

Planning and Zoning:

Why Euclidean Zoning Has Nothing to Do with Geometry and Other Important Issues

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INTRODUCTION – BASIC VOCABULARY

“Land use law” is a term generically applied to regulatory activities governing physical planning and land development. The term embraces zoning, as well as subcategories or related regulations such as sign control, architectural review and historic preservation regulations, subdivision controls and environmental regulations.

Key Players

1. Board of Alderman;
2. Planning & Zoning Commission;
3. Board of Zoning Adjustment; and
4. City Staff.

INTRODUCTION – BASIC VOCABULARY

- **Euclidean Zoning.**
 - *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).
- **Transect-Based Zoning:** “a zoning classification system that prescriptively arranges uses, elements, and environments according to a geographic cross-section that range across a continuum from rural to urban, with the range of environments providing the basis for organizing the components of the constructed world, including buildings, lots, land use, street, and all other physical elements of the human habitat, with the objective of creating sustainable communities and emphasizing bicycle lanes, street connectivity, and sidewalks, and permitting high-density and mixed use development in urban areas.” §89.010, RSMo.

INTRODUCTION – RULES OF INTERPRETATION

- “One of the primary rules of construction in this state is that zoning ordinances, being in derogation of common law property rights, should, whenever ambiguous, be strictly construed in favor of the property owner. Where a term in a zoning ordinance is susceptible of more than one interpretation, the courts are to give weight to the interpretation that, while still within the confines of the term, is least restrictive upon the rights of the property owner to use his land as he wishes.” *Cunningham v. Board of Aldermen of Overland*, 691 S.W.2d 464, 469 (Mo.App. E.D. 1985)

Constitution → State Statute → Ordinance

“DILLON’S RULE”

“Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city. 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' " *Taylor v. Dimmitt*, 336 Mo. 330, 78 S.W.2d 841, 843 (Mo. 1934).

Constitution → State Statute → Ordinance

“Zoning ordinances constitute an exercise of a state's police power. A city has no inherent police power so it must look to statutes to determine the extent of the power delegated to it by the state. Any exercise of such delegated powers must conform to the terms of the statutory grant. Missouri's Zoning Enabling Act, sections 89.010 through 89.140, is the sole source of power and measure of authority for a city, town, or village in zoning matters.” *Moore v. City of Parkville*, (Mo. 2005).

ZONING ENABLING ACT (Chapter 89): provides the general authority from which all planning and zoning actions are made.

LIMITATIONS ON ZONING AUTHORITY

United States Constitution

Missouri Constitution

Missouri Legislation

Federal Legislation (ADA, FHAA, RLUIPA, EPA, etc.)

Decisional Law

PLANNING AND THE “COMPREHENSIVE PLAN”

- **The Plan**
- Referred to as the: “city plan,” “master plan,” or “comprehensive plan”
 - Adopted by the Planning and Zoning Commission after a public hearing
 - A general guide to future development.
 - Imposes no restrictions on the use of land.
 - Adherence to the plan constitutes a factor in determining the reasonableness of a zoning regulation.

LEGAL FRAMEWORK - TYPES OF ACTIONS

There are three (3) types of actions in planning and zoning:

1. **Legislative Acts**
2. **Administrative Acts**
3. **Ministerial Acts**

LEGAL FRAMEWORK – LEGISLATIVE ACTS

Legislative Acts: If a particular act prescribes a new policy or plan then it is legislative. These actions are taken by the elected governing body and are afforded great deference.

1. Types of Legislative Acts:
 - i. Original Zoning
 - ii. Zoning Amendments
2. Exceptions to authority to zone uses.
 - i. Religious institutions (Not granted in the Zoning Enabling Act).
 - ii. Other governmental bodies ... Sometimes.
3. Procedural Requirements: “Where the procedural requirements of the Zoning Enabling Act are not strictly complied with, the ordinance is invalid and cannot be enforced.” **Moore v. City of Parkville, (Mo. 2005).**

Statutory Requirements § 89.050, RSMo. :

- A public hearing
 - “At least fifteen days' notice ... in an official paper or a paper of general circulation in such municipality.”
 - Other Code Requirements?
 - “Hearing” defined: A “hearing” is “a session ... in which testimony is taken from witnesses,” an “opportunity to be heard, to present one’s side of a case, or to be generally known or appreciated,” and “a listening to arguments.”
 - Hearing was deemed insufficient under the statutory requirement because County Commission and Planning Commission precluded testimony regarding specific proposal related to regulatory zoning change. *Campbell et al. v. County Commission of Franklin County and Union Electric Company* (SC 93944, 2/10/2015).

Zoning Regulations v. Police Power Regulations

➤ ‘[T]he generally recognized definition of a zoning ordinance [is] as an ordinance which regulates the use of land and buildings according to districts, areas, or locations.’ *City of Green Ridge v. Kreisel*, 25 S.W.3d 559 (Mo. App.W.D., 2000).

➤ i.e., Section 79.370, RSMo. “The board of aldermen shall have power, by ordinance, to secure the general health of the inhabitants of the city by any measure . . . to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health, . . . and to pass ordinances for the prevention of nuisances and their abatement.”

Judicial Review of Legislative Acts:

- When attacking a refusal to rezone, a petitioner is actually challenging the propriety of the existing zoning. *White v. City of Brentwood*, 799 S.W.2d 232 (Mo.App. 1989).
- Zoning ordinances, as legislative actions, are presumed valid, and it is the challenger's burden to prove unreasonableness. *Flora Realty and Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 778 (Mo. 1952).
- No one factor is dispositive in balancing public versus private interests for purposes of zoning regulations. *Rhein v. City of Frontenac*, 809 S.W.2d 107, 110 (Mo. App. 1991). The decision of each case rests upon its own particular facts and circumstances. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 843 (Mo. 1963).

Judicial Review of Legislative Acts: (cont'd)

- The motives of the legislatures are largely irrelevant as long as the legislation does not impinge on the rights of individuals.
- “Where re-zoning has been denied, property owners may overcome that decision only by evidence which rebuts the presumption of validity and there is no contrary evidence that the decision of the city is a fairly debatable exercise of its authority to zone.” *Ohmes v. Lanzarini*, 720 S.W.2d 425 (Mo. App. E.D., 1986).

Judicial Review of Legislative Acts: (cont'd)

Examples of insufficient reasons to deny rezoning:

1. The denial of a previous rezoning application is not a sufficient basis to challenge a later rezoning of the same property.. *Broadway Apartments, Inc. v. Longwell*, 438 S.W.2d 451 (Mo.App. 1968).
2. An attempt to regulate or prevent competition is an insufficient reason to deny a zoning change because zoning ordinances are not intended to confer business monopolies on individuals. *Schmitt v. City of Hazelwood*, 487 S.W.2d 882 (Mo.App. 1972).
3. That there was no immediate plan to use the property, but rather only a desire for commercial zoning, was not considered fatal to the applicant. See *Ewing v. City of Springfield*, 449 S.W.2d 681 (Mo. App. 1970).

Examples of sufficient reasons to deny rezoning.

1. Showing mere difference in value under different zoning does not establish private detriment substantial enough to require zoning change.

White, 799 S.W.2d 232 (Mo.App. 1989).

2. Incompatibility of proposed use with surrounding uses. *State ex rel. Kolb v. County Court of St. Charles County*, 683 S.W.2d 318 (Mo. App. 1984).

(upholding denial of request to rezone residential property to industrial upon finding that most of land nearby was zoned and used as single-family residential).

LEGAL FRAMEWORK – ADMINISTRATIVE ACTS

- **Administrative Acts:** If an action implements a plan already adopted then it is legislative. These actions can be taken by the elected governing body as well as appointed commissions such as the Planning & Zoning Commission or Board of Adjustment.

- Examples:
 - Conditional Use Permits
 - Site Plans

Limitations on discretion.

“When the legislative body of the city chooses... to delegate to itself the discretionary power to enforce its regulation[s],... it acts administratively in acting on applications...” *State ex rel. Steak n’ Shake, Inc. v. City of Richmond Heights*, 560 S.W.2d 373, 376 (Mo. App. 1977).

- Administrative Authority:
 - An ordinance may not give an administrative body unbridled discretion – there must be a definite standard or rule for guidance.
 - A governmental body may not delegate their legislative discretion.
 - The standards must be specific enough so that an administrative body cannot arbitrarily grant permission to one person while denying it to another similarly situated.

LEGAL FRAMEWORK – ADMINISTRATIVE ACTS

Conditional Use Permits (No statutory authority).

- “The [conditional] use technique has developed as a flexible means of controlling uses considered to be essentially desirable, necessary, or convenient to the community but which, by their nature or operation, are regarded as troublesome in terms of traffic congestion or potential hazards to the public health and safety.” *Coots v. J.A. Tobin Constr. Co.*, 634 S.W.2d 249 (Mo. App. 1982).
- “[A conditional] use permit allows a property owner “to put his property to a use which the regulations expressly permit under conditions specified in the zoning regulations themselves.” *Prince v. County Comm’n of Franklin County*, 769 S.W.2d 833 (Mo. App. 1989).

A CONDITIONAL USE PERMIT IS NOT A REZONING!!!

- The fact that a conditional use is granted through the passage of an ordinance does not mean the board of aldermen has acted legislatively. *See Williams v. City of Kirkwood*, 537 S.W.2d 571 (Mo. App. 1976). Cannot vary from zoning ordinances by use of Conditional Use Permit.
- If an applicant meets all of the requirements in the zoning ordinance, the Board of Alderman is without authority to deny a permit. *State ex re. Sr. Estates of Kansas City, Inc. v. Clarke*, 530 S.W.2d 30 (Mo. App. 1975); *see also City of Lake Lotawana v. Lehr*, 529 S.W.2d 445 (Mo. App. 1975). There is, however, some authority granting the Board of Aldermen authority to exercise some discretion, as outlined in the City Code, pertaining to certain issues (traffic considerations, reasonable conditions, etc.).

LEGAL FRAMEWORK – ADMINISTRATIVE ACTS

Procedural Requirements:

- **Application and Notice.**
 - Notice of hearing before the Board of Aldermen mailed to the Applicant ten (10) days prior to the hearing.
- **Hearing v. Public Hearing.**
- **Standard of Review.** Arbitrary, Capricious and unreasonable.
 - Contested v. Non-Contested Case:
 - *Winter Brothers Material Company v. County of St. Louis, Missouri*, 2017 WL 1233902 (Mo. App. E.D. 2017) and *Grayland Nowden v. Division of Alcohol & Tobacco Control, Missouri Department of Public Safety*, (Mo. App. W.D. 2017)

LEGAL FRAMEWORK – THE BOARD OF ADJUSTMENT

- The Board of Adjustment is a quasi-judicial body authorized to “determine and vary the application of zoning regulations in harmony with their general purpose and intent.” § 89.080, RSMo.
- While the Board of Adjustment is not held to the same standard as a court of law, it more closely resembles a formal court than any other local government body.
- The Board of Adjustment is to be autonomous and independent from other boards or councils.
- It is to hear and decide matters solely on the “record” before it.
- Authorized Actions
 - Area Variances
 - Use Variances
 - Appeals

LEGAL FRAMEWORK – THE BOARD OF ADJUSTMENT

- **Area Variances:** Where strict application of the regulations would result in “*practical difficulties*” the Board Zoning of Adjustment may grant a variance.
 - The standards for the grant of a variance generally refers to some unique physical attribute of the property
 - Five Factors:
 - Size of the Variance
 - Effect on Government Services
 - Effect on Neighbors or Neighborhood
 - Alternatives to a Variance
 - Justice
 - If an applicant created the hardship, a variance may not be warranted

LEGAL FRAMEWORK – THE BOARD OF ADJUSTMENT

- **Use Variances:** Where strict application of the ordinance would cause “*unnecessary hardship*”, a use variance may be granted.
 - Unnecessary Hardship
 - The property owner is deprived of all beneficial use of the property or would incur unwarranted economic hardship in achieving a permitted use.
 - The conditions causing the hardship are unique and peculiar to the applicant’s property.
 - The proposed variance will not destroy the preservation of the City’s comprehensive zoning plan.
 - The use proposed must be specific and must be a use that is allowed as a permitted use in at least one other zoning district in the City.
 - The applicant must establish that granting a use variance would result in substantial justice for all

LEGAL FRAMEWORK – THE BOARD OF ADJUSTMENT

- **Appeals:** Appeals from the interpretation of administrative officials in the enforcement of the zoning regulations.

- **Procedures:**
 - A hearing is held before the Board of Adjustment, after public notice as well as due notice to the parties in interest.
 - City Code Requirements.
 - A vote of four (4) members of the Board of Adjustment is required to grant any variance
 - All testimony, objections thereto and rulings thereon, shall be taken down by a reporter employed by the board for that purpose.

LEGAL FRAMEWORK – THE BOARD OF ADJUSTMENT

- **Authority:** The Board of Adjustment may “reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement or determination as ought to be made and to that end shall have all the powers of the officer from whom the appeal is taken.
- **Judicial Review:** An appeal of decisions made by the Board of Adjustment may be presented to the Circuit Court of St. Charles County. All petitions must be filed with the court within thirty (30) days after the filing of the decision in the office of the board. A court will review the record made by the Board of Zoning Adjustments in a light most favorable to the Board’s decision.

LEGAL FRAMEWORK – MINISTERIAL ACTS

Ministerial Acts: execution of a specific legal duty upon specific facts. That the exercise of discretion and judgment vested in the administrative agency is to determine whether the plan meets the zoning or subdivision regulations. If it does it must be approved. Mandamus actions are available to require a body approve a plan.

Examples of Ministerial Acts:

- i. Plat approvals
- ii. Building Permits

Judicial Review of Ministerial Acts

“Arbitrary and capricious”

If the administrative body’s actions are “truly irrational” then damages may be imposed under 42 U.S.C. 1983. *Furlong v. City of Kansas City*, 189 S.W.3d 157 (Mo. 2006). To be truly irrational the act must exceed the arbitrary and capricious standard – intentional disregard of the law, knowing that it is disregarding the law thereby depriving individuals of a property right.

Good Faith Defense -- Acting in good faith and with the intention of serving those who elected you does not provide a defense to an action for damages under 42 USC 1983. *Furlong v. City of Kansas City*, 189 S.W.3d 157 (Mo. 2006); *Gunter v. City of St. James*, 189 S.W.3d 667 (Mo. App. S.D. 2006).

QUESTIONS

Planning and Zoning Commission Training Seminar September 11, 2017

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