
PRACTICAL GUIDE TO ZONING AND LAND USE LAW
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CURRENT CASE LAW AND LEGISLATIVE UPDATE

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INTRODUCTION

We assume that attendees to this CLE will have varying degrees of knowledge and interest in zoning and land use. Accordingly, a brief introduction is appropriate to put the relevant updates set forth below in context.

From our perspective, zoning and land use include a wide array of issues and topics. Authorizations and restraints on one's use of their property emanate from a multitude of legislative and administrative authorities at the federal, state, and local government and quasi-government levels. In other words, land use is affected by the United States Constitution, federal legislation such as the Clean Water Act (as amended - 33 U.S.C. §§1251, et seq.) and Clean Air Act (as amended - 42 U.S.C. §§7401 et seq.), state legislation empowering local government to zone and control land use, local government ordinances, and administrative agencies at the federal, state, regional and local levels.

Technically speaking, zoning is a subset of "land use." Zoning is a tool used by state and local authorities to control and manage land use. On the other hand, land use is a much broader term. A right to use private land is both guaranteed and constrained by the United States Constitution. The United States Constitution protects private property owners' right to own and use their property, but also constrains that use so as to prevent said use from adversely affecting other property owners or the health, safety, and welfare of the general public.

Consequently, land use is both protected and restrained by law, and both sides of this coin will be touched on today including within the case law and legislative updates in this section.

On one side of the above referred "coin", the U.S. Constitution protects against and prohibits the "taking" of private property for public use without just compensation. A "taking" is not limited to a complete taking of one's property but also applies to partial takings. These protections against takings remain a current and vibrant topic in case law and will be touched on below.

On the other side of the coin, states have the right to restrain private use of property for the protection of the public welfare. States, including Missouri, grant to local authorities the ability to control use of property via state planning and zoning statutes. Missouri's most prominent state planning and zoning statute is R.S.Mo. § 89.010 et seq. But Missouri has a dizzying array of planning and zoning statutes for differently sized cities and counties (See R.S.Mo. § 64.010 et seq. and § 65.650-65.701). The St. Louis region, of course, is known for its high level of local governments which then all have their own ordinances codifying their exercise of this authority granted to them by the state. Further, St. Louis has overlying districts such as Metropolitan St. Louis Sewer District and Fire Protection Districts which effect land use. Putting this all together, land use in Missouri is impacted by a multi-level, complicated, sometimes maybe even conflicted, array of federal, state, and local law. Some of this structure will be discussed in sections today and referenced in the updates below.

Complicating things more is the fact that when a local government improperly exercises their authority in this area, they can effectuate a "taking," knocking that particular matter back over to the earlier referenced side of the coin. This type of regulatory taking is referred to as inverse condemnation and this continues to be a fertile area of law with some updates below.

Finally, one area of land use law that will probably not be touched on much in this conference and yet may well be an ever increasing area of law in land use comes from the federal and state administrative agencies and quasi-administrative agencies. Land use is being directly impacted at present by requirements such as the Metropolitan St. Louis Sewer District's initiatives promulgated as a result of the Clean Water Act. One can expect environmental issues to result in increasing restriction on land use.

While this conference is not going to touch on every area of land use, the context of this seminar assumes private property ownership and use rights, recognizes the right of state and local governments to regulate use of property, and that said governments regulate use by:

- Establishing comprehensive or master plans which, in theory, are to provide a road map for appropriate and efficient use of property in the interest of the public and provide notice to property owners and prospective property owners as to what may or may not be an expected use of property;
- More specifically, and hopefully consistently with said plans, local governments establish zoning ordinances with classifications setting forth permitted uses for property and assigning parcels of property to zoning classifications which set forth those permitted uses;
- Then local government uses administrative procedures with requirements for development plans, site plans, subdivisions, and permits to insure that property owners actually develop and use

their property as prescribed by the comprehensive plans and zoning ordinances.

Having set forth the above context, below we provide updates on case law and legislation on zoning and land use as follows:

I. Survey of Recent Missouri Cases

II. The Response to Kelo

A. *Kelo v. City of New London, Connecticut*

B. Missouri Responses to Kelo

C. Local Issues

III. ABA Model Statute on Local Land Use Planning Procedures

IV. RLUIPA

I.

SURVEY OF RECENT MISSOURI CASES

State ex rel. City of Blue Springs, Missouri v. Nixon, 250 S.W.3d 365 (Mo. 2008).

Landowners brought an inverse condemnation action against City alleging that the City is liable to them for approving the plat of the development in which Landowners' property is located, and that plat failed to provide for drainage of storm water from the homes located higher on the hill on which Landowners' property was located. The plat met the City's development code requirements.

The alleged wrong on the part of the City claimed by Landowners is that the City's approval of the plat was ill-advised due to inadequate drainage. This alleged wrong occurred prior to Landowners' purchase of the property. Accordingly, to the extent that the damages from approval of the plat were capable of ascertainment prior to Landowners' purchase of the property, Landowners do not have standing to bring a claim for inverse condemnation, as inverse condemnation claims arise at the time of the taking and do not pass to subsequent grantees of the land.

To the extent that damages from approval of the plat were not ascertainable from prior to Landowners' purchase of the property, the City's mere failure to discover an alleged defect in the proposed plat does not give rise to a claim for inverse condemnation. This case arguably stands for the proposition that a city cannot be held liable for inverse condemnation based solely on the municipality's failure to act.

Great Rivers Habitat Alliance v. City of St. Peters, 246 S.W.3d 556 (Mo. App. 2008).

Pursuant to the Tax Increment Financing Act ("TIF Act"), the City blighted a 1,640-acre tract of farmland. Plaintiffs filed a declaratory judgment action alleging that the City's legislative findings of blight required by statute, that development would not occur in the area but for TIF financing, and that the adopted TIF plan conforms with the City's Comprehensive Plan were not fairly debatable. See § 99.810 RSMo. (Please note that the TIF Act's definition of "blight" is different from and not interchangeable with the Eminent Domain statute's blight definition in § 353.020. Accordingly, the *Centene* and *CORTEX* cases discussed below are not apposite here.)

The Trial Court granted the City's motion for summary judgment on these issues. Plaintiffs appealed, and the Western District Court of Appeals reversed.

Importantly, the Court found that in responding to a municipality's summary judgment motion, the party challenging the city's legislative action need not show that the reasonableness of the city's action is not fairly debatable. The non-movant need only show that a genuine dispute exists as to the city's reasonableness to defeat the city's

motion. “Summary Judgment tests simply for the existence, not the extent, of these genuine disputes.”

In the instant case, the Court found that the City failed to meet its summary judgment burden to establish that the subject property present condition and use met the definition of blight stated in § 99.810 RSMo. Also, Plaintiffs successfully demonstrated a genuine dispute that the subject property would not be redeveloped but for the TIF financing. Finally, the City failed to properly support its motion’s claim that the development plan conforms to the City’s Comprehensive Plan.

Gash v. Lafayette County, 245 S.W.3d 229 (Mo. 2008).

Plaintiffs owned a tract of land in Lafayette County, which was zoned as agricultural. Lafayette County is a fourth class county. Plaintiffs sought rezoning of the land as general business. While their application was being reviewed, Plaintiffs constructed 7 buildings—two residential and five non-residential. Plaintiffs did not obtain building permits for the five non-residential buildings. Ultimately, the county commission denied Plaintiffs’ request to rezone.

Plaintiffs filed suit against the County seeking a declaratory judgment that the County’s zoning classification of their property is arbitrary, unreasonable, and void. The County counterclaimed for permit and late fees for 4 of the non-residential buildings. The Trial Court entered judgment in favor of Plaintiffs on their claim for declaratory judgment and the counterclaim.

The Supreme Court found that § 64.870.2 provides that owners of land aggrieved by the County’s zoning ordinances must be challenged by a Writ of Certiorari. Accordingly, the Trial Court lacked jurisdiction to issue the declaratory judgment in favor of Plaintiffs.

Regarding the County’s counterclaim, § 64.865 allows a county to charge Plaintiffs with a misdemeanor and/or bring an action against Plaintiffs for injunctive relief for building without the necessary permits. The Court held that this statute does not allow the County to bring an action for unpaid permit fees when it did not issue a permit and did not incur the associated expense.

Clay County Realty Co. v. City of Gladstone, 254 S.W.3d 859 (Mo. 2008).

Originally in May 2003, the City passed an ordinance blighting Plaintiff’s property per Chapter 353 RSMo. In October 2005, the City designated Plaintiff’s property as blighted under the TIF Act (§§ 99.800 to 99.865 RSMo.) and approved a TIF plan for this property. The TIF plan provides for the use of eminent domain for economic development. As of the Court’s opinion, the City had never adopted an ordinance approving a TIF project specifying the redevelopment to occur at Plaintiff’s property.

The City has never completed formal condemnation proceedings against the property, and Plaintiff does not allege that the City has ran afoul of any of the time provisions in the TIF Act. Plaintiff brought suit alleging a taking under the Missouri Constitution for the diminution in value of its property, increased operating costs, and loss of rental and lease income as a result of the City's actions.

Actions for inverse condemnation provide a landowner with a remedy when a condemnor physically accomplishes a taking or damaging of private property without completing the procedural or compensatory requirements of a regular eminent domain action.

The consequential pre-condemnation damages alleged by Plaintiff are natural and often unavoidable. Accordingly, before a landowner has a viable cause of action for pre-condemnation damages, landowner must establish that there has been aggravated delay or untoward activity in instituting or continuing the condemnation proceedings at issue. Without this requirement, every condemnation case would give rise to a separate cause of action based on pre-condemnation activity, as such processes are endemic with delays.

When considering whether a condemnor has acted with undue delay, a Court should include in its determination the time limitations for condemnation proceedings established by the legislature. Citing, § 99.810.1(3); § 523.274.2 RSMo. Where such delays have not exceeded statutory limitations, the delays should not be labeled as "aggravated" without additional evidence of related "untoward activity" on a case by case basis, such as when a condemning authority repeatedly renews its blight designation of a property as permitted by § 523.274.2 RSMo., but does so without just cause.

Furthermore, property owners must prove that their damages were caused by the condemning authority's actions or inactions. Proving such causation is challenging, as presumably, cities do not blight property that is not already in decline.

In response to the City's motion for summary judgment, Plaintiff has offered evidence supporting its contentions that the City failed to enforce plan timetables for acquisition and redevelopment for their property which has been declared blighted for 5 years. Plaintiff asserts that the City has harassed them with building inspections and notices of code violations and by discouraging new tenants from renting in Plaintiff's property. The City denies such action or inaction. Consequently, a genuine dispute exists, and summary judgment for the City is thereby precluded.

Also, Plaintiff's claims are ripe. Landowners need not wait for their property to be condemned before they seek pre-condemnation damages, as suits can properly seek damages for ongoing harm.

Centene Plaza Redevelopment Corp. v. Mint Properties, 225 S.W.3d 431 (Mo. 2007).

Plaintiff owns a few parcels of land located on a particular city block in Clayton, MO. Plaintiff was interested in developing this entire block to expand its office and parking

space. When negotiating with the City over purchasing a parking garage on this block, Plaintiff learned that the City was seeking redevelopment of this block. The City then issued a request seeking proposals from developers to redevelop this area. Plaintiff submitted the only proposal in response thereto for the redevelopment of the entire block. The City commissioned a real estate consulting firm (“Consultant”) to analyze the block and determine whether it qualified as a blighted area. The Consultant ultimately concluded that the area was blighted. The City passed an ordinance finding the block blighted and approved Plaintiff’s plan, which included condemnation authority.

Plaintiff failed to reach an agreement with Defendant property owners to acquire their property on the block and filed a condemnation action against the Defendant property owners. The Trial Court found for Plaintiff. The Supreme Court of Missouri reversed. The City’s finding of blight must be supported by substantial evidence. § 523.261 RSMo. A blighted area is defined by § 353.020 as those portions of a city that “by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic **and** social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime, or inability to pay reasonable taxes...” Accordingly, the City’s determination of blight must include findings that the subject area is both an economic liability and a social liability.

Plaintiff failed to demonstrate substantial evidence of social liability. The Consultant did not make any conclusions on the social liability of the area. The Consultant testified that the factors in the area did not constitute a social liability as he understood the term. Rather, he stated that the area was a social liability only to the extent that it was an economic liability because of its inability to pay reasonable taxes. Also, reports from the City’s fire and police chiefs did not show that the block was requiring a significant number of or any more service calls than other areas in the City. No evidence was presented regarding public health concerns in the area.

The Court further stated that future benefits of redevelopment do not constitute probative evidence that the area in its present state constitutes a social liability.

The Court also noted that a blighted area for purposes of § 353.020 RSMo. can include buildings that are not themselves blighted, but which are deemed necessary for the redevelopment. However, the condemnor must still show that a portion of the area sought to be condemned is both a social and economic liability.

The following case distinguishes *Centene*.

Cortex West Development Corp. v. Station Investments #10 Redevelopment Corp., 2008 WL 2496962 (Mo. App. 2008); Motion for rehearing and/or transfer denied Aug. 4, 2008.

Here, Plaintiff was able to meet its burden to demonstrate both economic and social liabilities. For social liability, Plaintiff’s Consultant showed through significant statistical analysis the existence of physical deterioration of buildings, sites ,streets, and

sidewalks in the area and concluded that such conditions contribute to the unsafe state of the area. City officials also reviewed the area and reported to the Planning Commission their findings of ponding water in deteriorating parking lots, rusty and broken window frames and windows, unstable retaining walls in danger of falling into the street, and razor wire indicating fear of break-ins. The City's investigation independent of that of the Consultant was also presented to the Planning Commission.

Also, unlike the *Centene* plaintiff, Plaintiff in the instant case connected the above conditions with social liability by concluding that they are unsafe, that the area was in social decline, and the area was not contributing to the social welfare of the City and its residents.

While Plaintiff needed only to show one of the four factors to support finding of social and economic liability, i.e. blight, (age, obsolescence, inadequate or outmoded design, or physical deterioration; See 353.020(2) RSMo.), its Consultant demonstrated evidence for all four.

For economic liability, Plaintiff showed that the total taxable assessed value of the area since 1993 in "constant dollars" has declined by nearly 10%. While these values rose in actual dollars, this increase in total taxable assessed value did not match the increases of the remaining commercial properties in the City and the Consumer Price Index. Defendants presented an expert to rebut Plaintiff's economic evidence. As Plaintiff's evidence was sufficient to show economic liability, the Court was free to find Plaintiff's expert more credible and rely on that testimony rather than that presented by Defendants.

Therefore, the Court found that Plaintiff had shown that the City's determination of blight to be supported by substantial evidence, and ordering condemnation was proper.

II.

THE RESPONSE TO KELO

A. *Kelo v. City of New London, Connecticut*

One of the most significant cases involving and affecting land use in recent times is *Kelo v. City of New London Connecticut*, 545 U.S. 469, 125 S.Ct. 2655 (2005). (Summarized below at the end of this Section II). While *Kelo* alone may or may not fit within one's definition of "recent case law", the ripples which continue from it certainly are, including *Centene Plaza Redevelopment v. Mint Properties*, 225 S.W.3d 431 (Mo. 2007) and on the legislative side, the amendments to Missouri's Condemnation Statute. R.S.Mo. § 523.010 et seq.

For some background:

The authority of the government to take property, while undisputed, surely has been a controversial issue for many years. Yet, while some argue that *Kelo* did not create new

law, it certainly triggered the ire of citizens across the country and amounted to a call to action which some refer to as the "Kelo Push Back".

In *Kelo*, the Supreme Court recognized the right of local government to condemn private property and transfer said property to another private owner for development on the basis that the resulting economic development qualified as a public use. Federal and state governments responded quickly with studies and legislation to address the commonly held sense that there was something wrong with the "private to private" transfer of property forced by government.

B. Missouri Response to Kelo

Missouri was one of the first states to act when on June 23, 2005, Governor Matt Blunt established a task force to review and report back on several enumerated topics including studying this use of eminent domain for privately owned property and the effectiveness of Missouri's laws governing eminent domain and specifically developing a definition of "public use". On December 30, 2005, the Task Force reported back with 18 suggested steps in response to the Governor's request. During 2006, the Missouri Legislature adopted 11 of these suggestions in their entirety and 4 others in part. Much of the resulting legislation is found in R.S.Mo. § 523.010 et seq. and reprinted herein.

We are not going to address every one of the changes, but will note a few that we consider especially significant:

1. R.S.Mo. § 523.256 now requires a court before the court enters an order of condemnation to find that the condemning authority engaged in good faith negotiations prior to filing the condemnation petition. The statute goes on to set forth some of the required elements of good faith negotiations, including that the property owner received an offer no less than that set forth in a required state licensed or state certified appraisal and that the property owner is given an opportunity to obtain their own appraisal. Furthermore, and perhaps most significantly, if the court does not find the requisite good faith negotiations, then the condemning authority must reimburse the property owner for their actual attorney's fees and costs.
2. R.S.Mo. § 523.259 essentially codified and expanded the rulings from *66, Inc. v. Crestwood Commons Redevelopment Corporation*, 998 S.W.2d 32 (Mo. En Banc. 1999) and *66, Inc. v. Crestwood Commons Redevelopment Corporation*, 130 S.W.3d 573 (Mo. App. E.D. 2003) where the court held a condemning authority liable for attorney's fees and expenses of the private property owner following the condemning authority's abandonment of the condemnation.
3. A very significant change to the standard of review is set forth in R.S.Mo. § 523.261. In short, condemning authority must produce substantial evidence of blight; whereas previously, the condemning authority only needed proof that its decision was not arbitrary, induced by fraud, collusion or bad faith, and the court

could not reverse that determination if the legislative body's determination was fairly debatable.

We believe this significant change in the standard of review has changed our Courts with a sense of drawing a much harder line in review of condemnation cases such as *Centene Plaza Redevelopment Corporation v. Mint Properties*. (Summarized above in Section I.).

C. Local Issues

There are several developments in the St. Louis area that have involved or are affected by these issues evolving around *Kelo*.

One is the failed development in Sunset Hills which is at the heart of *Parish v. Novus Equities Co.*, 231 S.W.3d 236 (Mo. App. 2007).

Part of the fallout from the *Kelo* decision included the dispute over a redevelopment project in Sunset Hills, Missouri proposed by Novus Equities Company. Novus sought to acquire approximately 300 properties through negotiation or condemnation. When Novus' financing fell through for these purchases, it had 91% of these properties under contract or already acquired. Some of the homeowners under contract filed suit against Novus and the City when Novus failed to perform its agreements and buy their homes.

Summary of Parish

Parish v. Novus Equities Co., 231 S.W.3d 236 (Mo. App. 2007).

Among other claims against Novus and its related persons and entities, Plaintiff Homeowners alleged claims of negligence against the City of Sunset Hills for failing to monitor or confirm the status of Novus' financing and its commitments to Plaintiffs. Plaintiffs alleged that the City assumed this duty through the terms of the Redevelopment Agreement. Plaintiffs claimed that this duty was a proprietary function for which it was not entitled to sovereign immunity. Plaintiffs also claimed that the City waived sovereign immunity by procuring liability insurance for tort claims.

The Court found that the City's role in the Redevelopment Agreement constituted a governmental function, for which the City enjoyed sovereign immunity. The City was carrying out the broader governmental mandate of protecting public health, safety, and welfare within its boundaries. The City's participation in the Redevelopment Agreement and its entry therein was accomplished through legislative enactment of municipal ordinances, a fulfillment of the City's broader governmental mandate.

Next, the Court found that the City did not waive its sovereign immunity by procuring liability insurance for tort claims. Generally, procurement of liability insurance waives sovereign immunity, but this waiver extends only to the maximum amount of coverage provided by the policy and only for the types of claims the policy covers. Additionally, a

public entity retains its full sovereign immunity when the insurance policy contains a disclaimer stating that the entity's procurement of the policy was not meant to constitute a waiver of sovereign immunity. Here, the City's policy contained such an endorsement. Also, Plaintiffs were claiming economic losses, not property damage. The City's policy only provided coverage for property damage and bodily injury. Accordingly, the City retained sovereign immunity against Plaintiffs' claims.

(Plaintiffs claims against Novus and its related persons and entities are still pending in the Circuit Court of St. Louis County before the Honorable David Lee Vincent, III.)

Summary of Kelo

Kelo v. City of New London, 545 U.S. 469 (2005).

The City approved a redevelopment plan and authorized acquisition of the subject property by private negotiation and eminent domain. The subject property was primarily comprised of middle-class residences. The redevelopment project was to build a museum, hotel, offices, restaurants, and other uses. The property was being condemned solely because it was located within the redevelopment area, not because it was in poor condition or blighted.

The Connecticut Supreme Court ruled that all takings were valid as the project was for public use. The issue framed by the U.S. Supreme Court was "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." The 5-4 majority found in the affirmative.

The Court further narrowed this issue to whether the city's economic redevelopment plan served a "public purpose" and, if so, whether that satisfied Fifth Amendment requirements. The Court relied on prior precedent to broadly define public use and to defer to legislative bodies' findings of what constitutes a public use.

In dismissing the landowners' argument that the public benefits resulting from the proposed development should be determined with "reasonable certainty," the Court pronounced that in interpreting other portions of the Constitution, it has held that the details of the legislative plan will not be second-guessed by the courts when there is a legitimate legislative purpose, and its means were reasonable or not irrational. That is, the plan meets the rational basis test.

Ultimately, the Court held the following: the plan developed by the City of New London was legitimate; it was designed for a public purpose because, in part, the state statute on which the condemnation action was filed authorized such actions to meet the needs of industry and business; and it was carefully developed to increase jobs and the tax base. In deferring to the city's plan and determination that eminent domain was required to effectuate that plan, the Court found that economic development constituted a public

purpose that could reasonably benefit the public and that such use did not run afoul of the takings clause of the Fifth Amendment.

The Court found that economic development should not be differentiated from the other public purposes previously approved by the Court, such as facilitation of mining and agricultural support, eradication of urban blight, and elimination of concentrated land ownership. While recognizing that a condemning authority cannot take private property from one person for the direct purpose of transferring it to another for private benefit, the majority in *Kelo* was not convinced that economic development takings muddies the distinction between permissible public takings and prohibited private takings.

III.

AUGUST 2008 ABA MODEL STATUE ON LOCAL LAND USE PLANNING PROCEDURES ¹

Certainly a recent development, albeit not case law or legislation, was the ABA's vote in August of 2008 to recommend and urge state and local governments to adopt the model statute on land use planning procedures. While certainly not legislation itself, it not only is an effort to move toward legislation, but also reflects vastly held opinions that current planning and zoning statutes are outdated and not suitable for the current issues and demands facing communities and is in concert with recent legislation across the country which reflects a trend to update planning and zoning statutes.

Missouri's, as well as the majority of states, planning and zoning statutory framework is certainly old, much of it dating back to the 1920s, with many of the Missouri statutes remain untouched since 1939. Since this will probably be touched on in subsequent sections of this Conference, suffice it to say that the exercise of planning and zoning authority by local governments does not always meet up with what one would think are the ideals of the planning and zoning statutory framework. In other words, the idea of a comprehensive plan put together by consideration of the multitude of community issues and steering development of property in the best ways possible for the benefit of public, while at the same time encouraging effective private property ownership and use through zoning ordinances and administrative processes sometimes falls down in the actual execution of this idea.

We do not reprint the Model Statute in full here but do attach the 2 page report from the responsible committees. The report sets forth highlights. In a nutshell, the ABA Model Statute can be seen as an effort to update the planning and zoning framework to provide more effective application of planning ideals but also to be more effective in addressing the current issues and demands that communities face.

The Model Statute resulted from the long collaborative effort between the American Planning Association and American Bar Association. Washington University Professor

¹ The Model Statute can be found at:
<http://www.abanet.org/leadership/2008/annual/recommendations/OneHundredElevenA.doc>

Daniel Mandelker, one of the most prominent nationally recognized authorities on land planning, is prominently cited as having been intricately involved in the process.

We do not know of any current intentions in the Missouri Legislature to take up the Model Act, but perhaps the Missouri Legislature will be up for an overhaul of Missouri's Planning & Zoning enabling statute.

Perhaps an indication can be taken from the Missouri Legislature's enactment of a couple new minor amendments to the zoning statutes which do not appear to have major significance in current application but do suggest that modern, proactive, regionally oriented, planning concepts are being contemplated in Jefferson City. By House Bill No. 205 and 795 and the Senate Bill No. 22 and 81, the Missouri Legislature in 2007 adopted and codified amendments to R.S.Mo. § 89.010 and 89.400 with references to "transect-based zoning". Both of those sections are attached hereto. Both of those sections simply provide that when a local authority adopts zoning or a subdivision ordinance based on transect-based zoning and those provisions conflict with other political subdivision; enactments, then the transect-based zoning provisions governing street configuration, parking, etc. shall prevail over any conflicting provisions. Transect-based zoning involves zoning more from an "area wide" or regional perspective and designating uses of property within zones that transition from rural to urban. Transect-based zoning is part of the basis of the "SmartCode" which is another extensive planning and zoning code that is also a relatively recent, modern approach to planning and zoning with more emphasis on regional planning. While it may only be a theory on our part, it may be that the Legislature's recent adoption of references to transect-based zoning is an indication that legislature is interested in updating Missouri's planning and zoning statutes and perhaps that it will give full consideration to the ABA's Model Statute.

IV.

RLUIPA

Finally, and perhaps moving to the somewhat more obscure, there are relatively recent cases involving the RLUIPA and recent events which would suggest that the RLUIPA will become a more prevalent topic in the area of land use. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) 42 U.S.C. § 2000cc, et seq. (portions attached hereto) protects individuals, houses of worship and other religious institutions from discrimination in zoning and landmarking laws. Congress found that the right to assemble and worship within a physical space was at the core of the free exercise of religion and the First Amendment right to assemble for religious purposes, and yet also recognized that religious assemblies may be discriminated against by means of zoning codes and land use regulation. To address these concerns, the RLUIPA prohibits zoning and landmarking 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. The RLUIPA among other things prohibits zoning and land use laws that treat churches or religious assemblies on less than equal terms with

non-religious institutions, exclude religious assemblies, or unreasonably limit religious assemblies.

The relevance of the RLUIPA is highlighted by recent situations noted in the local papers involving efforts by communities of the Islamic and Hindu faiths to establish places of worship or religious institutions in local municipalities. While the conflict between free exercise of religion and local land use law is not new, the RLUIPA is recent legislation that provides stronger protection for religious freedom in the land use context and also provides a new cause of action in the free exercise versus land use context. Several recent cases in other jurisdictions have upheld the constitutionality of the RLUIPA in the land use context. There is one recent Missouri case, *St. John's Evangelical Lutheran Church v. City of Ellisville*, 122 S.W.3d 635 (Mo. App. E.D. 2003) that mentioned the RLUIPA in the Land Use context and took up an issue involving free exercise of religion versus land use restrictions, though the court did not actually apply the RLUIPA. The court summarized prior cases involving religion including *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959) and *Village Lutheran Church v. City of Ladue*, 935 S.W.2d 720 (Mo. App. 1996), which, in short held that local government may not restrict the location and use of buildings and land for use for religious purposes and could not prevent a church from building a multipurpose building in violation of the City's setback requirements. The Court clarified that, as suggested in *Village Lutheran II*, these decisions do not hold that municipalities have no right under their police powers to regulate churches. The Court recognized that municipalities have the authority to regulate churches in such matters as requiring a special use permit under the zoning ordinances and had the authority to limit the size of a sign that a church sought to erect on its property and held that it is wholly appropriate to impose limitations on a church property and its accessory uses when reasonably related to the general welfare of the community including the community's interest in preserving its appearance *Id.* at 643-644. Also, the court cited *Village Lutheran II* for the proposition that "the fact that a municipality exercised some control over the conduct of churches is not, per se, violative of the church's right into 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. *St. John's Evangelical* at 644.

It appears in Missouri that religious use of property cannot be prohibited as far as location and activity, but lesser issues such as the type of construction and signs and such will remain subject to the balancing of religious exercise interests versus the rights of cities to control land use for the protection of the general welfare. We can expect more cases in this area given that the RLUIPA not only supports free exercise of religion in the land use context but adds further relief to support litigation of grievances.