

## Takings-Based Limitations on the Power of State and Local Governments to Change Land Use Patterns to Combat Childhood Obesity

### MISSOURI

This memorandum summarizes Missouri takings law and the manner in which it limits the power of the state and its local political subdivisions to either condemn land to use for anti-obesity initiatives or adopt land use regulations to implement such initiatives. It should be read with our overview memo, which can be found at [www.nplan.org/nplan/products/takings\\_survey](http://www.nplan.org/nplan/products/takings_survey). Our goal in this memo is to inform state and local decision makers considering exercising their powers of eminent domain or adopting land use restrictions as part of an effort to combat childhood obesity. The analysis that follows addresses the limitations placed on eminent domain and zoning authority by applicable takings law. It assumes that the governmental entity considering using eminent domain or regulatory zoning authority has been delegated such powers by the state.

This memorandum does not purport to provide legal advice. The analysis we provide is preliminary and not the sort of case-specific, detailed analysis necessary to ensure that a proposed policy will be insulated from takings liability. It does not substitute for consultation with a lawyer, and we urge any political decision maker to confer with an attorney knowledgeable about land use and takings law in Missouri before undertaking a particular policy initiative. If there are important cases, statutes, or analysis that we have omitted from this memorandum, please inform us by sending an email to [info@phlpnet.org](mailto:info@phlpnet.org).

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State and local governments are increasingly concerned with the rise in childhood obesity rates among their citizens. In response, they are turning their attention to policies that might combat this alarming trend. Many of these policies involve changing the physical environment in which children spend their days. This physical environment encompasses both public and private spheres. The public sphere includes the network of roads, sidewalks, and recreational paths that make up the community, as well as the various parks, playgrounds, open spaces, public gardens, and lighting that most people think of as public infrastructure. The private sphere includes the various types of development that exist on private property in the community, such as single-family homes, multifamily dwellings, apartment complexes, restaurants, grocery stores, health clubs, and all manner of other private developments.

In many communities, neither the public nor the private physical environment encourages active living and healthy eating. Indeed, the infrastructure in many communities actively discourages or effectively impedes healthy life choices. Too many children grow up in communities that lack parks, playgrounds, and safe, well-lit open spaces to play, have no full-service grocery stores or sit-down healthy restaurants, but are saturated with formula restaurants selling high-calorie, high-fat foods and corner stores selling junk food and sugary drinks. Studies suggest that communities can combat childhood obesity by changing the physical environment in which

children live. Positive environment changes would promote active and healthy lifestyles, by fostering development of infrastructure such as public parks and playgrounds, full-service grocery stores, and well-lit open spaces, and would eliminate the negative influences of the community infrastructure, such as fast-food restaurants and dark, overgrown vacant lots.<sup>1</sup>

Communities around the country have already begun to adopt policies and programs designed to change their physical environment, using various strategies and tools. For example, Santa Clara County, California, has adopted a Countywide Trails Master Plan that details the county's commitment to acquiring dedicated easements over private property to create a 500-mile trail system throughout the county to provide recreational and fitness opportunities for its citizens.<sup>2</sup> Several years ago King County, Washington, adopted a property tax increase to fund the acquisition and maintenance of publicly owned parks and recreation facilities.<sup>3</sup> The Los Angeles City Council has imposed a one-year moratorium on the opening of new fast-food restaurants in South Los Angeles.<sup>4</sup> This zoning ordinance provides a respite during which the city can adopt and implement policies designed to encourage the opening of healthy eating alternatives in the area, which is currently saturated with fast-food restaurants and plagued by high obesity rates. Finally, Naperville, Illinois, has adopted an ordinance requiring developers to include a minimum number of bicycle parking facilities in all new commercial, residential, and public property developments, to encourage biking as an alternative to driving.<sup>5</sup>

Each of these initiatives targets an important aspect of the physical environment, and each involves a different type of government action. The Santa Clara County and King County initiatives require the local governments to acquire property rights in private property—in Santa Clara County the acquisition is by forced dedication<sup>6</sup> and involves a partial interest in the

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<sup>1</sup> See, e.g., KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT* (2004); L. D. Frank, M. A. Anderson & T. L. Schmid, *Obesity Relationships with Community Design, Physical Activity, and Time Spent in Cars*, 27 AM. J. PREVENTIVE MED. 87 (2004) (showing that neighborhood walkability was related to obesity in adults); Simone A. French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309 (2001); P. Gordon-Larsen, M. C. Nelson, P. Page & B. M. Popkin, *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 PEDIATRICS 417 (2006) (demonstrating that proximity of recreation facilities is correlated with the risk of overweight and obesity in children); James O. Hill & John C. Peters, *Environmental Contributions to the Obesity Epidemic*, 280 SCI. 1371 (1998); Kate Painter, *The Influence of Street Lighting Improvements on Crime, Fear, and Pedestrian Street Use after Dark*, 35 LANDSCAPE & URB. PLAN. 193 (1996); see also L. V. Moore, A. V. Diez Rous, J. A. Nettleton & D. R. Jacobs, *Associations of the Local Food Environment with Diet Quality: A Comparison of Assessments Based on Surveys and Geographic Information Systems*, 167(8) AM. J. EPIDEMIOLOGY 917 (2008) (ePub) (showing that the availability of supermarkets in neighborhoods was associated with a better-quality diet).

<sup>2</sup> Santa Clara County Trails Plan Advisory Committee, Santa Clara County Board of Supervisors, Final Countywide Trails Master Plan (Nov. 1995), available at [http://www.sccgov.org/SCC/docs%2FParks%20and%20Recreation%2C%20Department%20of%20%28DEP%29%2Fattachments%2F47616ctywide\\_trails\\_masterplan.pdf](http://www.sccgov.org/SCC/docs%2FParks%20and%20Recreation%2C%20Department%20of%20%28DEP%29%2Fattachments%2F47616ctywide_trails_masterplan.pdf).

<sup>3</sup> KING COUNTY, WASH., CODE § 4.08.082 (2009).

<sup>4</sup> Kim Severson, *Los Angeles Stages a Fast Food Intervention*, N.Y. TIMES, Aug. 12, 2008, available at <http://www.nytimes.com/2008/08/13/dining/13calo.html>.

<sup>5</sup> NAPERVILLE, ILL., CITY CODE § 6-9-7 (2009).

<sup>6</sup> A community can require a landowner to dedicate an easement for public use as a condition of a development permit only when that dedication shares an essential nexus with and is roughly proportionate to the impacts caused by the proposed development. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). This constraint is discussed in detail in [www.nplan.org/nplan/products/takings\\_survey](http://www.nplan.org/nplan/products/takings_survey).

property, while in King County the acquisition is by eminent domain and involves full title. In contrast, the Los Angeles and Naperville ordinances are two distinct examples of land use restrictions. The Los Angeles ordinance limits what landowners can do with their private property, while the Naperville ordinance imposes an affirmative requirement on private landowners.

These four specific initiatives illustrate the two primary tools available to communities that seek to use land use initiatives to prevent childhood obesity: They can rely on their power of eminent domain, on their land use regulatory authority, or both. The first option—relying on the power of eminent domain to acquire ownership interests in real property—may be used to provide public infrastructure such as parks, playgrounds, and recreational trails to promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit undesirable land uses (such as fast-food restaurants) in vulnerable neighborhoods or to require private property owners to do certain things on their property (such as install bicycle parking structures or stock healthy food in corner stores).

Communities that set out to combat childhood obesity by changing their physical environment using eminent domain or land use regulation will face limitations from both federal and state law in both contexts. The federal limitations come from the Fifth Amendment to the U.S. Constitution, which states: “[N]or shall private property be taken for public use without just compensation.” This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.<sup>7</sup> Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.<sup>8</sup> A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at [www.nplan.org/nplan/products/takings\\_survey](http://www.nplan.org/nplan/products/takings_survey). In addition to the federal constitutional limitations, every state imposes its own restrictions on the exercise of eminent domain and the imposition of land use regulations by its communities. These limitations, contained in state constitutions as well as statutes, may be more protective of private property than the federal Constitution, and they generally take three forms. First, state laws might incorporate a narrower definition of “public use,” such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Finally, state law may require a community to tolerate certain negative aspects of the physical environment (such as fast-food restaurants) that it would rather eliminate, just because those elements were present before the community undertook its reform initiative—commonly referred to as “grandfathering.”

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Missouri, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate landowners for validly adopted land use restrictions. Section 1 addresses limitations on the exercise of the power of eminent domain. Section 2 addresses limitations on the imposition of

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<sup>7</sup> See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>8</sup> See, e.g., *Pa. Coal v. Mahon*, 438 U.S. 104 (1978).

land use restrictions through changes in zoning laws. Section 3 explores the scope of the requirement that existing land uses be “grandfathered” under any new zoning regime.

## 1. Eminent Domain and the Requirement of Public Use

Eminent domain is the forced sale of private land to the public for public use. Ideally, a community that wants to convert private property to a public use negotiates an acceptable purchase price with the current owner of the property, and the sale is entirely voluntary. Occasionally, however, the owner of the parcel does not wish to sell. In these circumstances, many communities have the authority to compel the landowner to sell the property, as long as they pay a fair market price and put the property to public use. The federal Constitution has very little to say about the meaning of the phrase “public use.” In its decision in *Kelo v. City of New London* the U.S. Supreme Court reaffirmed its past holdings that state and local decision makers enjoy broad discretion to define the concept of “public use,” and upheld the condemnation of private property for transfer to another private party for the purpose of economic development.<sup>9</sup> States are free, however, to adopt greater protections for private property owners, and many states have done so by limiting the range of projects that count as public use.

Missouri is one such state. Private property owners are offered enhanced protection by Missouri law in two ways. First, the Missouri courts do not defer to legislative determinations of what constitutes public use under the state constitution. Second, Missouri has adopted statutory reforms further protecting private property owners from the exercise of eminent domain.

Like the U.S. Constitution, the Missouri Constitution requires the payment of compensation whenever the power of eminent domain is exercised for public use.<sup>10</sup> In addition, however, the constitution expressly prohibits the taking of private property for private use, with or without compensation.<sup>11</sup> Moreover, article I, section 28, of the Missouri Constitution provides that public use is a judicial question—specifically, when determining whether a use qualifies as public, courts will not give deference to any legislative declaration that the use is public.<sup>12</sup> As a result, courts in Missouri will not defer to a legislative determination that a proposed use constitutes a public use.<sup>13</sup> Nonetheless, Missouri courts have embraced a relatively wide and flexible interpretation of the public use requirement.<sup>14</sup> In particular, the public use requirement does not mean that a condemnation cannot benefit a private party:

“[I]t is not necessary that the whole community or any large part of it should actually use or be benefited by a contemplated improvement. Benefit to any considerable number is sufficient. . . . Nor does the mere fact that the advantage of a public improvement also inures to a particular individual or group of individuals deprive it of its public character.”<sup>15</sup>

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<sup>9</sup> *Kelo* is discussed in detail in [www.nplan.org/nplan/products/takings\\_survey](http://www.nplan.org/nplan/products/takings_survey).

<sup>10</sup> MO. CONST. art. I, § 26.

<sup>11</sup> *Id.* § 28.

<sup>12</sup> *Id.*

<sup>13</sup> *Arata v. Monsanto Chem. Co.*, 351 S.W.2d 717, 721 (Mo. 1961).

<sup>14</sup> *Kansas City v. Hon*, 972 S.W.2d 407, 414 (Mo. Ct. App. 1998).

<sup>15</sup> *Arata*, 351 S.W.2d at 721 (quoting *Kansas City v. Liebi*, 252 S.W. 404, 408 (1923)).

Moreover, communities in Missouri are legislatively authorized to use eminent domain to combat blight. Missouri's Real Property Tax Increment Allocation Redevelopment Act authorizes municipalities to exercise the power of eminent domain (among other powers) to implement redevelopment plans in any area that is designated a blighted area, a conservation area, or an economic development area.<sup>16</sup> These areas include areas where decay and unsafe conditions threaten public health, safety, and morals (blighted areas); where most of the structures are old and may become blighted (conservation area); and where "the municipality finds that redevelopment will not be solely used for development of commercial businesses which unfairly compete in the local economy and is in the public interest" (economic development area).<sup>17</sup> Similarly, the Urban Redevelopment Corporations Law authorizes municipalities to form Urban Redevelopment Corporations to develop and implement urban redevelopment plans in blighted areas.<sup>18</sup>

In the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London*, the Missouri legislature enacted statutory reform limiting the broad eminent domain authority evidenced by these statutes in three important ways. First, the act prohibits the use of eminent domain "solely for economic development purposes."<sup>19</sup> The statute defines economic development purposes as "use of property for increased tax revenue, employment, and general economic health,"<sup>20</sup> but excludes the elimination of blight and conditions leading to a designation as a conservation area from the definition of economic development.<sup>21</sup> Second, the act requires that communities consider parcels on an individual basis in determining whether an area is blighted and states that condemnations may not proceed unless a predominance of the redevelopment area is blighted.<sup>22</sup> Finally, the act requires that a finding of blight be supported by substantial evidence and not be arbitrary, capricious, or induced by fraud.<sup>23</sup> In *Centene Plaza Redevelopment Corp. v. Mint Properties*, the Missouri Supreme Court made clear that it would scrutinize closely blight designations by condemning authorities. The *Centene* court invalidated a proposed condemnation because the redevelopment corporation failed to make the requisite showing.<sup>24</sup>

Overall, even though Missouri law is more protective of private property than the federal Constitution, communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles are unlikely to be impeded by these laws. Recent statutory reforms will constrain communities seeking to use eminent domain for purely economic development purposes, as they were intended to do, but are not likely to significantly interfere with community efforts to use eminent domain for policies aimed at combating childhood obesity. Most policies that rely on eminent domain to combat childhood obesity will entail traditional public uses, such as parks, playgrounds, and hike and bike trails. All of these uses are clearly encompassed by the eminent domain power in Missouri. Moreover,

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<sup>16</sup> MO. ANN. STAT. §§ 99.800, 99.805 (West 2009).

<sup>17</sup> *Id.* § 99.805(1), (3), (5).

<sup>18</sup> *Id.* § 350.060.

<sup>19</sup> *Id.* § 523.271(1).

<sup>20</sup> *Id.* § 523.271(2).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 523.274(1); *see Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431 (Mo. 2007).

<sup>23</sup> MO. ANN. STAT. § 523.261.

<sup>24</sup> *Centene Plaza Redev. Corp.*, 225 S.W.3d 431.

the recent reform prohibits only those condemnations that are “solely” for the purpose of economic development, and even then permits blight- and conservation-driven condemnations. Thus, even if a proposed condemnation has incidental economic development benefits, as long as a condemning authority is able to assert a valid public purpose—such as combating childhood obesity—that is rationally related to the condemnation action, the recent statutory limitations will not invalidate the proposed condemnation. And although the judiciary will not defer to legislative declarations of public use, condemnations for traditional public purposes will not be struck down by courts.

## 2. Land Use Regulation and Compensation

Most government initiatives to combat childhood obesity by creating a healthy living environment will rely on zoning powers, not the exercise of eminent domain. For example, the City of Los Angeles has placed a moratorium on the building of new fast-food restaurants in South Los Angeles. Land use regulations such as these rarely implicate takings concerns, and governments are generally free to adopt such regulations without incurring takings liability.

However, some land use regulations do require compensation. Any land use regulation so severe that it amounts to the functional equivalent of a taking requires payment of just compensation. The U.S. Supreme Court has adopted two bright-line rules and a balancing test to determine whether a land use regulation constitutes a taking under federal law. First, a regulation that imposes a permanent physical occupation on private land is a taking as a matter of law.<sup>25</sup> Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.<sup>26</sup> All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactor test.<sup>27</sup> A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.<sup>28</sup> As with eminent domain, however, states are free to adopt a regulatory takings framework that provides more protections to property owners than does the U.S. Constitution.

The Missouri Constitution provides that “private property shall not be taken or damaged for public use without just compensation.”<sup>29</sup> The Missouri courts have interpreted article I, section 26, of the Missouri Constitution as providing similar protections as the federal Constitution, and Missouri courts rely on the U.S. Supreme Court’s regulatory takings jurisprudence to resolve claims for compensation.<sup>30</sup> Thus, in Missouri a land use regulation will be held to be a compensable taking if it deprives the landowner of all economically viable use, if it imposes a permanent physical occupation on the land, or if it is deemed compensable by virtue of the factors outlined in *Penn Central*. In addition, Missouri courts recognize the possibility that

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<sup>25</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>26</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

<sup>27</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>28</sup> Regulatory takings liability under the U.S. Constitution is discussed in more detail in [www.nplan.org/nplan/products/takings\\_survey](http://www.nplan.org/nplan/products/takings_survey).

<sup>29</sup> MO. CONST. art. I, § 26.

<sup>30</sup> See *Akers v. City of Oak Grove*, 246 S.W.3d 916, 919 (Mo. 2008); see also *Reagan v. County of St. Louis*, 211 S.W.3d 104, 107-09 (Mo. Ct. App. 2006); *Harris v. Mo. Dep’t of Conservation*, 755 S.W.2d 726, 729-31 (Mo. Ct. App. 1988).



regulation may constitute a temporary regulatory taking of property where, for instance, the commercial development of a piece of land is completely halted by a zoning ordinance that classifies the land as “non-urban.”<sup>31</sup>

Most zoning regulations do not fall into the per se takings categories. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others, and regulations rarely compel landowners to suffer the permanent occupation of their property by strangers. Following *Penn Central*, Missouri courts review takings challenges to traditional zoning regulations under an “essentially ad hoc, factual inquir[y]”<sup>32</sup> that focuses on three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action, in particular whether it amounts to a physical invasion or mere regulation of land use.<sup>33</sup> Regulations are rarely held to deprive landowners of all economically viable use, and the application of the *Penn Central* factors rarely results in a finding of a compensable taking.

Thus, limits on regulatory takings, like the limits on eminent domain, are unlikely to interfere with a community’s efforts to combat childhood obesity, as long as policy initiatives rely on land use restrictions that permit landowners to retain some economically viable use of their property.

### **3. Grandfathering Prior Nonconforming Uses**

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which she is currently putting her property. In some circumstances, a community may wish to prohibit a preexisting use to further its goals of combating childhood obesity. For example, a community may want to eliminate fast-food establishments within a certain distance of schools, including those restaurants that are already operating. Communities in Missouri will not be able to do this without paying compensation.

The Supreme Court of Missouri has held that existing uses of land are protected by the due process clause, and they may not be ordered discontinued by zoning amendments without compensation.<sup>34</sup> However, continuation of a prior nonconforming use remains subject to certain limitations, which, if violated, will require the landowner to either apply for a variance or come into compliance with the zoning ordinance. The idea is to allow the prior nonconforming use to continue operating in the same manner it had been before the zoning restriction was imposed. For example, a landowner may not extend or expand his nonconforming use.<sup>35</sup> In *Brown v. Gambrel*, the Supreme Court of Missouri found that a property owner who discontinued his nonconforming use as a public stable, expanded his facilities by remodeling, and converted a

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<sup>31</sup> *Chesterfield Vill. v. City of Chesterfield*, No. ED 78444, 2001 WL 488070 (Mo. Ct. App. May 9, 2001).

<sup>32</sup> *Penn Cent. Transp. Co.*, 438 U.S. at 124.

<sup>33</sup> See *Akers*, 246 S.W.3d at 919. The three *Penn Central* standards are discussed in more detail in [www.nplan.org/nplan/products/takings\\_survey](http://www.nplan.org/nplan/products/takings_survey).

<sup>34</sup> See *City of Monett, Barry County v. Buchanan*, 411 S.W.2d 108, 115 (Mo. 1967); *Hoffmann v. Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965).

<sup>35</sup> *Brown v. Gambrel*, 213 S.W.2d 931, 937 (Mo. 1948).

building into a dance hall had lost the protection of a nonconforming use.<sup>36</sup> In addition to termination of nonconforming uses due to expansion, prior nonconforming uses that have been abandoned will lose their right to continue as such.<sup>37</sup> Eliminating a prior nonconforming use by showing abandonment requires proof of intent to abandon, coupled by an external act signifying abandonment.<sup>38</sup>

The Supreme Court of Missouri has also recognized two additional ways to terminate nonconforming uses. Specifically, “ordinance conditions or prohibitions against reconstruction after 75% destruction or failure to complete a commenced construction within a year as destroying the nonconforming use are both valid, enforceable provisions.”<sup>39</sup> In *City of Monett, Barry County v. Buchanan*, the state supreme court found that a one-year time period after which a not-yet-completed nonconforming shopping center must be terminated was a reasonable provision of the zoning ordinance. In other words, zoning ordinances can place restrictions on construction of nonconforming uses that have yet to be completed.

However, unlike many states, in Missouri nonconforming uses may not be terminated by amortization.<sup>40</sup> In *Hoffmann v. Kinealy*, the Supreme Court of Missouri stated, “the amortization technique would validate a taking presently unconstitutional by the simple expedient of postponing such taking for a reasonable time.”<sup>41</sup> In other words, communities are not authorized to require termination of a valid nonconforming use after the passage of a specified period of time.

In general, communities in Missouri interested in changing zoning ordinances to create a physical environment more conducive to healthy, active lifestyles will not be allowed to require the cessation of prior nonconforming uses without paying compensation, either immediately or over time. These nonconforming uses will be permitted to continue until they are forfeited by specified actions of the owners, such as attempts to enlarge or expand the use, abandonment, or failure to complete a commenced construction in a timely fashion. Grandfathered rights can also be lost if a nonconforming use is substantially destroyed.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *City of Monett, Barry County v. Buchanan*, 411 S.W.2d 108, 116 (Mo. 1967).

<sup>40</sup> *Hoffmann v. Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965).

<sup>41</sup> *Id.*