

## CONSTITUTIONAL LIMITATIONS on LAND USE

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### I. Historical Aspect of Zoning as Constitutional Case Scenarios

#### A. 1791: Bill of Rights

**10<sup>th</sup> Amendment** – Power of States to enact zoning is inherent b/c not in the enumerated powers delegated to the federal government and not prohibited to the states by the Constitution; therefore reserved the power for the states.

#### B. 1791: Bill of Rights

**5<sup>th</sup> Amendment** - nor shall private property be taken for public use without just compensation

#### C. 1821: Missouri 1<sup>st</sup> Constitution

**Missouri applied for admission into the Union and submitted its constitution.**

#### D. 1875: Missouri Constitution

We, the people of Missouri, with profound reverence for the **Supreme Ruler of the Universe**, and grateful for His goodness, do establish this constitution for the better government of the state.

#### **Sidenote: The Declaration of Independence: 1776 –**

“When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and **Nature’s God** entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

#### **Article I, Section 10: Due Process:**

That no person shall be deprived of life, liberty or property without due process of law.

## **Article 1, Section 26: Public Use & Just Compensation**

That private property shall not be taken or damaged for public use without just compensation.

## **Article 1, Section 28: No Private Takings – Regardless of \$ Judicial Determination of Public Use**

That private 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.**

### **E. 1916:**

City of New York enacts 1<sup>st</sup> Comprehensive Zoning Ordinance

### **F. 1922:**

United States Supreme Court

**Pennsylvania Coal v. Mahon** - Regulatory Takings are land use regulations that are so burdensome, i.e. “goes too far” that they result in a taking prohibited by the 5<sup>th</sup> Amendment.

#### **Facts**

Constitutional challenge (taking requiring just compensation) to a statute that prohibited mining of coal in such a way so as to cause the surface to subside, if the surface is owned by another.

#### **Holding**

Statute is unconstitutional.

#### **Reasoning**

If regulation of land use goes too far, it will be recognized as a taking requiring just compensation under the Fifth Amendment.

Statute here takes away an entire estate that was bargained for (mineral rights to the coal).

(Even though the statute furthered a public policy of protecting surface owners, it diminished the investment-backed expectations of the mineral rights owners to such a degree that it amounted to a compensable taking)

**G. 1926:**

United States Supreme Court –

**Village of Euclid v. Ambler Realty – “fairly debatable”**

“Nuisance”: right thing in the wrong place/”pig in a parlor”

Nuisance should be controlled by legislative classification provided the judgment is “fairly debatable”.

**Facts**

Facial due process challenge (under the Fourteenth Amendment) of a zoning ordinance (that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the state of Ohio).

Specifically addressing the creation of Residential Districts which greatly restrict property use by excluding all business and even apartments and hotels, etc.

Seeking injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions.

**Holding**

Zoning ordinances are not unconstitutional (do not violate Due Process Clause) on their face.

**Reasoning**

Rule: If the validity of the legislative classification for zoning purposes be FAIRLY DEBATABLE, the legislative judgment must be allowed to control

Residential Districts have a rational relation to the health and safety of the community

- Less congestion and potential for disorder
- Less need for street repair
- Less danger of fire
- Provides quiet areas for residences
- Less reason for criminals to come into neighborhood if no stores and shops...they would be identified as strangers

Constitutional challenges to zoning ordinances will have to be brought in particular cases as they arise.

**H. 1928:**

United States Supreme Court – Constitutional Limits on Zoning  
**Nectow v. City of Cambridge**

**Facts**

Due process challenge (deprived of property without due process of law; invalid exercise of police power) to Euclidean zoning ordinance (residential, commercial and industrial districts) as applied to Plaintiff's property.

Seeking injunction on the statute with regard to Plaintiff's property only and a permit allowing him to build on the property without regard for the ordinance.

Owner had a contract to sell the property prior to the passage of the ordinance, which was terminated by the Buyer due to the new zoning restrictions. (Business and industry of all kinds are excluded from the particular parcel, while the rest of the owner's tract is unrestricted).

**Holding**

Zoning ordinance is unconstitutional deprivation of Plaintiff's property without due process of law.

**Reasoning**

Zoning of Plaintiff's parcel as residential is not indispensable to the general plan.

Zoning must bear a substantial relation to the public health, safety, morals, or general welfare.

Ford Motor Co., unrestricted lands to the east and south, soap factory and R.R. tracks are near. (Other residences as well).

Court found that the general welfare would not be promoted by the zoning of Plaintiff's property.

**I. 1945: Missouri Constitution –  
Article VI, Section 21 – Surrounded by “Chartered Cities”**

Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, re-planning, 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.

**J. 1951: LCRA Law enacted:  
Limited to Communities of 75,000+  
Detailed procedures of Eminent Domain**

POLICY: It is hereby found and declared that there exists in municipalities of the state insanitary, blighted, deteriorated and deteriorating areas which constitute a serious and growing menace injurious to the public health, safety, morals and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, necessitating excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, .... constitutes an economic and social liability, ....that this menace is beyond remedy and control solely by regulatory process in the exercise of the police power and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided; that the elimination or prevention of the detrimental conditions in such areas, the acquisition and preparation of land in or necessary to the development, renewal or rehabilitation of such areas and its sale or lease for development, renewal or rehabilitation in accordance with general plans and redevelopment or urban renewal plans of communities and any assistance which may be given by any public body in connection therewith are public uses and purposes for which public money may be expended and private property acquired; and that the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination; and that certain insanitary, blighted, deteriorated or deteriorating areas, or portions thereof, may require acquisition and clearance, as provided in this law, ....

Eminent Domain Procedures provided therein.

**K. 1954 - Missouri Supreme Court –**

**Dalton v. Land Clearance Authority of St. Louis**  
Constitutional to take old buildings and vacant land  
– NOT considered for Private Use  
- Public Use to “Clear Blight”

- Legislative Determination of public use is conclusive

**L. 1967 – Planned Industrial Expansion – 400,000 inhabitants**

**L. 1982 – TIF ACT**

Definitions: "Municipality", a city, **village**, or incorporated town or any county of this state. For redevelopment areas or projects approved on or after December 23, 1997, "municipality" applies only to cities, villages, incorporated towns or counties established for at least one year prior to such date;

Powers of Municipality: (3) Pursuant to a redevelopment plan, subject to any constitutional limitations, 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, real or personal, 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.

**1991- U.S. Steel v. Koehr  
Reconciles Article I, Section 28 (Judicial Determination)  
with Article VI, Section 21 –**

Legislative Determination is conclusive evidence of public use UNLESS clear evidence of that the legislative finding is arbitrary, induced by fraud or bad faith.

[Mo. Const. art. I, § 28](#), and [Mo. Const. art. VI, § 21](#), considered together, mean that final determination of the question whether a contemplated use of any property sought to be taken under [Mo. Rev. Stat. §§ 99.300-.715](#) is public rests upon the courts, but a legislative finding under said law will be accepted by the courts as conclusive evidence that the contemplated use thereof is public, unless it further appears upon allegation and clear proof that the legislative finding is arbitrary or is induced by fraud, collusion or bad faith. [State ex rel. U.S. Steel v. Koehr, 811 S.W.2d 385, 1991 Mo. LEXIS 70 \(Mo. 1991\).](#)

**2008 – City of Arnold v. Tourkakis**

Plain and unambiguous meaning of [Mo. Const. art. VI, § 21](#) does not place any limits on legislative enactments for non-charter cities or on the enactment of ordinances by charter cities to exercise eminent domain. Therefore, a non-charter city was authorized under the Missouri Real

Property Tax Increment Allocation Redevelopment Act and other sources to exercise eminent domain, and a trial court erred in finding that Mo. Rev. Stat. ch. 99 was unconstitutional as inconsistent with [Mo. Const. art. VI, § 21](#). [City of Arnold v. Tourkakis, 249 S.W.3d 202, 2008 Mo. LEXIS 28 \(Mo. 2008\)](#).

**K. 1978:**

United States Supreme Court –  
**Penn Central Transp. Co. v. City of New York**

**Balancing Test:** government's interest (promoting landmarks) vs. the detriment to owner imposed by designation - NO TAKING!  
(Could be transferred and continue operating)

**Facts**

New York City's Landmark Preservation Law was challenged as a taking of property that requires just compensation under the Fifth Amendment when Penn Central was not permitted to sell the development rights to a third party to develop a 55 story high-rise above Grand Central Terminal in Manhattan.

**Holding**

Statute did not provide for a taking requiring just compensation.

**Reasoning**

The Court provides a method to determine when government regulation goes too far and constitutes a taking requiring just compensation.

Three (3) factors to consider:

1. Economic Impact (on the parcel)
2. Investment-backed Expectations
  - Primary expectation is how it is being currently used, the law does not interfere with the current use of Grand Central Terminal
  - Not barred from building above the terminal, just can't put up a building of over 50 stories
  - Can transfer their development rights to other parcels on the block
3. Character of the Governmental Action
  - Taking may be more readily found when there is a physical invasion than when there is an adjustment on benefits and burdens of economic life to promote the common good (such is done with taxes)

All amount to a diminished value test.

The impact of the City's Landmark Law does not diminish the value of the parcel so much so as to constitute a taking.

(Really the Court intertwines the language and confuses the tests for valid exercise of police power and those for takings)

(Held that landmark preservation is a valid public purpose and historic preservation laws are not inherently arbitrary and capricious...all landmarks were similarly burdened under the law...also, many legitimate land use regulations have disproportionate economic impacts)

Confirmed in **2002 – Tahoe-Sierra Preservation County.**

**L. 1982:**

United States Supreme Court-  
**Loretto v. Teleprompter Manhattan CATV Corp.**

**Physical Invasion = Taking**

**M. 1985:**

United States Supreme Court –  
**City of Cleburne v. Cleburne Living Center**

**Equal Protection for mentally disabled.**

**N. 1987:**

United States Supreme Court –  
**Nollan v. California Coastal Commission**

**Nexus between demand and burden**

**O. 1990:**

**Missouri Court of Appeals: SHC v. Sturmfels – Nexus**

**P. 1992:**

United States Supreme Court –  
**Lucas v. South Carolina Coastal Council**

**Deprivation of all use – taking per se**

**Q. 1994:**

United States Supreme Court –

**Dolan v. City of Tigard** – Greenway dedication was a taking.

**Nexus and rough proportionality**

**R. 2005:**

United States Supreme Court:

**Kelo v. City of New London**

**II. Dedications:** private land *voluntarily* conveyed by owner for public use

a. Dedications can be made in two different ways:

- i. compliance with statutory requirements, or
- ii. through a common law dedication

b. Statutory Dedication

- i. Chapter 445 R.S.Mo. Provides a comprehensive plan for the platting and approval of real estate subdivisions, and the dedication of land for streets and other public uses.

*Ginter v. City of Webster Groves*, 349 S.W.2d 895 (Mo. 1961).

445.010 – 445.070 R.S.Mo.: Plat configuration, recordation and conveyance of easement interest in property.

*Willy v. Lieurance*, 619 S.W.2d 866 (Mo. App. S.D. 1981).

- ii. Acceptance/Rejection Issues

If the plat is approved compliant with the statutory provisions of Chapter 445, the dedication is valid and irrevocable without acceptance by the city. *Ginter v. City of Webster Groves*, 349 S.W.2d 895 (Mo. 1961).

71.270 R.S.Mo. provides the procedure for a county to follow in order to vacate a dedication even though the dedication may have properly conformed to the prescribed statutory scheme in Chapter 445

49.292 R.S.Mo. requires that a dedication may not be recorded until the grantee's acceptance had been acknowledged and proved

49.292 R.S.Mo. grants the county commission of any county the power to reject any dedication if the commission determines such rejection to be in the best interest of the county

*Willy v. Lieurance*, 619 S.W.2d 866 (Mo. App. S.D. 1981): the non-use of a statutory dedication by the public does not constitute an abandonment of the dedication (a dedication for a road is not lost when a county never spends money or labor for the construction of those roads)

c. Common Law Dedication

- i. The statutory scheme set out by Chapter 445 does not operate to restrict the common law power of an owner to dedicate land to public use. *State ex rel. State Highway Commission v. Public Water Supply Dist.*, 559 S.W.2d 538 (Mo. App. 1977) see also *Ginter* at 899 (Common law dedication of land for public use has not been abolished in Missouri).
- ii. “A common law dedication is accomplished when the proprietor of land does some act which clearly indicates his **intention** to dedicate the land to public use and there is an **acceptance** by the public.” *City of St. Charles v. DeSherlia*, 308 S.W.2d 456 (Mo. App. 1957).
- iii. Grantor Intent
  1. Intention of the owner to dedicate land for public use is the foundation of every dedication
  2. Grantor intention to dedicate land for public use could be manifested in:
    - a. a plat submitted in an attempt to comply with the statutes, or
    - b. it may be reflected in deeds between private individuals
- iv. Public Acceptance
  1. Unlike statutory dedications, common law dedications require public acceptance
  2. Public acceptance may be implied from:
    - a. long continued use by the public as of right, or

- b. by acts of the city itself, such as extending to a dedicated street the customary municipal services
- 3. Something as simple as non-use of the dedication by the public is enough to establish a lack of public acceptance thereby invalidating the dedication
- v. Note: when attempted compliance with the statutes becomes incomplete or defective, yet the dedicated land is accepted by the public, the dedication is valid under the common law even though the statutory requirements were not met

**III. Exactions:** dedication or fee requirements *imposed* on developers as a condition of approval of a development plan

- a. Exactions in the form of forced dedications of private property for public use may constitute a compensable taking
- b. *Nollan v. California Coastal Commission*, 483 U.S. 845 (1987): an exaction will constitute a compensable taking unless there is a “rough proportionality” between the exaction and the desired development by the property owner (the rough proportionality test is in addition to the traditional requirements that the state regulation advance a legitimate state interest and that the owner not be deprived of all economically viable use of the land)
- c. *Dolan v. City of Tigard*, 512 U.S. 374 (1994): in determining “rough proportionality,” “the city is required to make an ‘individualized determination’ that the required dedication is related both in nature and scope to the anticipated impact of the proposed development.”
  - i. The result of *Nollan* and *Dolan* is that for an exaction to be upheld as a valid police power regulation, three conditions must be met:
    - a. the regulation imposing the exaction must be an appropriate exercise of existing statutory authority,
    - b. if it is, then the effect of the regulation must be reasonably related to its purpose and degree of connectivity set out in *Dolan* must exist between the exaction imposed and the projected impacts of the development, and
    - c. If the regulation requires a fee in lieu of the dedication, the nexus between the purpose and effect of the ordinance should receive even greater scrutiny.