HIERARCHY OF LAND USE LAWS

A FRAMEWORK FOR THE PLANNING AND ZONING PROCESS

By

Dan Simon

I. INTRODUCTION

In planning and zoning issues, a property owner (or a property owner and a contract purchaser, who has a contract to purchase the property) will submit an "Application" to the City Planning Staff for a change of Zoning District/Classification for the owner's property or approval of a plan.. Since the processes do not officially start without an Application, these matters are "Application Driven." Without an Application to the Planning and Development Department, there is nothing for the Department, the Planning and Zoning Commission and the City Council to consider.

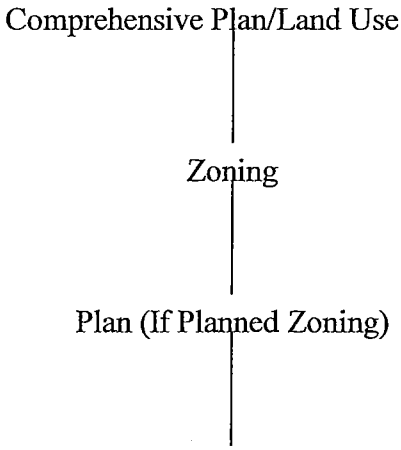
It is important to note that the same procedures apply when land outside of the City limits is sought to be annexed into the City upon a Petition for Annexation to the City. The Petition is submitted by the property owner and must be accompanied by an Application for Zoning. It states that it is "contingent" upon the property's being placed in a given zoning classification. The City's ordinances permit property owners to seek annexation on the condition the property will be annexed into the City only if the applicant receives the requested zoning classification. Unless the Annexation Petition is such a "contingent" application, the property will come in to the City in a temporary holding zoning classification of R-1. The City Council must then initiate a process to place it in a permanent zoning classification within 6 months of annexation

In all cases of rezonings, Petitions for Annexation (which are contingent on the approval of the requested zoning classification) and situations where property is annexed, on a non-contingent basis, the zoning processes are the same. All of the zoning issues are initiated with the Planning and Development Department and come before the Commission and the City Council. All are dealt with in substantially the same manner.

The planning and zoning is very important in that it frames the growth of the city but it is not well understood by many. The purpose of the paper is to provide a framework for the planning and zoning processes for rezonings, annexation zonings, plans when the property is a planned zoning, and subdivisions.

II. THE HIERARCHY OF LAND USE LAWS AND REGULATIONS

There is a hierarchy of land use laws and regulations that govern and guide the process. That hierarchy is:



A. COMPREHENSIVE PLAN/LAND USE PLAN

Missouri law requires that a city which institutes zoning have a Comprehensive Plan. While there seems to be a perception that there is no such plan in Columbia, such is not the case. We have had numerous plans for many, many years, and last amended a substantial component of if, the Land Use Plan, when we adopted the Metro 2020 Plan after several years of public debate and committee debate and input. The Land Use Plan, when coupled with some of the other plans, including the CATSO Plan, the Major Thoroughfare Plan, various utility plans, and probably some other components, functions as the Comprehensive Plan that is required by state law.

Note that this plan is not binding. It does not "zone" property. The plan is implemented by:

- Zoning, which governs, in a legally binding way, the use to which land can be put.
- Subdivision regulations, which govern the subdivision of the land into Lots, the location and placement of streets, the locations of utilities, and similar issues such as public street extensions, utility extensions, sewer extensions, economic development efforts, etc.

When a tract comes before the P and Z and the City Council, for rezoning, or initial zoning, the issue as to whether that zoning does or does not conform with the 2020 plan is always presented. Does the desired zoning conform with that plan? If it does not, then there is a burden on the Applicant to show why the deviation from the Plan should be permitted. If it does, then there is some burden on others to show why the Plan is not appropriate for this piece of property.

The Metro 2020 Plan is, by design, somewhat broad in its scope. It simply places various areas of property in certain "Districts", which are:

-neighborhood
-employment
-commercial
-green space.

Note that just because a District is a "Neighborhood District" does not mean that limited types of businesses cannot be placed in that district. The Neighborhood District, by design, is intended to include housing of all types (single family, duplex, multi family, condos, rental and owned) and limited amounts of office and commercial space that can be integrated into and can serve a neighborhood.

The plan is certainly given substantial deference in zoning issues.

B) ZONING:
The Zoning Code governs land use. The zoning that is attached to a piece of land determines, in binding fashion:

- the Permitted Uses to which it can be put;
- in some cases, so called "Conditional Uses" to which the land can be put, with a Conditional Use Permit from the Board of Adjustment;
- building heights (except in some planned zones, such as C-P);
- set back or yard requirements;
- lot or yard sizes;
- other development parameters.

Even in so called "Open Zones" or "Straight Zoning," (R-l, R-2, R-3, C-l, C-3, etc.), there are binding development parameters, which include the items mentioned above. In addition, there are other ordinances that define requirements:

-off-street parking and loading ordinances,
-tree preservation ordinances,
-storm water ordinances,
-street design and construction ordinances,
-landscaping and screening ordinances, and
-sign ordinances

which govern developments in open zones, or "Straight" Zones.

There are also "Planned Zones", which include C-P ("Planned Business District"), O-P ("Planned Office"), and PUD ("Planned Unit Development), or basically a Planned Residential Development. Note that here the classifications are by units per acre. For example, PUD-3, means no more that 3 units per acre). In a Planned Zoning District, a Development Plan must eventually be approved. The Development Plan is a "Overlay" on the property. It binds the development of the property, and will govern:

-building locations,
-building types and sizes,
-in some'cases, heights of buildings,
-in some cases, even the general appearance of the buildings (this has been rare but is becoming more common), -lawns, landscaping and open spaces,
-locations of parking,
-locations of driveways and entrances, and -other development matters.

Planned zoned property is becoming much more common, because of the perception that Planned Zoning gives the City greater control over the ultimate development of the property.

In Planned Zoning, the Applicant can seek zoning, without approval of a Plan, or can seek zoning, coupled with a "Plan", meaning that he/she seeks both approval of the zoning and approval of the Plan in the same process. Development Plans can be very, very expensive to develop. Recent amendments in these ordinances are sought to encourage applicants to make greater use of planned zones.

If a Development Plan is not approved as a part of the zoning of the land (Example, the Land is placed in District C-P, but no plan is approved), then the owner has to come back with a Development Plan. That requires the same application processes as are used in zoning the property. An application for approval of the plan must be filed. The notices are given to the neighbors, etc. The matter is presented to P and Z, and ultimately the council, just as is the case in the initial zoning of the property. There are hearings before both bodies.

In Planned Zones, the Rezoning Processes can be applied twice, once for the zoning itself, and once for the approval of the development plan.

The City Council possesses substantial legislative discretion as to the manner in which, property can be zoned. Zoning is a "legislative process." It is a "Political Process." The discretion of the council can be upset by the courts only in those instances where the owner can show that the council, by refusing to change the zoning classification for his property, has denied him a reasonably economic use of his property. So there is substantial discretion in the approval of Zoning for property.

There is somewhat less discretion in the approval of a "Development Plan", but there is still some substantial discretion, as long as it is not exercised umeasonably or in an arbitrary manner, or in such a manner as to make the property economically unusable. In some cases, the applicant

who seeks zoning to a Planned District will describe the contents of the ultimate plan, and this "Statement of intent" is approved with the zoning. This provides some protection to the developer in that it would be unreasonable to deny approval of a plan which comports with the "statement of intent", and it provides some additional protection to the City, which knows what the ultimate plan will provide.

In some planned zoning districts, the City Council, when it approves the zoning, will also approve a Statement of the Uses to which the property can be put (this is done, for example, in C-P).

Zoning and development plan approval issues are public hearing issues. However, much of the legislative discretion that the council possesses in land use issues ends with the zoning of the property (if it is open zoned) or the approval of the development plan (if it is planned zoned).

C. SUBDIVISIONS

In straight zoning subdivision regulations, street design and construction regulations, and similar regulations govern the development process. Once Property is zoned, it still must be subdivided into Lots, Streets Built, Sewers installed, storm water facilities put in place, utilities installed, etc. With Plan Zoning, some of these issues can be governed by the Development Plan. With straight zoning (and even to some substantial extent in planned zones) these matters are governed by the Subdivision Regulations and a host of other regulations which deal with Street Design and Construction, Utihty locations, etc. Ultimately, of course, the Building Code governs the construction of the buildings themselves.

Missouri law, and the law of most states, severely limits the governmental discretion in subdivision issues. The General Rule (and that is not to say that there are not exceptions) is that a plat which conforms with the underlying zoning and the minimum requirements of the Subdivision Regulations must be approved. There is no discretion to deny such approval. The discretion becomes even more limited when a Preliminary Plat has been approved The rule then is that any Final Plat which conforms with the Preliminary Plat must be approved.

Platting and development, after zoning, is governed, generally, by the Regulations, including:

-Subdivision Regulations,
-Street Design and Construction Regulations (These do include a number of public safety considerations, such as where streets can be located, intersections can be put, driveways can be located, lengths of cul-de-sacs, etc, need for two entrances, etc.),
-Tree Preservation Requirements,
-Storm Water Ordinances,
-Land Disturbance Ordinances,
-Utility location regulations, and similar regulations,
-In a Planned Zone, the requirements of the Development Plan,
-Building codes

These matters are largely not discretionary. They are purely administrative in nature, and in some cases almost ministerial in their application. These are not public hearing issues, either before the planning and zoning commission or the city council.

Unlike zoning, these issues are generally not discretionary. Much of the public input ends with the zoning or the zoning and development plan approval for property. Then the Regulations take over. The fight, then, if there is to be a fight, comes with the zoning or the zoning and development plan approvals.

III. GENERAL STEPS IN ZONING PROCESS/REZONTNG PROCESS

The general steps in any Rezoning Process (or initial zoning process, for that matter, when Annexation is being accomplished) are:

-DEVELOPER'S CONCEPT DEVELOPMENT: Obviously, the owner or the developer develops a concept as to the intended use to which the property is to be put, and may undergo some steps in doing some conceptual planning for this use. This may involve sketching out lots, streets, etc. This process may go on for a substantial period of time, or it may just go on for a few minutes through the developer's brainstorming. This process is obviously a private one which involves only the developer and his consultants. This process may involve some thought as to the probabilities that the zoning necessary to achieve the desired use of the property can be obtained. There may even be some very preliminary discussions with members of the city staff about their tWnking as to the developer's concept for the use of the property.

-INFORMAL CONCEPT DISCUSSIONS WITH CITY STAFF: At some point the Developer or his consultants may have some preliminary discussions with city staff, including members of the staff of the Planning Department and the Public Works Department. The purpose of these discussions may include, among other things:

-a determination as to the present zoning of the property, if not already known,
-a determination as to the "District" into which the property has been placed by the City's Metro 2020 Plan,
-a determination as to the very initial and preliminary, and totally non-binding thoughts of the City Staff as to how the Staff "might" view an Application for Zoning to a given Zoning Classification, if one is submitted. (Note: At this point, these discussions are really preliminary, and no one is bound to anything. The staff can change its mind, on review of the issues.)

FORMAL CONCEPT REVIEW: In many cases, and certainly those of any substance, the developer is very wise to seek a formal concept review by City Staff. This is a formal process. The developer or his consultant asks that the City Planning Staff schedule a Formal Concept Review. The request should describe the location of the property, the nature of the intended use of same, the zoning sought, and other important information. It might include sketches of the proposed development plan for the property. The Planning Staff will circulate the request and information among all relevant departments, including:

-Planning and Development
-Public Works
-Water and Light
-Police Department
-Fire Department
-Parks and Recreation,
-the City Arborist,
-perhaps MoDot if a State Road is involved,
-perhaps Boone County Planning Department,
-possibly others.

The Planning Staff will then schedule a meeting, which will be attended by the developer and/or his consultants, and representatives of each of these departments. The developer will discuss the intended project. The department representatives will then describe any issues or problems which they find to exist, such as:

-need for electrical or utility easements or street rights of way
-street locations, or needs for street extensions
-availability of sewers and other utilities, and/or the need to extend same
-tree preservation issues
-any police or fire protection issues
-any requirements for parks or trails
-the desired zoning and land use and whether or not same conforms with the Metro 2020 plan, and whether or not the Planning Staff feels that it can recommend same to the Commission and the City Staff, and any conditions on same which the Staff feels should be put in place,
-traffic issues and concerns
-other issues.

APPLICATION SUBMITTED: Eventually (or in smaller cases, maybe even at the outset) a formal Application for Rezoning (or initial Zoning in the case of an Annexation) is submitted to the Department of Planning and Development. This is a formal written Application, submitted, generally, on an official form for such Applications which has been prepared by the Planning Staff. That Application has to be accompanied by some substantial information, including a legal description of the property, its location, its acreage, its current zoning, the desired zoning, its intended use, the names and addresses of property owners within some defined distance of the property.

REQUEST FOR COMMENTS: The Planning Staff will send this Application, or its information, with a locator map and a request for comments to all department heads, and to:

-the School District
-MoDot if a state road is involved
-The County Planning Department, if the property is in the County
-Neighbors within 200 feet of the property
-Neighborhood Associations within 1000 feet of the property
-Boone electric and/or the water district, and/or the Fire Protection District, if they are to serve the property.

Generally, these requests for comments are sent out very shortly before the P and Z meeting. The meeting is scheduled (note not held, but just put on the docket) about 10 days after the Application is received. The P and Z meeting can be held within about 25 days after the Application is filed. The parties to whom this request is sent are asked to provide comments to the Planning Staff about the proposal. They are invited to contact the Planning Staff for information about the proposal. I think Planning Staff is readily available to answer questions about the proposal. Written comments are solicited. Folks are informed about the scheduled P and Z meeting.

This is the first "official" or "formal" notice to neighbors. The Neighbors and Neighborhood Associations, as I understand it, are limited to:

-200 feet for neighbors
-1000 feet for the associations.

STAFF REVIEW: After an Application for Rezoning is filed, or an Application is filed with a Development Pan, it will receive a formal review by the Staff of the Planning Department. The Staff will, prior to the public hearing before the Planning and Zoning Commission, provide the Commission with a Report and Recommendation. This Report is generally available the Thursday or Friday before the week in which the Commission meets. The Report is a publicly available document, and can be accessed on-line. This Report contains the first official statement of the Staffs position on the Requested Rezoning. If the property is to be placed in a Planned Zone, this Report may contain suggestions by the Staff as to restrictions on allowed uses that should be placed on the property, suggestions for requirements as to the Development Plan, and even suggestions as to requirements that might be imposed on the Developer for so called "off-site improvements", such as street and road improvements. If the Application was accompanied by a Development Plan, then the Staffs Report can extensively address the Plan and any defects or problems it finds to exist therewith. The Staff will made a recommendation to the Commission (and ultimately the City Council) as to whether the requested zoning should or should not be allowed, and as to any conditions or requirements that should be imposed. There is no requirement that the Commission or the Council follow these recommendations, but they are given substantial weight by both bodies.

This Review process for "minor cases" may take only something like 20 to 25 days. In "major cases" it can go on for a substantial period of time. There can be some give and take during this period of time. The Staff may find problems with the request, or with the Development Plan, and the Developer/Applicant may make adjustments in the request or the plan to try to deal with these issues. It is not unusual for there to be amendments in a Request or a Development Plan, which are made after its initial submission and before it is presented to the Commission.

Encouragement is always given by Staff to the Applicant to visit with the neighbors and other potential stakeholders, but there is no requirement that the Applicant do so.

NOTICE: Approximately 15 days before the issue comes before the Planning and Zoning Commission, the Staff causes a Public Notice of the meeting to be published. The Staff also sends notices, by mail to the property owners within 200 feet, and the neighborhood associations within 1000 feet.

PLANNING AND ZONING COMMISSION PUBLIC HEARING: Eventually, the Application for Rezoning (or the Application for Zoning and Plan approval) comes to a Public Hearing before the Planning and Zoning Commission. This is the first truly "public process" if you will. At the hearing, the Applicant and his consultants, will present their "case'Varguments for the granting of the zoning, or the granting of the zoning and the approval of a Development Plan if one is presented. Any opponents will then speak to the issue, and members of the public, generally, can speak to the issue.

RECOMMENDATION TO CITY COUNCIL: Since the Commission is not a "deciding body", but is purely a recommending body, it does not decide the issue. It makes a recommendation to the City Council, which has to make the final decision. It can recommend approval. It can recommend approval with conditions or changes or modifications or restrictions. It can recommend denial of the request. What it cannot do is to recommend some zoning for property which the applicant has not sought, although it can in its remarks indicate that it would approve other zoning (and it often does this). The council will approve or deny zoning, as requested, but it will not zone property to a classification not sought or consented to by an applicant.

TIME BETWEEN MEETINGS: At least (about) a month lapses between the Commission hearing, and the time when the matter comes before the City Council for a public hearing (another public hearing) on the Application. In complex cases, requested tablings can result in a longer time period. During this period, the true "political process" can come into play. The Applicant and his consultants are free to try to discuss the matter with the various members of the council, most of whom are receptive to these discussions. Opponents can also have these discussions, which they do many times. Most members of the council are open to these discussions. Both the Applicant and the Opponents are free to provide the council with written materials and arguments, which many of them do. E mails can also be used. In many, many cases, applicants will provide the council with written arguments and materials. During this time period, further adjustments can be made in the Application (or if there is a Development Plan, in the Plan) to try to meet and deal with various points raised by opponents, or various objections or concerns expressed by council members.

NOTICE: A further notice of a Public hearing before the council is published and given.

CITY COUNCIL PUBLIC HEARING: Eventually, the matter comes to a Public Hearing before the City Council. The council will have received the Staff Report, and the Report and Recommendations of the Commission, and has a transcript of much of the proceedings before the Commission. It may have received written materials and communications from the Applicant and opponents and other interested stakeholders. The Council Public Hearing rules are somewhat flexible, but are generally somewhat similar to that of the Commission, although the primary speaker gets only 5 minutes. In complex cases, however, the council is inclined to alter its rules to allow a block of time for presentations by the Applicant, a block of time for presentations by organized opponents, and then time for remarks by the general public. The council, unlike the commission, will allow applicants to reserve some time for rebuttal.

FINAL DECISION: Ultimately, the City Council will decide the matter. It will either grant or deny the Application, in whatever form it appears at the time of this final decision. If annexation is requested, which is to be contingent on zoning, then it will vote on a single, combined ordinance, which both annexes the property and places it in the desired zoning classification.

PRESENTATION FOR LAW SESSION OF MOAPA CHAPTER CONFERENCE
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INTRODUCTION

The law firms of Van Matre, Harrison, Hollis, Patzer and Taylor, P.C., and Brown, Willbrand, Simon, Powell & Lewis, P.C., of Columbia, Missouri, for the purposes of providing to attendees of MoAPA Chapter Conference (October 6-8, 2010, in Columbia, Missouri), presentation materials for a presentation of matters of law affecting planning professionals, have prepared the attached presentation. Such presentation is broken into two basic parts. The first part deals, primarily, with Missouri land use laws, and some related topics. The second part deals with various districts, which are allowed to be created by Missouri law, for purposes of financing various improvements, and comparable purposes.

The following Table of Contents describes the contents of this presentation.

While the oral presentations cannot, within the allocated time, cover all of the materials, the attached presentation should be of future benefit to conference attendees, who can consult the presentation materials and the documents cited therein, as their future needs may dictate.

It is our hope that these materials will be of substantial benefit to the conference's attendees.

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Brown, Willbrand, Simon, Powell & Lewis, P.C.

B. Daniel Simon

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Memorandum

To: Dan Simon, Robert Hollis and Erick Creach
From: Nicki Walsch, Steven Ellis, Drew Weber and Brennan Connor
Re: Missouri land use laws

I. Introduction to Planning and Zoning

The power of planning and zoning is a police power delegated by the state to local political subdivisions, principally in Chapter 64 of the Revised Missouri Statutes for counties and Chapter 89 for cities, towns, and villages. While these enabling statutes are the sole source of the zoning power, the powers are broadly defined and allow local authorities to impose a wide range of land use controls. *See Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963). In addition to defining planning and zoning powers, Chapters 64 and 89 authorize the establishment of planning and zoning commissions, boards of adjustments, and subdivision regulations.

Although the planning and zoning powers of local governments are broadly defined, the exercise of that power must conform to the terms of the applicable enabling statute. *McCarty v. City of Kansas City*, 671 S.W.2d 790 (Mo. W.D. 1984). Any attempt to expand the powers beyond those specifically delegated by the legislature will be invalidated. *Allen v. Coffel*, 488 S.W.2d 671 (Mo. App. W.D. 1972). For example, in *State ex rel. Casey's General Stores, Inc. v. City of Louisiana*, the Missouri Court of Appeals Western District held that various provisions of a zoning ordinance adopted by the City of Louisiana, Missouri were invalid for failure to comply with the provisions of the zoning enabling statute. 734 S.W.2d 890 (Mo. App. E.D. 1987). Specifically, the city failed to provide fifteen days' notice of public hearings and held joint meetings of the planning commission and city council. *See* MO. REV. STAT. §§ 89.050, 89.070 and 89.360.

The authority, hierarchy, process, standards, and judicial review of each of these powers in the planning and zoning process are discussed below, focusing on the provisions for cities, towns, and villages under Chapter 89.

II. Hierarchy of MO Land Use Laws

A. Comprehensive Plan

In Missouri, planning and zoning for cities, towns and villages is governed by the planning enabling statutes, Missouri Revised Statutes sections 89.300-89.490. These statutes are based on the Standard City Planning Enabling Act (SCPEA) published by the U.S. Department of Commerce, and contain language similar to that adopted by most other states. Stephen L. Kling, Jr., *Municipal Land Planning Law in Missouri*, 56 J.Mo.B. 6 (2000). The planning enabling statutes allow a municipality to create a Planning Commission. MO. REV. STAT. § 89.310. The appointment of Planning Commission becomes necessary when the municipality needs to "coordinate development, consider re-zoning requests, and create zoning districts beyond the ones originally established when the municipality was first formed." Stephen L. Kling, Jr., *Municipal Land Planning Law in Missouri*, 56 J.Mo.B. 6 (2000). Once a municipality appoints a Planning Commission, the Commission possess all of the powers and duties created by the planning enabling statues, and must follow the statutory requirements. *Id.*

This authorization for a Planning Commission, rather than a city council, to be the body that adopts land use plans was purposeful. Stephen L. Kling, Jr., *Municipal Land Planning Law in Missouri*, 56 J.Mo.B. 6 (2000). This statutory arrangement was designed by the SCPEA to ensure that land use decisions are independent of political influences and short term considerations that might interfere with long term community planning. *Id.*

Once a Planning Commission has been formed, Missouri Revised Statutes section 89.340 then requires the Commission to produce a comprehensive plan for land use in the municipality. MO. REV. STAT. § 89.340 ("The commission shall make and adopt a city plan for the physical development of the municipality"). The Commission designs a plan 1) to be used as a guide in making zoning recommendations and decisions 2) to coordinate location and construction of public improvements 3) to coordinate design of subdivisions and construction of streets and related improvements. Stephen L. Kling, Jr., *Municipal Land Planning Law in Missouri*, 56 J.Mo.B. 6 (2000). The city plan should include:

> [T]he commission's recommendations for the physical development and uses of land, and may include, among other things, the general location, character and extent of streets and other public ways, grounds, places and spaces; the general location and extent of public utilities and terminals, whether publicly or privately owned, the acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment or change of use of any of the foregoing; the general character, extent and layout of the replanning of blighted districts and slum areas. The commission may also prepare a zoning plan for the regulation of the height, area, bulk, location and use of private, nonprofit and public structures and premises, and of population density, but the adoption, enforcement and administration of the zoning plan shall conform to the provisions of sections 89.010 to 89.250."

MO. REV. STAT. § 89.340.

1. Process

When preparing the plan, the Commission must make "careful and comprehensive" surveys and studies regarding the current conditions of the municipality and its likely future growth. MO. REV. STAT. § 89.350. The plan should be designed to achieve coordinated development of the municipality which will "best promote the general welfare, as well as efficiency and economy in the process of development." *Id.* In *Adams v. City of Manchester*, a group of citizens argued that the Planning and Zoning Commission failed to make careful and comprehensive surveys and studies before amending the city plan. 242 S.W.3d 418 (Mo. App. E.D. 2007). The citizens based their claim largely on a discrepancy between the documents produced to citizens before the plan was adopted and the documents produced prior to litigation. *Id.* at 426. The court issued summary judgment for the city, holding that the citizens had failed to show a genuine issue of material fact as to whether the city failed to follow the requirements of section 89.350. *Id.*

The Commission may adopt the plan as a whole, by a single resolution, or may adopt the plan in parts, so long as the parts are "functional subdivisions" of the subject matter of the plan. MO. REV. STAT. § 89.360. However, before the Commission may adopt, amend or extend any part of the plan

there must be at least one public hearing. *Id.* Fifteen days prior to the hearing, notice of the time and place of the hearing must be published in a newspaper of general circulation in the municipality. *Id.* After the public hearing, the Commission may pass the plan by a majority vote of the full membership of the Planning Commission. *Id.* In addition to the public hearing requirement, the statute also contains other provisions which keep the public informed. Any resolution passed by the city council which amends the city plan must refer explicitly to the maps and other matters that will become part of the plan. *Id.* Also, after the plan is adopted, a copy of the plan must be kept in the municipal clerks office and made available for public inspection. *Id.*

2. Nature of plans

Land use plans by adopted by Planning Commissions are not legally binding; they are merely a guide to development. Stephen L. Kling, Jr., *Municipal Land Planning Law in Missouri*, 56 J.Mo.B. 6 (2000). Sections 89.340 and 89.350 characterize city plans as "guid[es]" and "recommendations."*Id.*;MO. REV. STAT. §§ 89.340-89.350. City plans are adopted by resolution of the Planning Commission, an administrative body, therefore, they are merely expressions of the Commission's opinion regarding an administrative matter, not law. Stephen L. Kling, Jr., *Municipal Land Planning Law in Missouri*, 56 J.Mo.B. 6 (2000). It is also important to note that a land plan is not a zoning document and cannot be used as such. *Id.* (citing State *ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867, 871 (Mo. App. E.D. 1992)). Zoning ordinances must be enacted by the legislative body of the municipality, as discussed below.

B. Zoning

Zoning determines the permitted and conditional uses of land for the purpose of promoting the "health, safety, morals or the general welfare of the community." MO. REV. STAT. § 89.020. As such, the legislative bodies of all cities, towns, and villages may "regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes." *Id.*

In Missouri, zoning is governed by the Missouri Zoning Enabling Act which is codified in the Missouri Revised Statutes sections §§ 89.010-89.140. The powers of zoning and rezoning are granted to the legislative bodies of a municipalities and are exercised through the enactment of ordinances. Stephen L. Kling, Jr., *Municipal Land Planning Law in Missouri*, 56 J.Mo.B. 6 (2000). The city council's task is to apply the broad planning policies expressed by the Planning Commission in the land use plan to specific parcels of property on a case by case basis, as rezoning applications are submitted. *Id.* Although some commentators have argued that section 89.040 requires all approved rezoning to comply with the zoning scheme of the municipality's land plan, this would be inconsistent with the intent of the SCPEA and would not allow any discretion in zoning decisions. *Id.* (discussing Mo. Rev. Stat. § 89.040 which provides that zoning regulations "shall be made in accordance with a comprehensive plan."). Stephen L. Kling, Jr. argues that the reference to a comprehensive plan in section 89.040 merely means that zoning should be done in a comprehensive manner, not in a piecemeal fashion. *Id.* According to Kling, because re-zoning is a legislative act under Missouri law, a city council has broad legislative discretion to consider the general welfare,

the affect on adjoining properties, the public benefit versus the private detriment, and all other matters necessary and relevant to the decision. *Id.*; *Heidrich v. City of Lee's Summit*, 916 S.W.2d 242, 248 (Mo. App. W.D. 1995); *Hoffman v. City of Town and Country*, 831 S.W.2d 223, 224 (Mo. App. E.D. 1992).

1. Process

Section 89.070 states that in order to exercise its zoning powers, a legislative body must appoint a Zoning Commission to "recommend the boundaries of the various original districts and appropriate regulations to be enforced therein." MO. REV. STAT. § 89.070. Missouri courts have clearly stated that this section applies only to the establishment of zoning districts in areas that were not previously zoned by the municipality; it does not apply to the amendment of previously enacted zoning ordinances. *Murrell v. Wolff*, 408 S.W.2d 842 (Mo. 1966); *State ex rel. Sims v. Eckhardt*, 322 S.W.2d 903 (Mo. 1959). Section 89.070 also states that if a city Planning Commission already exists, it may be appointed as the Zoning Commission. *Id.*

When making suggestions for original zoning districts, the Zoning Commission must make a preliminary report and hold public hearings. MO. REV. STAT. § 89.070. After holding a public hearing about its preliminary report, the Zoning Commission will then submit its final report to the legislative body. *Id.* The legislative body may not hold its public hearings or take any action regarding zoning until it has received the final report of the Zoning Commission. *Id.*

The legislative body of a municipality has the authority to determine the manner in which zoning regulations/restrictions and the boundaries of such zoning districts shall be determined, established, enforced, amended, supplemented, or changed. MO. REV. STAT. § 89.050. In other words, the legislative body of the municipality is not required to involve the Zoning Commission in rezoning decisions but may do so if it chooses. Section 89.050 also states that regulation, restriction, or boundary enacted by the legislative body may not become effective until after a public hearing is held. *Id.* The public hearing must give parties in interest and citizens an opportunity to be heard. *Id.* At least fifteen days' notice of the time and place of the public hearing must be published in an official paper, or a paper of general circulation, in the municipality. *Id.*

In *Moore v. City of Parkville*, the Missouri Court of Appeals Western District held that section 89.050 does not require the public hearing to be held by the legislative body itself. 156 S.W.3d 384, 388 (Mo. App. W.D. 2005). In that case, the City of Parkville ordinances required the Planning Commission to hold public hearings on any proposed zoning amendments, and then make a recommendation to the Board of Aldermen. *Id.* The appellants argued that, in addition to giving notice of the public hearing, sections 89.050 and 89.060 required Parkville to give notice of the Board of Aldermen's meeting where the rezoning amendment was voted on. *Id.* The court noted that the Board of Aldermen has the authority to determine the manner in which zoning amendments are enacted. *Id.* The court also noted that the plain language of section 89.050 only requires a public hearing to be held; the statute does not state that the hearing must be before the legislative body. *Id.* The court noted that a two hearing procedure, involving both the commission and the legislative body, is required before the original enact of zoning ordinances; in the case of amendments, however, only one hearing is required, either before the legislative body or the commission

designated by the legislative body to fulfill that function. *Id.* at 390. Therefore, the court held that the city satisfied the notice and public hearing requirements of section 89.050. *Id.*

Even if all of the proper procedures are followed, a zoning regulation, restriction or boundary may not be modified if a protest against the change is signed by a specified number of landowners. MO. REV. STAT. § 89.060. Section 89.060 requires the protest to be signed by the owners of thirty percent or more of the land located in the area included in the proposed change, or "within a 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." *Id.* However, the protest may be overcome by a vote of two-thirds of all the members of the legislative body of the municipality. *Id.*

2. Classifications/Permitted Uses

Under the traditional zoning practice, know as "Euclidean" zoning, regulated areas are divided into districts in which only certain compatible uses are permitted. 1 Mo. Prac., Methods of Prac.: Transact. Guide § 12.4 (4th ed.). A traditional Euclidean zoning scheme includes residential, commercial, industrial and special districts and may include other use classifications such as education, religion, recreation, government facilities and public utilities. *Id.* Frequently, these zoning districts are broken down into subclasses according to density requirements and the effect of a district upon neighboring districts. *Id.* In Euclidean zoning, districts must be described with reasonable certainty and have definite boundaries in order to be valid. *Id.* Also, zoning regulations must be based on a rational basis of classification and must apply equally to all persons and things within a designated class. *Id.* Within each district, zoning regulations generally fall into the following categories: (I) restrictions on uses; (ii) height, bulk and area or lot restrictions; and (iii) architectural controls. *Id.* Flexibility in the classification system is maintained through a variety of devices including the following: (I) exceptions, which are expressly included in zoning regulations, (ii) variances, which are granted to prevent undue hardship, (iii) the allowance of nonconforming uses and (iv) the provision for certain uses provided that specified conditions are met. *Id.* More about these devices will be discussed below.

Uses of property permitted by the zoning ordinances may be carried on by the property owner as a matter of right, and are subject only to compliance with the applicable bulk, height, and area restrictions. *Wolfner v. Bd. of Adjustment of City of Frontenac*, 672 S.W.2d 147 (Mo. App. E.D. 1984). Generally, any use not expressly permitted in a district is deemed excluded. *State ex rel. Barnett v. Sappington*, 266 S.W.2d 774 (Mo. App. W.D. 1954). However, sometimes the terms used in ordinances to describe permitted uses require interpretation, which the local governmental body may do. In a strict interpretation case, courts will give great weight to the interpretation given by the local governmental body. *Coots v. J.A. Tobin Constr. Co.*, 634 S.W.2d 249 (Mo. App. W.D. 1982). At the same time, ambiguous provisions are construed against the zoning authority and in favor of the rights of the property owner. *Cunningham v. Bd. of Aldermen of City of Overland*, 691 S.W.2d 464 (Mo. App. E.D. 1985).

There is also a potential issue of whether a use can be considered an "accessory use." An accessory use is one customarily incidental and subordinate to the principal permitted use. For example, the City of Columbia Code section 29-27 lists specific accessory uses that are acceptable under certain permitted uses. These include pharmacies allowed in hospitals, and garages, private

pools and tennis courts attached to dwellings. Whether an accessory use is allowed depends on the language of the particular ordinance and the facts and circumstances of the use. *Schaefer v. Neumann*, 561 S.W.2d 416 (Mo. App. E.D. 1977).

In *Richmond Heights v. Richmond Heights Presbyterian Church*, the Missouri Supreme Court declined to consider First Amendment challenges to a city's prohibition of a church-sponsored day-care program. 764 S.W.2d 647 (Mo. 1989)(en banc). Instead, the Court held that a day care was permissible as an accessory use to a church under the city's own zoning ordinance. *Id.* The city zoning ordinance defined accessory use as "a structure or use which meets all the following criteria: (1) It is subordinate to and serves a principal building or a principal use; (2) It is subordinate in area, extent or purpose to the principal building or principal use served; (3) It contributes to the comfort, convenience or necessity of occupants, business or industry in the principal building or principal use served; (4) It is located on the same lot as the principal building or principal use served; and (5) It is located in the same or less restrictive zoning district." *Id.* The court concluded that a day care within the church met these requirements.

C. Planned Zoning

Traditional Euclidean zoning is often criticized because it cannot adequately respond to the needs of complex urban communities or adequately provide for recreational facilities, utilities, roads and future needs of communities. 1 Mo. Prac., Methods of Prac.: Transact. Guide § 12.4 (4th ed.). Planned zoning districts have become more common as a way of meeting these needs. *Id.* A planned district is usually created through a technique called a floating zone or through mapped overlay districts which impose an additional set of regulations on the underlying zoning district allowing addition controls and/or allowing flexibility for development in the district. *Id.* A floating zone does not have a fixed location within a community; the zone classification attaches to a particular piece of land only if the owner submits an application. *Id.* An ordinance establishing a floating zone typically sets forth detailed uses that may be included in the zone provided that the proposed kind, size and form of buildings are approved in advance. *Id.* Floating zones may be used to facilitate the establishment of combinations of developments, for other purposes that are not provided for in any other district or developments and uses in locations where necessary to protect the general welfare. *Id.*

A planned district, whether created through the floating zone or mapped overlay, generally requires approval of a site or development plan to carry out the rezoning. *Id.* The plan and the rezoning should be approved by ordinance and if the plan is approved, the development must occur in accordance with that plan. *Id.* Planned districts are useful because they allow the legislative body to consider, evaluate and make determinations on specific proposed developments, including, but not limited to, the proposed uses, buffering and landscaping, parking, set backs and other issues. *Id.* This allows the local authority greater control over the particulars of development and also permits the imposition of "conditions" on the grant of rezoning, often including roadway improvements, limits on hours of operation, and other requirements that could not be imposed in a traditional rezoning procedure. Such conditions will be upheld if they are "reasonably related" to the impact of the development on the surrounding area. *See 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. 1977)(en banc).

Another technique used to create flexibility in zoning is a Planned Unit Development (PUD). 1 Mo. Prac., Methods of Prac.: Transact. Guide § 12.4 (4th ed.). A PUD, for example, may permit clustering of residential and congruous commercial and industrial uses. *Id.* Within a PUD, the number of permissive uses (the uses which are expressly permitted by the ordinance) is limited while the number of conditional uses (uses which are permitted by ordinance provided that certain conditions are met to protect the public welfare) is expanded to allow the zoning authority more control over the development of the land. *Id.* Approval of PUD classification is a legislative act of rezoning, as is approval of preliminary site plans or development plans.

For example, Columbia's zoning ordinances are included in Chapter 29 of the Columbia City Code. The Columbia code has separate sections for each zoning classification, including planned districts which contain detailed restrictions on use and other requirements. The Columbia Code gives the following definitions:

> § 29-10 District PUD, planned unit development
>
> (a) Purpose. The purpose of this district is to enable innovation and flexibility in design and to promote environmentally sound and efficient use of land . The major objectives of a planned unit development are:
>
> (1) To allow for a mixture of housing types and densities located in proximity to each other.
>
> (2) To provide for more usable and suitably-located common open space and amenities than would otherwise be provided under conventional land development standards .
>
> § 29-13 District O-P, planned office district
>
> (a) Purpose. The purpose of this district is to enable innovation and flexibility in design and to promote environmentally sound and efficient use of land. The major objectives of an O-P district are:
>
> (1) To allow certain office uses in locations where a broad range of office uses might be inappropriate.
>
> (2) To encourage development of such scale and character that it will be harmonious with surrounding areas and minimize any adverse impacts.
>
> § 29-17 District C-P, planned business district.
>
> (a) *Purpose.* The purpose of t his district is to enable innovation and flexibility in design and to promote environmentally sound and efficient use of land . The major objectives of a C-P district are:
>
> (1) To allow certain commercial uses in locations where a broad range of commercial uses might be inappropriate.
>
> (2) To encourage development of such scale and character that it will be harmonious with surrounding areas and minimize any adverse impacts.

D. Subdivision

Once property zoned it still must be subdivided into lots, streets must be built, sewers installed, storm water facilities put in place, utilities installed, etc. Simply put, subdivision is the process of dividing a tract of land into two or more lots for purposes of development. MO. REV. STAT. § 89.300(3). Subdivision is governed by Chapter 445 of the Missouri Revised Statutes, which

deals with plats generally and section 89.400-480 which govern the subdivision and plat process as it relates to zoning. Section 89.410 is the enabling statute which authorizes local authorities to develop subdivision regulations governing location of streets and utilities, dedication of parks and open space, and bonding requirements to ensure completion of subdivision improvements. Section 89.410 states:

> The planning commission shall recommend and the council may by ordinance adopt regulations governing the subdivision of land within its jurisdiction. The regulations, in addition to the requirements provided by law for the approval of plats, may provide requirements for the coordinated development of the city, town or village; for 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; for adequate open spaces for traffic, recreation, light and air; and for a distribution of population and traffic; provided that, the city, town or village may only impose requirements for the posting of bonds, letters of credit or escrows for subdivision-related improvements as provided for in subsections 2 to 5 of this section.

MO. REV. STAT. § 89.410.

With Planned Zoning, some of these issues can be governed by development plan. *See, e.g.*, City of Columbia Code § 29-10(4),(5) ("Approval of the PUD development plan shall be deemed as satisfying the requirements of the subdivision regulations for a preliminary plat"; "No building permit shall be issued for any construction in the PUD until a final subdivision plat for the property on which permits are requested has been approved."). With straight zoning and even substantially planned zones, these matters are governed by Subdivision Regulations and other regulations dealing with street design/construction, utility locations, construction of buildings, tree preservation requirements, storm water ordinances, land disturbance ordinances.

1. Process

Sections 89.400 and 89.440 require that plats for municipalities be approved by the governing jurisdiction before they are recorded. MO. REV. STAT. §§ 89.400, 89.440. The subdivision approval process begins with the submission of a proposed plat to the local authority, the planning commission, for review. MO. REV. STAT. § 89.400. The commission must make a report and recommendation to the city council regarding the plat of a subdivision; the plat must be reviewed by the planning commission within sixty days or the plat will be deemed approved. MO. REV. STAT. §§ 89.400, 89.420. However, with the consent of the applicant, the commission may extend the sixty-day period. MO. REV. STAT. § 89.420. If the commission disapproves the plat, the grounds for disapproval must be made a matter of record. *Id.* No public hearing is required. Thereafter, the plat will be submitted to the governing body, the city council, for final approval and recording with the recorder of deeds. MO. REV. STAT. § 89.400.

2. Discretion

After zoning and plan approval, legislative discretion, which is substantially limited, becomes administrative in nature and almost ministerial in application. The general rule is that plat which conforms to underlying zoning and minimum requirements of subdivision regulations must be approved. Also, any final plat which conforms with an approved preliminary plat must be approved. When a subdivision plat meets all requirements of the state statute and local ordinances, the county [or city] commission lacks discretion to deny plat approval, and mandamus will lie to correct the denial. *Basinger v. Boone County*, 783 S.W.2d 496 (Mo. App. W.D. 1990). If a proposed subdivision plat complies with the zoning ordinance and the subdivision ordinance, neither the planning commission nor the legislative body has discretion to deny approval of the plat. *State ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867 (Mo. App. E.D. 1992).

The few reported decisions on the subdivision process often relate to imposing conditions, including a public dedication of property, on the approval of a subdivision plat. The enabling statute for municipalities authorizes regulations that "provide for the dedication, reservation, or acquisition of lands and open spaces necessary for public uses." MO. REV. STAT. § 89.410(2). Conditions imposed on the approval of a subdivision plat must be "reasonably attributable" to the impact of the proposed development to be sustained. *Home Builders Ass'n of Greater Kansas City v. City of Kansas City*, 555 S.W.2d 832 (Mo. 1977)(en banc); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972). Further, such conditions must not be arbitrary in their application so as to impose requirements on one owner but not on other similarly situated owners. *State ex rel. Rhodes v. City of Springfield*, 672 S.W.2d 349 (Mo. App. S.D. 1984).

III. Judicial review of municipal zoning decisions

Missouri courts have long held that our state's Zoning Enabling Act, sections 89.010 through 89.140, is the sole source of power and measure of authority for cities, towns and villages in zoning matters. *Fairview Enterprises, Inc. v. City of Kansas City*, 62 S.W.3d 71 (Mo. App. W.D. 2001) (quoting *City of Louisiana v. Branham,* 969 S.W.2d 332, 336 (Mo.App. E.D.1998)). The Zoning Enabling Act authorizes cities and counties to impose zoning regulations "for the purpose of promoting health, safety, morals, comfort or general welfare." *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531, 540 (Mo. App. E.D.1998) (citing MO. REV. STAT. § 64.850). Because the exercise of zoning power is a legislative rather than quasi-judicial function.... the courts may reverse a legislative action "only if arbitrary and unreasonable, meaning that the decision is not fairly debatable." *Summit Ridge Dev. Co. v. Independence*, 821 S.W.2d 516, 519 (Mo. App.1991) A decision is considered arbitrary and unreasonable if it bears no substantial relationship to the public health, safety, morals, or general welfare. *State ex rel. Barber & Sons Tobacco Co. v. Jackson County*, 869 S.W.2d 113, 117 (Mo. App.1993). If "the public welfare is not served by the zoning or if the public interest served by the zoning is greatly outweighed by the detriment to private interests, the zoning is arbitrary and unreasonable ..." *Despotis v. Sunset Hills*, 619 S.W.2d 814, 820 (Mo .App.1981). In making this determination, the courts considers:

> "the adaptability of the subject property to its zoned use and the effect of zoning on property value in assessing private detriment. The character of the neighborhood, the zoning and uses of nearby property, and the detrimental effect that a change in zoning

would have on other property in the area are relevant to the determination of public benefit."

State ex rel. Barber & Sons Tobacco Co., 869 S.W.2d at 117. Zoning ordinances are presumed valid and "any uncertainty about the reasonableness of a zoning regulation must be resolved in the government's favor." *Id.* Accordingly, a two-step analysis must be conducted when determining the validity of a zoning provision. *Lenette Realty & Inv. Co.*, 35 S.W.3d at 405. First, the court determines whether the challenging party has presented sufficient evidence to rebut the presumption that the present zoning is reasonable. Then, if the presumption has been rebutted, the court determines whether the government's evidence establishes that the reasonableness of the zoning is 'fairly debatable.'" *Id.* at 405-06.

A. Adaptability of property for the permitted use

Missouri courts have recognized that "where a zoning ordinance restricts property to a use for which it is not adapted, such an ordinance invades the rights of the property owner and is unreasonable."*West Lake Quarry and Material Co. v. City of Bridgeton*, 761 S.W.2d 749, 751 (Mo. App. 1988). A use restriction is unreasonable if it is not economically feasible, even if it is theoretically possible. *See id.* at 753.

B. Effect of zoning on value of challenger's property

The private detriment caused by a zoning ordinance is part of the balancing test applied by court, but appears less important than the other factors. *See, e.g., White v. City of Brentwood*, 799 S.W.2d 890, 893 (Mo. App. 1990) (in rejecting a challenge to a rezoning denial, the court noted that the property would be more valuable if rezoned but that, while "this is a detriment attributable to zoning; it is, however, one which we do not afford significant weight"); *Wells & Highway 21 Corp.*, 897 S.W.2d 56, 62 (Mo. App. 1995) ("Showing a mere difference in value under different zoning does not establish a private detriment substantial enough to require a zoning change"). Indeed, even vast differences in value do not seem able to overcome the weight of the other factors. For example in *Tealin Co. v. City of Ladue*, the Missouri Supreme Court declined to overturn a refusal to rezone property, despite the fact that the land would have been worth $97,000 if zoned commercial, as compared to $12,000 under the existing zoning. 541 S.W.2d 544, 548-49 (Mo. 1976). On the other hand, when the other factors actually favor the challenger, the courts point to the private detriment factor for additional support. *See, e.g., Huttig v. City of Richmond Heights,* 372 S.W.2d 833, 840 (Mo. 1963) (the court noted that value of property zoned residential was one-third the value of the property if zoned commercial).

Thus the "highest and best use" of a property is not determinative in a zoning challenge. In *State ex rel. Kolb v. County of Court of St. Charles County*, the Missouri Court of Appeals Eastern District Stated that "[e]vidence as to the highest and best use of a piece of property is relevant when determining the market value of the property upon condemnation. Zoning is pertinent to a property's highest and best use to the extent that it may limit or encourage certain uses of the property. However, the highest and best use of a piece of property has no relevance in rezoning proceedings because there is no determination of value involved in the decision to rezone."683 S.W.2d 318, 322 (Mo. App. E.D. 1984). This seems to be somewhat overstated in light of the fact that the value of

the property is a factor to consider when determining if a zoning denial was appropriate. Nonetheless, it demonstrates the reluctance of the courts to accord much weight at all to the private detriment that will be caused by a zoning decision.

C. Zoning and use of surrounding property

The use of the surrounding property is a critical factor to be considered because it concerns the public interest. The Missouri Court of Appeals Eastern District emphasized the importance of this factor in *Despotis v. City of Sunset Hills*: "In weighing the competing public and private interests, the zoning and use of property surrounding the tract sought to be rezoned is often the critical factor."619 S.W.2d 814, 821 (Mo. App. E.D. 1981). Courts look to the nature of the tract of land at issue, the existing uses for property abutting the land, and the character of the neighborhood. *See, e.g.*, *Summit Ridge Dev. Co. v. City of Independence*, 821 S.W.2d 516, 521 (Mo. App. W.D. 1991) (rezoning denial was reasonable because there was no showing, *inter alia*, of "any surrounding undesirable conditions which make the residential character of the site unreasonable"); *Despotis v. City of Sunset Hills*, 619 S.W.2d 814, 820 (Mo. App. E.D. 1981) (denial of rezoning from residential to commercial unreasonable; land next to heavily trafficked road, adjacent to commercial property, and on a block split into commercial and residential); *Loomstein v. St. Louis County*, 609 S.W.2d 443, 451 (Mo. App. E.D. 1980) (denial of rezoning from residential to commercial was unreasonable because the lot was surrounded on two sides by commercial zoning and heavy traffic); *National Super Markets, Inc. v. City of Bellefontaine Neighbors*, 825 S.W.2d 24, 25-26 (Mo. App. E.D. 1992) (denial of rezoning from residential to commercial was reasonable because the land to the east, south and west of the property was all zoned residential, which made the subject property "residential in character" even though two commercial buildings exist to the north, because property "takes its character from the predominant adjoining and nearby residential district and land uses"); *Hutting v. City of Richmond Heights*, 372 S.W.2d 833, 840-41 (Mo. 1963) (denial of rezoning from residential to commercial was unreasonable because the court considered regional development as well as the immediately adjoining property and concluded that the nature of the tract of land was basically commercial).

D. Effect of removal of current zoning on other property

The effect that the removal of current zoning will have on the surrounding property also concerns the public interest, but seems to be given less weight than other factors. Missouri courts have noted that even though a handful of private citizens may be adversely affected by a rezoning decision, that is not sufficient to demonstrate a harm to the public interest: "They, alone, do not constitute the public, and their collective interests are not that 'public interest' which must be weighed in any such zoning problem." *Hutting v. City of Richmond Heights*, 372 S.W.2d 833, 843 (Mo. 1963). According to the *Hutting* Court, "[r]efusal to rezone based primarily upon a desire to benefit (or conversely to refrain from possible injury to) [a particular neighborhood] does not constitute a matter of substantial city-wide interest." *Id.* at 842. Moreover, courts note that the effect of a rezoning is minimal (and thus not supportive of the public interest factor) where, for example, the surrounding property is zoned in the same manner as the zoning requested for the property at issue. *See, e.g.*, *West Lake Quarry and Material Co.*, 761 S.W.2d at 753.

E. Inquiry into motive/purpose

As noted above, a zoning decision violates the Due Process Clause of the United States Constitution if it is arbitrary. Nonetheless, the general rule in Missouri is that "the courts will not inquire into the interests or motives of the members of a municipal legislative body in exercising their legislative functions." *Strandberg v. Kansas City*, 415 S.W.2d 737, 742 (Mo. 1967). The basis for this refusal is the separation of powers doctrine. *Coffin v. City of Lee's Summit*, 357 S.W.2d 211, 217 (Mo. App. 1962). The Missouri Court of Appeals Eastern District stated that "[i]n the case of legislative rezoning, the reviewing court is not confined to nor concerned with the record made before the legislative body. The reasons for passing the rezoning order are not at issue. The reviewing court does not review the "record" before the legislative body. Instead the Court independently assesses the validity of the zoning de novo. This Court is concerned only with the end result, namely whether the rezoning order is fairly debatable and reasonable." *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531, 540 (Mo. App. E.D. 1998). In that case the challenger did not meet his burden of proving that the rezoning order was not reasonable. *Id.* According to the court, the motives of the commissioners were not decisive. *Id.*

F. Procedural Posture

Challenges to zoning or rezoning decisions generally take the form of a declaratory judgment challenge to the reasonableness of the existing ordinance, as applied to the property at issue, or sometimes, to validity of the zoning decision itself. *See, e.g., Salameh v. County of Franklin*, 767 S.W.2d 66,68 (Mo. App. E.D. 1989)("Generally, judicial review of legislative zoning actions is most often accomplished through an action for declaratory judgment"); *West Lake Quarry and Material Co.*, 761 S.W.2d 749 (Mo. App. E.D. 1988)(after denial of rezoning application, property owner brings declaratory judgment action pursuant to MO. REV. STAT. § 527.010, contending that existing zoning is unconstitutional and void as applied to the subject property); *State ex rel. Helujon, Ltd.*, 964 S.W.2d 531 (Mo. App. E.D. 1998)("Challenges to zoning, rezoning and refusals to rezone in Missouri must be by declaratory judgment or injunction").

Application for rezoning is necessary before judicial review of the existing zoning may occur, because of the requirement that a party exhaust all administrative remedies before seeking relief from the courts. *Salameh v. County of Franklin*, 767 S.W.2d 66,68 (Mo. App. E.D. 1989). Unless a party has exhausted all administrative remedies they do not have standing to bring a claim. *Id.* Also, the right of judicial review is activated by a legislative bodies refusal to rezone property after application for rezoning by the owner. *Id.* If the trial court determines that the zoning classification is arbitrary and unreasonable, the court's power is limited to declaring the current zoning unreasonable; it may not order a particular rezoning. *West Lake Quarry and Material Co. v. City of Bridgeton*, 761 S.W.2d 749, 753 (Mo. App. E.D. 1988)("The court's determination is limited to the reasonableness of the current zoning. The court can only require the City to place a reasonable zoning classification of the property."); *Renick v. City of Maryland Heights*, 767 S.W.2d 339, 344-45 (Mo. App. E.D. 1989).

An example of how all of these factors combine to influence a court's decision can be seen in *Hoffman v. City of Town and Country*, where the Missouri Court of Appeals Eastern District held that the City's refusal to rezone a property for commercial usage was unreasonable and not "fairly debatable." 831 S.W.2d 223 (Mo. App. E.D. 1992). The court reached this decision because (1)

property owner's 13.5 acre tract was on a busy federal highway which generated considerable noise; (2) the tract was surrounded by a mix of commercial, industrial, residential, and undeveloped areas; (3) there was a large high tension power line along the edge of the property; (4) owner's experts testified the land was unsuitable for residential development and homes built there would cost much more than the market would bear; (5) the land would be worth a good deal more if zoned commercial; and (6) because of existing uses in the area there was no public interest which outweighed the detriment to owner's private interest caused by the existing residential zoning. *Id.*

IV. Boards of Adjustment- Variances, Conditional Use Permits, Nonconforming Use

A. Variances

Boards of Adjustment are created to review specific applications of the zoning ordinances, and have authority to grant variances or exceptions from the strict letter of the zoning ordinance. *See* MO. REV. STAT. § 89.090. The Missouri Supreme Court has stated that the variance procedure:

> "fulfills a sort of escape hatch or safety valve function for individual landowners who would suffer special hardship from the literal application of the zoning ordinance. It is often said that the variance provides an administrative alternative for individual relief that can avoid the damage that can occur to a zoning ordinance as a result of as applied taking litigation. The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances."

Matthew v. Smith, 707 S.W.2d 411, 413 (Mo. 1986)(en banc)(internal citations omitted).

Section 89.090 gives board of adjustments the following powers:

> (1) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 89.010 to 89.140 or of any ordinance adopted pursuant to such sections;(2) To hear and decide all matters referred to it or upon which it is required to pass under such ordinance;(3) In 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, provided that, in any city with a population of three hundred fifty thousand or more inhabitants which is located in more than one county, the board of adjustment shall not have the power to vary or modify any ordinance relating to the use of land.2. In exercising the above-mentioned powers such board may, in conformity with the provisions of sections 89.010 to 89.140, reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made and to that end shall have all the powers of the officer from whom the appeal is taken. The concurring vote of four members of the board shall be necessary to reverse any order, requirement,

> decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance or to effect any variation in such ordinance except as provided in section 305.410, RSMo.

MO. REV. STAT. § 89.090. Boards are required to keep minutes of their meetings and records of how members vote, for public use. MO. REV. STAT. § 89.080. Additionally, all testimony given at board proceedings must be recorded by a recorder. *Id.*

The actions of a board of adjustment are not legislative. *State ex rel. Nealy v. Cole*, 442 S.W.2d 128, 131 (Mo. App. 1969). A board of adjustment cannot amend, modify, or change a zoning ordinance; it's function is merely to correct errors by granting variations, or permitting exceptions, where exceptional conditions surrounding a particular piece of property create an undue hardship on the landowner when strict application of the regulations is required. *Id.*

Generally, the "uses" of property covered by zoning ordinances fall in three categories. *Tustin Heights Ass'n v. Board of Supervisors*, 339 P.2d 914, 919(1) (1959). First, a "nonconforming use" is a use permitted which was in effect prior to ordinance enactment. *Id.* Second, a "conditional use,"also denominated a "special exception" or "special permit," may be permitted where desirable or essential to public welfare or convenience, will not impair the integrity and character of the zoned district, and is not detrimental to public health, welfare or morals. *Id.* Third, a "variance" is allowable upon a showing that a strict enforcement of the zoning limitation would cause unnecessary hardship. *Id.*

There are two types of variances: "use" and "nonuse." A use variance is one which permits a use other than one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. *Matthew v. Smith*, 707 S.W.2d 411, 413 (quoting A. Rathkopf, 3 The Law of Zoning and Planning § 38 (1979)). A nonuse variance, on the other hand, permitts deviations from restrictions which relate to a permitted use of the property, rather than limitations on the use itself. *Id.* For example, a nonuse restriction would include those relating to the height and size of buildings or the amount of the lot the building covers, the minimum habitable area of the building, or on the placement of buildings and structures on the lot. *Id.* Variances that are necessary due to the physical characteristics of the lot are a kind of nonuse variances and are commonly called "area variances." *Id.*

1. Use variances

Some jurisdictions do not permit use variances, either because of an express statutory directive or court interpretation. Due to court interpretation, Missouri was previously among the jurisdictions that did not permit use variances. *See e.g., State ex rel. Nigro v. Kansas City,* 325 Mo. 95, 27 S.W.2d 1030 (1930); *Rosedale-Skinker Imp. Ass'n v. Bd. of Adj. of St. Louis*, 425 S.W.2d 929 (Mo.1968); *State v. Kinealy*, 402 S.W.2d 1, 5 (Mo. App.1966);*Brown v. Beuc*, 384 S.W.2d 845, 851 (Mo. App.1964); *Bartholomew v. Bd. of Zoning Adj.*, 307 S.W.2d 730 (Mo. App.1958). This changed in *Matthew v. Smith*, when the Supreme Court of Missouri, following the direction of other jurisdictions, interpreted section 89.090 as empowering boards of adjustment to grant use variances under proper circumstances. 707 S.W.2d 411, 413 (Mo. 1986)(en banc). Although section 89.090

was amended in 1992 and 1993, Missouri courts have continued to allow use variances, based on the holding in *Matthew. State ex rel. Klawuhn v. Board of Zoning Adjustment of City of St. Joseph, Mo.*, 952 S.W.2d 725, 728-29 (Mo. App. W.D. 1997).

> In order for a board of adjustment to grant a variance, the applicant must prove:
>
> (1) relief is necessary because of the unique character of the property rather than for personal considerations; and (2) applying the strict letter of the ordinance would result in unnecessary hardship; and the (3) imposition of such a hardship is not necessary for the preservation of the plan not contrary to spirit of ordinance; and (4) granting the variance will result in substantial justice to all.

Matthew v. Smith, 707 S.W.2d 411, 415,16 (Mo. 1986)(en banc). To prove the second element, unnecessary hardship, the record must show that:

> (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality."

Id. at 416-17. According to the *Matthew* court ,the landowner must demonstrate that he or she will be deprived of "all beneficial use of the property under any of the permitted uses: A zoning regulation imposes unnecessary hardship if property to which it applies cannot yield a reasonable return from *any* permitted use." *Id.* at 417. A landowner is deprived of all beneficial use "where the land is not suitable for any use permitted by the zoning ordinance." *Id.* Mere "conclusory and lay opinion concerning the lack of any reasonable return is not sufficient there must be actual proof, often in the form of dollars and cents evidence." *Id.*

The *Matthew* court also noted that variances should be granted sparingly and only in exceptional circumstances. *Id.* at 413. Other Missouri courts have stated that "[v]ariances are to be granted only for severe interferences with the ability of the landowner to use his land and not for mere inconvenience." *McMorrow v. Board of Adjustment for City of Town & Country*, 765 S.W.2d 700, 701 (Mo. App. E.D. 1989) (citing *Volkman v. City of Kirkwood*, 624 S.W.2d 58 (Mo. App. E.D. 1981).

Landowners have little ability to contest use variances granted to other landowners, and cannot argue that they should be granted a use variance because the owner of similar property was granted a variance. Generally, courts have not allowed the defense of laches to be asserted against a municipality in enforcement of its zoning ordinance. A. Rathkopf, 3 The Law of Zoning and Planning § 45.04(1) (1979). Missouri has adopted this general rule:

> "It is no defense to a prosecution for violating an ordinance that other persons have been permitted to violate it without prosecution or punishment. In accordance with this general rule, it is held that the failure of municipal authorities to enforce a zoning ordinance against some violators does not preclude its enforcement against others.

> Nor does the fact that city officials fail to enforce the zoning ordinance against a violator estop the city from subsequently enforcing it against him."

City of Kansas City v. Wilhoit, 237 S.W.2d 919 (Mo. App. W.D. 1951)(citations omitted). An estoppel argument will not prevail against the government either, because estoppel does not apply to the acts of a government. *Long v. Board of Adjustment of City of Columbia*, 856 S.W.2d 390, 393 (Mo. App. W.D. 1993)(citations omitted).

2. Area (non-use) variances

Non-use variances "consist mostly of variances of bulk restrictions, of area, height, density, setback, side line restrictions, and restrictions covering miscellaneous subjects, including the right to enlarge nonconforming uses or to alter nonconforming structures." *Matthew v. Smith*, 707 S.W.2d 411, 413 (Mo. 1986)(en banc). The standard for obtaining a non-use variance was not effected by Supreme Court of Missouri's holding in *Matthew*; earlier precedent related to standard for area variances are still controlling. *Id.* at 416 fn.6. While non-use variances generally must meet the same standard as use variances expressed in *Matthew*, Missouri courts have stated that an applicant for a non-use variance bears a slightly less rigorous burden than an applicant for a use variance. *Baumer v. City of Jennings*, 247 S.W.3d 105, 113 (Mo. App. E.D.2008).

Use variances and area variances have different standard because of the natures of the two types of variances. *State ex rel. Klawuhn v. Bd. of Zoning Adjustment*, 952 S.W.2d 725, 728-29 (Mo. App. W.D. 1997). While an area variance relaxes only one or more incidental limitations to a permitted use, a use variance actually alters the use or uses permitted by the ordinance. *Id.*; *State ex rel. Branum v. Bd. of Zoning Adjustment of City of Kansas City, Mo.*, 85 S.W.3d 35, 40 (Mo. App. W.D. 2002). This means that where applicant for a use variance must prove that he or she faces "unnecessary hardship," an applicant for a non-use variance must merely show that he or she faces "practical difficulties." *Id.*; *See also State ex rel. Klawuhn v. Bd. of Zoning Adjustment*, 952 S.W.2d 725, 728-29 (Mo. App. W.D. 1997). Whether or not practical difficulties exist is a factual matter, therefore, a determination will only be overturned for an abuse of discretion. *Highlands Homes Ass'n v. Board of Adjustment*, 306 S.W.3d 561, 565 (Mo. App. W.D. 2009).

The Western District stated that "[a]lthough there is no precise definition of practical difficulties, [a]t the very least, a non-use [area] variance applicant must show that as a practical matter the property cannot be used for a permitted use *without* coming into conflict with certain of the ordinance's restrictions." *Slate v. Boone County Bd. Of Adjustment*, 810 S.W.2d 361, 364 (Mo. App. W.D. 1991)(internal citations omitted). As with undue hardship, the term "practical difficulties" refers to conditions of the land in question, and not conditions personal to the owner of the land. *State ex rel. Holly Inv. Co. v. Bd. of Zoning Adjustment of Kansas City*, 771 S.W.2d 949, 951 (Mo. App. W.D. 1989). According to the Western District, some relevant factors to be considered in determining whether sufficient practical difficulties exist include: (1) how substantial the requested variance is; (2) whether the variance will result in a substantial change to the character of the neighborhood or create a substantial detriment to adjoining properties; (3) whether the violation can be cured by some method other than the granting of a variance; and (4) whether, in light of the manner in which the violation arose and considering all relevant factors, the interests of justice will be served by granting the variance. *Id.* Economic hardship may be a consideration in

determining if practical difficulties exist, but it should not the determinative factor. *Id.* at 952. For economic hardship to be a consideration, the record must show that "the land in question cannot yield a reasonable return if the variance is not granted; that the hardship on the owner is due to unique circumstances and not to the general conditions in the neighborhood; and that the variance will not alter the essential character of the locality." *Id. at* 951-52.

B. Conditional Use Permits

A conditional use is one permitted in a zoning district only after specific administrative approval, usually by the Board of Adjustment. A "conditional use," also called a "special exception" or "special permit," may be permitted where desirable or essential to public welfare or convenience, will not impair the integrity and character of the zoned district, and is not detrimental to public health, welfare or morals. *One Hundred Two Glenstone, Inc. v. Board of Adjustment of City of Springfield*, 572 S.W.2d 891, 893 (Mo. App. S.D. 1978) (citing *Tustin Heights Ass'n v. Board of Supervisors*, 339 P.2d 914, 919(1) (1959). Unlike a variance, hardship is not a prerequisite to the granting of a special exception. *Id.* It has been said that the "basic difference between a use which is a special exception and one which requires a variance is that the former is legislatively [p]ermitted in a zone subject to controls whereas the latter is legislatively [p]rohibited but may be allowed for special reasons." .*One Hundred Two Glenstone, Inc. v. Board of Adjustment of City of Springfield*, 572 S.W.2d 891, 893 (Mo. App. S.D. 1978) (citing *Verona, Inc. v. Mayor and Council of West Caldwell*, 229 A.2d 651, 655(1) (1967). In other words, "an exception is written into the ordinance by the legislative body, rather than being granted or withheld at the discretion of the administrative board. It does not involve varying the ordinance but, rather, merely complying with its terms." *Wolfner v. Board of Adjustment of City of Frontenac*, 672 S.W.2d 147 (Mo. App. E.D. 1984).

It is not rare for people to confuse the terms and apply for the wrong category. Available conditional uses/exceptions are listed as part of the zoning ordinances. Ordinances generally list Permitted Uses and Conditional Uses for each category of zone. For example in the Columbia Code, the conditional uses that are allowed under an R-3 zone include counseling centers, bed and breakfast establishments, cemeteries, etc. Columbia, Missouri City Code § 28-8©. The ordinance for C-1 zones lists conditional uses such as assembly halls, bakeries, car washes, storage facilities, service stations, etc. Columbia, Missouri City Code § 29-14©.

In making a decision regarding an application for a conditional use permit, the governing body acts strictly in an administrative capacity. *State ex rel. Crouse v. City of Savannah*, 696 S.W.2d 346 (Mo. App. W.D. 1985). Because boards are acting in a ministerial capacity when issuing conditional use permits, legislative bodies should provide allowable special exceptions within their ordinances with relatively clear standards. As stated by the Missouri Court of Appeals Eastern District, "[t]he special use technique presupposes a legislative determination of allowable property uses. A zoning board issues a special permit for a land use which the legislative body has explicitly authorized in a designated zone. In considering a special permit application, the board must first determine if the proposed use falls within a permitted category of special exception uses. This question is a threshold inquiry, before the board can even reach the issue of compliance with the general criteria of the zoning ordinance such as congestion and overcrowding. The cited zoning authorities clearly contemplate that a special use ordinance will enunciate which uses are allowable." *Erigan Co., Inc. v. Town of Grantwood Village*, 632 S.W.2d 495, 498 (Mo. App. E.D.

1982)(citations omitted). The discretionary power to issue special use permits should be limited by sufficient standards to ensure that it will be exercised in a "reasonable and nonarbitrary" manner. *State ex rel. Manchester Improvement Co. v. City of Winchester*, 400 S.W.2d 47, 48 (Mo. 1966).

C. Nonconforming Use

"A "nonconforming use" is a use of land that lawfully existed prior to the enactment of a zoning ordinance, or an amendment to an existing zoning ordinance, that is maintained after the effective date of the ordinance or amendment even though the use is not in compliance with the zoning restrictions applicable to the district in which it is situated." *Odegard Outdoor Advertising, LLC v. Board of Zoning Adjustment of Jackson County*, 6 S.W.3d 148, 150 fn. 1 (Mo. 1999). The reason that nonconforming uses are allowed is because using property for an existing use is a vested right, and to require compliance with the zoning ordinance would constitute a taking. *Hoffmann v. Kinealy*, 389 S.W.2d 745, 753 (Mo. banc 1965). In that event, the zoning authority is faced with the choice of allowing the property owners to continue the nonconforming use or compensating the property owner for the value of the taken use. *City of Monett v. Buchanan*, 411 S.W.2d 108, 115 (Mo.1967). "Zoning ordinances must permit continuation of non-conforming uses in existence at the time of enactment....If a zoning regulation does not expressly exempt existing uses, the regulation will be construed as having only prospective effect to preserve the order from invalidity." *Missouri Rock, Inc. v. Winholtz*, 614 S.W.2d 734, 739 (Mo. App. W.D.1981).

The *Odegard* case arose from the denial of two variance applications for billboards that did not conform to the new County development code. *Odegard Outdoor Advertising, LLC v. Board of Zoning Adjustment of Jackson County*, 6 S.W.3d 148, 150 fn. 1 (Mo. 1999). The court found that the billboards were conforming prior to the enactment of the new restrictions and had been continually maintained since the enactment. *Id.* 149. As a result the court held that the "billboards [were] exempt from compliance as prior nonconforming uses under the zoning ordinance's express language" *Id.*

Maintaining the nonconforming use is essential to being entitled to a nonconforming use permit. Once the use is discontinued, the owner loses this right. In *City of Belton v. Smoky Hill Ry. & Historical Soc., Inc.*, the Missouri Court of Appeals Western District distinguished the situation from *Odegard*. *City of Belton v. Smoky Hill Ry. & Historical Soc., Inc.*, 170 S.W.3d 429, 436 (Mo. App. W.D.2005). In *Odegard*, the non-conforming uses were never discontinued subsequent to the enactment of the zoning ordinances. *Id.* By contrast, the use of the railroad tracks in *Smoky Hill* was discontinued for several years after the enactment of the Belton zoning ordinance. *Id.* Smoky Hill sought to continue a non-conforming use that was discontinued for longer than the Belton zoning ordinance permitted. *Id.* Based on the rule expressed in *Odegard* the court held that Smoky Hill was required to comply with the zoning ordinances. *Id.*

The burden of proof is on the landowner seeking a nonconforming use allowance. *Acton v. Jackson County*, 854 S.W.2d 447, 448 (Mo. App. W.D. 1993). As such the landowner must prove the essential elements of the right to maintain the use, including prior existence of the use, and denial of such use will be sustained where the evidence in support of such prior use is insufficient or contradictory." Id. The purpose of the zoning ordinance is diminished if these areas are prevalent. As such, the allowance provided for nonconforming uses is narrow. According to the Supreme

Court of Missouri, "[t]he purpose of permitting a nonconforming use is to avoid the injustice of forcing a use to stop immediately when it had been lawful before enactment of a zoning provision. Nonconforming uses, however, are not favored in law because of their interference with zoning plans. Policy dictates that they should not endure any longer than necessary and should be eliminated as quickly as justice will permit. *See Hoffmann v. Kinealy,* 389 S.W.2d 745 (Mo. banc 1965); *Brown v. Gambrel,* 213 S.W.2d 931 (Mo.1948); and *Boyce Industries, Inc. v. Missouri Highway and Transportation Commission,* 670 S.W.2d 147 (Mo. App.1984).

Missouri courts have stated that it is "public policy to interpret zoning ordinances with a view to the early termination of nonconforming uses. Accordingly, provisions of zoning regulation for the continuation of such uses should be strictly construed." *Acton v. Jackson County*, 854 S.W.2d 447, 448 (Mo. App. W.D. 1993). One way courts accomplish this has been to interpret zoning ordinances as "rigidly restricting a change from one nonconforming use to another." *Id.* (citing Huff v. Board of Adjustment of City of Independence, 695 S.W.2d 166, 168 (Mo. App.1985).

Courts will look to the local ordinance regarding nonconforming uses. Most expressly state that an expansion is unlawful. This does not necessarily mean an expansion automatically terminates the prior nonconforming right, as explained in *State ex rel. Dierberg v. Board of Zoning Adjustment of St. Charles County*. 869 S.W.2d 865 (Mo. App. E.D. 1994). In that case, a members-only hunting and shooting club had been enjoying a legal nonconforming use and continued to operate as originally established. When the club expanded, adding a kennel, pavilion, restrooms, and allowing members of the public to use the facilities for a fee, the Board of Zoning Adjustment found that such use was an improper enlargement of the nonconforming use and must cease, but that the enlargement did not terminate or forfeit the nonconforming use. *Id.* at 869. The issue on appeal to the court was whether the enlargement extinguished the prior nonconforming right. The court agreed with the Board of Zoning Adjustment's, finding that the enlargement was unlawful and must cease, but that the established use may continue. *Id.* at 871. The court stated "[w]e find no cases in which the nonconforming use of property is forfeited due to an enlargement or extension of that use, absent specific statutory authority." *Id.* at 870.

The court distinguished this scenario from two situations which may extinguish the prior nonconforming right. The first is when there is statutory authority stating an expansion extinguishes a nonconforming right. *Id.* at 869. Thus, a nonconforming use ordinance could grant authority to extinguish the use if it is expanded. The second is when the owner is found to have changed uses instead of merely expanding an existing use. According to the court, "If there has been a "change of use," the general rule is that the previous use has been abandoned and cannot be resumed. If there has merely been an unauthorized extension or enlargement, the previous use cannot be said to have been abandoned because it still exists, and the fact of extension or enlargement in itself is evidence of the intent not to abandon it. In such cases the court usually compels the operator to diminish the size of his activity to that which previously existed." *Id.* at 870 (citing Rathkopf, *The Law of Zoning and Planning,* Vol. 4, pg. 51A-47). The court relied on the Board of Adjustment's finding that the hunting club had expanded its use, not changed use. *Id.* at 870.

D. Judicial review of Board decisions

The Missouri Administrative Procedure Act, sections 536.100-536.140, governs appeals of board of adjustment decisions regarding those procedural and substantive issues that are not covered by section 89.110, the statute which grants the right of review. *Deffenbach Industries Inc. v. Potts*, 802 S.W.2d 520, 524 (Mo. App. W.D. 1990). The standard of review is found in section 536.140. *Id.* at 525 fn. 6. The statute provides in pertinent part that the courts inquiry may extend to a determination of whether the action of the agency:

> (1) Is in violation of constitutional provisions;(2) Is in excess of the statutory authority or jurisdiction of the agency;(3) Is unsupported by competent and substantial evidence upon the whole record;(4) Is, for any other reason, unauthorized by law;(5) Is made upon unlawful procedure or without a fair trial;(6) Is arbitrary, capricious or unreasonable;(7) Involves an abuse of discretion.

Courts generally state that the board's decision must be supported by competent and substantial evidence in the record. *State ex rel. Tucker v. McDonald*, 793 S.W.2d 616 (Mo. App. E.D. 1990). Or, that the court can reverse a decision of a board of adjustment where the decision is "clearly contrary to the overwhelming weight of the evidence." *Wolfer v. Board of Adjustment of Frontenac*, 672 S.W.2d 147, 150 (Mo. App. E.D. 1984). Another way of stating this is, that if two different conclusions are reasonable from the evidence presented, the court must not substitute its judgment for that of the Board. *Shiverdecker v. Zoning Bd. of Adjustment of Fulton*, 351 S.W.2d 43, 46 (Mo. App. 1961). "The scope of judicial review of a board of adjustment decision is limited to determining whether the decision was authorized by law and supported by competent and substantial evidence upon the record."*Campbell v. City of Columbia*, 824 S.W.2d 47, 49 (Mo. App. W.D. 1991)(quoting *Huff v. Board of Adjustment of City of Independence*, 695 S.W.2d 166, 167 (Mo. App.1985). In reviewing the evidence for substantial evidence to support the decision of the Zoning Board of Adjustment, it is viewed in the light most favorable to the board, giving it the benefit of all reasonable inferences. *Campbell v. City of Columbia*, 824 S.W.2d 47, 49 (Mo. App. W.D. 1991). If the result reached could reasonably have been reached, a reviewing court is without authority to disturb the finding unless it was clearly contrary to the overwhelming weight of the evidence. *Id.*

V. Recovery Act

A. American Recovery and Reinvestment Act of 2009

In February 2009, the federal government passed the American Recovery & Reinvestment Act (ARRA) to address the national recession. The bill dedicated $787 billion to reinvigorate the nation's faltering economy, create family-supporting jobs, rebuild and upgrade core infrastructure, and strengthen our social safety net. The Recovery Act is popularly known as the "economic stimulus package." As part of the Recovery Act, grant funds are available from Department of Housing and Urban Development for Community Development under Community Development Block Grant. For example, in Binghamton, New York "HUD has also allocated to the City $624,800 in Community Development Block Grant-Recovery funds (CDBG-R). These funds are to be invested in economic development, housing, infrastructure, and other activities that will quickly spur additional investment, increased energy efficiency, and job creation or retention. The City dedicated

$300,000 for milling and paving activities. The City has dedicated $125,000 to demolish the structures which have been blighted and abandoned. The City has dedicated $138,000 in upgrading its street lights with new, more energy efficient equipment. The project aims to improve illumination and realize a cost savings through reduced energy use. The new lights will enhance aesthetics and safety and will help promote increased foot traffic and new business development.

Nothing in the Recovery Act directly alters the process or standards of zoning, planning, annexation or other land use controls. However, these newly available funds to cities and states for community and infrastructure development have made the necessity of understanding issues such as zoning, planning, and eminent domain even more crucial.

VI. Annexation

Annexation in Missouri can be extremely complex and is governed by multiple statutes. The applicable statue and the procedures required to annex property varies based on the size, location and status of both the municipality and county. The following is a list of annexations statutes in Missouri and the entities to which they relate:

Mo. Rev. Stat. § 71. 012-Owner initiated annexation in all municipalities
71.014-Annexation by cities located within a county that borders a first class county with a charter form of government and a population of more than 900,000
71.015-Annexation by all cities, towns and villages not located in a first class county that has adopted a constitutional charter
71.860-Annexation by cities in charter counties with fifty or more incorporated cities
72.150-Consolidation of cities, towns, and villages
72.440-72.430-Boundary changes in St. Louis County
77.020-Altering boundary limits in third-class cities
79.020-Altering boundary limits in fourth-class cities
81. 080-Extension of limits in cities and towns of 20,000 or less, special charter
81.200-Extension of limits in cities of more than 20,000 and less than 250,000, special charter cities and towns
82.090-Extension of limits in constitutional charter cities

A. Voluntary annexation

Voluntary annexation by property owners in all municipalities is governed by Missouri Revised Statute section 71.012. MO. REV. STAT. § 71.012. Pursuant to this statute, the governing body of any city, town or village may annex "unincorporated areas which are contiguous and compact to the existing corporate limits of the city, town or village." *Id.* "Contiguous and compact" is not generally defined by the statute but the properties may not be connected by only a "railroad line, trail, pipeline or other strip of real property less than one-quarter mile in width within the city, town or village so that the boundaries of the city, town or village would leave unincorporated areas between the annexed area and the prior boundaries. . . ." *Id.* However, voluntary annexations are not

prohibited merely because the annexation would create an island of unincorporated property within the city, town or village. *Id.*

In order to obtain voluntary annexation, a petition requesting annexation must be signed by the owners of all fees interests in real property located in the area to be annexed and presented to the governing body of the city, town or village. *Id.* A request for annexation may also be signed by the governing body of a common interest community and approved by a majority vote of the unit owners located in the area to be annexed. *Id.* After the petition or request is presented, the governing body of the city, town or village must hold a public hearing. *Id.* The hearing must be held at least fourteen days after the petition is received but no more than sixty days after it is received. *Id.* The hearing must also be held at least seven days after notice of the hearing is published in a newspaper located in the city, town or village or if no such newspaper exists, then in the newspaper closest to the city, town or village. *Id.*

Any person, corporation or political subdivision that has an interest in the annexation may present evidence at the public hearing about the proposed annexation. *Id.* After the hearing, the governing body may annex the property by passing an ordinance, if the governing body determines that "the annexation is reasonable and necessary to the proper development of the city, town or village, and the city, town or village has the ability to furnish normal municipal services to the area to be annexed with a reasonable time." *Id.* However, if a written objection to the proposed annexation is filed with the governing body within fourteen days of the hearing "by at least five percent of the qualified voters of the city, town or village, or two qualified voters of the area to be annexed," then the governing body can not annex the property without further process, as provided in sections 71.015, 71.860, and 71.920. *Id.* In other words, a valid written objection to a proposed annexation converts a voluntary annexation to an involuntary annexation, forcing the city to comply with additional requirements before it may annex the property. *Justice Committee for Citizens of Poplar Bluff v. City of Poplar Bluff*, 991 S.W.2d 708 (Mo. App. S.D. 1999).

Voluntary annexation in "any city, town or village" located in "a county which borders a county of the first classification with a charter form of government with a population in excess of six hundred fifty thousand" is governed by section 71.014. MO. REV. STAT. § 71.014. Upon petition of all fee interest holders, such a governing body in such a county may annex an unincorporated area that is contiguous and compact to the existing city limits, "notwithstanding the requirements of section 71.015." *Id.* The Missouri Bar CLE states that section 71.014 applies to owner initiated annexation in cities, but not villages, in Franklin, St. Charles and Jefferson Counties. While these counties may fit the requirements of the statute, the statute could also apply to additional counties; it is not clear whether this section of the CLE is up-to-date. Also, the assertion that section 71.014 applies only to cities, but not towns or villages is not supported by the language of the statute. A 1986 amendment to the statute inserted "town, or village," making the statute applicable to any municipality in those counties. *See* Mo. Rev. Stat. Ann. § 71.014. While these provisions are important to keep in mind, they do not apply to Columbia, because Columbia does not border a first class county with a sufficient population. It is unlikely that such provisions will apply to Columbia at any time in the near future.

B. Involuntary annexation

Section 71.015 imposes certain requirements on any city, town or village "not located in any county of the first classification which has adopted a constitutional charter to for its own local government" that seeks to annex an area involuntarily. MO. REV. STAT. § 71.015. First, as a condition precedent to annexation, the city, town or village must determine that the land to be annexed is contiguous and "that the length of the contiguous boundary common to the existing city, town or village limit is at least fifteen percent of the length of the perimeter of the area proposed for annexation." *Id.* Then, the governing body must propose an ordinance which states the area to be annexed and that the area complies with the fifteen percent requirement. *Id.* The ordinance should also state that the annexation is "reasonable and necessary to the proper development of the city, town or village," that the city has developed a plan to provide services to the area, that a public hearing will be held before the ordinance is adopted and the date that the proposed annexation would become effective. *Id.* Next, the city, town or village must set a date for a public hearing regarding the ordinance and make a "good faith effort" to notify all fee owners of record within the area to be annexed, by certified mail, between thirty and sixty days before the hearing. *Id.* All residents of the area who are not fee owners must be notified by publication in a qualified newspaper in the county or counties where the area to be annexed is located. *Id.* The publication must take place once a week, for three consecutive weeks, prior to the hearing, and at least one notice must be published "not more than twenty days and not less than ten days before the hearing." *Id.*

At the hearing regarding the proposed ordinance, the city, town or village must present a "plan of intent" which describes the major services currently offered by the city, a proposed time line for providing services to the annexed area within three years of the effective annexation date, the level at which the city, town or village assesses property, the tax rate for that property, a proposed zoning plan for the area to be annexed and the effective annexation date. *Id.* After the public hearing, if the governing body approves the ordinance, then the governing body must file a petition with the circuit court of the county requesting a declaratory judgment authorizing the annexation. *Id.* In 1995, section 71.015 was amended to allow the city seek the declaratory judgment before or after an election is held approving the annexation.

For all involuntary annexations, the annexation must be approved by "a majority of the total votes cast in the city, town or village and by a separate majority of the total votes cast in the unincorporated territory sought to be annexed." *Id.* If a majority of voters in the area to be annexed do not approve the annexation, but the majority in the city, town or village do, then a second election must be held with 120 days. *Id.* In the second election, the annexation must be approved by two-thirds of those who vote in the election. *Id.* If two-thirds vote in favor of the annexation then the governing body may proceed; however, if the annexation fails the second vote, then the governing body may not attempt to annex the proposed area by involuntary means for a period of two years from the date of the election. *Id.*

If the city, town or village is located in "any county of the first classification with a charter form of government with a population of two hundred thousand or more inhabitants which adjoins a county with a population of nine hundred thousand or more inhabitants," then different rules apply to the election. *Id.* In such a city, town or village, an election must be held in which the proposed for annexation is approved by a majority of the total votes in the city, town or village and by a majority

of the total votes cast in the area to be annexed. *Id.* If the proposal does not receive the necessary majority votes then the area may not be subject to another annexation proposal for a period of two years. *Id.* No second vote on the issue is allowed. *Id.*

The provisions of section 71. 015 also apply to all city, towns, villages and municipalities of any kind "located in any county with a charter form of government where fifty or more cities, towns and villages have been incorporated.." MO. REV. STAT. § 71.860. However, sections 71.920, 72.400-72.420 create exceptions to the general annexation requirements for those municipalities. *Id.*

Section 71.920 states that if annexation is approved by a unanimous vote in both the municipality and the area to be annexed, then the governing body of the municipality may annex the territory by ordinance "notwithstanding" the other provisions of chapter 71. MO. REV. STAT. § 71.920. However, in a first class charter county with a population over 900,000 the annexation may not become effective for at least one year, regardless of whether it is approved unanimously or not. Sections 72.400-72.420 provide the procedures for boundary changes, such as annexation, incorporation or consolidation of municipalities in counties with a charter form of government where fifty or more cities, towns or village have been incorporated, but only if that county has created a Boundary Commission.

The alteration of city limits by third class cities is governed by section 77.20, which requires an election and approval by a majority of voters in the city, if the annexation is involuntary; if the election is voluntary, then no election is required. Section 79.020 contains almost identical requirements for boundary changes in fourth class cities. Annexation in special charter cities is governed by sections 81.080 and 81.200. Extension of limits for constitutional charter cities is governed by section 82.090.

VII. Eminent Domain

A. Kelo v. City of New London

Eminent Domain has become an especially controversial topic in the last few years due to the Supreme Court's 2005 decision in *Kelo v. City of New London.* 545 U.S. 469 (2005). As a result of *Kelo*, Missouri and many other states have adopted changes to their eminent domain laws, intended to curb the use of eminent domain for economic development purposes. Stanley A. Leasure and Carol J. Miller, *Eminent Domain-Missouri's Response to Kelo*, 63 J. Mo. B. 178 (2007).

In *Kelo*, the City of New London, Connecticut created a redevelopment plan for a 90 acre tract of land which would included a conference hotel, restaurants, shops, commercial establishments, office space, a museum, a marina and river walk and an adjacent research facility for the Pfizer Company. *Kelo v. City of New London*, 545 U.S. 469, 486 (2005). Several land owners in the project area objected to the condemnation of their property through eminent domain because they argued that it violated the Takings Clause of the Fifth Amendment to the United States Constitution. *Id.* at 477. The main issue was whether the city's decision to take the property for economic development counted as a "public use" for the purposes of the Fifth Amendment. *Id.* at 480. The United States Supreme Court, in a divided 5-4 opinion, upheld the Connecticut Supreme Court decision that the takings were for public use. *Id.* at 469, 490. The United States Supreme Court recognized that public use has been

broadly interpreted by previous precedent to mean "public purpose" or public benefit." *Id.* at 481-84. The Court rejected an "employment test" which would have required use by the general public in order to satisfy the Fifth Amendment, and the Court also followed the long standing tradition of deference to the legislature regarding what constitutes public use. *Id.* at 484-85, 489-90. The Court did recognize that private property cannot be taken from one person and directly transferred to another person for private use, however, the Court held that economic development was a legitimate public use, and therefore, does not count as a private taking. *Id.* at 477-87. The Court also held that legislative purpose should not be subject to judicial review, so long as the legislative purpose is legitimate and the means used to achieve that purpose are reasonable and not irrational. *Id.* at 487-88. The dissenting justices took issue with the majorities definition of public use, which, they argued, essentially allows the state to take private property and transfer it to another private owner so long as there is some secondary public benefit involved such as taxes, jobs or aesthetics. *Id.* at 501(O'Connor, J., dissenting). Justice Thomas argued that eminent domain should only be used to take private property when the government will own the property or the public will have a legal right to use it. Id. at 508-509 (Thomas, J., dissenting). Justice Thomas also rejected the majority's position that legislative decisions regarding public use are entitled to deference by the Court; he argued that no deference should be given to the legislature at all. *Id.* at 517-518. Justice O'Connor, on the other hand, recognized that some deference is appropriate, however she argued that the judicial branch must have the authority to interpret the public use provision if the Fifth Amendment is to retain any meaning at all. *Id.* at 497 (O'Connor, J., dissenting).

B. Missouri Eminent Domain Law

The Missouri Constitution, article 1, section 28, similar to the federal constitution, states that private property may not be taken for public use without just compensation. The taking of private property for private use is also prohibited by the Missouri Constitution, even with compensation, unless the use fits one of the limited exceptions:

> [P]rivate property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.

MO. CONST. art. I, sec. 28. In *St. Charles v. DeVault Management*, the Missouri Supreme Court of Missouri identified a three step analysis for evaluating condemnation actions: 1) is there constitutional, statutory or ordinance authority for the exercise of eminent domain; 2) is the taking for public use; has the condemning authority complied with the conditions precedent to bringing the action. *City of St. Charles v. DeVault Management*, 959 S.W.2d 815, 821 (Mo. App. E.D. 1997; *See also City Center Redevelopment v. Foxland, Inc.*, 180 S.W.3d 13 (Mo. App. E.D. 2005). When looking at the public use element, the Missouri Supreme Court, similar to the *Kelo* Court, has generally taken a broad "public benefit" view. Stanley A. Leasure and Carol J. Miller, *Eminent Domain-Missouri's Response to Kelo*, 63 J. Mo. B. 178 (2007).. In 1923, in *Kansas City v. Liebi*, the Missouri Supreme Court discussed the two judicial interpretations of the term "public use;" the employment occupation theory

which requires the public or government agencies to actually possess or occupy the property, and the broader public advantage-public benefit theory. 252 S.W. 404 (Mo. 1923)(en banc). The court ultimately adopted the broader theory and held that the use may still have a public character even if a private individual or group is benefitted by the taking. *Id.* The Missouri Supreme Court has also stated that a use is considered public as long as the primary benefit is to the public, even if eminent domain is used to help a private enterprise. *Arata v. Monsanto Chemical Co.*, 351 S.W.2d 717 (Mo. 1961).

Despite the constitutional mandate that Missouri courts should determine what a public use is, the courts have generally deferred to the wisdom of the legislature, and stated that it is not the courts' role to second guess legislative decisions. *See City of St. Louis v. Butler Co.*, 219 S.W.2d 372, 374 (Mo. 1949)(en banc); *City of St. Louis v. Brown*, 56 S.W. 298, 299 (Mo. 1900); *Kansas City v. Liebi*, 252 S.W. 404, 410 (Mo. 1923). In 1998, in the case of *Kansas City v. Hon*, a Missouri appellate court noted that the Missouri Constitution gives the courts the ability to determine what a public use is, however, the court stated that the legislative determination that something is a public use should be considered as evidence. 972 S.W.2d 407 (Mo. App. 1998). The court upheld the decision to condemn land to expand the Kansas City airport and noted that public purpose has a broad and flexible definition that keeps pace with changing conditions. *Id.*

The power to use eminent domain is inherent only to the state; municipalities can only use eminent domain if expressly or impliedly authorized to do so by statute. *Southwestern Bell Tel. Co. v. Newingham*, 386 S.W.2d 663, 665 (Mo. App. S.D. 1965);*State ex rel. Highway Comm'n v. Gordon*, 36 S.W.2d 105, 106 (Mo. banc 1931). Various Missouri statutes allow private-public partnerships to facilitate redevelopment projects; these statutes give project developers the power to use eminent domain in order to take blighted property with the approval of the city or county. One such law, the Municipal Housing Land Clearance Redevelopment Law, originally enacted in 1951, gives municipalities and counties with populations of 75,000 or more the authority to exercise eminent domain, through resolutions or ordinances. MO. REV. STAT. § 99.330 (2006). However, this authority only extends to areas of the community that are "blighted or insanitary" or where redevelopment is "necessary in the interest of the public health, safety, morals or welfare of the residents of such community." *Id.* Smaller communities can also opt into the Redevelopment Law with voter approval. MO. REV. STAT. § 99.320(6)(2006).

Missouri also allows municipalities to create Planned Industrial Expansion Authorities through the Planned Industrial Expansion Act, which was originally enacted in 1967 and amended in 1986. MO. REV. STAT. § 100.310(15)(2006). PIEAs are public corporate bodies, and are answerable to city councils. *Id.* They can be appointed to prepare development plans or consider proposals for developing industrial areas; projects of PIEAs can include "acquiring, selling or leasing 'blighted, insanitary and underdeveloped industrial areas' and clearing, remodeling, constructing or installing improvements on such land for industrial or commercial use." *Id.*; 63 J. Mo. B. 178.

Urban Redevelopment Corporations, on the other hand, are private entities, organized under general corporation laws. MO. REV. STAT. § 353.020 (2006). They are used to carry out redevelopment plans that have been approved by a city or county. *Id.* Another law used to redevelop blighted property is the Real Property Tax Increment Allocation Redevelopment Act, which uses Tax

Increment Financing to help pay for the costs of developing blighted areas. MO. REV. STAT. § 99.805.1. More on this subject will be discussed later in this memo.

The Planned Industrial Expansion Law, the Municipal Housing for Land Clearance for Redevelopment Law and the Real Property Tax Increment Allocation Redevelopment Act all allow property to be considered blighted if it is either an economic *or* a social liability. MO. REV. STAT. § 100.310 (2006); MO. REV. STAT. § 99.320 (2006). These three statutes contain almost identical language, except that the PIEA and the Land Clearance Redevelopment Law both use the term "insanitary" where the TIF act uses the term "unsanitary." The Planned Industrial Expansion statute defines a blighted area as:

> an area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals or welfare in its present condition and use.

MO. REV. STAT. § 100.310.

The definition of a blighted area used in the Urban Redevelopment Corporation Law is very similar to that used in the other eminent domain statutes, however, it requires a finding of both economic *and* social liability. The Urban Redevelopment Corporation Law defines a "blighted area" as:

> that portion of the city within which the legislative authority of such city determines 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.

MO. REV. STAT. § 353.020. The Supreme Court of Missouri has held that this creates a distinct difference in the statutes; where a private development corporation is involved there must be substantial evidence of both economic and social liability. *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431 (Mo. 2007). In *Centene Plaza,* the court stated that social liability means a "menace injurious to the public health, safety, morals and welfare" and did not defer to the legislative determination because the social liability element was lacking in that case. *Id.*

Article VI, section 21 of the Missouri Constitution states:

> Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or

otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.

MO. CONST. art. 6, § 21. Section 21 is silent as to whether the end-use of the property must be public; therefore disputes have arisen regarding whether section 21 should be read as an exception section 28, or if the terms of section 28 also apply when eminent domain is exercised over blighted property.

In *State, on Inf. of Dalton v. Land Clearance for Redevelopment,* the benchmark case on blight in Missouri, the Missouri Attorney General challenged the constitutionality of the Land Clearance for Redevelopment Authority Law, and the actions of the Kansas City Development Authority under that law. 270 S.W.2d 44 (Mo. 1954). The city council declared several areas of downtown Kansas City to be blighted, and the Authority began acquiring and demolishing property with the intention of transferring it to private individuals after it had been cleared. *Id.* The court determined the sections 21 and 28 must be read to together, and while the use of the condemned property must be in the public interest, the court found that the transferring of property to private interests did not violate the constitution. *Id.* According to the court, "After the completion of redevelopment, the retention of fee title by the public authorities may be no longer necessary to the accomplishment of the essential public purpose. Since the purpose has then been accomplished, the sale to private interests is purely an incident of the main program. Nothing in the Constitution or statutes requires that public ownership be continued for a longer time than is necessary to the accomplishment of the public purposes which give rise to the taking." *Id.* Also, despite the judicial review provision of section 28, the court held that it would accept legislative findings of blight and public interest as "conclusive evidence" unless it was clearly established that the legislative finding was "arbitrary or was induced by fraud, collusion or bad faith." *Id.* The court also noted that it was permissible to take non-blighted property within the blighted area if necessary for the redevelopment project. *Id.*

This was reaffirmed by the court in *Tierney v. Planned Industrial Expansion Authority.* In *Tierney*, the city council of Kansas City declared property to be blighted because of "economic underutilization" and the PIEA began acquiring property through eminent domain. 742 S.W.2d 146 (Mo. 1987). Property owners challenged the determination of blight because they argued that the "economic underutilization" rationale was too broad and gave the city council and the PIEA "unlimited discretion" to take private property "for the benefit of another." *Id.* at 151. The court, however, deferred to the legislative determination and held that it was permissible to take large areas of property, even if not all property in the area were blighted. The court explained that industrial development is a "proper purpose" because urban land is scarce and difficult to obtain. *Id.*

C. Kelo's Aftermath in Missouri

In *Kelo*, the majority made sure to point out that its holding applied only to the public use requirements of the Federal Constitution. *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005); 63 J. Mo. B. 178,180. State governments are free to restrict the use of eminent domain through their state constitutions or statutes. 63 J. Mo. B. 178,180. As a result of *Kelo*, Missouri Governor Matt Blunt created the Missouri Eminent Domain Task Force in 2005 to analyze existing state and federal eminent domain laws, make recommendations to the Missouri General Assembly and to develop criteria for state and local governments to use during the eminent domain process. *Id.* at 186. The task force was specifically asked to develop a clear definition of "public use." *Id.* The main goal of the task

force was to allow the state and local governments to use eminent domain when necessary for a clear and direct public purpose, while at the same time also to protect personal property rights. *Id.*

In 2006, as a response the task force's recommendations, the Missouri General Assembly passed House Bill 1944, which adopted many of the task force's recommendations. *Id.*; *See also* Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71. Mo. L. Rev. 721 (2006). The recommendations included a "Landowner's Bill of Rights" which provides improved notice to landowners , process, review and penalties, as well as expanded compensation categories and moving expenses. 63 J. Mo. B. 178, 186. The legislature did not adopt the task force's recommendations regarding mandatory mediation and also declined to define "public use" or to provide more detailed parameters for determining when a property is blighted. *Id.* The task force also recommended that the delegation of eminent domain power to private developers through Urban Redevelopment Corporations be eliminated. *Id.* The General Assembly did not adopt this recommendation, but did provide more oversight of urban redevelopment corporations. *Id.* Board members of redevelopment corporations or non-governmental authorities must now be elected or appointed by elected officials. *Id.* Additionally, these authorities cannot acquire property through eminent domain without the adoption of a local ordinance. *Id.*

The task force also recommended that eminent domain be limited to traditional uses only, however, the legislature did not adopt this recommendation or eliminate economic development as a reason for eminent domain. *Id.* at 186-87. Instead, the bill states that eminent domain may not be used "solely" for economic development purposes; therefore, economic development can still be an motivation for eminent domain, so long as it is not the only motivation. *Id.* Economic development is defined as using property to increase the tax base, tax revenues, general economic health or employment. *Id.* at 187. However, under the new law, economic development does not include "blighted, substandard or unsanitary conditions" or "conservation areas." *Id.* Due to the fact that redevelopment projects are often located in areas that are considered blighted, the exact effect that this exemption will have is not clear. *Id.* The legislature did not adopt a new definition of blight as recommended by the task force. *Id.* Instead the legislature chose to keep the historical definition, and created a blanket exemption that farmland may not be labeled as "blighted" by condemning authorities. *Id.* This provision was a result of several members of the Missouri Farm Bureau being members of the task force; however, this provision will probably have little effect because it is unlikely that farmland would ever meet the definition of being blighted or that any authority could exercise eminent domain over farmland. *See also* Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71. Mo. L. Rev. 721 (2006).

The new law also requires authorities to make a parcel by parcel assessment of property to determine if it is blighted. 63 J. Mo. B. 178, 187; Mo. Rev. Stat. § 523.274.1(2006). However, condemnation proceedings can be used against any parcel of land in the area if the "preponderance" of the property in the area is determined to be blighted. Mo. Rev. Stat. § 523.274.1 (2006). Therefore, the statutes "parcel-by-parcel" assessment is essentially moot.

The most significant changes in Missouri eminent law, however, are probably those that deal with the calculation of just compensation. 63 J. Mo. B. 178, 187. As part of HB 1944, the General Assembly adopted a more expansive definition of fair market value and added additional compensation for "heritage value," "homestead taking"and moving and reestablishment expenses. *Id.* "Fair market

value" now means "the value of the property taken after considering comparable sales in the area, capitalization of income, and replacement cost less depreciation, singularly or in combination [with] ... its highest and best use, using generally accepted appraisal practices." *Id.*; MO. REV. STAT. § 523.001

Just compensation for all condemnation proceedings filed after December 31, 2006, is determined either by commissioners or a jury. 63 J. Mo. B. 178, 187; *See* MO. REV. STAT. § 523. 040; MO. REV. STAT. § 523.060.2. The deciding authority determines just compensation by whichever of the following three methods results in the highest compensation: "(1) [a]n amount equivalent to the fair market value of such property;" (2) 125 percent of fair market value for a "homestead taking; or (3) 150 percent of fair market value for a "heritage value" taking. 63 J. Mo. B. 178; MO. REV. STAT. § 523.060.2 (2006); MO. REV. STAT. § 523.001(3)(2006); MO. REV. STAT. § 523.001(2); MO. REV. STAT. § 523.039(3)(2006). A homestead taking involves taking the "primary place of residence" (or the property within 300 feet of the primary residence) "that prevents the owner from utilizing the property in substantially the same manner as it is currently being utilized." MO. REV. STAT. § 523.001(3). Heritage value is additional value (beyond fair market value) assigned to property that has been in "the same family for fifty or more years," including business property where the small business employs less than 100 employees. MO. REV. STAT. § 523. 001(2); MO. REV. STAT. § 523. 039(3). The added value is a fixed 50 percent of fair market value. MO. REV. STAT. § 523. 001(2); MO. REV. STAT. § 523. 039(3).

When a partial taking is involved, landowners now have the right to propose an alternative location on the landowner's property to be condemned instead of the property chosen. MO. REV. STAT. § 523.265. The landowner must make this request within thirty days of receiving initial notification of the condemnation. *Id.* When only a portion of the property is taken, the new law states that the fair market value of the portion taken is the difference between the fair market value of the entire property prior to the taking and the fair market value of the remaining property immediately after the taking. MO. REV. STAT. § 523.001(1).

Additionally, the new Missouri law requires timely notice to be provided to displaced persons, including tenants, who are eligible for moving expenses. MO. REV. STAT. § 523.205.6. After just compensation has been paid to the clerk of the circuit court, property owners must generally surrender the condemned property within ten days. MO. REV. STAT. § 523.055. However, if the property is the owner's principal place of residence, the owner is allowed one hundred days to surrender the property. *Id.* Property owners must be notified at least 60 days before negotiations to acquire the property are initiated. MO. REV. STAT. § 523.250.1(2006). This notification must: (1) identify the property, (2) state the purpose for which the property is being condemned. (3) explain to the landowner property owner's rights. *Id.* The property owner has the right to legal counsel at his or her own expense, right to counteroffer and engage in negotiations, right to get a separate appraisal of just compensation, right to contest the condemnation, the right to just compensation to be determined by condemnation commissioners or a jury. MO. REV. STAT. § 523.250.1(3) (2006). In addition, property owners have the right to notification regarding relocation assistance and the add-ons to fair market value. MO. REV. STAT. § 523.205.5(3) (2006). Written offers sent by certified or registered mail must be provided to the property owners at least 30 days prior to the filing of the condemnation petition and 10 days notice is required before viewing the property for the determination of fair market value; the property owner also has the right to be present for such viewing. MO. REV. STAT. §§ 523.250.2,523.040.2 (2006).

The new Missouri law also requires the condemning authority to negotiate in good faith with the property owner prior to filing a petition for condemnation. MO. REV. STAT. § 523.256. If the negotiations are not made in good faith, the court may dismiss the condemnation petition and assess costs and attorney's fees to the condemning authority. *Id.* An expedited hearing may be held to determine if "fraud, collusion or bad faith" occurred in determining that the area was "blighted, substandard or unsanitary." MO. REV. STAT. § 523.262. The determination of blight must now be supported by "substantial evidence. *Id.* In the hearing, the court may review the trial court's finding of blight in the condemnation action, or consider the issue as part of a separate declaratory judgment action. MO. REV. STAT. § 523.261. This express authority for judicial review, and the new "substantial evidence" requirement are intended to lessen deference to legislative decisions regarding what constitutes blight. 63 J. Mo. B. 178, 190. However, it is not clear if this will be enough to overcome the historical tendency of Missouri appellate courts to defer to local governing bodies. *Id.*

VIII. Redevelopment Authorities

The Land Clearance for Redevelopment Law is contained in Chapter 99 of the Missouri Revised Statutes, which is entitled "Municipal Housing." An "authority" is a "public body corporate and politic, exercising public and essential government functions." MO. REV. STAT. § 99.420. The purpose of a redevelopment authority is rehabilitation of blighted areas. *State ex rel. R. W. Filkey, Inc. V. Scott*, 407 S.W.2d 79 (Mo. App. 1966). To carry out this purpose the authority may prepare, recommend and carry out redevelopment plans for land clearance and urban renewal plans. MO. REV. STAT § 99.420(2). *Id.*

A. Process

The authority is granted a broad range of powers to carry out its plans, however, it is subject to certain restrictions and oversight. First of all, the authority may not prepare a redevelopment or renewal project unless the governing body of the community where the plan or project is located has deemed the area, by resolution or ordinance, to be "a blighted, or insanitary area in need of redevelopment or in need of rehabilitation." MO. REV. STAT § 99.430.1(2). Also, the authority may not recommend a redevelopment or urban renewal plan to a governing body until a general development plan for the community has been created. MO. REV. STAT § 99.430.1(3). After theses prerequisites are fulfilled, the authority may proceed in developing its plan, using the authority granted to it in section 99.420, as discussed below.

An authority may prepare a redevelopment or urban renewal plan itself, or may out source the work. *Id.* at § 99.430.1(4). The plan must be detailed enough to show how it relates to local objectives regarding "appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities and other public improvements and the proposed land uses and building requirements" the project area. *Id.* It should also include:

> (a) The boundaries of the land clearance or urban renewal project area, with a map showing the existing uses and condition of the real property therein;(b) A land use plan showing proposed uses of the area;(c) Information showing the standards of population densities, land coverage and building intensities in the area after redevelopment or urban renewal;

> (d) A statement of the proposed changes, if any, in zoning ordinances or maps, street layouts, street levels or grades, building codes and ordinances;(e) A statement as to the kind and number of additional public facilities or utilities which will be required in the area after redevelopment or urban renewal; and(f) A schedule indicating the estimated length of time needed for completion of each phase of the plan. *Id.*

After the redevelopment or renewal plan is completed, the authority must submit the plan to the "planning agency" of the community where the project is located, if such a planning committee exists. *Id.* at § 99.430(5). The purpose of this requirement is to ensure that redevelopment or renewal project conforms to the general plan for the community. *Id.* After the plan is presented to the planning agency, the agency has thirty days to review the plan and submit written recommendations to the authority. *Id.* After receiving the recommendations of the planning agency, or if no recommendations are received within thirty days, the authority may proceed with the next step in the process, presenting the redevelopment or urban renewal plan to the governing body of the community. *Id.*

Before recommending a redevelopment or renewal plan to the governing body, the authority must consider whether land uses and building requirements of the plan conform to the general plan for the community and whether the plan is designed to accomplish

> a coordinated, adjusted and harmonious development of the community and its environs which, in accordance with present and future needs, will promote health, safety, morals, order, convenience, prosperity and the general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, vehicular parking, the promotion of safety from fire, panic and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the provision of adequate transportation, water, sewerage, and other public utilities, schools, parks, recreational and community facilities and other public requirements, the promotion of sound design and arrangement, the wise and efficient expenditure of public funds, the prevention of the recurrence of insanitary or unsafe dwelling accommodations, or insanitary areas, or conditions of blight or deterioration, and the provision of adequate, safe and sanitary dwelling accommodations.

MO. REV. STAT § 99.430.1(6). The authority's recommendation to the governing body must be accompanied by the recommendations of planning agency or commission. *Id.* The authorities recommendation should also explain the proposed method and estimated cost of acquiring property and preparing the area for renewal or redevelopment. *Id.* The recommendation should estimate the proceeds or revenues generated by the areas "disposal" to developers. *Id.* Additionally, the recommendation should explain how the project will be financed, how long each phase of the plan will take to complete, and should provide a plan for relocating families displaced by the project. *Id.*

After the authority recommends its plan to the governing body, the governing body must hold a public hearing, which gives all interested parties a "reasonable opportunity" to express their opinion about the plan. *Id.* at § 99.430.1(8). Prior to the hearing, notice must be published in a newspaper that is generally circulated in the community. *Id.* The notice must be published once a week for two consecutive weeks, and the last publication must occur at least ten days prior to the hearing. *Id.* The

notice should describe the time, date, place and purpose of the hearing and must identify the area that will be involved in the renewal or redevelopment plan. *Id.* After holding th hearing, the governing body can approve the renewal or redevelopment plan if it conforms to the general plan for the community. *Id.* at § 99.430.1(9). The plan must be approved by the governing body before the authority can obtain any real property for the project. *Id.* at § 99.430.1(1).

Section 99.430.2 provides an expedited process that the authority may use as an alternative to waiting for the governing body to declare an area blighted and then waiting for the planning agency to approve the plan. *Id.* at § 99.430.2. Under this expedited process, the authority may make its own determination that an area is blighted, insanitary or underdeveloped, and may recommend its finding to the governing body at the same time that it presents its renewal or redevelopment plan for approval. *Id.* At the same time that makes its recommendations to the governing body, the authority must also present its recommendations to the planning agency of the community. *Id.* The planning agency has thirty days to submit written recommendations regarding the finding of blight or the plan. *Id.* After the planning agency submits its recommendations, or after thirty days, the governing body may precede with the hearing process describe earlier. *Id.* Once the hearing is held, the governing body may simultaneously approve the finding of blight and the plan for renewal or redevelopment, if it conforms to the general plan for the community. *Id.*

Once the plan is approved, by either of the two methods provided above, the authority may begin acquiring property. Property in a land clearance project may be "sold, leased, exchanged or transferred" to redeveloper "for residential, recreational, commercial, industrial or other uses or for public use." MO. REV. STAT. § 99.450(1). The property must be sold, leased or transferred at its "fair value" even if that is less than the cost of acquiring the property. *Id.* In determining the fair value of the property, the authority should consider the uses and purposes required by the plan, any restrictions placed upon the property, the objective of preventing the recurrence of blight and anything else the authority thinks is appropriate. *Id.* When fixing the sale or lease price, the authority should have the property appraised by land experts and should take the appraisal into consideration. *Id.*

Before entering into any redevelopment contracts, the authority should invite proposals from private redevelopers or individuals interested undertaking the redevelopment. *Id.* at § 99.450(2). This means that the authority should publish a public notice in a generally circulated newspaper, at least two times, before considering any proposals. *Id.* The notice must identify the area and offer to make all pertinent information available to the developer. *Id.* The authority should also create and utilize "reasonable competitive bidding procedures" in order to determine which redeveloper to award the contract to. *Id.* The authority should consider the financial and legal ability of the redevelopers to carry out their proposals, and the authority may accept which ever proposal it determines to be in the public interest. *Id.* Before accepting any contract, the authority must give the governing body thirty days notice, in writing, of its intent to accept. *Id.*

Section 99.450(3) allows the authority to covey property to the community for "streets, alleys and public ways," and to "grant servitudes, easements and rights-of-way for public utilities, sewers, streets and other similar facilities." *Id.* at § 99.450(3). The authority may also convey property to the municipality, county or any other appropriate public body for "parks, schools, public buildings, facilities or other public purposes." *Id.* Additionally, section 99.450.3 gives the municipality sweeping authority to "temporarily operate and maintain real property" in the project area "for such uses and

purposes as may be deemed desirable even though not in conformity with the redevelopment plan." *Id.*

The authority can modify a renewal or redevelopment plan at any time. *Id.* at § 99.430.1(10). However, once the property involved has been sold or leased to a redeveloper, modification of the plan must be approved by the redeveloper or its successors. *Id.* Also, if the proposed modification is substantial, it must be approved by the governing body. *Id.*

B. Powers

As stated above, section 99.420 gives the authority substantial power to carry out its renewal and redevelopment projects. The authority's general powers include the ability to sue and be sued, to make contracts and to make bylaws, rules and regulations to carry out its statutory purpose. *Id.* at § 99.420(1). It may contract with "any person or agency, public or private" to furnish or repair any "services, privileges, works, streets, roads, public utilities or other facilities for or in connection a land clearance project or urban renewal project." *Id.* at § 99.420(3). It may also acquire property for such projects by purchase, lease, gift, grant, bequest, devise, eminent domain, or other means. *Id.* at § 99.420(4). Once the authority has obtained real property it has the power to:

> hold, improve, clear or prepare for redevelopment or urban renewal any such property; to develop, construct, reconstruct, rehabilitate, repair or improve residences, houses, buildings, structures and other facilities; to sell, lease, exchange, transfer, assign, subdivide, retain for its own use, mortgage, pledge, hypothecate or otherwise encumber or dispose of any real or personal property or any interest therein; to enter into contracts with redevelopers of property and with other public agencies containing covenants, restrictions and conditions regarding the use of such property for residential, commercial, industrial, recreational purposes or for public purposes in accordance with the redevelopment or urban renewal plan and such other covenants, restrictions and conditions as the authority may deem necessary to prevent a recurrence of blighted or insanitary areas or to effectuate the purposes of this law....

Id.

The authority may conduct examinations and investigations regarding any matter that is "material" to the authority's purpose. *Id.* at § 99.420(9). It may also conduct public or private hearings involving testimony by witnesses and other evidence. *Id.* Related to its power to conduct hearings, the authority may administer oaths, issue subpoenas to witnesses and compel the production of documents. *Id.* Based on the information available to it, the authority may make recommendations to other agencies regarding property that is "dangerous to the public health, safety, morals or welfare." *Id.*

The authority has the ability to make all necessary surveys, studies and plans. *Id.* at § 99.420(10). It may enter any property necessary to carry out its plans, in order to make surveys, appraisals, investigations and the like. *Id.* A property owner does not have a cause of action for trespass against the authority unless the authority causes injuries by "wantonness or malice." *Id.*

The authority may also provide assistance in relocating to families that are displaced by the authority's project. *Id.* at § 99.420(11). The authority may delegate any of its powers or functions to a municipality or public body, and may loan any of the proceeds of any bonds or note for a project to a developer. *Id.* at § 99.420(12)-(13). The authority may also invest funds that are held in reserve or not immediately needed for a project. *Id.* at § 99.420(7). Additionally, it can borrow money and accept financial assistance from the federal government, state, county, municipality or any other public or private source. *Id.* at § 99.420(8)

IX. Tax Increment Financing

In 1982, the Missouri General Assembly passed the Real Property Tax Increment Allocation Redevelopment Act.

A. Procedure

1. Redevelopment Plan

When a county in Missouri desires to implement a Tax Increment Financing ("TIF") project within the boundaries of a municipality partially or totally within the county, such county must first obtain the permission of the governing body of the municipality. "Each redevelopment plan shall set forth in writing a general description of the program to be undertaken to accomplish the objectives." The plan must include the estimated project costs, the anticipated sources of funds, evidence of the commitments to finance the costs, the anticipated type and term of the sources of funds to pay the costs, the anticipated type and terms of the obligations to be issued, the most recent equalized assessed valuation of the property within the redevelopment area which is to be subjected to payments in lieu of taxes and economic activity taxes pursuant to section 99.845, an estimate of the equalized assessed valuation after redevelopment, and the general land uses to apply in the redevelopment area. No redevelopment plan shall be adopted without findings that: (1) The redevelopment area is a blighted area, a conservation area, or an economic development area, and has not been subject to growth and development through investment by private enterprise; (2) the redevelopment plan conforms to the comprehensive plan for the development of the municipality as a whole; (3) the estimated dates of completion of any redevelopment project, provided that no ordinance approving a redevelopment project shall be adopted later than ten years from the adoption of the ordinance approving the redevelopment plan and provided that no property for a redevelopment project shall be acquired by eminent domain later than five years from the adoption of the ordinance approving the project; (4) a plan has been developed for relocation assistance for businesses and residences; (5) a cost-benefit analysis showing the economic impact of the plan on each taxing district; (6) a finding that the plan does not include the initial development or redevelopment of any gambling establishment. By the last day of February each year, each commission shall report to the director of economic development the name, address, phone number and primary line of business of any business which relocates to the district. The director of the Department of Economic Development shall compile and report that information to the governor, the speaker of the house and the president pro tempore of the senate on the last day of April each year.

A municipality may approve redevelopment plans and projects, and designate redevelopment project areas by introducing an ordinance in the governing body of a municipality within fourteen to

ninety days from the completion of the hearing required in section 99.825. No redevelopment project shall be approved unless a redevelopment plan has been approved and a redevelopment area has been designated prior to or concurrently with the approval. Furthermore, the "area selected for the redevelopment project shall include only those parcels of real property and improvements thereon directly and substantially benefitted by the proposed redevelopment project improvements."

A municipality has the authority to "[m]ake and enter into all contracts necessary or incidental to the implementation and furtherance" of the redevelopment plan or project. Pursuant to a redevelopment plan and upon adoption by ordinance, a municipality may acquire by purchase, donation, lease or, as part of a redevelopment project, eminent domain, own, convey, lease, mortgage, or dispose of land and other property or rights or interests therein, and grant or acquire licenses, easements and options with respect thereto, all in the manner and at such price the municipality or the commission determines is reasonably necessary to achieve the objectives of the redevelopment plan. Furthermore, no disposition of land or agreement relating to the development of property shall be made without making public disclosure of the terms of the disposition and all bids made in response to the municipality's request. The procedures for obtaining the bids and proposals must provide reasonable opportunity for any person to submit alternative proposals or bids.

According to *Allright Properties, Inc. v. Tax Increment Financing Commission*, before a municipality can condemn property for a redevelopment project, it has to satisfy Section 523.274, which governs eminent domain. This statute says: "Where eminent domain authority is based upon a determination that a defined area is blighted, the condemning authority shall individually consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory definition of blight." "If the condemning authority finds a preponderance of the defined redevelopment area is blighted, it may proceed with condemnation of any parcels in such area." The Court of Appeals said that the "plain and ordinary meaning of Section 523.274's language sets up a two-prong test that a condemning authority must pass before it can proceed with condemnation." Under the statute's first sentence, the General Assembly requires the condemning authority to examine carefully each parcel apart from the others to determine whether or not it satisfies the statutory definition of blight. Although the statute requires a condemning authority to evaluate each parcel, the court saw nothing in the statute that requires the authority to make a specific finding for each parcel. Instead, the General Assembly mandated that the condemning authority "consider" each parcel in making a finding that the entire area was predominantly blighted; not that an individual parcel was blighted.

Due to the proximity of the General Assembly's enactment of Section 523.274 to the U.S. Supreme Court's issuance of *Kelo v. New London*, the court said that one of the General Assembly's main goals in enacting Section 523.274 was to protect non-blighted parcels from a government's taking by eminent domain. Furthermore, after examining the history of the statute, the court concluded that a "condemning authority is to determine that an area is predominantly blighted by measuring total square footage of blight in a redevelopment area and comparing it to the square footage of land that is not blighted." Therefore, the court construed Section 523.274 as requiring a condemning authority to examine each individual parcel of a redevelopment area to determine whether or not it is an area, that "retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use[.]" The

statute authorizes the condemning authority to take land so long as a preponderance of the area, as a whole, is blighted.

2. Commission

a. Creation of the Commission

Beginning August 28, 2008, any city, town, or village in a county with a charter form of government and with more than one million inhabitants, in a county with a charter form of government and with two hundred fifty to three hundred fifty thousand inhabitants, or in a county of the first classification with more than one hundred eighty-five thousand but fewer than two hundred thousand inhabitants shall, prior to adoption of an ordinance approving the designation of a redevelopment area or approving a redevelopment plan or project, create a commission consisting of twelve persons. The members of these commissions are appointed as follows: (a) six members appointed either by the county executive or presiding commissioner; (b) three members appointed by the cities, towns, or villages in the county which have TIF districts; (c) two members appointed by the school boards whose districts are included in the county; and (d) one member to represent all other districts levying ad valorem taxes in the proposed redevelopment area.

Members appointed to the commission, except those appointed by either the county executive or presiding commissioner, shall serve on the commission for a term to coincide with the length of time a redevelopment project, plan, or designation of a redevelopment area is considered for approval by the commission. The six members appointed by either the county executive or the presiding commissioner shall serve on all such commissions until replaced. The city, town, or village that creates the commission shall send notice by certified mail to the county executive or presiding commissioner, to the school districts, and to the other taxing districts whose boundaries include any portion of the proposed redevelopment area. The city, town, or village that creates the commission shall be solely responsible for notifying all other cities, towns, and villages in the county that have TIF districts and shall exercise all administrative functions of the commission. The school districts receiving notice from the city, town, or village shall be solely responsible for notifying the other school districts within the county of the formation of the commission. If the county, school board, or other taxing district fails to appoint members to the commission within thirty days after the city, town, or village sends the written notice that it has convened such a commission or within thirty days of the expiration of any such member's term, the remaining duly appointed members of the commission may exercise the full powers of the commission.

b. Powers of the Commission

Any commission created under section 99.820, may exercise the powers enumerated in sections 99.800 to 99.865, except final approval of plans, projects and designation of redevelopment areas. The commission shall hold public hearings and provide notice pursuant to sections 99.825 and 99.830. Any commission created under subsection 3 shall, within fifteen days of receipt of a redevelopment plan meeting the minimum requirements of section 99.810, fix a time and place for the public hearing referred to in section 99.825. The public hearing shall be held no later than seventy-five days from the commission's receipt of a redevelopment plan and request for public hearing. Within thirty days following the public hearing, the commission shall vote and make recommendations to the governing body on all proposed redevelopment plans, projects, and designations of redevelopment

areas, and amendments thereto. If the commission fails to vote within thirty days following the hearing, the plan, project, designation, or amendment thereto shall be deemed rejected by the commission.

c. Procedures the Commission Must Follow

Prior to the adoption of an ordinance proposing the designation of a redevelopment area, or approving a redevelopment plan or project, the commission shall fix a time and place for a public hearing. The commission shall notify each taxing district located wholly or partially within the boundaries of the proposed redevelopment area, plan or project. Notice of the public hearing shall be given, at least twice, by publication and mailing. The first publication shall not be more than thirty days and the second publication to be not more than ten days prior to the hearing, in a newspaper of general circulation in the area of the proposed redevelopment. Notice by mailing shall be given by certified mail addressed to the person or persons in whose name the general taxes for the last preceding year were paid on each lot lying within the redevelopment area. Such notice shall be mailed not less than ten days prior to the date set for the public hearing.

The Notice shall include the following: (1) the time and place of the public hearing; (2) the general boundaries of the proposed redevelopment area or project by street location; (3) a statement that all interested persons shall be given an opportunity to be heard at the hearing; (4) a description of the proposed redevelopment plan or project and a location and time where the entire plan or project proposal may be reviewed by any interested party; (5) other matters as the commission may deem appropriate. Not less than forty-five days prior to the date set for the public hearing, the commission shall give notice by mail to all taxing districts from which taxable property is included in the redevelopment area, project, or plan. In addition, the notice shall include an invitation to each taxing district to submit comments to the commission. A copy of any and all hearing notices required must be submitted by the commission to the director of the Department of Economic Development.

At the public hearing, any interested person or affected taxing district may file with the commission written objections to, or comments on, any issues embodied in the notice. The commission shall hear and consider all protests, objections, comments and other evidence presented at the hearing. If necessary, the hearing may be continued to another date without further notice. Prior to the conclusion of the hearing, changes may be made in the redevelopment plan, project, or area, provided that each affected taxing district is given written notice of such changes at least seven days prior to the conclusion of the hearing. After the public hearing but prior to the adoption of an ordinance approving a redevelopment plan, project, or designating a redevelopment area, changes may be made without a further hearing, if the changes do not enlarge the exterior boundaries of the redevelopment area, and do not substantially affect the general land uses established in the redevelopment plan or substantially change the nature of the redevelopment projects. Notice of such changes shall be given by mail to each affected taxing district and by publication in a newspaper of general circulation in the area of the proposed redevelopment not less than ten days prior to the adoption of the changes by ordinance. Hearings with regard to a redevelopment project, area, or plan may be held simultaneously.

After the adoption of an ordinance approving a redevelopment plan or project, no ordinance shall be adopted altering the exterior boundaries, affecting the general land uses established under the

plan, or changing the nature of the project without complying with the procedures pertaining to the initial approval of a redevelopment plan or project. This provision was at issue in *Ste. Genevieve School District R-II v. Board of Aldermen of Ste. Genevieve*. In that case, the city solicited proposals for the redevelopment of a certain plot of land. Golden Management submitted a proposal for the redevelopment of the area. These improvements were in addition to improvements already proposed for the area. However, the city decided not to reconvene the TIF commission. Instead, the city adopted an ordinance that amended the overall redevelopment plan to embody the changes proposed by Golden and also authorized the issuance of TIF notes to fund the cost associated with the redevelopment. Looking at the language of Section 99.825, the court said that the amendment in this case was a change in the nature of the redevelopment project because the cost increased by 360% and the focus of the project changed. Therefore, the procedures followed in this case were improper.

Beginning on January 1, 2008, if, after concluding the hearing, the commission makes a recommendation under section 99.820 in opposition to a proposed redevelopment plan, project, or designation, or any amendments thereto, a municipality desiring to approve such project, plan, designation, or amendments shall do so only upon a two-thirds majority vote of the municipality's governing body. TIF projects within an economic development area shall apply to and fund only the following infrastructure projects: highways, roads, streets, bridges, sewers, traffic control systems and devices, water distribution and supply systems, curbing, sidewalks and any other similar public improvements, but in no case shall it include buildings.

3. Preparation of Redevelopment Area

Within a redevelopment area, a municipality may clear any area by demolishing existing buildings and structures or a municipality may renovate, rehabilitate, or construct any structure, building, street, utility, and make any other site improvement essential to the preparation of the redevelopment area. A municipality may fix, charge, and collect fees, rents, and other charges for the use of any building or property owned or leased by it in a redevelopment area. Furthermore, a municipality may accept "grants, guarantees, and donations of property, labor, or other things of value from a public or private source for use within a redevelopment area." A municipality may incur redevelopment costs, issue obligations, and make payment in lieu of taxes ("PILOTS") to taxing districts.

4. Appropriations

The initial appropriation of up to fifty percent of the new state revenues shall not be made to or distributed by the Department of Economic Development to a municipality until the director of the Department of Economic Development and the commissioner of the office of administration have approved a TIF application made by the municipality for the appropriation of the new state revenues. The municipality shall include in the application the long list of items enumerated in section 99.845 in addition to the items in section 99.810.

The municipality shall also include in the application the methodologies used in the application for determining the base year and determining the estimate of the incremental increase in the general revenue portion of the state sales tax revenues or the state income tax withheld by employers. The Department of Economic Development may request the appropriation following application

approval. The appropriation shall be either a portion of the estimate of the incremental increase in the general revenue portion of state sales tax revenues in the redevelopment area or a portion of the estimate of the state income tax withheld by the employer on behalf of new employees. At no time shall the annual amount of the new state revenues approved for disbursements from the Missouri supplemental TIF fund exceed thirty-two million dollars. Redevelopment plans and projects receiving new state revenues shall have a duration of up to fifteen years, unless prior approval for a longer term is given by the director of the Department of Economic Development and the commissioner of the office of administration. However, the duration shall not exceed twenty-three years.

"New state revenues" are the incremental increase in the general revenue portion of state sales tax revenues received. The incremental increase in the general revenue portion of state sales tax revenues for an existing or relocated facility shall be the amount that current state sales tax revenue exceeds the state sales tax revenue in the base year as stated in the redevelopment plan. New state revenues also include state income tax withheld on behalf of new employees. The state income tax withholding allowed by this section shall be the municipality's estimate of the amount of state income tax withheld by the employer within the redevelopment area for new employees who fill new jobs directly created by the TIF project.

5. Missouri Supplemental Tax Increment Financing Fund

There is a special fund known as the "Missouri Supplemental Tax Increment Financing Fund", administered by the Department of Economic Development, to distribute the amount of the new state revenues as provided in subsections 4 and 5 if and only if the conditions of subsection 10 are met. The fund shall also consist of any gifts, contributions, grants or bequests received from federal, private or other sources. Moneys in the Missouri supplemental tax increment financing fund shall be disbursed per project pursuant to state appropriations. Redevelopment project costs may include the portion of salaries and expenses of the Department of Economic Development and the Department of Revenue reasonably allocable to each redevelopment project approved for disbursements from the Missouri supplemental TIF fund for the ongoing administrative functions associated with the redevelopment project. Such amounts shall be recovered from new state revenues deposited into the Missouri supplemental TIF fund created under this section. For redevelopment plans or projects approved by ordinance that result in net new jobs from the relocation of a national headquarters from another state to the area of the redevelopment project, the economic activity taxes ("EATS") and new state tax revenues shall not be based on a calculation of the incremental increase in taxes as compared to the base year or prior calendar year for such redevelopment project. Rather, the incremental increase shall be the amount of total taxes generated from the net new jobs brought in by the relocation of the national headquarters. In no event shall a redevelopment project to receive an appropriation in excess of up to fifty percent of the new state revenues.

Municipalities seeking state supplemental TIF for a redevelopment project or plan must complete a Precertification Request Form and a Program Application. A Precertification Request Form or Program Application may be submitted to the Department of Economic Development at any time. However, because of the state's appropriation process, applicants must submit a precertification request prior to September 1 in order to have the department support the project or plan and to have it listed in the department's budget for TIF appropriation during the next legislative session. Being listed in the budget does not mean the project is approved by the department or that the project is or

will be eligible for disbursements, but only connotes that the project is not statutorily ineligible. The department will accept a Program Application for proposed projects or plans if the project or plan is included in the TIF appropriation approved by the legislature. However, the municipality must complete the application process and be issued approval by the department before being eligible for disbursements. The first installment of new state revenues will not be available until July 1 of the year in which the appropriation occurs.

No transfer from the general revenue fund to the Missouri supplemental TIF fund shall be made unless an appropriation is made from the general revenue fund for that purpose. Additionally, no municipality shall commit any state revenues prior to an appropriation being made for a particular project. For all redevelopment plans or projects adopted or approved after December 23, 1997, appropriations from the new state revenues shall not be distributed from the Missouri supplemental TIF fund into the special allocation fund unless the municipality's redevelopment plan ensures that one hundred percent of PILOTS and fifty percent of EATS generated by the project shall be used for eligible redevelopment project costs while tax increment financing remains in effect. This account shall be separate from the account into which PILOTS are deposited, and separate from the account into which EATS are deposited.

In *City of Shelbina v. Shelby County*, there was an issue over whether the city's ordinances complied with Section 99.845.1. The statute states in pertinent part: "A municipality, *either at the time a redevelopment project is approved or, in the event a municipality has undertaken acts establishing a redevelopment plan and redevelopment project and has designated a redevelopment area* after the passage and approval of Sections 99.800 to 99.865...which acts are in conformance with the procedures of Sections 99.800 to 99.865, may adopt tax increment allocation financing by passing an ordinance.... (Emphasis added)." The court said that the plain language of the statute provided that a municipality must take the step of either: (1) approving a redevelopment project; or (2) undertake acts that establish a redevelopment plan and a redevelopment project prior to enacting TIF ordinances. According to the court, the redevelopment plan which was presented at the TIF Commission's public hearing revealed that the City lacked any specific redevelopment project prior to enacting the ordinances. Since Section 99.845.1 contemplates the adoption of a redevelopment project prior to enactment of TIF ordinances, and in light of the absence of a redevelopment project at that time, the court deemed the ordinances void.

6. Status Reports

Each year the governing body of the municipality, or its designee, shall prepare a report concerning the status of each redevelopment plan and project, and shall submit a copy of the report to the director of the Department of Economic Development. The report must include the following: (1) The amount and source of revenue in the special allocation fund; (2) the amount and purpose of expenditures from the fund; (3) the amount of any pledge of revenues, including principal and interest on any outstanding bonded indebtedness; (4) the original assessed value of the redevelopment project; (5) the assessed valuation added to the redevelopment project; (6) PILOTS received and expended; (7) the EATS generated within the redevelopment area in the calendar year prior to the approval of the redevelopment plan; (8) the EATS generated within the redevelopment area after the approval of the redevelopment plan; (9) reports on contracts made incident to the implementation and furtherance of a redevelopment plan or project; (10) a copy of any redevelopment

plan; (11) the cost of any property acquired, disposed of, rehabilitated, reconstructed, repaired or remodeled; (12) the number of parcels acquired by or through initiation of eminent domain proceedings; and (13) any additional information the municipality deems necessary.

Data contained in the report and any information regarding amounts disbursed to municipalities pursuant to the provisions of section 99.845 shall be deemed a public record. An annual statement showing the PILOTS received and expended in that year, the status of the redevelopment plan and projects, amount of outstanding bonded indebtedness and any additional information the municipality deems necessary shall be published in a newspaper of general circulation in the municipality. Five years after the establishment of a redevelopment plan and every five years thereafter the governing body shall hold a public hearing regarding those redevelopment plans and projects. The purpose of the hearing is to determine if the redevelopment project is making satisfactory progress under the proposed time schedule contained within the approved plans for completion of the project. Notice of such public hearing shall be given in a newspaper of general circulation in the area once each week for four weeks immediately prior to the hearing. Any municipality which fails to comply with the reporting requirements shall be prohibited from implementing any new TIF project for a period of no less than five years from such municipality's failure to comply.

The director of the Department of Economic Development shall submit a report to the state auditor, the speaker of the House of Representatives, and the president pro tem of the senate no later than February first of each year containing a summary of all information received by the director pursuant to section 99.865. For the purpose of coordinating all TIF projects using new state revenues, the director of the Department of Economic Development may promulgate rules and regulations to ensure compliance with this section. The Department of Economic Development shall provide information and technical assistance, as requested by any municipality, on the requirements of sections 99.800 to 99.865. This information and technical assistance shall be provided in the form of a manual, written in an easy-to-follow manner, and through consultations with departmental staff. Based upon the information provided in the reports, the state auditor shall make available for public inspection on the auditor's web site a searchable electronic database of such municipal TIF reports. All information contained within the database shall be maintained for at least ten years from the initial posting.

B. Obligations

Obligations secured by the special allocation fund set forth in sections 99.845 and 99.850 may be issued by the municipality pursuant to section 99.820 or by the TIF commission to provide for redevelopment costs. A municipality may, by ordinance or resolution, pledge all or any part of the funds in and to be deposited in the special allocation fund to the payment of the redevelopment costs and obligations. The municipality may, in addition to obligations secured by the special allocation fund, pledge any part or any combination of net new revenues of any redevelopment project, or a mortgage on part or all of the redevelopment project to secure its obligations or costs.

When redevelopment project costs have been paid, all surplus funds then remaining in the special allocation fund shall be paid by the municipal treasurer to the county collector. The county collector shall immediately pay the funds to the taxing districts in the area selected for a redevelopment project. The funds must be distributed in the same manner and proportion as the most recent distribution by the collector to the affected districts of real property taxes from real property in the area

selected for a redevelopment project. Upon the payment of all redevelopment project costs, retirement of obligations and the distribution of any excess moneys, the municipality shall adopt an ordinance dissolving the special allocation fund for the redevelopment area and terminating the designation of the redevelopment area as a redevelopment area. Nothing in sections 99.800 to 99.865 shall be construed as relieving property in such areas from paying a uniform rate of taxes, as required by article X, section 3 of the Missouri Constitution.

Obligations issued pursuant to sections 99.800 to 99.865 may be issued in one or more series bearing interest at such rate or rates as the issuing body of the municipality shall determine by ordinance or resolution. The governing body shall also determine, by ordinance or resolution, the maturity date, registration privileges, covenants, terms and conditions, and/or redemption rights of the obligations. Obligations issued pursuant to sections 99.800 to 99.865 may be sold at public or private sale at a price determined by the issuing body and shall state that obligations issued pursuant to sections 99.800 to 99.865 are special obligations payable solely from the special allocation fund or other funds specifically pledged. Neither the municipality, its duly authorized commission, the commissioners or the officers of a municipality nor any person executing any obligation shall be personally liable for such obligation by reason of the issuance thereof. The obligations issued pursuant to sections 99.800 to 99.865 shall not be a general obligation of the municipality, county, state of Missouri, or any political subdivision thereof. A municipality may also issue its obligations to refund, in whole or in part, obligations issued by the municipality under the authority of sections 99.800 to 99.865, whether at or prior to maturity. However, the last maturity of the refunding obligations shall not be expressed to mature later than the last maturity date of the obligations to be refunded.

C. Taxes

If a municipality, by ordinance, provides for tax increment allocation financing pursuant to sections 99.845 and 99.850, the county assessor shall immediately determine total equalized assessed value of all taxable real property within such redevelopment project. This is done by adding together the most recently ascertained equalized assessed value of each taxable parcel of real property within the project. The county assessor shall certify the amount as the total initial equalized assessed value of the taxable real property within the project. After the county assessor has certified the total initial equalized assessed value, then the county clerk shall, in every year that tax increment allocation financing is in effect, ascertain the amount of value of taxable property in a redevelopment project. The clerk does this by including in the amount the certified total initial equalized assessed value of all taxable real property in lieu of the equalized assessed value of all taxable real property in such area. For the purpose of measuring the size of PILOTS, all tax levies shall be extended to the current equalized assessed value of all property in the redevelopment project in the same manner as the tax rate percentage is extended to all other taxable property in the taxing district. The method of extending taxes under this section shall terminate when the municipality adopts an ordinance dissolving the special allocation fund for the redevelopment project.

D. Payments in Lieu of Taxes

A municipality, at the time a redevelopment project is approved, may adopt tax increment allocation financing by passing an ordinance providing that after the total equalized assessed valuation of the taxable real property in a redevelopment project exceeds the certified total initial equalized

assessed valuation, the ad valorem taxes, and PILOTS arising from the levies upon the taxable real property in the redevelopment project shall be divided as provided in Section 99.845. The portion of taxes, penalties and interest levied upon each taxable piece of real property which is attributable to the initial equalized assessed value of each taxable piece of real property in the redevelopment area shall be allocated to and, when collected, shall be paid by the county collector to the respective affected taxing districts in the manner required by law in the absence of the adoption of tax increment allocation financing. PILOTS attributable to the increase in the current equalized assessed valuation of each taxable piece of real property in the area selected for redevelopment shall be paid to the municipal treasurer. The treasurer shall deposit the PILOTS into the Special Allocation Fund of the municipality for the purpose of paying redevelopment costs and obligations. PILOTS which are due and owing shall constitute a lien against the real estate of the redevelopment project from which they are derived. Payments shall be collected in the same manner as the real property tax.

In addition to PILOTS, for redevelopment plans and projects adopted or approved after August 31, 1991, fifty percent of the total additional revenue from taxes, penalties and interest which are imposed by the taxing district shall be allocated to, and paid by the local political subdivision collecting officer to the treasurer or other designated financial officer of the municipality. The treasurer shall deposit such funds in a separate segregated account within the special allocation fund. Beginning January 1, 1998, for redevelopment plans and projects adopted or approved by ordinance and which have complied with subsections 4 to 12 of section 99.845, in addition to the PILOTS and EATS, up to fifty percent of the new state revenues over and above the amount of such taxes reported by businesses within the project area may be available for appropriation by the general assembly to the Department of Economic Development supplemental TIF fund. These funds, coming from the general revenue fund, are available for distribution to the treasurer or other designated financial officer of the municipality with approved plans or projects. In order for the redevelopment plan or project to be eligible to receive this revenue, the municipality shall comply with the requirements of subsection 10 of this section prior to the time the project or plan is adopted or approved by ordinance. The treasurer of the municipality shall deposit the funds in a separate segregated account within the special allocation fund.

Section 99.845.4 applies only to blighted areas located in enterprise zones, federal empowerment zones, central business districts, or urban core areas of cities, provided that the enterprise zones, federal empowerment zones or blighted areas contained one or more buildings at least fifty years old. In addition, the section applies to blighted areas that suffer from generally declining population or property taxes over the twenty-year period immediately preceding the area's designation as a project area; or historic hotels located in a county of the first classification without a charter form of government with a population in excess of one hundred fifty thousand and containing a portion of a city with a population in excess of three hundred fifty thousand.

E. Restrictions

No new TIF project shall be authorized in any "greenfield area" that is located within a city not within a county or any county subject to the authority of the East-West Gateway Council of Governments. Municipalities not subject to the authority of the East-West Gateway Council of Governments may authorize TIF projects in "greenfield areas." A "greenfield area" is "any vacant, unimproved, or agricultural property that is located wholly outside the incorporated limits of a city,

town, or village, or that is substantially surrounded by contiguous properties with agricultural zoning classifications or uses unless said property was annexed into the incorporated limits of a city, town, or village ten years prior to the adoption of the ordinance approving the redevelopment plan for such greenfield area."

Section 99.847 prohibits new TIF projects for the flood plain areas of St. Charles County. The statute says that no new TIF project shall be authorized in any area which is within an area designated as flood plain by the Federal Emergency Management Agency ("FEMA) and which is located in or partly within a county with a charter form of government with greater than two hundred fifty thousand inhabitants but fewer than three hundred thousand inhabitants. However, if the redevelopment area actually abuts a river or a major waterway and is substantially surrounded by contiguous properties with residential, industrial, or commercial zoning classifications, a new TIF project may be authorized in that location. This subsection does not apply to TIF projects or districts approved prior to July 1, 2003, and it allows the modification, amending, or expansion of projects initiated before that date. This section does not apply to TIF projects or districts approved prior to August 28, 2004.

No new TIF project shall be authorized in any hunting heritage protection area after August 28, 2007. Hunting heritage protection areas include all land located within the one hundred-year flood plain of the Missouri River and all land located within the one hundred-year flood plain of the Mississippi River, as designated FEMA as amended from time to time. This subsection does not apply to TIF projects or districts approved prior to August 28, 2007, and the subsection allows the modification, amendment, or expansion of such projects. This subsection also does not apply to TIFs approved for the purpose of flood or drainage protection; or for the purpose of constructing or operating a renewable fuel facility.

F. Conflict of Interest

If any member of the governing body of the municipality, a member of a commission established under subsection 2 or 3 of section 99.820, or an employee or consultant of the municipality, involved in the planning and preparation of a redevelopment plan owns or controls an interest, direct or indirect, in any property included in any redevelopment area, he or she shall disclose the same in writing to the clerk of the municipality. Such person shall also disclose the dates, terms, and conditions of any disposition of the interest and that disclosure shall be entered upon the minutes book of the governing body of the municipality. If an individual holds such an interest, then that individual shall refrain from any further official involvement in regard to the redevelopment plan. Furthermore, no such member or employee shall acquire any interest, direct or indirect, in any property in a redevelopment area or proposed redevelopment area after either (a) such individual obtains knowledge of such plan or project, or (b) first public notice of such plan, whichever first occurs. Lastly, a municipality may charge the reasonable costs incurred by its clerk or other official in administering the redevelopment project as a redevelopment cost.

G. Severability

If any section, subsection, subdivision, paragraph, sentence or clause of the Real Property Tax Increment Allocation Redevelopment Act is, for any reason, held to be invalid or unconstitutional,

such decision shall not affect any remaining portion, section, or part thereof which can be given effect without the invalid provision.

H. Determination of "Blighted Area" and "Economic Development Area"

"'Blighted area', an area which, by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use." The definition of "blighted" provided in the Act is read to mean that if any of the first five factors predominate, the first half of the definition is satisfied. However, if various factors are present without "predominating" in the area, then the question becomes whether those factors, combined, predominate to such an extent that the second half of the definition is satisfied. If a predominance of factors listed in the first half of the definition leads to any resulting circumstance listed in the second half of the definition, an area may properly be declared to be a "blighted area." Thus, an area is blighted if the "predominance of" an enumerated factor or factors leads to any of the enumerated resulting circumstances, all of which must be considered in light of the area's "present condition and use." In determining if an area is "blighted" the redevelopment area as a whole is considered. A piecemeal analysis of whether individual portions of the redevelopment area are blighted is not contemplated by the Act. The issue of why site improvements are so deteriorated to constitute blight is not relevant under the Act. It only matters that the improvements are deteriorated.

In *JG St. Louis West, Ltd. v. City of Des Peres*, there was an issue over a city's determination of an area as blighted. First, plaintiffs argued that the trial court and City Board of Aldermen ("Board") found the shopping mall at issue to be the City's single greatest asset, which precluded the finding that it was an economic liability and thus a "blighted area." The Board found five blighting factors that combined to make shopping mall an economic liability, in its view. It was determined that shopping mall suffered from obsolete platting, it had irregularly platted lots that constrained the ability to expand the size of the mall, the roof, utility system and parapet wall had deteriorated, and there was a lack of adequate storm water control. Evidence cited in the Redevelopment Plan indicated that shopping mall was not keeping its value relative to neighboring, similarly situated and similarly used properties. Moreover, the plan contained evidence of a decline in sales at shopping mall with a corresponding drop in sales tax revenue for City. The court said that the plaintiffs did not sustain their burden of showing that Board's decision was arbitrary. Furthermore, the court said "[w]hile we acknowledge Plaintiffs' argument that it is illogical to label as an economic liability, a commercial enterprise that is indisputably City's greatest economic asset, we are mindful of our standard of review." Therefore, the court found that there was evidence before the Board that established that the shopping mall was an economic liability. Thus, Board's decision as to blighting was fairly debatable and not arbitrary.

I. Constitutionality

In *Tax Increment Financing Commission v. J.E. Dunn Construction Co.*, J.E. Dunn challenged the constitutionality of the Missouri Real Property Tax Increment Allocation Redevelopment Act.

Dunn contended that the Act allows for a non-uniform levy and assessment of taxes in violation of Mo. Const. art. X, §§ 3 and 4(b) and creates an arbitrary classification for tax purposes in violation of the equal protection guarantees of Mo. Const. art. I, § 2 and U.S. Const. amend. XIV. The court quoted art. X, § 3, which states: "Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax." Section 99.850.3 provides that "nothing in sections 99.800 to 99.865 shall be construed as relieving property in such project areas from paying a uniform rate of taxes, as required by article X, § 3 of the Missouri Constitution." Dunn argued that other taxing authorities levying taxes against District property would face increased costs and they would be required to increase the taxes or fees they assess. As a result, he argued, the property owners outside the Project Area would carry more than their fair share of the general costs of government, which creates a non - uniform scheme of taxation. The court said that district property was subject to the same tax levy as property not within the District. "It is the application of the existing tax levy to the improvements that creates the tax increment used to fund repayment of the bonds." Therefore, the levy was uniform. Even if the levy were uniform, Dunn argued that the assessment of taxes was not uniform and violated both art. X, § 3 and art. X, § 4(b). The court said that Section 99.855.2 requires that "all tax levies . . . be extended to the current equalized assessed value of all property in the redevelopment project area in the same manner as the tax rate percentage is extended to all other taxable property in the taxing district." On its face, the court said that the Act requires compliance with the mandates of the Constitution.

J. County Administrative Fee

In *City of Desloge v. St. Francois County*, the city alleged that it was improper for the county to charge the city administrative fees for the TIF projects at issue. The County argued that Sections 99.805 (7) and 99.820(1)(14) together showed that a county may charge an administrative fee. Section 99.805 (7) defines a "municipality" to include "any county." Section 99.820.1(14) authorizes a municipality to "[c]harge as a redevelopment cost the reasonable costs incurred by its clerk or other official in administering the redevelopment project." Thus, the county argued that it was entitled to charge reasonable costs incurred in the administration of the various TIF projects. The court disagreed because the Act clearly intended that a county be considered a "municipality" only when that county creates and administers a TIF Commission and redevelopment plan. According to the court "it is the TIF Commission and the municipality which created the Commission who administer the redevelopment projects, not the county in which the municipality is located." "Therefore, even though the TIF Act contemplates that counties may occasionally take on TIF projects and thus be considered municipalities for purposes of the Act, that does not mean that the Act's use of the word municipality automatically refers to a county."

K. The But-For Test

Section 99.810 sets forth what is called the "but-for test" and establishes that a municipality must find, before adopting a redevelopment plan, that "[t]he redevelopment area . . . has not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed without the adoption of tax increment financing." In *Great Rivers*, Great Rivers' petition asserted that the City's finding on whether the area was subject to growth and development was arbitrary and capricious. The but-for finding does not focus exclusively on the area's present condition and use. Instead, the finding requires that a municipality assess whether an area

would "reasonably be anticipated to be developed without the adoption of tax increment financing." The but-for finding is intended to demonstrate the need for a TIF designation in order to accomplish that redevelopment. Courts consider the Redevelopment Area as a whole in making the but-for analysis. The plain words of the TIF statute do not permit piecemeal examination of the entire Redevelopment Area when applying the but-for test, or the blighting analysis.

X. Special Business Districts

A. Creation and Dissolution

The governing body of any city may establish special business districts ("SBD"). Upon establishment, each such district shall be a body corporate and politic and a political subdivision of the state. A SBD shall be formed by ordinance of the governing body of the city establishing the SBD. Prior to the establishment of a SBD, the governing body shall conduct a survey and investigation for the purposes of determining the nature of and suitable location for improvements, the approximate cost of acquiring and improving the land, the area to be included in the district, the need for and cost of special services and cooperative promotion activities, and the percentage of the cost of acquisition, special services, and improvements in the SBD which are to be assessed against the property within the district and the portion of the cost to be paid by public funds. The cost of the survey and investigation shall be included as a part of the cost of establishing the SBD. A written report of this survey and investigation shall be filed in the office of the city clerk and be available for public inspection.

Section 71.790 was specifically amended in 2006 to allow the city of Springfield to dissolve a special business district in accordance with the procedures set forth in Sections 67.950 and 67.955. However, any proceeds from the disposal of assets of the district after payment of all indebtedness must be used by the governing body of Springfield in a manner consistent with the purposes of the district and within the boundary of the former district.

Section 67.950 provides for the dissolution of a SBD. The dissolution may be achieved upon filing with the governing body of the district a petition containing the signatures of eight percent or more of the voters of the district. In addition, a SBD may be dissolved upon the motion of a majority of the members of the governing body of the district to submit the question to the voters in the district. The question shall be submitted in substantially the following form: Shall the ..... district be dissolved? The district shall be dissolved upon approval of a simple majority for all purposes except the payment of any outstanding bonded indebtedness. Upon passage of a proposition to dissolve, the governing body shall dispose of all assets of the district and apply all proceeds to the payment of all indebtedness of the district. If any funds are left after the liquidation, they shall be paid to the taxpayers of the district. Such payments shall be computed on the ratio of each taxpayer's tax paid in to the total tax collected for the last taxable year for which the district collected taxes. The liquidation, payments and refunds shall be completed within one hundred twenty days after the date of the submission of the question.

A SBD may be established, enlarged or decreased in area upon petition by one or more owners of real property on which is paid the ad valorem real property taxes within the proposed district. In addition, the governing body of the city may adopt a resolution of intention to establish, enlarge or

decrease in area a SBD. The resolution must contain a description of the boundaries of the proposed area; the time and place of a hearing to be held by the governing body; and the proposed uses to which the additional revenue shall be put and the initial tax rate to be levied. Whenever a hearing is held, the governing body shall publish notice of the hearing on two separate occasions in at least one newspaper of general circulation. The publication shall not be more than fifteen days nor less than ten days before the hearing. Additionally, the governing body shall mail a notice of the hearing by United States mail to all owners of record of real property and licensed businesses located in the proposed district.

The governing body shall hear all protests and receive evidence for or against the proposed action and then rule upon all protests. If the governing body decides to change the boundaries of the proposed area, the hearing shall be continued to a time at least fifteen days after the decision. Notice shall be given in at least one newspaper of general circulation at least ten days prior to the time of said hearing showing the boundary amendments. If the governing body following the hearing decides to establish the proposed district, it shall adopt an ordinance to that effect. The ordinance shall contain the number, date and time of the resolution; the time and place the hearing was held concerning the formation of the area; the description of the boundaries of the district; a statement that the property in the area established by the ordinance shall be subject to the provisions of additional tax; the initial rate of levy to be imposed upon the property lying within the boundaries of the district; a statement that a SBD has been established; the uses to which the additional revenue shall be put; in any city with a population of less than three hundred fifty thousand, the creation of an advisory board or commission and enumeration of its duties and responsibilities; and in any city with a population of three hundred fifty thousand or more, provisions for a board of commissioners to administer the SBD.

There are few cases which discuss small business districts. However, in *Gilroy-Sims and Associates v. Downtown St. Louis Business Dist.*, suit was brought against a SBD to enforce provisions of the Hancock Amendment. The court held that the city, not the SBD, was liable for the plaintiff's attorney's fees.

B. Powers of Governing Body

In establishing and maintaining a SBD, the governing body shall have all the powers necessary to carry out any and all improvements adopted in the ordinance establishing the district. The governing body can close, open, widen, or narrow existing streets or alleys in whole or in part. Those powers also include the ability to construct or install pedestrian or shopping malls, plazas, sidewalks or moving sidewalks, parks, meeting and display facilities, convention centers, arenas, bus stop shelters, lighting, benches, sculptures, telephone booths, traffic signs, fire hydrants, kiosks, trash receptacles, marquees, awnings, canopies, walls and barriers, paintings, murals, alleys, shelters, display cases, fountains, rest rooms, information booths, aquariums, aviaries, tunnels and ramps, pedestrian and vehicular overpasses and underpasses, and each and every other useful, necessary, or desired improvement. Additionally, the governing body has the power to landscape and plant trees, bushes, shrubbery, and flowers; to install and operate, or to lease, public music and news facilities; to purchase and operate buses, minibuses, and other modes of transportation; to construct and operate child-care facilities; to lease space within the district for sidewalk café tables and chairs; to construct lakes, dams, and waterways; to provide special police or cleaning facilities and personnel for the SBD; to maintain all city-owned streets, alleys, malls, bridges, ramps, tunnels, lawns, trees and decorative plantings, and

every structure or object of any nature whatsoever constructed or operated by the said municipality; to grant permits for newsstands, sidewalk cafes, and each and every other useful, necessary, or desired private usage of public or private property; to prohibit or restrict vehicular traffic on such streets as the governing body deems necessary; to lease, acquire, dispose of, construct, reconstruct, extend, maintain, or repair parking lots or parking garages; and to promote business activity in the district by advertising, decoration of any public place in the area, promotion of public events which are to take place on or in public places, furnishing of music in any public place, and the general promotion of trade activities in the district.

The governing body shall have sole discretion as to how the revenue derived from any tax or from disposition of assets shall be used. In addition, the governing body shall appoint an advisory board or commission to make recommendations as to the use of the revenues. The governing body also cannot decrease the level of publicly funded services in the district existing prior to creation of the SBD. Furthermore, the governing body cannot transfer the financial burden of providing services to the district unless the services at the same time are decreased throughout the city. Lastly, the governing body shall not discriminate in the provision of the publicly funded services between areas included in a SBD and areas not included.

C. Special Exceptions

In any city with a population of three hundred fifty thousand or more, a district shall have all the powers necessary or convenient to carry out any and all improvements adopted in the ordinance establishing the district. Additionally, the governing body may cooperate with other public agencies, with any industry, or any business located within the SBD in the implementation of any project within the district. The governing body may also enter into any agreement with any other public agency, person, firm, or corporation to effect any of the provisions contained in Sections 71.790 to Section 71.808; contract and be contracted with: sue and be sued; accept gifts, grants, loans, or contributions; and employ such managerial, engineering, legal, technical, clerical, accounting, and other assistance as it may deem advisable. Moreover, in any city with a population of three hundred fifty thousand or more, the governing body of the city creating the district shall have final discretion as to how the revenue derived from any tax to be imposed under sections 71.790 to 71.808 shall be used within the scope of the above purposes. The level of publicly funded services in the district existing prior to creation of the district shall not be decreased by the governing body. The governing body shall not transfer the financial burden of providing the services to the district unless the services at the same time are decreased throughout the city. Lastly, the governing body shall not discriminate in the provision of the publicly funded services between areas included in such a district and areas not so included.

In St. Louis city, real property subject to partial tax abatement under the provisions of chapter 353 shall, for the purpose of assessment and collection of ad valorem real estate taxes levied under the provisions of sections 71.790 to 71.808, be assessed and ad valorem real estate taxes shall be collected as provided in the ordinance adopted by the governing body of the city approving the development plan of any such corporation and authorizing tax abatement.

D. Taxes

For the purpose of paying for all costs and expenses incurred in the operation of the SBD, the provision of services or improvements, and incidental to the leasing, construction, acquisition, and maintenance of any improvements or for paying principal and interest on notes or bonds authorized for any said improvement, the district may impose a tax upon the owners of real property within the district. Such tax shall not exceed eighty-five cents on the one-hundred-dollar assessed valuation. Taxes levied and collected under sections 71.790 to 71.808 shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. For the purpose of paying for all costs and expenses incurred in the operation of the district and the provision of services or improvements, the district may impose an additional tax on businesses within the district.

Any SBD within a city which has a population of three hundred fifty thousand or more and is located within more than one county, upon authorization of a majority of the voters, may impose one or more of the following special assessments on all real property located within the SBD: (1) not more than five cents per square foot on each square foot of land; (2) not more than one-half of a cent per square foot on each square foot of improvements; and (3) not more than twelve dollars per abutting foot of the lots, tracts and parcels of land within the district abutting on public streets, roads and highways.

The governing body of any city in which there is a SBD may order an election on the approval of a new tax rate ceiling or assessment limit for any tax imposed pursuant to subsections 1 to 3 of section 71.800. All costs of any such election shall be borne by the district out of its existing levy. The order shall set forth the new tax rate ceiling or assessment limit proposed. Any provision of law to the contrary notwithstanding, the tax rate ceiling may be increased or decreased, from any rate as revised under the provisions of section 137.073, RSMo, to any rate not in excess of eighty-five cents on the one-hundred-dollar assessed valuation. The order shall specify a date on which ballots for the election shall be mailed.

Application for a ballot shall be conducted as follows. Persons entitled to apply for a ballot in an election to approve a new tax rate ceiling are: a resident individual of the district; or an individual, partnership, limited partnership, corporation, estate, or trust, which owns real property within the SBD. Only persons entitled to apply for a ballot in elections pursuant to this section shall apply. Such persons shall apply with the clerk of the city in which the SBD is organized. Each person applying shall provide his name, address, mailing address, and phone number; an authorized signature; and evidence that he is entitled to vote. No person shall apply later than the fourth Tuesday before the date for mailing ballots specified in the governing body's order.

E. Bonds

Any SBD may, upon approval by the voters, incur indebtedness and issue bonds or notes for the payment thereof. Notice of the election, the amount and the purpose of the loan shall be given. If the constitutionally required percentage of the votes cast are for the indebtedness, the district shall, subject to the restrictions of Section 71.796 and Section 71.800, be vested with the power to incur indebtedness in the name of the district and issue the bonds of the district for the payment thereof. The indebtedness authorized by this section shall not be contracted for a period longer than twenty years,

and the entire amount of the indebtedness shall at no time exceed ten percent of the value of taxable tangible property within the district. It shall be the duty of the district to provide for the collection of an annual tax sufficient to pay the interest on the indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within the time the principal becomes due.

In addition to the bonds specified in Section 71.802, the cost of any district of acquiring, constructing, improving, or extending any revenue producing facilities may be met from the proceeds of revenue bonds of the district. Revenue bonds issued under authority of this section shall be payable solely from the revenues derived from the operation of the revenue producing facility acquired, constructed, improved or extended in whole or in part from the proceeds of the bonds. No revenue bond issued pursuant to this section shall constitute an indebtedness of the district within the meaning of any constitutional or statutory restriction, limitation or provision. For the purpose of refunding, extending and unifying the whole or any part of any valid outstanding bonded indebtedness payable from the revenues of a revenue producing facility, the district may issue refunding bonds not exceeding in amount the principal of the outstanding indebtedness to be refunded and the accrued interest to the date of the refunding bonds.

The notes and bonds shall mature at such time or times, in the case of any general obligation bond or note not exceeding twenty years, from the date of issue of such original bond or note, and in the case of any revenue bond not exceeding fifty years from the date of issue, as may be provided by the governing body of such city. The notes and bonds shall bear interest at such rate, be in such denominations, be in such form, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places and be subject to such terms of redemption as provided by the governing body. Lastly, the notes and bonds shall be sold at public or private sale, at such price or prices as shall be determined.

XI. Neighborhood Improvement Districts

The Missouri state constitution was amended in 1990 to allow for the creation of "Neighborhood Improvement Districts" ("NID").

> "1. The general assembly may authorize cities and counties to create neighborhood improvement districts and incur indebtedness and issue general obligation bonds to pay for all or part of the cost of public improvements within such districts. The cost of all indebtedness so incurred shall be levied and assessed by the governing body of the city or county on the property benefitted by such improvements. The city or county shall collect the special assessments so levied and use the same to reimburse the city or county for the amount paid or to be paid by it on the general obligation bonds issued for such improvements.2. Neighborhood improvement districts may be created by a city or county only when approved by the vote of a percentage of electors voting thereon within such district, or by a petition signed by the owners of record of a percentage of real property located within such district, that is equal to the percentage of voter approval required for the issuance of general obligation bonds under article VI, section 26.3. The total amount of city or county indebtedness for all such districts shall not exceed ten percent of the assessed valuation of all taxable tangible property, as

shown by the last completed property assessment for state or local purposes, within the city or county."

The "Neighborhood Improvement District Act" ("Act") was passed to implement this constitutional provision. The Act is codified in R.S.Mo. §§ 67.453-67.475. A NID is an area of a city or county with defined limits and boundaries which is created by vote or by petition, benefitted by an improvement, and subject to special assessments against the real property therein for the cost of the improvement.

A. Creation of a NID

1. Election

If the governing body of a city or county wishes to create a NID, they may, by resolution, submit the question of creating the district to the voters residing in the district at a general or special election. The resolution shall include the project name, general nature of the proposed improvement, estimated cost, boundaries, and the proposed method of assessment of real property within the district. In addition, the resolution must include any provision for the annual assessment of maintenance costs of the improvement. The NID is created when approved by "the vote of the percentage of electors within such district voting thereon that is equal to the percentage of voter approval required for the issuance of general obligation bonds." Article VI, section 26 of the Missouri Constitution requires approval by 4/7 or 2/3 (depending on the type of election) of the voters in the district for the creation of a NID. The notice of election shall contain everything contained in the resolution, including a statement that the final cost of the NID and the amount of general obligation bonds issued shall not exceed the estimated cost of the improvement by more than twenty-five percent. Furthermore, the annual assessment for maintenance costs cannot exceed the *estimated* annual maintenance cost by more than twenty-five percent.

2. Petition

Alternatively, a city or county may create a NID if a petition "has been signed by the owners of record of at least two-thirds by area of all real property located within such proposed district." If any person or entity owns more than one parcel of land in the proposed district, that person or entity is allowed only one signature on the petition. In order to become effective, the petition shall be filed with the clerk of the city or county. A proper petition for the creation of a NID must set forth the information provided in the notice of election and it must provide notice that the names of the signers may not be withdrawn more than seven days after the petition is filed with the clerk.

3. Resolution or Ordinance

Upon receiving voter approval or upon the filing of a proper petition with the clerk, the governing body may, by resolution or ordinance, determine the advisability of the improvement and may order that the district be established. The resolution or ordinance shall state and make findings concerning the details laid out in the notice of election or petition. Additionally, it shall also state that the final cost of the improvement assessed against the real property within the NID and the amount of

general obligation bonds issued shall not, without a new election or petition, exceed the estimated cost of such improvement by more than twenty-five percent.

4. Costs, Plans, and Specifications

After the governing body makes the findings specified in section 67.457 and plans for the improvements have been prepared, the governing body shall, by ordinance or resolution, order assessments to be made against each parcel of real property benefitted by the improvement. The cost of any improvement in a NID shall be apportioned against each particular property in accordance with the benefits enjoyed by each property as a result of the improvement. Cost is assessed per front foot, square foot, or by any reasonable assessment plan, as determined by the governing body, which results in imposing a substantially equal share of the cost upon property similarly benefitted.

> "An improvement may be combined with one or more other improvements for the purpose of issuing a single series of general obligation bonds to pay all or part of the cost of such improvements." However, separate funds or accounts for each improvement must be established in the records of the city or county. A city or county that creates a NID "shall assess special assessments on the property deemed by the governing body to be benefitted by each such improvement pursuant to section 67.457." The money collected from the special assessments must be used to "reimburse the city or county for all amounts paid or to be paid by it as principal of and interest on its general obligation bonds issued for such improvements."

5. Notice

The plans and specifications for the improvement and the proposed assessment must be filed with the clerk, and be open for public inspection. After filing, the clerk then publishes notice that the governing body will conduct a hearing to consider the proposed improvement and assessments in a newspaper of general circulation at least once between 10 and 20 days before the hearing. In addition, the notice must contain the project name, the date, time and place of the hearing, general nature of the improvement, revised estimated cost (or the final cost if available), the boundaries, and that written or oral objections will be considered at the hearing. At the same time, the clerk must mail to the owners of the real property liable for the assessments a notice of the hearing and a statement of the cost proposed to be assessed against the property. The failure of any owner to receive the notice will not invalidate the proceedings.

6. Hearing

At the hearing, the governing body shall hear and pass upon all objections to the proposed improvements and assessments. The governing body may also amend the proposed improvements, plans and specifications, and/or assessments to any property, and, by ordinance or resolution, order that the improvement be made and financing be obtained as provided in sections 67.453 to 67.475.

7. Post-Hearing Procedures

After an improvement is authorized, the governing body may issue temporary notes of the city or county to pay the costs of the improvement in an amount not to exceed the estimated cost of the

improvement. These temporary notes are general obligations of the city or county. General obligation bonds of the city or county shall be issued and sold to refund, retire and pay off the temporary notes and any accrued interest. A separate fund or account must be created in the city or county treasury for each improvement project and they are to be used solely to pay the costs incurred in making the improvement. The proceeds from the sale of bonds and temporary notes by the governing body shall be credited to the funds or accounts. Upon completion of an improvement, if any balance remains in the fund or account, it shall be refunded back to the property owners or credited against the amount of the original assessment on each parcel of property, on a pro rata basis.

After construction of the improvement is properly completed, the governing body shall compute the final costs of the improvement and apportion the costs among the benefitted property in an equitable manner. "After the passage or adoption of the ordinance or resolution assessing the special assessments," the clerk must mail a notice to each property owner which describes his/her parcel of property, the special assessment assigned to such property, and a statement that the property owner may pay the assessment in full, with interest, on or before a specified date, or may pay such assessment in annual installments. Special assessments shall be collected and paid to the city or county treasurer in the same manner as taxes.

8. Bonds and Assessments

A special assessment shall be a lien on the property against which it is assessed on behalf of the city or county to the same extent as a tax upon real property. The lien attaches on the date of the assessment. The lien may be foreclosed in the same manner as a tax upon real property by land tax sale or by judicial foreclosure, at the option of the governing body. Upon the foreclosure of any such lien, "the entire remaining assessment may become due and payable and may be recoverable in such foreclosure proceeding at the option of the governing body." "All lands, lots, mineral rights, and royalty interests on which . . . neighborhood improvement district special assessments are delinquent and unpaid are subject to sale to discharge the lien for the . . . unpaid special assessments . . . ." No proceedings for the sale of land for unpaid special assessments, relating to the collection of unpaid special assessments and providing for foreclosure sale and redemption of land, shall be valid unless initial proceedings are commenced within three years after the delinquency occurs. In order to enable county and city collectors to be able to collect unpaid special assessments, the county auditor shall annually audit and list all unpaid special assessments and provide a copy of such audit and list to the county collector and to the governing body of the county. In any NID organized prior to August 28, 1994, an assessment may be levied and collected after the original period approved for assessment has expired, with the proceeds used solely for maintenance of the improvement.

9. Statute of Limitations

No suit to set aside the special assessments made under the Act or to question the validity of the proceedings shall be brought later than ninety (90) days from the date of mailing the notice to property owners of the assessments.

10. Total Indebtedness

The total amount of city or county general obligation bond indebtedness incurred for improvements, including temporary notes issued, may not exceed ten percent of the assessed valuation of all taxable tangible property within the city or county. "Any city with a population of three hundred fifty thousand (350,000) or more inhabitants shall appoint a citizen advisory committee composed of members of each council districts on proposed neighborhood improvement district."

R.S.Mo. § 67.456 was added to the Act in 2004. It mandates that the average maturity of bonds or notes issued under the Act after August 28, 2004, "shall not exceed one hundred twenty percent of the average economic life of the improvements for which the bonds or notes are issued." Any improvement for which a petition is filed or an election is held after August 28, 2004 must include provisions for maintenance of the project during the term of the bonds. Starting on August 28, 2004, if any parcel of property within a NID is divided into more than one parcel of property after the final costs of the improvement are assessed, all unpaid final costs of the improvement shall be recalculated and reassessed proportionally to each of the parcels resulting from the division, based on the assessed valuation of each resulting parcel. "No parcel of property which has had the assessment against it paid in full by the property owner shall be reassessed under this section." Furthermore, "[n]o parcel of property shall have the initial assessment against it changed, except for any changes for special, supplemental, or additional assessments authorized under the [Act]."

11. Supplemental or Additional Assessments

"To correct omissions, errors or mistakes in the original assessment which relate to the total cost of an improvement", the governing body may, without notice or hearing, make supplemental or additional assessments on property within a NID. However, if the supplemental or additional assessments exceed twenty-five percent of the estimated cost of the improvement, a new election or petition is needed. When an assessment is set aside by a court, the governing body finds that the assessment is excessive, or on advice of counsel the governing body determines that the assessment is or may be invalid for any reason, the governing body may, upon notice and hearing, make a reassessment or a new assessment as to such property.

B. NIDs in Adjoining Counties

The governing bodies of two or more adjoining counties may create a NID to improve a road or street located within the counties. All provisions of sections 67.453 to 67.475 shall apply to such a district and all powers included within those sections shall be available to the governing bodies of the district. However, any decision required of the governing bodies must be made in a unanimous manner by all governing bodies of the counties in the district. In forming the district, the governing body of each county must separately comply with the provisions of either subsection 2 or 3 of section 67.457. The separate fund or account required by section 67.473 shall be maintained in the treasury of the county containing the largest percentage of the assessed valuation of the district. The governing body of each county within the district is required to approve expenditures from the fund.

C. Case Law

In the first Missouri Supreme Court case to deal with NIDs, the Court upheld the constitutionality of the Neighborhood Improvement District Act. There were three issues in *Spradlin*: 1) may a city or county form a NID "where the land in the district is owned by a single entity and contains neither extant dwellings nor multiple residents"; 2) whether article VI, section 26(f) of the Missouri Constitution requires a city or county issuing bonds pursuant to article III, section 38(c), to provide for the collection of an annual tax on all of the taxable tangible property in the city or county; and 3) whether article VI, section 26(b) and article X, section 22(a) of the Missouri Constitution require voter approval before a city or county can issue NID bonds.

In *Spradlin*, Callaway County Golf Partners ("CCGP") proposed construction of a public golf course to the city council of Fulton, Missouri. Under the proposal, CCGP agreed to purchase land, improve the land with a golf course, lease the golf course to the City, and to operate and manage the golf course for the City. CCGP, as sole owner of the property, then petitioned the City Council to establish 187.87 acres of the land as the Fulton Golf Course Neighborhood Improvement District. As proposed, the 187.87 acre tract would be used exclusively as a golf course. At the time of the CCGP petition, the tract contained no residences. The City adopted Ordinance 690-95 creating the NID and authorizing the issuance of $ 3,110,000 in general obligation bonds to finance the improvement. The City also enacted Ordinance 692-95, which authorized a special assessment against the district property to pay the cost of the bonds. The ordinances did not provide for voter approval prior to issuance of the bonds. James Spradlin, a resident taxpayer of Fulton, filed suit claiming that a golf course is not a "neighborhood" under the constitution or the Act and that issuance of the bonds without voter approval violated article VI, section 26, and article X, section 22(a) of the Missouri Constitution.

Spradlin contended that because section 38(c) refers to "electors" and "owners of record", a NID requires multiple owners. The court said that Spradlin's argument ignored the rule that "whenever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or person is included . . . ." "Rules for the interpretation of statutes apply with equal force to the constitution." Therefore, the court held that a constitutional provision referring to electors or owners also refers to an elector and a single owner. Second, Spradlin contended that the word "neighborhood" inherently requires multiple parcels or multiple residents. Absent constitutional definition, the court looked to Webster's Third New International Dictionary 1514 (1976), which defined "neighborhood" as "an area or region of usually vague limits that is usually marked by some fairly distinctive feature of the inhabitants or terrain ...." Webster's New Universal Unabridged Dictionary 957 (1994) also defines a "neighborhood" as "a district or locality, often with reference with its character or inhabitants." "Under these commonly understood definitions, a neighborhood exists wherever there is a defined area, whether or not that area has multiple residents or residences." The court said that the definition of NID adopted by the legislature is consistent with one of the commonly understood meanings of "neighborhood" and, therefore, is consistent with the Missouri constitution. As a result, the city's decision to create a NID out of a single tract of land owned by a single entity was consistent with the Act and the constitution.

Spradlin further urged that Ordinance 692-95 offended section 38(c) because it purported to levy a tax against all of the taxable tangible property of the city in the event that the special assessment was insufficient to pay the principal and interest on the bonds. The city, relying on article VI, section

26(f), argued that the constitution's use of the words "general obligation bonds" in section 38(c) must be read as an authorization in the city to levy a tax against all of the taxable tangible property in the city. According to the court, "[b]y its language, section 26(f) requires that a city dedicate either an existing or new tax levied against *all taxable tangible property* in the city to meet the debt service whenever it issues general obligation bonds." Section 38(c) requires that "the cost of *all* indebtedness so incurred shall be levied and assessed . . . on the property benefitted by such improvements . . . ." The court said that section 38(c) contemplates that the city will act as guarantor of the NID bonds by issuing general obligation bonds that pledge the city's full faith and credit to the repayment of the bonds. However, section 38(c) does not authorize the city to impose a city-wide tax on all taxable tangible property to pay for NID bonds. Since section 38(c) and section 26(f) "are at loggerheads," the section passed last in time, 38(c), prevails. Therefore, the court held that "section 38(c) creates an exception to section 26(f) and does not permit the city to impose a city-wide tax on all taxable tangible property when the city issues neighborhood improvement district bonds."

The city appealed the trial court's judgment that article X, section 22(a), requires voter approval before the city can issue general obligation bonds because section 38(c), passed later than 22(a), does not require voter approval. According to the court, section 38(c) does not authorize a city-wide tax for NID bonds. If a city chooses to impose a levy against all taxable tangible property in the city upon failure of the special assessments to meet the bond payments, the bonds are no longer NID bonds issued pursuant to section 38(c). The bonds are general obligation bonds issued under section 26. As a result, the court said it did not need to decide whether section 22(a) applies. Section 26(b) requires the voters of the city to approve the issuance of general obligation bonds that require a city-wide tax to meet the debt service before the city can collect it. Section 38(c) permits a city to issue its NID bonds without city-wide voter approval, but only to the extent that the city is willing to pledge its current revenue stream to the bond payments if the special assessments prove inadequate. As a result, the court said that the portion of Ordinance 692-95 that purported to levy a new city-wide tax without voter approval violated article III, section 38(c) and article VI, section 26(b).

The only other case which discusses NIDs in detail is *Rasse v. City of Marshall*. In May 1994, Louis Rasse petitioned the City of Marshall for creation of the Salt Fork Neighborhood Improvement District for improvements on a 26.13 acre tract of land that Mr. Rasse owned in fee simple. The petition proposed development of the land by constructing roadways, streets, curbs, gutters, driveway entrances, drainage works, sewers, water mains, and utility connections with an estimated the cost of $ 639,676.00. The City approved the project and the NID was eventually renamed the Cypress Point Subdivision.

On January 2, 1996, Mr. Rasse attended a city council meeting at which the ordinance making the final assessments was presented for ratification. Mr. Rasse opposed wording in the ordinance that the work had already been completed according to plans and specifications. However, the City Administrator disagreed, and other council members related that the construction company had committed to rectify any deficiencies. In spite of Mr. Rasse's opposition, the city council enacted Ordinance No. 6929 which recited that the Salt Fork NID Project was completed in accordance with plans and specifications. The ordinance set the final costs of the improvements at $ 798,500.00 and assessed $ 15,066.04 against each lot. The city clerk mailed notice of the special assessments to Mr. Rasse on January 17, 1996. Mr. Rasse did not pay the special assessments in full and the City then divided the amount due plus interest into annual installment payments. To collect the 1996 and 1997

special assessment installments, the City advertised a tax sale of Mr. Rasse's land in July 1998. In response, Mr. Rasse filed the lawsuit that is the subject of this appeal.

On August 19, 1998, Mr. Rasse filed his Petition for Declaratory and Injunctive Relief and contended that the special assessments against him were invalid because the construction project had not been completed according to specifications. The city filed a motion for summary judgment claiming that Mr. Rasse's action to challenge the special assessments was barred by the statute of limitation in R.S.Mo. § 67.465. According to section 67.465, no suit to set aside the special assessments or to otherwise question the validity of the proceedings relating thereto shall be brought after the expiration of ninety days from the date of mailing of notice to property owners of the assessments. The court said that the plain language of § 67.465 broadly prohibits any suit to set aside NID special assessments or to otherwise question the validity of the proceedings. Mr. Rasse's lawsuit sought a declaration invalidating the special assessments and an injunction prohibiting their collection. Even though presented in terms of equitable relief, the court said that the claim amounted to an attempt to set aside the NID special assessments, which "necessarily equals a questioning of the validity of the proceedings. Accordingly, the court held that matters in Mr. Rasse's lawsuit contesting the special assessments and their validity fit well within the ambit of the special statute of limitation in § 67.465. The special assessment notice was mailed on January 17, 1996. The petition was filed on August 19, 1998, so the court ruled that the special statute of limitation "barred the portion of the lawsuit challenging the special assessments."

XII. Community Improvement Districts

In 1997, the Missouri General Assembly passed the Community Improvement District Act. Because of constitutional concerns over the manner in which the bill was passed, the CIDA was reintroduced and again passed in 1998.

A Community Improvement District is created upon a petition by a majority of property owners within a district. Once established the CID has the power to remove or cure blighted areas, construct public improvements, and foster economic development. There are a number of ways to fund a CID, but only a CID established as a political subdivision may levy taxes. A CID may expire upon its own terms or a petition filed by the majority of property owners.

A. Formation

1. The petition

A petition for a proposed Community Improvement District is filed with the clerk of the municipality in which the district will be located. The petition must be signed by property owners owning more than 50% of the assessed value of the real property within the boundaries of the district and the owners of more than 50% of all the real property within the district (50% value and 50% per capita). The petition should include a statement indicating whether the CID is being formed as a political subdivision or a not-for-profit corporation. This decision impacts a number of issues, most importantly the methods available to raise funds for the district.

The statute lists a number of other requirements for the petition, including: the name of the district; a legal description of the proposed district; a five year plan stating the purposes of the district, the improvements the proposed district will make, and a cost estimate of these improvements; and the proposed length of time for the existence of the district.

2. Notice/Hearing

Within ninety days of the receipt of a petition the municipal clerk shall determine if the petition contains all of the necessary information (meets the statutory requirements). If the petition does not meet the requirements the clerk will return it to the submitting party, specifying which requirements were not met. The clerk shall forward a properly filed petition to the governing body of the municipality.

Within forty-five days of receiving a verified petition from the municipal clerk the governing body shall hold a public hearing on the establishment of the CID. Notice must be provided by publication and by mailing. At the public hearing the governing body may adopt an ordinance approving the petition and establishing the proposed CID. A written report must be sent the Missouri Economic Development Council if the creation of the CID is approved.

3. Addition/Removal of Property & Mergers

A CID may add or remove property from the district by ordinance upon: a properly filed petition; a public hearing; and approval by the Board. The CID may add or remove from the district.

Any district organized as a non profit corporation may merge with any other district also organized as a non profit corporation. The boundaries of the merging districts must be contiguous. The term of existence of the surviving district corporation shall be the shortest length of time remaining for existence of either of the merging districts.

B. Board of Directors

The procedure for establishing a board of depends upon whether the CID was designated a political subdivision or a not for profit corporation. If the CID is designated as a not for profit corporation the election and qualifications of directors shall be in accordance with Chapter 355 of the Missouri Revised Statutes.

If the CID is designated as a political subdivision the board members may either be elected or appointed. The board shall consist of at least five, but not more than thirty members. The members (whether appointed or elected) shall serve staggered terms. If the board is to be elected the one half of directors receiving the most votes shall serve a term of four years and the one half receiving the least amount of votes shall serve a term of two years. If appointed one half of the board shall serve two years and the other half shall serve a term of not less than three, but not more than four years as designated in the petition.

The Board is responsible for submitting an annual budget to the governing body of the municipality. The governing body may review and comment on this proposed budget, but these

comments shall only be recommendations. The Board must then hold a meeting and formally adopt a budget not less than thirty days prior to the first day of the fiscal year. Within one hundred and twenty days of the end of the fiscal year, the Board is required to submit a report detailing the services provided, revenues collected and expenditures made to the municipal clerk and the Missouri Department of Economic Development.

C. Powers of the District

Each CID shall have all the powers necessary to carry out and affect the purposes and provisions of the district, unless limited by the governing body of the municipality or the petition. In addition to this broad grant of power the Community Improvement District Act specifically lists a number of powers a CID possesses. The CID may: (1) sue and be sued; (2) enter into contracts; (3) acquire and dispose of property as necessary; (4) borrow or loan money; (5) levy and collect special taxes and assessments;; and (6) if the CID is organized as a political subdivision it may also levy and collect real property taxes and business license taxes.

The CID may enter into an agreement with the municipality for the purpose of abating any public nuisance within the district. The CID has the power to support business activity and economic development in the district through the promotion of business activity and the development, retention, and recruitment of developers and businesses. The CID may also provide assistance to construct, reconstruct, install, repair, maintain, and/or equip any...public improvements.

If the district is located in a blighted area the CID is granted additional powers. It may contract with any private property owner to demolish, renovate, reconstruct or rehabilitate any building or structure owned by such private property owner. The CID may also expend or loan its revenues to take actions reasonably anticipated to remediate the blighting conditions and serve a public purpose.

D. Funding

A district may use any one or more of the assessments, taxes or other funding methods to accomplish any power, duty, or purpose of the district. The county or city collector shall collect the real property taxes and special assessments while the Director of Revenue is responsible for collecting any sales tax.

1. Special Assessments

A district may levy a special assessment against real property in its boundaries if authorized by a petition signed by fifty percent or more of the real property owners in the district by value and per capita. The special assessment may be allocated in any method as long as the benefit conferred is related to the cost for each tract of land. The Board may impose a special assessment at a rate lower than which it was authorized to and then increase the rate up to that approved by the voters. Each assessment that is due and owing shall constitute a perpetual lien against the property from which it is derived and may be foreclosed pursuant to RSMo. § 88.861.

2. Obligations

A CID can issue obligations payable out of out of all, part, or any of its revenues. Such obligations may be secured by all or part of any property, any interest in property or any other security interest. These obligations must be authorized by the district and shall not be for a term of greater than twenty years. A CID cannot issue a general obligation without the approval of the majority of qualified voters as required by the Missouri Constitution. Obligations issued by a CID which is a political subdivision and any proceeds from such obligations are exempt from taxation.

3. Special Fund

Any municipality in which a district is located may create a fund by ordinance for the CID in the municipality's treasury. This fund can be used to: pay the costs of planning, administration, and any improvement the CID is authorized to make; prepare preliminary plans and studies to determine the feasibility of a public improvement or service; and, if ordered by the governing body of the municipality, pay the initial cost of the public improvement or service until obligations have been sold or issued. **4. Sales and Use Tax**

Only a CID formed as a political subdivision may levy a sales and use tax on retail sales made in the district. The sale of motor vehicles, trailers, boats or outboard motors and sales to or by public utilities and providers of communications, cable, or video service are excluded from any such tax. A majority of qualified voters must approve the tax through a mail-in ballot.

The tax may be imposed in increments of one-eighth of a percent, up to one percent. The district may also establish its own brackets to be used in collecting the tax. The tax shall be collected by the Missouri Director of Revenue. Lastly, the tax may not be repealed if it would impair the district's ability to repay any liabilities.

E. Real property or business license tax

Only districts which have been formed as political subdivision have the power to levy taxes. A district may levy a tax upon real property or any business located within the district if approved by a majority of qualified voters via mail-in ballot.

The district may levy the approved tax at a rate lower than that approved by the voters and may increase the tax up to this rate ceiling without further voter approval. The district cannot repeal or amend a real property or business license tax if doing so would impair its ability to pay back liabilities it has incurred or obligations it has issues.

F. Termination of a CID

Each ordinance establishing a CID shall specify the term for the existence of the CID. The term may be set forth as either a minimum, maximum, or definite number of years.

A CID may also be terminated prior to the expiration of its term if the CID has no outstanding obligations. The first step in this process is the filing of a petition which must be signed by more than

fifty percent of property owners by value and per capita. Once a proper petition is filed a hearing will be held and the governing body of the municipality may adopt an ordinance terminating the CID. Upon termination of the CID the assets shall be distributed in accordance with the dissolution ordinance. Every effort should be made to ensure that the distribution benefits the real property within the district.

G. Statute of Limitations

Any lawsuit challenged the creation of a CID, the levying of any tax or assessment, or the merger of two or more CIDs must be brought within ninety days from the effective date of the passing of such ordinance or resolution.

XIII. Transportation Development District

A transportation development district (TDD) is a political subdivision of the State of Missouri that may be created to undertake specific projects to improve public transportation. The group wishing to form the TDD must petition the circuit court within the county the TDD will be located. If approved the matter is submitted to the voters or property owners within the TDD. Once established, the district may be funded by the issuance of bonds or the levying of special assessments or taxes. A TDD works closely with Missouri Highway and Transportation Commission or the local transpiration authority throughout its existence. At the conclusion of the project control of the TDD is formally transferred to the Commission or local transportation authority.

A. Formation

1. The Petition

The first step in creating a Transportation Development District (TDD) is the filing of a petition with the clerk of the circuit court of any county partially or totally within the proposed TDD. There are a number of items that must be included a petition to form a TDD. These requirements include: a description of the boundaries of the proposed TDD; the project(s) to be undertaken by the proposed TDD; the estimated costs and revenues of the project; and details of the budgeted expenditures. The petition shall name the Missouri Highway and Transportation Commission (the Commission) and the local transportation authority as Respondents.

A petition may be filed by not less than fifty registered voters from each county partially or totally within the proposed TDD. However, if no registered voters reside within the proposed district, the owners of all real property located within the proposed TDD may file a petition. Alternatively, the governing body of any local transportation authority may file a petition to create a TDD.

Two or more local transportation authorities may pass a joint resolution calling for the establishment of a TDD. The petition may be filed in the circuit court of any county where the proposed TDD will be located. A joint petition may also be filed if at least fifty registered from each of the two (or more) counties partially or totally within the proposed TDD sign a petition.

2. Notice/Hearing

If the petition is filed by registered voters or by a local transportation authority the circuit clerk with whom the petition was filed must give notice to the public. The circuit clerk also has the option of ordering a hearing on the proposed TDD. If the petition was filed by the real property owners residing in the proposed district (i.e. there are no registered voters in the district) the clerk must order that a hearing be held.

3. Court Approval/Denial

Within thirty days of the filing of a petition the circuit clerk shall serve a copy on the respondents, the Commission and the local transportation authority (if not a petitioner). The respondents then have thirty days to file a response either agreeing with or opposing the TDD. If the respondents oppose the creation of the TDD the court shall hear the case without a jury and issue a declaratory judgment.

Any resident, taxpayer, entity, or local transportation authority within the proposed district may intervene in support or in opposition of the proposed TDD. A recent case out of the Missouri Western District Court of Appeals upheld the trial court's refusal to allow neighboring property owners to intervene in opposition to a proposed TDD. The court stated that neither proximity to the TDD nor possible taxation conferred the right to intervene. The proposed district would not directly tax the appellants or their property. They would only be taxed if they shopped in the district which was too attenuated an interest to allow them to intervene.

The circuit court can refuse to certify the creation of the TDD if the petition is defective, the proposed TDD is illegal or unconstitutional or if it will be an undue burden on any property owner within the district. If the court finds that a proposed method of funding the TDD is illegal or unconstitutional it shall simply strike such method from the petition.

If the circuit court approves the petition it will then call an election. A simple majority vote is needed to approve the proposed TDD. If the petition was filed by owners of real property, each owner shall have one vote per acre of real property owned.

If the proposed district is not approved by the voters the same question shall not be submitted for voter approval again for at least two years. If the petition was filed by two or more local transportation authorities (or registered voters from two or more counties) and is not approved, a new petition must be filed before the question is submitted again to the voters.

B. Board of Directors

The composition of the Board of Directors and whether the members are elected or appointed depends on who filed the petition to form the TDD.

1. Petition filed by voters

After the approval of the petition an election shall be held to elect the board of directors. The board shall consist of not less than five and not more than fifteen members. The directors will be elected at large and serve terms of one, two, or three years with the member receiving the most votes serving the longest term, the member receiving the second most the second longest term, and so on.

2. Petition filed by owners of real property

After approval of the petition the circuit clerk shall call a meeting of the owners of real property within the district to elect a board of directors. Each owner will receive one vote per one acre of land owned. The directors shall serve terms of one, two or three years with the one-third receiving the most votes serving three years, the next third serving two years, and the last third serving one year.

3. Petition filed by joint resolution

If the district is comprised of four or more local transportation authorities, the board will consist of the presiding officer of each authority. If the district is comprised of 2 or 3 local transportation authorities the board shall consist of the presiding officer of each authority plus a member appointed by said officer.

4. Appointees

The Commission shall appoint one or more advisors to the board. Any local transportation authority that will assume maintenance of the project shall appoint one or more advisors to the board. Any county located within the TDD that is not a local transportation authority may appoint one or more advisors to the board. These advisors have the right to attend all meetings and have access to all records, but do not have a vote.

5. Powers of Board

The board shall possess all of the district's legislative and executive powers. A majority of the board constitutes a quorum. If a quorum exists, a majority of those voting have the authority to act in the name of the board and approve any board resolution.

C. Powers of the District

The district has the power to contract with commission, a local transportation authority, a corporation, partnership or individual regarding funding, promotion, planning, designing, constructing, improving, maintaining, or operating a project or to assist in such activity. The district may also contract with the Commission or a local transportation authority to transfer the project.

The more general powers of a district include: the right to sue and be sued; to pay its employees and contractors; and to purchase or lease real or personal property. The district may also exercise any other implied power necessary or convenient for the district to accomplish its purpose.

D. Submission/Approval of Projects & Project Control

Before commencing construction or funding of a project, the TDD must submit the project to the Commission for approval. Any modifications to a plan previously approved by the Commission must be submitted to Commission for approval. If the project will not be merged with any state highways and transportation system under the Commission's jurisdiction the project must also be submitted to the local transportation authority for approval. However, the Commission may determine it has no interest in the project in which case the TDD is only required to submit the project to the local transportation authority for approval.

The Commission or local transportation authority also must approve: the purchase or sale of right of ways or limiting access from adjacent property to the district. Prior approval by the applicable authority is also required before a TDD can condemn lands for a project.

E. Funding

A district may be funded by issuing bonds, levying special assessments, imposing taxes, or in some instances toll roads. Assessments and property taxes shall be collected by the county collector(s) unless the TDD decides to undertake the task itself. The Director of Revenue is responsible for the collection of sales taxes.

1. Special Assessments

A district may levy a special assessment if the assessment is approved by a majority of the voters in the district or by the unanimous vote of owners of real property in the district. If the vote on the special assessment fails the board of directors may delete (with the approval of the commission or the local transportation authority) any portion of the project that was to be funded by the special assessment. The district may establish different classes or subclasses of property and impose different levy rates according to the benefit derived by each class or subclass.

2. Property Tax

The district may impose a property tax not to exceed an annual rate of ten cents per $100 of assessed value if such tax is approved by at least four-sevenths of the qualified voters in the district. The district may initially levy a tax lower than the ceiling and can then increase the tax up to the ceiling without voter approval. The county collector of each county the TDD is located shall be responsible for the collection of this tax.

3. Sales Tax

Any district can imposes a sales tax on all retails sales made in the district by resolution of the board. However, the board cannot pass such a resolution unless authorized by a majority of the voters with this power. If a TDD is comprised entirely of a county or a city, the TDD may still establish a retail sales tax upon the approval of qualified voters.

The tax will be imposed upon all sellers for the privilege of doing business in the district pursuant to sections 144.010 to 144.525 of the Missouri Revised Statutes. The tax will not apply to the sale of vehicles, trailers, boats, outboard motors, telephone service, electricity, water, or gas (natural or artificial). The tax may be imposed in increments of 1/8% up to 1%. The district may elect to impose brackets to avoid fractions of pennies. The director of revenue shall perform all duties incident to the administration, collection, enforcement and operation of the tax.

The sales tax may be repealed or amended as long as doing so would not affect the district's ability to pay back its liabilities. Upon a petition of ten percent of the qualified voters within the district to repeal such a tax the matter will be submitted to all of the qualified voters as long as doing so would not affect the district's ability to pay back its liabilities.

In each TDD where a sales tax has been imposed, every retailer shall display a sign stating the rate of the tax.

4. Toll Roads

The district may charge and collect tolls and fees if approved by a majority of qualified voters. The district may relocate an existing highway (subject to Commission approval) or a road or street (subject to approval by local transportation authority), but the highway, road or street cannot be an existing free public street, road or highway (it has to already be subject to a toll/fee).

5. Borrowing Money/Issuing Bonds

A TDD may incur liabilities, buy or lease property, and/or borrow money to accomplish its purposes. A TDD may also issue bonds, notes, and other obligations which are secured by any or all of the district's property. However, such obligations cannot be secured by property acquired by eminent domain. Also, no obligation of the district shall be an obligation of the State of Missouri or any agency of political subdivision thereof without written consent.

A district may issue bonds to pay for its project(s). The district shall determine the rates and prices of such bonds, but the maturity date shall not exceed forty years. These bonds, the interest thereon, or any proceeds from such bonds are exempt from Missouri state taxes except the state estate tax. The district may issue contract with the Commission or the local transportation authority to issue bonds if it will be merged into the state highways or a local transportation system.

Bonds issued by the district are the sole responsibility of the district and shall not constitute a debt of the state of Missouri, or any agency or political subdivision of the state.

F. Audits

The state auditor shall audit each district at least once every three years. The auditor may choose to audit a district more frequently if deemed appropriate.

G. Project completion

Within six months after the development and initial maintenance costs have been paid the district shall pursuant to contract transfer ownership and control of the project to the Commission or the local transportation authority. After completing its project and transferring ownership, the district may submit to qualified voters the question of whether it should be abolished. A TDD may not be abolished if there are outstanding claims or causes of actions against it, its liabilities exceed its assets, or while the TDD is insolvent.

The district could also choose to take on another project(s) subject to voter approval.