

DRONING ON AND ON.... AND OTHER HOT LEGAL ISSUES FOR PLANNERS

KC–American Planning Association
Planning Law Seminar
February 16, 2017

WHITE | GOSS
ATTORNEYS AT LAW

TODAY'S TOPICS

- Open Meetings and Records (Aaron March)
 - Drafting Defensible Regulations (Bryant Parker)
 - Exactions (Bryant Parker)
 - Drones (Patrick McBride/Mark Bryant)
 - Fun and Games (Patrick McBride)
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OPEN MEETINGS AND RECORDS

AARON G. MARCH, ESQ.

SUNSHINE ACT/OPEN MEETINGS AND RECORDS LAWS

- Chapter 610 RSMO (Sunshine Act)
 - KSA 75-4317 (KOMA)
 - KSA 45-215 – 45-223 (KORA)
 - Other Considerations:
 - Charter
 - Ordinances
 - Bylaws
 - Rules
-

MISSOURI SUNSHINE ACT

- **610.011. Liberal construction of law to be public policy.**

It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy.

MISSOURI SUNSHINE ACT

- **610.021. Closed meetings and closed records authorized when, exceptions, sunset dates for certain exceptions.**
 - Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:
 - Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys.

KSA 75-4317

- **75-4317. Open meetings declared policy of state; citation of act.**

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.

KSA CHAPTER 45

- **45-216. Public policy that records be open.**

It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.

KSA CHAPTER 45

- **45-222. Civil remedies to enforce act; attorney fees**

(c) In any action hereunder, the court shall award attorney fees to the plaintiff if the court finds that the agency's denial of access to the public record was not in good faith and without a reasonable basis in fact of law. The award shall be assessed against the public agency that the court determines to be responsible for the violation.

- **45-223. Civil penalties for violations.**

(a) Any public agency subject to this act that knowingly violates any of the provisions of this act or that intentionally fails to furnish information as required by this act shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court of not to exceed \$500 for each violation.

They're Out to Get You

Executive Session Raises Public Ire

Kansas City Star
February 14, 2017 article

PROJECT LOLLIPOP

Don't be a sucker!

DRAFTING DEFENSIBLE REGULATIONS

BRYANT E. PARKER, ESQ.

GOAL – WHY?

- GOAL: Establish land use regulations that stand up in court.
 - Why?
 - Best Interest of Development Community to have clear rules
 - Benefits of Successful Developments
 - Costs of Litigation
-

GOAL – HOW?

- Proactive Approach
 - What does the law require and how do I satisfy it?
 - What standards apply?
 - Identify goal(s) then work backwards on how to accomplish
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AT THE START

- New Regulation v. Amendment of Existing Regulations
 - Advantages to amending existing regulations include:
 - Maintaining consistent interpretations over time
 - Benefits of any court cases interpreting existing regulations
-

WHAT ARE THE RULES?

To be valid, all land use regulations must
further the public health, safety
and welfare

WHAT IS THE PUBLIC HEALTH, SAFETY AND WELFARE?

- Starts out with broad definition:
 - "The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it" *Day-Brite Lighting Inc. v. State of Missouri*, 342 U.S. 421 (1952)
 - "Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." *Berman v. Parker*, 348 U.S. 26 (1954)

REGULATIONS THAT PROMOTE THE PUBLIC HEALTH, SAFETY AND WELFARE

- Zoning
 - Community Aesthetics
 - Sanitary Environment
 - Prevention of Crime
-

WHAT IS THE PUBLIC HEALTH, SAFETY AND WELFARE?

- The Kansas Supreme Court recently re-examined the definition of “public health, safety and welfare”
 - "Black's Law Dictionary defines 'public health' as '[t]he health of the community at large.' It defines 'public safety' in similar terms as '[t]he welfare and protection of the general public, usu[ally] expressed as a governmental responsibility.' And it likewise defines 'public welfare' as '[a] society's well-being in matters of health, safety, order, morality, economic, and politics.' Black's Law Dictionary 787, 1351, 1732 (9th ed. 2009). We note further that 'public health, safety, and welfare' is a common legal term of art that encompasses these three concerns.“

City of Lincoln Center v. Farmway Co-op, Inc., Kansas Supreme Court Opinion No. 105,962. (2013).

WHAT IS THE PUBLIC HEALTH, SAFETY AND WELFARE?

- The Court overturned the City's noise ordinance because:
 - It was unconstitutionally vague.
 - It lacked objective standards for making factual determinations regarding too much noise.
 - The Court upheld the City's dust ordinance because an adequate public standard sufficient to notify the public was contained within the ordinance.
-

WHAT IS THE PUBLIC HEALTH, SAFETY AND WELFARE?

- Most Recent Case from Missouri, *Duffner v. City of St. Peters*, 482 S.W.3d 811 (Mo.App.E.D. 2016).
 - Stay tuned ... Appellate Court sent the case back to the trial court to determine whether there was a valid public health, safety or welfare reason for the regulation.

ARE THERE LIMITS TO LAND USE REGULATIONS?

"If regulation goes too far it will be recognized as a taking" – Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)

EXACTIONS

EXACTIONS – WHAT ARE THEY?

- An exaction is any interest in property (including money) that is demanded to be transferred to the government in order for property to be developed
 - Can be real property interest (including easement and right of way) or cash payment, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013)

EXACTIONS OVERVIEW

- The U.S. Supreme Court in *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) dealt with when government may require the uncompensated conveyance of an easement as a condition of a land-use permit.
 - A valid development condition/exaction mitigates conditions that would otherwise justify denial of the permit or application.
 - Exactions can be an out and out plan of extortion.

EXACTIONS – CONSTITUTIONAL ANALYSIS

- For a development condition/exaction to be legal, the U.S. Supreme Court determined in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994) that:
 - there must be first a determination whether an “essential nexus” exists between the “legitimate state interest” and the permit condition exacted by the city.
 - then it must be decided whether the required degree of connection exists between the exactions and the projected impact of the proposed development.

EXACTIONS – ROUGH PROPORTIONALITY

- For an exaction/development condition to be lawful, there must be “rough proportionality” between the harm or impact being mitigated and the “amount” of the exaction.
- “Rough proportionality,” derived from the Fifth Amendment, has no precise mathematical calculation. The city must make some sort of individualized determination that the required dedication (exaction) is related both in nature and extent to the impact of the proposed development.

TYPICAL EXACTIONS

- Dedication for:
 - Streets
 - Sidewalks
 - Other public ways

can be reasonable exactions if they satisfy the rational nexus and rough proportionality tests of *Dolan*

EXACTIONS – RECENT CASES

- ***Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013)** is a Florida land conservation case.
 - The City offered the developer two options as a condition of granting a development permit:
 - develop only 1 acre of the site and grant a conservation easement on the rest; or
 - develop all 3.7 requested acres and perform "offsite mitigation," in which petitioner would fund improvements to a distinct parcel of city-owned property.
 - The U.S. Supreme Court held that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.

DRONES

PATRICK McBRIDE
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What is a “Drone”?



BAD Drone!



Most Recognizable Drone



DJI Phantom : First widely spread recreational/professional Drone equipped with GoPro Hero and Gimble

“UAV”

U – Unmanned

A – Aerial

V – Vehicle

“UAS” – Unmanned
Aircraft Systems

TOP GUN

FIGHTER
PILOT



TOP GUN
DRONE PILOT



2012
GREN

DRONES

MARK S. BRYANT, ESQ.

DRONES – INTRODUCTION

- Use of Unmanned Aircraft Systems ("UAS" or drones) has exploded into the public's awareness primarily in association with military use
 - Many individuals now fly UAS for pleasure and the commercial applications are limitless
 - As of June 2016, the FAA has granted over 5,000 Section 333 exemptions for drone use. An expected 11 million commercial drones sold by 2020
 - You can buy a drone at Best Buy. Range in price from \$100 to thousands.
-

FEDERAL STATUTORY BACKGROUND

- U.S. National Airspace ("NAS") is regulated by the Federal Aviation Administration ("FAA"). The FAA treats drones as aircraft and subjects them to Federal Aviation Regulations ("FARS")
 - 2012 Congress passed the FAA Modernization and Reform Act ("FMRA")
 - Tasked FAA with integration of civil UAS into the NAS
 - FAA Extension Safety and Security Act of 2016
 - Requires the FAA and NASA to establish a pilot Unmanned Traffic Management ("UTM") system

LICENSE REQUIRED

TOP GUN

FIGHTER
PILOT



TOP GUN
DRONE PILOT



2012
GREAT

FEDERAL REGULATORY BACKGROUND

- FAA divides UAS operation into four categories:
 1. Public operations or governmental operations
 2. Civil or non-governmental operations
 3. Part 107 Remote Pilots
 4. Model aircraft operations
-

DRONE – REGISTRATION

- Consumers who own drones weighing between 0.55 and 55 pounds must register before their first outdoor flight
 - Registrants can operate as many UAS as they like but each aircraft must visibly display the owner's contact information and unique registration number
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STATE AND LOCAL UAS LEGISLATIVE ACTION

- In 2015, 45 states considered 153 bills and resolutions
 - 17 states enacted 23 bills and 4 adopted resolutions regulating drones
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STATE AND LOCAL UAS LEGISLATIVE ACTION

- Preemption
 - If a state or local law conflicts with federal laws or regulations, it is likely to be invalidated
 - FAA Fact Sheet provides guidance to state and local governments
 - Local drone regulations for which consultation with FAA is recommended:
 - Operational restrictions on flight altitude, flight paths; operational bans; any regulation of the navigable airspace
 - Mandating equipment or training for UAS related to aviation safety such as geo-fencing
-

STATE AND LOCAL UAS LEGISLATIVE ACTION

- Drone Regulation via police power:
 - Land use, zoning, privacy, trespass and law enforcement operations
 - Requirement for police to obtain search warrant prior to using UAS for surveillance
 - Specifying that UAS may not be used for voyeurism
 - Prohibitions on using UAS for hunting or fishing, or to interfere with or harass someone who is hunting or fishing
 - Prohibitions on attaching firearms or similar weapons to UAS

AREAS OF UAS LEGISLATION ACROSS THE COUNTRY

1. Privacy

- The mission of the FAA is "to provide the safest, most efficient aerospace system in the world." This mission does not include regulating privacy related issues

2. Safety Issues

- Drones can range in size from 1 or 2 pounds to 55 pounds. What happens when they fail or fall?
- Over time congested airspace will become increasing a concern

3. Operator Insurance

CITIES CAN AND SHOULD USE THEIR REGULATORY POWERS TO:

- Designate certain areas for:
 - take off
 - landing
 - operation
- Prohibit infringements of privacy
- Provide notice when operating in populated areas
- Protect non-participants and passersby
- Prevent careless and reckless operation
- Require insurance and other regulations similar to driving
 - Flying while drunk or under the influence
 - Leaving the scene of an accident

THANK YOU!

Q & A

**NOW
LET'S GO
PLAY!**



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