduct, bad faith, and vindictiveness

have been employed by the party ordered to pay attorney fees. *Id.* Thus the “special circumstances” or “very unusual circumstances” exception to the American Rule is limited to cases where the party against whom attorney fees are assessed has engaged in intentional misconduct, bad faith, and vindictiveness. There is absolutely no evidence of intentional misconduct, bad faith or vindictiveness on the part of the County.

Accordingly, the American Rule applies in the case at bar, and the trial court erred in entering its judgment ordering County to pay Reagan’s attorney fees.

CONCLUSION

This Court should reverse the trial court's entry of judgment in the amount of \$65,300 in favor of Reagan on the inverse condemnation claim of Count III. This Court should reverse the trial court's entry of judgment in favor of Reagan for attorney fees in the amount of \$103,763.75 and costs in the amount of \$7,591.50. Finally, this Court should affirm the trial court's entry of judgment in favor of St. Louis County on the claim of deprivation of substantive due process rights pursuant to 42 U.S.C. § 1983 of Count IV.

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Certification of Compliance

I hereby certify that this Brief contains all the information required by Rule 55.03 and complies with the type-volume limitation of Rule 84.06(b) and Eastern District Special Rule 360. This Brief was prepared in Microsoft Word 9.0 and contains 8367 words according to the word count of the word processing system used to prepare this Brief. Pursuant to rule 84.06(g), I hereby certify that a 3.5 inch diskette, which was scanned for viruses and is virus free, contains the full text of this Brief and has been submitted for filing with this Brief.

Christopher J. McCarthy
Associate County Counselor

Certification of Service

I hereby certify that on October 24, 2006, one copy of Appellant's Substitute Brief in the form specified by Rule 84.06(a) together with one copy of the disk required by Rule 84.06(g) were sent first-class mail, postage pre-paid, to:

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