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June 21, 2018

Kirkwood City Council
FOR HAND DELIVERY AT
PUBLIC HEARING

Re: Petition for Rezoning of 1837 Bach Ave. (PZ-28-18)

Introduction

On behalf of Save Sugar Creek, Great Rivers Environmental Law Center submits the following comments to the Kirkwood City Council (“City Council”) regarding the Petition for Rezoning of 1837 Bach Ave., PZ-28-18. Sherry Schwartzbaugh, as Trustee of the Thomas J. Jr. and Bessie A. Frederickson Revocable Trust, (“Applicant”) has petitioned the City of Kirkwood for a rezoning of the property located at 1837 Bach Avenue, Kirkwood, Missouri 63122 (the “Property”) requesting that 1.09 acres remain zoned as R-1 and that 0.89 acres be rezoned as R-2.

The City Council’s decision whether to accept or reject Applicant’s Petition for Rezoning the Property is a legislative act that reviewing courts presume is valid.¹ This presumption of validity can only be rebutted when the detriment to the private interest outweighs the public benefits from maintaining the current zoning.² Even if the presumption is rebutted, reviewing courts will uphold a decision to maintain the current zoning if the balance between private detriment and public benefit is “fairly debatable.”³ Ultimately, where a rezoning is requested, the applicant has the burden to demonstrate both its own private detriment and the lack of public benefit caused by the municipality’s maintenance of the current zoning classification.⁴

¹ *JGJ Props., LLC v. City of Ellisville*, 303 S.W.3d 642, 647 (Mo. App. E.D. 2010).

² *Id.* at 648.

³ *Id.*

⁴ *Id.* at 647.

The Eastern District for Missouri has upheld several decisions of municipalities like Kirkwood where a municipality denied a request for rezoning.⁵ Here, City Council must deny Applicant's request for rezoning because the Applicant has not met its burden to demonstrate a cognizable private detriment to justify the rezoning. Furthermore, the Applicant has not met its burden to demonstrate a lack of public interest in maintaining the present zoning on the property sufficient to outweigh any detriment to the Applicant's private interest, which also necessitates denial of the rezoning request. Finally, if City Council concludes that this balancing of interests is fairly debatable, the City Council should nevertheless deny Applicant's request for rezoning.

I. The City Council should deny Applicant's Petition for Rezoning because Applicant has failed to meet its burden to demonstrate a private detriment from the current zoning of the Property as R-1.

Applicant has presented no evidence to the City's Planning and Zoning Commission (P&Z) regarding its private detriment if the current zoning classification of R-1 for the entire property is maintained. Applicant's original and revised application as well as the P&Z Committee Report identifies no private detriment suffered by Applicant in maintaining the present zoning of R-1 for the entire parcel. At best, the Applicant has told P&Z that the purpose of the request for rezoning the property is "to demolish the existing home and market the property for sale."⁶ Yet, in response to questions from P&Z whether the Applicant has a deal with a developer contingent upon rezoning the property, the Applicant "indicated that the property has not been listed for sale at this point and they have not made any arrangements as described."⁷ This statement, as explained below, precludes Applicant from demonstrating a private detriment sufficient to justify the requested rezoning.

The Eastern District has recently stated that "there can be no private detriment in the absence of demonstrated negative impact on property value."⁸ "In fact, as long as zoning has not adversely affected property value, owners dissatisfied with the zoning may simply recoup their investment on the open market."⁹ The Court's logic is entirely applicable here. Applicant has not even attempted to sell the Property as stated to P&Z and, therefore, Applicant cannot demonstrate a private detriment from loss of property value. Applicant has not presented any other evidence of a loss of property value, such as appraisals or other reports that demonstrate a loss from the current zoning. Applicant can simply sell the property "as is" and recoup its investment on the open market. This complete failure by Applicant to carry its burden to demonstrate private detriment requires that the City Council deny the request for rezoning.

⁵ See *JGJ Props., LLC, White v. City of Brentwood*, 799 S.W.2d 890, 894 (Mo. Ct. App. 1990), *Wells & Highway 21 Corp. v. Yates*, 897 S.W.2d 56 (Mo. Ct. App. 1995), and *Tealin Co. v. City of Ladue*, 541 S.W.2d 544 (Mo. 1976). Noticeably, no reported appellate cases in Missouri have overturned a municipality's decision to deny a request for rezoning.

⁶ P&Z Report for PZ-28-18 dated May 2, 2018.

⁷ *Id.*

⁸ *JGJ Props., LLC*, at 650.

⁹ *Id.*

Clearly, the sole purpose for requesting the rezoning is that Applicant can make more money from selling the property if the property is rezoned, which would allow for subdivision of the Property into two or more lots. However, just because Applicant might be able to sell the property for a higher price if rezoned does not constitute private detriment. “Private detriment does not necessarily occur just because land will bring a higher price if rezoned...”¹⁰ Even if Applicant presented evidence about loss of property value from the current zoning versus the proposed zoning, such as with an appraisal, “the use that affords the property owner the highest economic value[] should not be the controlling factor in the [City Council’s] determination of private detriment.”¹¹ Rather, the City Council should, as any reviewing court would, “consider a property’s reasonable use in measuring an owner’s private detriment.”¹² Reasonable use of the Property would include maintaining the current zoning as R-1 and allowing construction of one single-family residence on the Property.

Similarly, if the only objective of a zoning amendment is to further private landowner interests, it is void, constitutionally, since it does not promote the public health, safety or welfare.¹³ The zoning amendment must promote the public interest in some demonstrable way—here Applicant has not met its burden to demonstrate any public interest promoted by the requested rezoning. The sole purpose of the request to rezone is to benefit the private owner, not the public.

Applicant’s failure to meet its burden to prove a private detriment requires that the City Council deny the request for rezoning. Furthermore, because the rezoning would only benefit Applicant, granting the rezoning would be constitutionally void. If the City Council ignores Applicant’s failure to demonstrate private detriment and decides to rezone the Property in the absence of private detriment, it would be contravening clearly established case law and subjecting itself to a legal challenge.

“Because [Applicant has] failed to prove any private detriment whatsoever, [City Council] need not balance the private detriment against the public interest. Furthermore, because [Applicant] ha[s] not cleared the first hurdle in the analysis of zoning decisions by rebutting the presumption that continuation of the present zoning was reasonable, [City Council] need not address the second hurdle in examining whether the City’s continuation of the present zoning is ‘fairly debatable.’”¹⁴ Because Applicant has not met its burden to prove any private detriment, the request for rezoning must be denied without further consideration of public benefits or whether balancing of interests is fairly debatable.

¹⁰ *JGJ Properties*, at 649 (internal citations omitted).

¹¹ *Id.* at 650.

¹² *Id.*

¹³ *Little v. Winborn*, 518 N.W.2d 384 (Iowa 1994).

¹⁴ *JGJ Properties*, at 649.

II. The public interest in maintaining the current zoning outweighs Applicant's private detriment, if any, and the Petition for Rezoning should be denied.

While the rezoning should be denied outright based on the analysis in Section I above, Section II and Section III herein are intended to provide further reasons why the rezoning should be denied by the City Council. Significantly, Applicants have failed to meet their burden to provide evidence that the public benefits of retaining the present zoning of R-1 would be too little to outweigh any private detriment. Conversely, members of Save Sugar Creek and other citizens of Kirkwood have rendered the record replete with public benefits in maintaining the current zoning of R-1 that promote the health, safety, and welfare of the City of Kirkwood and its residents.

Public benefit factors that have been used by municipalities to deny rezoning requests and have been upheld by reviewing courts include: (1) the cohesive, well-maintained nature of the neighborhood; (2) a municipality's wish to avoid piecemeal rezoning; (3) the fact the property lies within a floodplain; and (4) reliance on studies or plans conducted by a municipality.¹⁵ Each of these factors is relevant to Applicant's Petition for Rezoning and demonstrate that the current zoning on the property should be maintained. Similarly, other health, safety, and welfare factors demonstrate that the rezoning is not in the public interest and should be denied.

(1) Cohesive and Well-Maintained Nature of the Neighborhood

Granting the Petition for Rezoning would establish a precedent that any landowner in Sugar Creek who possessed 1.58 acres up to 1.99 acres could split-zone their property into an R-1/R-2 parcel and then maximize profits through subdivision. A minimum of 9 residences in the Sugar Creek watershed and 32 other residences in Kirkwood are in the applicable size range and would, therefore, be subject to the same split zoning requested by Applicant.¹⁶ Furthermore, any landowner with 1.34 acres to 1.57 acres could split-zone their property into an R-1/R-3 parcel and then maximize profits through subdivision. A minimum of 32 residences in Kirkwood are in this applicable size range and would, therefore, be subject to the same split-zoning requested by Applicant.¹⁷ This precedent would negate the cohesive, well-maintained nature of the neighborhood.

While some R-3 zoned properties exist at the top of Sugar Creek Valley, there are no R-2 zoned properties anywhere in this area. More importantly, all properties that are visible along Adams Rd. from Kirkwood Park to Ballas Rd. and from Ballas Rd. to Dougherty Ferry Rd. when within the Sugar Creek corridor are zoned as R-1. This cohesive R-1 zoning, which separates

¹⁵ *White v. City of Brentwood*, 799 S.W.2d 890, 894 (Mo. Ct. App. 1990).

¹⁶ This list was prepared by Josh Levinson, Great Rivers' intern, and submitted to the City Council at the June 21, 2018 hearing. The City's and County's databases lacked several data points for properties within Kirkwood and Sugar Creek that likely would increase this number, making these values conservative estimates.

¹⁷ *Id.*

structures by maintaining lot sizes 1 acre and greater, creates an iconic scenic corridor throughout Sugar Creek Valley that is a unique natural resource of the City of Kirkwood. Applicant's proposal would be the sole deviation from this cohesive and well-maintained nature of the neighborhood and would invite other homes in the area to similarly erode this characteristic by seeking split-zoning on properties between 1.34 and 1.99 acres.

Similarly, without any development plans or subdivision proposal by the Applicant, the City cannot ensure the use of the property after rezoning and, therefore, would be blindly rezoning the property without being able to ensure that the rezoning would not undermine the cohesive and well-maintained nature of Sugar Creek Valley. In the absence of such plans, the City is placed in the difficult task of attempting to balance the public benefit with private detriment without actually knowing what health, safety, and welfare impacts might result from approving the rezoning.

(2) Piecemeal Zoning

The Eastern District defines spot zoning as a parcel of land receiving "unique treatment contrary to like property in the same general location."¹⁸ Granting the Petition for Rezoning would constitute piecemeal rezoning by the City of Kirkwood, which is a type of spot zoning whether legal or illegal. At the May 2, 2018 P& Z Meeting, Applicant's attorney "cited numerous properties that became rezoned, resubdivided and reconfigured from Strohm Place and Highland Terrace Subdivisions that are zoned R1 and contain less than one acre."¹⁹ If anything, these examples demonstrate the negative impacts of continued piecemeal zoning by the City of Kirkwood, and do not demonstrate a lack of public benefit.

Kirkwood should cease and desist piecemeal zoning because it "often encourages, if it does not necessitate, justifiable efforts on the part of other property owners in the vicinity to seek similar reclassification in order to regain their values or to preserve them, thus tending to depart further from the spirit, design and comprehensive plan of the zoning system."²⁰ As explained above, the approval of Applicant's request to rezone would set a precedent for a large amount of properties in Kirkwood to seek split-zoning to maximize profits from their land.

Any zoning change that allows an intensified use of land, such as from R-1 to split-zoned R-1/R-2, creates a new value because rezoning makes the land become worth more than the price originally paid for it and, therefore, creates uncompensated wealth transfers that favor individual landowners arbitrarily.²¹ Furthermore, piecemeal zoning confers an unearned increment in the value of the land that represents a windfall to the landowner because the value of the land increases without compensation or effort on the part of the landowner.²² Zoning decisions and

¹⁸ *Wheeler v. Berkeley*, 485 S.W.2d 707, 711 (Mo. App., E.D. 1972).

¹⁹ P&Z Meeting Minutes dated May 2, 2018.

²⁰ *Numer v. Kansas City*, 365 S.W.2d 753, 760 (Mo. App. K.C. 1963).

²¹ Daniel R. Mandelker, *Spot Zoning: New Ideas for an Old Problem*, 48 Urb. Law. 737, 742 (2016).

²² *Id.* at 743.

other land use policies “should be made in a process in which private gains and losses can be balanced throughout the entire community.”²³ These policy reasons against piecemeal zoning provide the City of Kirkwood with ample justification to refuse to continue to engage in piecemeal zoning, which justification has been approved by reviewing courts.²⁴

(3) Development in the Floodplain

Sugar Creek passes along the northern corner of the current 1.98 acre lot. Approximately 565.2 square feet of the current lot is designated as FEMA Regulatory Floodway AE.²⁵ Approximately 6,871.5 square feet (16%) of the current lot is situated in a Special Flood Hazard Area AE, and approximately 10,729.8 sq. ft. (25%) of the current lot is in a 500 year Flood Hazard zone. The lot slopes downhill towards Sugar Creek with a change in elevation of 70 ft. from the southern-most corner of the lot to the northern-most corner. This large floodplain combined with the large slope demands limitations on development and demonstrates that the lot should maintain R-1 zoning. In fact, Applicants amended application contains a Property Boundary Survey which, when compared to FEMA flood maps, demonstrates that the buildable area in the proposed R-1 portion encroaches significantly on the floodplain. Conversely, if the Property remained entirely R-1, any new construction could easily be designed not to encroach on the floodplain, which would provide a public benefit. Increased development on the Property if the rezoning is approved will lead to exacerbated stormwater runoff, erosion, and flooding for nearby residents. These neighboring residences already suffer from unprecedented and exacerbated flooding that did not occur a decade ago.

At the May 2, 2018 P&Z meeting, the minutes reflect that Applicant’s attorney “believes that a majority of the lots surrounding 1837 Bach Avenue have more area in the flood plain than 1837 Bach Avenue.”²⁶ This statement is false. It also fails to recognize that surrounding residences have larger lots with homes constructed further away from the floodway and floodplain. Approval of the rezoning would result in increased flooding impacts to nearby residents, the prevention of which constitutes a public benefit that outweighs any private detriment to Applicant.

(4) Plans or Studies

Section 89.040 RSMo requires that zoning regulations “. . . shall be made in accordance with a comprehensive plan.” The zoning amendment sought by Applicant, if granted by the City Council, would result in a zoning regulation and, therefore, the request for rezoning can only be granted if it is in accordance with the City’s Comprehensive Plan. The proposed rezoning for the

²³ *Id.* at 770.

²⁴ See *supra*, Note 15.

²⁵ Within the City of Kirkwood, 28 lots contain FEMA Regulatory Floodway AE land. Of these lots, approximately 4 residential structures are situated within the FEMA Regulatory Floodway AE boundaries, all of which were constructed before the area was designated as a floodway/floodplain or before floodway/floodplain regulation.

²⁶ Envision Kirkwood 2035, at Page 75.

Property is not in accordance with the EnVision Kirkwood 2035 Comprehensive Plan because it would contradict several goals.

Kirkwood's Comprehensive Plan acknowledges that "we are part of a greater natural ecosystem and that future growth and policies should work to minimize negative impacts on our environment."²⁷ Furthermore, "Kirkwood can work on implementing campaigns and policies to help minimize negative environmental impacts on air quality, water quality, and habitat loss."²⁸ Rezoning the Property to allow for increased development is inconsistent with the goal of mitigating negative impacts on air quality, water quality, and habitat loss. Rezoning to allow additional residences would remove trees necessary for erosion control, carbon dioxide capture, and wildlife habitat, which would contribute to negative impacts to air quality, water quality and habitat loss in violation of this state goal in the Comprehensive Plan. Additionally, the anticipated increase in impervious surfaces will intensify stormwater runoff and flooding in Sugar Creek causing further negative environmental impacts.

Additionally, rezoning the Property to maximize development potential is not in accordance with the Comprehensive Plan because it contradicts the goal to "promote a thriving and healthy urban forest."²⁹ The Comprehensive Plan recognizes the public benefits of maintaining an urban forest, such as property value growth, stormwater reduction, air and water quality improvement, reduction of the urban heat island effect, improved energy efficiency, and noise reduction.³⁰ If the rezoning is approved and the Property is subdivided and developed, a large portion of the land will be cleared of trees. The effect of this increased infill development will be detrimental to public interests and the surrounding environment. By rezoning the Property, the City will not promote a thriving and healthy urban forest. Rather, the City will promote infill development in place of the urban forest. Therefore, the proposed rezoning is unreasonable and not aligned with the Comprehensive Plan.

(5) Other Public Benefit Factors

Several other public benefit factors weigh in favor of maintaining the current zoning of R-1 including the health and safety of nearby residents.

a. Health

Sugar Creek has been used for over a century for swimming and wading by adults and children alike. Today, children primarily recreate on Sugar Creek and often traverse its course on both public and private property. Similarly, private landowners use the creek along their property for various activities. While Sugar Creek in the vicinity of Applicant's property is private, this ownership right is not absolute and is subject to certain limitations to preserve the

²⁷ Envision Kirkwood 2035, at Page 75.

²⁸ *Id.*

²⁹ *Id.* at 84.

³⁰ *Id.*

public interest, such as a limit on the right to exclude the public.³¹ Thus, the public enjoys an easement to fish, swim, wade, and boat, even in non-navigable waters such as Sugar Creek.³² Additionally, each property owner along Sugar Creek has a right to use the creek on his or her property. Unfortunately, the rights of private residents and the public to use Sugar Creek is impaired by bacterial contaminants, and the rezoning proposed by Applicant would further impair these public and private rights.

The Missouri Department of Natural Resources (“MDNR”) issued its Proposed 303(d) Listed Waters in late 2017. The Missouri Clean Water Commission approved the list on January 24, 2018, and will become final after public notice and comment over the next several months. Sadly, Sugar Creek (Waterbody I.D. 4117) is now listed as an impaired waterbody for *Escherichia coli* (E. coli). MDNR lists the source of the impairment as “Urban Runoff/Storm Sewers” and the beneficial uses that are impaired are “Whole Body Recreation- B” (“WBC-B”) and “Secondary Contact Recreation” (“SCR”). WBC-B includes swimming³³ and SCR includes fishing, wading and other shoreline activities.³⁴ Thus, all of Kirkwood’s residents who recreate on or around Sugar Creek are at risk for adverse health impacts from the impairment, which risk will be increased if Applicant’s request for rezoning is approved.

When a waterbody is impaired for a beneficial use, MDNR is required to establish a Total Maximum Daily Load (“TMDL”) for the waterbody, which attempts to identify sources of pollution that are causing the impairment. Additionally, the TMDL process includes development of an implementation plan designed to address the impairment. Unfortunately, this process often takes several years once a waterbody is listed. Based on several other TMDLs in

³¹ *Elder v. Delcour*, 269 S.W.2d 17, 24 (Mo. 1954) (en banc) (concluding that a private landowner could not prevent the public from floating down a stream and fishing its waters, even though he owned bed to non-navigable stream under the federal navigation-for-title test); *Bollinger v. Henry*, 375 S.W.2d 161, 165 (Mo. 1964) (concluding that a private landowner on non-navigable stream owned the streambed but the owner did not have exclusive title to water flowing down the stream while on owners' land, did not have complete freedom of use or control of the water, and did not have right to divert water to the exclusion of others).

³² *Id.*

³³ 10 CSR 20-7.031(1)(C)2.A (“Activities involving direct human contact with waters of the state to the point of complete body submergence. The water may be ingested accidentally and certain sensitive body organs, such as the eyes, ears, and the nose, will be exposed to the water. Although the water may be ingested accidentally, it is not intended to be used as a potable supply unless acceptable treatment is applied. Waters so designated are intended to be used for swimming, water skiing, or skin diving.”)

³⁴ 10 CSR 20-7.031(1)(C)2.B (“Uses include fishing, wading, commercial and recreational boating, any limited contact incidental to shoreline activities, and activities in which users do not swim or float in the water. These recreational activities may result in contact with the water that is either incidental or accidental and the probability of ingesting appreciable quantities of water is minimal.”)

the St. Louis Metropolitan area,³⁵ it is likely that this impairment is caused by two factors: (1) sanitary sewer overflows (“SSOs”) caused by inadequate capacity of the sanitary sewer system and (2) polluted urban runoff. Applicant’s proposal implicates both of these sources of impairment, which militates against the rezoning.

i. SSOs

The Metropolitan St. Louis Sewer District (“MSD”) has conducted a study on the capacity of the sanitary sewer system for the Lower Meramec service area.³⁶ The sanitary sewer systems servicing the Sugar Creek area are included in the study. MSD’s study has identified two segments of sanitary sewers along Adams Rd. and abutting Sugar Creek as having inadequate capacity to handle the sewage the system receives.³⁷ In response to the inadequate capacity issues, MSD intends to begin construction to upgrade the system in 2028.³⁸ Allowing rezoning of the property would increase sewage flows to an already overtaxed sanitary sewer system, which will result in more overflows, greater impairment to Sugar Creek, and increased adverse health risks to residents. To protect the health and safety of nearby residents and others who may recreate on Sugar Creek, City Council must deny Applicant’s proposal to rezone the property.

ii. Urban Runoff

In its TMDL for Fishpot Creek, which is located primarily in Ballwin and Manchester and which is similar to Sugar Creek in both impairment (E. coli) and beneficial uses impaired (WBC-B and SCR), MDNR discussed the impacts of stormwater runoff on the impairment of that waterbody.³⁹ According to MDNR, “[u]rban runoff has been found to carry high levels of bacteria and can be expected to exceed water quality criteria for bacteria during and immediately after storm events in most streams throughout the country (EPA 1983). E. coli contaminated runoff can come from both heavily paved areas and from open areas where soil erosion is common (Burton and Pitt 2002).”⁴⁰ For these reasons, MDNR concluded that urban runoff was a significant contributor to the E. coli impairment in Fishpot Creek. The same is likely true of Sugar Creek-- that urban runoff is a significant contributor to the E. coli impairment. Approval of Petitioner’s rezoning request would lead to greater amount of paved areas, impervious surfaces, and open areas prone to soil erosion, all of which are not in the public interest.

³⁵ MDNR has issued TMDLs in St. Louis County related to Bacteria (E. coli) for Fishpot Creek, Deer Creek, Gravois Creek, Creve Coeur Creek, Maline Creek, Cold Water Creek, and Watkins Creek.

³⁶ MSD, Lower Meramec Service Area Capacity Assurance Evaluation dated December 31, 2013.

³⁷ *Id.* at Section 3-7 and 3-9.

³⁸ *Id.*

³⁹ MDNR, Water Protection Program, Bacteria TMDL for Fishpot Creek, St. Louis County, Missouri, Completed Dec. 31, 2014, Approved Jul. 13, 2016, located at <https://dnr.mo.gov/env/wpp/tmdl/docs/tmdl-bacteria-fishpot-cr-final.pdf> (last visited June 18, 2018).

⁴⁰ *Id.* at Section 3.1.3, Page 14.

Ensuring the least amount of paved areas, impervious surfaces or open areas prone to soil erosion is necessary to promote the health and safety of residents of Kirkwood who come into contact with water from Sugar Creek.

b. Safety

Rezoning the lot to allow additional homes and driveways along Bach Avenue is poor access management and is not in accordance with the Mobility and Infrastructure Goal 3 of the Comprehensive Plan to “promote efficient and safe movement of people and goods throughout Kirkwood.” The intersections of Bach Ave./Ballas Rd. and Ballas Rd./Adams Ave. are both difficult and dangerous to navigate, and are frequent sites of accidents. Increased access to these intersections by rezoning with the intent to build more homes will increase traffic congestion and decrease traffic safety. While there is currently no development plan for the lot, a city council is justified in anticipating future developments and effects when exercising zoning powers.⁴¹ Adding more than one driveway along Bach Ave. as it approaches Ballas Rd. will likewise adversely effect the safety of residents that use Bach Ave. to exit their neighborhood because this portion of Bach Ave. is extremely steep and dangerous.

* * *

The City Council should conclude that the health, safety, and welfare of the residents of Kirkwood benefit most from the current zoning, and that the detriment on the Applicant’s private interest is outweighed by these benefits shared by Kirkwood residents. Applicant “ha[s] not shown [it] suffer[s] a detriment from the present zoning [of R-1] which is substantially greater than that which [is] a natural consequence of zoning. Nor [has it presented] evidence conclusive that the public benefit from retaining the present zoning would be too little to justify their detriment.”⁴²

III. Fairly Debatable

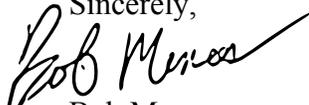
Based on Sections II and III above, there is no doubt that: (1) there is no private detriment from maintaining the current zoning; and (2) public benefit factors demand maintaining the current zoning. If the City Council’s decision is to deny the rezoning and a reviewing court were to find Applicant’s private detriment outweighed all of the public benefit factors discussed above and at hearing, the court would still likely uphold the decision as “fairly debatable.” The record is replete with public benefit factors and devoid of private detriment. P&Z voted only 5-4 to approve Applicant’s rezoning proposal, which demonstrates a fair debate at that level of review. However, P&Z did not consider the appropriate legal standard, which demonstrates Applicant’s failure to demonstrate a private detriment. While the issue is really not “fairly debatable” for the reasons stated above, this legal standard of review should provide added security to the City Council to do what is in the public interest and benefits the health, safety, and welfare of its constituents—deny Applicant’s Petition.

⁴¹ *City of Moline Acres v. Heidbreder*, Mo., 367 S.W.2d 568, 573 (Mo. 1963).

⁴² *White v. Brentwood*, 799 S.W.2d at 894.

* * *

Applicant's Petition for Rezoning should be denied because the Applicant has failed to meet its burden to demonstrate a private detriment sufficient to warrant rezoning the Property. Additionally, Applicant has failed to meet its burden to demonstrate a lack of public benefit in maintaining the current zoning of the Property. Save Sugar Creek has demonstrated that the public benefit in maintaining the current zoning outweighs the private detriment in denying the request for rezoning. Save Sugar Creek respectfully requests City Council deny Applicant's Petition for rezoning for the foregoing reasons.

Sincerely,

Bob Menees