

# Municipal Officials Training Academy

## Practical Tips for Handling Planning and Zoning

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Presented by:  
Daniel G. Vogel, Esq.  
Cunningham, Vogel & Rost, P.C.  
*legal counselors to local government*  
333 S. Kirkwood Road, Suite 300  
St. Louis, Missouri 63122  
314.446.0800  
*dan@municipalfirm.com*  
*www.municipalfirm.com*

# Today's Topics

## I. Basic Introduction to Land Use

1. Planning
2. Zoning
3. Subdivision
4. Building Code/other

## II. Hot Topics

1. Intergovernmental relations
2. Telecommunication towers
3. Solar panels

## III. Practical Tips

# Introduction/Handouts



- This is not Comprehensive Planning and Zoning
  - See [www.municipalfirm.com](http://www.municipalfirm.com) for additional classes/materials
  - Chancellor's Certificate Program sponsored by East-West Gateway Council of Governments and University of Missouri-St. Louis
  - Attachment E – other links
  - Attachment A – treatise on Missouri Land use Law
- Complete Handout List:
  - Attachment A – Legal Aspects of Planning and Zoning (Mo. & Ill.)
  - Attachment B – Administrative Review Procedure Sample Ordinance
  - Attachment C – Example Order Qualifying Newspaper
  - Attachment D – Practical Recommendations Handout
  - Attachment E – List of Practical Resources
  - Attachment F – Powerpoint pdf

# **I. Basic Introduction to Land Use**

- 1. Planning**
- 2. Zoning**
- 3. Subdivision**
- 4. Building Code/other**



# Planning

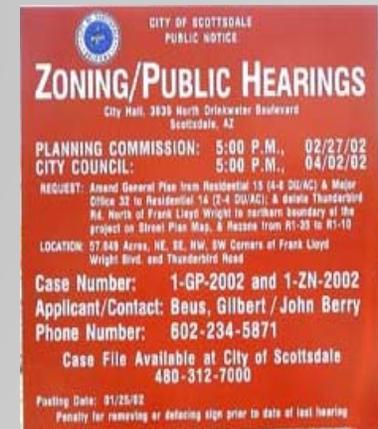
- Plan Adoption Procedure - §89.360 RSMo.
  - Public hearing; 15 days' published notice
  - Commission resolution (adopted by Commission not Council)
    - "shall refer expressly to maps, descriptive matter intended" in plan
    - Approved by majority vote of full Commission membership
    - Plan/resolution signed by Commission Secretary
  - Certified to governing body and municipal clerk
  - Copies filed in offices of:
    - Planning and Zoning Commission
    - **County Recorder of Deeds**
    - Municipal Clerk
- Procedures must conform to state enabling legislation





# NEWSPAPER NOTICE:

- **Typical Statutes Requiring 15 days' published Newspaper Notice for Hearing:**
  - Master Plan Adoption – §89.360 RSMo.
  - Zoning Amendment – §89.050. RSMo.
  - Subdivision Code amendment - §89.410 RSMo. (not expressly stated)
  
- **Notice must be in an “official paper” (zoning) or a newspaper of “general circulation” in the municipality (master plan and zoning)**
  - **General Circulation:**
    - Has a “sufficient nexus” to the municipality
    - Does not need to be actually published in the municipality
  
- **Notice must be in a paper meeting the requirements of §493.050 RSMo.:**
  - Newspaper publishes daily, tri-weekly, semi-weekly, or weekly
  - Admitted to the post office as periodicals class matter
  - Published regularly and consecutively for a period of 3 years
  - Has a list of paid subscribers (no certain number required)
  - **TIPS:**
    - In first-class counties, look for optional circuit court order – See Attachment C
    - Elsewhere, call the paper and ask them to provide letter that they comply



# Zoning

- Zoning Definition:

- Local law controlling use of land (types of use, density, height, appearance, etc.) §§89.010-89.140

- Zoning implemented through three (3) primary documents:

- Official Zoning Map depicts location and boundary of each zone

- Zoning Code – rules for each district/use:

- Established zones and details the regulations for each zone

- Provides rules for interpretation

- Provides administrative procedures

- Site-specific ordinance (or permit) zoning applying Code to particular property or area



BILL # \_\_\_\_\_ ORDINANCE # \_\_\_\_\_  
Sponsor: \_\_\_\_\_

AN ORDINANCE AUTHORIZING A CHANGE IN ZONING FROM "NU" NON-URBAN DISTRICT TO "R-1E" SINGLE FAMILY ESTATE DISTRICT AND A MINOR SUBDIVISION PLAT FOR VICTORIA PLACE SUBDIVISION LOCATED OFF SMITH LANE

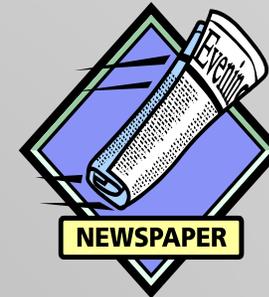
WHEREAS, an application has been filed with the Zoning Officer requesting rezoning from "NU" to "R-1E" and a minor subdivision for a 1.840 acre parcel (Victoria Place) located off Smith

# Zoning

- Key issues:

- "Spot" Zoning – the rezoning of a single parcel that benefits a private party, to the detriment of the public interest as a whole - an “unreasonable” inconsistent zoning of a small area
- Vested Rights/Non-Conforming Uses – a use that lawfully existed at the time the ordinance became effective but does not fully conform to the requirements of the ordinance
- Planned Zoning – a site-specific zoning that waives or imposes requirements to address specific issues
- Conditional Use/Special Use – not a rezoning; rather an “evidentiary” permit under existing zoning
- Zoning “runs with the land” – annexation does not automatically change or implement zoning; zoning stays until affirmatively changed by required process. *Rucci v. City of Pacific*, 327 F.3d 651(8<sup>th</sup> Cir. 2003)

# Zoning



- Amending Procedure:

- Procedures are Mandatory

- State ex. rel. Casey's General Stores, Inc. v. City of Louisiana, 734 S.W.2d 890, 895 (Mo. App. E.D. 1987) ("Where the enabling statutes are not complied with, the ordinance is invalidly acted and cannot be enforced.")

- Public hearing and at least 15 days' notice of hearing shall be published in an official paper or a paper of general circulation in the City. §89.050 RSMo.

- Public hearing must be 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. 2005) (P&Z hearing satisfied statutory requirement)

- Statute does not require Commission review for amendments but most City Codes do

- Protests require 2/3 vote of governing body for approval

- Petition "acknowledged" by owners of 30% or more in or within 185 feet distant from the boundaries of the district proposed to be changed. §89.060 RSMo.

# Zoning

- Standard for Zoning:
  - Rezoning decisions are legislative in nature
  - Presumption favors the legislative determination. Reviewing courts will defer to any decision that is reasonable or where the issue is "fairly debatable."
    - Zoning reasonableness reviewed based on *existing* zoning NOT proposed zoning. *National Super Markets, Inc. v. Bellefontaine Neighbors*, 825 S.W.2d 24, 26 (Mo. App. E.D. 1992) ("It is not the province of the court to determine the proper zoning but only if the present zoning is reasonable.")
  - What Factors can be considered:
    - Adaptability of the subject property to its zoned use
    - Effect of the zoning on the property value
    - Traffic congestion
    - Negatively impact adjacent property values
    - Others...
  - What Factors are Impermissible or not controlling:
    - Municipalities are strictly prohibited from relying on competition in zoning decisions; *Lenette Realty & Inv. Co. v. City of Chesterfield*, 35 S.W.3d 399 (Mo. App. E.D. 2000)
    - Highest and best use of the property should not be the controlling factor in a court's determination of private detriment
    - Personal financial hardship
    - Others...

# Subdivision

- Definitions:

- Local law controlling the division of land
- Subdivision may occur by recording of:
  - Deed (metes and bounds or other legal description)
  - Recorded Plat (and deeds referencing numbered plat lots)

- 2 Sources of Authority:

- §89.300 et seq. RSMo. (subdivision and planning)
  - §89.410 RSMo. – adopting zoning regulations
- §445.030 RSMo. (historical plat act)

- Procedures (§89.410-440 RSMo.):

- Duly advertised public hearing prerequisite to board approval
- Commission to complete review within 60 days of submission
- Approval does not constitute public acceptance of ROW or property
- City Council approval/endorsement required for plat recording (and must be by ordinance §445.030 RSMo.)
- Ministerial – not discretionary
  - Damages awarded under 42 USC §1983 for "truly irrational" denial of plat. *Furlong Companies v. City of Kansas City*, 198 S.W.3d 157 (Mo. 2006)



# Subdivision Regulations

## Escrows



- Authorized to require securities as a condition of plat approval  
§89.410 RSMo.
- Escrows/guarantees will be a future Training Academy Session
  - See also [Municipalfirm.com/training.htm](http://Municipalfirm.com/training.htm)
    - 2009 Missouri Municipal Attorneys Association Summer Seminar- presentation handouts

# Building Code/other

- **Definition:**
  - Local law controlling construction standards
- **Authority to regulate building construction:**
  - “regulate and control the construction of buildings.” §77.500 RSMo.
  - “regulate and control the construction of buildings.” §79.450 RSMo.
  - “mandatory demolition” and “mandatory repair and maintenance” §67.400 RSMo.
- **Enactment of International Codes - §67.280 RSMo**
  - City may “adopt or repeal an ordinance which incorporates by reference the provisions of any code...”
  - One copy of the code must be kept on file
  - Copy must be on file for 90 days prior to adoption of an ordinance which incorporates the code
  - Ordinance must state the penalty for violating such code (penalty cannot be incorporated)
- **Other – grading codes; environmental regs.; tree ordinances, etc. – Process?**

## **II. Hot Topics**

- 1. Intergovernmental Relations**
- 2. Telecommunication**
- 3. Solar Panels**

# 1. Intergovernmental Relations



- Police Powers:

- County, like schools and other political subdivisions, is obligated to comply with City Building Codes and pay permit fees.

*Engelage et al. v. City of Warrenton*, 378 S.W.3d 410 (Mo. App. E.D. 2012)

- In building authority, the legislature “vested the city, and the city alone, with authority to protect public safety.”

- But: City did not have zoning authority to deny school district a building. *Normandy School Dist. v. City of Pasadena Hills*, 70 SW3d 488 (Mo. App. 2002)

- Zoning:

- Zoning power is more limited. §89.020 RSMo.

- Schools subject to City review of new or abandoned school, but school board may still override any disapproval with 2/3 vote. *Board of Education v. City of Springfield*, 174 SW3d 653 (Mo. App. 2005); §89.380 RSMo.

- Utilities are not government - utilities still subject to County zoning law generally. *Stop Aquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005)



# 2. Telecommunications

- **HB 331/345 (2013)**

- Preempts all local zoning for additions to existing structures and replacements (essentially ending disguised towers staying disguised)
- Eliminates local authority to require sharing of towers (collocation)
- Strictly limits zoning authority as to new telecom tower applications
- Eliminates many ROW agreements and other impacts on ROW, poles, leasing, tariffs



- October 17, 2013 – Cole County. Cir. Court held laws unconstitutional on procedural grounds
  - Currently on appeal to Supreme Court (*City of Liberty, et. al. v. State*)
- 2014 BILLS – Special interests are back!- see [MML legislative page](#) or sign up for CVR Municipal Reports

# 3. Solar Panels

- City Zoning and Building Codes Not Preempted
  - City of Clarkson was not preempted from regulating solar panel systems:
    - “use of reflective materials that shine bright sunlight into a neighbor's window
    - ...or the way the solar panels may appear from the street or a neighboring property...
    - These types of restrictions are within the police powers of the City.”



- But denial of permit for solar panel was still held improper:
  - Affirmed trial court's finding that decision was arbitrary and capricious

*Babb v. Mo. Public Service Com'n, et al.,*  
414 S.W.3d 64 (WD 2013)

# **III. Practical Tips**

# Practical Tips

1. Use Administrative Review ("Exhaustion") Ordinance
2. Follow the Master Plan
3. Avoid Takings Claims
4. Rely on Multiple Sources of Authorities for Controversial Decisions
5. Use Planned Development for Conditions/Variations When Possible
6. Hearing Process - practical tips
7. Don't Continue Mistaken Application of Ordinances
8. Moratorium – if you must, then.....
9. Deal with the Politics

# Practical Tips

## 1. Administrative Review ("Exhaustion") Ordinance (see Attachment A)

- ❑ Purpose: require dispute to be fully presented to City BEFORE lawsuit is permitted – “any person claiming illegal action shall...”
- ❑ Authority: Upheld in *State ex. Rel. Maynes Constr. Co. v. City of Wildwood*, 965 S.W.2d 949 (Mo. App. 1998)
- ❑ Benefits:
  - Creates extra step to reach final decision: stops lawsuit until process completed
  - Examples of dismissed lawsuits:
    - *Site Plan lawsuit dismissed - State ex. Rel. Maynes Constr. Co. v. City of Wildwood*, 965 S.W.2d 949 (Mo. App. 1998).
    - *Employee lawsuit dismissed - Parker v. City of Saint Joseph*, 167 S.W.3d 219 (Mo. App. W.D. 2005)
  - Provides opportunity to “cure” illegal decision or prevent “taking”
  - Requires property owner to show their evidence and claim before suing – deferential standard



# Practical Tips

## 1. Administrative Review ("Exhaustion") Ordinance Cont.

### □ Basic process: (see Attachment B)

- Obtain initial written decision of local government (Site plan, zoning, CUP, etc.)
- Petition for review w/in 10 days of that decision
- Provides for "expedited" review for cause
- Hearing before Review Board (Plan Commission, BZA or other designated entity); applicant must provide detailed evidence and basis for claim of taking or illegality prior to hearing
- Set evidentiary hearing date within prescribed time – quasi-judicial with a record and ability to cross (meets due process and APA)
- Review Board makes recommendation as to whether illegality/taking exists; referred to Council for decision
- Council makes the "final" decision that may be challenged in court

### □ Basic instructions for implementation:

- Consult your City Attorney before implementing this sample ordinance to ensure it meets your City's needs and does not conflict with current City policies or applicable law as implemented.
- Incorporate ordinance within code of ordinances:
  - Be careful to review what acts require administrative review so entire code works together
  - Ensure decisions that are applicable, are not "final decisions" until completion of this process
  - NOTE: some statutes give direct appeal rights without exhaustion requirements – this will not change those rights.
  - Ensure an appropriate "Review Board" is designated or created (BZA, planning commission, etc.)
- Review time frames and process to make sure it fits practical application

# Practical Tips

## 2. Follow the Master Plan

- ❑ First step is always look to what the plan says
- ❑ Amend the plan if it is wrong or outdated – don't just violate it
- ❑ Authority: Draft mechanism in code to require review/compliance or Plan change before zoning is approved
- ❑ Purpose: Plan determines policy for the community
- ❑ Benefits:
  - Helps avoids “arbitrary” decisions if in compliance with plan
  - Helps defend decision in Court:
    - U.S. Supreme Court CITATION TO IMPORTANCE OF PLAN - *Penn Central*, fn. 29 – when zoning ordinance is challenged “judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land use plan.”

# Practical Tips



## 3. Avoid Takings Claims:

### A. Document an economically viable use that *remains* BEFORE you deny application

- Within files or in record**
  - Admission of applicant – ask them about other uses
  - Owner's Real estate marketing
  - Identify code uses that are permitted and nearby examples
- Authority: *Lucas v. South Carolina Coastal Council*, 505 U.S 1003 (1992) (*Per se* taking occurs when regulation denies "all economically viable uses")**
- Purpose: Provides defense to takings lawsuit**

### B. Approve Something

- Consider approving what is acceptable, rather than just denying what is unacceptable (*Del Monte*)**
- Purpose: Missouri courts review zoning based on the use that was authorized, not just the use that was proposed and denied**
- Benefit: Eliminates "total taking" if viable use is authorized**

For more information, see [CVR takings seminar](#)

# Practical Tips

## 4. Rely on Multiple Sources of Authorities for Controversial Decisions:

- ❑ **Cite zoning and non-zoning statutes**
  - Example: Lighting ordinance – rely on zoning, building code authority, and nuisance statutes
  - Comply with procedures for all cited authorities
- ❑ **Purpose: Provides multiple authorities to support decision**
- ❑ **Benefits:**
  - Gives you multiple authorities to support the decision so court can pick any one to rule in City's favor
  - As some powers are more limited than others, citing all that could apply helps ensure at least 1 applies and supports the decision

# Practical Tips

## 5. USE Planned Development for Conditions/Variations When Possible

- ❑ PUD modifications or variances often justify the denial or condition:
  - Codify PUD requirement for greater intensity uses (similar to density bonus)
  - Call out conditions as needed for the modifications
- ❑ PUD is “legislative” (no evidence required)
- ❑ Allows for waivers – CUP generally does not
- ❑ Conditions NOT permissible with straight zoning approval

# Practical Tips

## 6. Hearing Process - how to limit costs of required process:

- ❑ Newspaper notice: offer additional free notice if you want to pick the cheapest paper (web; posting, etc.)
  - Change Code if necessary
  - Still have at least one "lawful" notice
- ❑ Court Reporter: If cannot afford a court reporter for contested cases, at least tape the proceeding
  - Tip: check battery and sound to ensure working
  - No transcript required for "legislative" hearings
  - Provides an argument that you have a record to avoid remand
- ❑ Always enter entire City Code in all evid. hearings
- ❑ Assume Findings of Fact of "substantial evidence" are required (see confusion in authority) (CUP and other evidentiary hearings)

# Practical Tips



## 7. Don't Continue Mistaken Application of Ordinances

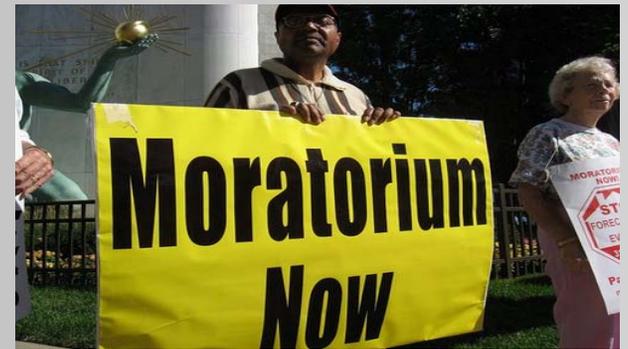
- If City Code official makes mistake, don't compound it – an illegal permit cannot be relied on by anyone

- ❑ Authority: *Green's Bottom Sportsmen, Inc. v. St. Charles County Board of Adjustment*, 553 S.W.2d 721 (Mo. App. 1977) ("a building permit ... issued but unauthorized under the ordinance is void.")
- ❑ Purpose: Gives you authority to withdraw or void the permit and not allow work to occur in violation of City Codes
- ❑ We all make mistakes – but a void permit issued is still a void permit – don't compound the error

# Practical Tips

## 8. Moratorium – If you must, then . . .

- ❑ Short in duration
- ❑ Clear and definitive end time
- ❑ Rational, documented need
- ❑ Narrow in scope (i.e. don't block all building where need is more limited)
- ❑ Avoid temporary taking by also granting some uses in the interim if appropriate



# Practical Tips

## 9. Finally – Deal with the Politics

- If Planning & Zoning or staff recommend, but Council likely going to deny,
  - Draft neutral recommendations to include the reasons for both denial and approval
  - Provide sufficient additional process to deal with the controversy before the final decision (slow down a bit)
  - Clearly state in the record that any improper objections are NOT being considered
- Purpose/Benefit: Ensures support within the record regardless of ultimate Council decision

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## **Municipal Issue Report**

### **Free Quarterly Educational Reports and Notices Sent by Email:**

- Available to municipal officials or employees
- **Municipal Resources:**
  - Annual Municipal calendar with applicable deadlines
  - Public Training Academy monthly webinar announcements
  - Special district requirements and deadlines
- New legislation affecting municipalities
- New case law affecting municipalities
- Links to recent event and educational opportunity resources

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3. Leave a business card (identify public official status)

**Input: Please let us know what you want to see in these reports**

**View prior reports at: [www.municipalfirm.com](http://www.municipalfirm.com)**

# Training Academy February Survey

- We rely on your feedback to provide training on topics you want to hear; please take a few short minutes to fill out this brief evaluation of this presentation:

<https://www.surveymonkey.com/s/GQTZJ5L>

# Questions... ....Comments



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St. Louis, Missouri 63122

314.446.0800

[dan@municipalfirm.com](mailto:dan@municipalfirm.com)

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