

## Legal and Practical Issues Related to Zoning for the Provision of Homeless Services



LAUBER MUNICIPAL LAW, LLC

Missouri Municipal Attorneys Association  
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## Overview

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- Ⓜ Permits issued in error
- Ⓜ Permissive and Cumulative Zoning
- Ⓜ Community input
- Ⓜ Legal opposition
- Ⓜ The final ordinance and supporting documents



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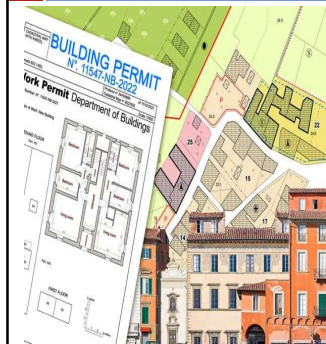
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## Introduction - Background

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- Ⓜ September 2021 application for "commercial" building permit submitted.
- Ⓜ Application was approved and the permit was issued.
- Ⓜ Later, it was discovered that the primary use of the building would be to provide "transitional services". These include showers, kitchens, and rooms for sleeping. As well as social services and professional resources.
- Ⓜ City determined the building plans were inconsistent with the zoning code.
- Ⓜ The building permit was then revoked.

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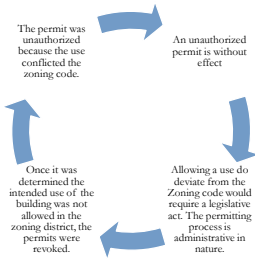
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## Unauthorized permit/Permits issued in error

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## Permissive and Prohibitive Zoning

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## Permissive and Prohibitive Zoning

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### Permissive Zoning:

- Assumes that no uses are allowed unless they are expressly listed
- Generally, if a city's ordinance lists uses that are permitted, then those not listed are not permitted
- This is based over 80 years of Missouri case law, beginning with *Kaegel v. Holekamp* in 1941 and includes several cases like *Frison v. City of Pagedale* in 1995.

### Prohibitive Zoning:

- Prohibitive ordinances assume that all uses are allowed
- Then list each use that is not allowed.
- "It's allowed, unless it's on the list"

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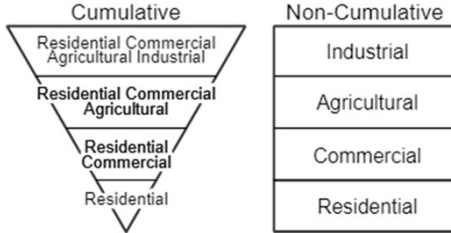
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## Compounding effects of Cumulative Zoning

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## Compounding effects of Cumulative Zoning

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- Ⓜ Permits less intense uses in more intense zoning districts. But does not allow high intensity uses in less intense districts.
- Ⓜ E.g. R-2 district will allow all uses permitted in R-1,
  - Ⓜ R-3 may do the same, so that all uses allowed in R-1 and R-2 are now allowed in R-3 as well.
- Ⓜ In our case, the building was intended to be built in M-1 (light industrial). It was determined that the building may be classified as “transient housing.” Which, while undefined, was cut off from cumulative uses at C-2 –commercial “the C-2 district permits “any use permitted in district C-1, except transient dwelling houses.”

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## Amending the Zoning Ordinance

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- Ⓜ The City recognized its position was untenable. The City knew the zoning code would have to be amended to allow the provision of transitional services in the community.
- Ⓜ Changes are typically “text amendments” or “rezoning”
  - Ⓜ Text amendments change what the regulations say;
  - Ⓜ Rezoning change which regulations apply to which properties.
- Ⓜ The City chose to make a text amendment.
  - Ⓜ This allows more properties to be put to more uses for transitional services.

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## Getting the Community involved

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## Getting the Community involved

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- Ⓜ The City directed the Mayor and City Staff to create a “Transitional Services Committee.”
- Ⓜ The committee focused on:
  - Ⓜ Identifying issues related to homelessness to be addressed throughout the zoning ordinance
  - Ⓜ Establish definitions specific to transitional services for use in the ordinance
  - Ⓜ Establishing and defining new land uses to expand the scope of uses permitted by the ordinance
  - Ⓜ Created regulations for special use permits
  - Ⓜ Created minimum standards for shelters and housing.
  - Ⓜ Create provisions for emergency shelters

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## Legal Challenges and opposition

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As early drafts of the ordinance were circulated, local and national law firms voiced their objections and threatened litigation. They claimed the ordinance was vague and overbroad, and that it violated the equal protection clause of the US Constitution.



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# Legal Challenges and opposition

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## Vague and Overbroad

- An ordinance will be found invalid if it is so vague that citizens cannot understand what the law regulates or when they are violating it.
- An ordinance will be found invalid if it regulates more than its intended purpose.
- Vague and overbroad were challenges leveled at earlier drafts of the ordinance. Opponents claimed words were too general. Claimed provisions of the ordinance and minimum standards regulate beyond safety by requiring certain training and record-keeping of shelter personnel.
- The City took these challenges seriously and took the opportunity to fine tune any areas that could be considered unclear.



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# Legal Challenges and opposition

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## Equal Protection

- The equal protection analysis first looks to see if there is any burden to a fundamental (constitutional) right, or if the law results in an unequal impact on any protected class. These include:
  - Age
  - Race
  - Religion
  - National Origin
  - Religious Beliefs
  - Gender/pregnancy
  - Veteran status
  - Disability



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# Legal Challenges and opposition

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## Equal Protection

- If there is no fundamental right or protected class implicated, the court will presume the ordinance is valid. The burden is then on the challenger to show that the law has no rational relation to a legitimate government purpose.
- This is a very high hurdle for a challenger to clear.
- In our case, the City was clear to focus on increases in traffic, crime and any threats to safety these may cause.

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# Legal Challenges and opposition

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## Arbitrary and Capricious

- Similar to the equal protection challenge,
- an argument most often directed at administrative agencies.
- A decision is arbitrary if it comes about seemingly at random or by chance or as a capricious and unreasonable act of will. It is capricious if it is the product of a sudden, impulsive and seemingly unmotivated notion or action.
- often, an administrative decision will be found arbitrary or capricious if it appears to be based on animus or some other personal reason.



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# Legal Challenges and opposition

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## Build the Record to support the ordinance:

- Data to support City's Decisions
- Case studies from other Cities
- Journal articles
- Local and regional data and statistics.



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# Conclusion

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- The City's decision to revoke the permit resulted in the decision to amend the City's permissive zoning code to allow more uses in more districts.
- After months of contentions discussion, 17 defined uses and concepts were added to the code. These include:

Day Shelter	Emergency Shelter	Temporary warming/cooling Shelter
Emergency Housing	Transitional Housing	Permanent Supportive Housing

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## Conclusion

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- ④ Ultimately the ordinance was passed with little excitement early this year.
- ④ There have been no further challenges to the ordinance.

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### About the Firm

Lauber Municipal Law, LLC, was established for the purpose of serving local governmental entities of all types and sizes. We can serve your community as its general counsel (City Attorney) or as special counsel for technical issues like economic development incentive approvals, annexation, elections, impeachments, and appellate work.

Our goal through Lauber Municipal Law, LLC, is to meld our previous experience together to provide a high-quality, "big firm" work product, while providing the flexibility, personal responsiveness, and cost effectiveness of a small firm. We completely understand public entities' needs to obtain the most effective representation possible while considering the fact that these services are compensated from a budget made up of public funds. As the motto for Lauber Municipal Law, LLC, states: We are proud to serve those who serve others. Our sincere desire is to make that job easier and less stressful for the elected officials and administrative staffs of these entities.

The choice of a lawyer is an important decision and should not be based solely on advertisements. This disclosure is required by rule of the Missouri Supreme Court.

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