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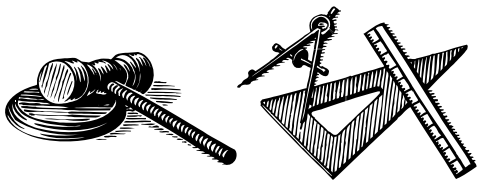
MODULE 5

LEGAL ASPECTS
OF
PLANNING & ZONING



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LEGAL ASPECTS OF PLANNING AND ZONING

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Legal aspects of the planning and zoning process involve both substantive and procedural requirements applicable to adoption and enforcement of land use controls as well as planning techniques such as the comprehensive plan. This handout will deal with requirements attending adoption and use of zoning and planning tools, the scope of and limitations on regulatory authority, and the procedures involved in zoning reviews and appeals.

I. INTRODUCTION AND BASIC VOCABULARY.

A. FOUNDATIONS OF LAND USE LAW.

"Land use law" is a term generically applied to regulatory activities governing physical planning and land development. Although traditionally and primarily a function of municipal government, land use law encompasses enactments by the federal government, such as the Clean Water Act, as well as by state government, regional commissions, and counties. The term embraces zoning, as well as subcategories or related regulations such as sign control, architectural review and historic preservation regulations, subdivision controls, and environmental regulations. The relationship of these mechanisms to zoning controls is discussed below.

B. LAND USE CONTROLS AND THE SCOPE OF REGULATION.

1. <u>Zoning</u>. "Zoning" describes an exercise of local governmental police power regulating the use of land. The power is exercised pursuant to state enabling legislation. *See e.g.*, Ch. 64 RSMo. (Counties); Ch. 89 RSMo. (Cities, towns, and villages). Generally, the practice of zoning divides a jurisdiction into a series of land use districts or "zones" and establishes use, bulk and density limitations, and standards for land use and development occurring within each district. The zoning regulations or zoning ordinance is comprised of both a text and a map. The text establishes the types of districts and details the regulations and standards applicable to each zoning district. The zoning map depicts the location and boundaries of each zoning district.

a. <u>The Zoning Ordinance and Components</u>. Zoning is the legislative division of a community into districts and the prescription and application in each district of regulations addressing structural and architectural designs of buildings and prescribing the use to which the buildings may be put. *City of Kirkwood v. City of Sunset Hills*, 589 S.W.2d 31, 36 (Mo. App. E.D. 1979); *City of Green Ridge v. Kreisel*, 25 S.W.3d 559, 563 (Mo. App. W.D. 2000). It is founded on the exercise of police power. As such, zoning is not unlimited and restrictions must bear a substantial relationship to public health, safety, morals or general welfare. *State ex rel. Hous. Auth. of St. Louis County v. Wind*, 337 S.W.2d 554 (Mo. App. 1960). If there is a substantial relationship to the general welfare,

the property owners' future use may be restricted, and the ordinance may impose hardship and inflict economic loss. *Hoffmann v. Kinealy*, 389 S.W.2d 745 (Mo. banc 1965); *McCarty v. City of Kansas City*, 671 S.W.2d 790 (Mo. App. W.D. 1984). The zoning ordinance must rest on some rational basis of classification and apply to all alike persons falling within the designated classification. *Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771 (Mo. banc 1952).

Although some jurisdictions may provide for elaborate zoning performance standards, most often zoning regulations state maximum or minimum standards. In addition to establishing zoning districts and associated regulations, zoning ordinances typically provide definitions and rules of interpretation and construction.

b. The Zoning Map. In addition to depicting the district zones, the text of a zoning ordinance may additionally provide rules for interpreting the zoning map. At the time of adoption or amendment of the zoning map, the jurisdiction may incorporate in the adopting or amending ordinance a legal description of the areas zoned. The zoning ordinance and map may not establish only a single zoning district. *City of Moline Acres v. Heidbreder,* 367 S.W.2d 568 (Mo. 1963), *but cf., McDermott v. Village of Calverton Park*, 454 S.W.2d 577 (Mo. 1970) (Upheld zoning ordinance that established four zoning districts, but only one use, single-family dwellings.). Missouri courts have upheld zoning ordinances and maps establishing only residential districts and excluding all non-residential uses. *State ex rel. Chiavola v. Village of Oakwood,* 886 S.W. 2d 74 (Mo. App. W.D. 1994), *cert. denied* 514 U.S. 1078 (1995); *Bosch v. Renner*, 494 S.W.2d 339 (Mo. 1973).

2. General Zoning Vocabulary. Particularly for the practitioner who has few occasions to be involved in zoning matters, the nature of the concept involved should immediately key counsel to specific procedures and standards of review. A city council may act legislatively or administratively. The nature of its action determines review procedures. Action by certain personnel may permit a petition directly in circuit court or may mandate an appearance before the board of adjustment. No specific approach or overall strategy can be developed without first determining the controlling characteristics of the concept with which the client and attorney are dealing.

It is unlikely that a permissive use will be confused with a nonconforming use, but it is equally unlikely that most general practitioners can recite a real difference between a "variance" and an "exception" or outline the reasons why a floating zone is not spot zoning. The following terms are not suggested to be all-inclusive definitions but merely a guide to a quick and workable understanding of the problems the practitioner faces:

- "Permitted Use" or "As of Right" — The use of land and property within the district for which the district is primarily formed. It is the use to which the property owner has a right to put property and is enforced through building permits. Usually a zoning code will list, within each zoning district, the uses in which a owner/occupier of land can engage as of right, subject only to compliance with applicable bulk, height, density and other similar requirements. *See e.g., Wolfner v. Bd. of Adjustment of City of Frontenac*, 672 S.W.2d 147 (Mo. App. E.D. 1984). Structures and uses customarily incidental and subordinate to expressly permitted principal uses may be similarly allowed. Whether a

particular "accessory use" is permissible, however, often turns on the definition of that term contained in the ordinance. *St. Louis County v. Taggert*, 866 S.W.2d 181 (Mo. App. E.D. 1993) (Holding that the parking of dump trucks was not an accessory use within the county's zoning ordinance and that any use that is not expressly permitted in a given district is excluded from it.). Where district regulations list permitted uses without identifying prohibited uses, uses not expressly permitted may be deemed prohibited. *Frison v. City of Pagedale*, 897 S.W.2d 129 (Mo. App. E.D. 1995) (Holding that an outdoor flea market was not an expressly permitted use in the city's commercial zoning district and therefore was not authorized.); *State ex rel. Barnett v. Sappington*, 266 S.W.2d 774 (Mo. App. 1954) (Zoning ordinance enumerating the uses permitted in specified areas, without listing prohibited uses, deemed to automatically exclude any use not expressly permitted in a particular zone.); *Barr v. City Council of City of Chesterfield*, 904 S.W.2d 27 (Mo. App. E.D. 1995) (Holding, based on a construction of the city's ordinance, that a medical office and parking garage on hospital premises was an accessory use to the hospital.). Issuance of permits or approval for permitted uses may be compelled by action in mandamus. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157 (Mo. 2006).

- "Conditional Use" or "Special Use" — A use that may be available to the property owner provided certain conditions can be met as set down by municipal personnel or the governing body administratively applying standards that were determined legislatively by the governing body. The courts appear to use conditional use and special use interchangeably although there may be a more pronounced distinction in the zoning authority's use of the devices. These uses are generally granted by "permit" or other administrative approval process. While a few Missouri statutes refer to authority for special or conditional use permits for specific types of uses, *see* R.S.Mo. §89.143, the Zoning Enabling Act does not establish any general limitation or procedures governing the issuance of such permits.

- "Nonconforming Use" — A lawful use in existence at the time the zoning ordinance becomes effective but that is not within the district's permissive uses and that will not be permitted in the future. The avenue of review is precipitated by the authority, generally a petition seeking injunctive relief, and the property owners will assert the nonconforming use as an affirmative defense. *See Missouri Rock, Inc. v. Winholtz*, 614 S.W.2d 734 (Mo. App. W.D. 1981).

- "Variance" — A decision made by the board of adjustment to avoid the strict application of the zoning ordinance provision without violating the spirit of the ordinance; it is based on hardship and economic considerations. The avenue of review is appeal of the decision to the circuit court. *See One Hundred Two Glenstone, Inc. v. Bd. of Adjustment of City of Springfield*, 572 S.W.2d 891 (Mo. App. 1978).

- "Exception" — Unlike a variance, the strict application of the ordinance is avoided by a literal legislative exception providing a specific alternative within the ordinance.

- "Floating Zone" — A stand-alone district with predetermined or site-specific standards, that may be applied to any given area that meets the standards within certain classifications on an *ad hoc* basis, such as for planned commercial districts, flood plain

districts or other areas that may be placed or "floated" to specific applicable areas.

- "Overlay Zone" — A set of district regulations that "overlay" and supplement the underlying district regulations, such as for flood plain or historic areas. Unlike floating zones, overlay zones "overlay" and incorporate an underlying zoning district.

- "Planned Unit Development" — A floating or overlay zoning district or mechanism that establishes specific regulations for a property or set of properties developed as a "unit." The main objective of a PUD is to achieve flexibility and allow for specific requirements to create a more desirable development for the community than would be possible through the strict application of zoning ordinances.

- "Spot Zoning" — Isolated, arbitrary zoning distinguished by the absence of adjacent comparable or compatible zoning of the same type.

- "Historic Zone" — A district in which designated structures are preserved by controlling demolition, requiring rehabilitation or both.

3. Other Regulatory Activities. Although the local "Building Official" is often empowered to enforce zoning regulations, zoning does not directly regulate building construction standards. Similarly, related issues such as grading, excavation, sediment control, septic and well systems, demolition of structures, and occupancy of existing structures are addressed by other related local regulations such as subdivision, building and housing codes, and environmental and health regulations. While there may be overlap in these types of regulations, different procedures or requirements sometimes apply based on the source of authority used by the local government or applied by the courts.

a. Subdivision. Subdivision authority refers to the local government regulation of the partitioning of land. Section 89.300(3) RSMo. (Defining the term "subdivision" as the "division of a parcel of land into two or more lots, or other divisions of land."). Primary regulatory objectives include obtaining assurances that development is served by adequate infrastructure, *i.e.*, streets, sewers, and water, and establishing minimum standards for the conveyance of real property. Although separate from zoning, many subdivision regulations expressly require compliance with zoning requirements. *See Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157 (Mo. banc 2006) (Section 1983 action for "truly irrational" denial of preliminary plat.).

b. Sign Controls. Sign controls may be a species of zoning, s*ee University City v. Diveley Auto Body Co.*, 417 S.W.2d 107 (Mo. banc 1967), but also may be adopted by specific statutory authority independent of zoning regulations. *See Ashley v. City of Marthasville*, 2010 WL 2696674, 2010 U.S. Dist. LEXIS 66740, *5 (E.D. Mo. 2010) (Refusing to require compliance with zoning procedures under § 89.050 RSMo. when enacting a billboard ordinance due to express authority under § 71.288 RSMo. for such regulations.). Regulations governing the permissible location, type, size, height, illumination, and other attributes of signs and outdoor advertising may be included in the zoning ordinance or may be provided as "stand alone" regulations. In either case, it has been held that local regulation of "outdoor advertising" must conform to the strictures of Missouri's "Billboard Act." *See* §§ 226.500-226.600 RSMo. *See also, Outcom, Inc. v.*

City of Lake St. Louis, 960 S.W.2d 1 (Mo. App. W.D. 1996). However, the limitations of the Billboard Act on local authority have been significantly narrowed in a recent holding that § 71.288 RSMo. allows local regulations to be more restrictive than the specific height, size, lighting, and spacing limitations found in the Billboard Act and even allows cities and counties to pass a total ban on outdoor billboards. *State ex rel. Ad Trend, Inc. v. City of Platte City*, 272 S.W.3d 201 (Mo. App. W.D. 2008); *see also Olympus Media/Missouri L.L.C. v. City of Lake Ozark*, 2009 WL 3461305, *3-5 2009 U.S. Dist. LEXIS 98083, *10 - 12 (W.D. Mo. 2009) (Court refused to grant relief to owner of advertising signs who claimed his property right to a permit was devalued when city granted a permit in violation of its own ordinance because owner had no property right in a competitor advantage.).

c. Architectural Review Board. Architectural design review represents another species of zoning regulation that addresses aesthetics and exterior design of buildings and structures and may additionally regulate site design and landscaping. Although initially reluctant to recognize aesthetics as a basis for regulation, Missouri has since accepted architectural review and regulation as authorized to preserve property values. *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *see also, State ex rel. Gannett Outdoor Co. of Kansas City v. City of Lee's Summit*, 957 S.W.2d 416 (Mo. App. W.D. 1997) (Recognizing the importance of aesthetic considerations in billboard regulation.). Often a separate review board oversees design control regulation. Local establishing ordinances typically require that review boards include architects or other similar professionals demonstrating expertise in this area.

d. Historic Preservation. Historic preservation codes involve building regulation as well as planning and zoning. For example, historic preservation regulations may be used to limit or prohibit exterior building or landscape changes that are determined to be inconsistent or incompatible with the architectural character of a structure or an area exhibiting local historic value. Missouri's Local Historic Preservation Act authorizes creation by ordinance of local historic preservation commissions that may recommend to the local governing body the designation of local historic districts, provide technical assistance to owners of historic properties, and prepare an historic preservation plan for the community. *See* § 253.415 RSMo. The Local Historic Preservation Act specifically authorizes the integration of the historic preservation plan with local zoning ordinances and building codes. The governing body may similarly provide for review by the historic preservation commission of plans for new construction, building alteration, and demolition within a designated local historic district.

e. Building and Housing Codes. Building codes, which include national standardized codes published by the International Code Council, govern construction standards for new buildings and structures. Missouri law expressly authorizes municipal adoption of such standardized codes by reference, obviating the need to expressly adopt such extensive code provisions. *See* § 67.280 RSMo. (Requiring filing of technical codes with city clerk for ninety days prior to adoption by incorporation.).

f. Nuisance. Several state statutes provide authority for local governments to declare what constitutes a nuisance and to abate a nuisance so long as the abatement

procedure is carried out in a lawful manner. *See, e.g.*, §§ 67.398-67.450; § 71.285; §§ 71.760-71.780; §§ 77.530, 77.560 (3rd class); §§ 79.370-79.383 (4th class); § 80.090 (Villages). The authority is independent of zoning powers and is delegated to allow local governments to abate or prohibit uses, or conditions resulting there from, that are dangerous or detrimental to the public health.

C. PLANNING AND THE "COMPREHENSIVE PLAN."

1. Relationship to Zoning and Land Use Regulations. Variously referred to as a "city plan," "master plan" or "comprehensive plan," such plans constitute general guides to future development within the jurisdiction. *See* §§ 89.040, 89.360 RSMo., etc. Unlike zoning regulations, adoption of a master or comprehensive plan imposes no restrictions on the use of land. Although enabling statutes require zoning regulations to be "in accordance with a comprehensive plan," neither preparation nor adoption of a separate plan is *necessarily* a prerequisite to the exercise of zoning authority. *State ex rel. Chiavola v. Village of Oakwood,* 886 S.W.2d 78 (Mo. App. W.D. 1994) (Holding that § 89.040 RSMo., which requires that zoning ordinances be made in accordance with a comprehensive plan, did not require the separate physical existence of a comprehensive plan apart from a comprehensive zoning ordinance.). Absent a comprehensive plan, Missouri courts have recognized the zoning regulations themselves as meeting the "comprehensive plan" requirement. *See Strandberg v. Kansas City,* 415 S.W.2d 737 (Mo. banc 1967); *State ex rel. Westside Development Co, Inc. v. Weatherby Lake,* 935 S.W.2d 634 (Mo. App. W.D. 1996) (Finding that even though the city had not adopted a document entitled "City Plan," it had adopted an official map that was intended to be a planning tool in the development of the community, and the city properly exercised its zoning authority in refusing to approve the plaintiff's application for a preliminary plat since the proposed street did not connect adjoining subdivisions, as required by city ordinance.). Adherence of the local government to the comprehensive plan constitutes a factor in determining the reasonableness of a zoning regulation. *J.R. Green Props., Inc. v. City of Bridgeton,* 825 S.W.2d 684 (Mo. App. E.D. 1992). Accordingly, it is advisable that local governments adopt such a separate comprehensive plan, given its role in upholding or enforcing the zoning regulations.

Under Illinois law, municipal comprehensive plans are also "guides," not law. *See City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 749 N.E.2d 916, 930 (Ill. 2001); 65 ILCS 5/11-12-6. However, one legal effect is that municipal comprehensive plans containing designations of needed public lands (schools, parks, roads, etc.) is a statutory foundation to require developers to provide for such lands as part of subdivision plat approvals from a city. 65 ILCS 5/11-12-8.

2. As an Instrument of Land Use and Development Policy. Although in theory the comprehensive plan represents the written and graphic embodiment of municipal land use and development policy, its significance is typically revealed in litigation over the application of zoning and other implementation tools. In this, Missouri courts have recognized the comprehensive plan as merely a "general guide" to development and that flexibility in its application is required to meet changing circumstances. *See Treme v. St. Louis County,* 609 S.W.2d 706 (Mo. App. E.D. 1980). Accordingly, zoning amendments need to be in general conformance with the plan, but need not strictly follow it. *See generally,* 1 AM. LAW. ZONING § 5:1, *et seq.* (5th ed.).

Under Illinois law, it has similarly been held that the consistency of a zoning classification with a comprehensive plan is a factor in determining the validity of the zoning in a lawsuit where zoning is challenged. *See Parkway Bank & Trust Co. v. County of Lake*, 389 N.E.2d 882 (Ill. App. 1979). Thus, the plan will affect the validity of future zoning requests but the comprehensive plan itself does not actually restrict zoning uses or establish any zoning regulation.

II. AUTHORITY AND LIMITATIONS FOR ADOPTION AND ENFORCEMENT OF ZONING.

A. STATE LAW LIMITATIONS ON LOCAL AUTHORITY.

1. Dillon's Rule. In Missouri, "Dillon's Rule" governs basic questions of local governmental authority. Named for the judge who developed the rule at the turn of the century, Dillon's Rule limits local authority to "(1) those [powers] granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation–not simply convenient, but indispensable." *State ex rel. City of Blue Springs v. McWilliams*, 335 Mo. 816 (Mo. 1934), citing 1 DILLON ON MUNICIPAL CORPORATIONS § 89 (3d ed.); *see State ex rel. Birk v. City of Jackson*, 907 S.W.2d 181 (Mo. App. E.D. 1995) (City had express statutory authority to see to the disposal of municipal waste and implied power to purchase land outside of its municipal boundaries for the purpose of operating a municipal landfill.). Thus, local adoption of land use controls other than those provided for in enabling statutes must await express authorization. In Missouri, such enabling authority is provided to counties at Chapter 64 RSMo. and to cities, towns, and villages at §§ 89.010 through 89.191 RSMo. In particular instances, extra-territorial zoning is authorized. *See* § 89.144 RSMo. (Third class cities over 25,000 population) and § 89.145 RSMo. (Certain home rule charter cities). In Illinois, non-home rule municipalities possess zoning powers under the Illinois Municipal Code, 65 ILCS 5/11-13-1 *et seq*.

2. Conformance with Enabling Statutes. Because municipalities are without inherent zoning powers, enabling legislation is the sole source of the power to zone. *City of Vinita Park v. Girls Sheltercare, Inc.*, 664 S.W.2d 256 (Mo. App. E.D. 1984). In Missouri, municipal zoning ordinances are authorized by, and cannot conflict with, Chapter 89 RSMo. *Whitaker v. City of Springfield*, 889 S.W.2d 869 (Mo. App. S.D. 1994). Adoption and enforcement of local zoning regulations must conform to the strictures of state enabling legislation. *State ex rel. Klawuhn v. Bd. of Adjustment of the City of St. Joseph*, 952 S.W.2d 725 (Mo. App. W.D. 1997); *McCarty v. City of Kansas City*, 671 S.W.2d 790 (Mo. App. W.D. 1984). This requirement applies to constitutional charter cities as well as statutory communities. *City of Springfield v. Goff*, 918 S.W.2d 786 (Mo. banc 1996). Attempts to expand authority beyond the statutory authority risks invalidation. *See e.g. Allen v. Coffel*, 488 S.W.2d 671 (Mo. App. 1972). Failure to comply with specific requirements of zoning enabling statutes is fatal. *Goff*, 918 S.W.2d at 789*; State ex rel. Casey's General Stores, Inc. v. City of Louisiana*, 734 S.W.2d 890 (Mo. App. E.D. 1987) (City's failure to comply with statutory requirement of fifteen days' notice of public hearings on the proposed zoning ordinance resulted in city being equitably estopped from denying issuance of a building permit for construction of the store; finding that when the enabling statutes are not complied with, a zoning ordinance is invalidly enacted and cannot be enforced.); *see also State ex rel. Stewart* v. *King*, 562 S.W.2d 704 (Mo. App. 1978) (Vote required for zoning amendment does not include abstention.). However, not all regulations of

property are derived completely from zoning authority. *See City of Green Ridge v. Kreisel*, 25 S.W.3d 559 (Mo. App. W.D. 2000) (Where the purpose of ordinance was primarily to regulate for health concerns by avoidance of the maintenance of nuisances rather than to provide for uniform development of real estate, ordinance regulating activities of junkyards irrespective of their location in the city was not zoning; thus, statutory notice and hearing were not necessary before the ordinance's enactment.).

3. Delegation Limitations. Missouri courts have long held that a city cannot delegate to third parties legislative power to create restrictions on the use of land or zoning decisions. In *State ex rel. Sims v. Eckhardt*, 322 S.W.2d 903, 909 (Mo. 1959) the court invalidated a city ordinance that "purports to delegate to individuals the legislative power to create restrictions on the use of land to be enforced by the City. . . . The individual, not the City Legislative Body, determines the restrictive covenant. Under the authorities this purported delegation of legislative authority is void." Thus, a board of adjustment had no legal authority to revoke appellant's building permit on the basis that it violated a restrictive covenant. *Id.* Therefore, an ordinance that gives private individuals or their agreements the power to veto or override a zoning decision will be held invalid as an unauthorized delegation of power. *See also Hays v. City of Poplar Bluff et al.,* 173 S.W. 676, 680 (Mo. 1953) (Ordinance void because "its refusal to consider applications for relief from the enforcement of its prohibitory terms, unless accompanied by the written consent of the property owners of the block, amounts to a delegation of the legislative power of the city to such property owners."); *City of St. Louis v. Russell*, 22 S.W. 470, 472 (Mo. 1893) (Ordinance that prevented the building commissioner from issuing permits without the consent of nearby landowners was void.).

B. OTHER LIMITATIONS ON ZONING AUTHORITY.

1. Constitutional Limitations.

a. Takings. The Taking clause of the Fifth Amendment prevents governmental entities from taking private property for public use without payment of just compensation. Widespread confusion regarding many aspects of "takings" law under the Fifth Amendment to the U.S. Constitution was significantly resolved in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In *Lingle*, the Supreme Court abolished the long-standing "substantially advance legitimate state interests" standard of *Agins v. City of Tiburon*, 447 U.S. 255 (1980), in federal constitutional takings analyses. Instead, the *Lingle* Court held that all federal takings must be analyzed as one of four types: (1) physical invasions, (2) total regulatory takings, (3) partial regulatory takings, and (4) exactions. *See also Iowa Assurance Corp v. City of Indianola*, 2011 U.S. App. LEXIS 16873, *8-*9 (8th Cir. 2011) (Describing the four kinds of takings):

> **(1) Physical Invasions.** Under the Fifth Amendment, permanent physical invasions of private property are takings that require just compensation. *Loretto v. Teleprompter Manhattan CATV Corp. et al.*, 458 U.S. 419 (1982) (Statute requiring landowners to allow cable facilities to be physically located on private property was physical taking.). Subject to the defenses to takings discussed below, a physical invasion by the government constitutes a taking without any further standard necessarily applied. . *See also Iowa Assurance Corp*, 2011 U.S. App. LEXIS at *10-*11 (Holding regulation requiring fence around property used

to store racecars is not a physical taking because "the ordinance does not erode [the] right to exclude others from the property, which is central to establishing a *Loretto* claim.").

(2) Total Regulatory Takings. Imposition of land use regulations that prohibit "all economically viable uses" constitute *per se* takings of private property for public use and require payment of just compensation, except for limited circumstances such as where the prohibited use is a nuisance under common law. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992); *see Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (Rejecting *per se* taking claim when landowner was able to build only a single residence on an 18-acre parcel; land retained significant development value and was not "economically idle."); *but cf., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (Affirming Ninth Circuit's finding that there was substantial evidence to support a jury verdict that the city's regulation deprived landowner of all economically viable uses, even when landowner was able to sell property for $800,000 profit.).

(3) Partial Regulatory Takings. Partial regulatory takings require case-specific application of balancing factors. Such situations involve governmental regulation of land that deprives a landowner of some, but not all, of the available uses of property. For example, in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the city's historic preservation law would not allow a developer to construct upward on a landmark train terminal. The court utilized a series of factors to determine whether the city's regulation was a taking that required just compensation and was thereafter dubbed, the *Penn Central* test. The factors are: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. *See Reagan v. County of St. Louis*, 211 S.W.3d 104 (Mo. App. E.D. 2006) (Applying *Penn Central* test and rejecting takings claim where down zoning by county caused 30% diminution in value.). Note that subsequent U.S. Supreme Court decisions applying the *Penn Central* factors have interchangeably used "reasonable investment-backed expectations" with the original phrase "distinct investment-backed expectations." *See Palazzolo v. Rhode Island*, 533 U.S. at 617 ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."). Notably, a total denial of use for a limited period of time is not a taking of all economic value subject to a "*per se*" taking, but may require compensation under *Penn Central* (see Temporary Takings below).

(4) Exactions, Dedication Requirements, and Impact Fees. Development exactions or conditions which lack an "essential nexus" to a stated permissible governmental objective may also result in compensable takings. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). This kind of taking

only occurs when the government requires a property owner to dedicate a portion of private property to public use. *Iowa Assurance Corp v. City of Indianola*, 2011 U.S. App. LEXIS 16873, *11-*12 (8th Cir. 2011) (Holding an ordinance requiring the building of a fence does not fall under *Nollan* because no dedication of land to public was required). Even assuming that an essential nexus exists between a legitimate governmental interest and a permit condition, a "rough proportionality" between the condition imposed and the impact of the development must be shown. Absent such a showing, the condition constitutes a compensable taking under the Fifth Amendment. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Prior cases from several jurisdictions suggest that *Dolan*'s "rough proportionality" may be circumvented where the exaction is a condition of a development agreement between the local government and the applicant. *See Leroy Land Development v. Tahoe Regional Planning Agency*, 939 F.2d 696 (9th Cir. 1991) (Determining that a contractual promise in settlement agreement to restrict land use cannot result in a 'taking' where the promise is voluntary and supported by consideration.). No definitive judicial determination of this question has arisen since *Dolan*, however. *But see Bd. of County Supervisors of Prince William County v. United States*, 48 F.3d 520 (Fed. Cir. 1995) (Distinguishing voluntary developer conditions in conveyance of property to county from *Dolan* "rough proportionality" but noting that county imposed no dedication requirement and that the conditions did not constitute a property interest.).

(5) A New Type of "Judicial" Taking? A recent four-Justice plurality of the Supreme Court recognized a new form of taking resulting from a "judicial" decision. In *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env. Protection*, 130 S.Ct. 2592 (2010), the Supreme Court reviewed a state judicial application of Florida's property law in declaring that the state's creation of 75' wide erosion control berm in a submerged public area of ocean shore owned by the public was not a taking even though it effectively terminated any future accretion rights of adjoining owners (because their property no longer touched the "high-water line" and placed new land where the shore line/property line once existed.) The Supreme Court held 8-0 that there was no taking because under Florida common law the property rights associated with shorelines did not prohibit artificial "avulsions" (sudden changes in land previously submerged). However, the four-Justice plurality (authored by Scalia, J.) stated that a taking claim could have arisen directly from the court decision interpreting state property rights. Two Justices countered that there was no need to decide that issue, while two other Justices argued that due process analysis, not taking law applies to judicial decisions because a judicial branch simply has no authority for a taking with compensation – a precondition to applicability of the Takings Clause. The plurality view is important because it could be extended or applied to suggest that any judicial interpretation of property rights that decreases rights – even those existing only by judicial precedent (nuisance, navigable waters, etc.) – can now never be reinterpreted or evolved. Note, in *Sagarin v. City of Bloomington*, 932 N.E.2d 739 (Ind. App. 2010) the state court declined to apply the plurality opinion in *Stop the Beach Renourishment* as applicable law.

b. Temporary Takings; Moratoria. The Supreme Court first recognized

temporary land use regulatory takings in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304 (1987). The Court expressly precluded expansion of the recognized temporary taking action beyond the facts in *First English* which did not deal with the "quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.* at 321. The Court revisited temporary takings in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002) in which it considered the facial constitutionality of a 32-month moratorium on development pending completion of a land use plan. The Court rejected a *per se* rule that delays of more than one year require compensation. "[A] regulation temporarily denying an owner all use of her property might not constitute a taking if the denial was part of the State's authority to enact safety regulations, or if it were one of the normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.* at 303 (citing *First English*). "Normal delays" even of more than a year are not unlawful unless they fail the balancing test set forth in *Penn Central.*

c. Land Use Takings Under State Law.

(1) Standing. Missouri courts hold that to have standing to sue for inverse condemnation, a plaintiff must own the property at the time the alleged property damage occurs. *State ex rel. City of Blue Springs v. Nixon,* 250 S.W.3d 365 (Mo. banc 2008) *citing Crede v. City of Oak Grove,* 979 S.W.2d 529, 534 (Mo. App. W.D. 1998 (Damages claim based on inverse condemnation does not pass to subsequent grantees of land.). However, this should be compared to the U.S. Supreme Court's opinion in *Palazollo, supra,* that acquisition of property subsequent to the enactment of a regulation that is alleged to affect a taking does not automatically bar a takings claim by the subsequent property owners. 533 U.S. at 626-30.

(2) Permanent Regulatory Takings. Missouri courts consider the same factors as the U.S. Supreme Court in determining whether a taking has occurred under the Missouri Constitution. *Schnucks Markets, Inc. v. City of Bridgeton,* 895 S.W.2d 163, 168 (Mo. App. E.D. 1995) *citing Penn Central*, 438 U.S. at 124. Missouri has also adopted the Supreme Court's standard (since rejected in *Lingle*) that a compensable taking occurs when the regulation does not "substantially advance a legitimate state interest." *Harris v. Missouri Dept. of Conservation,* 755 S.W.2d 726 (Mo. App. W.D. 1988). However, as stated above, the Supreme Court, in the *Lingle* case, has now rejected use of the longstanding "substantially advance a legitimate state interest" standard. How Missouri courts will respond to this change in federal takings jurisprudence remains to be seen. Nevertheless, in Missouri, the previous federal standard was applied in cases where a partial regulatory taking was permanent, *see, e.g., Longview of St. Joseph, Inc. v. City of St. Joseph*, 918 S.W.2d 364, 372 (Mo. App. W.D. 1996) ("A zoning ordinance which substantially advances legitimate governmental goals of protecting residents from the ill effects of urbanization and assures a city's orderly development and which is applied reasonably and fairly does not give rise to a 'takings' claim, especially when the landowner is not prevented from developing

the land in other ways."), and in cases in which the permanency of the partial regulatory taking was not addressed, *see, e.g., Harris*, 755 S.W.2d at 731.

(3) <u>Temporary Regulatory Takings</u>. Missouri has also long recognized a cause of action for a temporary taking. *See City of Cape Girardeau v. Hunze*, 284 S.W. 471 (Mo. 1926); *Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d 573 (Mo. banc 2000). However, Missouri has not squarely addressed whether a cause of action for a temporary partial regulatory taking exists and, if so, what standards apply. *Clay County ex rel. County Comm'n of Clay County v. Harley & Susie Bogue, Inc.*, 988 S.W.2d 102 (Mo. App. W.D. 1999). Without acknowledging the viability of a damages claim for temporary regulatory taking, the Missouri Supreme Court held that such cause of action was barred by the doctrine of *res judicata* where it was filed in an action subsequent to the original invalidation of the subject zoning. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315 (Mo. 2002).

(4) <u>Physical Invasion/Inverse Condemnation</u>. Although a land use regulation ordinarily could not in itself constitute a physical invasion of property, if such a claim was asserted, sovereign immunity would generally bar actions in the form of a trespass or nuisance. *See e.g., Heins Implement Co. v. Missouri Highway & Transp. Comm'n*, 859 S.W.2d 681, 689 (Mo. banc 1993), *abrogated on other grounds* 263 S.W.3d 603 (Mo. 2008) (Inverse condemnation proper avenue for government diversion of surface water.). Missouri courts have held that "inverse condemnation is the exclusive remedy when private property is damaged by a nuisance operated by an entity having the power of eminent domain." *Basham v. City of Cuba*, 257 S.W.3d 650, 653 (Mo. App. S.D. 2008); *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365 (Mo. banc 2008) ("[W]hen private property is damaged by a nuisance operated by an entity having the power of eminent domain, the proper remedy is an action in inverse condemnation.") *citing Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d at 577; *see also Collier v. City of Oak Grove*, 2007 WL 1185982, *9, 2007 Mo. App. LEXIS 643, *26 (Mo. App. W.D. 2007), *vacated on other grounds* 246 S.W.3d 923 (Mo. 2008) ("In Missouri, a claim for damage caused by a municipal sewer is a constitutional takings claim of inverse condemnation.").

(5) Precondemnation Damages. Note, at least one Missouri case has allowed a cause of action for pre-condemnation damages in the form of inverse condemnation where property had been declared to be blighted, but there was a several year delay in condemning the property. *Clay County Realty Co. v. City of Gladstone*, 254 S.W.3d 859 (Mo. banc 2008). In *Clay County Realty Co.*, the Court held that there were genuine issues of material fact in dispute about whether the city's actions show "aggravated delay or untoward activity" that could merit recovery of precondemnation damages where the property owner alleged a loss of rental tenants after the property was declared blighted, that the city failed to enforce plan timetables for acquisition and redevelopment of the property which had been declared blighted for five years, that the city harassed the property owner with building inspections and notices of code violations, and that the city discouraged new tenants from renting the property. *Id.*

(6) Exactions, Dedication Requirements, and Impact Fees. Missouri courts have approved the conditioning of zoning approvals on reasonable dedications of property or payments relating to the development impact by the applicant. *See Home Builders Ass'n of Greater St. Louis v. City of St. Peters*, 868 S.W.2d 187 (Mo. App. E.D. 1994) (Ordinance requiring subdivision developer to establish trust account to reimburse lot owners for costs and attorney fees in enforcing covenants was a proper use of city's police powers in attempting to protect welfare of future buyers in subdivisions.). Such exactions must be "reasonably attributable," however, to the impact of the proposed development. *Home Builders Ass'n of Greater Kansas City v. City of Kansas City*, 555 S.W.2d 832 (Mo. banc 1977) (If the establishment of a subdivision increases the city's needs for recreational areas, the cost of meeting the increased need may reasonably be required of the subdivider.); *Home Builders Ass'n of Greater St. Louis v. City of St. Peters*, 868 S.W.2d at 191; *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972) (Finding that the county planning commission could not condition approval of a preliminary plat on the landowner's relocation, widening, and paving of one road, and the further lighting of two other roads because such improvements were not reasonably related to the proposed activities of the landowners.). *State ex rel. Rhodes v. City of Springfield*, 672 S.W.2d 349 (Mo. App. S.D. 1984) (Finding that the city's act of imposing conditions only on certain lot owners to improve an unmaintained street and install curbs and gutters before reissuing building permits was arbitrary, capricious, and discriminatory when those conditions had not been imposed on other houses in the same subdivision.). Missouri courts have interpreted state takings law coextensively with federal law. *See Reagan et al. v. County of St. Louis*, 211 S.W.3d 104, 107-111 (Mo. App. E.D. 2006) (Applying the *Penn Central* balancing test to discern whether a taking occurred under Art. I, Section 26 of the Missouri Constitution.); *see also Reagan v. County of St. Louis*, 2008 WL 250349, 2008 U.S. Dist. LEXIS 6103 (E.D. Mo. 2008) (Noting coextensive application by state court of federal taking standard to Missouri Constitution.). Therefore, the "roughly proportional" and "essential nexus" standards of the United States Supreme Court's decisions in *Nollan* and *Dolan* should now govern in Missouri courts as well. Further, exactions must be imposed on all similarly situated applicants. Illinois state law calls for a more stringent test on exactions,

requiring exactions to be "specifically and uniquely attributable" to the development upon which the exactions are imposed. *Pioneer Trust & Savings Bank v. Village of Mt. Prospect*, 176 N.E.2d 799 (Ill. 1961); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. 1995); *Northern Ill. Home Builders Ass'n v. County of DuPage*, 649 N.E.2d 384 (Ill. 1995).

d. Defenses to Takings. Notwithstanding the standards set forth above, no taking claim exists under either state or federal constitutional provisions when the government action merely limits a use that the landowner has no right to undertake, such as maintenance of a nuisance. The U.S. Supreme Court has recognized numerous examples of permissible government prohibitions of uses without compensation based on state nuisance law. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-31 (1992). In addition, *Lucas* recognized that the use of preexisting navigable water rights is not a taking. For example, lake bed owners may be denied uses that would flood a neighbor's land without invoking a taking, and a government order to remove a nuclear plant on a fault line would similarly not be a taking. *Id.* A taking will also not be found if the government is merely preventing a property owner from using his land in a noxious manner. *See Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (Government cannot be "burdened with the condition that [it] must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."). Further, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court specifically held that reasonable administrative or permitting delays will not be deemed a taking. Finally, passage of time can also be a defense to a taking action. *See City of Gainsville v. Morrison Fertilizer, Inc.*, 158 S.W.3d 872 (Mo. App. E.D. 2005) (No taking after statute of limitations established adverse possession.).

e. Free Speech; Free Expression. Political speech continues to enjoy the highest level of constitutional protection, including as applied in the zoning context. For example, communities may not wholly ban political signage on private property in a residential district, even on the basis of aesthetics or safety. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Although cities may regulate the size, number, and duration of temporary signs on private property and may require removal after some period of time, a prohibition on political signs more than thirty days prior to the election and required removal within seven days of the election fails constitutional scrutiny as being content-based when only applied to "political" signs. *Whitton v. City of Gladstone*, 832 F.Supp. 1329 (W.D. Mo. 1993), *aff'd in part, rev'd in part* 54 F.3d 1400 (8th Cir. 1995). Further, to the extent a municipality permits illumination of commercial signage, the municipality must permit illumination of permanent political signage. *Id.*

Certain types of speech or expression enjoy a lesser degree of protection. For example, municipalities have a right to regulate the time, place, and manner of offerings of adult entertainment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (U.S. 1986) (Upholding zoning ordinance prohibiting adult movie theaters within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school where ordinance was seeking to control "secondary effects" of adult uses.); *see also, e.g., U.S. Partners Financial Corp v. Kansas City*, 707 F. Supp. 1090 (W.D. Mo. 1989); *Thames Enterprises v. City of St. Louis*, 851 F.2d 199 (8th Cir. 1988) (Upholding restriction of

adult entertainment and massage parlors to minimum 500 feet from residential district.); *but cf., Blue Moon Entertainment, LLC v. City of Bates City*, 441 F.3d 561 (8th Cir. 2006) (Conditional use permit constituted prior restraint.). See also § II(B)(2)(e)(5) below for further discussion.

The Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). For general commercial speech to enjoy First Amendment protection, first, the sign "at least must concern lawful activity and not be misleading." At the same time, the regulation must concern a substantial governmental interest. "If both inquiries yield positive answers, [the court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (Striking down ban on news racks containing "commercial handbills" that did not apply to news racks containing "newspapers.").

f. <u>Freedom of Religion</u>. The First Amendment provides two separate limitations on the government's ability to regulate religion – the Free Exercise Clause and the Establishment Clause. Generally, a "neutral law of general applicability that incidentally impinges on religious practice will not be subject to attack under the free exercise clause." *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (Generally applicable zoning ordinance that limited central business district to only commercial uses did not violate Free Exercise. Missouri courts have held that "the fact that a municipality exercises some control over the conduct of churches is not, *per se*, violative of a church's right to the free exercise of religion; but rather a determination of whether such regulation is tantamount to an infringement of the free exercise of religion depends on the facts and circumstances of each case." *Village Lutheran Church v. City of Ladue*, 997 S.W.2d 506 (Mo. App. E.D. 1999) (*Village Lutheran II*) (City's mere requirement that the Church apply for a special use permit to add extension to building did not infringe on the free exercise of religion where Church voluntarily applied for permit.). The *Village Lutheran II* Court cited *Western Presbyterian Church v. Bd. of Zoning Adjustment of the District of Columbia*, 862 F.Supp. 538 (D.C. Cir. 1994) as an example of when enforcement of zoning regulations would violate the protection of the Free Exercise Clause (Enforcement of zoning regulations to prohibit church from feeding homeless persons on its premises substantially burdened free exercise of religion because ministering to the needy considered a religious activity.).

In order to pass muster under the Establishment Clause: (1) a law must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the law must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). In the area of zoning, the Establishment Clause prevents the government from granting a religious organization a veto power over location or licensing of uses to which the religious organization may object. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 124-27 (1982) (Supreme Court struck down under Establishment Clause statute that prohibited liquor licenses within 500 feet of churches when church objected to the license.). However, the Establishment Clause does not prevent general zoning and other regulations

that would prevent certain uses in the vicinity of churches. *See Grendel's Den*, 459 U.S. at 121 ("[T]here can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals and the like by exercise of reasonable zoning laws."); *see also People Tags, Inc. v. Jackson County Legislature*, 636 F.Supp. 1345 (W.D. Mo. 1986) (Zoning ordinances prohibiting location of adult bookstore and theater within 1,500 feet of school or church did not violate Establishment Clause where zoning ordinances did not give churches any direct power or authority to prevent operation of adult bookstores; however violations of free speech and due process were found.).

In addition to limitations imposed by the constitution, governmental entities must also comply with limitations relating to religious uses imposed by statutes such as RLUIPA and enabling authority under Chapter 89 RSMo., both discussed below.

While not directly related to zoning, practitioners should be aware of the line of cases dealing with placement of religious symbols on public land. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Supreme Court used the three-prong test set forth in *Lemon v. Kurtzman*, *supra*, to disapprove a county's placement of a nativity scene on public property during the Christmas season. *But cf. Lynch v. Donnelly*, 465 U.S. 668 (1984) (Upholding nativity scene erected by city in private park that also contained many secular elements.). The determinative test states that "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *County of Allegheny*, 492 U.S. at 597 (per Blackmun, J, plurality opinion). The nativity scene, bereft of any significant secular components, was held to be an impermissible endorsement of religion. *Id*. at 598-602. It is interesting to note that the Court in *County of Allegheny* also upheld the constitutionality of an 18-foot tall menorah, also set on public property, in part because it stood near a 45-foot Christmas tree and sign saluting liberty, minimizing the likelihood that the menorah could be taken as a sign of government endorsement of Judaism. *Id*. at 614. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court upheld against Establishment Clause challenge a Ten Commandments monument, which was displayed on the grounds surrounding the Texas State Capitol. The Establishment Clause challenge was rejected, at least partly, because the Ten Commandments "have an undeniable historical meaning" in addition to their "religious significance." *Id*. at 690 (plurality opinion of Rehnquist, C.J.). In 2009, the Supreme Court upheld a city's refusal to allow a religious group to erect a monument to their religion in a public park which also contained a Ten Commandments "virtually identical" to the one at issue in *Van Orden*. *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009). Applying a free-speech standards, the Court held that in allowing (or not allowing) private groups to erect monuments in a public park, the city was engaging in governmental speech, not subject to a forum test and the private group's free-speech were not violated by the city's refusal. Interestingly, the majority opinion in *Summum* did not engage in an analysis under the Establishment Clause. *See id*. at 1139-40 (concurring opinion of Scalia, J.)

g. <u>Search and Seizure</u>. The Fourth Amendment to the U.S. Constitution generally prohibits the search or seizure of private property unless a warrant has been issued. In the context of building, zoning and land use code enforcement, the U.S.

Supreme Court has determined that if an occupant – not necessarily the owner – of property does not consent to inspection, a warrant must be obtained. Further, a non-consenting occupant may not be prosecuted for the failure to consent. *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523 (1967). Exceptions to these principles exist where the premises or violation is observable from a place where a member of the public may remain or where emergency situations are presented. Notwithstanding expansive language contained in some national standard codes, such codes cannot authorize an unconstitutional search.

h. <u>Substantive Due Process</u>. Substantive due process claims involving local land use decisions require that the "government action complained of is truly irrational, that is something more than . . . arbitrary, capricious, or in violation of state law." *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992) *quoting Lemke v. Cass County*, 846 F.2d 469, 470-72 (8th Cir. 1987) (en banc) (Arnold J., concurring). This "truly irrational" standard therefore requires that the alleged action be so egregious or extraordinary as to shock the conscience. *See Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993) (County regulation that required conditional use permit before "thin spreading" of petroleum-contaminated soil on to agricultural land was not truly irrational, even where CUP had not been previously required for the practice in years past.). To illustrate this heightened standard for substantive due process claims, the *Chesterfield Development* court explained that such irrationality would be a zoning ordinance applying only to persons whose names begin with a letter in the first half of the alphabet. The concurrence in *Lemke* gave an example of a decision made by the flip of a coin as being one that is "truly irrational." In *Chesterfield Development*, even the knowing enforcement of an invalid zoning regulation (a "bad-faith violation of state law") was held not to be "truly irrational" for purposes of creating an additional federal cause of action. *Chesterfield Development*, 963 F.2d at 1104; s*ee also Bituminous Materials, Inc. v. Rice County, Minn.*, 126 F.3d 1068 (8th Cir. 1997) (Denial of permit was not truly irrational even where county official showed personal animus against applicant.). The Missouri Supreme Court appears to have applied the "truly irrational" standard in a manner somewhat more favorable to property owners. *See Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157 (Mo. banc 2006) (Denial of preliminary plat was truly irrational where city council ignored advice of staff and city attorney, gave applicant no reasons for denial or opportunity to correct, and subjected applicant to numerous, uncommon delays.); *see also Gunter v. City of St. James*, 189 S.W.3d 667 (Mo. App. S.D. 2006).

i. <u>Equal Protection</u>. "The Equal Protection clause prohibits the discriminatory application of land use restrictions among similarly situated landowners." *City of Sugar Creek v. Reese*, 969 S.W.2d 888, 894-95 (Mo. App. W.D. 1998) *citing Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Therefore, the challenger must show that he/she is being treated differently than those similarly situated. *See Cleburne*, 473 U.S. at 439 ("Equal Protection Clause of the Fourteenth Amendment commands . . . that persons similarly situated should be treated alike."); *see also City of Sugar Creek*, 969 S.W.2d at 895 ("In order to make a case for discriminatory enforcement, however, a plaintiff must show that he has been singled out and compelled to comply with law while others similarly situated have not been so compelled."). Absent a "suspect classification" such as race, courts review these equal protection

challenges under the highly deferential "rational basis" standard. *Gilmore v. County of Douglas*, 406 F.3d 935, 937 (8th Cir. 2005); s*ee also City of Cleburne,* 473 U.S. at 446-47. The United States Supreme Court has recognized that an equal protection claim can be asserted by a class of only one member. *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) (Stating that courts recognize "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.") (internal citations omitted). Finally, there must be purposeful government action, not merely incompetence or a random action in order to have an equal protection claim. *See Olympus Media/Missouri L.L.C. v. City of Lake Ozark,* 2009 WL 3461305, *3-5, 2009 U.S. Dist. LEXIS 98083, *10-12 (W.D. Mo. 2009) ("Random government incompetence is insufficient to satisfy an equal protection violation.").

2. <u>Decisional and Other Limitations</u>.

a. <u>"Contract" Zoning</u>. "Contract zoning," also referred to as "conditional zoning," is an arrangement or understanding with a local government in which the developer agrees to dedicate property to the government in exchange for zoning or rezoning. Communities may grant zoning amendments in exchange for concessions from applicants provided that the concessions are reasonably related to the requested rezoning. If no such reasonable relationship exists, contract rezoning is an unconstitutional contracting away of the police power in violation of MO. CONST., Art. XI, § 3. *State ex rel. Missouri Highway and Transp. Comm'n v. Sturmfels Farm Ltd. P'ship,* 795 S.W.2d 581 (Mo. App. E.D. 1990). In order to pass constitutional muster, the offer made or the exaction demanded for the zoning or rezoning must bear a reasonable relationship to the activities of the developer. *Sturmfels Farm Ltd. P'ship*, 795 S.W.2d at 586; *Treme v. St. Louis County*, 609 S.W.2d 706 (Mo. App. E.D. 1980); *Home Builders Ass'n of Greater Kansas City v. City of Kansas City*, 555 S.W.2d 832 (Mo. banc 1977); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972). The *Sturmfels* court suggested that it was also a "taking" without just compensation in violation of MO. CONST., Art. I, § 26. *Sturmfels*, 795 S.W.2d at 586. While the primary issue in *Sturmfels* was more a matter of eminent domain than zoning and planning, the case will be of interest to anyone involved in contract zoning or who believes that a case for contract zoning may be made. The court's discussion as to why this party's claim of contract zoning was not a collateral attack on the rezoning ordinance bears noting particularly if that issue is tied to a condemnation proceeding.

As noted above, in reviewing a takings challenge to conditions imposed on the issuance of a building permit, the US Supreme Court has also held that not only must there be an "essential nexus" between the condition and the stated purpose for the imposition of the condition, but, although "[n]o precise mathematical calculation is required, . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development's impact." *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

b. <u>"Spot" Zoning</u>. "Spot" zoning is used to denote an amendment to a municipal zoning ordinance reclassifying one or more lots or parcels of land for use out of harmony with the classification of the surrounding areas and without regard for the

public welfare. Zoning decisions reached for reasons other than public welfare constitute illegal spot zoning. *See Treme v. St. Louis County*, 609 S.W.2d 706 (Mo. App. E.D. 1980). For example, zoning classifications limited to a single parcel raise immediate concerns. *See Strandberg v. Kansas City*, 415 S.W.2d 737 (Mo. banc 1967) (Term "spot zoning" connotes a zoning amendment classifying land for a use out of harmony with surrounding areas and without regard to public welfare.). Where such a decision is reached for reasons other than the general welfare, the decision is invalid. *See e.g., Numer v. Kansas City*, 365 S.W.2d 753 (Mo. App. 1963). But as a term describing function, spot zoning is not necessarily improper. *Ewing v. City of Springfield*, 449 S.W.2d 681 (Mo. App. 1970). The mere fact that the property rezoned was under sole ownership was not determinative of whether the ordinance constituted spot zoning. *Id.* Spot zoning is only improper when it is out of harmony with the public welfare or implemented without reference to the public welfare. *Broadway Apartments, Inc. v. Longwell*, 438 S.W.2d 451 (Mo. App. 1968).

c. <u>Vested Rights; Nonconforming Uses</u>. Although a grant of a permit confers no substantive rights, lawful use of property under such a permit vests rights to the extent of the use. *See Ford Leasing Development Co. v. City of Ellisville*, 718 S.W.2d 228 (Mo. App. E.D. 1986). The rights vests as a result of the use. Accordingly, substantial expenditures without actual prior use of the property do not give rise to a vested right. *McDowell v. Lafayette County Comm'n*, 802 S.W.2d 162 (Mo. App. W.D. 1990) (Without actual prior use, expenditure of approximately $200,000 for acquisition, planning, engineering, and obtaining of a permit did not establish vested right immune from changes in zoning regulation.); *see also State ex rel. Claudia Lee & Associates v. Bd. or Zoning Adjustment of Kansas City*, 297 S.W.3d 107, 110-12 (Mo. App. W.D. 2009) (Subsequently passed ordinance may moot on-going litigation for permit under old ordinance and preclude any vested right from forming since "mere filing for a permit application does not give landowner such a 'vested right[]' and "landowner does not develop a 'vested right' in a 'nonconforming use' that was complaint with prior zoning laws unless he has actually established use in reliance on the prior law."), *and Lamar Co., LLC v. City of Kansas City*, 330 S.W.3d 767 (Mo. App. W.D. 2010) (holding a vested right "requires reliance on law existing at the time that the nonconforming use was initiated," and landowner had no vested right when permit was filed with knowledge of new law that would change existing law). A use of land prior to the enactment of a zoning regulation which is maintained after the effective date of the regulation is termed a "legal nonconforming use" and is similarly a vested right. *Schwartz v. Bd. of Adjustment of City of St. Louis*, 906 S.W.2d 413 (Mo. App. E.D. 1995). In Missouri, all zoning ordinances must provide for the exemption of legal nonconforming uses. *Mullen v. City of Kansas City*, 557 S.W.2d 652 (Mo. App. 1977). Again, legality of the use is vested by use and not by ownership or tenancy. *State ex rel. Kugler v. City of Maryland Heights*, 817 S.W.2d 931 (Mo. App. E.D. 1991). Thus a legal nonconforming use can be said to "run with the land." *Browning-Ferris Industries of St. Louis, Inc. v. City of Maryland Heights*, 747 F. Supp. 1340 (E.D. Mo. 1990) (Finding that a change of ownership is not an abandonment of the right to a legal nonconforming use because the nonconforming use follows the land and not the person.). But, "the spirit of zoning ordinances always has been and still is to diminish and decrease non-conforming uses." *Hoffman v. Kinealy*, 389 S.W.2d 745, 750 (Mo. banc 1965). Expansion or change in the use may, however, destroy the right to continued use. *Acton v. Jackson County*, 854

S.W.2d 447 (Mo. App. W.D. 1993) (No right to continue nonconforming use of building as a massage parlor when use is expanded to include illegal activity of prostitution.); *but see State ex rel. Dierberg v. Bd. of Zoning Adjustment of St. Charles County*, 869 S.W.2d 865 (Mo. App. E.D. 1994) (Determining that enlargement of nonconforming hunt club did not destroy vested right absent express contrary provision in ordinance; use was enlarged but not changed.). While no right to a continued zoning classification exists, zoning changes designed to prohibit or restrict a single applicant or land use are arbitrary and invalid. *May Dept. Stores Co. v County of St. Louis*, 607 S.W.2d 857 (Mo. App. E.D. 1980).

d. Amortization. While "amortizing" or requiring the termination of a use over a designated time period is generally prohibited as a violation of a vested right in Missouri, *see Hoffman v. Kinealy*, 389 S.W.2d at 753, some exceptions have been upheld, such as in limited sign regulation circumstances. *See University City v. Diveley Auto Body Co*., 417 S.W.2d 107 (Mo. banc 1967). Conversely, in Illinois, as a general rule, amortization ordinances are valid assuming their reasonableness as applied to a particular property. *Village of Gurnee v. Miller*, 215 N.E.2d 829 (Ill. App. 1966). However, ordinances that attempt to amortize legal non-conforming signs infringe on the statutory right of a sign owner to receive just compensation when their signs are required to be altered or removed. *City of Oakbrook Terrace v. Suburban Bank and Trust Co.*, 845 N.E.2d 1000 (Ill. App. 2006).

e. Statutory Limitations. The scope of zoning authority under Chapter 89 RSMo. has also been limited or modified based on the entity being regulated, including the following:

(1) Schools. In the case of public school districts, a city's zoning regulations are either not applicable or limited. *See Normandy School Dist. v. City of Pasadena Hills*, 70 S.W.3d 488 (Mo. App. E.D. 2002) (City could not regulate and prohibit placement of temporary, portable classrooms (modular units) under either its zoning or building codes because the zoning enabling act, §§ 89.010–89.140, RSMo., does not contain authority to restrict use of public property for public purposes and state law, *see* § 700.035 RSMo., prohibits a municipality from requiring that a modular unit comply with any codes other than those set forth in that section.); *see also Bd. of Education of the School Dist. of Springfield, R-12 v. City of Springfield*, 174 S.W.3d 653 (Mo. App. S.D. 2005) (School district subject to § 89.380 RSMo. planning requirements of city, but county was not.).

But see, 105 ILCS 5/10-22.13a (Authorizes Illinois school boards: "To seek zoning changes, variations, or special uses for property held or controlled by the school district.").

(2) Religious Entities. In Missouri, enabling authority for zoning controls does not fully extend to the regulation of churches and houses of worship. *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959); *Village Lutheran Church v. City of Ladue*, 935 S.W.2d 720 (Mo. App. E.D. 1996) (Village Lutheran I) (City could not require special use permit

for expansion of Church facilities.); *but see Village Lutheran Church v. City of Ladue*, 997 S.W.2d 506 (Mo. App. E.D. 1999) (Village Lutheran II) (City did not violate Church's right to the free exercise of religion by requiring Church to apply for special use permit, especially where Church voluntarily applied for permit.).

However, religious uses are still subject to many types of land use regulations. *See St. John's Evangelical Lutheran Church v. City of Ellisville*, 122 S.W.3d 635 (Mo. App. E.D. 2004) (Municipalities may use their regulatory powers over churches solely for the purposes of promoting health, safety, morals or the general welfare of the community.). This limitation on the application of land use regulations to church activities apparently extends to accessory uses operated by churches. *See City of Richmond Heights v. Richmond Heights Presbyterian Church*, 764 S.W.2d 647 (Mo. 1989) (Use of a church educational building for a day care program was a permitted "accessory use" and did not require a conditional use permit.); *but see, Ass'n for Educational Development v. Hayward*, 533 S.W.2d 579 (Mo. banc 1973) (City not required to issue occupancy permit for rectory for members of religious society.); *Chaminade College Preparatory, Inc. v. City of Creve Coeur*, 956 S.W.2d 440 (Mo. App. E.D. 1997) (Upholding denial of permit to religiously-affiliated school as supported by competent testimony because school was not a church and thus not exempt from operation of zoning ordinances.).

Churches and houses of worship are also protected by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified at 42 U.S.C. §§ 2000cc, *et seq.*, which was passed to protect individuals, houses of worship, and other religious institutions from discrimination in land use regulations. RLUIPA prohibits zoning laws that "substantially burden" the religious exercise of churches or other religious assemblies or institutions absent the "least restrictive means" of furthering a compelling governmental interest. Specifically, RLUIPA prohibits zoning laws that: (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions; (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination; (3) totally exclude religious assemblies from a jurisdiction; or (4) unreasonably limit religious assemblies, institutions or structures within a jurisdiction.

(3) <u>Other Governmental Entities</u>. Where two local governments are in conflict, Missouri courts have used various "tests" to determine which local government's zoning laws "prevailed" over the other, including the "power of eminent domain" test and the "balancing of interest" test. Traditionally, if one of the municipalities is exercising power derived from the constitution and the other municipality's power is derived solely from statute, the municipality with the constitutional source of power would prevail. Since most cities derive their zoning power from statute (other than charter cities), the practical effect is that most municipal uses of property are allowed, regardless of zoning laws.

The "balancing of interest" test balances the competing public interests of the governmental entities involved by examining:

- The nature and power of the competing localities;
- Source of their powers;
- Kind and function of the land use involved;
- Extent of public interests served by the use;
- Degree to which the zoning regulation would impair that use;
- Extent and nature of local interests protected by the zoning regulations; and
- Extent to which the land use would impair the local interests.

The Missouri Supreme Court has examined these many competing tests and found that the common thread is that "where a power has its source in the Constitution, although delegated by the state legislature to a municipality or other state agency, [the constitutional power] takes precedence over and cannot be restricted by a power, such as zoning, which is delegated to a competing municipality or governmental agency without any constitutional source." *See City of Kirkwood v. City of Sunset Hills*, 589 S.W.2d 31, 42 (Mo. App. E.D. 1979) (Indicating that in cases where the conflict involves zoning authority that the "power of eminent domain" test may be appropriate but that in other cases, the court would use the "balancing of interests" test.); *see also City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 114 (Mo. App. E.D. 2000) (When determining whether city could impose zoning regulations on another city's airport, factors included: "the nature and scope of the instrumentality seeking immunity, *the kind of function or land use involved, the extent of the public interest to be served thereby,* the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interest.") (emphasis original); *City of Washington v. Warren County*, 899 S.W.2d 863, 866 (Mo. 1995) ("Under the 'power of eminent domain' test, if a power has its source in the constitution, although delegated by statute, then it prevails over and cannot be limited by another government entity's power, such as zoning, that is delegated solely by statute and without any specific constitutional authority. Only where the zoning authority is likewise authorized by the constitution or authorized by a statute that implements clear constitutional authority will this court apply a 'balancing of interests' test.") (internal citations omitted).

See also, Wilmette Park District v. Village of Wilmette, 490 N.E.2d 1282 (Ill. 1986) (A municipal ordinance cannot be used to frustrate or contravene the statutory authority granted to another unit of local government.).

(4) <u>Public Utilities</u>. Public utilities are not exempt from zoning regulations but specific restrictions may be preempted by public service commission regulation or other state law. *Compare Stopaquila.Org v. Aquila, Inc.,* 180 S.W.3d 24 (Mo. W.D. App. 2005) (Utility was subject to county zoning

authority, rejecting interpretation of *Crestwood II* as exempting utilities from zoning regulations.) *with Union Electric Co. v. City of Crestwood (Crestwood II)*, 562 S.W.2d 344 (Mo. banc 1978) (Zoning authority did not provide basis for city to require under-grounding of intra-state transmission lines.). While Public Service Commission jurisdiction or regulations may preempt specific authority over certain types of private utility uses, utilities are not generally exempted from zoning regulation by statute. *See, e.g.*, § 67.1844.1 RSMo. (Subjecting utility companies to "safety codes and all other applicable zoning and safety ordinances, to the extent not inconsistent with public service commission laws or administrative rules.").

However, § 49.650 RSMo. denies non-charter counties the general power to adopt ordinances, resolutions or regulations governing railroad companies, telecommunications or wireless companies, public utilities, rural electric cooperatives or municipal utilities.

(5) Adult Uses. Recently enacted statutory provisions, §§ 573.525-.540 RSMo., regulate sexually-oriented businesses and alcohol sales. In addition to regulating nude and semi-nude activities and alcohol sales and consumption on-site, these statutes provide that a sexually-oriented business must be at least 1,000 feet from a pre-existing school, house of worship, public library, public park, licensed daycare facility, residence, and other sexually-oriented business and must close between the hours of midnight and 6:00 a.m. While these statutes seem to establish a minimum floor of regulation, it is important to note that nothing in these statutes preempts any political subdivision from maintaining, enacting or enforcing local provisions which are stricter than but not inconsistent with these provisions. This legislation is subject to pending legal challenge, but currently remains in effect during the litigation.

f. Telecommunications Act of 1996. The federal Telecommunications Act of 1996 (the "TCA") provides limitations on the ability of local government to regulate placement, construction, and modification of "personal wireless service facilities," i.e.: cell towers. 47 U.S.C. § 332(c)(7). The TCA provides that decisions on the placement, construction, and modification of personal wireless service facilities must be in writing, based on substantial evidence, and done within a reasonable period of time. 47 U.S.C. § 332 (c)(7)(B)(ii)-(iii). The TCA also provides that local government regulation of personal wireless service facilities cannot "unreasonably discriminate among providers of functionally equivalent services; . . . prohibit or have the effect of prohibiting the provision of personal wireless services," or regulate "on the basis of the environmental effects of radio frequency emissions. . ." 47 U.S.C. § 332 (c)(7)(B)(i), (iv). The TCA provides for expedited review in federal district court for alleged violations. 47 U.S.C. § 332 (c)(7)(B)(v).

To satisfy the TCA's "in writing" requirement, decisions by local zoning boards "must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons." *Sprint*

Spectrum, L.P. v. Platte County, 578 F.3d 727, 731 (8th Cir. 2009) (Applying without deciding majority standard for TCA "in writing" requirement.).

While the language of the TCA only requires local governments to act on "final actions" related to placement, construction, and modification of personal wireless service facilities within a "reasonable period of time," the FCC has determined that a reasonable time is 90 days for requests for co-locations and 150 days for all other requests. *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) . . ., FCC Declaratory Ruling 09-99*, 24 FCC Rcd. 13994 (November 18, 2009). In the Eighth Circuit, the "final action" that starts the 30-day limitations period for providers to sue under the TCA is the issuance of the local government's written decision, not the local government's vote to deny a permit or other request. *USCOC of Greater Missouri, LLC v. City of Ferguson*, 583 F.3d 1035, 1041-42 (8th Cir. 2009).

For a local government's decision to be an effective prohibition of service, as defined by the TCA, a "significant gap" in wireless coverage, among other things, must be at issue before the denial of any means to close the gap can become an actionable prohibition. *See, e.g., APT Pittsburgh Ltd. P'ship v. Penn Twp.*, 196 F.3d 469, 480 (3rd Cir. 1999). There is currently a circuit split as to whether an actionable "significant gap" can be based only upon an alleged gap in a single provider's wireless service — as opposed to a gap in the service of all providers. Compare, *e.g., APT Pittsburgh Ltd. P'ship*, 196 F.3d at 480 (Applying 2nd and 3rd Circuit standard; gap must be in all available wireless service.), with *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 732-33 (9th Cir. 2005) (Applying 1st and 9th Circuit standard; gap only need be in one providers' available service.). The Eighth Circuit has not weighed in on this matter. However, in the Eighth Circuit, a claim of effective prohibition based on a specific decision of a zoning board requires a showing that a wireless provider adequately investigated "all feasible alternative sites," that it gave "serious consideration" to other locations, and that its proposed site "was the only location for a cellular tower that would remedy [the provider's] coverage issue." *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 820 (8th Cir. 2006). Facial challenges to zoning regulations alleging effective prohibition must show "either (1) the impossibility of obtaining a permit through the applicable local ordinances; or (2) that no alternative sites exists that the provider could use to fill a gap in service." *USCOC of Greater Missouri, LLC v. Village of Marlborough*, 618 F.Supp.2d 1055, 1062 (E.D. Mo. 2009). Effective prohibition claims under the TCA must contain allegations showing that the provider's proposed site is the "only viable location." *Id*. at 1062-63 (Prohibition of service claim dismissed where complaint failed to allege proposed site was only viable location and alleged facts showing that sites other than proposed site would remedy provider's coverage needs.).

In order to succeed on a claim of unreasonable discrimination under the TCA, a wireless providers "must show that [the local government] discriminated among providers of functionally equivalent services and that these providers were treated unequally." *Village of Marlborough*, 618 F.Supp.2d at 1064-65. This necessarily requires a wireless provider to allege that another *specific* wireless provider was *actually* treated better by the local government. *Id*. (TCA unreasonable discrimination claim

dismissed without allegation that a competitor to plaintiff-provider was actually treated more favorably by village.).

It is highly recommended that local government officials consult their counsel to assist in reviewing applications to place cell towers within their boundaries, as the provisions of the TCA are highly technical and many courts have held the appropriate remedy for violations is an injunction to allow the a wireless provider to construct its tower in the manner it applied for. *See*, *Sprint Spectrum L.P. v. County of St. Charles*, 2005 WL 1661496, 2005 U.S. Dist. LEXIS 43590 (E.D.Mo. July 6, 2005); *but see USCOC of Greater Missouri, LLC v. County of Franklin*, 575 F.Supp.2d 1096, 1102-03 (E.D. Mo. 2008) (Remand back to zoning board was appropriate remedy where zoning board failed to comply with "in writing" requirements of TCA.).

In addition to requirements of the TCA, Illinois state law imposes substantial restrictions on the ability of counties to regulate telecommunication towers. *See* 55 ILCS 5/5-12001.1. For example, in counties with populations over 180,000, the county must permit towers in non-residential zoning districts that are less than 200 feet in height with setbacks to residential structures equal to 100% of the height. *See* §5-12001.1(h).

g. Wind Towers. Illinois municipalities are allowed to regulate energy-generating wind towers or wind farms, but must provide a public hearing with 30-days' newspaper notice for any siting decision on wind towers or wind farms. 65 ILCS 5/11-13-26 (2007; amended 2009, effective 2010). Municipalities cannot establish setbacks greater than 1.1 times the height of the wind tower where it is exclusively used by an end user (i.e., on-site towers). *Id.*; see also 55 ILCS 5/5-12020 (2007; amended 2009, effective 2010) (Same, counties). While not specifically addressing wind towers, Missouri statutes provide that counties cannot interfere with public utility services that have been authorized or ordered by the Public Service Commission. *See e.g.*, §§64.090 and 64.620 RSMo. and § II(B)(2)(e)(4) above.

III. ZONING PROCEDURES, APPEALS AND METHODS OF REVIEW.

A. PLANNING AND ZONING PROCEDURAL REQUIREMENTS.

1. Adoption of "Comprehensive Plan"/"City Plan"/"Zoning Plan." – § 89.360 RSMo. There are certain requirements that must be followed when adopting a "comprehensive plan" pursuant to § 89.360 RSMo. The statute makes it clear that the adoption must be by the planning commission (not the legislative body). The plan may be adopted in whole or in parts, but "[b]efore the adoption, amendment or extension of the plan or portion thereof the commission shall hold at least one public hearing thereon." That public hearing must not be held before fifteen (15) days notice of the time and place of the hearing and the notice of the hearing must be published in at least one (1) newspaper in the municipality. The resolution of the adoption of the plan must be approved by a majority vote of the full membership of the planning commission. The adopting resolution "shall refer expressly to the maps, descriptive matter and other matters intended by the commission to form the whole or part of the plan . . ." *Id.* A copy of the comprehensive plan must also be certified to the council and the municipal clerk, and a copy must be *filed* with the office of the county recorder of deeds and be available at the municipal clerk's office. A failure to strictly comply with these statutory requirements is fatal to

the comprehensive plan. *See State ex rel. Casey's General Stores, Inc. v. City of Louisiana*, 734 S.W.2d 890 (Mo. App. E.D. 1987) (Proposed municipal zoning ordinance was a nullity for failure to comply with statutory requirement that copy of plan be recorded in office of county recorder of deeds, even though ordinance itself was recorded.).

2. Adoption of an Illinois "Comprehensive Plan" 65 ILCS 5/11-12-7. Under the Illinois Municipal Code, comprehensive plan or plan amendments must be submitted to the municipality's plan commission. The corporate authorities may adopt parts or the whole comprehensive plan recommended by the plan commission. Corporate authorities must schedule a public hearing in front of the plan commission or the corporate authorities with not less than 15 days' notice. The corporate authority must then either adopt in whole or in part or reject the entire comprehensive plan "[w]ithin 90 days after the conclusion of the hearing . . ." If the 90 days expire with no formal action, the comprehensive plan can no longer be acted upon. If adopted, the corporate authorities must enact an ordinance and the plan becomes effective upon the expiration of 10 days after the date of filing notice of the adoption with the recorder of the county.

3. Missouri Zoning Regulations – §§ 89.050-89.060 RSMo. Missouri's zoning enabling law, as the sole source of power and measure of authority for cities, towns, and villages in zoning matters, mandates a municipality's strict compliance with the statutory notice and hearing requirements found in §§ 89.050 and 89.060 RSMo. when amending, supplementing, changing, modifying, and repealing zoning regulations, restrictions, and boundaries. Specifically, § 89.050 RSMo. requires the legislative body of the municipality to provide the manner "in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality." *Id*. These public hearings are to be held before the "legislative body." *See Murrell v. Wolff*, 408 S.W.2d 842 (Mo. 1966); *but see Moore v. City of Parkville*, 156 S.W.3d 384 (Mo. App. W.D. 2005) (Hearing before planning and zoning commission satisfied hearing requirements.). While the statute requires fifteen days' notice to be published in a newspaper before the public hearing is held, the statute does not require that the landowners are entitled to *actual* notice of zoning changes. *See Williams v. Dept. of Building Development Services of City of Springfield*, 192 S.W.3d 545 (Mo. App. S.D. 2006).

Section 89.060 RSMo. acknowledges that zoning regulations and boundaries will, from time to time, need to be amended, modified or even repealed. However, on occasion such amendments may face objection or protest. Accordingly, § 89.060 RSMo. states that in the event "of a protest against such change duly signed and acknowledged by the owners of thirty percent or more, either of the areas of the land (exclusive of streets and alleys) included in such proposed change or within an area determined by lines drawn parallel to and one hundred and eighty-five feet distant from the boundaries of the district proposed to be changed, such amendment shall not become effective except by the favorable vote of two-thirds of all the members of the legislative body of such municipality." *Id.* Thus, when changes to zoning ordinances are facing a protest by 30% of land owners within 185 feet from the boundaries of the district proposed to be changed, then a favorable vote by 2/3 of "all the members of the legislative body" is required.

4. Illinois Zoning Amendments – 65 ILCS 5/ Art. 11, Div. 13. To amend zoning ordinance in Illinois, there must be a public hearing "before some commission or committee designated by the corporate authorities," with no less than 15 days and no more than 30 days newspaper notice. All testimony at the public hearing must be under oath. Where there are protests by "owners of 20% of the frontage proposed to be altered, or by the owners of 20% of the frontage immediately adjoining or across an alley there from, or by the owners of 20% of the frontage directly opposite the frontage proposed to be altered," the proposed amendment requires adoption by 2/3 vote.

However, a recent Illinois Supreme Court decision may have changed the notice requirements beyond mere newspaper notice requiring direct notice to be sent to property owners who may be affected by a zoning change. *Passalino v. City of Zion*, 237 Ill.2d 118, 928 N.E.2d 814 (Ill. 2010). In *Passalino*, the City of Zion attempted to effectuate large scale rezoning by adopting a new zoning ordinance and map for the entire city. *Id.* at 816. The city gave published newspaper notice in accordance with 65 ILCS 5/11-13-2. *Id.* at 817. The new zoning changed the zoning district of 85 properties within the city. *Id.* at 820. The Illinois Supreme Court applied *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and held that the zoning ordinance would affect the property interests of landowners whose property was rezoned, and accordingly, those landowners were entitled to notice that was specifically directed to them apprising them of the hearing at which the zoning ordinance was considered. *Id.* at 819-21. Therefore, Illinois municipalities should be weary of simply following the statutory requirements and providing newspaper notice because such was of no protection to the City of Zion against a U.S. Constitutional Due Process violation.

5. Subdivision Regulations – § 89.410 RSMo. Section 89.410 RSMo. authorizes the planning commission of the municipality to recommend, and the council to ultimately adopt by ordinance, regulations governing the subdivision of land. The statute makes it clear that the municipality may impose various requirements on the subdivision of land, including:

a. Requiring the coordinated development of the city, town or village;

b. The coordination of streets within subdivisions with other existing or planned streets or with other features of the city plan or official map of the city, town or village;

c. Adequate open spaces for traffic, recreation, light and air;

d. Distribution of population and traffic; and

e. Posting of bonds, letters of credit or escrows for subdivision-related improvements.

Before adoption of its subdivision regulations or any amendment thereof, a duly advertised public hearing thereon shall be held by the council. There is no similar hearing requirement under state law for subdivision plat approval, but the practitioner should be aware that § 445.030 RSMo. does require the council to approve the subdivision plat by ordinance and further requires that all taxes must be paid prior to recording the plat with the County Recorder

of Deeds. Furthermore, § 89.400 RSMo. imposes an additional requirement that when the municipality has adopted a major street plan, the planning commission must review and make a recommendation to the city council and the council must approve the plat before such plat can be recorded.

6. Streets/Public Improvements – §§ 89.380, 89.460 RSMo. Pursuant to § 89.460 RSMo., if a city has adopted a major street plan and subdivision regulations, the municipally "shall not accept, lay out, open, improve, grade, pave or light any street, lay or authorize the laying of water mains, sewers, connections or other utilities in any street within the municipality unless the street has received the legal status of a public street prior to the adoption of a city plan; or unless the street corresponds in its location and lines with a street shown on a subdivision plat approved by the council or planning commission or on a street plan made by the council or planning commission or on a street plan made by and adopted by the commission." All other requests for street location, construction or acceptance must first be submitted to the planning commission for its approval. If it is disapproved by the planning commission, an affirmative vote of not less than two-thirds of the entire council is required for approval. Section 89.380 RSMo. also sets forth requirements in approving streets or other public improvements. Specifically, when the planning commission has adopted the plan of a municipality, "no street or other public facilities, or no public utility, whether publicly or privately owned, and, the location, extent and character thereof having been included in the recommendations and proposals of the plan or portions thereof, shall be constructed or authorized in the municipality until the location, extent and character thereof has been submitted to and approved by the planning commission." In the event the commission disapproves a street or public improvement, it must communicate its reasons for disapproval to the council and the council shall then approve only upon a two-thirds vote of the entire council. However, if the commission fails to act within sixty (60) days after submission of the request, the failure to act shall be deemed an approval by the commission. At least one Missouri court has found that this statutory requirement applies to school boards, but does not apply to counties. *See Bd. of Education of the School District of Springfield, R-12 v. City of Springfield*, 174 S.W.3d 653 (Mo. App. S.D. 2005).

7. Illinois Subdivision Plat Approval – 65 ILCS 5/ Art. 11, Div. 12. In conjunction with a comprehensive plan, cities can adopt an official map with ordinance setting forth standards for public improvements. In reviewing plats, the corporate authorities of the municipality shall determine whether a proposed subdivision plat complies with the official map. Whenever the official map/ordinance indicates that a school site, park site, or other public lands are necessary, the city may require that lands be designated for such public purpose before approving a plat. A subdivision plat must provide for streets, alleys, public ways, ways for public service facilities, storm and flood water run-off channels and basins, and public grounds, in conformity with requirement of the official map/ordinance. These requirements apply to land within the municipality and "contiguous territory which is not more than 1 1/2 miles beyond the corporate limits of an adopting municipality. . ."

B. APPLICABLE REVIEW STANDARDS; RULES OF PROCEDURE AND SUBSTANTIVE LAW.

1. Legislative vs. Administrative Actions and Judicial Review. As an initial matter, the applicant must identify the objective and the applicable review procedure, whether legislative, administrative or quasi-judicial. As set forth more fully in this section, zoning decisions may be legislative or administrative in nature. For example, adoption of a zoning code

is a legislative act entitled to presumptive validity. *See e.g., State ex rel. Helujon Ltd. v. Jefferson County,* 964 S.W.2d 531 (Mo. App. E.D. 1998) (Approval of PUD classifications are treated as rezoning, requiring a legislative standard of review.); *Wells & Highway 21 Corp. v. Yates,* 897 S.W.2d 56 (Mo. App. E.D. 1995) (Zoning ordinances are legislative acts and so challenges to their validity are reviewed de novo, with deference to the trial court's ability to assess credibility of witnesses.). However, in cases of implementation of the zoning ordinance, such as the issuance of a conditional or special use permit, courts construe such acts as an administrative in nature requiring a finding of substantial evidence supporting the decision. *Campbell v. City of Columbia,* 824 S.W.2d 47 (Mo. App. W.D. 1991) (On application for conditional use permit, board of adjustment acts strictly in administrative capacity in exercise of discretionary power delegated by city legislative body to enforce conditional use permit regulation.). Standards governing such administrative decisions must be sufficiently clear and definite. *Erigan Co., Inc. v. Town of Grantwood Village,* 632 S.W.2d 495 (Mo. App. E.D. 1982) (Zoning ordinance provision for special uses was invalid where it lacked standards to ensure reasonable enforcement in that it failed to specify authorized uses.). Failure to specify standards for administrative review is fatal. *See Porporis v. City of Warson Woods,* 352 S.W.2d 605 (Mo. 1962) *citing Lux v. Milwaukee Mechanics Ins. Co.,* 15 S.W.2d 343 (Mo banc. 1929) (Ordinance or statute which attempts to clothe administrative officer with arbitrary discretion, without definite standard or rule for his guidance, is unconstitutional). Administrative acts that deprive an applicant of protected property interests and rise to the level of being "truly irrational" may warrant damages under 42 U.S.C. § 1983. *Furlong Companies, Inc. v. City of Kansas City,* 189 S.W.3d 157 (Mo. banc 2006) (City council ignored advice of staff and city attorney, gave applicant no reasons for denial or opportunity to correct and subjected applicant to numerous, uncommon delays.).

2. Legislative Actions. Generally speaking, acts of the governing body are legislative in nature and are thus subject to a different standard of review than administrative acts.

a. Zoning. "It is well established in Missouri that the exercise of the zoning powers delegated to cities including the enactment of ordinances amending the comprehensive plan is a legislative function." *Strandberg v. Kansas City,* 415 S.W.2d 737, 742 (Mo. banc 1967); *see also Bowman v. Greene County Comm'n,* 732 S.W.2d 223 (Mo. App. S.D. 1987). "The power of a municipality or county to regulate land use is derived from the state police power as that power is delegated through the enactment of statutes . . . Missouri falls among the large group of jurisdictions that views the exercise of zoning power as a legislative function, rather than a quasi-judicial or administrative function." *State ex rel. Helujon, Ltd. v. Jefferson County,* 964 S.W.2d 531, 535-36 (Mo. App. E.D. 1998) *citing Heidrich v. City of Lee's Summit,* 916 S.W.2d 242, 248 (Mo. App. W.D. 1995) and *McCarty v. City of Kansas City,* 671 S.W.2d 790, 793 (Mo. App. W.D. 1984).

b. Rezoning. Rezoning decisions are legislative in nature. *Hoffman v. City of Town and Country,* 831 S.W.2d 223, 224 (Mo. App. E.D. 1992); *Erigan Co., Inc. v. Town of Grantwood Village,* 632 S.W.2d 495, 496 (Mo. App. E.D. 1982) *citing Vatterott v. City of Florissant,* 462 S.W.2d 711, 713 (Mo. 1971) ("Zoning, rezoning, and refusals to rezone are legislative acts."). Accordingly, presumptions favoring the determination attach. Rezoning requires a noticed public hearing prior to enactment and may additionally require a recommendation of the planning commission. § 89.050 RSMo.; *see also, Murrell v. Wolff,* 408 S.W.2d 842, 848 (Mo. 1966). In the event the planning

commission recommends against the rezoning proposal, local regulations may require approval by a "super-majority" of the governing body. In the event of a written protest by record owners of 30% of the land included in the proposal or within an area 185 feet distant and parallel to the area of the proposed rezoning, approval requires a favorable vote of at least two-thirds of the governing body. § 89.060 RSMo.

c. Initiative and Referendum. In Missouri, the processes of initiative and referendum may be available to effect a rezoning without approval of the governing body. Where statute provides the right of initiative and referendum to residents of a municipality, rezoning, as a legislative act, is not exempt from initiative or referendum. *State ex rel. Hickman v. City Council of Kirksville*, 690 S.W.2d 799 (Mo. App. W.D. 1985). However, a charter city may exempt rezoning from initiative and referendum by so stating within its charter. *State ex rel. Powers v. Donohue*, 368 S.W.2d 432 (Mo. banc 1963); *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d 501 (Mo App. E.D. 2006). In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), the Supreme Court held that the use of a referendum in a zoning issue is not invalid on a procedural due process theory (i.e. lack of hearing and notice) because the people can reserve to themselves the power to deal directly with matters which might otherwise be assigned to a legislative body. *See also Orange County Industrial Development Authority v. Florida*, 427 So.2d 174 (Fla. 1983) (Holding that once the referendum power is reserved certain discernible due process standards accompanying delegated powers do not apply.). Having established that initiative and referendum are available on rezoning, the question remains whether the notice and hearing requirements of Chapter 89 RSMo. must be fulfilled to enact valid rezoning ordinance by initiative or referendum. The Missouri Supreme Court in *State ex rel. Powers v. Donohue* held that any zoning amendment, even those adopted by initiative or referendum, enacted without complying with required notice and hearing provision would be "unlawful and void." 368 S.W.2d at 439. While the Court in *City Council of Kirksville* suggested that the hearing and notice requirements of Chapter 89 RSMo. need not be complied with where rezoning is being effected by initiative or referendum based on the *City of Eastlake* opinion, it should be noted that the *City of Eastlake* decision addressed whether lack of notice and hearing would violate constitutional procedural requirements, not whether the use of initiative or referendum to effectuate rezoning disposes of otherwise-mandatory statutory notice and hearing requirements. In view of the disagreement with *City Council of Kirksville* noted in *State ex rel. Petti v. Goodwin-Raftery*, 190 S.W.3d at 508, as to the continuing validity of *State ex rel. Power v. Donohue*, the cautionary view is that rezonings made by initiative or referendum must meet the procedural requirements set forth in Chapter 89 RSMo.

d. Planned Uses. The Planned Use Development ("PUD") is usually a development that is in whole or in part residential and proposed to be developed as a "unit" on one parcel of land. Often the development proposal is somewhat at variance with existing general zoning applicable to the site, but, in exchange for approval, the local government exercises "precise control" over the development through the approval of a site-specific development plan. See, 1 McQuillin Mun. Corp. § 1.80 (3rd ed. 2010). The main objective of a PUD "is to achieve flexibility to create a more desirable living environment than would be possible through the strict application of zoning ordinances." *Id.* The hope of the local government is that the PUD process will encourage developers to be creative in laying out their development by taking into account the terrain, natural

features, wooded areas, and other existing desirable features thus being more efficient in the use of resources. To increase their desirability, PUDs utilize modern zoning techniques, such as site plan review, green space allowances, density bonuses, and cluster zoning (i.e. allowing a reduction in size and width of individual lots within a large development provided the overall density of the track remains the same).

A PUD "is a relatively recent zoning concept, representing a modern, flexible approach to progressive land use planning . . .[the approval of which] is a zoning decision, requiring the same standard of review as the zoning or rezoning of an area." *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531, 536 (Mo. App. E.D. 1998) *see also McCarty v. City of Kansas City*, 671 S.W.2d 790, 796 (Mo. App. W.D. 1984) (Holding an amendment to the approved development plan is the equivalent to rezoning in that "the zoning characteristics of the district consist not only in the classification of the district to [PUD] but in the components of the general plan accompanying the application for the creation of the district and any subsequent amendments to the plan that may be properly adopted.").

3. <u>Standard of Review for Legislative Decisions</u>. In judicial review of legislative acts, courts will uphold decisions that are reasonable or where the issue is "fairly debatable." *J.R. Green Props., Inc. v. City of Bridgeton,* 825 S.W.2d 684, 686 (Mo. App. E.D. 1992). "The so-called 'debatable' rule means that, 'if there is substantial evidence both ways [i.e., substantial evidence of both reasonableness and unreasonableness], then the legislative conclusion is determinative.'" *JGJ Props., LLC v. City of Ellisville,* 303 S.W.3d 642, 648 n.5 (Mo. App. E.D. 2010) *citing Elam v. City of St. Ann,* 784 S.W.2d 330, 335 n.4 (Mo. App. E.D. 1990).

A review of zoning change decisions involves two steps:

1. The court reviews the property owner's evidence to determine whether the owner has successfully rebutted the presumption that the continuation of the present zoning is reasonable; and

2. The court reviews the government's evidence to determine whether it makes the continuance of the present zoning fairly debatable.

Despotis v. City of Sunset Hills, 619 S.W.2d 814, 820 (Mo. App. E.D. 1981); *see also JGJ Props.,* 303 S.W.3d at 648.

The determination of whether the challenging party has presented sufficient evidence to rebut the presumption of reasonableness is made by balancing the private detriment to the challenging party against the public interest in upholding the provision. Factors considered by the court in establishing private detriment include the adaptability of the property involved to its zoned use and the effect of zoning on property value. Courts consider a property's "reasonable" use rather than its "highest and best" use in measuring private detriment. Consideration of the "highest and best" use would circumvent the principles of a comprehensive zoning scheme because any landowner whose property was in any way diminished in value because of a zoning restriction could successfully challenge that restriction.

If the challenging party is successful in establishing that the private detriment outweighs

the public interest, the government must establish that the continuation of the present zoning is a "fairly debatable" issue. If the issue is at least fairly debatable, the reviewing court may not substitute its opinion for that of the zoning authority that enacted the challenged provision. *Lenette Realty & Inv. Co. v. City of Chesterfield*, 35 S.W.3d 399, 408 (Mo. App. E.D. 2000). The pertinent inquiry of the court is not what may have been literally or physically before the legislative body or present in the individual lawmakers' minds, but rather whether the legislative body's action, when viewed in the light of the facts existent at the time of enactment of the ordinance, was reasonably doubtful or fairly debatable. *Desloge v. St. Louis County*, 431 S.W.2d 126, 132 (Mo. 1968). The court will not inquire into the interest or motive of members of a legislative body when exercising legislative functions. *State ex rel. Kolb v. County Court of St. Charles County*, 683 S.W.2d 318, 322 (Mo. App. E.D. 1984). The court may reverse and order ministerial acts, but it cannot make the zoning authority's decisions for it. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 844 (Mo. 1963); *See also Treme v. St. Louis County*, 609 S.W.2d 706, 710 (Mo. App. E.D. 1980) (Finding the court exceeded its jurisdiction in ordering an amendment of the ordinance rezoning the tract of land when no such relief had been requested.).

Merely demonstrating that the reasonableness of the rezoned classification is debatable and doubtful will produce no success because that proof is not sufficient to show a failure to rezone is an arbitrary abuse of discretion that bears no reasonable relationship to the public health, safety, and general welfare. More must be shown by a proponent of a zoning change than the issue is fairly debatable. *Strandberg v. Kansas City*, 415 S.W.2d 737, 745-76 (Mo. banc 1967). Finally, the historical development of the ordinance should be checked. If possible, there should be a review of the minutes of the meeting at which the ordinance was discussed and passed to determine if the proposed action is consistent with the historical development. A check should be made of the comprehensive plans, traffic plans, city plans, etc. Previous plans and filings may contain a commitment or announcement of policy that will assist in promoting the client's interest. *Murrell v. Wolff*, 408 S.W.2d 842 (Mo. 1966).

On appeal of a trial court's approval of a city's action, because a city's rezoning of property and adoption of a new policy or scheme is a legislative and not administrative function, the city's action will be reviewed under the appellate procedure and standard requiring affirmation of a trial court's judgment unless there is no substantial evidence to support it, it was against the great weight of the evidence or it erroneously declared or applied the law. *Temple Stephens Co. v. Westenhaver*, 776 S.W.2d 438, 440 (Mo. App. W.D. 1989).

4. Attacks on the Validity of Zoning Ordinances. A zoning ordinance is presumed valid, and a party challenging its application has the burden of proving by clear and convincing evidence that it is unreasonable as applied. Any uncertainty as to the reasonableness of the zoning ordinance will be resolved in favor of the government. The court will not substitute its judgment for the council's unless it appears that the decision was arbitrary and unreasonable. *Longview of St. Joseph, Inc. v. City of St. Joseph*, 918 S.W.2d 364, 369 (Mo. App. W.D. 1996). The reasonableness of the governing body's action with regard to maintaining or changing zoning classifications can be attacked by declaratory judgment in the circuit court. It is not an administrative decision, and it requires no similar exhaustion of remedies. But when statutory writ of certiorari proceedings are provided, these proceedings should be exhausted before injunctive relief is sought. *State ex rel. Rhodes v. City of Springfield*, 672 S.W.2d 349, 357 (Mo. App. S.D. 1984). Under a petition for writ of certiorari, the court of appeals will refuse to review issues not presented to the board of zoning adjustment but raised for the first time on certiorari in circuit court. These proceedings are not *de novo*, and the court does not weigh evidence; it reviews only questions of law that appear on the face of the record. *State ex rel. Weinhardt v. Ladue Prof'l Bldg., Inc.*, 395 S.W.2d 316, 321 (Mo. App. 1965).

a. Standing. To confer standing, the challenged zoning decision must affect the interest of the person claiming standing more distinctly and directly than the public generally. *Lenette Realty & Inv. Co. v. City of Chesterfield*, 35 S.W.3d 399, 405 (Mo. App. E.D. 2000). Standing to challenge the validity of an ordinance or seek review of an administrative decision affecting property rights will be conferred on an "adjoining, confronting or nearby" property owner without further proof of special damage. *Allen v. Coffel*, 488 S.W.2d 671 (Mo. App. W.D. 1972). However, "adjoining, confronting or nearby property owners" must show that their "interests have been affected adversely more distinctly and directly than the general public's interest." *Miller v. City of Arnold*, 254 S.W.3d 249, 254 (Mo. App. E.D. 2008) (Affidavit of nearby property owner that he believed rezoning would increase traffic and decrease value of property were specious and did not state material facts to establish standing.). A party with a contractual right to buy the subject property also has standing. *Lenette Realty*, 35 S.W.3d at 405.

While a protectable right required for standing to challenge rezoning may be less than a legal wrong, the rezoning decision must act directly on an interest of the person who claims standing distinct from the effect on the general public. Missouri courts "are not bound by grants of standing given to litigants in federal courts." *Palmer v. St. Louis County*, 591 S.W.2d 39, 42 (Mo. App. E.D. 1979). In an action by realtors and landowners to enjoin the enforcement of a city anti-blockbusting ordinance on the grounds that it was unconstitutional, the court ruled that the landowners had no standing to challenge an ordinance when they had not alleged that they owned property in the zoning district to which the ordinance applied or that they had been adversely affected by the ordinance's proscriptions. *Howe v. City of St. Louis*, 512 S.W.2d 127, 130 (Mo. banc 1974); *but see Home Builders Assn. of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612 (Mo. App. E.D. 2000) (HBA's developer members had a legally protectable interest where doing business free from constraints of alleged unlawful ordinance deserves legal protection.). The "party asserting the unconstitutionality of a statute or ordinance bears the burden of supporting that contention by at least relating the argument to the statute or ordinance and issue at hand." *City of Eureka v. Litz*, 658 S.W.2d 519, 522 (Mo. App. E.D. 1983); *See also Cunningham v. Leimkuehler*, 276 S.W.2d 633, 635

(Mo. App. 1955) ("[C]ertiorari is not a trial de novo even though the statutes authorized taking of additional testimony in circuit court."); *Draper & Kramer, Inc. v. Mueller*, 599 S.W.2d 9 (Mo. App. E.D. 1980) (Review of denial of permit by way of writ of certiorari; appellate court found reason for denial pre-textual and real reason not a violation of ordinance.); *State ex rel. Monsey-Feager/Rouse-Waites v. McGuire*, 510 S.W.2d 449, 452 (Mo. banc 1974) (Writ of certiorari to review decision of board of adjustment must be served on the board and all who are interested parties before the board and whose property interests are directly affected.). Review of claims of zoning denials prior to actually requesting rezoning will not be heard. *St. Louis County v. City of Sunset Hills*, 727 S.W.2d 412 (Mo. App. E.D. 1987) (County, through a declaratory judgment action, sought determination that city zoning ordinance was unconstitutional and void as applied to county's land in the city but circuit court dismissed and court of appeals sustained because the action would not terminate the controversy giving rise to the proceeding because the county had not filed an application for rezoning.); *but see Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320 (Mo. App. 1976) (Application not required in a declaratory judgment action; court did not address the issue of justiciability.).

b. Equitable Estoppel. Equitable estoppel ordinarily is not applicable and usually cannot be invoked against a city in matters pertaining to the exercise of governmental functions, including matters relating to the enforcement in a change in zoning regulations. *See Fraternal Order of Police Lodge No. 2 v. City of St. Joseph*, 8 S.W.3d 257, 263 (Mo. App. W.D. 1999) ("Equitable estoppel is normally not applicable against a governmental entity . . . The application of equitable estoppel against governmental entities or public officers is limited to exceptional circumstances where right of justice or the prevention of manifest injustice requires its application . . . This doctrine is not favored by law and is not to be casually invoked . . . Equitable estoppel is not applicable if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy . . . The underlying principle behind its limited application to governmental entities and public officials is that public rights should yield only if private parties possess greater equitable rights.") (internal citations omitted); *see also State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Bd. of Adjustment*, 553 S.W.2d 721 (Mo. App. 1977) ("The doctrine of estoppel is not generally applicable against a governmental body and if applied, it is done so only in exceptional circumstances and with great caution. . .'Further, it is a well established principle in Missouri that a governmental unit is not estopped by illegal or unauthorized acts of its officers . . . it is recognized that a building permit for construction issued but unauthorized under the ordinance is void and a city is not estopped because its employee issued the license or permit.'") *citing State ex rel. Walmar Inv. Co. v. Mueller*, 512 S.W.2d 180, 184 (Mo. App. 1974); *JGJ Properties, LLC v. City of Ellisville*, 303 S.W.3d 642, 650-52 (Mo. App. E.D. 2010) (Refusing to estop city from denying rezoning to commercial even though city planner assured applicant that the land was appropriate for commercial use and applicant received a variance conditioned on the rezoning of the properties because "it is generally true that estoppel will not lie against a city based upon the statements and actions of its agents[.]"). But "the courts may apply the doctrine in exceptional cases where required by right and justice . . . or to prevent manifest injustice." *Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo. 1966).

5. Administrative Actions. Generally speaking, acts of officers, boards of adjustment, and other non-legislative boards of the governing body are typically administrative in nature and are subject to a different standard of review than legislative acts. As a result, an applicant seeking administrative approval is faced with different burdens and procedures in administrative proceedings. The following are typical activities related to the zoning process that are generally found to be administrative in nature:

a. Special Use/Conditional Use Permits. A special or conditional use is one permitted in a zoning district following a specific review and approval based on enumerated requirements and subject to certain conditions which may be imposed. *See e.g., Deffenbaugh Industries, Inc. v. Potts*, 802 S.W.2d 520 (Mo. App. W.D. 1990). Allowable special uses are identified within the regulations of the zoning district to which they apply. Special use permits are personal to the holder and not transferable unless the granting ordinance so expressly provides. *Citizens for Safe Waste Mgt. v. St. Louis County*, 810 S.W.2d 635, 642 (Mo. App. E.D. 1991). As noted above, in reviewing applications for a special use permit, the reviewing body acts in an administrative capacity. *Ford Leasing Development Co. v. City of Ellisville*, 718 S.W.2d 228, 234 (Mo. App. E.D. 1986). Accordingly, limitations on administrative discretion apply. Appeals of a denial of special use permits are, however, to the circuit court under the certiorari provisions of the Zoning Enabling Act (Chapter 89 RSMo.) rather than by petition for review under the Administrative Procedures Act. *Platte Woods United Methodist Church v. City of Platte Woods*, 935 S.W.2d 735 (Mo. App. W.D. 1996). Further, a board can deny a conditional use permit based on lay witness testimony even if there is expert testimony to the contrary. *See State of Missouri, ex rel Karsch et al. v. Camden County*, 302 S.W.3d 754, 761-62 (Mo. App. S.D. 2010) ("Several cases have held that lay witness testimony is sufficient to support the denial of a request for a CUP and that lay witness testimony can even be considered over expert testimony at the discretion of the administrative body rendering the decision.").

b. Site Plan Review/Planned Districts. Site plan review reflects another administrative approval which allows imposition of conditions on a site-by-site basis. In contrast, planned districts provide for the imposition of similar development-specific conditions within the context of a rezoning decision (i.e. legislative). In both cases, the conditions imposed must reasonably relate to the impact of the development on the surrounding area. *See e.g., Treme v. St. Louis County*, 609 S.W.2d 706 (Mo. App. E.D. 1980).

c. Variances. Variances describe a form of quasi-judicial relief which may be granted by a board of adjustment from strict application of zoning regulations to a particular property where "practical difficulty" or "unnecessary hardship" would otherwise result. *See* § 89.090.1(3) RSMo. (Providing that a board of adjustment shall have power "[i]n passing upon appeals, where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the construction or alteration of buildings or structures or the use of land so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done . . .").

The difficulty or hardship must be different from that suffered throughout the zone or location. *Ogawa v. City of Des Peres,* 745 S.W.2d 238, 242-43 (Mo. App. E.D. 1987) (Upholding denial of a variance and finding that it was not unreasonable, arbitrary, or capricious even though it deprived the owner of any permitted use of the property under the current zoning ordinance because, among other reasons, there were at least 15 other parcels of property similarly situated and granting a variance would alter the character of the neighborhood.). A public hearing must precede the decision. Although economic hardship may be considered, the standards for a grant of variance generally refer to some unique physical attribute of the property. *See Behrens v. Ebenrech*, 784 S.W.2d 827, 829 (Mo. App. E.D. 1990) (Finding that property owners' argument that their lot suffered to an unusual degree because it was the only house on the street with its backyard facing the road did not establish requisite "practical difficulties" in support of their application to erect a privacy fence in violation of city code.); *Conner v. Herd,* 452 S.W.2d 272, 277 (Mo. App. 1970) (Noting that even economic hardships must reflect the nature of the property, not the situation of the owner or applicant.); *but see Highlands Home Ass'n v. Bd. of Adjustment,* 306 S.W.3d 561, 566-68 (Mo. App. W.D. 2009) (Reviewing showing of practical difficulties for two variances for 95-foot disguised cellular tower and above-ground storage unit, court found that "[b]ecause landowner and Sprint do not seek to rely on "economic hardship" as a primary consideration, we do not find that they were required to show a topographical limitation to the particular piece of land in question to justify their request for a variance in this instance."). Further, a variance should not issue where the applicant caused the difficulty or hardship or where the difficulty predates applicant's purchase of the property. *J.R. Green Props., Inc. v. City of Bridgeton*, 825 S.W.2d 684, 686 (Mo. App. E.D. 1992) (Noting that "[o]ne who purchases realty with the intention of applying for a variance cannot contend that restrictions caused him such peculiar hardship that he is entitled to special privileges.").

Missouri recognizes both "use" variances and "non-use" or area variances. *Matthew v. Smith,* 707 S.W.2d 411 (Mo. banc 1986). A "use" variance permits uses other than those permitted by the zoning ordinance while a "non-use" variance permits deviations from restrictions that relate to a permitted use, such as height and size of buildings, lot size, and yard requirements. *Hous. Auth. of City of St. Charles v. Bd. of Adjustment of the City of St. Charles,* 941 S.W.2d 725, 727 (Mo. App. E.D. 1997). A greater showing of hardship is required for a use variance. *Matthew,* 707 at 416 (Noting that a non-use variance requires a "slightly less rigorous" standard.). The "practical difficulties" standard is applied in nonuse variance cases, and the "unnecessary hardship" standard is applied in use variances. *See Wolfner v. Bd. of Adjustment of the City of Warson Woods,* 114 S.W.3d 298 (Mo. App. E.D. 2003). Indeed, in the context of a use variance, courts have interpreted the standard to require "circumstances where the refusal to grant the variance would amount to denial of any permitted use under the ordinances." *McMorrow v. Bd. of Adjustment for City of Town & Country*, 765 S.W.2d 700, 701 (Mo. App. E.D. 1989). In Illinois, the standard is stated as "practical difficulties" or "particular hardship." 65 ILCS 5/11-13-5. Unlike some special use permits, all variances run with the land. *Ford Leasing Development Co. v. City of Ellisville,* 718 S.W.2d 228, 232 (Mo. App. E.D. 1986).

6. Appeals from Decisions of Officers. While the board of adjustment certainly hears requests for variances from the underlying zoning requirements for a parcel of land, the board is also endowed with the power to hear appeals from decisions of any administrative official in the enforcement of §§ 89.010 to 89.140 RSMo. or of any ordinance adopted pursuant to such sections "*where it is alleged there is error in any order, requirement, decision, or determination*" by such official. § 89.090.1(1) RSMo. (emphasis added). Such an appeal may be taken by any person aggrieved, by any neighborhood organization, as defined in § 32.105 RSMo., representing such person, or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer. *See* § 89.090 RSMo. So, while a board, commission, council or a local government could appeal a decision of one of its officers, no appeal lies for any action by a board, commission or council — only "administrative officers." *See Longview of St. Joseph, Inc. v. City of St. Joseph*, 918 S.W.2d 364, 370 (Mo. App. W.D. 1996).

Thus, a person who has been aggrieved by a decision by an officer may seek a determination by the board of adjustment as to whether the official's interpretation of the code was correct. In fact, before a person denied a permit can seek legal redress for such denial, the person must first have such claim reviewed by the board of adjustment. Failure to do so could be considered jurisdictional.

7. Procedural Concerns. As stated above, administrative zoning proceedings are controlled by Chapter 89 RSMo. and to some degree, Chapter 536 RSMo. ("Administrative Procedures Act"). *See Wolfner v. Bd. of Adjustment of City of Warson Woods*, 39 S.W.3d 76, 77-78 (Mo. App. E.D. 2001); *State ex rel. Wrenn v. Bd. of Zoning Adjustment of Kansas City*, 923 S.W.2d 423, 424 (Mo. App. W.D. 1996); *Sandweiss v. Bd. of Adjustment of City of St. Louis*, 811 S.W.2d 48, 49 (Mo. App. E.D. 1991); *Drury Displays, Inc. v. Bd. of Adjustment of City of St. Louis*, 781 S.W.2d 201, 203 n. 1 (Mo. App. E.D. 1989). Thus, an applicant should be familiar with limitation periods for any challenge, notification of interested parties, and other procedural requirements involved whether relating to filing for review with a board or council of the local government pursuant to local regulations, filing for judicial review or appealing a decision of a local government. Similarly, an applicant should know whether a record is required to be made, a court reporter engaged or whether formal, written findings and conclusions must accompany the decision. *See generally, State ex rel. Steak n Shake, Inc. v. City of Richmond Heights*, 560 S.W.2d 373, 376 (Mo. App. 1977) (Where hearing was required, duty to cause a record to be made fell on the parties desiring that their interests be reviewed.). That said, difficulty in ascertaining just what procedures apply arises, however, because "[a] review of section 89.110 shows that there are no requirements of any kind in that section to mandate specific or mandatory notice, required findings of fact, or any recommendation requirements . . ." *State ex rel. Jackson v. City of Joplin*, 300 S.W.3d 531, 534-38 (Mo. App. S.D. 2009) (Rejecting argument that failure of a city planning commission to make an actual "recommendation" deprives the council of authority to grant a special use permit because there is no statutory requirement under § 89.110 RSMo. that a commission issue any findings of fact; using § 536.090 RSMo. to supplement the lack of a findings requirement in § 89.110 would be improper because the written findings requirement of § 536.090 has no application in a § 89.110 certiorari review, *citing State ex rel. Co-op. Ass'n No. 86 of Aurora v. Bd. of Zoning Adjustment of the City of Aurora*, 977 S.W.2d 79, 84 (Mo. App. S.D. 1998) ("[F]indings of fact requirement of section 536.090 'does not apply' to challenges to a municipal zoning decision filed under section 89.110[.]"); thus city's failure to follow a local findings of fact requirement, even by the final decision-making body, does not

itself invalidate the decision, *citing Karelitz v. Soraghan,* 851 S.W.2d 85, 88 (Mo. App. E.D. 1993) ("[F]inding a board's failure to issue findings of fact did not invalidate decision where findings of fact were required under ordinance and not statute . . . even without the findings of fact, the board's reasons for granting the variance were clearly explained in the transcript of the proceedings.")); *but see Complete Auto Body & Repair, Inc. v. St. Louis County,* 232 S.W.3d 722, 726 (Mo. App. E.D. 2007) (Applying § 536.090 RSMo., and stating that in any contested case decided on the merits, the administrative body is required to accompany its decision with findings of fact and conclusions of law.). If findings are prepared, any review of the findings supporting an administrative decision should consider whether the findings are fairly and adequately stated, whether findings are based on evidence in the record, whether findings are consistent with applicable law, and whether the findings comport with the applicable administrative standards.

8. <u>After the Decision (Rehearing or Reconsideration - Limitations on Timing; Repetitive Petitions)</u>. In the event of an unfavorable result, applicant may consider a request for reconsideration prior to resorting to litigation. Although administrative bodies are reluctant to grant reconsideration, availability may depend on common law and on the procedural rules governing the agency. *See e.g.,* MCQUILLIN ON MUNICIPAL CORPORATIONS § 25.274 n.3 (3rd ed.) *citing Rosedale-Skinker Imp. Ass'n v. Bd. of Adjustment of City of St. Louis,* 425 S.W.2d 929, 932 (Mo. banc 1968) (Rehearing before a board of adjustment may be available where there is a material change in the condition of the property or in the plans of the applicant.). *But see, State ex rel. Laidlaw Waste Systems, Inc. v. Kansas City,* 858 S.W.2d 753, 755-56 (Mo. App. W.D. 1993) (Limiting the *Rosedale-Skinker* decision to zoning variance appeals and further determining in the case of a conditional use permit that zoning boards enjoy no inherent power to rehear cases.). Even where local procedures bar repetitive petitions, a new hearing may be obtained where substantial changes are made. Absent some change in underlying facts, however, a favorable decision which obtains a rehearing may in turn be challenged as arbitrary. *Res judicata* is applicable to decision of the board of adjustment. *See Veal v. City of St. Louis,* 289 S.W.2d 7, 10-11 (Mo. 1956) (Holding that the decision of the board of adjustment, as affirmed on appeal, was conclusive on the landowner.); *Landes v. City of Kansas City,* 635 S.W.2d 87, 90 (Mo. App. W.D. 1982). However, *res judicata* may not be invoked in a decision by a legislative body such as a city council. The fact that a council has already considered the same question under the same set of facts does not bar future consideration. *Broadway Apartments, Inc. v. Longwell,* 438 S.W.2d 451, 457 (Mo. App. W.D. 1968). See also *Treme v. St. Louis County,* 609 S.W.2d 706, 716 (Mo. App. E.D. 1980) in which the court held that a county council's refusal to rezone a tract of land in question upon a prior request did not establish that a subsequent rezoning was in conflict with the county's comprehensive plan.

a. <u>Exhaustion</u>. A party aggrieved by an administrative zoning decision must exhaust its administrative remedies before it can resort to an action at law or in equity. A party is not entitled to a writ of mandamus or declaratory judgment when there is an available adequate remedy – by way of administrative review – that has not been exhausted. *See State ex rel. J. S. Alberici, Inc. v. City of Fenton,* 576 S.W.2d 574 (Mo. App. E.D. 1979); §§ 64.660 and 536.100 RSMo.; *Williams v. City of Kirkwood,* 537 S.W.2d 571 (Mo. App. 1976); *Cohen v. Ennis,* 318 S.W.2d 310 (Mo. banc 1958). Courts will routinely dismiss cases when exclusive remedies are not exhausted first. *See State ex rel. Freeway Media, L.L.C. v. City of Kansas City,* 14 S.W.3d 169, 173 (Mo. App. W.D. 2000) (Finding that a declaratory judgment and writ of mandamus action for denial of

outdoor advertising permits was improper and the exclusive remedy was an appeal to the board of zoning appeals, and that the declaratory judgment law is not a substitute for already existing remedies.); *Fewin v. City of Poplar Bluff*, 768 S.W.2d 594, 595 (Mo. App. S.D. 1989) (Appeal dismissed because no showing that rental property owner had exhausted administrative remedies under the city's ordinances establishing the procedure for obtaining building permits and appeals from a denial of them.).

The proper course of action is to exhaust administrative remedies by appealing to the board of zoning adjustment. Appeals of decisions of officials in second and third class county boards of zoning adjustment are made under §§ 64.870 and 64.660 RSMo. by petition for writ of certiorari; appeals from first class county boards of zoning adjustment are made under § 64.120 RSMo.; and appeals to boards of adjustment in cities is pursuant to § 89.110 RSMo. (Judicial review of decisions of board of adjustment.); *N.G. Heimos Greenhouse, Inc., v. City of Sunset Hills*, 597 S.W.2d 261, 262 (Mo. App. E.D. 1980) (Failure to exhaust administrative remedies set forth in Chapter 89 RSMo. and the city code was jurisdictional defect requiring dismissal.).

In other situations, even where statute does not provide for administrative review of a city's decision, exhaustion may still be required if a system for administrative review is provided for by the municipality. *State ex rel. Maynes Constr. Co. v. City of Wildwood*, 965 S.W.2d 949, 952-53 (Mo. App. E.D. 1998) (Developer was required to take advantage of administrative review procedures in the city code before seeking judicial relief on challenge of conditions placed on site development plan by city's P&Z commission.).

Absent a special statute or ordinance, the administrative review will be a review under Chapter 536 RSMo. *Standard Oil Div. of Amoco Oil Co. v. City of Florissant*, 607 S.W.2d 854 (Mo. App. E.D. 1980). Whether that review is under § 536.100 RSMo., or § 536.150 RSMo., depends on whether the decision was made in a contested case which, in turn, exists only when there are rights required by law to be determined after the hearing. *State ex rel. Crouse v. City of Savannah*, 696 S.W.2d 346, 347 (Mo. App. W.D. 1985). While the Missouri Administrative Procedure Act, Chapter 536 RSMo., and Rules 100, *et seq.*, sets forth special procedures for review of contested cases, such procedures are inapposite to authorized declaratory judgments and other specific provisions for judicial review or actions of planning and zoning commissions as provided by statute. *See* § 64.660 RSMo.; *see also American Hog Co. v. Clinton County*, 495 S.W.2d 123, 127-28 (Mo. App. W.D. 1973). A provision providing for judicial review other than Chapter 536 RSMo. does not eliminate the need to exhaust administrative remedies before filing the petition. *Platte County v. Chipman*, 512 SW.2d 199 (Mo. App. W.D. 1974); *State ex rel. Crouse v. City of Savannah*, 696 S.W.2d 346 (Mo. App. W.D. 1985).

However, when an ordinance is challenged as facially unconstitutional, courts will not require parties to exhaust administrative remedies. *See Dallen v. City of Kansas City*, 822 S.W.2d 429, 434 (Mo. App. W.D. 1991) (Property owners who wished to build a gasoline service station in a manner not allowed under the zoning regulations not required to file for a building permit before challenging an entire ordinance as facially unconstitutional.).

A political subdivision seeking a determination of immunity from the zoning authority of another political subdivision does not have to exhaust administrative remedies before seeking judicial determination of its intergovernmental immunity. *City of Bridgeton v. City of St. Louis,* 18 S.W.3d 107, 112 (Mo. App. E.D. 2000) (Issue of whether St. Louis, which owns the airport, is immune from the zoning ordinances of Bridgeton, which is the location of a proposed runway expansion for the airport, is purely legal and does not require St. Louis to exhaust administrative remedies.). For other failure-to-exhaust cases, see *Toghiyany v. City of Berkeley,* 984 S.W.2d 560 (Mo. App. E.D. 1999); *Miller v. Browning-Ferris Industries,* 674 S.W.2d 150 (Mo. App. W.D. 1984); *N. G. Heimos Greenhouse, Inc. v. City of Sunset Hills,* 597 S.W.2d 261 (Mo. App. E.D. 1980); and *Westside Enterprises, Inc. v. City of Dexter*, 559 S.W.2d 638 (Mo. App. S.D. 1977).

b. Ripeness. Although technically distinct from the requirement for exhaustion of administrative remedies, the requirement that a claim be ripe for review is similar in effect. In *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269, 1273-74 (8th Cir. 1994), in which the plaintiffs claimed that the county's conditional approval of the plaintiffs' site development violated their rights to equal protection under the 14th Amendment and took their property without due process in violation of the 5th and 14th Amendments, the court, citing to *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985), held that for such claims to be ripe, the particular zoning decision being challenged must be finally applied to the property at issue. The decision maker must arrive at a definite position on the application, inflicting an actual concrete injury on the applicant. The court determined that the county had made a final decision even though the plaintiffs had not applied for a variance. *See Williamson County Regional Planning Comm'n*, 473 U.S. at 192–94 (Holding that a final decision must involve denial of a variance).

c. Standing. In order to have standing to challenge an administrative zoning decision, the plaintiff must demonstrate a specific and legally cognizable interest in the subject matter of the decision and show that the decision will have a direct and substantial impact on the plaintiff's personal or property rights or interests. *See Citizens for Safe Waste Management v. St. Louis County,* 810 S.W.2d 635, 639-40 (Mo. App. E.D. 1991) (Finding that a not-for-profit entity did not have standing because it did not allege an interest in the subject matter other than the interests of its individual members, but an owner and resident of property adjacent to a landfill site — who had alleged the adverse impact from fumes and odors, increased traffic, dust, and noise generated by the landfill — had standing.).

d. <u>Standard of Review for Administrative Actions</u>. An appellate court reviews the findings and conclusions of the board of adjustment and not the judgment of the trial court. The scope of the review is limited to determination of whether the board's action was supported by competent and substantial evidence upon the record as a whole (viewing the evidence and the inferences in a light most favorable to the action or decision) and whether the action was arbitrary, capricious, unlawful, unreasonable or in excess of the board's jurisdiction. *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. banc 2000); *see also Wolfner v. Bd. of Adjustment of City of Frontenac,* 672 S.W.2d 147, 150 (Mo. App. E.D. 1984). The court of appeals does not substitute its judgment or try the matter *de novo*. *Heather Ridge P'ship, L.P. v. City of Creve Coeur*, 997 S.W.2d 46, 48 (Mo. App. E.D. 1999). If there is substantial credible evidence to support the finding and if the result could reasonably have been reached, the court of appeals is without authority to disturb the finding unless it was clearly contrary to the overwhelming weight of the evidence. *Wolfner*, 672 S.W.2d at 150.

The court will view the record in the light most favorable to the findings of the tribunal and consider favorable inferences that the tribunal had the right to draw from the evidence before it. *Murphy v. Bd. of Zoning Adjustment of Kansas City*, 593 S.W.2d 549, 554 (Mo. App. W.D. 1979). If an ordinance does not define certain terms, the court of appeals will seek to ascertain the legislative intent. *Coots v. J. A. Tobin Constr. Co.*, 634 S.W.2d 249, 251 (Mo. App. W.D. 1982). Regardless of nomenclature adopted by the board of zoning adjustment, the court of appeals will look at what actually occurred and determine the matter accordingly. *Gipson v. Bd. of Zoning Adjustment of Kansas City*, 609 SW.2d 468, 472 (Mo. App. W.D. 1980) (Court decided that the board had not actually granted a variance.).

Each of the following three cases contain an excellent analysis of the standard of appellate review of a zoning decision in Missouri and they are noteworthy for that purpose: *St. Louis County v. Kienzle*, 844 S.W.2d 118 (Mo. App. E.D. 1992); *J.R. Green Properties, Inc. v. City of Bridgeton*, 825 S.W.2d 684 (Mo. App. E.D. 1992); *Hoffman v. City of Town & Country*, 831 S.W.2d 223 (Mo. App. E.D. 1992). *Hoffman* is particularly enlightening with respect to the distinction between *de novo* appellate review and the *Murphy v. Carron*, 536 S.W.2d 30, 31 (Mo. banc 1976) standards relating to the appellate court's obligation to defer to the trial court's determination with respect to the credibility of witnesses.

All parties to a proceeding before the board of adjustment must be given notice of any petition for review of the board's decision by the circuit court. Section 89.110 RSMo. and § 536.110 RSMo. are *in pari materia* and must be construed together; thus, it is jurisdictional that the board and each party of record be notified personally or by registered mail of the petition for review. If the trial court does not have jurisdiction to determine the issues presented on the merits, an appellate court has no jurisdiction to consider the appeal. Neither consent nor waiver can confer jurisdiction; the court has a duty to make a determination, *sua sponte*, as to its jurisdiction. In *State ex rel. Wrenn v. Bd. of Zoning Adjustment of Kansas City*, 923 S.W.2d 423, 425 (Mo. App. W.D. 1996), the neighboring landowners were parties to the proceeding under § 536.100, RSMo. 1994, as designated by the record before the board of adjustment, and were not given

notice of the subsequent application for writ of certiorari; therefore, the trial court was without jurisdiction to enter an order.

It should be noted, however, that in Illinois the distinction between legislative and administrative acts has been blurred with the adoption of statutes like 65 ILCS 5/11-13-25, which provides for *de novo* judicial review as a legislative act on all decisions by the corporate authority of a municipality on special uses, variances, rezonings, and other zoning ordinance amendments.

C. GENERAL TIPS AND RULES OF PROCEDURE FOR ZONING DECISIONS

Prior to seeking zoning approvals, the applicants/practitioners should familiarize themselves with the proposed development or improvement and its location and surrounding uses as well as all applicable zoning regulations. Typically, local governments update and amend zoning regulations on a piecemeal basis. Thus, the practitioner should assure that the regulations under review represent the most current iteration. Thorough review of the substance of the regulations is critical. Additionally, development of a procedural time line may assist in determining the scope of review and the approach and in estimating the likely duration of the review process.

1. Creating a Record. In Missouri, the hearing may be formal or informal, a record or a non-record hearing depending on the type of approval sought and local regulations and procedures. Generally, in matters of a quasi-judicial nature such as appeals before the board of adjustment or other board of appeals, the local government will create a record. *See e.g.*, § 89.080 RSMo. ("All testimony, objections thereto and rulings thereon, shall be taken down by a reporter employed by the board for that purpose."). For other administrative matters such as the issuance of a conditional or special use permit, the local governmental body may or may not generate a written record and so the applicant who fears an adverse decision may want to engage a court reporter given that the court's review will involve an inquiry into whether the municipal entity's decision to issue or deny a permit was based on competent and substantial evidence *on the record. See e.g., State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. banc 2000). In any case, all parties involved in such record hearings should formally submit all exhibits, ordinances, and other documentation relied on in presenting their position. *See Lussow v. County Comm'n of Franklin County*, 887 S.W.2d 815, 816-17 (Mo. App. E.D. 1994) (Recognizing that because a court may not take judicial notice of the existence or contents of an ordinance, the ordinance must be entered into the record when the ordinance "prescribes standards for the issuance of a CUP," and that the absence of the ordinance from the record is a "fatal defect in the proceedings" leaving the court with "no standards for determining whether the [commission's] decision was based on competent and substantial evidence, since we do not know what was required in order to justify the issuance of the permit.") (internal citations omitted).

2. Notice; Due Process Considerations. Various application procedures require advance submittals to gain access to a review agency agenda. An applicant should also become familiar with requirements for support documentation and similar information and exhibits to assure that the application will be deemed complete and be accepted for timely review. In some cases, the applicant retains responsibility for notice to surrounding owners and residents. For example, where a decision requires a public hearing, an applicant should at a minimum inquire

as to the notice and timing requirements and responsibilities. Furthermore, anyone who appeals a decision of the board of adjustment to the circuit court must give notice to abutting landowners who participated in proceedings before the board as such notice is jurisdictional. *Wolfner v. Bd. of Adjustment of City of Warson Woods*, 39 S.W.3d 76, 78 (Mo. App. E.D. 2001) (Reading § 89.110 and § 536.110 RSMo. *in pari materia* and applying Chapter 536's notice requirements where Chapter 89 RSMo. is silent; finding it "jurisdictional that the agency and each party of record be notified personally or by registered mail of the petition for review filed by an aggrieved party.") (internal citations omitted). Where a municipal zoning decision is legislative (such as rezoning), the failure to comply with statutory notice requirements will be fatal to the decision. *State ex rel. Freeze v. City of Cape Girardeau*, 523 S.W.2d 123 (Mo. App. 1975). However, failure to comply with notice requirements set forth only in a city's ordinance (and not statute) generally will not render a zoning decision void. *State ex rel. Jackson v. City of Joplin*, 300 S.W.3d 531 (Mo. App. S.D. 2009).

3. Evidentiary Matters. Well in advance of the hearing, an applicant should obtain any applicable written rules of procedure. An applicant may also consult with staff and other prior applicants to obtain familiarity with local procedures. To facilitate the hearing, an applicant may wish to identify exhibits in advance of the presentation. Because strict rules of evidence do not typically apply to local land use hearings, authentication of documents is not required and hearsay (if not objected to) will usually be admitted. *See State ex rel. Henze v. Wetzel*, 754 S.W.2d 888, 896 (Mo. App. E.D. 1988) (Boards of adjustment are not bound by rules of technical pleading.). Counsel for an applicant should ensure, however, that the record demonstrates that exhibits are introduced and admitted by the presiding officer. Where the record will be summarized by the reviewing agency, an applicant may consider obtaining the services of a stenographic reporter. *See Drury Displays, Inc. v. Bd. of Adjustment of City of St. Louis*, 832 S.W.2d 330, 331 (Mo. App. E.D. 1992) (Appellant's failure to provide transcript of board of adjustment proceeding presented inadequate record for appellate review.). When litigation or other review is anticipated, a court reporter transcribing the proceedings is indispensable. *Bloom v. City of Independence*, 591 S.W.2d 104, 105-06 (Mo. App. W.D. 1979). Illinois requires all testimony given at hearings provided under Art. 11, Div. 13 – Zoning – of the Illinois Municipal Code to be under oath.

4. Lobbying; *Ex Parte* Contacts. Prior to or during the pendency of an application, applicants may wish to make formal or informal contacts with officials and staff involved in the review. An applicant's counsel should be particularly aware, however, of restrictions on *ex parte* communications with officials directly involved in the review and decision making. Limitations typically apply to non-legislative proceedings before quasi-judicial bodies such as boards of adjustment or commissions where decisions are based on a record such as in administrative "contested" cases. This may include special use permits, variances, and related administrative or quasi-judicial proceedings.

5. Know Your Opponent. Generally speaking, the governmental body is not the adversary, if one even exists. Instead, objections will likely come from neighbors, business competitors or other interested parties. Counsel should know the opposition and what interests they may have. And while the interests may not be sufficient to give the opposition standing to challenge the proceedings, those in opposition to a zoning application may still wield influence with persuasive results. *See e.g., City of Eureka v. Litz*, 658 S.W.2d 519, 522-23 (Mo. App. E.D. 1983) (The fact that a proposed medical clinic would be in competition with a hospital for

emergency services did not give the hospital standing to challenge a grant of a special use permit for the clinic.); *but see State ex rel. Hous. Auth. of St. Louis County v. Wind*, 337 S.W.2d 554 (Mo. App. 1960). Thus, applicants might be well served to meet with potential adversaries early in the process to assuage any fears or concerns.

6. Conditions. An issuing officer may attempt to attach conditions to the issuance of building permits and other ministerial acts that substantively expand the ordinance. It should be determined if there is statutory or ordinance authority for the conditions and then if the same conditions have been imposed in previous, similar situations. *State ex rel. Rhodes v. City of Springfield*, 672 S.W.2d 349 (Mo. App. S.D. 1984); *Wolfner v. Bd. of Adjustment of City of Frontenac*, 672 S.W.2d 147 (Mo. App. E.D. 1984).

7. Testimony of Property Value. While a landowner is competent to testify about the fair market value of her property, *see Rigali v. Kensington Place Homeowners' Ass'n*, 103 S.W.3d 839, 846 (Mo. App. E.D. 2003), such testimony alone may not be considered "substantial" by a court. *JGJ Props., LLC v. City of Ellisville*, 303 S.W.3d 642, 650 (Mo. App. E.D. 2010) ("The only evidence of the alleged diminution in value presented at trial was [the property owners'] own self-serving testimony that their properties are worth less zoned residential than they would be under commercial zoning. Appellants failed to provide evidence of any appraisals or other substantive evidence of the relative value of their properties when zoned as residential versus commercial. The record contains no evidence of the properties' residential or commercial value, much less any evidence that the current zoning has adversely affected the properties' residential value, either absolutely or relative to their commercial worth. We find no evidence in the record, aside from [the property owners'] own conclusions, that the properties in question would definitely be worth more zoned as commercial property rather than residential."). For that reason, if property values are at issue, it might be preferable to have expert testimony. *Rigali*, 103 S.W.3d at 846 ("Any lack of professional experience on the part of the landowner goes to the weight and not the competency of the testimony.").

8. General Rules of Construction – Zoning Codes. The following principles of construction or interpretation of zoning ordinances have been approved on a number of occasions:

- The determination of what uses are permitted under a zoning ordinance must be made on the basis of the wording of the particular ordinance and the context in which it occurs.

- The basic rule of statutory construction is to seek the intention of the legislators and, if possible, to effectuate that intention.

- Legislative intent must be ascertained by giving words their ordinary, plain, and natural meaning and by considering the entire act and its purposes and by seeking to avoid an unjust, absurd, unreasonable or oppressive result.

- Zoning ordinances, being in derogation of common law property rights, are to be strictly construed in favor of the property owner and against the zoning authority.

- When a term in a zoning ordinance is susceptible of more than one interpretation, the courts are to give weight to the interpretation that, while still within the confines of the

term, is least restrictive on property owners' rights to use their land as they wish.

- The interpretation placed on a zoning ordinance by the body in charge of its enactment and application is entitled to great weight.

See Coots v. J. A. Tobin Constr. Co., 634 S.W.2d 249 (Mo. App. W.D. 1982).

9. Conflicts between Zoning Authority and other Statutory Provisions. When statutes and municipal ordinances conflict, the statutes will prevail. *McCarty v. City of Kansas City*, 671 S.W.2d 790, 793 (Mo. App. W.D. 1984). A municipality may not attempt to broaden statutory or constitutional power by passage of its own ordinances on the same subject. For the most part, municipal ordinances finding their authority in the constitution or other non-zoning statutory power will prevail over zoning ordinances. *City of Kirkwood v. City of Sunset Hills*, 589 S.W.2d 31, 42-43 (Mo. App. E.D. 1979) (Statute authorized the city's acquisition of property within one mile of its corporate limits to be used as a public swimming pool and recreational facility but adjacent city had a statutorily authorized zoning ordinance prohibiting such use; court sustained the acquisition of the pool and facility because city's power to acquire land by purchase or condemnation for parks had its source in Article I, § 26 of the Constitution of Missouri.); *see also State ex rel. City of Gower v. Gee*, 573 S.W.2d 107, 111-12 (Mo. App. 1978) (Finding a fourth class municipality was authorized to construct a sewage plant on land outside of but within five miles of its municipal corporate limits despite the conflicting zoning ordinance of second class county restricting the land site to agricultural purposes.); *but see St. Louis County v. City of Manchester*, 360 S.W.2d 638, 642 (Mo. banc 1962) (The county could enjoin construction of a fourth class city sewage disposal plant in an area outside of city limits within the county district designated as residential.).

Similar conflicts arise between zoning ordinances and regulations of the Public Safety Commission. *See Union Electric Co. v. City of Crestwood*, 562 S.W.2d 344, 346 (Mo. banc 1978) (City's attempt to regulate inter-city, high-voltage electric transmission lines conflicted with the power vested in the Public Service Commission and the city had to yield to it.); *see also State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960); *but see Stopaquila.Org v. Aquila, Inc*., 180 S.W.3d 24, 30 (Mo. App. W.D. 2005) (Refusing to extend *Union Electric Co. v. City of Crestwood* to zoning ordinance of first class non-charter county pertaining to regulations on the location of a power plant.).

Sometimes overriding policy and statutory obligation is more important than the strict application of a conflicting municipal zoning ordinance. *See City of Vinita Park v. Girls Sheltercare, Inc.*, 664 S.W.2d 256, 260-62 (Mo. App. E.D. 1984) (City's attempt to prohibit the county juvenile court's use of property as a girl's sheltered care group home under zoning ordinance yielded to valid statutory mandate that the county provide group home facilities for the juvenile court and the statutory authorization to lease suitable facilities.). See also *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. App. 1975), in which the court resolved the same problem, but on a more subjective basis.

Many of the cases of conflict between zoning authorities or statutes and ordinances involve billboards. For a primer on the current state of municipal authority to regulate billboards and the interplay with the Missouri Billboard Act, see *State ex rel. Ad Trend, Inc. v. City of Platte City*, 272 S.W.3d 201, 204-05 (Mo. App. W.D. 2008) (Upholding city's denial of

billboard permit under city ordinance passed pursuant to § 71.288 RSMo.). *See also, C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322, 325-29 (Mo. banc 2000) (Finding § 71.288 RSMo. authorizing cities to regulate billboards within 660 feet of the edge of MoDOT rights-of-way more restrictively than the Billboards Act (§§ 226.500–226.600 RSMo.), unconstitutional; § 71.288 RSMo., gives city or county authority to adopt regulations with respect to outdoor advertising that are more restrictive than the height, size, lighting, and spacing provisions of Billboards Act which was enacted to set minimum regulations on outdoor advertising so that Missouri would not lose 10% of its federal highway funds. Missouri cases had interpreted Billboards Act as preempting more restrictive local controls, but there was nothing to prevent Missouri itself from increasing the restrictiveness at either the state or local level.); *and see Wall USA, Inc. v. City of Ballwin*, 53 S.W.3d 168, 171 (Mo. App. E.D. 2001) (Billboard Act gives municipalities jurisdiction over advertising located within 660 feet of the state highway rights-of-way, not within the rights-of-way; MoDOT's jurisdiction over advertising within the state highway rights-of-way is exclusive.).

Sometimes the conflict may be between ordinances of the same local government. *See City of Kansas City v. Tayler*, 689 S.W.2d 645, 646-47 (Mo. App. W.D. 1985) (A nonzoning ordinance requiring livestock to be kept 200 feet from residences prevailed over zoning ordinance permitting the keeping of livestock.). Typically, nonzoning ordinances imposing a higher standard will prevail over the otherwise conflicting zoning ordinance.

10. <u>Is it Even Zoning</u>? Not every exercise of the police power by a local government is derived from the zoning enabling authority of Chapter 89 RSMo. In some situations, the zoning ordinance under attack is not really a zoning ordinance at all. *See St. Charles County v. St. Charles Sign & Elec., Inc.*, 237 S.W.3d 272, 277 (Mo. App. E.D. 2007) (Ordinance prohibiting outdoor storage of scrap without fence was enacted under police power to protect public health and safety, not a zoning ordinance, and non-conforming status of outdoor storage use did not protect use from application of ordinance.); *see also City of Green Ridge v. Kreisel*, 25 S.W.3d 559, 564-65 (Mo. App. W.D. 2000) (Ordinance regulating activities of junkyards irrespective of their location in the city was directed toward regulation of health and safety by avoidance of the maintenance of nuisances, not zoning; thus, statutory notice and hearing were not necessary before the ordinance's enactment.); *Borron v. Farrenkopf*, 5 S.W.3d 618, 621-22 (Mo. App. W.D. 1999) (Regulation of concentrated animal feeding operations (CAFOs) with "zoning quality about them" concerning CAFOs were upheld as health ordinances permitted under § 192.300 RSMo., even though the regulations included building, setback, and permit requirements because these were reasonably related to health concerns raised by CAFOs.); *L.C. Development Co., Inc. v. Lincoln County*, 26 S.W.3d 336, 338-40 (Mo. App. E.D. 2000) (Upholding county regulation on the "location" of a sanitary landfill within one-quarter mile of an occupied residence pursuant to § 260.215.2 RSMo. by prohibiting landfills in these areas even though statute did not expressly address regulating the "location" of solid waste facilities.).

ONLINE PLANNING & ZONING RESOURCES

Name of Site	URL/Web Address
Cunningham, Vogel & Rost, P.C.	www.municipalfirm.com
American Planning Ass'n	www.planning.org
Am. Planning Ass'n Missouri Chapter	http://www.mo-apa.org/
Am. Planning Ass'n Illinois Chapter	www.ilapa.org
East-West Gateway Council of Gov'ts	http://www.ewgateway.org/
National Ass'n of Counties	www.naco.org
Land Use Law – Prof. D. Mandelker	http://landuselaw.wustl.edu/
Missouri Municipal League	www.mocities.com
St. Louis County Municipal League	www.stlmuni.org
Illinois Municipal League	www.iml.org
Missouri Statutes	www.moga.mo.gov/STATUTES/STATUTES.HTM
Illinois Statutes	www.ilga.gov/legislation/ilcs/ilcs.asp
Mid-Missouri Regional Planning Comm'n	http://www.mmrpc.org/
Planners Web	www.plannersweb.com
Sustainable Communities Network	http://www.sustainable.org
Planetizen	http://www.planetizen.com/
GIS Planning	http://www.gisplanning.com
Nat'l Center for Bicycling & Walking	http://www.bikewalk.org/
Congress for the New Urbanism	http://www.cnu.org
National Trust Main Street Center	http://www.mainstreet.org/
Project for Public Spaces	http://www.pps.org/
Affordable Housing Design Advisor	http://www.designadvisor.org/
Rails-to-Trails Conservancy	http://www.railtrails.org/index.html
Reconnecting America	http://www.reconnectingamerica.org/
ASFE/The Geoprofessional Business Ass'n	http://www.asfe.org/
U.S. Green Building Council (LEED)	http://www.usgbc.org/
Smart Growth Network	http://www.smartgrowth.org
Urban Land Institute	http://www.uli.org
Nat'l Ass'n of Development Organizations	http://www.nado.org/

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