ANNUAL UPDATE OF SUPREME COURT AND MISSOURI LAND USE CASES

Missouri Municipal Attorneys Association

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U.S. Supreme Court Cases

REED v. TOWN OF GILBERT, AZ., No. 13-502, 2015 WL 2473374 (U.S. June 18, 2015) – *An ordinance restricting signs based on the subject matter is a content-based restriction on free speech and subject to strict-scrutiny.*

The Town of Gilbert passed an ordinance banning the display of outdoor public signs. The ordinance then exempted twenty-three different sign categories, each category was subject to a different set of restrictions. Three categories were at issue in the case: "Ideological Signs," "Political Signs," and "Temporary Directional Signs." The City fined a local Church for failing to comply with the sign ordinance, namely for failing to include the date of the event and removing the signs one hour after the event. A local Church, that did not have a regular meeting facility, put up signs on Saturday with the location and time of Sunday services. The Church removed the signs sometime Sunday afternoon. The Church later filed suit, alleging the Town's sign ordinance violated the Church's first amendment right to freedom of speech. The Ninth Circuit ruled that the sign ordinance was a content-neutral restriction and satisfied intermediate scrutiny.

HELD (9-0, Breyer, Kagan, Ginsberg joining in judgment only): The City's sign code ordinance is a content-based restriction on speech and does not pass the strict scrutiny analysis. The ordinance is content based, applying to all signs and depending entirely on the communicative intent of the signs. All content-based restrictions are presumptively unconstitutional unless the state can prove that the restriction serves a compelling state interest. Since the ordinance is content-based on its face, the Court does not need to consider the City's purpose for adopting the ordinance. A content-based restriction is subject to strict scrutiny regardless of the underlying motive. In addition, a restriction that discriminates based on viewpoints or subject-matter is a content-based restriction. In this case, while the ordinance does discriminate between viewpoints, the ordinance is a content-based restriction because it does discriminate based on a specific subject matter. Finally, a restriction based on the identity of the speaker can be a content-based restriction. (The Court, however, determined that the ordinance in question was not a restriction based on the identity of the speaker) Since the City's sign ordinance is a content-based restriction, the ordinance must pass the strict scrutiny analysis. The Court ruled that the ordinance is underinclusive and fails the strict scrutiny analysis. The City failed to show how restricting the size and posting of one type of sign over another increased public safety and preserved the aesthetic beauty of the city. While the City cannot discriminate based on the content of the sign, the City is free to pass ordinances that are content-neutral, such as limits on the size and location of the sign.

Concurrence (Alito, Kennedy, and Sotomayor): The Court's ruling that a regulation restricting a sign based on the topic or subject matter is a content-based restriction does not prevent municipalities from enacting content-neutral regulations. These can include rules distinguishing between the number of signs, size, electronic and fixed message, and the number of signs on a roadway, just to name a few.

Concurrence (Breyer): Courts should not rigidly apply strict scrutiny to content-based

restrictions. When a public forum or view point is threatened, Courts should continue to presume that the regulation is unconstitutional. However, in all other cases, the strict scrutiny analysis should be used as a "rule of thumb" by balancing regulatory objectives against First Amendment harms.

Concurrence (Kagan, Ginsberg, and Breyer): Strict scrutiny should be applied when a restriction infringes on the marketplace of ideas or when the restriction favors one viewpoint or belief over another. Because a subject-matter restriction does not necessarily impinge those themes, the Court should not categorically apply a strict scrutiny analysis. Instead, courts should adopt a balanced approached when reviewing subject-matter regulations. In this case, however, the City failed to establish that the restrictions pass the intermediate scrutiny test (or even the "laugh test").

8th Circuit: The 8th Circuit, in *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400 (8th Cir. 1995), noted that a viewpoint-neutral restriction could be a content-based restriction on speech if the regulation restricted discussion on an entire topic. The Court ruled that while courts can look at the government's purpose for enacting the restriction, the government's purpose does not control. The Supreme Court's ruling in *Reed*, rejects the proposition that courts should take into account the government's purpose when a viewpoint or subject-matter restriction on speech is content-based.

WALKER v. TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., No. 14-144, 2015 WL 2473375 (U.S. June 18, 2015) – *Specialty license plate design is government speech and thereby denial to allow an image of the confederate flag on a license plate does not violate the Free Speech Clause.*

Texas requires all motor vehicles to display a license plate. Texas offers drivers a choice between standard license plates and specialty license plates. Specialty license plates can either be designed by the Department of Motor Vehicles Board or at the request of private groups or citizens. The Board reviews private requests and has the authority to deny a design request on various grounds including a finding that the design is offensive to the public. The Sons of Confederate Veterans submitted a request for a specialty plate. The design included an image of the group's logo, a confederate flag framed by the group's name, and a faded image of the confederate flag in the background of the license plate. The Board, after receiving comments in opposition to the design, determined that the design was offensive to the public and denied the group's request for a specialty license plate. The group filed suit seeking an injunction to require the Board to approve the design, arguing that the denial violated the Free Speech. The Fifth Circuit held that the specialty plate was private speech and the Board's denial was a form of viewpoint discrimination.

HELD (5-4): The Free Speech Clause does not bar government speech. The government is free to express its own viewpoints and determine the content of its messages. Following the holding in *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125,(2009) the Court ruled that a specialty license plate is a form of government speech. According to the Court, States have long used

license plates to communicate State messages. In addition, the public readily identifies license plates with the State. Not only are plates required and used for a government purpose, the designs are also owned by the state. Finally, the government maintains control over the design, dictating aspects of the design and ultimately approving the design. The Court rejected the argument that license plates are a forum where the public can express its views. The Court reasoned that license plates have never been recognized as a traditional forum nor did Texas intend for license plates to become a public forum. While license plates are a form of government speech, not barred by the Free Speech Clause, the Free Speech Clause does bar the government from requiring individuals to promote a government viewpoint. When drivers display a license plate they communicate the government's message. The Free Speech Clause bars the State from requiring individuals to communicate a message that they do not agree with.

Dissent (Alito, Roberts, Scalia, and Kennedy joining): Designs and messages on license plates are a form of private speech protected by the First Amendment. According to the Dissent, the government does not communicate or support messages on the license plates. Rather, the plates can be likened to mobile billboards. In addition, a license plate is a limited public forum, where the public is able to communicate messages subject to State rules. The rules however, must not discriminate based on viewpoint. By denying the Sons of Confederate Veterans the right to display their design on the plate because it might be offense is a form of viewpoint discrimination.

HORNE v. DEPARTMENT OF AGRICULTURE., No. 14-275, 2015 WL 2473384 (U.S. June 22, 2015) – *The raisin reserve requirement violated a Takings Clause under the Fifth Amendment.*

The Secretary of Agriculture promulgated the California Raisin Marketing Order to help maintain a stable raisin market. The marketing order required raisin growers to give a percentage of their raisin crop to the Government each year. Typically, raisin growers ship their raisin crop to handlers. Handlers then set aside the "raisin reserve" and only pay growers for the remaining load. The Government then takes possession of the raisin reserve and generally sells the reserve on non-competitive markets. Growers have an interest in any net proceeds, but in the past years production costs exceeded proceeds. The Hornes are both raisin farmers and handlers. They refused to comply with the raisin reserve, instead paying farmers for their entire raisin load and not setting aside any raisins. The Government fined the Hornes $480,000, the market value of the estimated reserve, and a $200,000 civil penalty for refusing to comply with the order. The Hornes argued that the raisin reserve is an unconstitutional taking under the Fifth Amendment. The Ninth Circuit, however, ruled that the Fifth Amendment provides less protection to personal property than to real property. The Ninth Circuit also characterized the raisin reserve as a use restriction, where the government provided the grower a benefit in exchange for the raisin reserve.

HELD (5-4): The Court ruled that the Takings Clause of the Fifth Amendment protects both real property and personal property. In addition, the Court determined that a physical appropriation of property, as opposed to a regulatory appropriation, constitutes a *per se* taking and the same constitutional protections are allotted to physical appropriations of real and personal property. It

does not matter if the taking does not deprive the property owner of all benefit or use of the property. In this case, the Court ruled that since the marketing order gave the Government title to the raisin reserves, the raisin reserve requirement constituted a *per se* taking of personal property. In addition, a property owner's contingent interest in the property does not alter the Court's determination that the reserve is a *per se* taking. Similarly, the Court rejected the argument that the Government provides raisin farmers a benefit in exchange for reserve. The ability to sell and trade raisins on the market is not a special government benefit. Finally, the Court held that damages should be calculated based on the market value of the raisins at the time of taking, and rejected the argument that the Court should take into consideration the benefit of any price increase resulting from the raisin reserve program. While the Court determined that a physical appropriation of personal property violated the Takings Clause of the Fifth Amendment, the Court left open the option of using regulations limiting the amount of crop that can be sold on the market as long as the Government does not take possession or title to the property.

Concurrence (Breyer, Ginsberg, and Kagan joining): The case should be remanded to determine if the Hornes would be due any compensation if they had complied with the raisin reserve requirement.

Dissent (Sotomayor): A taking that does not deprive the property owner of all property rights is not a *per se* taking. Because the Hornes have a residual interest in the profits from the government's sale of the raisins, they have not suffered a takings.

CITY OF LOS ANGELES v. PATEL, No. 13-1175, 2015 WL 2473445 (U.S. June 22, 2015) – *Facial challenges can be brought under the Fourth Amendment and Los Angeles Code requiring hotel operators to provide hotel registries to police is facially unconstitutional*

Section 41.49 of the Los Angeles Municipal Code ("LAMC") requires hotel operators to maintain hotel registries with information about their guests. The registries contain information including guest names, car make, model, and license plate number, and the date and time of arrival and departure. LAMC 41.49 requires hotel operators to make registries available to police officers to inspect upon request. Hotel operators and the lodging associate sued the City, arguing that section 41.49 was facially unconstitutional under the Fourth Amendment. The District Court ruled in favor of the City, stating that there was no expectation of privacy, the 9th Circuit affirmed. On rehearing the Court of Appeals reversed, holding that the police inspection constituted a search and 41.49 was facially unconstitutional because it required hotel operators to comply with the search without being given an opportunity to obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusal to comply.

HELD: (5-4) Sotomayor for the Court, Facial challenges under the Fourth Amendment are permitted and LAMC 41.49 is facially unconstitutional under the Fourth Amendment . A facial challenge is an attack on the statute not the application of the statute. Courts have recognized facial challenges under the Fourth Amendment. When deciding if that provision is facially unconstitutional, Courts will inquire into searches that the law actually authorizes. In this case, the statute authorizes a warrantless search. A warrantless search

may be permitted in instances where a special need makes probable cause or warrants impracticable. An administrative search is a "special needs" situation. An administrative search permits searches when the search serves to deter criminal behavior. Courts have held that persons subject to administrative searches be given an opportunity to "obtain pre-compliance review before a neutral decision-maker." LAMC 41.49 is an administrative search that deters criminal behavior in hotels. As such, hotel operators must be given an opportunity to seek pre-compliance review. Currently, operators have the option of either complying with the search or face a penalty. An opportunity for pre-compliance review should give operators an option to challenge the search if they suspect that the search is unreasonable. The statute only has to give operators the opportunity to seek review; a review is not required in all situations. Since the LAMC 41.49 does provide for pre-compliance review, the statute is facially invalid.

The government has not recognized hotels as closely regulated industries so that operators would not have an expectation of privacy. Even assuming that hotels were closely regulated, the City must establish that the City has a 1) "substantial' government interest" in the permitting the search, 2) the warrantless search is "necessary to further [the] regulatory scheme," and 3) the statute must provide a substitute for a warrant. In this case, the City is not able to show that the warrant is necessary and it does not provide for a warrant substitute. For these reasons, LAMC 41.49 is invalid for closely regulated industries.

Dissent (Scalia, Roberts, Thomas joining): LAMC 41.49 is a reasonable administrative, warrantless search. The statute limits the search to a single record and does not permit entry into non-public spaces.

Dissent (Alito and Thomas joining): The statute is not invalid in all situations, and thereby the court should not determine that the statute is facially invalid.

TEXAS DEPARTMENT OF HOUSING & COMMUNITY AFFAIRS v. INCLUSIVE COMMUNITIES PROJECT, INC., No. 13-1371, 2015 WL 2473449 (U.S. June 25, 2015) – *Disparate-impact claims are cognizable under the Federal Housing Act.*

The Texas Department of Housing and Community Development ("Department") distributes federal tax credits to developers. The Department allocates credits based on a point system, taking into account statutory criteria and criteria approved by statute. The Inclusive Communities Project ("ICP") brought a disparate impact claim under the Fair Housing Act, arguing that the system of awarding tax credits contributed to segregated housing patterns. The Act makes it illegal for anyone to deny an individual the right to buy, sell, or rent a home on the basis of race. According to the claim, the Department awarded a disproportionately high number of federal tax credits to developments located in predominantly black inner cities and a very low number of credits to developments in predominately white suburban areas. The District Court ruled that the ICP must revise its point system to encourage development in areas with good schools and away from hazardous sites. During appeal, the Secretary of Housing and Urban Development issued a

regulation that allowed for disparate impact liability. The Fifth Circuit Court of Appeals, relying on the HUD regulation, ruled that disparate impact claims are cognizable under the FHA. The Department petitioned for a writ of certiorari on the question of whether a disparate-impact claim is cognizable under the FHA.

HELD (5-4): A disparate-impact claim is cognizable under the FHA. Laws designed to prevent discrimination should be interpreted to encompass disparate-impact when the text of the law addresses the results of the actions. Under the FHA, individuals are prohibited from refusing to sell or rent property or "otherwise make unavailable" on the basis of race. Including "otherwise make unavailable" is a results oriented phrase that looks to the consequences of an individual's actions. Based on the Court's rulings in *Griggs v. Duke Power Co.*, 91 S. Ct. 849 (1971) and *Smith v. City of Jackson, Miss.*, 125 S. Ct. 1536 (2005), courts should interpret the Act to allow for disparate-impact liability. This interpretation is consistent with rulings from all nine circuits, recognizing disparate-impact claims under the FHA. In addition, Congress was aware of the circuit court decisions recognizing disparate-impact when it passed the 1988 amendments. Nevertheless, Congress did not make corrections to the statute to correct for those rulings.

Dissent (Thomas): The Court passed down an erroneous ruling in *Griggs*, and should thereby limit *Griggs* to decisions relating to Title VII.

Dissent (Alito, Roberts, Scalia, Thomas): The Fair Housing Act does not provide for disparate-impact liability and Congress did not intend to create disparate-impact liability under the FHA. The FHA only recognizes intentional discrimination; the majority is reading in liability under the Act that was never intended by Congress. Recognizing disparate-impact liability under the FHA will increase litigation and negatively affect individuals the FHA was designed to assist.

Missouri State Court Cases

***450 N. LINDBERGH LEGAL FUND, LLC v. CITY OF CREVE COEUR, MO.*, 2015 WL 3759314 (Mo. App. 2015)** – *The circuit court did not have jurisdiction to review a noncontested case.*

Defendant, Wm. Biermann Company, applied for a conditional-use permit to build an assisted-living facility. The Planning and Zoning Committee held a hearing to consider Defendant's permit request. At the hearing, Defendant provided information regarding the facility and answered questions posed by community members. Community members were also permitted to speak in favor or in opposition to the permit. While statements were made under oath, no witnesses were examined or cross-examined. After the meeting, the Planning and Zoning Committee recommended that the City Council approve the permit. Community members filed a petitioned with the circuit court to review the hearing under RSMo §§ 536.100 to 536.140, permitting the court to review contested cases. The Court denied relief on the merits after finding that the adoption of the ordinance was not arbitrary or unconstitutional. Plaintiffs appealed the circuit court's ruling.

HELD: Because the case was not a contested case, the circuit court did not have jurisdiction to review. The Missouri Administrative Procedures Act allows courts to review municipal decisions when enforcing zoning ordinances if the case is either contested or noncontested. When reviewing a contested case, the court reviews the record presented before the administrative body. In a noncontested case, however, the court reviews the case de novo. The key to classifying a case as either contested or noncontested is whether the statute or ordinance requires a hearing. A contested case will require a formal hearing that determines the legal rights of the parties. In order to qualify for a contested case, parties must be given an opportunity for a formal hearing with the presentation of evidence, including sworn testimony and cross-examination of witnesses. In this case, the Planning and Zoning Committee followed the City's zoning ordinance and held a public hearing. The City Code provided no procedural requirements for the hearing. After the hearing, the Committee recommended that the City Council approve the permit. The City Code did not require the City Council to follow the Committee recommendations. As such, the public hearing required by the City Code did not meet the formal hearing requirements of a contested case. Since the case was an uncontested case, the circuit court did not have authority to review the case, remanding the case with instructions to dismiss for failure to state a claim.

AVERY CONTRACTING, LLC v. NIEHAUS, 2015 WL 1743003 (Mo. App. 2015) – *Section 228.342 RSMo does not permit landowners to condemn public property out of necessity.*

The Jefferson County Circuit Court granted the Missouri Highways and Transportation Commission ("Commission") a condemnation order for a highway construction project. Under the order, the Commission acquired approximately fifteen acres of land and access rights to property owned by the Raebel Living Trust. The condemnation order gave the Commission direct access to the property and also prohibited access to the property from the highway construction project. The condemnation order left the property landlocked, preventing access to and from the land. In 2013, all remaining rights in the property were transferred to Avery Construction. After obtaining rights to the property, Avery petitioned the circuit court for a private roadway out of necessity. In the suit, Avery sought a court order for a permanent easement across land owned by private landowners in the Creekstone subdivision ("Creekstone") and the Commission pursuant to §228.342 RSMo. The trial court dismissed Avery's claim against the Creekstone property for failing to meet the pleading requirements under §228.342 RSMo. The court also granted the Commission's motion to dismiss. Avery's appealed.

HELD: The Court properly dismissed Avery's claims against Creekstone and the Committee. To bring a claim under §228.342 RSMo, the Plaintiff must plead all three points of the claim; 1) that the Plaintiff owns the property, 2) no private or public roads run through or alongside the property, and 3) the new road is necessary. Despite amendments and changes to the statute, courts have consistently held that a Plaintiff must continue to plead all three elements of the offense. Avery, in its claim against Creekstone, did not plead the second element because a public roadway runs alongside a roadway, and therefore the claim must be dismissed.

In addition, §228.342 RSMo does not contemplate the possibility of condemning public property out of necessity. There is no language in the statute that gives individuals the right to take public

property. Since all of the Commission's property is public property, Avery's condemnation claim against the Commission must be dismissed.

METRO. ST. LOUIS SEWER DIST. v. CITY OF BELLEFONTAINE NEIGHBORS, 2015 WL 778079 (Mo. App. 2015) – *Section 88.667 RSMo does not give the City authority to condemn public property through eminent domain.*

The City of Bellefontaine Neighbors ("City") hired an independent contractor to repair streets and sidewalks. The Contractor preformed mudjacking services as part of the repair project. The process consisted of pumping a concrete like substance under roads to fill gaps. During the process, the concrete made it into the Metropolitan St. Louis Sewer District ("MSD") sewer system, resulting in over sixty thousand dollars in repair damages. MSD brought an inverse conversion claim against the City, seeking to recover the cost of repair. The City argued that MSD did not have standing to sue the city, another political subdivision. The City also claimed sovereign immunity. The trial court granted the City's motion to dismiss and removed the City from the case. MSD appealed

HELD: MSD does not have standing to bring an inverse conversion claim against the City. Section 88.667 RSMo grants the City the right to take private property for public use. Courts have also extended the statute to allow the city to condemn private land that has been devoted to public use. While the statute specifically grants the city the power of eminent domain for private property, the court will not extend the statute to apply to public land. However, since the United States Supreme Court has extended the Fifth Amendment to apply to takings of private and public land, the Court will transfer the question to the Missouri Supreme Court.

The Court determined the petition sufficiently alleged facts establishing that the City acted in a proprietary capacity in carrying out the project. Thus sovereign immunity does not apply to tort claims arising out of the City's repair project. Pursuant to Rule 83.02, the Court transferred this case to the Missouri Supreme Court for the purposes of reexamining existing law.

DYNASTY HOME, L.C. v. PUBLIC WATER SUPPLY DISTRICT NO. 3 OF FRANKLIN COUNTY, MO., 453 S.W.3d 876 (Mo. App. 2015) – *A landlord does not have a property right in a tenant's utility service and thereby cannot require the provider to terminate service on past due accounts.*

Dynasty Homes ("Dynasty") is the landlord of residential rental properties. Public Water Supply District ("District") provides utility services to Dynasty's tenants. Dynasty requires its tenants to sign up for utility services in their own names. Section 247.050 RSMo outlines many of the terms and rules governing the District's services. Under the section, if a utility bill is more than forty-five days past due, then the District has the authority to terminate the tenant's utility services. The District sends out a delinquency and termination notice to both the tenant and the landlord. If the tenant does not pay the bill, then the District can collect money from the landlord. Dynasty requested that the District terminate service for accounts if they are more than thirty days past due, instead of forty-five days. The District refused Dynasty's request. Dynasty filed

suit for inverse condemnation arguing that the District's refusal to terminate services constituted an unlawful taking, causing the landlord injury. The court granted the District's motion for summary judgment; Dynasty appealed.

HELD: While §250.140 deems water service as furnished to both an owner and occupant and offers the district a remedy to sue both, it also states that tenants are not liable for an owner's delinquency and owners are liable for their tenant's delinquency. Because the legislative framework places the risk of delinquency on the property owner, the district did not inversely condemn the property by requiring the payment of the delinquency. Dynasty has not been able to show that the statute is unreasonable and inconsistent with the legislature's purpose. As such, the court affirmed the trial court's summary judgment in favor of the District.

STATE Ex Rel. WATSON v. SHERRY, **436 S.W.3d 718 (Mo. App. 2014)** – *Under the TIF Act, the City must acquire property by paying the condemnation fee within five years after the adoption of the ordinance approving such redevelopment project .*

The City of Richmond passed the Real Property Tax Increment Allocation Redevelopment Act ("TIF"). Through the TIF, the City is able to use eminent domain to take private property for redevelopment. In 2008, the City entered an Order of Condemnation to take Petitioner's property for redevelopment. In 2013, the City entered a Writ of Possession and paid damages. Petitioners filed a Writ of Prohibition to prohibit the City from taking the property. Petitioners argued that the City did not have authority to enforce the Condemnation after five years.

HELD: Petitioners were entitled to file a Writ of Prohibition and the City did not have authority to enforce the condemnation order more than five years after filing the Writ of Condemnation. A Writ of Prohibition is proper when an individual faces irreparable harm. In this case, Petitioners' property would have been demolished shortly after the City's condemnation award, resulting in irreparable harm to Petitioners.

In addition, the City no longer has the power or authority to condemn. The Act states that "no property for a redevelopment project shall be acquired by eminent domain later than five years from the adoption of the ordnance approving such redevelopment project." Courts have interpreted "acquired" to mean a taking. Similarly, Courts have ruled that a City acquires the property when it pays the award for condemnation, prior to paying the condemnation award the City does not have rights to possession or control of the property. Since the City did not pay Plaintiffs for the property within the five-year period, the City no longer has authority to enforce the award.

MCNEIL v. CITY OF KANSAS CITY, **2015 WL 2058729 (Mo. App. 2015)** – *The demolition order was in excess of the City's policing power and properly excluded from evidence and the Plaintiff was entitled to prejudgment interest.*

In 2008, McNeil purchased property that the city placed on the dangerous buildings list in 2001. After purchasing the property, McNeil began renovating the building. In 2009, McNeil's

financing fell though and work on the building stopped. In June 2009, the City sent McNeil a letter instructing him to clean the lot and he complied with that request the following month. In July 2009, McNeil received a preliminary commitment from a lender for a construction loan. In August 2009, the City demolished the building. A jury trial awarded McNeil damages, costs, and prejudgment interest. The City appealed on the grounds that the circuit court excluded the demolition order from evidence and appealed the award for prejudgment interest.

HELD: The demolition order was void and thereby properly excluded by the circuit court. Following the ruling in *Woodson,* the demolition order was facially in excess of the City's delegated authority. In addition, the Court in *Woodson* held that the same demolition order was vague and thereby invalid. Since the demolition order was invalid the demolition order was also void. Since the order was void, the Court properly excluded the demolition order from evidence.

The jury properly awarded McNeil prejudgment interest. Section 408.040 RSMo provides for prejudgment interest for liquidated claims. The City's demolition of McNeil's building was not a valid exercise of police power. McNeil's wrongful demolition claim can be properly described as an indirect taking for purposes of awarding prejudgment interest. While parties dispute the building's exact value, the parties did agree that the fair market value should be used. Since the claim can be determined by a calculation, even if in dispute, the claim can be characterized as a liquidated claim and qualify for liquidated damages. For these reasons, the McNeil's claim did qualify for a prejudgment interest award.

***LABRAYERE v. BOHR FARMS, LLC*, 458 S.W.3d 319 (Mo. 2015)** – *Section 537.269 RSMo, which precludes non-economic recovery is constitutional and does not result in an unlawful taking because the restriction provides a benefit to the public*

Bohr Farms and Cargill Farms owned and operated a hog-feeding farm. Neighbors filed a temporary nuisance claim against both Farms on the ground that the odor emanating from the farm constituted a temporary nuisance. In the suit, neighbors requested damages for loss of use and enjoyment of their property. The circuit court entered summary judgment for the Farms after determining that §537.296 RSMo only permitted recovery for economic damages in nuisance claims and also denied claims for negligence. Plaintiffs appealed, challenging the constitutionality of the §537.296 RSMo and the denial of the negligence claim.

HELD: Section 537.296 RSMo is constitutional and the circuit court properly denied Plaintiff's negligence claims. The section, which effectively places a limit on Plaintiff's use and enjoyment of their property, is constitutional because the limitation results in a public benefit, not a purely private benefit. Similarly, while the section limits recovery to economic damages, a fair market rental value is a proper calculation of damages for temporary nuisance claims. Similarly, the section does not violate the party's equal protection. Rural and residential landowners are not a recognized suspect class and land use restrictions are not subject to strict scrutiny. As such, the section is subject to rational basis scrutiny. The State is able to show that it has a rational basis for the law, promoting the agricultural economy.

Finally, the negligence claim is barred by §537.296 RSMo. Plaintiffs can only recover for non-economic damages when the claim is independent of the nuisance claim. However, here the negligence claim is dependent on the nuisance claim and is thereby barred by §537.296 RSMo.

Concurrence: Denying non-economic recovery for a temporary nuisance claims does not constitute a taking that is constitutionally barred under the Fifth Amendment because the State did not interfere with Plaintiffs' bundle of rights.

CAMPBELL v. COUNTY COMMISSION OF FRANKLIN COUNTY, 453 S.W.3d 762 (Mo. 2015) – *A public hearing is required under §64.875 RSMo and the hearing must provide the public an opportunity to present their side.*

Ameren purchased land adjoining Ameren's Labadie power plant. Ameren proposed to build a coal-ash landfill on the property. The County Commission ("County") held a public hearing to amend the Franklin County Unified Land Use Regulations. The County notified the public about the zoning hearing so that the public could voice their opinion regarding Ameren's proposal. After the hearing, the County approved the permit. Appellants filed a petition for a writ of certiorari challenging the legality of the permit. Appellants maintained that the County told the public that they could not address the permit at the hearing and that county officials interrupted speakers who attempted to discuss the zoning amendments. Based on these facts, Appellants argued that the County held an insufficient hearing and alleged that the permit was invalid because the zoning amendments do not "promote the health, safety, and general welfare of the citizens of Franklin County" as required by §64.875 RSMo. The circuit court granted Defendant's motion to dismiss for failure to state a claim on the ground that pleadings failed to show in the County did not hold a sufficient hearing. Similarly, the court rejected Appellants' claim that the zoning amendments were invalid. Appellants appealed.

HELD: Appellant's petition does state a valid claim for relief, alleging sufficient facts to show that the County did not hold a sufficient hearing. Section 64.875 RSMo does not define "hearing" or provide requirements for holding a hearing. Similarly, Missouri courts have not ruled on what constitutes a hearing under the section. In addition, the statute does not state whether a public hearing is required. As such, the Court will apply rules of statutory interpretation, giving effect to the ordinary and plain meaning of the words in the statute. Relying on the dictionary's definition of "hearing," a hearing should at a minimum provide the public with an opportunity to present their side before the commission. Similarly, while the statute does not specifically require a public hearing, it does require notice of a public hearing. Since sending a notice of a public hearing would be pointless if a public hearing was not required, requiring a public hearing would be consistent with the main meaning of the statute and the legislature's intent. As such, the County's motion to dismiss is reversed and the case is remanded to the circuit court to decide the case on the merits. Appellant's second point cannot be decided until the court decides if the County held a sufficient hearing.

SHOEMYER v. MISSOURI SECRETARY OF STATE, No. SC 94516, 2015 WL 3978756 (Mo. June 30, 2015) – *A ballot title is a voting irregularity and can be challenged post-election.*

Plaintiffs in the case challenge the sufficiency of a ballot title, proposing a constitutional amendment. The plaintiffs alleged that the ballot title mislead voters, being insufficient and unfair. Plaintiffs field the challenge after the election and after requesting a recount. The State argued that Missouri statutes do not provide for a post-election ballot title challenge.

HELD: Plaintiffs were entitled to challenge the ballot title post-election and the ballot title was sufficient and fair. Section 116.190 RSMo allows parties to challenge election irregularities post-election. Relying on *Dotson,* violations of election statutes are irregularities and an insufficient ballot title qualifies as such an irregularity. In addition, the statute requires parties to bring the claim within thirty days after the official announcement of the election results. The time limitation does not start until after all recounts. In this case, Plaintiffs made a timely challenge to the election results, filing the challenge within thirty days of the recount.

While the Plaintiffs filed a timely challenge, the ballot title was sufficient and did not mislead voters. Even though the summary did not state that the ballot measure was subject to article VI of the constitution, the limitation did not depend on third-party action. The Court determined, *local governments always had the power granted by article VI*, thus the limitation did not change the law. (emphasis added)