Municipal Land Planning Law in Missouri –Further Observations and Analysis

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An examination of additional issues and applications of the comprehensive plan and Missouri Municipal Land Planning Law.

In May of 2000, I submitted an article to the *Journal of the Missouri Bar* for publication entitled "Municipal Land Planning Law in Missouri." This article was ultimately published in the November/December 2000 issue. The impetus for the article was the large amount of research my law firm undertook throughout the 1990s in several representations involving land plans and contested re-zonings, and the knowledge I gained working closely with one of America's leading experts on land use law, Professor Daniel R. Mandelker.[2] My article was not intended to be the last word on the topic, but only the beginning.

Since the publication of my article, I have received several inquiries requesting elaboration on issues that I merely touched upon, as well as questions regarding matters that were not discussed. Many of these questions came from both land planners and land use attorneys. In addition, the local chapter of the American Planning Association ("APA") has been discussing an effort to review and revise Missouri land planning statutes as part of the national effort discussed in my prior article. For all of these reasons, a follow-up article attempting to address further questions and issues, and providing a status report on efforts to update state land planning statutes, was thought to be appropriate.

I. The Importance of Land Planning

Beyond the statutory requirement of the adoption of a land plan by municipalities with planning commissions is the initial question of "Why plan?" On the most elemental level, the Missouri municipal planning statutes are enabling legislation empowering Missouri municipalities to "plan," including: making, adopting and carrying out a land plan; adopting subdivision regulations; controlling subdivision of land and plat approval; and controlling public improvements. Land plans adopted pursuant to the Missouri municipal planning statutes are also prerequisites to, or critical factors in, utilization of many state economic and redevelopment statutes. On a broader level, the reason for, and process of adopting and instituting, land plans is not simple and has evolved over time.

The purpose of traditional planning was to design a physical framework for the change and development of the municipality. The focus was on projecting the type and intensity of suitable land uses and the extent, character and location of public improvements and facilities that are necessary for the make-up and development of the municipality. In other words, traditional planning dealt with the physical development of land. Comprehensive land planning was to be the essence of zoning. Under the model acts originally adopted by most states, zoning regulations were required to be made "in accordance with a comprehensive plan." This language was intended to require the making of zoning decisions in a comprehensive manner after due consideration and regard for the municipality's land plan. Thus, the "land plan," also commonly referred to as a comprehensive plan, city plan, master plan or general plan, was to be the essential foundation for the growth and development of the municipality.

Missouri law, in following the model Standard City Planning Enabling Act ("SCPEA"),[3] reflects this traditional view of land planning. Planning primarily involved the adoption of a land plan by a planning commission to provide a guide for future development of the municipality. The planning commission, rather than the legislative body of the municipality, was chosen to prevent short-term political considerations from interfering with long-term planning. The primary functions of the land plan were: (1) to be a guide in making zoning decisions and recommendations; (2) to coordinate the location and construction of public improvements; and (3) to coordinate the design of subdivisions and construction of streets and related improvements. These functions were to be "implemented" by various actions, such as the adoption and enforcement of zoning and subdivision regulations, and the adoption and use of a capital improvement program ("CIP") to fund public projects identified in the land plan.

As a practical matter, many municipal planning commissions rarely "plan" pro-actively today, but rather primarily review and recommend re-zoning decisions and approve site development plans. Some planning commissions and legislative bodies of a municipality do not even consider the land plan in making land use and development decisions. Over time, the adoption of a land plan has become viewed merely as a legal requirement of state law, a prerequisite to federal or state grants, or a prerequisite to creation of a redevelopment district under various state statutes, and not as a real and useful tool to guide and direct the overall development of the municipality. The lack

of case law in this state linking the importance of the land plan to zoning decisions has contributed to this trend. Not surprisingly, many land plans today remain virtually untouched and have been figuratively gathering dust since their adoption. The fact that the primary purpose of a planning commission under the SCPEA model is to "make, adopt and carry out a land plan" seems to have been forgotten. However, concepts like urban sprawl and smart growth, as well as heightened dissatisfaction of the public with uncoordinated development and increasing litigation over re-zoning decisions, have revived interest in the land plan as something more than just a legal requirement. The chief aim of a land plan should still be to influence physical development and land use in a manner that will improve the quality of the entire municipality. Benefits to be gained from proper use of a land plan would include higher property values, attractive residential neighborhoods, complementary retail and commercial businesses, adequate public facilities and streets, and reasonable taxes.

Land planning has evolved from the purpose originally intended. Contrary to past uses of land planning to keep a municipality growing, a great deal of interest has recently arisen in establishing appropriate restraints on growth. Organizations like the APA have stressed planning as a dynamic process; not just the adoption of a document prepared by a professional land planner, but the thoughtful and thorough consideration of a blueprint for the future prepared with input from all sectors of the community that reflects the goals and objectives of that community. A consistency doctrine has emerged over the last few decades, and the idea that the land plan must have some greater role in judicial decisions regarding zoning has been spreading.[4] The land use plan, when followed, evidences the existence of an orderly plan of growth and development as well as the degree of consistency required for a rational and valid zoning decision. Demonstration that an individual zoning decision is in accordance with a properly adopted land plan is strong evidence of its validity. Once the land plan is adopted, inconsistency with the land plan should strongly support a finding of arbitrariness or of spot zoning. When an up-to-date land plan is not available for review in connection with a re-zoning decision, a presumption of arbitrariness should be raised. While the guidelines of a land plan do not place the legislative body in a legal straightjacket, they do establish parameters within which the discretion of the legislature of the municipality can operate with safety.[5]

Only by adopting, utilizing and implementing land plans in this manner will the act of "planning" provide the benefits envisioned. The State of Missouri, by allowing municipalities to plan (and in requiring planning commissions, once appointed, to make, adopt and carry out those plans), has acknowledged the desirability of an officially adopted statement of policy regarding a municipality's development. Land use planning is a matter of statewide importance that is evident from the purposes of land planning law. Planning decisions may have profound ramifications for neighboring entities and require that each planning agency be guided by, and implement, certain fundamental state policies and goals. The importance of a land plan is further highlighted by the fact that many of Missouri's redevelopment statutes require a land plan as a prerequisite for utilization of such statutes.[6] Zoning and re-zoning decisions should be made "in accordance with a comprehensive plan" and, accordingly, decisions of a municipality's legislative body that are contrary to properly made and adopted land plans should be subject to heightened scrutiny by courts when challenged. While politicians and judges often ignore the crucial importance of both planning and the land plan itself, it needs to be recognized and reinforced continuously and vigorously.

II. Planning Framework

The Missouri scheme for planning is somewhat confusing. Municipal planning in Missouri follows the SCPEA, which was intended to apply to cities, towns, villages, and other incorporated political subdivisions, but not to counties and townships. As used in the SCPEA, such is the definition of the term "municipality."[7]

The Missouri municipal land planning statutes provide that they apply to all "municipalities" in this state.[8] At the beginning of the Missouri municipal land planning statutes are found the words "Planning - All Municipalities" in bold capitalized print. Although the term "municipality" is not defined in the Missouri municipal land planning statutes, it appears that this term was intended to have the same meaning set forth in the SCPEA. Missouri case law, while not crystal clear on the point, seems to support this interpretation of the term's meaning, as does the statutory framework for land planning in this state.[9]

Missouri has a wide-ranging division of planning powers between the state, cities, counties and other political subdivisions. As discussed in my previous article, planning for municipalities, i.e., cities, towns and villages, is found in §§ 89.300 - 89.491, RSMo. Township planning is found in §§ 65.650 - 65.701, RSMo. County planning is more varied and complex. In fact, Missouri appears to have more provisions allocating planning powers specifically to counties than many other states. It has been observed that this may be a reflection of Missouri's largely rural nature at the time these laws were adopted.[10]

The statutes conferring planning powers to counties can be found as follows: charter counties, §§ 64.010 - 64.160, RSMo; non-charter counties of the 1st class, §§ 64.211 - 64.295, RSMo; counties of the 2nd and 3rd classes, §§ 64.510 - 64.727, RSMo; alternative planning for non-charter counties of the 1st, 2nd, 3rd and 4th classes, §§ 64.800 - 64.905 RSMo; special provisions for non-charter counties with a population of at least 150,000 inhabitants that contain all or a portion of a city with a population of at least 300,000, § 64.906, RSMo; counties bordering on lakes having at least 110 miles of shoreline, §§ 64.005 and 64.007, RSMo; and in certain 2nd and 3rd class counties making up the same judicial circuit, through a county lake authority, §§ 67.781 - 67.790, RSMo. Although these statutes have many provisions that are the same or similar to those found in the Missouri municipal planning statutes (and that were obviously derived from the SCPEA), there are significant and important differences that are beyond the scope of this article.

Even municipalities that are not otherwise authorized to establish a planning commission with the power to prepare a land plan are empowered to prepare such a plan for the purposes of initiating and carrying out a land clearance project under the Land Clearance for Redevelopment Authority Law.[11] They are also given these powers for purposes of initiating and carrying out a planned industrial expansion project under the Planned Industrial Expansion Law.[12] On a broader level, state and regional planning powers are covered specifically in §§ 251.010 - 251.440, RSMo. Regional planning commissions created under this law may adopt regional comprehensive plans for the development of the region, but such plans are generally only advisory to the local governments in their area. The Office of Administration is the official state planning agency and is responsible to local governmental units for planning assistance as requested by the governmental unit or its planning commission. Other planning powers are vested to a greater or lesser degree in many state and local agencies or commissions. The following non-exclusive list of Missouri statutes gives a feel for the wide diversification of power given to agencies and commissions, which are primarily aimed at emphasizing economic development: Economic Development Districts, §§ 251.500 - 251.510, RSMo; Missouri State Highway and Transportation Commission, §§ 226.010 -226.191, RSMo; Missouri Industrial Development Board, § 100.250 - 100.297, RSMo; Planned Industrial Expansion Authorities, §§ 100.300 - 100.850, RSMo; Development Finance Corporations, §§ 371.010 - 371.250, RSMo; Missouri Housing Commission, §§ 215.010 - 251.250, RSMo; Environmental Improvements and Energy Resources Authority, §§ 260.005 - 260.125, RSMo; and Urban Redevelopment Corporations, §§ 353.010 - 353.190, RSMo. Planning powers intended to further specific development or use objectives are found in other statutes, such as the Open Space Conservation Act, §§ 67.870 - 67.910, RSMo, and the Missouri Main Street Program, §§ 251.470 - 251.485, RSMo.

There are other statutes beyond those emphasizing economic development that impact land planning. For example, Missouri's Local Historic Preservation Act allows municipalities and counties to create historic preservation commissions that may prepare and integrate historic preservation plans into land plans and local government planning.[13] Boundary commissions, in issuing comments on proposed boundary changes, must base their comments on planning considerations.[14] Certain municipalities can even protect themselves from airports or landing fields in areas where those uses are not permitted under its land plan.[15]

Historically, Missouri and many other states have left land planning primarily to individual localities within the state. Although much has been done and continues to be done on both the regional and state levels, these efforts have often proved to be ineffective. However, in recent years some states, primarily in the coastal areas, have pioneered more authoritative and coordinated regional and state planning roles. Some of these states have even attempted to coordinate land use decisions with transportation planning. Time will tell if these approaches will be successful.

III. Importance of the SCPEA to Interpret Missouri's Land Planning Statutes

Missouri's municipal land planning statutes were patterned after and closely follow the corresponding provisions of the SCPEA.[16] The SCPEA was intended to be a model enabling statute for municipalities to exercise land planning powers and duties in a standard manner. While the differences are more pronounced, county planning statutes are also based upon the SCPEA.

The SCPEA was published with official footnotes explaining the meaning and purpose of the model act provisions. In construing uniform and model acts enacted by the General Assembly, courts must assume the General Assembly did so with the intention of adopting the accompanying interpretations by the drafter.[17] The Supreme Court of Alabama, in interpreting its planning statutes that follow the SCPEA, noted the importance of the SCPEA official footnotes and stated, "We have received a copy of the Standard [City] Planning [Enabling] Act from the Library of Congress and have placed it in the Supreme Court Library because of the comprehensive section by section analysis which is set out in the publication. The analysis made should be of assistance to the bench and

bar in determining the intent of our own Legislature at the time of the passage of our planning statutes."[18] Certain California Supreme Court justices, in reviewing the SCPEA, have likewise stated that the official footnotes "are remarkable in a number of respects, not least for their clarity and straightforward treatment of the authors' intent."[19]

IV. Implementing the Municipality's Land Plan and Related Issues

The planning commission's major responsibility as the "authorized" agency under Missouri municipal land planning statutes is to make, adopt and carry out the municipality's land plan. The SCPEA, in official footnote 8, describes the meaning of the words "make and carry out" that are included in § 89.310, RSMo. That official footnote provides that the planning commission should not only make the land plan, but have a strong influence in "implementing" the land plan and protecting it against departures. Moreover, this footnote further provides that the planning commission is to use its influence continuously to cause adjustment of the municipality's physical development to the land plan, as well as to promote further review, elaboration and updates of the land plan itself when conditions warrant. A land plan has little value to the community unless there are means of implementing it.

The term "implementation" is a term of art used by those involved in ongoing land planning. Implementation methods include: (1) making re-zoning decisions (whether reactionary or initiated by the municipality) based upon recommended land uses in the land plan; (2) adopting zoning ordinances and subdivision regulations tailored to the desired development for the municipality in the land plan; (3) the public ownership and operation of streets, parks, public buildings and utility services; (4) using CIPs to finance public improvements envisioned as necessary in the land plan based upon existing and anticipated future land use; and (5) using economic or redevelopment statutes to allow assemblage of properties and assistance for public infrastructure improvements where appropriate. Utilization of most of these methods is necessary to effectively implement a land plan, although many municipalities in Missouri have not effectively utilized them after their adoption of a land plan.

With respect to re-zoning applications, the first and foremost responsibility of the planning commission is to examine and consider thoroughly the land plan as it pertains to the subject property, and to use that examination and consideration as the basis for its recommendations to the legislative body regarding the re-zoning application.[20] Approval of re-zoning applications by the legislative body of the municipality that do not conform with a proper land plan should be rare, and such approval should only occur when a mistake, change of circumstance or unforseen circumstance exists. Care should be taken to consider the impact on adjoining properties and on the entire land plan itself, because re-zoning and planning decisions are interrelated. Every inquiry by the municipality in such instance should be a factual one as to whether the requested re-zoning reflects the goals of the land plan, and whether it takes into account the specific recommendations for the target property already set forth in the land plan in light of the present factual circumstances surrounding the request. While the land plan does not operate as legally controlling zoning law, it should constitute a guide for suitable projected land uses for the municipality, and should be given great deference as re-zoning requests are considered. If re-zoning decisions are made without proper consideration of the land plan, the over-all plan for the municipality will be nibbled away on a case by case basis.

Municipalities in Missouri that have adopted and continue to use a land plan generally wait for re-zoning applications to be filed by developers before taking action to further implement the land plan. In other words, they view the land plan as a tool to encourage developers to come forward with applications that conform to the land plan. Rarely will a municipality proceed on its own initiative to re-zone property or make substantial changes to subdivision regulations based solely on the land plan.

There are several reasons why municipalities use this reactionary re-zoning approach, rather than initiating re-zonings of property as may be recommended by the land plan. Fear of litigation from the land owners may certainly be a factor. While there have been no court decisions to date holding that a designation of land use in a land plan is a taking of property, there have been decisions holding that the act of re-zoning can constitute a taking.[21] Any re-zoning to a use deemed less valuable by the owner may trigger this type of lawsuit. Judicial decisions to date in this state have not fully analyzed the importance of the land plan in zoning disputes.[22] Another factor may be that the immediate change wrought by a municipality's unilateral action will prove to be unpopular and, if several properties are affected, could result in a large group of property owners voicing angry complaints in public to municipal officials. Additionally, implementation of a land plan by municipality-initiated re-zonings involves a great deal of time and effort that the municipality either does not want to undertake, or simply cannot afford to undertake.

Adoption of zoning ordinances and subdivision regulations recommended by the land plan are also important implementation tools. Without proper zoning districts being available to permit and encourage desired development

and to restrict and discourage unwanted development, the municipality will certainly not develop in the manner intended. Subdivision regulations, in turn, provide legal requirements and infrastructure design criteria for development of property within the municipality. Public ownership and operation of streets, parks, public buildings and occasionally utility services, as well as CIPs to allocate necessary funds and to provide timing for such public improvements and services (discussed later in this article), are also critical and necessary to implement land plans.

More exotic planning implementation approaches that are frequently used by municipalities, in addition to the traditional implementation methods described above, are the creation of "redevelopment districts" pursuant to the Real Property Tax Increment Allocation Redevelopment Act,[23] the Urban Redevelopment Corporations Law,[24] or the Land Clearance for Redevelopment Authority Law.[25] Under these laws, a municipality creates a redevelopment district and usually re-zones property to further the desired redevelopment. While providing a mechanism to implement a land plan, these statutes generally focus on individual areas rather than the entire municipality and are predicated on the active interest of developers in a targeted redevelopment project.

Of course, proper planning should *precede* the creation of any redevelopment areas or districts.[26] Urban redevelopment and renewal legislation is intimately related to the subject of municipal and county planning.[27] Designation of the target property as a redevelopment area on the land plan is a precondition to the exercise of eminent domain against private property by a municipality in connection with redevelopment under the Urban Redevelopment Corporation Law.[28] Redevelopment plans under the Real Property Tax Increment Allocation Redevelopment Act must conform to the municipality's land plan.[29] The Land Clearance for Redevelopment Authority Law also requires, in connection with the approval of redevelopment and urban renewal plans, the existence of a land plan showing the proposed uses of the redevelopment area and the review by the planning commission of the redevelopment plan for comformance to the land plan.[30] While not a prerequisite to the exercise of a housing authority's power, the Housing Authorities Law requires the housing authority to take into consideration the relationship of any applicable housing project to any land use plan covering the area in which the project is located.[31] The Planned Industrial Expansion Law, §§ 100.300, et seq., RSMo, cannot be utilized unless the municipality has a land plan and the industrial development project is first submitted to the planning commission for written recommendations as to its conformance to the municipality's land plan.[32] The legislative authority of the municipality must also make a finding that the plan for the proposed industrial development project is in conformity with the land plan for the development of the community as a whole.[33] These statutes indicate the critical nature of land plans for redevelopment projects and the concept that the first steps in a redevelopment or renewal project should be the drafting or consideration of a land plan.

Implementation of land plans should give meaning to the goals and objectives of the land plan. A program of implementation should include for each goal and objective: (1) specific public action needed to be taken by the municipality, such as re-zonings, land purchases, condemnations, etc; (2) a time frame for identified actions; (3) an allocation of responsibilities for actions; (4) a schedule of necessary capital improvements; (5) an inclusion of benchmarks and procedures to monitor the effectuation of actions; (6) a general description of land development regulations and design guidelines that may need to be adopted; and (7) identification of any economic development statutes or federal/state grants that need to be utilized.[34]

For a land plan to be effective, it must be properly and continuously implemented. The planning commission should accept the responsibility of becoming the watchdog for protecting the future effectiveness of the land plan, insisting that it be used in decision-making. Failure to do so renders the land plan a purposeless document, and disregards the careful and comprehensive effort required by the Missouri municipal planning statutes put forth in the land plan's creation.

V. Plan Amendments

Amendment of a land plan is a topic frequently debated by planning and zoning commissions. The Missouri municipal planning statutes only require an amendment to be preceded by published notice, a public hearing and the filing of the amendment with the municipal clerk and county recorder's office.[35] The Missouri municipal planning statutes follow the SCPEA specifically in this regard and the official footnotes provide little further guidance. *When* amendments should be adopted is not adequately addressed. Perhaps this is purposeful, although the SCPEA footnotes do not explain this omission as they do with respect to the lack of an express definition for the term "master plan."[36]

Section 6 of the SCPEA provides that the planning commission may from time to time "amend, extend, or add to the plans." This exact language is not found in the Missouri municipal land planning statutes; however, the ability to amend or extend the land plan and any portion thereof, and the procedural requirements therefore, are found in § 89.360, RSMo. The footnotes of the SCPEA to the foregoing quoted language provides some insight into amendments contemplated under the SCPEA scheme. Official footnote 39 provides that, from time to time, the need for changes in the plan will develop, and the plan may need to be carried into greater detail in one or other of its features. This footnote also discusses the need to amend the plan to cover territory not completely covered or not covered in sufficient detail in the original plan, as well as the need to include new subjects that have developed within the municipality, such as commerce or business areas.

The SCPEA's lack of direction as to when amendments should be adopted may have been intended to allow municipalities flexibility to adopt amendments as and when needed, since the need will undoubtedly vary from municipality to municipality. In practice, Missouri municipalities differ widely in their approach to amendments. Some municipalities never amend their land plans and rarely review them. Others have adopted an approach to amend the land plan only when presented with a re-zoning application that they desire to approve and that does not already conform to the land use plan. In the latter instance, the municipalities have their planning commissions amend the land use plan while the re-zoning application is pending.

The contemporaneous amendment approach is potentially a flawed one, because the careful and comprehensive studies required for proper planning cannot normally be made using this procedure. In essence, this approach constitutes a form of spot planning (which is analogous to spot zoning), and arguably leads to spot zoning. This approach may not allow for consideration of the impact on adjoining properties and may have unintended consequences to those properties. The objectives of the land plan in terms of land uses, anticipated capital improvement needs, transportation needs and other goals may also become inconsistent or incorrect, compounding future development problems. This piecemeal procedure defies the general tenets of careful and comprehensive planning mandated by the Missouri municipal land planning statutes and could be challenged as arbitrary.

A better approach may be the periodic review by a municipality of its land plan. Some municipalities require review every five years, while others review their plans on a more frequent basis. Some states statutorily require thorough periodic review and update of land plans by the municipality.[37] A few states actually have statutes providing that a re-zoning or plat approval in conflict with the land plan constitutes an automatic amendment to the land plan; however, this approach could destroy proper planning without adequate safeguards, for the reasons stated above.[38] For a land plan to be of any real value it should be reviewed on a periodic basis, the timing of which will depend upon the pace of change experienced by the municipality.

VI. Paying For the Plan

Some municipalities fail to adopt or timely update a land plan due to failure of the legislative body to appropriate amounts sufficient for the planning commission to be adequately staffed and to engage the services of professional planners. Missouri follows the SCPEA in providing that the expenditures of the planning commission, exclusive of gifts and grants, shall be within the amounts appropriated by the legislative body of the municipality.

Although the SCPEA further requires the legislative body to provide the funds, equipment and accommodations necessary for a commission to do its work, this requirement was not included in the Missouri municipal land planning statutes. Official footnote 29 of the SCPEA discusses the merits of making this requirement mandatory, pointing out that elected officials seldom appreciate the importance of having a land plan and may even possess a somewhat jealous attitude toward the requirement. While recommending a mandatory requirement, official footnote 29 suggests that it can be changed to an optional one, if desired.

In following the optional approach, Missouri has indirectly tied the hands of every planning commission because a planning commission cannot undertake its duties and statutory mandate to make, adopt and carry out a land plan without proper funding. Obviously, the underlying motive is to provide some sort of budgetary control on the part of the municipality, but the failure or refusal to appropriate sufficient funds could cause a municipality to be in violation of the Missouri municipal planning statutes, and may ultimately jeopardize its re-zoning decisions and be actionable by a municipality's residents. It has been suggested that the SCPEA explicitly authorized piecemeal adoption of the land plan in recognition of the limited budgets of municipalities.[39]

VII. Capital Improvement Programs and Public Improvements

As discussed in my initial article, a primary function of a land plan is to coordinate location and construction of public improvements. The SCPEA scheme acknowledges that in order to provide effective planning, future public improvements must not be authorized or constructed until they have been submitted to the planning commission for a review of those public improvements as they relate to the land plan, and until the public has been given a chance to discuss and weigh the benefits and detriments of the proposed improvements.[40] To be effective, land plans must apply to public as well as private development, as contemplated by the SCPEA.[41]

The SCPEA scheme as adopted in Missouri incorporates two interrelated but separate concepts with respect to planning for public infrastructure. First is the *requirement* that the extent, character and location of all public improvements initially be submitted to the planning commission for review as set forth in § 89.380, RSMo.[42] The extent, location and character of improvements are relevant considerations in the review and approval process. The level of detail to be submitted to the commission for review, while greater than the "general" location, character and extent that may be included in the land use plan, should not include minutiae. However, sufficient detail should be included to allow the planning commission to fully consider the improvements bearing upon the land plan and the development of the municipality. The intent is for the planning commission to view these projects in a broad and comprehensive fashion and leave the details of the installation and construction to the municipal engineer and public works department.[43] While the planning commission is directed to review the project in comparison to the land plan, absolute adherence of the projects identified in or envisioned by the land plan is not required.[44] However, implied in this review requirement is the expectation that most projects will adhere to the land plan, and that the planning commission's recommendation will reflect this unless circumstances require otherwise. Having the planning commission, a non-elected body, review public improvement projects not only provides for more careful analysis, but also helps insulate the process from short-sighted political pressure.[45] The right of the legislative body or other applicable body or agency to override any disapproval of the planning commission by a super-majority gives flexibility to emergencies and projects overlooked in the land plan or deemed necessary due to changed circumstances.

With respect to public improvement approval, there are no cases in Missouri directly interpreting § 89.380, RSMo. However, there are currently at least 22 other states with similar statutes requiring submission of public improvement projects to the planning and zoning commission for review prior to the authorization of construction.[46] While the language of all of these statutes is not identical, it generally follows the original SCPEA section requiring submission of public improvement projects to the planning commission and the ability of the city council or other public body to override a negative recommendation by a super-majority vote. The cases interpreting these statutes, while few, uniformly acknowledge the requirement and mandate of these statutes, especially as to the municipality's own public improvements.[47] Most of these cases have focused on the ability of the municipality under such statutes to review public improvements of *other* governmental or quasi-governmental authorities and utility companies. These cases also indicate that the language contained in these types of statutes does not preclude expenditure of funds for design work before submission of plans (showing the "extent, location and character" of the public improvement) to the planning commission. In fact, one court even pointed out that no meaningful review could be made by a planning commission without professional design work. This analysis is consistent with the official footnotes of the SCPEA.[48]

The second concept with respect to planning for public infrastructure is the adoption of a CIP to provide a source of funding for public improvements. Local government practices vary as to how the document is prepared. The CIP is a multi-year scheduling of projects, and consists of project descriptions and tables showing the corresponding sources of revenue and expenditures year by year. The CIP is an essential part of any municipal fiscal system, and is one of the planning commission's most powerful tools for implementing a land plan.[49] The scheduling is prepared from a study of available fiscal resources and the choice of specific improvements to be constructed in the future. The CIP generally does not legally bind the municipality to make a particular expenditure in a given year. In contrast, a capital improvement budget refers to those public improvements that are to be scheduled for the next fiscal year. Usually, the capital improvement budget, is adopted subsequent to approval of a CIP as part of the annual operating budget and thereby assumes legal significance. Adoption of a CIP should be a key element of implementing a land plan, covering both anticipated public improvements and the repair and replacement of existing public infrastructure. These improvements then encourage and guide new development and redevelopment.

The SCPEA scheme does *not* mandate that the planning commission prepare the CIP or the capital improvement budget, and this approach is followed in the Missouri municipal land planning statutes.[50] However, the SCPEA includes provisions requiring the planning commission to "recommend to the appropriate public officials programs

for public structures and improvements and for the financing thereof." Missouri follows this language in § 89.370, RSMo, but substitutes the word "may" for "shall." Missouri also follows the SCPEA requirement that all public officials must furnish the planning commission all available information it requires to do its work upon request by the planning commission, and retains language granting the planning commission the power necessary to enable it to perform its functions and promote municipal planning. In short, while not required to provide capital improvement information, it appears that Missouri has recognized the need for the planning commission to do so in municipalities where such budgeting is necessary.

A CIP is not a format for approval of specific projects, but a schedule of projects and the manner in which they will be financed. The CIP is intended to carry out the program of implementation contained in the local comprehensive plan. The projects should already be identified in the municipality's land plan, or if not, then proposed by municipal departments or the public and approved as required in § 89.380, RSMo. While local practices vary, it is advisable that the planning commission review the draft CIP against the backdrop of the land plan and forward its recommendations to the legislative body. The legislative body then makes the final decision as to the amount and priority of funding for the projects in the CIP. If the legislative body approves the CIP, the first year of the CIP should be adopted as the capital improvement budget for that year. Once the capital improvement budget is adopted, municipal departments can begin to spend monies on individual projects, contract for architectural and engineering services and send out requests for construction bids. Planning commission staff, the public works department and the finance department should work with the planning commission in this regard to develop recommendations for a CIP and a capital improvement budget to be considered by the legislative body.

Many municipalities fail to submit public improvement projects to their planning commissions. Many municipalities also fail to involve the planning commission in any part of the CIP process. When the legislative body (or other body subject to § 89.380, RSMo) approves or authorizes public improvements without first submitting them to the planning commission and without its input on the CIP, it often subjects these decisions to short-term thinking and political pressure. This, in turn, could avoid long-term planning for the proper development of the municipality and result in development mistakes that may be difficult to correct in the future.

VIII. Update On National Planning Initiative

In my initial article, I briefly described the efforts of the APA to modernize state land planning laws. I also discussed the efforts made by six states in that regard and the *Growing Smart Legislative Guidebook*, a massive publication of the APA. Since publication of my initial article, 11 states have incorporated language from the *Growing Smart Legislative Guidebook* into laws or pending legislation.[51] The APA is also offering technical assistance to states and nonprofit groups on statutory reform efforts.

The APA has announced that it will publish a final edition of the *Growing Smart Legislative Guidebook* in late 2001. Additional material will include: authority for land development regulations, including zoning, subdivision, site plan review, and planned unit development; provisions for innovative regulation, including incentives for affordable housing and good community design, historic preservation, mitigation banking, transfer of development rights, and purchase of development rights; vesting; development impact fees; development agreements; a unified development permit review process; administrative and judicial review of land use decisions; enforcement of land development regulations; adequate public facilities ordinances; tax abatement, redevelopment, and tax increment financing; public record keeping of land development regulations and plans; and a model state "smart growth" act, which is an adaptation of a 1997 Maryland law.

Given the varied framework of planning statutes in Missouri, it is time for a reconsideration of the statutory scheme. More uniformity and some clarifications would be advisable, at a minimum. However, although the current system is workable given a proper understanding by municipalities and correct interpretation by the courts, a more ambitious effort may be worthwhile, if not essential, to better land planning in the future. The *Growing Smart Legislative Guidebook* would be of great assistance in this regard.

Recently, the Office of the Governor of Missouri prepared a draft of an executive order on a "Smart Growth" initiative. The draft was very broad and vague, and seemed to encourage land use control at a regional level rather than as historically at the local level. The Republican Party promptly issued a resolution condemning the effort. It is unknown at the time this article was written whether or not any executive order on this issue will be issued in the near future.

IX. Conclusion

As can be seen, there are many more important and necessary reasons for municipalities to prepare, adopt and carry out land plans than mere technical compliance with the statutory requirements found in Missouri's municipal planning statutes. It should not be forgotten that planning laws are enacted to ensure the orderly and effective development of land for the benefit of all citizens. Each land plan expresses the value judgment of the community and should be given great weight.[52] Urban sprawl, increasing population, redeveloping communities and economic development statutory requirements represent only a few of the many circumstances underscoring why proper planning is necessary and required. Adherence to proper planning practices should be applied to zoning decisions, and should also be required in the utilization of economic development and redevelopment laws. Regional and statewide planning should work in tandem to promote the coordinated development of regions containing many municipalities. Uniform implementation strategies should be formulated to give land plans greater strength and meaning. Perhaps this article and others like it will raise public awareness of Missouri's current planning problems, promote an interest in examining the purpose and utility of existing municipal land planning laws, and increase the possibility of updating or reforming this state's land planning laws as recommended by the APA.

Endnotes

[1] Stephen L. Kling, Jr., is a principal in the law firm of Jenkins & Kling, P.C., located in St. Louis. He received his J.D. from St. Louis University School of Law in 1981 and received his M.S. in finance from St. Louis University School of Business in 1980. Mr. Kling recently received planning awards from both the Missouri Chapter of the American Planning Association and its St. Louis Section for his initial article, "*Municipal Land Planning Law in Missouri*" published in the November/December 2000 issue of the Journal of the Missouri Bar. Mr. Kling would like to again thank Professor Daniel R. Mandelker, Stamper Professor of Law, Washington University School of Law, for his review and comments to this article, and his insights into the original intent and purpose of the redevelopment laws.

[2] Professor Daniel R. Mandelker is a Stamper Professor of Law at Washington University's School of Law in St. Louis. Besides writing almost innumerable articles on land use law, Professor Mandelker is also a long time reporter for the Land Use Law and Zoning Digest. Recently, Professor Mandelker has been honored with a mammoth issue of Washington University Law School's Journal of Law and Policy. This publication explores themes inspired by Professor Mandelker's research and writing on land use law.

[3] A Standard City Planning Enabling Act (Advisory Comm. on City Planning & Zoning, U.S. Dept. of Commerce 1928).

[4] A consistency doctrine is a judicial reaction against arbitrary decision making in the zoning process. *See* Daniel R. Mandelker, Land Use Law § 1.17 (4th ed. 1997).

[5] Robert Anderson, American Law of Zoning § 5.07 (3rd ed. 1986). However, a strong word of caution should be made. Ordinarily, a land use decision at the local government level enjoys a presumption of validity, yet a presumption shift should occur when a captured political process produces a plan that does not represent all of the interest groups in a community. The burden should shift to the municipality to justify its planning policies in that situation. *See generally* Daniel R. Mandelker, *Planning and the Law*, 20 Vt. L. Rev. 657 (Spring 1996).

[6] *See infra* Section IV and note 26.

[7] SCPEA, n. 2.

[8] Section 89.310, RSMo, 2000.

[9] *City of Olivette v. Graeler*, 338 S.W. 2d 827, 835 (Mo. 1960); *State ex inf. Nesslage v. City of Lake Saint Louis*, 718 S.W. 2d 214, 218 (Mo. App. E.D. 1986); *Hunt v. St.Louis Housing Authority*, 573 S.W. 2d 728, 731 (Mo. App. E.D. 1978). Further support for this point is the fact that the companion Missouri municipal zoning statutes in § 89.110, RSMo, apply to all cities, towns and villages in this state.

[10] Growing Smart State Summaries, Missouri (American Planning Association 1996).

[11] Section 99.640, RSMo 2000. Of course, this statute and the parallel statute under The Planned Industrial Expansion Law cited in the next footnote were unnecessary after adoption of the Missouri municipal planning statutes in 1963, which apply to all municipalities in this state.

[12] Section 100.600, RSMo 2000.

[13] Sections 253.415(6), RSMo 2000.

[14] Sections 72.403.3 and 72.423.4, RSMo 2000.

[15] Section 305.200, RSMo 2000.

[16] Growing Smart Legislative Guidebook, Phase I and II Interim Edition, Chapter 7 and Table 7-5 (American Planning Association 1998); Robert H. Freilich and The UMKC Law Review Staff, *Missouri Law of Land Use Controls with National Perspectives*, 42 UMKC L. Rev. 4, 15 (1973).

[17] *In the Matter of Nocita,* 914 S.W.2d 358, 359 (Mo. banc 1996); *John Deere Co. v. Jeff DeWitt Auction Co.*, 690 S.W. 2d 511, 514 (Mo. App. S.D. 1985).

[18] *Roberson v. City of Montgomery*, 233 So. 2d 69, 71 (Ala.1970).

[19] *DeVita v. County of Napa*, 889 P. 2d 1019, 1049 (Cal. 1995).

[20] Robert C. Simonds, Handbook for Planning Commissioners in Missouri 8 (3rd ed. 1991).

[21] *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[22] The land plan has been acknowledged as a factor but there is scant analysis. *See State, Chiavola v. Village of Oakwood,* 886 S.W. 2d 74, 78 (Mo. App. W.D. 1994); *J.R. Green Properties v. Bridgeton,* 825 S.W. 2d 684, 686 (Mo. App. E.D. 1992). There also is a recognition that zoning regulations, restrictions and districts be "well planned." *See State ex rel. Holiday Park v. City of Columbia,* 479 S.W. 2d 422, 424 (Mo. 1972); *State v. Eckhardt*, 322 S.W. 2d 903, 907 (Mo. 1959).

[23] Sections 99.800 - 99.865, RSMo 2000.

[24] Sections 353.010 - 353.190, RSMo 2000.

[25] Sections 99.300 - 99.660, RSMo 2000.

[26] Traditionally, the first steps in a redevelopment project are the review by a local agency of the comprehensive plan and, subsequently, the preparation of a detailed redevelopment plan following or coordinated with the comprehensive plan showing the proposed use of all land in the redevelopment area. *See* Note, *Public Use As a Limitation of Eminent Domain in Urban Renewal*, 68 Harv. L. Rev. 1422, 1423 (1955). *See also* Wilton s. Sogg and Warren Wertheimer Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 Harv L. Rev. 504, 510 (1959). Most early federal and state legislation required the urban redevelopment or renewal project plan to conform to, or be considered in relation to, the land plan for the community. *See generally* Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. Pa. L. Rev. 25 (1967). However, Missouri's statutes contain varied requirements as to the significance of the land plan. Additional confusion arises in that some of the early Missouri statutes were adopted before enactment of the Missouri municipal land planning statutes. Prior to the adoption of such statutes, many cities did not or could not prepare land plans, and some of those few that did, had their land plans adopted by the legislative body. The Missouri municipal planning statutes, of course, authorized municipalities to appoint planning commissions that were vested with the sole authority to make, adopt and carry out land plans. The author suggests that more uniformity in the redevelopment statutes with respect to land plans would be desirable and that blighting determinations that do not conform to recommendation

of the municipality's land plan be subject to greater scrutiny by the courts. Those few Missouri redevelopment statutes that do not require conformance to or consideration of the municipality's land plan should also be reviewed and, possibly, revised to allow more coordinated land planning. The Growing Smart Legislative guidebook contains a model statute for general purpose redevelopment that can be adapted to many types of areas involving redevelopment. The model statute requires, as a condition to approval of a redevelopment plan, the adoption of a land plan by the municipality as well as review by, and a written recommendation from, the planning commission.

[27] W.G. Roester, *Current Planning and Zoning Enabling Legislation for Cities and Counties in the State of Missouri*, 24 UMKC L. Rev. 221, 224 (1956).

[28] Section 353.170(1), RSMo2000.

[29] Section 99.810(2), RSMo 2000. However, the same precondition does not appear to apply to the exercise of such power by private urban development corporations under the same law.

[30] Sections 99.320(20) and (21), 99.420(2) and 99.430, RSMo 2000.

[31] Section 99.130, RSMo 2000.

[32] Section 100.400.1(5), RSMo 2000.

[33] Section 100.400.1(9), RSMo 2000.

[34] Growing Smart Legislative Guidebook, note 16 at 7-150.

[35] Section 89.360, RSMo 2000. Interestingly, the SCPEA provided for published notice in both a newspaper of general circulation within the municipality and in the local gazette. Section 89.360, RSMo, provides only for publication in a newspaper of "general circulation within the municipality." Many municipalities publish in both the local newspaper and a legal newspaper to avoid the issue of whether publication in a legal newspaper alone meets the requirement of the statute.

[36] SCPEA, n. 32.

[37] Kan. Stat. Ann. § 12-747 (2000 Supp.); Ky. Rev. Stat. Ann. § 147.670(9) (Lexis Nexis 2001).

[38] N.M. Stat Ann. § 3-19-12 (Michie 1978); Mich. Comp. Laws § 125.45 (1997). Missouri statutes do not so provide, and this argument was rejected in *City of St. Charles v. Devault Management*, 959 S.W. 2d 815, 822 (Mo. App. E.D. 1997).

[39] *Lazy Mountain Land Club v. Matanuska - Susitna Borough Board of Adjustment*, 904 P. 2d 373, 380 (Alaska 1995).

[40] SCPEA, n. 47.

[41] SCPEA, § 9 and Mandelker, note 26 at 25.

[42] *See* Simonds, note 20 at 13, for a discussion of the process to be followed.

[43] SCPEA, n. 31.

[44] SCPEA, n. 46.

[45] It has been suggested that 75-90% of the funds spent for public facilities are used on projects that have not been subjected to careful analysis that justifies their need and makes certain that they are part of a comprehensive long-range plan. *See* Herbert H. Smith, The Citizens Guide to Planning 143 (3rd ed. 1993).

[46] Ala. Code § 11-52-11 (1989); Ariz. Rev. Stat. Ann. § 9-461-07 (West 1996); Ark. Code Ann. § 14-56-412 (Michie 1987); Colo. Rev. Stat. § 31-23-209 (1998); Conn. Gen. Stat. § 8-24 (2001); Kan. Stat. Ann. § 12-748 (1991); La. Rev. Stat. Ann. § 33:109 (West 1988); Mich. Comp. Laws § 125.39 (1997); Minn. Stat. Ann. § 462.356 (West 2001); N.H. Rev. Stat. Ann. § 674:11 (1996); N.J. Rev. Stat. Ann. § 40:55D-31 (West Supp. 2001); N.M. Stat. Ann. § 3-19-11 (Michie 1978); N.D. Cent. Code § 40-48-16 (1983); Ohio Rev. Code Ann. § 713.02 (Baldwin Supp. 2001); Okla. Stat. Ann. tit. 11, § 47-109 (West 1994); 53 Pa. Cons. Stat. § 10303 (West Supp. 2001); S.C. Code Ann. § 6-29-540 (West Cum. Supp. 2000); S.D. Codified Laws § 11-6-19 (Michie 1995); Tenn. Code. Ann. § 13-4-104 (1999); Utah Code Ann. § 10-9-305 (1999); Va. Code Ann. § 15.2-2232 (Michie 1997); Wyo. Stat. Ann. § 15-1-506 (Lexis 2001).

[47] *Riggione v. Town of Orange,* 2001 WL 497101 (Conn. 2001); *Trivalent Realty Co. v. Town of Westport*, 477 A.2d 140, 142 (Conn. App. Ct. 1984); *Leoni v. Water Pollution Control Authority of the Town of Harwinton*, 571 A.2d 153, 156 (Conn. App. Ct. 1990); *Hall v. Housing Authority of Louisville*, 660 S.W.2d 674, 676 (Ky. Ct. App. 1983); *City of Annapolis vs. Waterman,* 745 A.2d 1000, 1006 (Md. 2000); *Lerner v. City of Minneapolis*, 169 N.W. 2d 380 (Minn. 1969); *Citizens to Protect Public Funds v. Board of Educ. of Parsippary - Troy Hills*, 98 A.2d 673 (N.J. 1953); *Cervase v. Kawaida Towers, Inc.,* 308 A.2d 47, 55 (N.J. Super. Ct. 1973); *Township Committee of the Township of Edgewater Park v. Edgewater Park Housing Authority,* 455 A.2d 569, 571 (N.J. Super. Ct. 1982); *City of Heath v. Lickins County Regional Airport Authority*, 237 N.E.2d 173, 179 (Ohio Misc. 1967); *Matter of Suntide Inn Motel, Oklahoma City, Okla.*, 563 P.2d 125, 128 (Okla. 1977); *Harpeth Valley Utilities v. Metropolitan Government,* 1998 WL 313397, No. 01A01-9712-CH-00699 (Tenn. App. 1998); *Board of Supervisors of Fairfax County v. Washington, D.C. SMSA L.P.*, 522 S.E. 2d 876, 879 (Va. 1999); *Concerned Tax Payers of Brunswick County v. County of Brunswick,* 455 S.E. 2d 712, 715 (Va. 1995).

[48] SCPEA, nn. 31, 37 & 44.

[49] Stuart Meck, *The CIP: A Planning Commissioner's Powerful Tool*, The Commissioner, 1,3 (1996); Michael Chandler; *Capital Improvement Programs*, Plan. Commissioner's J. 20 (1996-1997); Growing Smart Legislative Guidebook, note 16 at 7-251. The Growing Smart Legislative Guidebook contains a model statute authorizing a municipality to adopt a capital improvement plan and capital budget to carry out the program of implementation contained in the local land plan.

[50] Mandelker, note 4 at § 3.07.

[51] Of particular note is a recent statute enacted by the State of Kentucky that follows, but goes beyond, the recommendations of the Growing Smart Legislative Guidebook, and requires in great specificity that citizen members of planning commissions, as well as the planning staff, attend orientation training and continuing education programs on land use planning, zoning, public hearing procedures and other topics related to the planning commissioners' duties. *See* Ky. Rev. Stat. Ann. § 147A.027 (Michie 2001).

[52] Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 Mich. L. Rev. 922-31 (1976).