SC92486

IN THE SUPREME COURT OF MISSOURI

ROBERT BATEMAN
and
DONNA BATEMAN,

Appellants,

vs.

CATHY RINEHART,
Clay County Assessor,

Respondent.

On Appeal from the Circuit Court of Clay County
Honorable Larry D. Harman, Circuit Judge
Case No. 10CY-CV05348

SUBSTITUTE BRIEF OF THE APPELLANTS

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Preliminary Statement

Since 2001, Robert and Donna Bateman have owned two parcels of vacant land within a residential subdivision in Clay County. The City of Gladstone zones the land for single-family residential use and prohibits any and all commercial use of the land. In 2000, the City Council unanimously refused to change the zoning to commercial.

One of the parcels, located on a cul-de-sac between two houses, used to have a house located on it. The Batemans demolished it because it was in bad condition. The other parcel is landlocked and has never been used. The Clay County Assessor always had classified the parcels as residential and assessed their property taxes as such.

Suddenly, for the 2009-10 cycle, the Assessor abruptly reclassified the Batemans' vacant land as commercial and reassessed it at ten times the previous value. The Batemans challenged this first before the County Board of Equalization, and then before the State Tax Commission ("STC"). The STC affirmed the reclassification and reassessment. It held the land's immediate most suitable economic use was commercial.

This was error. In Missouri, for the immediate most suitable economic use of residentially-zoned property to be commercial, the County must show that the disparate zoning is not an obstacle to its immediate commercial use. There was no such evidence here. Rather, the County agreed the land was zoned solely for residential use, never had been used as commercial, and could not be used as commercial during the 2009-10 assessment cycle. As a matter of law, the notion that someday, in some speculative future, the land *might* be rezoned cannot equate to its *immediate* most suitable use.

This Court should reverse the trial court's judgment that affirmed the STC.

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Jurisdictional Statement

This is a landowner couple's appeal from a judgment affirming a decision of the State Tax Commission concerning the assessment of property tax against their vacant land.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. Appellants timely appealed to the Missouri Court of Appeals, Western District. This case arose in Clay County. Under § 477.070, R.S.Mo., venue lay within that district of the Court of Appeals. The Court of Appeals designated this case as No. WD73947.

On February 21, 2012, the Court of Appeals issued an opinion affirming the trial court's judgment. Appellants filed a timely Motion for Rehearing and Application for Transfer in the Court of Appeals, both of which were denied. Appellants then filed a timely Application for Transfer in this Court pursuant to Rule 83.04. On July 3, 2012, the Court sustained that application and transferred this case.

Therefore, pursuant to Mo. Const. art. V, § 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Statement of Facts

A. The Subject Property

In 2001, Appellants Robert and Donna Bateman bought two contiguous parcels of land in Gladstone, Clay County, Missouri (L.F. 135, 144). Both lots are "vacant land on the southeast corner of Northeast 68th Street and North Oak" Trafficway, located within Bolling Heights, a private residential subdivision and development (L.F. 131, 135, 288). The two parcels are Lot 23 and Lot 21 of Bolling Heights (L.F. 132, 252; Appx. A27). The total size of both is 1.22 acres (L.F. 149).

Lot 23 abuts North Oak Trafficway and fronts a cul-de-sac on Northeast 67th Terrace (L.F. 132, 252; Appx. A27). It is shaped roughly like a triangle, with dimensions of 325 feet by 269 feet by 60 feet by 23 feet (L.F. 133, 252; Appx. A27). The Batemans bought it for $120,000 (L.F. 144). Though at the time they bought the lot there was a house located on it, the Batemans demolished the house shortly thereafter because it was in bad condition and could not be fixed without "a lot of expense" (L.F. 137, 145).

Lot 23 only ever has been used as residential property (L.F. 135). It never has been used for any commercial purpose, nor was there any pending commercial development on the property at the time of the administrative hearing below (L.F. 135-36). Like the rest of the Bolling Heights subdivision, Lot 23 is zoned residential as "R-1, single family" (L.F. 135-36, 208, 213). It adjoins residential homes in the subdivision (L.F. 135). Indeed, Respondent Assessor's own aerial photograph shows one of the two parcels to be surrounded by houses (L.F. 253). According to Respondent, this R-1 zoning

"allows only one family to live on the property. It does not allow for an owner to rent out a room or portion of the house" (L.F. 282).

Lot 23 contains no actual approach to North Oak Trafficway (L.F. 137). Thus, not only would any commercial development have to change the zoning there, but in order to have access via North Oak it also would have to negotiate an easement over Bolling Heights's private buffer zone (L.F. 137, 185). Additionally, even after rezoning and procurement of an easement, any commercial development would have to obtain a variance from the City of Gladstone to be accessed from North Oak, as its ordinances require a 35-foot buffer zone around all edges of the property (L.F. 137, 186).

Lot 21, the other subject property, does not abut North Oak Trafficway at all, but rather Northeast 68th Street (L.F. 139, 252; Appx. A27). Northeast 68th Street is a private road (L.F. 139, 185, 252; Appx. A27). To access it, any owner of Lot 21 would have to negotiate an easement with its owner (L.F. 185). Effectively, this leaves Lot 21 "landlocked" (L.F. 139). The property has an irregular shape, with dimensions of 227 feet by 227 feet by 47 feet by 92 feet by 103 feet by 74 feet (L.F. 139, 252; Appx. A27). It also is subject to the same 35-foot exterior buffer requirements as Lot 23, and has the same zoning as Lot 23 (L.F. 139-41). The Batemans paid $35,000 for Lot 21 (L.F. 144). At the time they purchased it, as now, it was unimproved (L.F. 144).

The Batemans never tried to develop either lot in any way (L.F. 143). In April 2000, however, before the Batemans' ownership, a company called Fuel Outlet requested the City of Gladstone to rezone both Lots 21 and 23 from residential (R-1) to commercial (CP-3), so it could operate a filling station on the two lots (L.F. 138, 140-41, 143, 178,

183, 213-14). In June 2000, the Gladstone City Council took up Fuel Outlet's request, but unanimously voted it down (L.F. 135, 185-86, 213-14). As the Council's minutes reflect, the councilmembers felt *any* commercial development this close to residents' houses (described as "right in the back yards") was unsafe and undesirable (L.F. 186).

The Batemans did nothing with the property until July 2008, when they listed both lots together with a realtor for $450,000 (L.F. 138, 141-43). The realtor's listing described the land as "Retail-Pad" (L.F. 284). The Batemans had not listed either lot for sale before then (L.F. 144). The listing expired a month prior to the hearing in this case (L.F. 142). The Batemans never received any offer on either property (L.F. 138, 142).

B. Reclassification

Suddenly, effective January 1, 2009, Clay County Assessor Cathy Rinehart reclassified both Lot 23 and 21 from residential property to commercial property, though valued as agricultural property (L.F. 136). Previously, the Assessor had assessed Lot 23's "true market value" as $15,900, with a residential property assessed value of $3,020 (L.F. 59, 137-38). For the landlocked and never-used Lot 21, the previously assessed "true market value" had been $5,200, with a residential property assessed value of $990 (L.F. 141).

After the Assessor decided to reclassify the property, she had Gary Maurer, a commercial appraiser for Clay County, reappraise the property (L.F. 95, 146). His appraisal was admitted into evidence as Respondent's Exhibit 1 (L.F. 197-284). Mr. Maurer appraised the market value of the two parcels together at $345,400 (L.F. 146).

He appraised Lot 21 alone as $161,800, and Lot 23 alone at $160,300 (L.F. 147, 211). He said, though, that he believed the properties would be sold together (L.F. 146).

In his appraisal, after appraising the lots' supposed true market value as commercial land, Mr. Maurer applied to both the assessment percentage for agricultural property, which is 12% (L.F. 147). As such, Lot 21's assessed value wound up at $19,420 (up from $990) and Lot 23 at $19,240 (up from $3,020), with a total of $38,660 (L.F. 59, 137-38, 141, 147, 211). Mr. Maurer said he applied the agricultural rate because, "[I]n the state of Missouri all commercial property has a surtax," and based on "a couple of House Bills" in the 1980s, developable property could be assessed at 12%, "rather than the 19 or 32 percent" levels for commercial property (L.F. 148). Thus, he said, "you can use an agricultural assessment on something that's clearly not agricultural" (L.F. 148).

Mr. Maurer's "comparables" were vacant property in Clay County, though he admitted all of them were zoned as commercial and all the sales were before the fall 2008 economic downturn (L.F. 160, 164, 233, 266-73). One property was 1.83 acres, which sold in July 2006 for $515,000 (L.F. 149, 233). Another was 1.3 acres a mile and a half away on North Oak Trafficway, which sold in October 2005 for $410,000, or $7.24 per square foot (L.F. 150, 233). Another was two acres 12 miles away, which sold in September 2008 for $350,000, or $4.022 per square foot (L.F. 150, 233). Mr. Maurer said that one had been zoned as residential, but then was rezoned as commercial (L.F. 151). Another was four acres 12 miles away, which sold in August 2006 for $160,000, or $9.08 per square foot (L.F. 151, 233).

Although Mr. Maurer was directed to reassess the Batemans' lots as commercial property, he admitted he was not aware of any development plan being presented to the City of Gladstone at the time of his appraisal for either Tract 23 or 21 (L.F. 158). He acknowledged that, because the property was zoned only for residential use, rather than commercial use, this would cause potential commercial buyers to shy away from considering purchasing it (L.F. 159). He flatly forecasted that, due to the zoning and other restrictions, neither lot would not be used as commercial property during the 2009-10 assessment cycle (L.F. 162-63).

C. Proceedings Below

On June 10, 2009, the Batemans appealed the assessor's reassessment to the Clay County Board of Equalization (L.F. 60, 62). On July 16, 2009, the Board decided not to alter the assessor's determination (L.F. 60, 62). As such, on September 22, 2009, the Batemans sought review by the State Tax Commission ("STC") (L.F. 59, 61). In his petition to the Commission, Mr. Bateman prayed for a return to the previous assessed values; he also argued the properties were misclassified and properly should be classified as residential (L.F. 59, 61).

On November 17, 2009, a hearing was held in Clay County before Luann Johnson, a Senior Hearing Officer of the STC (L.F. 63). The hearing was consolidated with two

other STC property tax appeals by the Batemans (L.F. 63-64).[1] The only two witnesses at the hearing were Mr. Bateman and Mr. Maurer (L.F. 64).

Officer Johnson issued her decision and order on December 22, 2009 (L.F. 285; Appx. A4-21). She set aside the Assessor's assessed value – but not the commercial reclassification – finding "the subject parcels were incorrectly classified as agricultural property and assessed at 12% of value" (L.F. 285; Appx. A4). Instead, she found the "proper classification of the subject parcels is commercial," with a "proper assessment ratio" of "32%" (L.F. 285; Appx. A4). So, because she agreed with assessor's "true market value" of $160,300 for Lot 23, she found the new commercial "assessed value" to be $51,300 (L.F. 285; Appx. A4). Similarly, she found the new commercial "assessed value" for Lot 21 to be $51,780 (L.F. 285; Appx. A4).

In making this decision, Officer Johnson discussed the eight factors in § 137.016.5, R.S.Mo., for determining the "immediate most suitable economic use" of "real property which is vacant, unused, or held for future used" (L.F. 288-293; Appx. A7-12). As to the first, "immediate prior use, if any," she found there was no immediate prior use because the properties "are vacant and unused," the most recent use of Lot 23 "was for residential purposes but said use ended in 2001," and there was no "record of any use of"

[1] These appeals were the subject of another case before the Court of Appeals, *Rinehart v. Bateman*, 363 S.W.3d 357 (Mo. App. 2012), which was argued and decided at the same time as the Batemans' appeal in this case below. In the other case, the Court of Appeals reversed the trial court's reversal of the STC's decision in the Batemans' favor.

Lot 21 (L.F. 289; Appx. A8). As to the second, "location," she found that the "only residential property around the subject property lies to the southeast. All other surrounding properties are commercial. … The subject property lies directly on North Oak Trafficway, a major five lane thoroughfare in the City of Gladstone" (L.F. 289; Appx. A8).

The third factor is "zoning classification" (L.F. 290; Appx. A9). Officer Johnson found that "[c]urrent zoning is R1 (residential). Prior to 2001, prior owners had attempted to get the zoning changed to C3, which request for change was denied. Respondent suggests that a less intensive commercial zoning would have been acceptable" (L.F. 290; Appx. A9). As to the fourth factor, "other legal restrictions on the use of such property," she found that because Northeast 68th Street, the road "to the north is a private, vacated right-of-way," therefore a "private development agreement would have to be negotiated for ingress and egress on the north side of the property," though it "has access to North Oak Trafficway through the contiguous parcel" (L.F. 290; Appx. A9).

The fifth factor is "availability of public services," to which Officer Johnson found "[a]ll utilities are available … Improvements are suitable for either commercial or residential development" (L.F. 290; Appx. A9). As to the sixth factor, "size of such property, she found that the "[p]roperty size makes it useful for either residential or commercial development" (L.F. 290; Appx. A9). As to the seventh factor, "access to public thoroughfares," she found the "property has access to North Oak Trafficway, a major five lane thoroughfare in the City of Gladstone (L.F. 291; Appx. A10).

The final factor is "other factors relevant to the immediate most suitable economic use of such property" (L.F. 291; Appx. A10). Officer Johnson found there was no evidence the parcels are being used for agricultural purposes, and thus Mr. Maurer was wrong that they could be assessed as agricultural (L.F. 291; Appx. A10). She found "little evidence" that the immediate most suitable economic use of the properties would be residential (L.F. 291; Appx. A10). She put great weight on the Batemans' marketing "the properties as an assemblage for commercial development" (L.F. 291; Appx. A10).

Officer Johnson found "no evidence of current residential use or any plans for residential development" (L.F. 291; Appx. A10). Rather, she found the area is "primarily commercial development" with "good access … to major thoroughfares," "utilities," and "the assemblage size allows for commercial development" wherein "lower intensity commercial zoning is probable" (L.F. 291-92; Appx. A10-11). Therefore, Officer Johnson found that "the most suitable economic use of the subject property is commercial" (L.F. 292; Appx. A11).

In so holding, Officer Johnson suggested Mr. Maurer's comparables "were a mix of commercial and residential" (L.F. 292; Appx. A11). She adopted Mr. Maurer's assessment of market value, but corrected the assessed value to be 32% for commercial, rather than 12% for agricultural (L.F. 293; Appx. A12). She held the Batemans failed to prove that their property had been misclassified as commercial (L.F. 297; Appx. A16). She ordered the Clay County Clerk to place an assessed value of $51,300 on the books for Lot 23, and of $51,780 for Lot 21 (L.F. 299; Appx. A18).

On January 20, 2010, the Batemans requested the STC review Officer Johnson's decision (L.F. 303). The STC did so and affirmed the decision on April 13, 2010 (L.F. 316; Appx. A22). On May 12, 2010, the Batemans filed a petition for judicial review of the STC's decision in the Circuit Court of Clay County (L.F. 1, 3).

The Batemans moved for summary judgment (L.F. 1, 8). On February 8, 2011, even though the Assessor had not moved for summary judgment, the trial court granted summary judgment to the Assessor (L.F. 49).

The Batemans filed a timely post-trial motion, which the trial court denied (L.F. 52, 339). Thereafter, they timely appealed to this Missouri Court of Appeals, Western District (L.F. 340).

On February 21, 2012, the Court of Appeals issued an opinion affirming the trial court's judgment affirming the STC. On July 3, 2012, this Court sustained the Batemans' application for transfer and transferred this case.

Point Relied On

The State Tax Commission erred in holding that the immediate most suitable economic use of the Batemans' vacant land was commercial, rather than residential *because* any commercial use of the property could not have been immediate, was speculative, was unsupported by sufficient competent and substantial evidence, and was unreasonable *in that* the land was zoned only for single-family residential use, only ever was used for residential purposes, and any and all commercial use of the land was prohibited by the zoning; even the County's expert admitted no commercial development plan for the land was pending and the land could not be used commercially without being rezoned, forecasting it would not be used commercially during the relevant assessment cycle.

Algonquin Golf Club v. State Tax Comm'n, 220 S.W.3d 415 (Mo. App. 2007)

Zimmerman v. Mo. Bluffs Golf Joint Venture, 50 S.W.3d 907 (Mo. App. 2001)

State ex rel. Mo. Hwy. & Transp. Comm'n v. Modern Tractor & Supply Co.,
839 S.W.2d 642 (Mo. App. 1992)

State ex rel. State Hwy. Comm'n v. Carlson, 463 S.W.2d 74 (Mo. App. 1970)

§ 137.016, R.S.Mo.

Argument

The State Tax Commission erred in holding that the immediate most suitable economic use of the Batemans' vacant land was commercial, rather than residential *because* any commercial use of the property could not have been immediate, was speculative, was unsupported by sufficient competent and substantial evidence, and was unreasonable *in that* the land was zoned only for single-family residential use, only ever was used for residential purposes, and any and all commercial use of the land was prohibited by the zoning; even the County's expert admitted no commercial development plan for the land was pending and the land could not be used commercially without being rezoned, forecasting it would not be used commercially during the relevant assessment cycle.

Standard of Review

On appeal from a trial court's review of an administrative agency's decision, this Court examines the underlying decision of the administrative agency and not the trial court's judgment. *Bird v. Mo. Bd. of Architects*, 259 S.W.3d 516, 520 n.7 (Mo. banc 2008). "[A] court reviewing the actions of an administrative agency should make a 'single determination whether, considering the whole record, there is sufficient competent and substantial evidence to support the award.'" *Albanna v. State Bd. of Registration for the Healing Arts*, 293 S.W.3d 423, 428 (Mo. banc 2009) (citation omitted); *see also* Mo. Const. art. V, § 18; § 536.140, R.S.Mo.

"When an administrative decision is based on the agency's interpretation and application of the law, we review the administrative conclusions of law and its decision *de novo*, and we make corrections to erroneous interpretations of the law." *Algonquin*

Golf Club v. State Tax Comm'n, 220 S.W.3d 415, 418 (Mo. App. 2007) (citation omitted). Where the State Tax Commission "interpret[s] Section 137.016[, R.S.Mo.] to reach its decision," this Court "independently review[s] its determination *de novo*." *Id.*

* * *

In order for the immediate most suitable economic use of vacant land zoned solely for residential use actually to be commercial use, there must be evidence that the current zoning restriction is not an obstacle to immediate commercial use. In this case, the county assessor's expert agreed that the Batemans' vacant land located within a residential subdivision is zoned solely for single-family residential use. The evidence was that it would be impossible to use the land commercially unless the zoning were changed, which would not occur during the tax assessment cycle at issue. Nonetheless, the State Tax Commission ("STC") held the land's *immediate* most suitable economic use was commercial. Was this error?

Under Mo. Const. art. X, § 4(b), and § 137.016.1, R.S.Mo., there are three possible classifications of real property for property tax purposes: "agricultural and horticultural property," "residential property," or "utility, industrial, railroad and other real property." Agricultural property is assessed at 12% of "true value," residential property at 19%, and commercial property at 32%. § 137.115.5, R.S.Mo. The county exacts a tax that "shall not exceed eight percent" of this "assessed value." Mo. Const. art. X, § 4(b).

If real property "is vacant, unused, or held for future use," it "shall be classified" under one of these categories "according to its immediate most suitable economic use." § 137.016.5, R.S.Mo. This subsection, which originated in a 1986 amendment to §

137.016, see House Bill 1022, 80th Gen. Assem., Reg. Sess. (Mo. 1986), sets forth eight factors that must be considered in determining the "immediate most suitable economic use" of vacant land. One of the factors is "Zoning classification of such property; except that, such zoning classification shall not be considered conclusive if, upon consideration of all factors, it is determined that such zoning classification does not reflect the immediate most suitable economic use of the property." § 137.016.5(3).

In Missouri, a taxpayer challenging a property tax classification and assessment has the burden of proof. *Reeves v. Snider*, 115 S.W.3d 375, 379 (Mo. App. 2003). Under § 137.016.5, however, once the taxpayer presents undisputed evidence that vacant property is encumbered with a zoning classification that prohibits the use an assessor has ascribed to the property, the assessor must show how the disparate zoning is not an obstacle to the property's immediate use for the purpose the assessor suggests. *Algonquin Golf Club v. State Tax Comm'n*, 220 S.W.3d 415, 420-21 (Mo. App. 2007).

Indeed, in neither of the only two reported decisions applying § 137.016.5 has the property's zoning not ultimately equated to its immediate most suitable economic use. *See Algonquin*, 220 S.W.3d at 420-21 (proper classification of land zoned residential was residential, and STC erred in holding it was commercial); *Zimmerman v. Mo. Bluffs Golf Joint Venture*, 50 S.W.3d 907, 914 (Mo. App. 2001) (proper classification of land zoned residential was residential, and of land zoned commercial was commercial).

This makes sense. The "*immediate* most suitable economic use" is the use to which the vacant land can be put with the least delay. If land is zoned for a specific use and other uses are prohibited by law, it must be presumed that the land's immediate most

suitable economic use is the use for which it is zoned – the only use the law allows. Absent competent and substantial evidence rebutting this presumption and showing how the disparate zoning was not an obstacle to other immediate use, under § 137.016.5 the land must be classified for property tax purposes pursuant to its zoning.

In this case, the STC erroneously departed from this law. Both the Batemans and the County's expert agreed the Batemans' vacant land was zoned for single-family residential use and any commercial use was prohibited. There was no evidence rebutting the presumption that the residential use the property's zoning classification mandated was not the *immediate* most suitable economic use. Indeed, any other use would have required legislative rezoning and thus could not possibly be *immediate*. The STC erred in holding the property's immediate most suitable economic use was commercial. It had to be residential.

A. Under § 137.016.5, the "immediate most suitable economic use" of vacant land must be the suitable economic use that can occur with the least delay.

Section 137.016.5 provides, "All real property which is vacant, unused, or held for future use … shall be classified according to its *immediate* most suitable economic use." (Emphasis added). Thus, vacant property is not merely to be classified under *any* suitable economic use (such as that which would garner the county's coffers the most tax revenue), but rather by the suitable economic use that is the most "immediate."

When reading a statute, the primary rule "is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *State ex rel. Unnerstall v.*

Berkemeyer, 298 S.W.3d 513, 519 (Mo. banc 2009) (citations omitted). "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert verbiage or superfluous language in a statute." *Id.* (citations omitted).

As the STC's hearing officer wrote in discussing what the immediate prior use of the Batemans' property had been, if any, "BLACK'S LAW DICTIONARY defines 'immediate' as 'Occurring without delay [or] not separated by other persons or things [or] having a direct impact" (L.F. 289; Appx. A8). Because the "prior use of the property was separated from the present by a long period of dormancy," she properly held that there was no "immediate" prior use (L.F. 289; Appx. A8).

But that same definition also applies to the "immediate most suitable economic use," because § 137.016.5 also expressly includes the word "immediate." Thus, applying the plain definition of "immediate," the "immediate most suitable economic use" of vacant land must be the suitable economic use that can occur with the least delay and the least separation by other persons or things. Thus, by simple logic, if one use can occur now, and another use would require a delay, the one that can occur now is immediate. The other cannot be.

As such, if property is zoned for a specific economic use and other uses are prohibited by law, it must be presumed that the immediate most suitable economic use is that which does not require the law to be changed. The zoned use is the one that can occur with the least delay. Changing the zoning would be a separation by another thing.

B. If vacant land is zoned for a specific economic use, that use must be presumed its immediate most suitable economic use.

In *Algonquin*, the Missouri Court of Appeals, Eastern District, held that where land owned by private clubs and used as private golf courses[2] was zoned for residential use and commercial use was prohibited, absent substantial evidence overcoming this significant obstacle, the immediate most suitable economic use of the land had to be residential, not commercial. 220 S.W.3d at 420-22. For, "in light of the" "significant zoning obstacles," the record could not "support an *immediate* use of the private golf course amenities" as commercial property. *Id.* at 421-22 (emphasis in the original).

Algonquin concerned a group of eight private, not-for-profit country clubs located in several municipalities in St. Louis County that operated private golf courses and related private amenities on their land. *Id.* at 416-17. All the clubs' land, however, was zoned solely for either single-family residential use or use as a private golf course. *Id.* at 417. The zoning "prohibit[ed] commercial building or use as a public golf course." *Id.*

The St. Louis County Assessor long had classified the clubs' land as residential for property tax purposes. *Id.* at 416. When, apparently reasoning that the clubs' land physically could be used as public, commercial golf courses, the assessor reclassified

[2] While a private country club's land used and maintained as a golf course plainly is not "vacant," the Court in *Algonquin* applied § 137.016.5 because this statute also applies to classify real property "which is used for a private club." 220 S.W.3d at 419.

their land as partly commercial (with the higher, 32% assessment rate), the clubs sought review by the St. Louis County Board of Equalization and, then, the STC. *Id.*

The clubs argued that, because their zoning prohibited any commercial use at all, commercial use simply could not be the "immediate most suitable economic use." *Id.* at 418-19. The STC disagreed; it was "not persuaded that current zoning restrictions and certain legal covenants would present sufficient obstacles to prohibit the conversion of these courses to public golf courses." *Id.* at 418.

The Court of Appeals reversed. While it recognized that, "[i]n all cases, the taxpayer has the burden of proof when challenging the STC's assessment of property," the clubs had presented "undisputed, detailed evidence outlining the zoning restrictions which permit the properties to be used for only residential purposes or as private golf courses" and "prohibit commercial building or public golf courses." *Id.* at 420. Thus, the burden had to shift to the county assessor to present evidence "to dispute these assertions." *Id.* But the assessor admitted "the Clubs' assertion regarding the zoning obstacles," and nothing in the record showed "how the zoning restrictions … could be overcome, so as not to be deemed 'sufficient obstacles,' and thereafter, permit use of the properties as public golf courses." *Id.* at 420-21.

Thus,

> When construing the phrase 'immediate most suitable economic use' as a whole, the record in this case cannot support a finding that the immediate most suitable economic use of the properties is as public golf courses. The uncontroverted evidence … reveals the *immediate* most suitable *economic*

> use of the properties at issue is as private residences, not public golf courses. While we acknowledge the Clubs' properties have amenities that could be used on a public golf course, the stipulated record also indicates significant zoning obstacles …. In light of those obstacles, we cannot say the record would support an *immediate* use of the private golf course amenities as public golf courses.

Id. at 421-22 (emphasis in the original). As a result, "the STC's commercial classification … [was] not supported by competent and substantial evidence." *Id.* at 422.

This decision, grounded on the express legislative mandate that the classified suitable economic use must be *immediate*, is eminently sensible. While the clubs' physical properties ostensibly could be used in some speculative future as public golf courses, that use could not be *immediate*, because the relevant municipalities' zoning ordinances prohibited it. Instead, the *immediate* most suitable economic use would be as private residences, per the zoning. Absent competent and substantial evidence rebutting the existence of the zoning restrictions or showing how they were an insignificant obstacle to immediate commercial use, that was the only proper result.

This case essentially repeats *Algonquin*. As in *Algonquin*, the Batemans' land is zoned for single-family residential use and any commercial use is prohibited. Commercial use of the property would require a change in the law. The County agreed with this and presented no evidence to rebut it. Thus, the STC's decision that the immediate most suitable economic use of the Batemans' property is commercial was unreasonable and unsupported by competent and substantial evidence.

C. The STC misapplied § 137.016.5: no evidence rebuts the presumption that the immediate most suitable economic use of the Batemans' vacant land zoned for single-family residential use was as residential property.

Section 137.016.5 sets forth eight factors to consider in determining the "immediate most suitable economic use" of vacant land:

> (1) Immediate prior use, if any, of such property;
>
> (2) Location of such property;
>
> (3) Zoning classification of such property; except that, such zoning classification shall not be considered conclusive if, upon consideration of all factors, it is determined that such zoning classification does not reflect the immediate most suitable economic use of the property;
>
> (4) Other legal restrictions on the use of such property;
>
> (5) Availability of water, electricity, gas, sewers, street lighting, and other public services for such property;
>
> (6) Size of such property;
>
> (7) Access of such property to public thoroughfares; and
>
> (8) Any other factors relevant to a determination of the immediate most suitable economic use of such property.

In this case, the hearing officer did discuss each factor (L.F. 289-93; Appx. A8-12). Ultimately, though, most of the factors showed the Batemans' property physically could be used either as residential or commercial property. Rather, the officer's decision that the immediate most suitable economic use was commercial came down to mere

speculation about how the property *might* be used in some potential but uncertain future. In so doing, she misapplied § 137.016.5. The zoning was the overwhelming factor: it made any immediate commercial use a legal and practical impossibility.

There was no "immediate prior use" of either property (L.F. 289; Appx. A8). The subject properties were located near both residential and commercial properties (L.F. 289; Appx. A8).[3] Access from the north versus the west would be the same whether the property were used commercially or residentially (L.F. 290; Appx. A9). Public services were "suitable for either commercial or residential development" (L.F. 290; Appx. A9). The property's "size makes it useful for either residential or commercial development" (L.F. 290; Appx. A9). The "access to public thoroughfares" was suitable for either use, too (L.F. 291; Appx. A10).

Only in discussing "zoning classification" and "other factors" did the STC hold commercial use was somehow more suitable than residential use. As to the zoning, the hearing officer wrote, "Current zoning is R1 (residential). Prior to 2001, prior owners had attempted to get the zoning changed to C3, which request for change was denied.

[3] As to this factor, "location," the hearing officer found that "the only residential property around the subject property lies to the southeast. All other surrounding properties are commercial" (L.F. 289; Appx. A8). While that technically is true, it was undisputed that both properties are located *within* a private residential subdivision. Both the County's expert's map and aerial photograph plainly show the properties extend to a residential cul-de-sac surrounded by residences (L.F. 252-53; Appx. A27).

Respondent suggests that a less intensive commercial zoning would have been acceptable" (L.F. 290; Appx. A9).

But that perfunctory finding did not begin to address the effect of the undisputed residential zoning. At the hearing, the parties agreed that Lots 23 and 21 are both zoned as "R-1, single family" residential (L.F. 135-36, 139-41, 208, 213). According to Respondent, R-1 zoning "allows only one family to live on the property. It does not allow for an owner to rent out a room or portion of the house" (L.F. 282). Both lots are located within a private residential subdivision, Bolling Heights, and Lot 23 previously had been used under its zoning (L.F. 135-36, 252; Appx. A27).

Even Respondent's expert, commercial appraiser Gary Maurer, agreed that, because the property was zoned for "R-1" single-family residential use, rather than commercial, it could not be used for commercial purposes without rezoning by the City Council; he explained this would cause potential commercial buyers even to shy away from considering purchasing it (L.F. 159). Mr. Maurer flatly forecasted the lots would not be used as commercial in the 2009-10 assessment cycle – the cycle for the very assessment the Batemans challenge (L.F. 162-63). Mr. Maurer further admitted that changing the zoning from R-1 to commercial would require presentation to and passage of a commercial development plan by the City of Gladstone, and no one had submitted any such plan (L.F. 158).

Indeed, the undisputed evidence was that the one time anyone actually did attempt to have these parcels rezoned for commercial use, the Gladstone City Council unanimously refused. In 2000, a gasoline company sought to rezone the land as

commercial in order to operate a filling station there (L.F. 138, 140-41, 143, 178, 183, 213-14). The City Council took up and discussed the request, but then unanimously voted it down (L.F. 135, 185-86, 213-14). In the minutes of the hearing, the councilmembers stated they felt any commercial development this close to residents' houses (described as "right in the back yards") was unsafe and undesirable (L.F. 186).

Thus, just as in *Algonquin*, the fact that the land is zoned for residential use – and any commercial use is prohibited – a utterly negates any possibility that its *immediate* most suitable economic use could be commercial. The Batemans presented "undisputed, detailed evidence outlining the zoning restrictions which permit the properties to be used for only residential purposes" and "prohibit commercial building …." 220 S.W.3d at 420. Thus, the burden had to shift to the Respondent Assessor to present evidence "to dispute these assertions." *Id.* But the Assessor's expert admitted the Batemans' "assertion regarding the zoning obstacles," and nothing in the record showed "how the zoning restrictions … could be overcome, so as not to be deemed 'sufficient obstacles,' and thereafter, permit use of the properties as" as commercial. *Id.* at 420-21.

As such, paraphrasing the Court of Appeals in *Algonquin*,

> When construing the phrase 'immediate most suitable economic use' as a whole, the record in this case cannot support a finding that the immediate most suitable economic use of the properties is as [commercial property]. The uncontroverted evidence … reveals the *immediate* most suitable *economic* use of the properties at issue is as private residences, not [commercial enterprises]. While [the Batemans'] properties have [physical

> characteristics] that could be used [commercially], the [undisputed] record also indicates significant zoning obstacles …. In light of those obstacles, we cannot say the record would support an *immediate* use of the [Batemans' vacant land] as [commercial property].

Id. at 421-22 (emphasis in the original). Thus, "STC's commercial classification of the … [Batemans'] properties [was] not supported by competent and substantial evidence." *Id.* at 422. The STC was simply wrong in its assertion that the "zoning of the properties under appeal is … [not] persuasive on the point of its most suitable economic use" (L.F. 317; Appx. A23).

Indeed, when it came down to it, the hearing officer and the STC both essentially ignored the zoning. Instead, in the eighth factor, "other factors relevant to the immediate most suitable economic use of such property," both put most of their decisions' weight on the Batemans' supposed (and unsuccessful) marketing "the properties as an assemblage for commercial development" (L.F. 291; Appx. A10).

But even if the Batemans had suggested during the course of their ownership that the property *someday*, *somehow*, *might*, or physically *could* be used as commercial property bore nothing on its *immediate* most suitable economic use. Respondents' expert agreed, as in *Algonquin*, that any commercial use would not be *immediate*.

Though there are only two cases specifically construing § 137.016.5, similar principles are gleaned from the law governing appraising – which requires that land be valued by its "highest and best use." "Only that the fact of the property's capability or adaptability to the [proposed] use may be considered as an element of its present value.

Mere speculative uses cannot be considered. There must be some probability that the land would be used within a reasonable time for the particular use to which it is adapted." *State ex rel. Mo. Hwy. & Transp. Comm'n v. Modern Tractor & Supply Co.*, 839 S.W.2d 642, 648 (Mo. App. 1992). In this case, a possibility of future commercial use of the land was entirely speculative. The undisputed evidence was the properties *would not* be used as commercial within the time of the present assessment cycle.

"Property may not be viewed in a vacuum, in isolation from all its circumstances." *NCR Corp. v. State Tax Comm'n*, 637 S.W.2d 44, 50 (Mo. App. 1982). But that is what the STC did in this case. Ignoring the zoning, the STC found the property physically could be used as commercial property. The Batemans have little quarrel with that. Commercial use in some speculative future may well be a "suitable economic use" for the Batemans' vacant land. But the present, immediate state of the land cannot be viewed in a vacuum: the zoning is paramount. It is not merely *a* "suitable economic use" that guides the classification – it is the *immediate most* suitable economic use. The zoning prevents that from being anything other than residential.

Again, in the law of appraising, "It is only to the extent that … a probability of rezoning affects present market value that evidence of it may be received and considered at all." *State ex rel. State Hwy. Comm'n v. Carlson*, 463 S.W.2d 74, 80 (Mo. App. 1970). Even "if there is a showing of a reasonable probability of a change" in zoning, "the property must not be evaluated as though the rezoning were already an accomplished fact. It must be evaluated under the restrictions of the existing zoning and consideration given to the impact upon market value of the likelihood of a change in zoning." *Id.* So,

too, it must be in the realm of classifying vacant land for property tax purposes, which, unlike appraising, expressly requires a showing of "immediacy." Here, the land had not been rezoned. As in *Algonquin*, its immediate most suitable economic use had to be that for which it could be used *immediately*, residential use, without a speculative possibility of rezoning for commercial use that very well may not happen and, indeed, previously had been rejected.

The STC's decision that the immediate most suitable economic use of the Batemans' land was as commercial property was unsupported by competent and substantial evidence and misapplied § 137.016.5. This Court should reverse the trial court's decision affirming the STC.

D. The STC's misapplication of § 137.016.5 renders the Assessor's appraisal of the land for commercial use irrelevant.

Mr. Maurer, Respondent's expert, is a "commercial appraiser" for Clay County; he reappraised the Batemans' land as commercial property (L.F. 95, 146-47). His commercial appraisal of the two parcels together at $345,000 was Respondent's only evidence of their supposed market value (L.F. 146-477, 211, 197-284). The Batemans previously had paid $155,000 for both properties (L.F. 144).

But the Batemans' land was not commercial property. *Supra* at 20-26. Its valuation as such was irrelevant to its value as the residential property for which it was zoned and immediately usable.

Indeed, as Mr. Maurer admitted, all the vacant land to which he compared the Batemans' land in the appraisal was zoned as commercial (L.F. 160, 164, 233, 266-73).

While the hearing officer suggested all these comparables "were a mix of commercial and residential" (L.F. 292; Appx. 11), plainly, this was not true.

An expert appraiser's opinion of the value of real property must not be based on speculation. "To have probative value expert opinion must be 'founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation.'" *Modern Tractor*, 839 S.W.2d at 648 (citation omitted). In this case, Mr. Maurer did not explain why or how he decided the Batemans' property was to be classified and appraised as commercial property. Perhaps someone in the County Assessor's office, under directions to see to it that the Batemans' taxes be raised on their vacant land as much as possible, told him to appraise it as such. Whatever the reason, the suggestion that the land should be appraised as commercial property was mere speculation.

As a result, on remand, the trial court should be instructed to disregard Mr. Maurer's "commercial appraisal" of the Batemans' residentially-zoned land. The immediate most suitable economic use of the land is as residential property.

Conclusion

The Court should reverse the trial court's judgment and remand this case with instructions to reverse the State Tax Commission's decision.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 7,713 words.

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Certificate of Service

I hereby certify that, on July 23, 2012, I filed a true and accurate Adobe PDF copy of this Substitute Brief of the Appellants and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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