

Planning & Land Use Law

WHITE &
SMITH, LLC
PLANNING AND
LAW GROUP

Eastern Jackson County Planning Commissioners Training Series

Introduction

Local governments (cities, towns, villages, townships, and counties) have the power to develop and implement planning policies. The most common way to implement planning policies are zoning and subdivision regulations. Zoning divides a community into districts, establishing land use, density, intensity, setback, and building height regulations in each district. Subdivision regulations regulate the division of land into lots for development, and typically include lot and block layout, street design, and infrastructure regulations. Some communities use site location ordinances for specific uses (such as large-scale animal feeding operations) to protect public health.

Throughout the nation, land development regulation has emerged as a unique and dynamic area of the law as communities grapple with the demands of new development, a shifting real estate market, and new policy initiatives such as urban design and sustainability. Land use law in Missouri mirrors the State's geographic position - i.e., it tends to fall in the middle. Our General Assembly and courts do not tend to blaze new trails, and our zoning and planning legislation is conventional. At the same time, this is also a state where substantial innovation is possible at the local level. Standard zoning enabling legislation embraces a variety of useful regulatory tools (such as variations in setbacks and building height), and the municipal legislation was recently amended to allow "transect"-based zoning that emphasizes community design, mixed use, street connectivity, and sustainability. Local planning officials should become familiar with the planning and zoning enabling legisla-

tion (RSMo chapters 89 for cities and 64 for counties), and at least the general parameters of local limitations and opportunities for planning and land use regulation.

Where Does Our Power to Regulate Come From?

While some cities and counties have home rule charters, Missouri is not generally a home rule state. This means that local governments get their planning and development regulation authority from state legislation. A local government has authority that is expressly granted or necessarily implied by the statutes. Missouri's zoning enabling statutes still substantially follow the "Standard Zoning Enabling Act" model that it originally adopted in 1925. Missouri has at least 8 separate or supplementary planning and zoning statutes for at least 7 different kinds of entities - municipalities (cities, towns, villages), constitutional charter cities, first class charter counties, noncharter first class counties, second and third class counties (2 sets of legislation), townships, and cities with populations of 500,000 (supplemental street building line legislation).

In addition, federal or state statutes can preempt local controls. In Missouri, local laws are preempted when they directly conflict with state law, or where they intrude on areas that are occupied by state law. However, regulations that merely supplement state law are not preempted.

Planning and Land Use Law

Issues

Planning Commissioners are involved in developing land use policy, make recommendations on legislative decisions, and ruling on certain types of development applications. Here are the major legal issues they face:

What is a Comprehensive Plan, and what role does it play in the process?

A comprehensive plan is your local government's basic statement of land use policy. In some states - and in particular those with advanced planning legislation - plans have the force of law. Plans in those states have required elements (such as a future land use element, capital improvements element, etc.). Land development regulations must conform to the plan, and land use decisions that are subject to the plan are subject to invalidation in the courts. In some states, plans are subject to review by a state agency.

Missouri does not include these best practices. The zoning and planning enabling statutes do require zoning regulations to be "made in accordance with a comprehensive plan..." (RMSo § 89.040). However, the statutes do not define the phrase "comprehensive plan." Missouri courts have adopted the "unitary view" that the plan is not a separate document, but instead is the general zoning scheme that results from the adopted zoning regulations. Several court decisions have dismissed written comprehensive plans as "guidelines" which the local government could ignore in individual zoning cases. However, these decisions were based on an interpretation of the local plans and regulations. A local government could require consistent in its land development regulations.

The municipal planning and zoning statutes do provide for a "city plan" that deals with public and private improvements, and a "zoning plan" that addresses use, height, area, and bulk. The "city plan" is based on the Standard City Planning Enabling Act (SCPEA) promulgated by the United States Department of Commerce in 1928. It is rarely interpreted, but provides significant authority. Agencies sponsoring improvements must seek Planning Commission approval under the City Plan. The City Council or sponsoring agency can overrule the Planning Commission by a 2/3 vote.

How are land development policies implemented?

Local governments implement land development policies through local legislation - typically, zoning and subdivision regulations. They also implement policy through the type, location and capacity of public improvements. There are several types of processes that lead to development approval.

The first are **legislative** processes. These involve the development of rules for all development in a jurisdiction or an area. These include the adoption of zoning regulations and zoning maps. In Missouri, a rezoning - or the amendment of a zoning map at the request of a property owner - is considered legislative. The local government has very broad discretion in making these decisions. While property owners do not have procedural due process rights in a legislative proceeding, Missouri (as does most states) requires notice and a public hearing before zoning regulations are adopted. The local government must comply with the type (e.g., newspaper, posting, mailing) and timing (e.g. 15 days before the hearing) requirements for the notice. Failure to comply can result in a declaration that the legislation is void.

Quasi-judicial decisions involve the application of these laws to individual properties. These cases typically involve a public hearing where the applicant has due process rights. It is good practice for the agency to prepare findings of fact and conclusions of law to explain its decision, although these are not required by law. *State ex rel. Co-op. Ass'n No. 86 of Aurora v. Board of Zoning Adjustment of City of Aurora, Mo.*, 977 S.W.2d 79 (Mo. App. 1998). Examples include conditional or special use permits, special exceptions, and variances.

Administrative or ministerial decisions are issued by municipal officials without a public hearing. These are subject to specific criteria set out in the regulations, such as the zoning use, setback, and height requirements. An applicant can appeal these decisions to the local Board of Adjustment. Final subdivision plats are considered ministerial. An applicant can challenge denial of a final plat by filing a writ of mandamus requesting the court to order the local government to approve the plat.

What are the constitutional limitations on land development regulations?

Land development regulations are subject to the United States and Missouri constitutions. Some of the more important restrictions include:

- **Property rights.** If a regulation that effectively “takes” property, the local government must compensate the property owner. There are 2 major categories of takings cases: economic regulations and unlawful exactions.

An **economic** regulation can result in a taking if it strips property if nearly all of its economic value. Examples of economic regulations range from garden variety zoning regulations (such as restrictions on use, density, setbacks and height), to environmental and urban design standards. The courts tolerate large reductions in value under this test - property owners typically lose these cases even where 90-95% of their economic value is lost. However, if the regulation does not allow any economic use of the property, it is a *per se* taking - unless “background principles of nuisance and property law” independently restrict the owner’s intended use.

An **exaction** may include a forced contribution to infrastructure, a requirement that a developer dedicate property to public use (such as a park), or an “impact fee” that a developer pays to offset impacts on traffic or other improvements. These are subject to 2 major tests. First, it must have a logical nexus to the proposed development. Second, it must be roughly proportionate to the development’s impacts. The courts do not require surgical precision in calculating an exaction, but the local government may have the burden of proof in court. In addition, the proportionality requirement applies only to “individualized determinations” of the required contribution. Mere legislation is not subject to this test, although the common law or statutes usually require a rational nexus between development impacts and the exaction.

- **Due Process.** The regulations must rationally relate to a legitimate public interest (**substantive due process**). This is a very high threshold. Regulations that are arbitrary, capricious, or in violation of state law do not necessarily violate due process. Instead, they must be so egregious or extraordinary as to shock the conscience. *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006). Courts rarely invalidate regulations on substantive due process grounds.

At the administrative and quasi-judicial stage, land use decisions should give affected persons notice and an opportunity to be heard (**procedural due process**). The courts are flexible in apply this requirement to local government decision making, particularly for zoning decisions. For example, an agency can establish reasonable time limits for speaking and providing testimony. The rules of evidence that apply to court proceedings do not apply to zoning procedures, and courts recognize that planning commissioners are often lay persons who are unfamiliar with the intricacies of court rules. RSMo § 536.070 is a very useful summary of the due process considerations that apply to a public hearing (see inset on page 6).

- **Equal Protection.** The regulations can classify and make distinctions that are rationally related to a legitimate public purpose. The test for equal protection is similar to substantive due process, and land use regulations are rarely overturned on equal protection grounds. The exception is regulations that target a “suspect class”

(such as race or sex) or a “fundamental interest” (such as privacy or religious freedom). These require a compelling interest and must be narrowed tailored to that interest.

Property owners can raise “class of one” equal protection claims if it appears that they are intentionally treated differently from other similarly situated persons with and no rational basis.

- **Free Speech.** The First Amendment to the U.S. Constitution and Art. 1, § 8 of the Missouri Constitution protect freedom of speech. Free speech issues are commonly raised in challenges to sign and adult use regulations. A court’s analysis of the regulations depends on whether it is “content neutral” or “content based.” A time, place and manner regulation is **content neutral** (i.e., does not directly regulate speech), if it is justified without reference to the content of speech. These must be narrowly tailored to serve a significant government interest, and leave open ample alternatives for communication. If the message conveyed determines whether the speech is subject to the restriction, the regulation is **content based**. Content based regulations are subject to strict scrutiny, must further a compelling state interest, and must be narrowly drafted to achieve their purpose. In addition to these tests, the regulations must not give administrative officials too much discretion in deciding whether to issue the permit, or how long it takes to approve it.

How can we address non-conformities?

When new zoning and subdivision regulations are adopted, there may be uses, structures, lots, or other situations that do not conform to the new standards. Missouri law allows these situations to continue if they were lawfully established. While some states allow local governments to “amortize” nonconformities by requiring them to comply with the new regulations over time, Missouri courts consider this a taking. However, nonconformities are not favored by the law. A property owner has the burden to establish the existence of a nonconformity. The zoning regulations can:

- require the discontinuance of uses that are abandoned or destroyed
- prohibit or regulate the expansion of nonconformities
- prohibit nonconformities from changing to another nonconforming use, or from changing back once they come into compliance with the regulations
- require the registration of nonconformities within a reasonable time period

In addition to nonconformities, there are applications in progress when new regulations are adopted. If the property owner has relied on existing permits in good faith and taken substantial steps toward completing the use, they may have **vested rights** to complete the project. However, the mere issuance of a permit, without substantial steps toward completion, does not establish vested rights.

What is the major federal legislation that affects zoning decisions?

Federal law includes a number of important protections for particular land uses or land use decisions. Here are some examples:

- Fair Housing.** The Fair Housing Act (FHA) prohibits zoning regulations that discriminate on the basis of race, family status, or handicap (42 U.S.C. § 3601 et seq.). This has been used to overturn zoning regulations that foreclose housing opportunities for racial minorities, such as use restrictions, low density, large lot and minimum house size zoning schemes that make housing accessible only persons in higher income groups. For example, in 1974 the courts invalidated a ban on multifamily housing by Black Jack, Missouri, that was shown to have a racially discriminatory effect. *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). The FHA has also been used to overturn regulations that do not reasonably accommodate group homes for the handicapped (physical or mental impairments). The United States Supreme Court invalidated the denial of a special zoning permit for a permit for a group home for mentally impaired adults on equal protection grounds. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Many states, including Missouri, responded with state laws that restrict the zoning of group homes.

The following are considered single-family dwellings under municipal zoning ordinances (RSMo § 89.020):

- group homes with < 8 mentally or physically handicapped persons + 2 houseparents / guardians
- a private residence licensed by the Division of Family Services or Department of Mental Health to provide foster care to < 7 unrelated children.

- The Americans with Disabilities Act (ADA)**, 42 U.S.C. § 12131 et seq., requires the reasonable accommodation of persons with disabilities. Courts have applied this requirement to zoning restrictions.
- Cell Towers.** Cell towers may be regulated through zoning, but are protected by federal law. Section 704(c)(7) of the Telecommunications Act of 1996 (“TCA”), 47 U.S.C. § 332(c)(7), applies to any regulation of the placement, construction, and modification of personal wireless service facilities. The TCA has 5 important provisions:
 - It prohibits unreasonable discrimination among providers of functionally equivalent services; and
 - It forbids regulations that prohibit or effectively prohibit the provision of personal wireless services; and
 - It requires local governments to act on zoning applications personal wireless service facilities within a

“reasonable period of time” after the request is duly filed, taking into account the nature and scope of the request. In 2009, the Federal Communications Commission (FCC) established a “shot clock” rule that sets the following presumptively reasonable time frames: (1) 90 days for the review of collocation applications; and (2) 150 days for the review of siting applications other than collocations.

- Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
 - Local governments cannot regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency (RF) emissions if they comply with the FCC’s RF emissions regulations.
- Religious Land Uses.** The Religious Land Use and Institutionalized Persons Act (RLUIPA) applies to zoning regulations. 42 U.S.C. § 2000cc-5(5). RLUIPA imposes 2 major requirements: equal treatment of religious land uses, and avoiding substantial burdens or unreasonable limitations on the exercise of religion
 - Equal Treatment. RLUIPA: “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C. § 2000cc(b)(1).
 - Substantial Burden. A government cannot “impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that” the land use regulation is “in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.” There is no bright line test for determining whether an ordinance imposes a substantial burden. This issue is sorted out by judges and juries on a case by case basis. However, it does mean that the normal police power justifications may not suffice. The underlying interests promoted by the ordinance has to be “compelling.”

Unreasonable Limitation. Under RLUIPA’s “unreasonable limitations” provision, the regulation cannot “unreasonably limit” religious assemblies, institutions, or structures. This is another invitation for widely varying interpretations by federal courts and juries.

What is spot zoning?

Spot zoning is commonly misunderstood. It typically refers to the rezoning of an area land surrounded by incompatible land use to benefit of a single owner, and without any community benefit. A court will uphold legislative action unless it is arbitrary and unreasonable - i.e., if it bears no substantial relationship to the public health, safety, morals, or general welfare. Courts will also whether the public interest served by the zoning is greatly outweighed by the detriment to private interests. The following factors are relevant:

Private Detriment

- adaptability of the subject property to its zoned use
- the effect of zoning on property value

Public Benefit

- the neighborhood character
- nearby zoning and uses
- any detrimental effect that a change in zoning would have on other property in the area

Spot zoning is frequently used as a pejorative term. However, spot zoning is not necessarily invalid. It is invalid only if it fails the tests listed above. It is valid if it is harmonious with the with the comprehensive zoning plan and is “done for the public good—that is, to serve one or more of the purposes of the enabling statute, and so bears a substantial relationship to the public health, safety, morals and general welfare.” *Treme v. St. Louis County*, 609 S.W.2d 706 (Mo.App. 1980). These tests leave considerable discretion in the courts to weigh a zoning action, but they also underscore the need for good planning. A separate planning document that clearly explains the local zoning scheme can minimize uncertainty for both neighborhoods and applicants. In fact, local governments who want to encourage mixed use, walkable neighborhoods will find that zoning is sometimes best in “spots.”

What is contract and conditional zoning?

Contract and conditional zoning involve requirements that are attached to a rezoning, subdivision plat, or other zoning approval. These conditions are typically negotiated between the applicant and local government to offset or mitigate the impacts of a development. The applicant may proffer the conditions as an inducement to rezone. For example, a rezoning may include a condition that the applicant widen an off site road in order to accommodate additional traffic resulting from the development.

In Missouri, “contract zoning” occurs where the local government approves a rezoning in exchange for considerations given by or exacted from the developer, and the considerations bear no reasonable relationship to the development. Courts consider this a contracting away of the police power, as opposed to an action that furthers the public health, safety and general welfare.

However, the conditions that have a reasonable relationship to the development are considered valid conditional zoning.

Conclusion

This discussion presents and summarizes some of the highlights of Missouri land use law. There are thousands of reported cases, along with hundreds of pages of statutory law, bearing on this subject. This scratches the surface, but does present a glimpse of the issues a Planning Commissioner faces when serving their community. The bibliography below includes some sources for readers who want to drill down on individual topics, or explore additional issues.

Bibliography

Freilich, Robert and The UMKC Law Review Staff, “Missouri Law of Land Use Controls with National Perspectives,” 42 *UMKC L. Rev.* 4 (1973).

Freilich & White, *A 21st Century Land Development Code* (American Planning Association, 2008).

Kling, “Municipal Land Planning Law in Missouri –Further Observations and Analysis,” *Missouri Bar Journal* (Jan. - Feb. 2002).

Kling, Nichols, & Welch, “Zoning as a Tool of Land Use Control,” *Missouri Bar Journal* (Sept. - Oct. 2008).

Michenfelder & Koslovsky, “Missouri Law of Land use Controls,” in *Missouri Local Government Law*, Third Ed., Vol. 1 (Missouri Bar 2008).

White, “County Zoning Statutes and Problematic Land Use Decisions,” *Missouri Bar Journal* (March-April 2003).

White, Michael T. *Missouri Land Use: Law and Practice*. Lexis Law Publishers, 1995.

White, “Writing Defensible Codes,” *The Commissioner* (Winter 2006).

White, “Unified Land Management Codes,” *Municipal Lawyer* (Aug. 2006).

536.070. Evidence--witnesses--objections--judicial notice--affidavits as evidence--transcript

In any contested case:

- (1) Oral evidence shall be taken only on oath or affirmation.
- (2) Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.
- (3) A party who does not testify in his own behalf may be called and examined as if under cross-examination.
- (4) Each agency shall cause all proceedings in hearings before it to be suitably recorded and preserved. A copy of the transcript of such a proceeding shall be made available to any interested person upon the payment of a fee which shall in no case exceed the reasonable cost of preparation and supply.
- (5) Records and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence, but the records and documents may be considered as a part of the record by reference thereto when so offered.
- (6) Agencies shall take official notice of all matters of which the courts take judicial notice. They may also take official notice of technical or scientific facts, not judicially cognizable, within their competence, if they notify the parties, either during a hearing or in writing before a hearing, or before findings are made after hearing, of the facts of which they propose to take such notice and give the parties reasonable opportunity to contest such facts or otherwise show that it would not be proper for the agency to take such notice of them.
- (7) Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof, unless it is wholly irrelevant, repetitious, privileged, or unduly long.
- (8) Any evidence received without objection which has probative value shall be considered by the agency along with the other evidence in the case. The rules of privilege shall be effective to the same extent that they are now or may hereafter be in civil actions. Irrelevant and unduly repetitious evidence shall be excluded.
- (9) Copies of writings, documents and records shall be admissible without proof that the originals thereof cannot be produced, if it shall appear by testimony or otherwise that the copy offered is a true copy of the original, but the agency may, nevertheless, if it believes the interests of justice so require, sustain any objection to such evidence which would be sustained were the proffered evidence offered in a civil action in the circuit court, but if it does sustain such an objection, it shall give the party offering such evidence reasonable opportunity and, if necessary, opportunity at a later date, to establish by evidence the facts sought to be proved by the evidence to which such objection is sustained.
- (10) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of

personal knowledge by the entrant or maker, may be shown to affect the weight of such evidence, but such showing shall not affect its admissibility. The term "business" shall include business, profession, occupation and calling of every kind.

(11) The results of statistical examinations or studies, or of audits, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it. All the circumstances relating to the making of such an examination, study, audit, compilation of figures or survey, including the nature and extent of the qualifications of the maker, may be shown to affect the weight of such evidence but such showing shall not affect its admissibility.

(12) Any party or the agency desiring to introduce an affidavit in evidence at a hearing in a contested case may serve on all other parties (including, in a proper case, the agency) copies of such affidavit in the manner hereinafter provided, at any time before the hearing, or at such later time as may be stipulated. Not later than seven days after such service, or at such later time as may be stipulated, any other party (or, in a proper case, the agency) may serve on the party or the agency who served such affidavit an objection to the use of the affidavit or some designated portion or portions thereof on the ground that it is in the form of an affidavit; provided, however, that if such affidavit shall have been served less than eight days before the hearing such objection may be served at any time before the hearing or may be made orally at the hearing. If such objection is so served, the affidavit or the part thereof to which objection was made, may not be used except in ways that would have been permissible in the absence of this subdivision; provided, however, that such objection may be waived by the party or the agency making the same. Failure to serve an objection as aforesaid, based on the ground aforesaid, shall constitute a waiver of all objections to the introduction of such affidavit, or of the parts thereof with respect to which no such objection was so served, on the ground that it is in the form of an affidavit, or that it constitutes or contains hearsay evidence, or that it is not, or contains matters which are not, the best evidence, but any and all other objections may be made at the hearing. Nothing herein contained shall prevent the cross-examination of the affiant if he is present in obedience to a subpoena or otherwise and if he is present, he may be called for cross-examination during the case of the party who introduced the affidavit in evidence. If the affidavit is admissible in part only it shall be admitted as to such part, without the necessity of preparing a new affidavit. The manner of service of such affidavit and of such objection shall be by delivering or mailing copies thereof to the attorneys of record of the parties being served, if any, otherwise, to such parties, and service shall be deemed complete upon mailing; provided, however, that when the parties are so numerous as to make service of copies of the affidavit on all of them unduly onerous, the agency may make an order specifying on what parties service of copies of such affidavit shall be made, and in that case a copy of such affidavit shall be filed with the agency and kept available for inspection and copying. Nothing in this subdivision shall prevent any use of affidavits that would be proper in the absence of this subdivision.

(L. 1945 p. 1504 §§ 7, 8, A.L. 1957 p. 748 § 536.080, A.L. 1978 S.B. 661)