MEMORANDUM

TO: Dan Simon

FROM: John Freese

DATE: 4/11/14

RE:

INTRODUCTION

This memo will discuss Missouri law regarding the authority for denying building permits by government actors. The "issuance of a building permit is a ministerial act which the building commissioner may not refuse to perform if the requirements of the applicable ordinance have been met." Wolfner v. Bd. of Adjustment of City of Frontenac, 672 S.W.2d 147 (Mo. App. 1984).

DISCUSSION

In State ex rel.Folkers v. Welsch, a relator brought action to have the court issue a writ of mandamus commanding the St. Louis Building Commissioner to issue a building permit for a gasoline filing station. State ex rel.Folkers v. Welsch, 124 S.W.2d 636 (Mo. App. 1939). In the case, the court laid of the standard for the issuance of such a permit. Id. The court noted that that the purpose of mandamus is to compel performance of a ministerial duty which one has refused to perform. Id. While it will not lie to correct or control the judgment or discretion of a public officer in his ordinary duties, it will lie "to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown." Id. A ministerial act is "an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case." Id.

The court found that because the all of the requirements of the ordinance governing such permits were complied with, the commissioner was not justified in refusing to perform the duty of issuing the permit. Id. Thus, the court affirmed the judgment of the Circuit Court awarding the writ of mandamus.

In Wolfner v. Bd. of Adjustment of City of Frontenac, a developer either purchased or acquired the option to purchase several lots. Wolfner v. Bd. of Adjustment of City of Frontenac, 672 S.W.2d 147 (Mo. App. 1984). The Frontenac City Ordinance provided an exception through which two of the lots, six and seven, were issued a permit. Id. Subsequently, the permits on lots six and seven to lapse. Id. Wolfer purchased the lots and applied for building permits, which were denied by the building commissioner. Id. Wolfner appealed to the Board of Adjustment, which conducted a hearing and affirmed the denial of permits for two reasons: (1) the Board felt the intent of the ordinance was to give relief only to the original owners of the lots; and (2) the request would be for the convenience of Wolfner, who failed to demonstrate hardship. Id.

The court first established that it must determine if the board's action was authorized by law. Id. Second, it must determine whether the decision was supported by competent and substantial evidence upon the whole record. Id. Additionally, the court could not disturb the finding if there was substantial credible evidence to support it and the result could have reasonably been reached. Id. The court could only disturb the finding if it was clearly contrary to the overwhelming weight of the evidence. Id.

In making its determination, the court first distinguished an exception and a variance in zoning matters. Id. The court explained that an "exception is written into the ordinance by the legislative body, rather than being granted or withheld at the discretion of the administrative board." Id. An exception "does not involve varying the ordinance but, rather, merely complying with its terms." Id. An exception is legislatively permitted while a variance is legislatively prohibited, but may be allowed for special reasons. Id. This is significant because, "the issuance of a building permit is a ministerial act *which the building commissioner may not legally refuse to perform if the requirements of the ordinance have been met.*" Id. (emphasis added). As a result, "a building permit must be issued for any property which meets the conditions specified in an ordinance as constituting an exception."

Because the exception was clearly stated without ambiguity, the court found that the Board of Adjustment read into the ordinance a provision never enacted by the Frontenac Board of Alderman. Id. The court noted that a board of adjustment is "solely an administrative body without a vestige of legislative power." Id. While a previous ordinance had language which tended to support the board's stated intent, the language was removed from the ordinance at issue. Id. The court concluded that by eliminating the language, the Board of Aldermen had no

intention that the exception would have such a limited application. Id. As a result, the court set aside the denial of the permit. Id.

In State ex rel. McDonald's v. Daly, McDonald's sought to compel the City of St. Louis to issue a building permit for a proposed fast food restaurant. State ex rel. McDonald's Corp. v. Daly, 748 S.W.2d 51 (Mo. App. 1988). The court, citing Wolfner, noted that "the issuance of a building permit is a ministerial act which the building commissioner may not refuse to perform if the requirements of the applicable ordinance have been met." Id.

The court found a "critical shortcoming" in McDonald's position. Id. The record established that McDonald's failed to meet all of the valid prerequisites for the issuance of the permit. Id. The application failed to identify the contract. Id. Additionally, the application's plans and diagrams were not sufficiently detailed. Id. Though McDonald's claimed these issues were minor and could be dealt with, the court found these problems undercut their right to the relief sought by mandamus. Id. To be entitled to mandamus, "one must show a clear, unequivocal, specific right to have the act performed as well as a corresponding present, imperative, and unconditional duty on the part of the respondent to perform the action sought." Id. Because McDonald's failed to establish a clear, unequivocal right to have the building commissioner issue the permit, the court affirmed the trial court's refusal to make its writ of mandamus. Id.

CONCLUSION

"The issuance of a building permit is a ministerial act which the building commissioner may not refuse to perform if the requirements of the applicable ordinance have been met." Wolfner v. Bd. of Adjustment of City of Frontenac, 672 S.W.2d 147 (Mo. App. 1984). Because our application and plans meet all the requirements specified in the city ordinances, we have established a clear, unequivocal right to have the building commissioner issue the building permit.

ırds converting the land is substantial in nature as opposed to
ıas a nonconforming use and has a vested right to continue in
t for whether or not a landowner has acquired a vested right
ed on a case-by-case basis. Id.

ɔnstrate how this test has been applied. In State ex rel Great
, the Great Lakes Pipe Line Co. sought a writ to compel an
umping station. State ex rel Great Lakes Pipe Line Co. v.
1965). The village argued that there was no substantial
ɔrming use. Id. The court disagreed, finding that, prior to the
eat Lakes had acquired a site and completed a portion of the
00. Id. The court found that such evidence supported the
had established a non-conforming use prior to the zoning

ke St. Louis, Outcom sought to erect eight signs along I-70.
mpany applied for permits while notifying the City that their
invalid. Id. The city repealed the ordinance and enacted a
type of signs Outcom wanted to erect. Id.
n argued it acquired a vested right by taking all legal action
he court concluded otherwise, finding that at the time
ɔhibited Outcom's application. Id. Though Outcom
ce, it was never legally challenged and therefore presumed
d that Outcom did not acquire a vested right under the new

ordinance because no determination was made as to whether Outcom conformed with the ordinance. Id.

The property owners in State ex rel. Lee v. City of Grain Valley sought to build a modular home to replace their existing home. State ex rel. Lee v. City of Grain Valley, 293 S.W.3d 104 (Mo. App. 2009). The city informed the family that their property was zoned commercial, and that building such a residence would not be allowed. Id. The family requested a zoning variance and, after a hearing before the Board of Zoning Adjustment, was denied. Id. A city ordinance designating the property as "transitional" was passed soon after. Id. The family filed a lawsuit seeking a writ of mandamus against the city. Id.

The court, applying the test in Outcom, found that the only showing the family could plausibly make was that they submitted a building permit, and then sought a variance. Id. The court found such a submission to be insufficient, reasoning that even an issuance of a permit under the prior law would not be enough to acquire a vested interest in non-conforming use. Id. McDowell v. Lafayette County Com'n demonstrates the high barrier to acquiring a vested right in non-conforming use. McDowell v. Lafayette County Com'n, 802 S.W.2d 162 (Mo. App. 1990). The appellants sought to establish non-conforming use for the operation of a landfill. Id. The appellants hired consultants and engineering experts to examine the feasibility of a trash disposal. Id. The appellants determined there was no zoning, and the appellants were assured by county authorities this was indeed the case. Id. The appellants purchased a tract of land and the deed to the property was executed in June of 1984. Id.

In November of 1984, voters approved to zone the county, but not before the appellants applied for the operation permit from the Department of Natural Resources (DNR). Id. On January of 1986, zoning ordinances were approved by local authorities. Id. In the meantime, the

appellants had expended over $200,000 for land acquisition, planning, leasing of equipment, test borings and fees to the DNR. Id. Appellants even engaged in dumping of building materials without a permit in an attempt to establish a nonconforming use prior to the date of the zoning regulations. Id.

The court found that these "well-intended and professional efforts" did not qualify as lawful non-conforming use. Id. The court found no evidence that appellants had "operated a landfill which by its operation would have qualified as a 'lawful non-conforming use.'" Id. "The purchase, the cost of planning, the securing of equipment, the test boring and the continued open intent to operate the landfill, even in combination, did not establish a lawful non-conforming use in appellants." Id.

CONCLUSION

It appears that the standard for establishing a vest right in non-conforming use is a difficult one. The critical point is where the "work completed towards converting the land is substantial in nature as opposed to merely preliminary, the landowner has a nonconforming use and has a vested right to continue in the nonconforming use." As Hendrickson and McDowell demonstrate, it appears that one must complete construction on the actual structure, as purchasing land, testing, and continued open intent to operate are insufficient.

MEMORANDUM

TO: Dan Simon

FROM: John Freese

DATE: 2/7/14

RE: Refusal to Rezone

INTRODUCTION

This memo details Missouri's law concerning rezoning applications, as well as recent cases applying the law in the area. Additionally, this memo will explain the recent decision in *Gash v. Lafayette County*.

DISCUSSION

In *Fairview Enterprises, Inc. v. City of Kansas City*, the trial court declared a rezoning ordinance null and void, finding that the public interest was not served. Fairview Enterprises, 62 S.W.3d 71 (Mo. App. 2001). Because zoning and refusal to rezone are legislative acts, the court reviewed "*de novo* any challenges to their validity, with deference to the trial court's ability to assess credibility of witnesses." *Id.* Because the exercise of zoning power is legislative rather than quasi-judicial, the legislative action will only be overturned if it is "arbitrary and unreasonable, meaning that the decision is not 'fairly debatable.'" *Id.*

A legislative action is arbitrary and unreasonable if it bears no substantial relationship to the public health, safety, morals, or general welfare. *Id.* The court noted several factors, including:

> "the adaptability of the subject property to its zoned use and the effect of zoning on property value in assessing private detriment. The character of the neighborhood, the zoning and uses of nearby property, and the detrimental effect that a change in zoning would have on other property in the area are relevant to the determination of public benefit."

The court applied a two-step analysis. *Id.* "First, the court determines whether the challenging party has presented sufficient evidence to rebut the presumption that the present zoning is reasonable. Then, if the presumption has been rebutted, the court determines whether the government's evidence establishes that the reasonableness of the zoning is 'fairly debatable.'" *Id.*

In *Windy Point Partners, LLC v. Boone County ex rel. Boone County Com'n*, the court reviewed an application for rezoning and conditional use permit for a mobile home park. Windy Point Partners, LLC v. Boone County ex rel. Boone County Com'n, 100 S.W.3d 821 (Mo. App. 2003). As in *Fairview*, the court would reverse the zoning action if it was arbitrary and unreasonable, meaning that the decision was not "fairly debatable." *Id.* Windy Point argued that, assuming the conditional use permit should have been approved, the Commission's refusal to rezone the property constituted an error as a matter of law. *Id.* However, because the court found

that the conditional use permit was not improperly denied, the Commission was not required as a matter of law to approve the rezoning. *Id.* at 826.

The court in *JGJ Properties, LLC v. City of Ellisville* the court applied the two-prong test found in *Fairview*. JGJ Properties, LLC v. City of Ellisville, 303 S.W.3d 642 (Mo. App. 2010). "First, the court reviewed the property owner's evidence to determine whether the owner has rebutted the presumption that continuation of the present zoning was reasonable; and second, the court reviews the government's evidence to determine whether such evidence makes the continuation of the present zoning fairly debatable." *Id.*

In order to rebut the presumption of validity, the appellants had to demonstrate their private detriment outeighed the public benefit. *Id.* The court noted that the "highest and best use standard" need not be applied, rather the court's consider a property's reasonable use in measuring the owner's private detriment. *Id* Because the court found no private detriment, there was no need to consider whether the action was fairly debatable. *Id.*

The decision in *Gash v. Lafayette Country* is distinguishable from other rezoning decisions. Gash v. Lafayette County, 245 S.W.3d 229 (Mo. 2008). Because the zoning decision was made by a county, the review must be pursued via a writ of certiorari as specified in section 64.870.2. *Id.* Section 74.870.2 provides:

> "Any owners, lessees or tenants of buildings, structures or land jointly or severally aggrieved by *any decision* of the board of adjustment or *of the county commission,* respectively, under the provisions of sections 64.845 to 64.880, or board, commission, or other public official, may present to the circuit court of the county in which the property affected is located, a petition.... *Upon the presentation of the petition the court shall allow a writ of certiorari directed to the board of adjustment or the county commission, respectively, of the action taken ....*"

The court found that the General Assembly's decision to provide review of such actions via a writ of certiorari precludes the use of declaratory judgment. *Id.* The court recognized that other jurisdiction find the declaratory judgment is the appropriate procedure for reviewing acts such as zoning and rezoning, those jurisdictions are not governed by section 64.870.2. *Id.* at 233. Because a legal remedy existed, the circuit court lacked jurisdiction to issue a declaratory judgment. *Id.*

CONCLUSION

There seem to be little material changes in the law regarding rezoning actions since the decision in *Chesterfield.* The courts have continued to apply the two-pronged test. It seems the decision in *Gash* will only be relevant in circumstances where a county's legislative action falls under section 64.870.2.

Issues

1. What are the grounds for challenging a denial of a rezoning request?

2. Does a "predetermination" to deny zoning invalidate the denial?

Short Conclusion

1. A challenge to a rezoning denial must establish that the detriment caused to the private property by the existing zoning outweighs the benefit to the public. The challenge must also establish that continuing the existing zoning is not fairly debatable. The basic factors to be considered in assessing such a challenge are: the adaptability of the property for the permitted use; the effect of the zoning on the value of the challenger's property; the zoning and use of surrounding property; and the effect of removal of current zoning on other property in the area. If the challenger is successful, the result is that the existing zoning is deemed "arbitrary and unreasonable" and, therefore, unconstitutional, and will not be enforced.

2. While a "predetermination" theoretically could invalidate a zoning decision, courts generally refuse to examine the motives behind the zoning decision at issue. Indeed, in a 1998 case, the Missouri Court of Appeals refused even to consider a challenge to a county's zoning decision that was allegedly made for the county's own economic benefit. State *ex rel.* Helujon, Ltd. v. Jefferson County, 964 S.W.2d 531 (Mo. App. 1998) (discussed *infra).* Despite the general rule, Missouri courts have occasionally at least reviewed the evidence when confronted with a claim of bias.

   While a case factually on point in Missouri does not seem to exist, there are some relevant (older) cases in other jurisdictions. In those cases, the courts sometimes concluded that a determination concerning zoning/rezoning was just an effort to lower the value of property so that a future condemnation could be accomplished. These cases concluded that such action was entirely inappropriate, which resulted in a voiding of the decision at issue.

Analysis

Basic legal principles. "The authority of the [ ] city to zone arises solely from the enabling provisions of Ch. 89, R.S.Mo...." Huttig v. City of Richmond Heights. 372 S.W.2d 833, 838 (Mo. 1963) (denial of rezoning unreasonable). In Missouri, "zoning, rezoning and refusals to rezone are considered to be legislative acts, not quasi-judicial acts." Hoffman v. City of Town and Country, 831 S.W.2d 223, 224 (Mo. App. 1992) (denial of rezoning unreasonable). Judicial review of a legislative act is limited to determining "whether the legislative body exercised its power arbitrarily or unreasonably. State *ex rel.* Kolb v. County Court of St. Charles County ("Kolb"), 683 S.W.2d 318, 321 (Mo. App. 1984) (denial of rezoning reasonable). "A decision is considered, arbitrary and unreasonable if it bears no substantial relationship to the public health, safety, morals, or general welfare." Heidrich v. City of Lee's Summit 2000 Mo. App. LEXIS 384, at * 7 (Mo. App. March 21, 2000) (quotation omitted) (approval of zoning ordinance not unreasonable).

More specifically, a refusal to rezone (or other zoning decision) is presumptively valid, which "carries with it the presumption that maintaining the zoning is in the public interest and welfare, and, thus, the basic question is whether the public interest and welfare outweighs the detriment to [the challenger's] interests caused by the zoning." Hoffman, 831 S.W.2d At 229. "Missouri courts use a two-step analysis in determining the validity of a zoning provision." Wells & Highway 21 Corp. v. Yates. 897 S.W.2d 56, 61 (Mo. App. 1995) (zoning classification reasonable). First, it is the challenger's burden to defeat, by competent and substantial evidence, the presumption of validity. Kolb, 683 S.W.2d at 321. The challenger does so by demonstrating "a public as well as a private need for the change." Id If the challenger makes the requisite demonstration, the court then reviews the governing body's "evidence to determine whether its evidence makes the continuance of [the], zoning fairly debatable." Loomstein v. St. Louis County, 609 S.W.2d 443,446 (Mo. App. 1980) (citation omitted). If the legislative decision is fairly debatable, the legislative decision will be upheld. Id. (quotation omitted). Moreover, "any uncertainty about the reasonableness of a zoning regulation must be resolved in the government's favor." Heidrich. 2000 Mo. App. LEXIS 384, at *7 (quotation omitted). If, however, the decision is not fairly debatable, the decision is "arbitrary and unreasonable and, therefore, violative of the due process clauses of our State and Federal Constitutions." Loomstein, 609 S.W.2d at 446.[1] In sum, a zoning classification will be found unconstitutional "[i]f the public welfare is not served by the zoning or if the public interest served by the zoning is greatly outweighed by the detriment to private interests." Despotis v. City of Sunset Hills. 619 S.W.2d 814, 820 (Mo. App. 1981) (denial of rezoning unreasonable).

In weighing the private detriment and the public interest, Missouri courts look to several factors: the adaptability of the property for the permitted use; the effect of the zoning on the value of the challenger's property; the zoning and use of surrounding property; and the effect of removal of current zoning on other property in the area. Loomstein, 609 S.W.2d at 447-50. These factors are explored below.

The adaptability of the property for the permitted use. This factor concerns the private detriment element of the balancing test, and is critical. Thus, in West Lake Quarry and Material Co. v. City of Bridgeton. 761 S.W.2d 749 (Mo. App. 1988), the court stated that, "where a zoning ordinance restricts property to a use for which it is not adapted, such an ordinance invades the rights of the property owner and is unreasonable." Id at 751. *See also* Renick v. City of Maryland Heights, 767 S.W.2d 339, 343 (Mo. App. 1989) (rezoning denial unreasonable; evidence of unsuitability of R-3 zoning consisted of testimony concerning prevailing noise levels and effect of highway proximity, which "rebutted the presumption of validity").

The mere fact that the existing zoning can be complied with is not decisive. As the court stated in Ohmes v. Lanzarini. 720 S.W.2d 425 (Mo. App. 1986), "[t]here was evidence of the obvious fact that a residence[s] [sic] could be built on the subject property. We do not find evidence of the possibility that the subject acre could be developed as zoned, single family residential, in itself, sufficient to maintain the denial as based on a reasonably debatable ground.... [T]he mere possibility of development as zoned does not change the character of the land ...." Id at 427-28 (denial of rezoning unreasonable).

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[1] ' The Missouri Supreme Court has stated that "a mere difference in the opinions of experts does not make such a question legally debatable." Huttig. 372 S.W.2d at 842. .'

Instead, complying with the zoning restriction must be "economically feasible." As stated in West Lake Quarry and Material Co.. "[t]he evidence regarding the adaptability of the property for development under its current zoning showed that residential development, although theoretically possible, is not economically feasible." Id at 753 (zoning unreasonable). "Economically feasible" is not satisfied simply by a piece of property having significant value as currently zoned without the requested change. Hoffman. 831 S.W.2d at 235. Thus, for example, that land under existing zoning had a significant market value was not determinative in Hoffman, where a house would have to be priced at between $600,000 and $750,000 for a development to be economically feasible, and the market would not support such a house price. Id at 223 (denial of rezoning unreasonable; development with existing zoning classification not economically feasible). However, "[n]ot economically feasible" is not the same as "commercially inconvenient." Summit Ridge Development Co. v. City of Independence. 821 S.W.2d 516, 520-21 (Mo. App. 1991) (denial of. rezoning reasonable).

The effect of the zoning on value of the challenger's property. This factor also concerns the private detriment side of the balancing test. This factor, however, seems less important than others. *See,* e.g.. White v. City of Brentwood. 799 S.W.2d 890,893 (Mo. App. 1990) (in rejecting challenge to rezoning denial, court notes that the property would be more valuable if rezoned but that, while "this is a detriment attributable to zoning; it is, however, one which we do not afford significant weight"); Huttig. 372 S.W.2d at 839 ("The fact that loss will be sustained through depreciation, if the ordinance is valid, is not controlling") (quotation omitted); Wells & Highway 21 Corp.. 897 S.W.2d at 62 ("Showing a mere difference in value under different zoning does not establish a private detriment substantial enough to require a zoning change"). Indeed, vast differences in value seem not to be able to overcome the weight of the other factors. Thus, for example, that land would be worth $97,000 if zoned commercial, as compared with $12,000 under the existing zoning, was not sufficient to invalidate a refusal to rezone property in Tealin Co. v. City of Ladue, 541 S.W.2d 544, 548-49 (Mo. 1976). Where, however, the other factors actually favor the challenger, the courts point to this factor for additional support. *See, e.g.,* Huttig, 372 S:W.2d at 840 (existing zoning unreasonable; court notes that value of property zoned residential was one-third the value of the property if zoned commercial).

In light of the foregoing, it is not surprising that Missouri courts hold that the "highest and best use" of a piece of property is not determinative of the challenge to the zoning decision. In fact, the Missouri Court of Appeals has stated, "[e]vidence as to the highest and best use of a piece of property is relevant when determining the market value of that property upon condemnation. Zoning is pertinent to a property's highest and best use to the extent that it may limit or encourage certain uses of the property. However, the highest and best use of a piece of property has no relevance in rezoning proceedings because there is no determination of value involved in the decision to rezone."

Kolb, 683 S.W.2d 318, 322 (internal citations omitted) (denial of rezoning reasonable; proper to exclude testimony concerning highest and best use). This seems to be somewhat overstated in light of the fact that the value of the property is a factor to consider in reviewing a rezoning denial. Nonetheless, it demonstrates the reluctance of the courts to accord much weight at all to this factor.

Zoning and use of surrounding property. This factor, which concerns the public interest, is critical. As the Missouri Court of Appeals has stated, "[i]n weighing the competing public and private interests, the zoning and use of property surrounding the tract sought to be rezoned is often the critical factor." Despotis. 619 S.W.2d at 821. Courts look to the nature of the tract of land at issue, the existing uses for property abutting the land, and the character of the neighborhood. *See, e.g.,* Summit Ridge, 821 S.W.2d at 521 (rezoning denial reasonable; no showing, *inter alia,* of any surrounding undesirable conditions which make the residential character of the site unreasonable"); Despotis. 619 S.W.2d at 820 (denial of rezoning from residential to commercial unreasonable; land next to heavily trafficked road, adjacent to commercial property, and on a block split into commercial and residential); Loomstein, 609 S.W.2d at 451 (denial of rezoning from residential to commercial unreasonable; lot surrounded on two sides by commercial zoning and heavy traffic); National Super Markets, Inc. v. City of Bellefontaine Neighbors, 825 S.W.2d 24, 25-26 (Mo. App. 1992) (denial of rezoning from residential to commercial reasonable; court notes, *inter alia,* that land to the east, south and west of the property is all zoned residential, which makes the subject property "residential in character," even though two commercial buildings exist to the north, because property "takes its character from the predominant adjoining and nearby residential district and land uses"); Huttig:, 372 S.W.2d at 840-841 (denial of rezoning from residential to commercial unreasonable; court considers regional development as well as the immediately adjoining property, and concludes that the nature of the tract of land is basically commercial.

Effect of removal of current zoning on other property. This factor also concerns the public interest, but it does not seem as important as the other factors. Courts have noted that simply because a handful of private citizens may be adversely affected by a rezoning is insufficient to demonstrate a public interest: "They, alone, do not constitute the public, and their collective interests are not that 'public interest' which must be weighed in any such zoning problem." Id. (quotation omitted). *See also* Huttig, 372 S.W.2d at 842-43 (refusal to rezone "based primarily upon a desire to benefit (or conversely to refrain from possible injury to) the subdivision of Lake Forest, [ ] does not constitute a matter of substantial city-wide interest"). Moreover, courts note that the effect of a rezoning is minimal (and thus not supportive of the public interest factor) where, for example, the surrounding property is zoned in the same manner as the zoning requested for the property at issue. *See, e.g.,* West Lake Quarry and Material Co., 761 S.W.2d at 753.

Inquiry Into Motive/Purpose. As noted above, a zoning decision violates the due process clause if it is arbitrary. Nonetheless, the general rule is that "the courts will not inquire into the interests or motives of the members of a municipal legislative body in exercising their legislative functions." Strandbere v. Kansas City, 415 S.W.2d 737, 742 (Mo. 1967) (rejecting an alleged conflict of interest challenge to rezoning ordinance; noting general rule, and concluding that "[t]here is nothing in this record which, disqualifies Mayor Davis from participating in the passage of the ordinance"). The basis for refusing to inquire into motives is that such an inquiry is prohibited by the doctrine of separation of powers. Coffin v. City of Lee's Summit 357 S.W.2d 211, 217 (Mo. App. 1962).

The Missouri courts have used this general rule to prevent inquiry into an improper bias claim, though the courts occasionally review the evidence before reiterating that motives may not

be inquired into. In Kolb, the Missouri Court of Appeals reviewed a challenge to a rezoning denial. Among other things, the Kolbs challenged the exclusion of testimony that "was to show the motivation for the votes of the judges and particularly the judge who voted against the rezoning." 683 S.W.2d At 322.[2] In response to this challenge, the appellate court simply noted the general rule from Strandberg, and concluded that "[t]here was no error in the exclusion of the testimony Id *See also* Smith v. City of Lee's Summit, 450 S.W.2d 485, 487-88 (Mo. App. 1970) (in challenge to a grant of a rezoning request, court reviews evidence of alleged conflict of interest by city council member, but concludes that, "in the absence of any specific statutory provision, we would not inquire into the motive of Mr. Childers in casting his vote in favor of the rezoning and could not disqualify him from acting in his capacity as a member of the city council"); Coffin, 357 S.W.2d 211,217 (in rejecting challenge to vote by certain Aldermen based on alleged "direct, personal, financial or pecuniary interest," court notes that the evidence fell short of demonstrating a "direct financial interest in the passage of the ordinance," and that "[t]hese facts before us do not present a situation where this court can say that it is clearly in the public interest for the court to examine the personal interest, financial interest or motives of the members of the legislative body of the City in exercising its legislative function in enacting the amendment" to the zoning ordinance); Summit Ridge Development Co. v. City of Independence, 821 S.W.2d 516, 520 (Mo. App. 1991) (denial of rezoning reasonable; rejecting contention that, *inter alia,* the City Council acted arbitrarily and unreasonably "by voting against the re-zoning based upon 'personal impressions and opinions,'" and noting that "City Council members were not precluded from voting against the rezoning purely due to citizen input, which in fact was not even the case here").

In State *ex rel.* Heluion. Ltd. v. Jefferson County, 964 S.W.2d 531 (Mo. App. 1998), the Missouri Court of Appeals confronted a property owner's challenge to approval of a rezoning application on the ground that, *inter alia,* "the county commission approved the rezoning order for reasons unrelated to those permitted in the state enabling statutes . . . . [i.e., for the purpose of promoting health, safety, morals, comfort or general welfare]." Id at 540. Helujon claimed that "the county commission approved the rezoning order on hopes for economic benefits to the County." Id The economic benefit, based on testimony from the county commissioners, included a contract between the county and the potential lessee of the subject property if the property were rezoned, which required payments to the County of $350,000 annually, and a hope that the County would benefit through increased employment and business revenue. Id

The court rejected the challenge, refusing even to consider the possible impropriety. The court stated:

> In the case of legislative rezoning, the reviewing court is not confined to nor concerned with the record made before the legislative body. *The reasons for passing the rezoning order are not at issue.* The reviewing court does not review the "record" before the legislative body. Instead, this Court independently assesses the validity of the zoning de novo. *This Court is concerned only with the end result, namely whether the rezoning order it fairly debatable and reasonable.* It is Helujon's burden to prove the rezoning order is not reasonable. Helujon did not meet the burden. [An expert]

[2] The county court judges had to approve the particular sort of zoning change requested in Kolb. Id.

> testified that the rezoning order was reasonable. The trial court did not err in deciding Helujon offered no evidence that the rezoning order constituted inappropriate or unreasonable zoning or land use planning. The fact that the commissioners considered economic benefits is not decisive. *'The pertinent inquiry is thus not what matters may have been literally or physically before the [Commission] or present in the lawmakers' minds.*

Id. at 540 (internal citations and quotations omitted; emphasis supplied).

We were unable to find a case in Missouri directly on point, i.e., where the improper motive/purpose was to keep land values low in anticipation of a future condemnation. There are, however, a number of (older) cases in other jurisdictions in which this issue is addressed. *See, e.g.,* Annotation, *Motive of members of municipal authority approving or adopting zoning ordinance or regulation as affecting its validity,* 71 A.L.R.2d 568 (1997); J. R. Kemper, Annotation, *Eminent Domain: Validity of "freezing" ordinances or statutes preventing prospective condemnee from improving, or otherwise changing, the condition of his property,* 36 A.L.R.3d 751 (2000).

In some of these cases, the courts conclude that a unique circumstance exists sufficient to inquire into motive, and conclude that the zoning decision is arbitrary and unreasonable. Thus, for example, the Supreme Court of Michigan stated that the zoning power "maybe greatly abused if it is to be used as a means to depress the values of property which the city may upon some future occasion desire to take under the power of eminent domain. Such a use of the power is utterly unreasonable, and cannot be sanctioned." Grand Trunk Western Railroad Co. v. City of Detroit, 40 N.W.2d 195, 199 (Mich. 1949). In doing so. the Grand Trunk court noted the general rule about not inquiring into motives, concluded that the situation was quite unusual, and pointed out that, in the instant case, the court did not need to make any inferences of improper motives because the evidence of improper motive was quite plain. Id.

In other cases, however, the courts review the evidence of improper motive, conclude that the evidence is insufficient to support a claim of improper motive, and then reiterate the rule that motive may not be inquired into in any event. For example, in McCarthy v. City of Manhattan Beach. 264 P.2d 932 (Cal. 1953), cert dem, 348 U.S. 817 (1954), the California Supreme Court noted that the trial court "properly" disregarded the improper motive contention, while noting, nonetheless, that the trial court had "determined that the city council had not been actuated by any improper motive or intent." Id. at 940. The court then pointed out that the claim was "entirely immaterial in view of the settled rule that 'the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance . . . . If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless." Id.

Procedural Posture. The challenges to zoning/rezoning decisions generally take the form of a declaratory judgment challenge to the reasonableness of the existing ordinance as applied to the property at issue and, sometimes, to the zoning decision at issue as well. *See, e.g.,* Salameh v. County of Franklin. 767 S.W.2d 66, 68 (Mo. App. 1989) ("Generally, judicial review of legislative zoning actions is most often accomplished through an action for declaratory judgment"); West Lake Quarry and Material Co.. 761 S.W.2d 749 (after denial of rezoning

application, property owner brings declaratory judgment action pursuant to R.S.Mo. §527.010, contending that existing zoning-is unconstitutional and void as applied to the subject property); State *ex rel.* Heluion. Ltd.., 964 S.W.2d 531 ("Challenges to zoning, rezoning and refusals to rezone in Missouri must be by declaratory judgment or injunction"). However, application for rezoning is necessary before judicial review of the existing zoning may occur: "The application for rezoning of [ ] property is a necessary exhaustion of administrative remedies prerequisite to [plaintiffs'] standing to attack the existing zoning ordinance. The refusal to rezone plaintiffs property serves to activate judicial review of the preexisting zoning." Salameh. 767 S.W.2d at 68.

Reviewing Court Procedure. Review of a zoning decision "is not initiated in a trial court by direct appeal on the record made before the legislative body." Hoffman. 831 S.W.2d at 224. Instead, "review is initiated by a plenary action, such as the request for a declaratory judgment. . . The trial court is, thus, not confined to nor concerned with the record made before the legislative body." Id. at 224-25. Accordingly, "the trial court, in a plenary action, reviews a presumptively valid decision of the local legislative body to determine whether the decision was fairly debatable, on a record which may, and probably quite often does, differ from the record before the legislative body." Id. at 225. *See also* Heidrich, 2000 Mo. App. LEXIS 384, at *8 ("When reviewing legislative actions, our scope of review is not limited to the record presented to the legislative body"). The Hoffman court also noted that the trial court often makes credibility determinations concerning the experts' opinions or the facts on which they rely, determinations which receive deference from the appellate court. Hoffman, 831 S.W.2d at 225.

If the trial court determines that the zoning classification is arbitrary and unreasonable, the court's power is limited to declaring the current zoning unreasonable; it may not order a particular rezoning: "[T]he court's determination is limited to the reasonableness of the current zoning. The court can only require the City to place a reasonable zoning classification of the property." West Lake Quarry and Material Co., 761 S.W.2d at 753 (citation omitted) (reversing trial court's ordering of the City to rezone the property to the classification requested by the challenger). *See also* Salameh, 767 S.W.2d at 68 ("Where the court finds a particular zoning order arbitrary and unreasonable as it is applied to certain property, judicial authority does not extend to ordering a specific rezoning, but is limited to declaring the legislation void or invalid"); Renick, 767 S.W.2d at 344-45 (appellate court reverses lower court's invalidation of all possible residential zoning classifications because only R-3 actually applied to the subject property; court also notes that "[a]ny unconstitutionality arises from the continued application of a particular zoning classification, not from the refusal of a legislative body to rezone").

Is the right-of-way dedication condition an unconstitutional taking?

Requiring a right-of-way dedication for an expressway that is necessitated primarily by development other than the proposed subdivision is almost definitely an unconstitutional taking.

In regard to subdivision regulation, there is the requirement that there be some "reasonable relationship" between the exaction demanded and the proposed activity of the landowner. State ex rel. Noland v. St. Louis County, 478 S.W.2d 363, 367 (Mo. 1972). This requirement exists so as not to violate the Takings Clause of the Fifth Amendment of the U.S. Constitution which states: "nor shall private property be taken for public use, without just compensation." In Noland, the court found in favor of the landowner who proposed a subdivision which would include 14 new homes. St. Louis county provided many conditions that needed to be met before it would approve the plat proposal. Notable conditions included lighting and improvement of a nearby street and a 60-feet right-of-way dedication that would run diagonally through the subdivision. The right-of-way dedication would have effectively destroyed the value of the property. The court found that the plat proposal needed to be approved without the dedication and improvements mostly because the improvements were not necessitated by the creation of the proposed subdivision. Noland, 478 S.W.2d at 367. Noland also pointed out that zoning and subdivision ordinances "may be valid generally, yet invalid in its application to a specific tract." Id. at 366-367.

The Noland rule was modified for mandatory dedications for recreation purposes to: "If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is reasonably attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power." Home Builders Association of Greater Kansas City v. City of Kansas City, 555 S.W.2d 832, 835 (Mo. 1977). While this modification appears to be dictum, the court's strong wording indicated it should be followed by lower courts. This modification was adopted to determine the constitutionality of a Kansas City statute requiring developers to dedicate 9% of their merchantable land when platting a subdivision. The land was supposed to be dedicated to provide land for recreation such as the creation of parks. The court remanded the case to lower courts to determine if a 9% dedication was a fair exaction in light of the modified standard. While this holding may seem to have a narrow application to dedications for parks, a strongly reasoned dissent cautioned it would not be much of a stretch to extend this reasoning to require mandatory dedications for things such as police stations, fire departments, schools, or libraries. Home Builders Association of Greater Kansas City, 555 S.W.2d at 839.

Although these leading Missouri cases have probably been superceded by two Supreme Court cases, the Supreme Court standard is similar to that adopted in Noland. However, parts of the of the Home Builders Association of Greater Kansas City holding have been affirmed in at least a minor takings dispute as recently as 1994. *See* Home Builders Association of Greater St. Louis v. City of St. Peters, 868 S.W.2d 187, 191 (Mo.App. 1994). First, the Supreme Court held it was a taking to condition a re-building permit on granting a public easement across beachfront property. Nollan v. California Coastal Commission, 483 U.S. 825, 841-842 (1987). The Court's reasoning was that the

permit to expand the house may have decreased sight lines, but the government interest to protect sight lines was not furthered by an easement to traverse the beachfront property. Id., 483 U.S. at 837. In other words, the Court found that to be valid, a condition to a permit approval must have a "nexus" to the harm caused by the permit. Id. If the condition does not "substantially advance" the "legitimate state interest" infringed upon by granting the permit, then the condition is likely a taking because it has failed the "nexus" test. The Court went as far as to say that it would probably not have been a taking to create a permanent viewing spot on the Nollan's property for those whose view of the ocean would have been obstructed by the house expansion; however a public easement across the property went too far. Id., 483 U.S. at 836.

The Supreme Court built on the Nollan "nexus" test by adding the requirement that a dedication be roughly proportional "in nature and extent to the impact of the proposed development." Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). An individualized determination of the effect of the development is required and is used to determine if the exaction is roughly proportionate to the harm created by the development. Id., 512 U.S. at 390-391. The Dolan decision has been limited to the exactions context. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999). The Supreme Court defines exactions as: land-use decisions conditioning approval of development on the dedication of property to public use." Id., 526 U.S. at 702. In Dolan, a business wanted to expand, and the requisite building permit was conditioned on a dedication of part of the property for flood control and traffic improvements. The city wanted the business to donate all of its property in the 100-year flood plain to be greenway and to allow for a pedestrian/bicycle path to go through the greenway. The requested dedications easily passed the "nexus" test because the increased pavement from the parking lot would increase the chance of flooding and because the store expansion would increase traffic in the area. Dolan, 512 U.S. at 388-389. However, the dedications failed the "rough proportionality" test which is similar to the "reasonable relationship" test set forth in Noland, the early Missouri case relating to exactions. In regard to the flood control concerns, the dedication of a public easement for the greenway failed because a private greenway could just as easily help control flooding. Dolan, 512 U.S. at 393. The Court points out that the business could at least place time, place, and manner restrictions on a private greenway, whereas the right to exclude has been completely lost if there is public easement. Id. at 394. Additionally, the Court did not allow the pedestrian/bicycle pathway because the findings that it "could offset some of the traffic demand . . . and lessen the increase in traffic congestion" were too conclusory and ambiguous to meet the individualized determination required as part of the "rough proportionality" standard. Id. at 395-396.

Here, the City is concerned with the increased traffic flow created by a new subdivision. Increased traffic flow almost certainly falls under the legitimate state interest of health and safety, so the City can use its police powers to try to control the problem. A right-of-way dedication to aid traffic flow would almost certainly pass the Nollan "nexus" test because it would be targeted at directly attacking the traffic flow concerns. Similarly, in Dolan, the greenway dedication required for flood control and the pedestrian/bicycle path to offset some traffic flow easily met the "nexus" test in regard to concerns about flood control and increased traffic.

However, the right-of-way dedication required by the City would almost certainly fail the Dolan "rough proportionality" test. There are no studies indicating the amount that traffic will be increased by the creation of the new subdivision. This makes it impossible for the City to make an individualized determination "that the required dedication is related in both nature and extent to the impact of the proposed development." Furthermore, the expressway would be needed with or without the new subdivision, so the developer should get at least some compensation if the developer must surrender the entire right-of-way necessary to construct the extension of Stadium boulevard. In Noland, St. Louis county failed to establish a "reasonable relationship" (which is akin to the "rough proportionality" test) between demanding a 60 foot wide right-of-way dedication to extend a through street that was not necessitated by the new subdivision and building 14 houses in a new subdivision. Since the right-of-way dedication demanded is five times as big in our case, it is almost certain a court would find the required dedication is not "roughly proportional" to the impact of increased traffic from building a new subdivision. It could be argued that the developer would need to make a small dedication proportionate to the increased traffic from the subdivision. However, the impact of the new subdivision needs to be determined before the dedication can be required.

CONCLUSION

While several early Missouri cases are instructive, the facts of this case lends themselves to analysis under Supreme Court exactions cases. Nollan requires a "nexus" between the exaction demanded and the harm sought to be avoided by the proposed development. Dolan expands on this test by adding the requirement that the exaction be "roughly proportionate" to the impact created by the development. When a government entity demands too large of an exaction as a condition for approving proposed development, that exaction is a taking in violation of the Fifth Amendment of the U.S. Constitution. In our case, the demanded exaction almost certainly passes the "nexus" test. However, the demanded exaction almost certainly fails the "rough proportionality" test since the impact of the new development is almost entirely unrelated to the need to extend Stadium. Since the demanded exaction almost certainly fails the "rough proportionality" test, it likely constitutes an unconstitutional taking.

Even if the City's request for a right-of-way does not constituted a "taking" under the Fifth Amendment to the U.S. Constitution, the City of Columbia probably cannot require the dedication of a right-of-way 300 feet wide. However, assuming our Constitutional argument fails, the City could probably require the dedication of a right-of-way by our developer of something less than 300 feet. Therefore, in the unlikely event the City prevails on the issue of whether or not the 300 foot right-of-way constitutes a "taking" under the Fifth Amendment to the U.S. Constitution, the City probably can require a right-of-way dedication for an expressway under the Ordinances of the City of Columbia, although the City probably cannot require that the full 300 feet be dedicated.