MISSOURI LAND USE LAW

Original Zoning: Missouri's Zoning Enabling Act

by Mary B. Schultz

Zoning and land use regulation by municipalities are authorized by statute in Missouri by the Zoning Enabling Act, §§ 89.020 - 89.491, RSMo (Zoning and Planning). (Counties should refer to §§ 64.010 - 64.975, RSMo (County Planning, Zoning, Recreation, Natural Streams and Waterways)). Because zoning and land use regulation fundamentally conflict with individual property rights recognized and protected under our constitutions and the common law, the enabling statutes and ordinances adopted by local governments are generally strictly construed against the government and in favor of individual property owners. However, if prescribed procedures are followed and the regulations bear a substantial relation to the public good or general welfare, courts are to defer to the legislative judgment of local governments.

By following the procedures in the enabling statutes, local governments may divide their jurisdiction into zoning districts, define categories of uses for those districts, and establish regulations or performance standards for those uses. Uses categories may be defined generally (e.g., residential, office, commercial, industrial), and specifically (e.g., residential districts might include single family dwellings, multifamily dwellings, churches, schools, certain recreational uses; commercial districts might include specific retail uses or use categories). Typically, local governments define uses that will be permitted in particular zoning districts, and state generally that if a use is not expressly permitted it is to be deemed prohibited. In addition, local governments often authorize "conditional" or "special" uses if certain special procedures are followed and conditions are satisfied. Such conditional or special uses include those uses, that a local government concludes might be beneficial to the community but incompatible with permitted uses in the particular zoning district unless certain conditions are met. A conditional use permit, if granted, defines the conditions deemed necessary to protect surrounding property owners while benefiting public interests in the conditional use. Finally, local governments will define performance standards for various uses in particular zoning districts. Such regulations include minimum lot sizes, setbacks from lot lines and streets, parking requirements, limitations on building mass (e.g., floor area ratios), density, and green space and landscaping requirements. More recently, there has been a move toward what are often referred to as "planned districts," where the local government tailors its regulations or performance standards to a particular tract. Generally, such planned districts offer more flexibility to developers and greater control over development to governments. However, a local government adopting such planned districts must clearly define the criteria for establishing the regulations for particular developments.

Inverse Condemnation: Reasonableness Of Zoning As Applied To Particular Property

The purpose of zoning is to improve a community through land use planning and control of land development. The goal is to confine certain uses to designated areas without imposing undue burdens on individual property owners. The public interest in regulating land development for the benefit of the community is balanced against the private interest in individual freedom to use property for whatever purposes desired. Zoning adversely affects individual property rights, limiting development of even those uses that are not intrinsically offensive or harmful. Nevertheless, zoning is generally recognized as a valid exercise of "police power" for the "general welfare" of the community, and property owners are not entitled to compensation or other relief from the impact of zoning on the use and enjoyment of their property.

When does a zoning regulation go too far? Particular zoning regulations may be deemed a "taking" requiring "just compensation" under the Fifth and Fourteenth Amendments to the U.S. Constitution, or may be declared invalid, where they go beyond the enabling statutory authority, in Missouri the Zoning Enabling Act, §§ 89.010, RSMo *et seq.* where they cannot be shown to promote the general welfare; where they exceed what is reasonably necessary to do so; or where they deprive the property owner of all beneficial use of his property. If a zoning regulation goes too far as it relates to particular property, the government may in some cases condemn the property under its power of eminent domain and pay "just compensation" to the affected property owner, or the property owner may file a lawsuit seeking to have the zoning declared invalid.

When zoning as applied to particular property is challenged in court, the local government's legislative judgment in applying a zoning classification to a particular parcel must be presumed valid. If the zoning of a particular parcel is "fairly debatable," the courts must defer to the local government's legislative decision and uphold the zoning. In order to rebut the presumption favoring existing zoning, a property owner must show a private detriment which so outweighs the public benefit derived from the zoning that the unreasonableness of the zoning is not even "fairly debatable." (*See e.g., Hoffman v. City of Town and Country*, 831 S.W.2d 223 (Mo.App. 1992); *Elam v. City of St. Ann*, 784 S.W.2d 330 (Mo.App. 1990)). Factors relevant to a determination of private detriment include the adaptability of the property to uses permitted by the existing zoning and the effect of existing zoning on property value. The property owner must prove the property cannot feasibly be developed for any uses permitted within the zoning district. This usually involves an economic analysis of the cost of developing the property for uses permitted by the existing zoning and of the market value of the property. It is not sufficient for the property owner to establish that the existing zoning does not allow for the "highest and best," or a more commercially valuable use of the property. While local governments all too often become embroiled in a battle

among experts, such evidence of private detriment is best refuted by showing that surrounding or similar properties under the same zoning classification are being used.

"Four Corners" Rule

In a reported opinion of the Missouri Court of Appeals for the Eastern District, what I have referred to as the "Four Corners Rule" was reaffirmed. *City of Louisiana v. Branham*, 969 S.W.2d 332 (Mo.App.E.D. 1998) (*Branham* case). The "Four Corners Rule" requires that a city's zoning regulations and its application of zoning classifications to particular property, must fall within the "Four Corners" of the enabling legislation and the City's own zoning regulations. A city must strictly adhere to both procedural and substantive requirements of the enabling legislation and its own zoning regulations.

Zoning and land use regulation by municipalities are authorized by statute in Missouri by the Zoning Enabling Act, §§ 89.020 - 89.491, RSMo (Zoning and Planning) (1994). (Counties should refer to §§ 64.010 - 64.975, RSMo (County Planning, Zoning, Recreation, Natural Streams and Waterways)). A city does *not* have inherent or intrinsic authority to regulate land use or to enact zoning regulations. A city's sole source of authority in zoning matters and the full measure of its authority, is derived from the Zoning Enabling Act. *City of Louisiana v. Branham*, 969 S.W.2d 332, 336 (Mo.App.E.D. 1998); *State ex rel. Casey's General Stores, Inc. v. City of Louisiana*, 734 S.W.2d 890, 895 (Mo.App.E.D. 1987).

If a city fails to follow procedures prescribed by the Zoning Enabling Act in enacting zoning regulations or applying zoning classifications to particular property, those regulations or actions are deemed void *ab initio,* and cannot be enforced. *City of Louisiana v. Branham*, 969 S.W.2d at 336 ("enactment of a zoning ordinance or the amendment of an existing ordinance must … strictly comply with the statutorily prescribed notice and hearing requirements of §89.050 and §89.060, RSMo"). See also, *Casey's*, 734 S.W.2d at 895; *Monsanto Co. v. Cox*, 791 S.W.2d 483, 486 (Mo.App.1990).

Municipalities derive their authority to establish land use regulations through the state's police power delegated through enabling statutes. Where the enabling statutes are not complied with, the ordinance passed is invalidly enacted and cannot be enforced.

State ex rel. Casey's General Stores, Inc. v. City of Louisiana, 734 S.W.2d 890, 895 (Mo.App.E.D. 1987) (*internal citations omitted*); *accord State ex rel. Holiday Park, Inc. v. City of Columbia*, 479 S.W.2d 422, 423, 425 (Mo. 1972); *McCarty v. City of Kansas City*, 671 S.W.2d 790, 793 (Mo. App.W.D. 1984); *O'Dwyer v. Monett*, 123 Mo.App. 184, 100 S.W. 670 (1907).

Similarly, a city must follow the requirements and procedures of its own local zoning regulations; otherwise, its amendments and other zoning decisions are invalid and unenforceable. *Id.*; see also, *State v. Arnold*, 149 S.W.2d 384, 387 (Mo.App. 1941); *Temple Stephens Co. v. Westhaver*, 776 S.W.2d 438, 441 (Mo. App.W.D. 1989); see *Schweig v. City of St. Louis*, 569 S.W.2d 215, 225 (Mo. App.E.D. 1978); 8A E. *McQuillin Municipal Corporations* § 25.253 (3d ed. 1986).

For example, in the *Arnold* case, the defendants failed to submit the proposed zoning amendments to the city planning commission for recommendation and report as required by

ordinance and statute. *State v. Arnold*, 149 S.W.2d 384, 387 (Mo.App. 1941). The Missouri Court of Appeals held that the violation of the procedures required in the zoning ordinance and statute rendered the zoning changes void. *State v. Arnold*, 149 S.W.2d at 387; see also *State ex rel. Kramer v. Schwartz*, 82 S.W.2d 63, 336 Mo. 932 (Mo. 1935). In the *Temple Stephens* case, the Missouri Court of Appeals declared a rezoning invalid because the notice of the proposed rezoning did not comply with the requirements of the local zoning ordinance. *Temple Stephens*, 776 S.W.2d at 441.

The subject property in the *Branham* case consisted of seven lots in the City's "R-2, Mobile Home Dwelling District." According to the zoning ordinance, permitted uses in the R-2 district were buildings, homes, or "mobile homes for dwelling purposes." Although mobile homes were themselves permitted, "mobile home parks" were expressly prohibited. The Branhams purchased seven adjoining lots within the city of Louisiana, with the intention of placing a mobile home on each of the seven lots. They initially placed a mobile home on one of the seven lots and they resided in that home. Later, however, the Branhams conveyed one of their remaining six lots to Mrs. Hill, Mrs. Branham's mother. Although Mrs. Hill's initial request for a permit was initially denied, a permit was eventually granted.

At the time the Branhams originally acquired their seven lots and when they conveyed one of the remaining six lots to Mrs. Hill, the zoning ordinance did not define a "mobile home park" or provide an express distinction between "mobile homes for dwelling purposes" and "mobile home parks." A few months after the Branhams conveyed one of their lots to Mrs. Hill, the City purported to amend the zoning ordinance to provide a definition of a "mobile home-trailer park." No public hearing was held on that amendment to the zoning ordinance.

Approximately four months after the City adopted the definition of a "mobile home-trailer park," the Branhams applied for a building permit to place a mobile home on one of their remaining five lots. The City denied the permit, and the Branhams' appeal to the Board of Adjustment was denied. A few months later, the Branhams placed a doublewide mobile home on two other lots, without seeking a permit.

The City filed an action seeking an injunction and a declaratory judgment that the Branhams were in violation of the City's zoning ordinance prohibiting "mobile home-trailer parks" in the R-2 zoning district. The Branhams counterclaimed seeking a declaratory judgment that they were entitled to place a mobile home on each of their lots. The trial court held that the Branhams could place a single mobile home on any one of their six lots, but that any additional mobile homes on their remaining lots would constitute a "mobile home-trailer park" prohibited by the City's zoning ordinance. On appeal, the court of appeals reversed the trial court.

The court of appeals concluded that the City's amendment to the zoning ordinance to provide a definition of a "mobile home-trailer park" was invalid because it was not enacted in accordance with the procedural requirements, including notice and a public hearing, required by the Zoning Enabling Act. The court of appeals rejected the City's attempt to distinguish its new definition of a "mobile home-trailer park" from a "zoning amendment." *Id.* at 337. The court reasoned that by adding a definition of a "mobile home-trailer park," the City affected

permitted uses in a direct and substantive way. *Id*. The court of appeals then attempted to determine whether a mobile home on each of the Branhams' six lots would constitute a "mobile home park" within a meaning of that term provided by statutory construction. The court concluded the term "mobile home park," absent a definition, would not include the relatively small number of lots and mobile homes proposed by the Branhams. The court applied another rule of statutory construction applied to zoning regulations. If a zoning ordinance is susceptible of more than one interpretation, the court will apply that interpretation which is least restrictive upon the rights of the property owner to use his land as he wishes. *Branham*, 969 S.W.2d at 338; *Cunningham v. Board of Aldermen of Overland*, 691 S.W.2d 464, 469 (Mo.App.E.D. 1985); *Coots v. J.A. Tobin Construction Co.*, 634 S.W.2d 249, 251-253 (Mo.App.W.D. 1982).

"Tug Of War" Between Predictability And Flexibility In Land Use Controls

Missouri cities have all struggled, and will likely continue to struggle with alternatives for managing growth, protecting natural resources, preserving or revitalizing existing neighborhoods, assuring proper development of new communities, and providing infrastructure and other support for our expanding metropolitan area. Land use development regulations have grown increasingly complex, attempting to balance the desire for precise rules with predictable results and the recognition that "cookie cutter" development regulations often do not provide for sufficient flexibility or creativity in meeting specific development challenges.

"Black letter" rules are efficient, predictable and relatively easy to administer. Rules afford clear directions to guide development staff and officials, property owners and developers. On the other hand, they can impair the ability of developers to address physical limitations or economic imperatives, and limit the flexibility or latitude of local zoning authorities in regulating land use and development on particular tracts of land.

It is now generally accepted that there should be a healthy amount of pragmatic judgment in making land use decisions. However, if "discretion" is delegated to administrative officials or staff without sufficient standards to guide decisions, the discretion could be abused. Local zoning authorities must therefore undertake to strike the proper balance in their zoning and other land use controls between rules that are precise and predictable, and standards that are flexible and allow for the application of discretion and judgment.

In order to allow for the exercise of discretion that is not arbitrary and capricious decisions (or does not result in unnecessary lawsuits *alleging* arbitrary and capricious decisions), zoning and other land use regulations should provide for substantive and procedural choices that are guided by discernible standards that can be applied to particular developments and decisions. By creating and applying standards to manage or control land use and development, a local zoning authority may prescribe a pragmatic approach to land use and development. Standards may be applied and requirements tailored to specific land uses, site characteristics, adjoining uses and the community. Because standards lack the precision of "black letter" rules, the process of making land use and development decisions, and the record supporting that process is of great importance. It is not sufficient that decisions based upon standards be reasonable; they must appear reasonable "on the record."

In developing zoning and other land use or development regulations or codes, local zoning authorities should determine whether a "black letter" rule or standards that would allow for discretion by officials or staff be appropriate for particular provisions. Some regulations should be clear, precise and predictable. For example, the provisions relating to what permits are required and procedures for applying and processing applications for those permits should be rules. Depending on the type of permit, the requirements for a particular development might be determined by application of standards that should be enumerated in the regulations. For example, requirements for particular "planned" developments could be based on a variety of standards, like compatibility with topographical and other unique characteristics or conditions of the site or adjoining property, natural resources, adjoining uses, the development character of the area, and other matters that affect site and community land use planning, such as circulation of traffic, parking, density, building footprints, and visual compatibility with or buffering between adjoining uses.

I do *not* recommend that local zoning authorities rely on or encourage "variance" procedures whether granted by the board of zoning adjustment, the planning commission, or some other body to provide for flexibility. The legal tests for determining whether or not to grant a "variance" from strict application of a zoning ordinance are statutory. A variance from the zoning ordinance may be granted only upon a showing "on the record" of "practical difficulties or unnecessary hardship." A variance from subdivision or other land use regulations may be granted on a similar showing of hardship. When hearing and considering evidence presented at a public hearing on an application for a variance, the board of adjustment or other board performs a "quasi-judicial" function. The board simply determines whether "the record" sufficiently supports a finding of hardship that would warrant a variance. When the board is determining whether or not to grant a variance, it is exercising discretion in weighing the evidence and determining whether the record supports a finding of hardship. However, it is *not* performing a *planning* function.

Another way for a local zoning authority to regulate land development without unduly stifling creativity or flexibility is to prescribe in the regulations the result or performance requirement without dictating the means to achieve that result. For example, stormwater and erosion control regulations might restrict the rate of stormwater runoff to a specified volume per second, but not dictate whether the runoff would be restricted by limitations on impervious surfaces, on-site detention or some combination of methods. Such standards provide for flexibility provided there is compliance with the performance standard or requirement.

Land use regulations should reflect a local zoning authority's conscious balance between predictable rules and flexible standards.❑

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