Environmental Considerations

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Introduction

- Impact on Land Use
- Permitting
- Wetlands
- Superfund
- Reuse of Environmentally Impaired Property
- Green Building
- Sustainability Audits

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Impact on Land Use

- Nuisance
- Substance
- Jurisdiction (Federal, State, Local)

- Authority
  - Home rule
  - Specific grants
  - General police powers

Site Location Regulations

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Borron v. Farenkopf (Mo.App. 1999) [Linn County]

- Health ordinance established environmental controls and requires bonding
- State law generally prohibits zoning of farm buildings or structures
- CAFO statute provides: "nothing in this section shall be construed as restricting local controls"

Held:
- Authorized by health ordinance statute
- Not covert zoning
- Not preempted by CAFO statute
Implied Preemption

Test =

- Local regulation prohibits what statute permits or vice versa [Conflict] or

- State statute regulates so extensively that no room for local regulation
Borron v. Fahrenkopf (Mo.App. 1999) [Linn County]

“The regulations in question do have a zoning quality about them, but ... there is a font of case law and technical information illustrating the health hazards related to hog facilities. ... The purpose of the ordinance was to regulate for health concerns rather than for a uniform development of real estate.”
Part of "Wild Dunes" resort on Isles of Palms, SC, 11/94

- Row of Large House
- Row of Large Houses

#10 large house
#11 Lucas (vacant)
#12 large square house
#13 Lucas (vacant)
#14 large house
#15 large house

street: "Beachwood East"

Permitting

- Level of government –
  - State
  - Federal
  - Local

- Type of permit
  - General
  - Specific

- Zoning Process
  - Legislative
  - Discretionary (quasi-judicial)
  - By right
Permitting – Things to Know

- Submittal requirements
- Professionals needed
- Time limits
- Decision making process
- Appeals process
Federal
Missouri Department of Natural Resources
Exhaustion of Administrative Remedies

- Declaratory judgment v. administrative review / writ of certiorari
- Local zoning compliance for state permits
- Incomplete = denied
Going Rogue

- Notice of violation
- Cure periods
- Injunction / abatement
- Criminal
- No vesting
Wetlands

**Benefits**
- flood control
- water quality
- habitat
- biological diversity

**Regulatory Structure**
- No net loss
- State & local regulations

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Wetlands Defined

- Hydric soils
- Inundated or saturated by surface or groundwater
- Frequency and duration
  - Sufficient to support
  - Under normal circumstances do support
- Prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions

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Federal Agencies

- United States Army Corps of Engineers
- Environmental Protection Agency
- Fish and Wildlife Service
- Soil Conservation Service

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Wetlands
404 Jurisdiction – Activities Regulated

- Filling
- Not if limited to –
  - Dredging
  - Excavation
  - Draining
  - Piling
  - Land clearing
  - Golf course construction
  - Dredging and disposal outside of navigable waters

* Courts split
Wetlands
404 Jurisdiction – Areas Regulated

- **Adjacent** to "**navigable waters**"
- = "**waters of the United States**"
  - permanent, standing or flowing
  - Includes includes "streams" and "rivers"
- intrastate waters, "the use, degradation or destruction of which could affect interstate or foreign commerce"
- "**Migratory Bird Rule**" not extend authority to nonnavigable, isolated, intrastate waters

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Wetlands

404 Jurisdiction – Areas Regulated

- “adjacent”
  - Bordering
  - Contiguous
  - neighboring
  - separated by man-made dikes or barriers, natural river berms, beach dunes etc.

- Rapanos v. United States (plurality)
  - adjacent channel contains water of the United States (i.e., a relatively permanent body of water connected to traditional interstate navigable waters)
  - wetland has a continuous surface connection with that water
Wetlands
404 Jurisdiction – Areas Regulated

- 1987 Wetlands Delineation Manual
- Not define Waters of United States
404 Jurisdiction

- Exemptions
  - normal farming activities
  - temporary sedimentation basins at construction sites
Wetlands

- General Permits
  - State, regional, or nationwide basis
  - Minimal adverse environmental effects (separately & cumulative)
  - 5 year limit
Wetlands

- Individual Permits
  - 1 Pre-application/application
  - 2 Public notice and comment
  - 3 Evaluation, decision and mitigation
  - 4 Monitoring and enforcement
Wetlands Review Guidelines

- Public interest review
  - probable / cumulative impacts
  - balance benefits against reasonably foreseeable detriments
- Importance of wetlands
- USFWS comments
- Water quality impacts
- Historic, cultural, scenic, and recreational values
- Property rights
- Other requirements

- Impoundment structure safety
- Floodplain management
- Water supply & conservation
- Energy conservation & development
- Navigation
- Environmental benefits
- Economics
- Mitigation

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Wetlands Compensation Mitigation

Types
- Restoration
- Enhancement
- Establishment
- Preservation

Mechanisms
- Permittee-responsible
  - On-site
  - Off-site (same watershed)
- Mitigation bank
- In-lieu fee

Avoid / minimize first

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| Consolidated aquatic resource restoration, enhancement, establishment and preservation projects | ✅ | ✅ |
| Administered by state governments, local governments, or non-profit non-governmental organizations |  | ✅ |
| Administered by private entities | ✅ |  |
| Projects financed by fees collected from permittees |  | ✅ |
| Initial financing from private investment | ✅ |  |
| Initiate compensatory mitigation projects only after collecting fees; often substantial time lag between permitted impacts and implementation of compensatory mitigation projects |  | ✅ |
| Milestone (site selection, plan approval, and financial assurances) before credit sold, and generally sell a majority of their credits only after the physical development of compensation sites has begun | ✅ |  |
| Lower financial assurances required |  | ✅ |
| Greater risk and regarding the implementation of the compensatory mitigation project and its adequacy to compensate for lost functions and services. |  | ✅ |
Wetlands

- Takings Litigation
  - Majority privately owned
  - All reasonable use
  - Penn Central test (modified by Lingle)
Superfund

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- Missouri Abandoned Sites Law
- Kansas Environmental Use Controls
Missouri Abandoned Sites Law

Goals
- Identify sites
- Respond to emergencies
- Pay for responses
- Limit cleanup liability

Tools
- Registry
- Emergency response
- Cleanup funding
CERCLA Potentially Responsible Parties (PRPs)

- Present owners and operators
- Former owners and operators
- Persons who arranged for disposal, treatment or transportation ("generators")
- Person transporting hazardous substances to the facility
CERCLA Liability

- Type
  - Strict
  - Joint and several
  - Retroactive

- National Contingency Plan (NCP)

- State Cooperative Agreements
Property Transfer

- Landowner liability protections (LLPs)
  - Innocent landowner
  - Contiguous property owner
  - Bona fide prospective purchaser
- All appropriate inquiries
  - Ownership
  - Use
- EPA Audit Policy
- State “no further action” letters
# Environmental Site Assessment (Audit)

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Phase I</strong></td>
<td>Identifies potential or existing environmental contamination liabilities</td>
</tr>
<tr>
<td><strong>Limited Phase I</strong></td>
<td>Omits steps (e.g., site visit [Transaction Screen], file searches)</td>
</tr>
<tr>
<td><strong>Phase II</strong></td>
<td>“Intrusive” investigation which collects original samples of soil, groundwater or building materials to analyze for quantitative values of various contaminants</td>
</tr>
<tr>
<td><strong>Phase III</strong></td>
<td>Remediation delineating extent of contamination, site cleanup steps, monitoring</td>
</tr>
</tbody>
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Reuse of Environmentally Impaired Property

“Brownfield”

“real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant”

Excluded sites -

- Ongoing remediation
- NPL sites
- Administrative/court orders
Brownfield Incentives

**EPA**
- Grant program
- Recipients
  - State agencies
  - Local governments
  - Redevelopment agencies
  - Regional planning agencies
  - Indian tribes

**State Programs**
- Targeted assessments
- Remediation tax credits
- Grants
- Loans
- Loan guarantees
Green Building

- Conventional environmental issues
  - Air quality
  - Water quality

- Sustainability (long term)
  - Energy efficiency
  - Climate change
  - Water use
Rating Systems

- Leadership in Energy and Environmental Design (LEED®)
- Energy Star (EPA)
- Natural Step
- Land & Natural Development (LAND) Code
Local Green Building Regulations

- Mandates
  - Public buildings
  - Size/impact (e.g., buildings > 50,000 sf)

- Incentives
  - Streamlining
  - Density
  - Floor area / building height
LEED for Neighborhood Design (LEED-ND)

- Site design issues
- Categories
  - location and linkage
  - neighborhood pattern and design
  - green infrastructure
  - design process
  - regional priorities (e.g., food or community serving retail, services, and community or civic facilities)
U.S. Conference of Mayors' Climate Protection Agreement

Fairway
Unified Government
Lawrence
Merriam
Mission
Prairie Village
Roeland Park
Shawnee
Westwood
Westwood Hills

Gladstone
Kansas City
Liberty
North Kansas City
Parkville
Pleasant Valley
Raytown
Greening local codes

- **Incentives**
  - Use Patterns
  - Density/intensity bonus (substantive)
  - Fast-track procedures (procedural)
  - Transfer of development rights

- **Mandates**
  - Parks | open space | civic spaces
  - Tree preservation
  - Riparian buffers

- **Standards**
  - Parking
  - Infrastructure (streets | stormwater management)
Sustainability – Trends in Local Regulations

- Renewable energy (solar / wind / geothermal) primary or accessory use regulations
- Urban agriculture
- Mixed use / transit-oriented development
- Parking requirements
- Tree protection
- Riparian buffers
- Steep slopes
- Infill
- Rehab building codes
Kansas City Urban Agriculture Ordinance

- Home Gardens
- Community Gardens
- Community Supported Agriculture (CSA)
Green development patterns

- Conservation Subdivisions
- Traditional Neighborhood Development / New Urbanism
- Mixed use neighborhoods / Infill
- Grayfield redevelopment
- Transit-oriented development
Green development patterns

- Conservation Subdivisions

- 35% of tract dedicated to primary conservation
- Active recreation accounting for 25% of all conservation areas.
- 50% of balance of tract in secondary conservation
- Pedestrian access to green space
Green development patterns

- Traditional Neighborhood Development / New Urbanism

Source: US Department of Transportation

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Development patterns

<table>
<thead>
<tr>
<th>Conventional</th>
<th>TND</th>
<th>Conservation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single use</td>
<td>Mixed use</td>
<td>Single or mixed</td>
</tr>
<tr>
<td>Maximum densities</td>
<td>Minimum densities</td>
<td>Maximum densities</td>
</tr>
<tr>
<td>Street standards for cars</td>
<td>Street standards for</td>
<td>Street standards for natural resource</td>
</tr>
<tr>
<td></td>
<td>pedestrians</td>
<td>preservation</td>
</tr>
<tr>
<td>Curvilinear streets</td>
<td>Interconnected streets</td>
<td>Curvilinear streets</td>
</tr>
<tr>
<td>Private open space</td>
<td>Public open space</td>
<td>Natural open space</td>
</tr>
<tr>
<td>Large lots</td>
<td>Small lots</td>
<td>Small lots</td>
</tr>
<tr>
<td>Wide setbacks</td>
<td>Build-to lines</td>
<td>Small setbacks</td>
</tr>
<tr>
<td>Minimum parking</td>
<td>Maximum parking</td>
<td>Maximum parking</td>
</tr>
<tr>
<td>Private orientation</td>
<td>Public orientation</td>
<td>Public or private orientation</td>
</tr>
</tbody>
</table>

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Green development patterns

- Mixed use neighborhoods / Infill
Green development patterns

- Grayfield redevelopment
Green development patterns

- Transit-oriented development

- ¼ - ½ mile of Transit Station or Major Bus Boarding Location
- Transit-supportive land uses (see Use Matrix)
- Traditional street design
- Minimum FAR
- No minimum parking within 500’; reduced in balance

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Standards

- Efficient and orderly location of streets
- Reduction of vehicular congestion
- Reservation or dedication of land for open spaces
- Off-site and on-site public improvements
- Recreational facilities (including dedication of land area for park purposes)
- Flood protection
- Building lines
- Compatibility of design
- Stormwater runoff (including historic and anticipated 100-year rain and snowfall precipitation records and patterns)
- Any other services, facilities and improvements deemed appropriate
Standards for green design
Innovative Road Configurations
Driveways

Typical One-Acre Lotting Along Rural Collector Road

Lots With Internal Access

Lots With Shared Driveway
Rural options
Pedestrian Connections
Parking (pervious pavement)
Stormwater Management
Conclusions

- Emerging and highly technical field
- Short v. long-term initiatives
- Increasing role of state & local government