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CASENOTE

YOU CAN'T DO THAT ANYMORE: ESTABLISHING AND LIMITING NONCONFORMING USES IN MISSOURI ZONING LAW

*Rose v. Board of Zoning Adjustment*¹

I. INTRODUCTION

City and County zoning ordinances serve a vital function for Missouri residential and commercial districts, as well as for the citizens who live and work there. Zoning boards create and enforce these regulations in an effort to establish a common and effective scheme of property use within a defined area. These legislative bodies, however, often amend or change zoning regulations and schemes, posing a threat to landowners whose land or use thereof is inconsistent with a planned modification. The law of nonconforming uses governs the landowners' rights to continue a use that is at odds with the new regulation.

Rose v. Board of Zoning Adjustment presents a unique fact pattern concerning a landowner's right to continue a nonconforming use. This casenote offers an examination of the case and relevant Missouri zoning law, defines the boundaries of nonconforming uses, and identifies the divergent interests at stake.

II. FACTS AND HOLDING

David Rose, a resident of Parkville, in Platte County, Missouri, appealed the decision of the Platte County Board of Zoning Adjustment concerning an alleged violation of Platte County's "Weed Ordinance."² Rose holds a degree in wildlife management and worked for ten years as a wetlands manager for the United States Fish and Wildlife Service.³ He purchased the home and lot at issue in August 1976 and decided to "transform the cut-grass yard area surrounding his home into a natural woodlands area."⁴ This project included the purchase and planting of several additional trees, shrubs, and flowering plants.⁵ Rose also allowed the natural grass and vegetation on the lot to grow uncut, without trimming or mowing.⁶

By 1991, the lot matured into a "wooded state" and led to complaints and an investigation by the Platte County codes enforcement officer, Gail Cantu.⁷ Cantu's investigation of the lot led to the filing of criminal charges against Rose, based on violations of Platte County's "Nuisance Ordinance."⁸ The charges alleged that Rose allowed "noxious weeds" such as poison ivy and oak to grow on his lot, in addition to other violations of the ordinance.⁹ After a trial in the Platte County Circuit Court, a jury acquitted Rose on all charges.¹⁰

Cantu raised additional complaints about the condition of the lot in 1992, 1996, and 1998.¹¹ The county prosecutor decided not to bring charges on each of these occasions.¹² On May 20, 1999, the Platte County Commission established new zoning regulations known as the "Weed Ordinance," which supplanted the Nuisance Ordinance.¹³ This

¹ 2001 Mo. App. LEXIS 2220 (Mo. App. W.D. 2001).

² *Rose v. Platte County, Missouri*, 2001 Mo. App LEXIS 2220, *1 (Mo. App. W.D. 2001).

³ *Id.*

⁴ *Id.* at **1-2.

⁵ *Id.* at *2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* The charges also indicated that Rose maintained other weeds and wood boards conducive to breeding insects and rodents, and that he had a decaying wood deck in a dangerous condition. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at **2-3. See Platte County Zoning Regulations. Art. III. §21.

new regulation required that weeds be removed from any parcel of land that is not zoned for agricultural use.¹⁴ It further provided the following definition of “weeds”:

- (a) dense growth of wild shrubbery...
- (b) noxious or poisonous plants, including but not limited to poison ivy, poison oak or poison sumac, at any height or state of maturity,
- (c) plants and/or indigenous grasses which attain such large growth as to become, when dry, a fire menace to adjacent improved property,
- (d) vegetation and/or grasses which, because of height, has a blighting effect on the neighborhood.¹⁵

Just five days after the enactment of the Weed Ordinance, Cantu again inspected Rose’s property and this time sent a letter notifying Rose that the weeds on his lot violated the new regulations and that they must be removed in thirty days.¹⁶ Rose did not respond to or act in response to the letter.¹⁷ Then, on July 8, 1999, Cantu sent Rose a Stop Order, stating that his ongoing failure to keep his lot in compliance with the ordinance would result either in criminal misdemeanor charges or the county’s removal of the weeds and assessment of costs.¹⁸ Again, Rose did not respond.¹⁹

Cantu’s third correspondence with Rose was an August 5, 1999 letter warning Rose that a hearing would be held regarding his violations of the ordinance.²⁰ The letter stated that the Platte County Planning and Zoning Director (“Director”) could declare the weeds a nuisance and have them removed if Rose failed to do so within fourteen days.²¹ Rose and his counsel appeared at the hearing on August 24, 1999.²² After the presentation of evidence, the Director decided that Rose was in violation of the ordinance and ordered the removal of the weeds, either by Rose or the county.²³

Rose appealed this decision to the Platte County Board of Zoning Adjustment (“BZA”) on September 20, 1999, and also applied for a variance to the ordinance arguing that he established a “prior nonconforming use” of the property under the County’s zoning regulations.²⁴ Rose requested that he be exempted from the Weed Ordinance because the present condition of his lot “existed for a substantial period of time” before the County enacted the new ordinance.²⁵ After a hearing, the BZA found that Rose violated the Weed Ordinance and denied his application for a variance, asserting that the proposed variance “would be opposed to the general spirit and intent of the [Stop] Order and that it would adversely affect the public health, safety, morals, order, convenience, property or general welfare.”²⁶ The BZA, however, failed to address Rose’s nonconforming use argument.²⁷

On December 28, 1999, Rose filed a petition against the BZA seeking to preclude enforcement of the new zoning ordinance.²⁸ In his petition, Rose sought judicial review of the BZA’s decision and a declaratory judgment that (1) Rose had a right to continue a prior nonconforming use of the lot; (2) the BZA’s ruling was “arbitrary, capricious, and unsupported by competent and substantial evidence; and (3) Platte County’s new Weed Ordinance was unconstitutional.²⁹ After hearing evidence in the matter, the Circuit Court of Platte County denied all of Rose’s claims.³⁰

¹⁴ *Id.* at *3.

¹⁵ *Id.* at **3-4. See Platte County Zoning Regulations, Art. III, §21.

¹⁶ *Id.* at **4-5.

¹⁷ *Id.*

¹⁸ *Id.* at *5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at **5-6.

²³ *Id.* at *6.

²⁴ *Id.* at **6-7. See Platte County Zoning Regulations, Art. VI, §2 “A nonconforming use of land, existing at the time of adoption of [the zoning regulations], may be continued, provided however: (1) Said nonconforming use may not be extended or expanded; (2) If said nonconforming use or any portion thereof is discontinued for a period of six (6) months, any future use of the land shall be in conformity with the applicable zoning district provisions for that location.”

²⁵ *Id.* at *7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at **7-8. Rose’s plea for judicial review was based on the Missouri Administrative Procedure Act. Mo. Rev. Stat. § 536 100 et seq. (2001).

Id. at *7.

³⁰ *Id.* at *8.

In the instant case, the Missouri Western District Court of Appeals rejected Rose's claims of unconstitutional vagueness, improper delegation of legislative authority, and double jeopardy.³¹ The court, however, reversed the case, instructing the trial court to remand the issue to the BZA for determination of Rose's prior nonconforming use claim.³² In appealing the decision of a County Planning and Zoning Director, a petitioner who asserts a prior nonconforming use with regards to a new zoning ordinance is entitled to a determination of whether that use existed and, if so, whether the petitioner should be permitted to continue that use or be compensated for the value of the taken use.³³

III. LEGAL BACKGROUND

A. Prior Nonconforming Uses, Variances, and Special Use Permits

The Missouri Supreme Court defines a prior nonconforming use of land as one that "lawfully existed prior to the enactment of a zoning ordinance, or an amendment to an existing zoning ordinance, that is maintained after the effective date of the ordinance or amendment even though the use is not in compliance with the zoning restrictions applicable to the district in which it is situated."³⁴ The rationale for allowing certain nonconforming uses to continue is so that the municipality does not deprive a landowner of her property without fair compensation or due process of law.³⁵ The nonconforming use itself represents a vested property right that a zoning ordinance or amendment cannot abrogate.³⁶ Although the landowner benefits from the existence of a prior nonconforming use, the right to continue in that use is a right that runs with the land, not the landowner.³⁷ Landowners typically assert a prior nonconforming use as an affirmative defense when a zoning board or commissioner brings an action to enforce an existing zoning ordinance or amendment against the landowner.³⁸ However, nonconforming uses are not favored by the law because they diminish the effectiveness of an overall zoning scheme.³⁹

If a landowner obtains a variance from the board of zoning adjustment, he is exempted from the strict application of a zoning ordinance or amendment.⁴⁰ There are two types of variances, "use" and "area." "Use" variances permit a property owner to use his land in a way that is not otherwise permitted in the zoning district in which the land is situated.⁴¹ An "area" variance allows a landowner to construct or place buildings and other structures on her land, the placement of which would otherwise violate a zoning ordinance.⁴² For a landowner to obtain a use variance, she must show that the strict enforcement of the zoning ordinance or amendment would cause "unnecessary hardship," while the standard to obtain an area variance requires a showing of conditions "slightly less rigorous than unnecessary hardship."⁴³

By way of contrast, a zoning authority can also issue a special use permit for property that may be used in a manner inconsistent with the normal, authorized use in a designated zone without special permission.⁴⁴ There are three differences between variances and special use permits. The fundamental difference is that a variance allows a landowner

³¹ *Id.* at *25.

³² *Id.*

³³ *Id.* at *20.

³⁴ 1 Mo. Practice. Methods of Practice: Transaction Guide § 12.7 (4th ed. 2001). See also *Odegard Outdoor Advertising, LLC v. Board of Zoning Adjustment of Jackson County*, 6 S.W.3d 148, 150 n. 1 (Mo. 1999) (en banc).

³⁵ *Id.* See also *Missouri Rock v. Winholtz*, 614 S.W.2d 734, 739 (Mo. App. W.D. 1981); *Outcom, Inc. v. City of Lake St. Louis*, 996 S.W. 2d 571, 575 (Mo. App. E.D. 1999); *Storage Masters-Chesterfield, L.L.C. v. City of Chesterfield*, 27 S.W.3d 862, 866 (Mo. App. E.D. 2000).

³⁶ *Id.*; See *City of Blue Springs v. Gregory*, 764 S.W.2d 101, 102 (Mo. App. W.D. 1988); *Missouri Rock, Inc.*, 614 S.W.2d at 739.

³⁷ *Id.*; See *Walker v. City of Kansas City, Mo.*, 697 F.Supp 1088 (W.D. Mo. 1988), *vacated*, 911 F.2d 80 (8th Cir. 1990).

³⁸ *Id.*

³⁹ *Id.*; See also *Burns v. City of Des Peres*, 534 F.2d 103 (8th Cir. 1976); *City of Sugar Creek v. Reese*, 969 S.W.2d 888, 891 (Mo. App. W.D. 1998).

⁴⁰ 1 Mo. Practice. Methods of Practice: Transaction Guide § 12.6 (4th ed. 2001).

⁴¹ *Id.* See also *Housing Authority of the City of St. Charles v. Board of Adjustment of City of St. Charles*, 941 S.W.2d 725, 727 (Mo. App. E.D. 1997).

⁴² *Id.*

⁴³ *Id.*; See also *Matthew v. Smith*, 707 S.W.2d 411, 416 (Mo. 1986)(en banc); *Hutchens v. St. Louis County*, 848 S.W.2d 616, 619 (Mo. App. E.D. 1993). Recall that in the principal case, the BZA addressed and decided Rose's appeal on the basis of a hardship variance instead of a prior nonconforming use.

⁴⁴ 1 Mo. Practice. Methods of Practice: Transaction Guide § 12.8 (4th ed. 2001). "Missouri courts appear to use the term special use permit interchangeably with the term conditional use permit. The special use permit is used as a flexible means of controlling uses considered to be desirable, necessary or convenient to the community, but which by their nature or operation are regarded as creating problems, such as traffic congestion or potential hazards to the public health and safety." *Id.*

to use the property in a manner forbidden by a zoning ordinance, while a special use permit allows the landowner to use property in a manner permitted by an ordinance, so long as certain criteria and conditions are met.⁴⁵ The second difference is that a landowner is not required to show unnecessary hardship, which is the standard for use variances.⁴⁶ The final distinction is that while variances create rights that run with the land, a special use permit is regarded as personal to the landowner who applied for the permit.⁴⁷

The Missouri Court of Appeals for the Western District examined an assertion of a prior nonconforming use in *Missouri Rock, Inc. v. Winholtz*.⁴⁸ The primary issue in the case was whether Missouri Rock, a rock mining and crushing business, was obligated to conform its property use to revisions in a Clay County zoning order enacted after Missouri Rock had lawfully established its business.⁴⁹

Missouri Rock began its open cut mining and rock crushing activities on the property in Clay County in 1975.⁵⁰ Prior to 1977, this use of the land was not regulated by Clay County zoning ordinances.⁵¹ However, in 1977 the county amended and revised zoning ordinances to include the regulation of mines, quarries and rock crushers.⁵² The changes required landowners to obtain special use permits to conduct these activities on their land.⁵³ The court found that Missouri Rock was already conducting lawful mining and crushing activities on the property prior to the ordinances revisions.⁵⁴ As such, the court stated that the changes in Clay County's zoning ordinances must be applied as prospective only and "excepting [nonconforming] uses to avoid unconstitutional deprivation of property interests."⁵⁵ It then held that Missouri Rock's activities constituted a prior nonconforming use and the company was not subject to the revised zoning ordinances requiring a permit.⁵⁶

In 1999, the Missouri Supreme Court held that billboards erected and utilized prior to zoning ordinances changes were not subject to the new regulations. In *Odegard Outdoor Advertising, LLC v. The Board of Zoning Adjustment of Jackson County*,⁵⁷ Odegard Outdoor Advertising ("Odegard") owned four billboards along U.S. Highway 40 in unincorporated Jackson County.⁵⁸ In 1992, the county's director of public works notified Odegard that it was required to obtain a special use permit for the billboards.⁵⁹ Odegard did so and obtained a three-year permit in 1993.⁶⁰ In 1995, Jackson County enacted a new unified development code, which rendered Odegard's billboards in violation of the code.⁶¹ When Odegard attempted to renew its special use permits in 1996, the director of public works rejected the application, citing that the billboards were in violation of the 1995 code.⁶²

Odegard petitioned the Jackson County Board of Zoning Adjustment for a variance and was denied.⁶³ On Odegard's appeal to the Jackson County Circuit Court, the court reversed the decision of the board of zoning adjustment and ordered that the billboards be allowed to stay, or that Odegard be compensated for their removal.⁶⁴

The Missouri Supreme Court asserted that the best way to resolve the case was to determine the legal status of the billboards at three points in time: (1) prior to the issuance of the 1993 special use permit; (2) after the issuance of the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* See also *Ford Leasing Development Co. v. City of Ellisville*, 718 S.W.2d 228, 232 (Mo. App. E.D. 1986).

⁴⁸ 614 S.W.2d 734 (Mo. App. W.D. 1981).

⁴⁹ *Id.* at 736.

⁵⁰ *Id.*

⁵¹ *Id.* at 739.

⁵² *Id.* at 737.

⁵³ *Id.* The changes arose as a result of the Missouri Supreme Court's decision in *Ryder v. County of St. Charles*, 552 S.W.2d 705 (Mo. 1977)(en banc), which asserted that former Mo. Rev. Stat. § 64.560 (1969) (prohibiting regulation of open cut and strip mining) was unconstitutional. *Id.*

⁵⁴ *Id.* at 739.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 6 S.W.3d 148 (Mo. 1999)(en banc).

⁵⁸ *Id.* at 149.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* The director of public works cited violations of billboard face gross area limitations and the location of the billboards in relation to the highway. *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

special use permit; and (3) after the adoption of Jackson County's new unified development code in 1995.⁶⁵ The court first concluded that the billboards were in compliance with all existing zoning ordinances prior to 1993, and that status did not change after Odegard received the 1993 permit.⁶⁶ The court then noted that Jackson County's new code expressly allowed for prior nonconforming uses to continue so long as the use was otherwise lawful when the code was enacted.⁶⁷ Therefore, the court held that the billboards' continued existence was lawful as a prior nonconforming use that existed prior to the new zoning regulations.⁶⁸

B. Limitations on Nonconforming Uses

One commentator warns that, "one dare not rely too heavily on nonconforming use rights, because they are comparatively fragile."⁶⁹ Indeed, there exist a number of limitations on the establishment of a nonconforming use. Several of these limitations relate to the "actual use" of the parcel of land. The following represent "actual use" issues and have been held insufficient to establish a prior nonconforming use in Missouri or Federal courts: (1) mere intent to use property for a use at some future time; (2) the purchase of property for a particular use followed by preliminary steps seeking approval of the use; (3) the platting of undeveloped land; and (4) leasing land for a certain use.⁷⁰ In *Storage Masters-Chesterfield, L.L.C. v. City of Chesterfield*, the Missouri Court of Appeals for the Eastern District examined these limitations as they relate to the actual use of property.⁷¹ This case concerned a zoning regulation prohibiting the illumination of advertising signs where the court held that the landowner failed to establish a prior nonconforming use.⁷² The landowner never illuminated the sign on his property and the court further noted that there were no facts in the record to support the inference that he took any "substantial steps" to illuminate it.⁷³ The court identified the appropriate test as follows:

The test for establishing a prior nonconforming use is strict... In determining whether an existing use of property may be protected as a lawful non-conforming use, the determinative factor is the actual rather than the contemplated use of the property... The landowner's mere intention or plan to use the land for a particular purpose... does not give rise to a vested right.⁷⁴

The court further noted that in order to show a prior nonconforming use, a landowner must have made at least "one substantial step" and that "mere preliminary work which is not of a substantial nature does not constitute a nonconforming use."⁷⁵

A holder of a nonconforming use cannot expand that use.⁷⁶ In *Dierberg v. Board of Zoning Adjustment of St. Charles County*, landowners established a lawful nonconforming use.⁷⁷ The use at issue was the operation of Pond Fort, a hunting club on property later zoned as an agricultural district.⁷⁸ Pond Fort opened in 1971 as private club with six members.⁷⁹ The owners and members were allowed to hunt and shoot clay targets on the property and could invite an

⁶⁵ *Id.* at 150.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 18A Mo. Practice, Real Estate Law--Disputes § 1304 (2d ed. 2001).

⁷⁰ 1 Mo. Practice, Methods of Practice: Transaction Guide § 12.7 (4th ed. 2001). See also *State ex rel. Beacon Court, Inc. v. Wind*, 309 S.W.2d 663 (Mo. App. 1958); *Ogawa v. City of Des Peres*, 745 S.W.2d 238 (Mo. App. E.D. 1987); *Burns v. City of Des Peres*, 534 F.2d 103 (8th Cir. 1976); *State ex rel. National Advertising Co. v. State Highway and Transportation Commission*, 703 S.W.2d 514 (Mo. App. 1985).

⁷¹ 27 S.W.3d 862 (Mo. App. E.D. 2000).

⁷² *Id.* at 866.

⁷³ *Id.*

⁷⁴ *Id.*; See also *In re Coleman Highlands*, 777 S.W.2d 621, 624 (Mo. App. 1989); *Outcom*, 996 S.W.2d at 575.

⁷⁵ *Id.*; See also *State ex rel. Great Lakes Pipe Line Co. v. Hendrickson*, 393 S.W.2d 481, 484 (Mo. 1965).

⁷⁶ See generally *Dierberg v. Board of Zoning Adjustment of St. Charles County*, 869 S.W.2d 865 (Mo. App. E.D. 1994); *Boyce Industries v. Missouri Highway and Transportation Commission*, 670 S.W.2d 147 (Mo. App. E.D. 1984).

⁷⁷ 869 S.W.2d at 869.

⁷⁸ *Id.* at 866-67.

⁷⁹ *Id.* at 866.

unlimited number of guests to do the same.⁸⁰ The zoning for the district in which Pond Fort was situated changed in 1973 and the new ordinance required private clubs to obtain a special permit to operate in the zoning district.⁸¹ The owners of Pond Fort never obtained a special permit.⁸² Over the next twenty years, Pond Fort experienced a growth in membership, held tournaments, and eventually allowed non-members to shoot claybirds for a fee.⁸³

The court in *Dierberg* affirmed the BZA's ruling that the landowners established a lawful nonconforming use prior to the 1973 zoning changes.⁸⁴ The court further held that the landowners had unlawfully extended the nonconforming use, based on the changes the club experienced after 1973.⁸⁵ The owners of Pond Fort, however, were not forced to relinquish their rights to the prior nonconforming use. In a question of first impression, and relying upon the reasoning of two New York state cases, the court concluded that the landowners did not forfeit their nonconforming use, but must cease those activities that constituted an extension of their lawful use.⁸⁶ The court, quoting one New York case, noted:

The fact that a valid nonconforming use had been expanded or enlarged does not work a forfeiture of the right to continue the original nonconforming use. If such use has been continued notwithstanding the extension, only the extended use may be prohibited.⁸⁷

Since Pond Fort continued to operate as a private club after 1973, the court did not terminate their original nonconforming use, but instead ruled that the club must return to what it was prior to 1973-exclusively a private club.⁸⁸

Changes or abandonment of a nonconforming use can, however, trigger forfeiture.⁸⁹ In *City of Sugar Creek v. Reese*, the Missouri Court of Appeals for the Western District examined the effect of a subsequent nonconforming use on a landowner's rights to the original nonconforming use.⁹⁰ The owner of the property at issue in *Reese* leased it to a manufacturer in 1960.⁹¹ At the time, zoning ordinances permitted all business, including manufacturing, to operate in the district. In 1966, the city changed the zoning for the property to a more restrictive business classification, which did not include manufacturing. After the 1966 zoning change, the use of the property existed as a lawfully nonconforming use.⁹² A subsequent zoning change in 1983, while still prohibiting manufacturing operations in the district, provided that, "a non-conforming use may be continued, but may not be changed to another non-conforming use."⁹³ The 1983 ordinance also provided that prior nonconforming uses may exist indefinitely, but if abandoned or discontinued for 180 consecutive days, the land must be used in compliance with the ordinance thereafter.⁹⁴

The manufacturing operation on the property persisted until 1992, when the tenants terminated the lease and vacated the lot.⁹⁵ The landowner then renovated the lot and opened an automotive sales and service shop. He was subsequently notified that his operation of an auto repair business violated the zoning ordinance and city officials ordered him to remove inoperable automobiles from the lot.⁹⁶ The court held that the landowner was bound by the 1983 ordinance that prohibited changes in nonconforming uses.⁹⁷ The time limit under the ordinance was not significant because the

⁸⁰ *Id.*

⁸¹ *Id.* at 867.

⁸² *Id.*

⁸³ *Id.* at 869.

⁸⁴ *Id.* at 868.

⁸⁵ *Id.* at 869.

⁸⁶ *Id.* at 870. See *Town of Oyster Bay v. Avalon Yacht and Cabana Club, Inc.*, 38 A.D.2d 604 (N.Y. 1971); *Garcia v. Holze*, 94 A.D.2d 759 (2 Dept. 1983).

⁸⁷ *Id.* at 870. (quoting *Garcia*, 94 A.D.2d 759).

⁸⁸ *Id.* at 871. The court also held that the extension of the nonconforming use did not constitute an abandonment of the original nonconforming use. *Id.* at 870-871.

⁸⁹ See generally *City of Sugar Creek v. Reese*, 969 S.W.2d 888 (Mo. App. W.D. 1998); *Huff v. Board of Adjustment of City of Independence*, 695 S.W.2d 166 (Mo. App. W.D. 1985).

⁹⁰ 969 S.W.2d 888.

⁹¹ *Id.* at 890.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 892.

ordinance expressly prohibited changes in nonconforming uses.⁹⁸ The court further held that the 1983 zoning ordinance did not result in an unconstitutional taking of the landowner's property.⁹⁹

IV. THE INSTANT DECISION

Rose presented the following four arguments on appeal to the Missouri Western District Court of Appeals: (1) Platte County's new Weed Ordinance was unconstitutionally vague; (2) the Weed Ordinance unconstitutionally delegated legislative authority to private entities; (3) the BZA improperly denied Rose's variance request based on his prior nonconforming use of the lot; and (4) enforcement of the Weed Ordinance violated his constitutionally protected double jeopardy rights.¹⁰⁰ The court addressed each of these claims.

A. Unconstitutional Vagueness

Rose first challenged the Weed Ordinance as unconstitutionally vague based on his claim that it "failed to provide adequate notice to the public and sufficient standards for enforcement."¹⁰¹ The court began by citing the "void-for-vagueness" doctrines, found in the Due Process clauses of both the United States and Missouri State Constitutions.¹⁰² It further explained that when examining statutes the enforcement of which could result in the deprivation of liberty or property, the statutory language must be "worded with precision sufficient to enable reasonable people to know what conduct is proscribed so they may conduct themselves accordingly."¹⁰³ Upon a challenge for vagueness, the court must view the language as it applied to the facts of the case.¹⁰⁴ Further, the court noted that statutory language that a reasonable person can understand is not unconstitutionally vague simply because it required interpretation on that case-by-case basis.¹⁰⁵

In examining the Weed Ordinance, the court addressed Rose's claim that it permitted officials to make arbitrary decisions as to what constituted a weed based on some of the language of the ordinance, specifically, the terms "blighting effect," "dense growth," "cultivated," and "noxious and poisonous plants."¹⁰⁶ Rose argued based on the court's decision in *City of Independence v. Richards*, the terms "unsightly" and "annoying" were neither defined nor explained textually.¹⁰⁷

The court, however, contrasted *Richards* with the instant case, asserting that the Weed Ordinance provided a "very detailed definition" of weeds and did so with language that enabled reasonable people to understand what the ordinance prohibited.¹⁰⁸ The court addressed Rose's selected terms by stating that they were descriptive phrases that simply provided guidance as to the types of vegetative growth that would constitute a violation of the ordinance.¹⁰⁹ It concluded that the Weed Ordinance was worded with "sufficient precision," and that the ordinance, as a whole, provided "a clear context for understanding and application, sufficient to avoid a challenge for vagueness."¹¹⁰ The court ended its discussion of vagueness by finding that the condition of Rose's property constituted a violation of the Weed Ordinance.¹¹¹ The growth on his lot was more than twelve inches high, it was not purchased at a nursery, and had not been cultivated, trimmed, or mowed.¹¹²

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Rose v. Board of Zoning Adjustment*, 2001 Mo. App. LEXIS 2220, *7-8 (Mo. App. W.D. 2001).

¹⁰¹ *Id.* at *8.

¹⁰² *Id.* at *9. See U.S. Const. amend. XIV; Mo. Const. art. I., § 10.

¹⁰³ *Id.* (quoting *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 55 (Mo. App. E.D. 1990)).

¹⁰⁴ *Id.* at *10. Quoting *Perez v. Mo. State Board of Registration for the Healing Arts*, 803 S.W.2d 160, 165 (Mo. App. W.D. 1991).

¹⁰⁵ *Id.* (quoting *Fitzgerald*, 796 S.W.2d at 55).

¹⁰⁶ *Id.* at *11.

¹⁰⁷ *Id.* at *12. See *City of Independence v. Richards*, 666 S.W.2d 1, 11 (Mo. App. W.D. 1983).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at **12-13.

¹¹⁰ *Id.* at *13. See *supra* note 107.

¹¹¹ *Id.*

¹¹² *Id.*

B. Improper Delegation of Authority

Rose next argued that the Weed Ordinance improperly delegated legislative authority to nurseries by allowing them to determine what constitutes a “weed.”¹¹³ He claimed that the ordinance was unconstitutional because it allowed nurseries to “exercise police powers” in that they could define “weeds” based on the types of vegetation they stock.¹¹⁴ Rose, however, failed to raise the issue of improper delegation of legislative authority both at trial and in his post-trial Motion for Reconsideration.¹¹⁵ The court noted that constitutional questions are waived if not “raised in the trial court at the earliest opportunity.”¹¹⁶ Therefore, the court denied Rose’s claim of improper delegation of legislative authority.¹¹⁷

C. Prior Nonconforming Use

Rose argued that the Weed Ordinance could not have been enforced against him, as a result of his nonconforming use of the lot in a “naturally wooded state” since 1976.¹¹⁸ The BZA argued, however, that Rose did not maintain that nonconforming use, but rather, he allowed the vegetative growth to expand and become denser after the Platte County Commission enacted the Weed Ordinance.¹¹⁹

The court began its treatment of this issue by discussing the importance of the law’s function in protecting the property of citizens. It noted that both federal and state constitutions provide that not even the government can take private property without just compensation.¹²⁰ Furthermore, the court reasoned that unconstitutional taking can occur when a county enforces a zoning ordinance against a property owner who established a prior nonconforming use of the land.¹²¹ The court provided the following definition of nonconforming use:

The term “nonconforming use” means a use of land which lawfully existed prior to the enactment of a zoning ordinance and which is maintained after the effective date of the ordinance even though not in compliance with the new use restrictions.¹²²

The court determined that the BZA examined Rose’s request for a variance on the basis of hardship pursuant to Mo. Rev. Stat. § 89.090(1)(3) (2001).¹²³ This statute states that the BZA may “‘vary or modify’ the application of any zoning ordinance upon a showing of ‘practical difficulties or unnecessary hardship in . . . carrying out the strict letter of such ordinance.’”¹²⁴ The court then observed that Rose’s application for a variance was not based on hardship, but rather on the constitutionally-based theory that he established a prior nonconforming use of his property and enforcement of the Weed Ordinance would result in an unconstitutional taking.¹²⁵ Essentially, the court found that the BZA applied the wrong standard in determining Rose’s eligibility for a variance.¹²⁶ It concluded that the BZA erred in this regard, and that Rose was entitled to another BZA ruling regarding his prior nonconforming use claim.¹²⁷ The court reversed and instructed the trial court to remand the case to the BZA for determination of this issue.¹²⁸

¹¹³ *Id.* at *14.

¹¹⁴ *Id.* at **14-5.

¹¹⁵ *Id.* at *15.

¹¹⁶ *Id.* See *Fisher v. State Highway Commn. of Mo.*, 948 S.W.2d 607, 611 (Mo. 1997)(en banc).

¹¹⁷ *Id.*

¹¹⁸ *Id.* See *supra* note 24 and accompanying text.

¹¹⁹ *Id.* at *16.

¹²⁰ *Id.* at *17. See U.S. Const. amend. V; Mo. Const. art. I § 26.

¹²¹ *Id.* See *Odegard Outdoor Advert. v. Board of Zoning Adjustment*, 6 S.W.3d 148, 149-150 (Mo. 1999)(en banc).

¹²² *Id.* See *Mo. Rock, Inc. v. Winholtz*, 614 S.W.2d 734, 739 (Mo. App. W.D. 1981).

¹²³ *Id.* at 18.

¹²⁴ *Id.* See Mo. Rev. Stat. § 89.090(1)(3) (2001).

¹²⁵ *Id.* at *19.

¹²⁶ *Id.* at *20.

¹²⁷ *Id.*

¹²⁸ *Id.*

D. Double Jeopardy

Rose's final claim on appeal was that, based on his 1991 trial and acquittal of charges under the Nuisance Ordinance, he cannot be prosecuted under the Weed Ordinance for the same conduct without being subject to double jeopardy.¹²⁹ The court first noted that the Double Jeopardy Clause prohibits later prosecutions for the same offense after an acquittal,¹³⁰ but that the labeling of a proceeding as either "criminal" or "civil" is not the key determination in deciding whether double jeopardy attaches.¹³¹ However, the court stated that the determination of whether a civil penalty is considered punishment for double jeopardy purposes rests on the nature of the penalty, basically, whether the civil penalty is remedial or punitive in nature.¹³² To constitute punishment, the goal of the civil penalty "must be the twin aims of retribution and deterrence."¹³³

According to the court, its determination, then, was whether the BZA's abatement remedy (voluntary or county-initiated removal of vegetation) was punitive or remedial.¹³⁴ The court delineated how the county did not file criminal charges against Rose, although the Weed Ordinance permits such sanctions, and that the county "limited" the remedy sought to the abatement procedures.¹³⁵ It concluded that this penalty was remedial since it "neither sought to deter [Rose] or seek retribution," and therefore, the BZA did not violate Rose's constitutional right against double jeopardy.¹³⁶

V. COMMENT

In the instant decision, the court correctly identified the BZA's error in determining the merits of Rose's appeal. The BZA's examination of the case in the context of a hardship variance was inconsistent with Rose's argument and resulted in an improper affirmation of the Director of Planning and Zoning's decision. As described above and delineated by the court, a use or hardship variance requires a showing of hardship.¹³⁷ The court noted that a hardship variance would require the showing of "practical difficulties or unnecessary hardship in ... carrying out the strict letter" of an ordinance.¹³⁸ The claim of a prior nonconforming use, of course, is based on a constitutional analysis.¹³⁹ The difference is essentially the difference between undue economic hardship and a taking without just compensation.

The issue on remand to the BZA is whether Rose established a prior nonconforming use on his lot before the Platte County Commission enacted the Weed Ordinance. The court gave no clear indication of its opinion on this decision. However, while discussing the BZA's error in deciding the appeal, the court alluded to one issue the determination of which will be critical to the analysis on remand. It briefly noted that in order to show a prior nonconforming use, Rose must "prove that his nonconforming use existed prior to enactment of the Weed Ordinance and was maintained, *but not expanded or extended*, thereafter."¹⁴⁰ This remark is consistent with the analysis of both *City of Sugar Creek* and *Dierberg*.

Rose's alleged nonconforming use was to allow the foliage and shrubbery on his lot to grow naturally, without human intervention. The essence of this particular "use" is to allow a natural, physical *expansion* as the plants grow over time. Rose, however, has never made efforts to change or alter this use; his original intention remains the same, to create

¹²⁹ *Id.* at *21.

¹³⁰ *Id.* at *22. See *U.S. v. Halper*, 490 U.S. 435, 440 (1989); see also U.S. Const. amend. V; Mo. Const. art. I, § 19.

¹³¹ *Id.* See *State v. Mayo*, 915 S.W.2d 758, 760 (Mo. 1996)(en banc); see also *Halper*, 490 U.S. at 447.

¹³² *Id.* See *In Re Caranchini*, 956 S.W.2d 910, 914 (Mo. 1997)(en banc).

¹³³ *Id.* at *23 (quoting *Mayo*, 915 S.W.2d at 760).

¹³⁴ *Id.*

¹³⁵ *Id.* at *24.

¹³⁶ *Id.* Rose's argument also failed because he failed to show that the Weed Ordinance proceedings constituted a prosecution for the "same offense" as the previous prosecution under the Nuisance Ordinance. The court noted that full review of this claim was precluded because the record on appeal was devoid of information relating to the text of the Nuisance Ordinance or the specific charges against Rose in the first prosecution. *Id.* at **24-5.

¹³⁷ See *supra* notes 41 and 43.

¹³⁸ 2001 Mo. App. LEXIS 2220, *18. See also Mo. Rev. Stat. § 89.090.1 (3) (2001) "The board of adjustment shall have the following powers: (3) In passing upon appeals, where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the construction or alteration of buildings or structures or the use of land so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done..." (Note that § 89.090.1 does not apply to Kansas City).

¹³⁹ See *supra* note 35; see also 2001 Mo. App. LEXIS 2220, *19.

¹⁴⁰ 2001 Mo. App. LEXIS 2220, *19 (emphasis added). See also *Odegard*, 6 S.W.3d at 150.

a natural woodlands area on his lot.¹⁴¹ Put simply and somewhat paradoxically, Rose has not expanded his use, but his use has expanded. To this effect, the court recalled that Rose and the county codes enforcement officer presented conflicting evidence regarding the growth of the foliage and the appearance of the lot subsequent to the enactment of the Weed Ordinance.¹⁴² However, regardless of this evidence and despite the absence of factually similar precedent, Rose might argue on remand that he has not expanded his nonconforming use. If he has simply allowed his lot to develop into the natural woodland area that was clearly his original intention, Rose could contend that his initial use, which subsequently became nonconforming, has not expanded or changed.

Even if the BZA determines that an expansion has occurred, Rose will not necessarily forfeit his nonconforming use. Applying the holding of *Dierberg*, a court might only compel Rose to diminish the extent of his use to that which previously lawfully existed.¹⁴³ This solution would raise serious practical and logistical challenges, potentially requiring Rose to trim or otherwise manicure the foliage on his lot.

Alternatively, other factors favor a finding of expansion. For instance, if Rose has added new shrubbery or trees since the enactment of the Weed Ordinance, the additions might constitute an expansion. Furthermore, suppose he developed new areas of his lot in the same fashion or later purchased an adjoining lot to develop as a natural woodland area. The finding of an expansion would seem much more likely in these situations.

There are also policy implications that do not favor the granting of a variance in this case or similar cases. First is the interest in providing public safety. Poisonous plants and weeds pose an obvious threat to the public.¹⁴⁴ Although the plants might be located on private property, their presence poses a risk of harm similar to that of a dangerous dog in the yard or a swimming pool with no fence. While there are policies that favor the protection of Rose's property and his use of it, consideration must also be given to the interests of his neighbors and the general public.¹⁴⁵ Zoning ordinances are often implemented in order to provide an area with a common scheme of appearance or function. When one lot of the zoning district does not conform to the common scheme, it subtracts from the overall effectiveness of the scheme and presents dilemmas for other property owners in the district. These issues range from individual aesthetic preferences to a reduction in property values. Yet there remains the policy of preventing unconstitutional takings. These competing interests must be reconciled in the resolution of the instant case and cases like it. Arguing for time limitations on nonconforming uses, one court has advocated on behalf of the neighbors:

The presence of any nonconforming use endangers the benefits to be derived from a comprehensive zoning plan. Having the undoubted power to establish residential districts, the legislative body has the power to make such classification really effective by adopting such reasonable regulations as would be conducive to the welfare, health, and safety of those desiring to live in such district and enjoy the benefits thereof. There would be no object in creating a residential district unless there were to be secured to those dwelling therein the advantages which are ordinarily considered the benefits of such residence.¹⁴⁶

Finally, cities and counties have an interest in establishing uniform and effective zoning districts. This interest contributed to the holding in *City of Sugar Creek v. Reese*, which allowed an ordinance to prohibit subsequent nonconforming uses.¹⁴⁷ Failure to apply rules similar to the one in that case would result in "cities having virtually little or no control of the land."¹⁴⁸ Perpetual nonconforming use rights would allow one landowner to fluctuate between many nonconforming uses over time, while her neighbor would be prohibited from having any such rights.¹⁴⁹ The result: cities could rarely acquire uniform application of zoning ordinances and landowners would be subject to inequitable restrictions on their property.¹⁵⁰

¹⁴¹ *Id.* at *1.

¹⁴² *Id.* at **19-20.

¹⁴³ *Dierberg*, 869 S.W.2d at 870.

¹⁴⁴ Recall that the first charges filed against Rose included the growth of noxious weeds, including poison ivy and oak. 2001 Mo. App. LEXIS at *2.

¹⁴⁵ The opinion states that the lot in question is located in a residential subdivision. *Id.* at *1.

¹⁴⁶ *City of Los Angeles v. Gage*, 274 P.2d 34, 43 (Cal. App. 1954).

¹⁴⁷ 969 S.W.2d at 892.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

The court in the instant decision correctly identified the BZA's error in deciding Rose's appeal. On remand, the BZA must resolve the paradox of Rose's nonconforming use and its expansion. At stake are the competing interests of Rose, his neighbors, and Platte County.

VI. CONCLUSION

The instant case presents a unique set of facts that must be incorporated into the existing body of zoning law. Rose can only be successful, however, if his efforts do not fall prey to the many limitations that Missouri law imposes on nonconforming uses. In terms of precedent, *Rose v. Board of Zoning Adjustment* joins existing case law in conveying the significance and merit of the divergent interests at stake.

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