

Zoning as a Tool of Land Use Control

An analysis of the use of zoning as a land use control

I. INTRODUCTION

The most recognized and pre-dominant tool to affect land use control in our country is zoning. There are other important tools as well, such as land use planning and subdivision regulations, but historically these have played a far smaller role in land use control than zoning, and they are generally less dramatic and encompassing.

Surprisingly, comprehensive zoning laws have only been in existence for a relatively short period of time. While the statutory scheme for zoning in Missouri and in other states has remained essentially unchanged for decades, the application and interpretation of such statutes have varied over time. This article examines the background, purpose, and limitations of zoning, as well as changes in the application and interpretation of zoning law.

II. HISTORY AND BACKGROUND

Prior to 1910, comprehensive zoning legislation on any level simply did not exist in this country. Dangerous, odoriferous, unsightly or objectionable land uses were controlled by specific laws that were primarily nuisance-based. Ordinances limiting or prohibiting specific uses that were clearly obnoxious or socially unacceptable were generally upheld by the courts.²

The first generally recognized comprehensive zoning code for an entire city was the New York City Zoning Resolution of 1916.³ New York City, being one of the first cities to experience urban problems as American cities expanded, had previously enacted legislation to control tenements and already had in place various codes for sanitation and new construction. The enactment of the zoning resolution in New York City was partly in direct response to the construction of the Equitable Building,



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which had no setbacks and blocked light and air from residences and other buildings in the area. The 1916 New York City Zoning Resolution addressed the type, location and use of buildings and structures. Many cities followed New York City's example, but the efforts were localized and conducted on a piecemeal basis. Furthermore, most of the early zoning codes focused on building construction rather than building location and land use.

Recognizing the importance of zoning and that it had to withstand constitutional scrutiny, the U.S. Department of Commerce organized an advisory committee in 1921 to draft model planning and zoning acts that could be adopted by the states. The first model act, entitled "A Standard State Zoning Enabling Act" (SZE), was first printed in 1924 with a revised version in 1926, and the second, "A Standard City Planning Enabling Act" (SCPEA), was first printed in 1927 with a revised version in 1928.⁴ The SZE dealt with regulation of current land use, while the SCPEA dealt with the adoption of comprehensive plans to guide future zoning decisions, public improvement approvals and subdivision regulation. The advisory committee also published primers for each of these model acts to assist the states in adopting them. The model acts provided for zoning and planning powers to be exercised only by local governmental authorities — in particular, municipalities.

Nearly all states eventually adopted zoning enabling acts descended from or influenced by the SZE. However, the SCPEA was adopted more slowly with several modifications in a large majority of the states.⁶ While the SZE was recommended to be adopted verbatim,⁷ the SCPEA contained various alternative and optional provisions.⁸

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² See, e.g., *L'Hote v. City of New Orleans*, 177 U.S. 587, 600 (1900).

³ DANIEL R. MANDELKER, LAND USE LAW § 1.01 (5th ed. 2003); JULIAN C. JUERGENSEMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 3.3 (2003).

The planning doctrine embodied in the SCPEA was intended to complement zoning and to be the primary basis for zoning decisions.⁹ Almost all states incorporated into their zoning statutes the SZEAL language expressly providing that zoning regulations shall be made "in accordance with" a comprehensive plan.¹⁰ However, because of the more pressing need for zoning to prohibit objectionable land uses and the fact that the SCPEA was not published until after the SZEAL, the concept of planning as the primary basis for zoning decisions was somewhat lost in the early legislation and subsequent interpretation by the courts. In cases involving challenges to zoning decisions, some courts found, somewhat disingenuously, that the master zoning ordinance itself could be used for support that a property-specific zoning decision was rational and in accordance with a comprehensive plan, even though no separate planning document or study existed.¹¹

The following SZEAL provisions are found in most state enabling statutes: (i) delegation of zoning power to local government; (ii) the power to initially divide the local government's territory into districts; (iii) a statement of purpose for zoning regulations; (iv) procedures for establishing and amending zoning regulations and a requirement that such

regulations be made in accordance with a comprehensive plan; (v) the approval of a temporary zoning commission to advise the city on adopting initial zoning regulations; (vi) authorization for a board of adjustment with quasi-judicial powers to authorize hardship variances and special exceptions to the strict letter of the zoning ordinances; and (vii) authorization for the adoption of enforcement mechanisms.

The type of zoning authorized by the SZEAL is sometimes referred to as "Euclidean Zoning," named after a famous court case. Euclidean Zoning is characterized by the division of a local government's jurisdiction into uniform districts, regulation of density, bulk and use in a consistent manner in each district, and the presumptions that uses should be strictly separated and densities should be restrained as much as possible.¹² Euclidean Zoning was upheld over a constitutional attack in the landmark case of *Village of Euclid, Ohio v. Ambler Realty Co.*¹³

Missouri statutes authorizing municipalities to zone originated from the SZEAL.¹⁴ These statutes are found in §§ 89.010-89.140, RSMo, and enable municipalities (cities, towns and villages) to zone. Like a number of rural states, Missouri also adopted zoning statutes that authorized counties to zone. The history and purpose of these statutes is unclear,

though they appear to be based upon the SZEAL.¹⁵ Moreover, the county zoning statutes were enacted in a bewildering array of sections based, in part, on the classification of counties.¹⁶ These statutes also include alternative county zoning and special zoning provisions for counties with special circumstances. The county zoning statutes may be found in Chapter 64, RSMo. Separate zoning authority is also provided for townships under Chapter 65, RSMo. Unlike the municipal zoning statutes, which are separate from municipal planning statutes, the county and township statutes have planning and zoning powers combined in a disorganized manner, and the planning portions do not contain important elements found in the Missouri municipal planning statutes, which are based on the SCPEAL. The county and township zoning statutes contain several other key deviations from the municipal zoning statutes, such as requirements for a vote of the people as a precondition to the exercise of planning and zoning powers¹⁷ and protections against control over certain uses of agricultural land.¹⁸

Independent of the Missouri enabling statutes, certain counties with constitutional charters are empowered under the Missouri Constitution to adopt zoning and planning regulations.¹⁹ Constitutional charter cities, however, do not have that

4 Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, in 1 MODERNIZING STATE PLANNING STATUTES: THE GROWING SMARTSM WORKING PAPERS 1, 1-2 (1996).

5 JUERGENSEMEYER & ROBERTS, note 3 at § 3.6; Ruth Knack et al., *The Real Story Behind the Standard Planning Acts of the 1920's*, LAND USE L. & ZONING, Feb. 1996, at 3, 8.

6 AMERICAN PLANNING ASSOCIATION, GROWING SMARTSM LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 7-277 (Stuart Meck ed., 2002).

7 A STANDARD STATE ZONING ENABLING ACT 1 (Advisory Comm. on Zoning, Dep't of Commerce 1926).

8 A STANDARD CITY PLANNING ENABLING ACT 2 (Advisory Comm. on City Planning & Zoning, Dep't of Commerce 1928); MANDELKER, note 3 at § 3.05.

9 See Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL'Y 295, 301-303 (2000) (citing Harland Bartholomew, *What Is Comprehensive Zoning?*, in PLANNING PROBLEMS OF TOWN, CITY AND REGION: PAPERS AND DISCUSSIONS AT THE TWENTIETH NATIONAL CONFERENCE ON CITY PLANNING 47, 50 (1928)).

10 "The notion that zoning regulations should be imposed only in accordance with a comprehensive plan is founded on the basic premise that zoning is a means rather than an end. The legitimate function of a zoning regulation is to implement a plan for the future development of the community." 1 ANDERSON'S AMERICAN LAW OF ZONING § 5.02 (Kenneth H. Young ed., 4th ed. 1996).

11 See, e.g., *Strandberg v. Kansas City*, 415 S.W.2d 737, 744 (Mo. banc 1967); *State ex rel. Westside Dev. Co. v. Weatherby Lake*, 935 S.W.2d 634, 640 (Mo. App. W.D. 1996); *State ex rel. Chiavola v. Vill. of Oakwood*, 886 S.W.2d 74, 78 (Mo. App. W.D. 1994). See also JUERGENSEMEYER & ROBERTS, note 3 at § 2.8; Meck, note 9 at 305 (citing Edward J. Sullivan & Thomas G. Pelham, *The Evolving Role of the Comprehensive Plan*, 29 URB. LAW. 363, 364 (1997)).

12 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1.5 (Edward H. Ziegler, Jr., ed., 2005).

13 272 U.S. 365, 397 (1926).

14 *State ex rel. Wahlmann v. Reim*, 445 S.W.2d 336, 338 (Mo. banc 1969); *State ex rel. Oliver Cadillac Co. v. Christopher*, 298 S.W. 720, 724-25 (Mo. banc 1927); *State ex rel. Chiavola v. Vill. of Oakwood*, 886 S.W.2d 74, 79 (Mo. App. W.D. 1994).

15 There is some authority that the initial county zoning and planning statutes were "enacted primarily for the protection of the inhabitants of a rapidly growing community caused by the location of United States war industries" at the beginning of World War II. *State ex rel. Wallach v. Loesch*, 169 S.W.2d 675, 681 (Mo. 1943).

16 See *Gash v. Lafayette County*, 245 S.W.3d 229, 232 n.6 (Mo. banc 2008). See generally ch. 64, RSMo 2000 & Supp. 2007.

17 Sections 64.005, 64.211.1, 64.212.1, 64.530, 64.845, RSMo 2000 (counties); § 65.650, RSMo 2000 (townships).

18 Sections 64.090.2, 64.620.2, 64.890.2, RSMo 2000 (counties); § 65.677, RSMo 2000 (townships).

19 *Casper v. Hellage*, 359 S.W.2d 781, 789-90 (Mo. 1962); Mo. CONST. art. VI, §§ 18(a)-(g).

right due to limitations in their constitutional grant, and their local zoning ordinances cannot conflict with Chapter 89, RSMo.²⁰

III. PURPOSE AND APPLICATION OF ZONING

The purpose of zoning is rather simple: to control land use. Because zoning focuses on current uses of land, it is different from other land use controls such as planning (which guides future development and regulates the subdivision of land) and building codes (which deal with the construction of structures). Zoning is affected by local ordinances enacted by local governments pursuant to the grant of authority by state statute or state constitution. A local government, as its first step in zoning, enacts a master zoning ordinance that divides the jurisdiction into different use districts or zones. Most master zoning ordinances include residential, agricultural, commercial and industrial zoning districts. The universal rule is that for such districts to be valid, they "must be described with reasonable certainty and have definite boundaries."²¹ Another core principle is uniformity — while one district may have different restrictions from another, restrictions within each district must be uniform for all properties within that district.²²

A typical master zoning ordinance consists of two parts: a map and a text. The zoning map shows how a community is divided into different use districts or zones. By referring to the map, one can identify the zoning district in effect for individual parcels of land in that community. The zoning text explains the rules and restrictions that apply in each zoning district and sets forth a series of procedures for

administering and applying the master zoning ordinance. By referring to the text of the master zoning ordinance, one can identify the uses permitted within each zoning district and the dimensional restrictions that apply to buildings on property within each district. A master zoning ordinance may also contain provisions for protection of historic districts and environmentally sensitive areas, use of commercial or political signs, parking and loading, and other land use matters.

Zoning districts assigned to *specific properties* can be changed by following the amendment procedure set forth in the master zoning ordinance, provided the notice and hearing requirements of the state statutes are followed. This process is commonly called a "rezoning" and can generally be initiated by the particular property owner (or a party holding a contract to the property) or by the local government. If such an amendment is approved (affected by an ordinance of the legislative body), a change in the zoning map must also be made to show the new zoning district applicable to the affected property. These property-specific zoning ordinances technically amend the master zoning ordinance, but are subject in all respects to the master zoning ordinance.²³ This important concept is sometimes misunderstood by the courts.

The permitted uses and rules that are set forth in the text of the master zoning ordinance for each zoning district can also be changed by following the amendment process outlined in the master zoning ordinance. This type of amendment (also affected by an ordinance of the legislative body) is referred to as a "text amendment" and many times requires sponsorship or

recommendation by the planning commission or an individual legislator. A text amendment will change the rules for *all* properties in the jurisdiction zoned for that particular district. For example, if the text for the uses permitted in a residential zoning district is changed to allow social clubs, then each property having that residential zoning classification will be permitted to be used for a social club.

In addition to permitted uses, zoning districts may provide for other uses on a conditional basis. Unless certain conditions are met, these uses are generally incompatible with nearby properties.²⁴ The decision by a legislative body to grant or deny "a conditional use permit is administrative in nature and must be made reasonably and not arbitrarily."²⁵ If the proposed conditional use meets the standard of the zoning district regulations for a conditional use permit, the agency authorized to issue the permit is "bound to issue" it "subject to reasonable conditions" designed "to mitigate any harmful [impact] that might otherwise result" from the use.²⁶

Master zoning ordinances of local governmental authorities vary greatly, both as to coverage of districts and as to procedures, which is due in part to the content of Missouri's zoning enabling statutes. The enabling statutes do not require any specific type or number of zoning districts. Although some of the variation in local master zoning ordinances with respect to coverage of districts is due to differing local preferences, many times there are practical reasons for the variations. A small jurisdiction may only need its master zoning ordinance to provide for residential, commercial and industrial districts. On the other hand, a large jurisdiction may have

20 *City of Springfield v. Goff*, 918 S.W.2d 786, 789-90 (Mo. banc. 1996); Mo. CONST. art. VI, § 19(a).

21 *State ex rel. Casey's General Stores, Inc. v. City Council of Salem, Mo.*, 699 S.W.2d 775, 777 (Mo. App. S.D. 1985).

22 *City of Richmond Heights v. Richmond Heights Mem'l Post Benevolent Ass'n*, 213 S.W.2d 479, 480 (Mo. 1948) ("In any event the regulation and restriction into districts must be reasonable, uniform or universal and nondiscriminatory, the restrictions having a fair tendency to accomplish or aid in the accomplishment of some purpose for which the city may exercise its power."); *State ex rel. Oliver Cadillac Co. v. Christopher*, 298 S.W. 720, 726 (Mo. banc 1927) ("A zoning ordinance cannot deny the equal protection of the laws, it must rest upon some rational basis of classification and apply alike to all persons and things falling within a designated class."). See also MICHAEL A. ZIZKA ET AL., STATE AND LOCAL GOVERNMENT LAND USE LIABILITY § 2:5 (2007) (noting that the uniformity requirement "has largely been subsumed by equal protection analysis").

23 See *Hoag v. McBride & Son Inv. Co.*, 967 S.W.2d 157, 170 (Mo. App. E.D. 1998).

24 *State ex rel. Straatmann Enterprises, Inc. v. County of Franklin*, 4 S.W.3d 641, 650 (Mo. App. W.D. 1999) (quoting *State ex rel. Dotson v. County Comm'n*, 941 S.W.2d 589, 592 (Mo. App. W.D. 1997)).

25 *State ex rel. St. Louis County, Mo. v. Jones*, 498 S.W.2d 294, 299 (Mo. App. E.D. 1973).

26 *State ex rel. Presbyterian Church of Washington, Mo. v. City of Washington, Mo.*, 911 S.W.2d 697, 701 (Mo. App. E.D. 1995) (quoting 6 ROHAN, ZONING AND LAND USE CONTROLS ch. 44.01[4], at 19).

broadier needs requiring multiple districts in each category based upon distinctions such as lot size and aggregate acreage. A large jurisdiction may also require special needs districts tailored for specific uses such as higher education, medical, mixed-use or environmentally sensitive areas.

The Missouri zoning statutes all have certain express requirements and limitations for a rezoning. These requirements must be followed and cannot be undermined by local ordinances. The Missouri municipal zoning statutes only require a published written notice and a public hearing prior to a vote by the legislative body on a rezoning application. Given the view of many courts that publication in a legal newspaper meets the publication requirement, this type of notice seems hardly adequate.²⁷ Several of the county zoning statutes and the township zoning statutes have additional procedural requirements.²⁸

Another express statutory limitation on rezonings is the statutory protest. All of the Missouri zoning statutes provide that neighboring property owners may protest a rezoning by filing a petition signed by the owners of the requisite percentage of property surrounding the property to be rezoned.²⁹ The filing of such a protest changes the vote of the legislative body necessary to approve the rezoning from a simple majority to a supermajority.³⁰ Missouri courts have stated that the purpose of these statutes is to require "serious

deliberation and greater unanimity of opinion" where such protests are filed³¹ and to allow interested parties the opportunity to profoundly affect the outcome of an application for rezoning.³² The statutory protest is derived from the SZEa, which noted the requirement to be a sound procedure having the effect of stabilizing zoning.³³ Like other express statutory zoning rights, the statutory protest cannot be limited or made subject to restrictions as to time or manner by local ordinance.³⁴

Although local governments must comply with minimum statutory procedural requirements, such as those regarding notice, hearing, and statutory protest, the zoning statutes grant local governments discretion in establishing procedures and imposing additional requirements for rezonings under their master zoning ordinances.³⁵ For example, a master zoning ordinance may contain special requirements regarding notice to nearby property owners. A common requirement is that owners of property located within a certain distance of the subject property be notified by letter of the proposed zoning change. Another common requirement is the posting of a sign on the subject property in order to provide notice and increase awareness of the pending request to change the zoning.

Other procedural requirements frequently included in a local government's master zoning ordinance involve voting, site plans, and multiple applications. Many local governments require planning com-

missions to review rezoning and other land use applications, and a few additionally require a planning and zoning committee to review such applications. Where such review is required, the ordinance may provide that when the planning commission gives the legislative body a negative recommendation as to a rezoning or conditional use permit application, the application may be approved only by a supermajority vote of the legislative body. The purpose of this provision is to give appropriate deference to the planning commission, which is the body of local government that focuses exclusively on land use. A master zoning ordinance may also contain requirements that site concept/development plans be submitted in connection with a rezoning proposal so that more certainty as to the use of the property can be established. Many master zoning ordinances also include limitations on how often a rezoning or conditional use permit application may be filed if the same application has previously been denied.

The Missouri zoning statutes provide for the creation of a board of adjustment by a legislative body.³⁶ The function of such a board was a core requirement of the SZEa. The board of adjustment has the power to grant variances from zoning restrictions when the restrictions will cause hardship to the applicant.³⁷ This board of adjustment can also be empowered by the zoning ordinance to consider appeals of decisions made by the city's zoning

27 As the American Planning Association has noted:

The purpose of notice is to have interested persons appear at the hearing and present their views on the proposed ordinance. When the proposed ordinance is of general importance, notice by publication is sufficient. However, when an ordinance affects a relatively small number of specified landowners more or differently than the general class of landowners or residents, the opportunity for these persons to present their opinion becomes even more important, and such persons thus must receive direct notice by certified mail.

AMERICAN PLANNING ASSOCIATION, note 6 at 8-32.

28 These additional requirements include a report or recommendation of the local planning body and notice of the hearing sent by certified mail to nearby property owners. Sections 64.271, 64.645, 64.670, 64.863, 64.875, RSMo 2000 (counties); § 65.692, RSMo 2000 (townships).

29 Sections 64.140, 64.271.3, 64.670, 64.875, RSMo 2000 (counties); § 65.692, RSMo 2000 (townships); § 89.060, RSMo 2000 (municipalities).

30 But see § 65.692, RSMo 2000 (requiring unanimous vote of township board to approve a rezoning in the face of a statutory protest).

31 *Dahman v. City of Ballwin*, 483 S.W.2d 605, 610-11 (Mo. App. E.D. 1972).

32 *State ex rel. Freeze v. City of Cape Girardeau*, 523 S.W.2d 123, 125 (Mo. App. E.D. 1975). See also *Bourgeois v. Town of Bedford*, 412 A.2d 1021, 1023 (N.H. 1980) (stating that purpose of protest petition statute is "to afford landowners protection from hastily conceived and ill-advised amendments to zoning ordinances").

33 A STANDARD STATE ZONING ENABLING ACT 7-8 n.31 (Advisory Comm. on Zoning, Dep't of Commerce 1926).

34 *Geneva Inv. Co. v. City of St. Louis, Mo.*, 87 F.2d 83, 89 (8th Cir. 1937) ("Nothing is delegated to the city legislative body with reference to protests."); *Whitaker v. City of Springfield, Mo.*, 889 S.W.2d 869, 872 (Mo. App. S.D. 1994). Counties adopting charters pursuant to article VI, §§ 18(a)-(g) of the Missouri Constitution could, however, impose such restrictions, given their unlimited constitutional grant. See note 19 and accompanying text.

35 Sections 64.110, 64.265, 64.640, 64.860, RSMo 2000 (counties); § 65.682, RSMo 2000 (townships); § 89.050, RSMo 2000 (municipalities). See also *Murrell v. Wolff*, 408 S.W.2d 842, 848 (Mo. 1966).

36 Sections 64.120, 64.281, 64.610, 64.660, 64.840, 64.870, RSMo 2000 (counties); § 65.675, RSMo 2000 (townships); § 89.080, RSMo 2000 (amended 2008) (municipalities).

37 A variance allows property to be used in a manner that does not comply with the literal requirements of the zoning ordinance. *Rosedale-Sinker Improvement Ass'n v. Bd. of Adjustment of City of St. Louis*, 425 S.W.2d 929, 933, 937 (Mo. banc 1968).

administrator or building inspector.

Finally, Missouri zoning statutes contain provisions for enforcement of and penalties for violating zoning ordinances.³⁸ These provisions are often supplemented by ordinances of the local government. The rights and remedies under the Missouri zoning statutes are not meant to be exclusive.

IV. LIMITATIONS OF ZONING POWER

In a majority of states, including Missouri, the exercise of zoning power is considered a legislative function.³⁹ The exercise of zoning power by local governments must conform to the provisions of the applicable enabling statutes or constitutional grant, as well as any additional requirements of the local master zoning ordinance. This includes adherence to the procedural requirements, which in many instances require published notice and a public hearing.⁴⁰ Failure to follow the required protocols can be fatal to the exercise of zoning power, particularly where there is a rezoning.⁴¹ Aside from these issues, there are other limitations on and exemptions from a local government's zoning power. While an exhaustive analysis of these limitations and exemptions is beyond the scope of this article, an overview is essential to gain a basic understanding of how they can restrict a local government's zoning power.

A. Constitutional and Statutory Limitations

Since the exercise of zoning power necessarily affects property rights, that exercise may be limited by the United States Constitution or state constitutions.

The Fifth and Fourteenth Amendments to the United States Constitution, as well as similar provisions under article I, §§ 10 and 26 of the Missouri Constitution, may be applicable. The Fifth Amendment prohibits the taking of private property for public use without payment of just compensation and the deprivation of a person's property without due process of law. The Fourteenth Amendment makes these restrictions applicable to local governments and their zoning regulations. A "taking" claim may arise where the impact of a zoning regulation on private property rights is so burdensome that it essentially takes away the value of the property and violates the constitutional guarantee that property shall not be taken for a public use without just compensation.

Due process claims fall into two general categories, procedural and substantive. A procedural due process claim generally involves a failure of the local government to provide reasonable notice and an opportunity to be heard. In the zoning context, procedural due process claims usually arise where the zoning procedures, such as the required advance publication of notice and public hearing, are not fairly conducted. A substantive due process claim is different in that the focus is not on the technical zoning procedures, but rather on protection against a fundamentally unfair process, such as where an arbitrary and capricious action has been taken by the local government in the zoning process. This type of claim can arise in a variety of circumstances, such as where a zoning of property does not allow an owner any reasonable way to use his or her property, where the zoning has no rational basis in

land planning and/or appears to punish or single out one or more owners, and where a zoning decision is made for purely political reasons or irrational deferral to political conditions.

The Equal Protection Clause of the United States Constitution may be violated in a zoning context where a zoning regulation treats one or a few parcels of property differently from similarly situated properties with no justification. For a claim of this nature to succeed, the zoning generally must affect a fundamental right or suspect classification, unless the action is irrational and wholly arbitrary. The First Amendment to the United States Constitution can also limit zoning power if the zoning regulation improperly restricts the freedoms of speech or religion. Freedom of speech claims in the zoning context commonly arise out of restrictions on signs and adult entertainment. As to freedom of religion claims in the zoning context, Congress has recently addressed the issue by adopting the Religious Land Use and Institutionalized Persons Act of 2000 (the "RLUIPA").⁴² The RLUIPA prohibits a local government from implementing or adopting a land use regulation in a manner that imposes a substantial burden on religious exercise unless it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.⁴³ Various other federal statutes may also restrict the use of zoning power in particular circumstances. The Fair Housing Act,⁴⁴ the Telecommunications Act of 1996,⁴⁵ the Federal Land Policy and Management Act of 1976,⁴⁶ the Federal Power Act⁴⁷ and the Federal Aviation Act of 1958,⁴⁸ among others, can either

38 Sections 64.150, 64.160, 64.291, 64.295, 64.650, 64.690, 64.865, 64.895, RSMo 2000 (counties); §§ 65.687, 65.697, RSMo 2000 (townships); § 89.120, RSMo 2000 (amended 2008) (municipalities); §§ 89.491, RSMo 2000 (municipalities).

39 *Strandberg v. Kansas City, Mo.*, 415 S.W.2d 737, 742 (Mo. banc 1967); *State ex rel. Barber & Sons Tobacco Co. v. Jackson County, Mo.*, 869 S.W.2d 113, 117 (Mo. App. W.D. 1993) (noting that "zoning, rezoning, and refusals to rezone are legislative acts"); MANDELKER, note 3 at § 6.68.

40 Sections 89.050, 89.060, RSMo 2000.

41 See, e.g., *City of Monett v. Buchanan*, 411 S.W.2d 108, 113 (Mo. 1967); *Wippler v. Hohn*, 110 S.W.2d 409, 411 (Mo. 1937); *Moore v. City of Parkville*, 156 S.W.3d 384, 387-88 (Mo. App. W.D. 2005); *Temple Stephens Co. v. Westenhaver*, 776 S.W.2d 438, 441-42 (Mo. App. W.D. 1989); *State ex rel. Freeze v. City of Cape Girardeau*, 523 S.W.2d 123, 126 (Mo. App. E.D. 1975).

42 42 U.S.C. §§ 2000cc to 2000cc-5.

43 42 U.S.C. § 2000cc(a)(1).

44 42 U.S.C. §§ 3601-3631. See *Huntington Branch, NAACP v. Town of Huntington, N.Y.*, 844 F.2d 926, 940-41 (2d Cir. 1988) (holding town's refusal to amend zoning ordinance and refusal to rezone certain site violated Fair Housing Act).

45 Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 U.S.C. and 47 U.S.C.).

46 16 U.S.C. § 1338a; 43 U.S.C. §§ 1701-1785.

47 16 U.S.C. §§ 791a-825r. See *Hackett v. J.L.G. Properties, LLC*, 940 A.2d 769, 778-79 (Conn. 2008) (holding town's zoning regulations were preempted by the Federal Power Act).

48 Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. §§ 40101-50105; see Pub. L. No. 103-272, 108 Stat. 745 (1994)). See *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 625-26, 640 (1973) (holding city ordinance invalid because preempted by Federal Aviation Act of 1958).

preempt local zoning law or require local zoning law to comply with the criteria of the federal law.

The most common attack on a zoning ordinance as it applies to a particular piece of property is that it is arbitrary or capricious, or, more simply, that it is unreasonable. This is essentially a claim that a zoning regulation violates constitutional protections, usually substantive due process or equal protection. In measuring the reasonableness of a zoning regulation, Missouri courts weigh the benefit to the general public against any private detriment by considering several factors. These factors include the following: (i) adaptability of the property to its zoning,⁴⁹ (ii) significant reduction in value of the property based upon the zoning,⁵⁰ (iii) incompatibility of the zoning with surrounding uses,⁵¹ and (iv) conformity of the zoning to the local government's comprehensive plan.⁵² Generally, no single factor is dispositive in the reasonableness inquiry.⁵³ A challenge to a zoning regulation may not only be made by the affected property owner, but also by owners of property in close proximity.⁵⁴

Of great significance to land use attorneys is that in cases challenging legislative land use decisions such as zoning, Missouri, like most other states, has employed a standard of review that must be

fully understood before pursuing a court attack on a zoning ordinance.⁵⁵ Missouri courts recognize a presumption that zoning ordinances are valid.⁵⁶ This means the party attacking a zoning regulation has the burden to prove that it is unreasonable. The courts utilize a "fairly debatable" test in this regard, meaning if the reasonableness or constitutionality of a zoning regulation is fairly debatable, the zoning regulation will stand.⁵⁷ In essence, the courts do not want to substitute themselves as another body weighing the propriety of a zoning ordinance. Rebutting this presumption can be difficult.

The "fairly debatable" standard of review should not be confused with the somewhat lesser standard of review that is required for review of administrative land use decisions, such as approvals of development plans, plats, and conditional use permits, and review of decisions of boards of adjustment. The standard of review for such administrative decisions is that the factual basis for the decision must be supported by substantial and competent evidence based upon the whole record.⁵⁸ Because of the differing standards of review applied to land use decisions, care must be taken in determining whether a decision is legislative or administrative. This determination requires analysis of

the type of decision and does not necessarily depend on which body makes the decision.⁵⁹

Rezoning applicants sometimes challenge the propriety of adding restrictions or conditions to a rezoning approval. Restrictions or conditions imposed by a governmental body are generally upheld if they are reasonable and in the public interest. This issue frequently arises with respect to dedications or exactions of part of the subject property for public purposes, such as streets. If the dedication or exaction bears a reasonable relationship to a rezoning, the requirement will be upheld. However, if it bears no reasonable relationship to the activities of the developer seeking the rezoning, it is forbidden.⁶⁰

B. Other Governmental Units

As a general rule, government authorities and agencies are exempt from zoning regulations of a local government.⁶¹ There are a number of cases involving this subject in Missouri, most of which deal with intergovernmental disputes. The analysis of these cases, as well as the extent of a local government's exemption from its own zoning regulations, is beyond the scope of this article.

49 *Huttig v. City of Richmond Heights, Mo.*, 372 S.W.2d 833, 841 (Mo. 1963).

50 *Rhein v. City of Frontenac*, 809 S.W.2d 107, 110 (Mo. App. E.D. 1991).

51 *Huttig*, 372 S.W.2d at 839-41.

52 *J.R. Green Properties, Inc. v. City of Bridgeton*, 825 S.W.2d 684, 686 (Mo. App. E.D. 1992). Missouri courts have yet to address the degree of significance of adherence to the local government's comprehensive plan (the comprehensive plan is sometimes also referred to as a land use plan, master plan, zoning plan, or city plan). The Missouri municipal planning statutes require the formal adoption of a land use plan document for municipalities that have appointed a planning commission. § 89.340, RSMo 2000. Under most of the county and township statutes, the adoption of a land use plan document is not obligatory. §§ 64.040, 64.231, 64.550, 64.815, RSMo 2000 (counties); § 65.662, RSMo 2000 (townships). Some courts from other jurisdictions hold that once a specific comprehensive planning document is adopted and is reduced to writing, there must be evidence that the rezoning ordinance was enacted in specific consideration of the comprehensive plan. See, e.g., *Webb v. Giltner*, 468 N.W.2d 838, 841 (Iowa Ct. App. 1991); *Udell v. Haas*, 235 N.E.2d 897, 901-02, 905 (N.Y. 1968) (en banc). The *Urban Lawyer*, a publication that annually reviews the significance of the comprehensive plan, recently concluded that "the comprehensive plan is gradually gaining more credence, through state legislation and court decisions, as the standard by which land use regulations and actions are judged." Edward J. Sullivan, *Recent Developments in Land Use, Planning and Zoning Law: Recent Developments in Comprehensive Planning Law*, 39 URB. LAW. 681, 694 (2007).

53 *Rhein*, 809 S.W.2d at 110.

54 *Moore v. City of Parkville*, 156 S.W.3d 384, 391 n.3 (Mo. App. W.D. 2005); *Allen v. Coffel*, 488 S.W.2d 671, 675 (Mo. App. W.D. 1972).

55 It remains to be seen what standard of review will be applied in challenges to zoning and rezoning decisions of certain counties. See *Gash v. Lafayette County*, 245 S.W.3d 229, 233-34 (Mo. banc 2008) (holding that § 64.870.2, RSMo, which provides for judicial review of decisions of fourth class county commissions by writ of certiorari, precludes judicial review of declaratory judgment actions challenging zoning and rezoning decisions by such county commissions).

56 *Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 778 (Mo. banc 1952).

57 *Binger v. City of Independence, Mo.*, 588 S.W.2d 481, 485-86 (Mo. banc 1979) (discussing "fairly debatable" standard in context of annexation decision); *Landau v. Levin*, 213 S.W.2d 483, 485 (Mo. 1948); *Summit Ridge Dev. Co. v. City of Independence*, 821 S.W.2d 516, 519 (Mo. App. W.D. 1991).

58 *Platte Woods United Methodist Church v. City of Platte Woods*, 935 S.W.2d 735, 738 (Mo. App. W.D. 1996).

59 *State ex rel. Ludlow v. Guffey*, 306 S.W.2d 552, 557 (Mo. banc 1957).

60 *State ex rel. Mo. Highway & Transp. Comm'n v. Sturmjels Farm Ltd. P ship*, 795 S.W.2d 581, 586 (Mo. App. E.D. 1990); *Treme v. St. Louis County, Mo.*, 609 S.W.2d 706, 716-17 (Mo. App. E.D. 1980).

61 *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 455-56 (Mo. 1959); *City of Vinita Park v. Girls Sheltercare, Inc.*, 664 S.W.2d 256, 260-63 (Mo. App. E.D. 1984). See generally MANDELKER, note 3 at §§ 4.26-4.40 (discussing the nature and scope of governmental immunity from local zoning ordinances in a variety of situations).

V. CHANGES IN ZONING PHILOSOPHY

Euclidean Zoning is commonly viewed as a uniform system of zoning that promotes separation and protection of land uses. A popular phrase adopted to describe the purpose of this type of zoning was to “keep the pig out of the parlor.”⁶² Under the strict interpretation of this type of zoning was a rather rigid system that envisioned only minimal change.⁶³ Early Missouri case law acknowledges this view.⁶⁴

However, as development intensified after World War II, the need for more frequent changes in zoning for particular properties became apparent. Property-specific amendments to the master zoning ordinance (rezonings) became more common, and the Missouri courts, while not specifically overruling earlier decisions advocating the need to protect existing zoning, clearly became more deferential to changes in zoning if supported by the local governmental body.⁶⁵ Unfortunately, this trend did not include recognition of the importance of planning and using comprehensive plans as a basis for rezoning decisions, which can give property owners and stakeholders the confidence to invest in the community and protect property from being subject to highly political zoning decisions.

In addition, new concepts for zoning had evolved. Overlay districts, which involve imposition of a second layer of regulation

over the current zoning classification that constitutes the first layer of regulation, became a tool not only to prohibit certain uses, but to encourage others. Special district zoning, floating zones, performance zoning and other incentive forms of zoning districts were created. All such districts had a goal of increased flexibility from the traditional Euclidean Zoning.

More importantly, the concept of “planned district” zoning developed. Planned zoning districts have more relaxed regulations and generally allow the mixing of uses and clusters of development to preserve larger green spaces, provided that a specific development plan becomes part and parcel of the zoning for the property receiving such zoning. This allows the local governmental authority the ability to tailor the uses permitted for a particular site and allows a developer greater creative scope for new development. While the enabling statutes do not expressly authorize this type of zoning, they do not appear to prohibit it, either, unless it somehow violates the uniformity requirement. Planned district zoning has been recognized by Missouri courts as a “modern, flexible approach to progressive land use planning.”⁶⁶ The Eastern and Western Districts of the Missouri Court of Appeals have specifically noted that in planned district zoning, the characteristics of the zoning consist not only of the zoning classification, but also of

the components of the development plan.⁶⁷ Planned district zoning has become the norm in urbanized areas of this state for any sizeable new development of property.

VI. SOME OUTER LIMITS ON WHAT CONSTITUTES ZONING

In some circumstances, it may be unclear as to what constitutes a zoning ordinance as opposed to an ordinance approved by a local government in the exercise of its police power. The difference can be significant in that certain procedural protections, including advance published notice and a public hearing, are necessary if the ordinance is a zoning ordinance.

In *City of Louisiana v. Branham*, the Missouri Court of Appeals held that an ordinance defining the term “mobile home trailer park” had the effect of prohibiting a land use (a mobile home park) that previously had been allowed in a certain location.⁶⁸ The court concluded the ordinance was an amendment to the city’s master zoning ordinance, and because it was enacted without proper notice and a public hearing, the ordinance was invalid.⁶⁹ The court noted that holding otherwise would allow the zoning enabling act’s procedural requirements to be circumvented by the enactment of zoning ordinances labeled as something else, such as a “general definitional ordinance” as the City of Louisiana had called its mobile home ordinance.⁷⁰

62 *Village of Euclid, Oh. v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Zuckerman v. Town of Hadley*, 813 N.E.2d 843, 850 (Mass. 2004).

63 See THE ADVISORY COMM. ON ZONING, DEP’T OF COMMERCE, A ZONING PRIMER 1 (1926) (“Zoning . . . fosters civic spirit by creating confidence in the justice and stability of the protection afforded.”); *id.* at 6 (“Because of the difficulty in making with precision the forecasts on which [a zoning ordinance] is based, its operation should be closely followed by those who most intimately understand the reasons for its provisions. Thus, improvements and adjustments may from time to time be made intelligently. It is to furnish in exceptional cases a means for remedying possible injustice that, in the standard act and in some other State laws, provision is made for a board of adjustment or appeals.”).

64 See, e.g., *State ex rel. Sims v. Eckhardt*, 322 S.W.2d 903, 907 (Mo. 1959).

65 Compare *id.* (“The statutes contemplate that zoning regulations, restrictions and districts be well planned, and that they be of a more or less permanent nature and subject to change only to meet genuine changes in conditions.”) with *Miller v. Kansas City*, 358 S.W.2d 100, 105 (Mo. App. W.D. 1962) (“Nor is it always necessary that a change in conditions be shown in order to justify a change in zoning. Here, the area is stagnated because of what is now regarded as unwise strip zoning. Conditions would seem to justify a re-examination of the situation and a change in zoning by extending a business district so as to permit land to be used in connection with an established business, and for purposes for which it is peculiarly adapted, if the council believed it to be for the general welfare.”).

66 *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531, 536 (Mo. App. E.D. 1998).

67 *Id.* at 537; *McCarty v. City of Kansas City, Mo.*, 671 S.W.2d 790, 796 (Mo. App. W.D. 1984) (quoting *Millbrae Ass’n for Residential Survival v. City of Millbrae*, 69 Cal. Rptr. 251, 268 (Cal. Ct. App. 1968)).

68 969 S.W.2d 332, 337 (Mo. App. E.D. 1998).

69 *Id.*

70 *Id.* at 336-37. The Eastern District later stated:

There are at least three relevant factors to consider in determining whether an ordinance was primarily enacted for zoning purposes: (1) whether the face of the ordinance expressly states its purpose, (2) whether the provisions of the ordinance are in fact directed toward the regulation of public health and safety or instead toward providing for the uniform development of real estate and (3) whether the ordinance has the effect of amending the zoning rules by disallowing a previously-permitted land use.

F.W. Disposal South, LLC v. St. Louis County, 168 S.W.3d 607, 613 (Mo. App. E.D. 2005) (holding that ordinance prohibiting solid waste processing facilities from being located within 1,000 feet of certain buildings was enacted primarily for zoning purposes and was invalid for failure to comply with procedural requirements for zoning changes).

On the other hand, in *City of Green Ridge v. Kreisel*, the court held that an ordinance regulating the activities of junkyards regardless of their location within the city was not a zoning ordinance, because the stated purpose of the ordinance was to prevent public nuisances and its provisions were directed to regulating health and safety rather than to providing for the uniform development of real estate; thus, the ordinance was not subject to the notice and hearing requirements of zoning amendments.⁷¹ The court noted that unlike in *City of Louisiana v. Branham*, the ordinance did not prohibit a previously permitted land use or otherwise dictate which property could be used as a junkyard, and it did not have the effect of precluding junkyard operation due to overly burdensome requirements.⁷²

Planned district zoning has brought with it issues as to what subsequent changes to a development plan approved as part of the planned district constitute an act of zoning. To put this in perspective, in a situation where a new development plan is submitted for a property already zoned for the intended use, there would simply be an administrative process whereby the local governmental body would review the plan only to see if it complies with the zoning district regulations for that property. If it does, the local governmental body must approve the plan, and there is virtually no legal basis to contest the plan.⁷³ However, where a substantial change is made to a

development plan in planned district zoning, the change itself may constitute an act of rezoning. This issue was first decided in Missouri in the case of *McCarty v. City of Kansas City, Missouri*.⁷⁴

In *McCarty*, the original development plan provided for a structure on the eastern portion of the property with the remainder of the property being devoted to parking and open spaces.⁷⁵ Many years later, the owner of the property sought a change in the development plan to build a 15,000-square-foot building on the portion of the property devoted to parking and open spaces.⁷⁶ The court in *McCarty* noted the change constituted a substantial departure from the original development plan.⁷⁷ The court concluded that this type of fundamental change to a site development plan in the context of planned district zoning was the equivalent of a rezoning.⁷⁸

The *McCarty* court made a few important findings. First, it found that the original development plan was a requirement of the zoning district.⁷⁹ Second, it recognized that the development plan under the zoning district was "required to show the nature and location of all improvements."⁸⁰ Finally, it found that a new revised development plan could only be approved after notice and hearing and adoption of an ordinance by the city council as provided in the zoning district text.⁸¹ It is unclear from the case whether all of these facts are necessary for a conclusion that approval of a change to a development plan in a planned zoning

district constitutes a rezoning. Perhaps the most important fact is that since the site development plan is part of the zoning ordinance and its use restrictions, any change in such restrictions or regulations is a change contemplated by § 89.060, RSMo, which comes into play when there is a change in the restrictions or regulations applicable to a zoning district.

The holding in *McCarty* as to the nature of site development plan modifications in planned district zoning has been noted with approval in *Heidrich v. City of Lee's Summit*⁸² and *State ex rel. Helujon, Ltd. v. Jefferson County*.⁸³ The court in *Helujon* described the importance of site development plan approval in a planned zoning district. The court noted that in a planned zoning district, the characteristics of the zoning consist not only of the district classification but of the components of the development plan in the original application and in any subsequent amendments to the development plan that might be properly adopted.⁸⁴ In essence, the development plan becomes part and parcel of the zoning in planned district zoning. In planned districts, development plan approvals or amendments are legislative in nature⁸⁵ rather than administrative.⁸⁶ When the decision is legislative, it requires the same standard of review and exercise of discretion as a zoning or rezoning.⁸⁷

Other states have recognized that in a planned zoning district, development plan approvals and amendments are legislative

71 25 S.W.3d 559, 565-66 (Mo. App. W.D. 2000).

72 *Id.* See also *City of Carmel, Ind. v. Martin Marietta Materials, Inc.*, 883 N.E.2d 781, 782, 786-87 (Ind. 2008) (holding that city was not required to use zoning procedure to enact ordinance regulating mining); *St. Charles County, Mo. v. St. Charles Sign & Elec., Inc.*, 237 S.W.3d 272, 277 (Mo. App. E.D. 2007) (stating that ordinance requiring fencing around outdoor storage of junk was not a zoning ordinance).

73 *Furlong Companies, Inc. v. City of Kansas City, Mo.*, 189 S.W.3d 157, 164-65 (Mo. banc 2006); *State ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867, 873 (Mo. App. E.D. 1992).

74 *McCarty v. City of Kansas City, Mo.*, 671 S.W.2d 790, 793 (Mo. App. W.D. 1984).

75 *Id.* at 792.

76 *Id.* at 792, 795.

77 *Id.* at 794.

78 *Id.* at 796.

79 *Id.* at 792.

80 *Id.*

81 *Id.* at 794.

82 26 S.W.3d 179, 184 (Mo. App. W.D. 2000).

83 964 S.W.2d 531, 536-37 (Mo. App. E.D. 1998).

84 *Id.* at 537 (quoting *McCarty v. City of Kansas City, Mo.*, 671 S.W.2d 790, 796 (Mo. App. W.D. 1984)).

85 *Heidrich v. City of Lee's Summit*, 26 S.W.3d 179, 184 (Mo. App. W.D. 2000); *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531, 536 (Mo. App. E.D. 1998).

86 See note 67 and accompanying text.

87 *Helujon*, 964 S.W.2d at 537.

in nature like zoning and rezoning. The court in *McCarty* specifically relied upon and quoted a California case, *Millbrae Association for Residential Survival v. City of Millbrae*.⁸⁸ This holding has been adopted in other jurisdictions as well.⁸⁹

VII. CONCLUSION

The topic of zoning is far more complicated than as briefly described in this article. While a relatively new concept, zoning regulations affect nearly everyone. It is likely that as lifestyles and uses of land

change, zoning will change as well. The effectiveness of zoning as a land use control will, however, be primarily dependent on how local governments continue to exercise their zoning powers and how the courts continue to interpret those powers.

⁸⁸ 69 Cal. Rptr. 251, 268 (Cal. Ct. App. 1968).

⁸⁹ *City of Tuscaloosa v. Bryan*, 505 So. 2d 330, 337 (Ala. 1987); *Orinda Homeowners Comm. v. Bd. of Supervisors*, 90 Cal. Rptr. 88, 92 (Cal. Ct. App. 1970); *Moore v. City of Boulder, Colo.*, 484 P.2d 134, 135-36 (Colo. Ct. App. 1971); *Blakeman v. Planning & Zoning Comm'n of the City of Shelton*, 846 A.2d 950, 958 (Conn. App. Ct. 2004); *City of New Smyrna Beach v. Andover Dev. Corp.*, 672 So. 2d 618, 620 (Fla. Dist. Ct. App. 1996); *Todd Mart, Inc. v. Town Bd. of Town of Webster*, 370 N.Y.S.2d 683, 689-91 (N.Y. App. Div. 1975); *Gray v. Trustees, Monclova Twp.*, 313 N.E.2d 366, 369 (Ohio 1974); *Frankland v. City of Lake Oswego*, 517 P.2d 1042, 1051-52 (Or. 1973); *Bailey v. Zoning Bd. of Adjustment of City of Philadelphia*, 801 A.2d 492, 502-03, 505 (Pa. 2002) (en banc); *Lutz v. City of Longview*, 520 P.2d 1374, 1376 (Wash. 1974).

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