



**KANSAS BAR  
ASSOCIATION**

# CHAPTER 1

## Land Use Controls and Zoning\*

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### § 1.1

#### I. THE PLANNING PROCESS

#### § 1.1.1

##### A. The Concept of Planning

Planning is used in this chapter as a generic term, as it is not defined in the Kansas statutes pertaining to land use and zoning. The term deals with idealized concepts of how new growth and development should be managed. Governmental planning is restrained by applicable constitutional and statutory limitations, which control how planning is implemented in our communities. The scope of this chapter will be to describe how planning is implemented in the cities and counties in Kansas, and to suggest steps the lawyer might take in representing a client whose real estate has been brought into the planning process.

Although the legislature recodified the statutory provisions governing planning and zoning effective January 1, 1992, except for the special provisions pertaining to an improvement district in Wabaunsee County (K.S.A. 19-2950 to 19-2955) and Johnson County (K.S.A. 19-2956 to 19-2966), this recodification often parallels the previous Kansas planning and zoning laws, and cases decided under the previous laws should remain persuasive.<sup>1</sup>

#### § 1.1.2

##### B. The Planning Commission

The governing body of a city may create by ordinance, and the board of county commissioners may create by resolution, a planning commission for that respective city or county. K.S.A. 12-744(a). County, metropolitan or regional planning commissions may also serve as the city planning commission. The planning commission shall be composed of at least five members. The number of members, the manner of filling vacancies, the members' term limits and rules for removal of members shall be determined by the governing body.<sup>2</sup> The planning commission shall meet at such times as fixed in its bylaws, and a record of these meetings must be kept.<sup>3</sup> Unless otherwise provided in the statute, all actions shall be taken by a majority vote of the membership.<sup>4</sup> The planning commission shall review or reconsider, at least annually, a comprehensive plan;<sup>5</sup> shall prepare and review zoning regulations and amendments thereto;<sup>6</sup> may adopt and amend subdivision regulations;<sup>7</sup> shall approve plats;<sup>8</sup> and shall develop flood plain controls.<sup>9</sup> A city planning commission may exercise authority outside its city limits by way of planning, zoning, or the administration of

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1. See Michael J. Davis, *Survey of Kansas Law: Real Property*, 41 KAN. L. REV. 669 (1993).
2. K.S.A. 12-744(a) & (b).
3. K.S.A. 12-745(a).
4. *Id.*
5. K.S.A. 12-747(d).
6. K.S.A. 12-753.
7. K.S.A. 12-749 to -750.
8. K.S.A. 12-752(b).
9. K.S.A. 12-754.

subdivision regulations, if at least two of its members reside outside of the city limits, but within three miles of the corporate city limits.<sup>10</sup>

### **§ 1.1.3 C. The Regional Planning Commission**

K.S.A. 12-744(c) provides that two or more cities or counties of the state may jointly cooperate pursuant to written agreement in the exercise and performance of planning powers, duties, and functions. In addition, cities or counties may jointly cooperate with cities or counties of any other state having adjoining planning jurisdictions; provided, however, that the laws of the other state permit such joint cooperation. Any such agreement is subject to the provisions of the Interlocal Cooperation Act.<sup>11</sup> The purpose of joint or regional planning is to enhance the efficiency of the planning process, particularly as that process cuts across municipal, county, and even state lines.

Regional planning is implemented by a joint agreement entered into by participating cities or counties. The joint agreement determines the planning area, as well as the number of planning commission members, terms of office, rules of order, employment of a director of planning and staff, and the sharing of costs and expenses. The regional planning commission is authorized to carry into effect all parts of state planning enabling legislation applicable to the cooperating cities or counties. However, a regional planning commission does not remove or limit the powers given by state law to the cooperating cities or counties. All legislative powers with respect to zoning and other planning decisions remain with the governing bodies of the cooperating cities and counties. Although cooperating cities or counties may continue to have their own planning commissions or boards, most cities and counties that have consolidated their planning efforts into regional planning commissions have not continued the separate operation of such planning commissions or boards.

The federal government has accelerated the trend toward regional planning, as many federal agencies require wide range, multijurisdictional planning efforts to ensure complete consideration of a problem area before providing federal funds for needed public improvements.

### **§ 1.1.4 D. The Professional Planner**

The professional planner is a member of a growing profession that imposes upon its members standards of training and professional skill. To the lawyer representing a client in the planning process, the planner occupies an important role which the lawyer often fails fully to appreciate. That role is to plan, requiring the planner to be somewhat idealistic and oriented toward long range goals. This orientation often clashes with the lawyer's short range, result oriented approach to a planning or zoning problem. The lawyer must, therefore, learn to look upon zoning matters in a long range planning context. If the lawyer does not, the planner's cooperation will be difficult to obtain. Because the planner and the planner's staff determine, in the first instance, whether an application has merit, and if so, how strongly the application shall be recommended to the planning commission, the planner's cooperation, or lack of it, may mean success or failure for the client.

## **§ 1.2 II. THE COMPREHENSIVE PLAN**

### **§ 1.2.1 A. Overview**

Planning commissions in Kansas are authorized to prepare comprehensive plans.<sup>12</sup> The preparation, adoption, and annual review of a comprehensive plan is perhaps the primary task of a planning commission. It is, however, frequently overlooked by the attorney whose concern is with the immediate impact of a zoning or subdivision regulation decision, rather

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10. K.S.A. 12-744(a).

11. K.S.A. 12-2901, *et seq.*

12. K.S.A. 12-747.

than with the long term impact that the comprehensive plan has on overall community development. Because a large portion of new development occurs on the periphery of a city's boundary as a community expands, the lawyer should be especially cognizant of how the comprehensive plan treats such particular tract.

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#### **B. Elements of the Comprehensive Plan**

The comprehensive plan is based on surveys and studies of past and present conditions and trends relating to land use, population and building intensity, public facilities, transportation, economic conditions, natural resources, and other factors that the planning commission believes are necessary as a part of the comprehensive planning process.<sup>13</sup> The plan that follows these studies may be a written presentation, including maps, plats, charts, and other descriptive material. The plan should state the planning commission's recommendations for the development or redevelopment of the community in the following seven areas:

1. Land use, showing the general location, extent, and relationship of the use of land for both public and private purposes;
2. Population and building intensity standards and restrictions;
3. Public facilities, including transportation facilities, which relate to the transportation of persons or goods;
4. Priority of public improvements;
5. Capital improvements plan, stating how public improvements will be financed;
6. Utilization and conservation of natural resources; and
7. Any other element deemed necessary to the proper development or redevelopment of the community.<sup>14</sup>

The comprehensive plan, therefore, deals not only with land use, but with the overall physical and social developmental goals and objectives of the community. It is the planning commission's responsibility to ascertain these goals and objectives and to translate them into the comprehensive plan.

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#### **C. Manner of Adoption of a Comprehensive Plan**

Prior to adopting or amending any comprehensive plan or portion of a comprehensive plan, the planning commission must hold a public hearing on its proposals.<sup>15</sup> Notice of the public hearing must be published at least once in the official city newspaper, in the case of a city, or in the official county newspaper, in the case of a county, at least 20 days prior to the date fixed for the hearing.<sup>16</sup> Although the statute contemplates that the hearing will be the first opportunity for public input into the comprehensive plan, it is instead usually one of the last steps. The first step typically involves citizen committees, established by the planning commission, inquiring into the community's goals and objectives in one or more of the subjects ultimately to be included in the comprehensive plan. These committees should include community leaders and representatives of the many public and private interests within the community. Their collective recommendations, together with those provided by consultants, the planning staff, and the planning commission itself, should form the basis of

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13. K.S.A. 12-747(b).

14. *Id.*

15. *Id.*

16. *Id.*

the comprehensive plan. The plan may be approved by a majority vote of all the members of the planning commission either in whole or in part, with each of the parts corresponding to the major geographical sections of the planning area or to the functional subdivisions of the plan.

After approval, a certified copy of the plan and a written summary of the hearing must be submitted to the governing body.<sup>17</sup> The governing body must approve the comprehensive plan for it to be effective. However, before any city adopts a comprehensive plan or part thereof affecting property located outside the corporate limits of such city, written notice of such proposed action shall be given to the board of county commissioners of the county in which such property is located.<sup>18</sup> Additionally, such notice must be given to the township board of the township in which such property is located if the township is located in a county not operating under the county unit road system.<sup>19</sup> Such notice shall be given at least 20 days prior to the proposed action.<sup>20</sup> Similarly, before a county adopts or amends a comprehensive plan affecting property located within three miles of the corporate limits of a city, written notice of such proposed action shall be given to the governing body of such city, and the township board of such township, if such county is not operating under the county unit road system.<sup>21</sup> Such notice shall be given at least 20 days prior to the proposed action.<sup>22</sup>

The governing body may either approve the planning commission's recommendations, override them with a two-thirds vote, or return them for further consideration with a statement specifying the basis for the failure to approve or disapprove. The planning commission may then resubmit the original or new recommendations. The governing body may adopt or amend these recommendations by a simple majority vote, or may simply take no further action. If the planning commission fails to submit any recommendations to the governing body at the first meeting of the governing body following the planning commission meeting that received the governing body's report, this failure shall be deemed a resubmission of the original recommendation, and the governing body may take action on the original recommendation with a simple majority vote.<sup>23</sup>

The comprehensive plan and any amendments to it become effective upon the publication of the ordinance or resolution adopting such plan.<sup>24</sup>

#### **§ 1.2.4 D. Effect of Adoption of the Comprehensive Plan**

Once adopted by the governing body, the comprehensive plan constitutes a guide or basis for public action for the purpose of ensuring a coordinated and harmonious development or redevelopment of the community.<sup>25</sup> Land use and public improvement programming decisions should be evaluated in terms of the comprehensive plan. If not, the plan will become a patchwork quilt of amendments and revisions, and will ultimately lose its vitality as the seminal planning tool for the community. Moreover, whether a requested zoning change complies with the comprehensive plan is an important criterion in determining if a zoning decision meets the statutory test of reasonableness.<sup>26</sup> The need to evaluate land use decisions in light of the plan does not, however, require that the plan be obligatory or binding upon the

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17. K.S.A. 12-747(b).

18. K.S.A. 12-743(a) (also applicable to the adoption or amendment of subdivision regulations, zoning regulations, or building or setback lines affecting property located outside the corporate limits of a city).

19. *Id.*

20. *Id.*

21. K.S.A. 12-743(b).

22. *Id.*

23. K.S.A. 12-747(b)

24. *Id.*; see also K.S.A. 12-3001 (prohibiting commission cities of the first class from adopting nonemergency ordinances on the day such ordinances are introduced).

25. K.S.A. 12-747(c).

26. *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978).

governing body, and the fact that the governing body has disregarded its comprehensive plan is not per se unreasonable.<sup>27</sup> The governing body must be free to deviate from a comprehensive plan as the community's goals and objectives change from those existing at the time the plan was adopted. Moreover, in recognition of these changing goals and objectives, K.S.A. 12-747(d) requires the planning commission to review the comprehensive plan annually to determine if any portion of the plan has become obsolete. If it has, or if amendments or additions to the plan are needed, the planning commission may, as it sees fit, adopt any amendment or addition in the same manner as the adoption of the original plan.<sup>28</sup> Failure by the planning commission to review the plan annually and amend it as required by changed conditions will cause the plan to lose its force as a guide in directing future land use decisions.<sup>29</sup>

### § 1.2.5 E. The Comprehensive Plan and Public Facilities

K.S.A. 12-748(a) provides that after a comprehensive plan has been adopted, no public improvement, facility, or utility of a type embraced within the recommendations of the plan shall be constructed without the planning commission's determination that such improvement, facility, or utility is in conformity with the plan. If the planning commission determines that the proposed improvement does not conform to the plan, it must state the manner in which the proposed improvement does not conform. The statement of nonconformity must be made to the governing body sponsoring the public improvement. The governing body may overrule the planning commission, and the comprehensive plan is then deemed to have been amended.

### § 1.2.6 F. The Comprehensive Plan and Building or Setback Requirements for Proposed Streets and Highways

As part of its comprehensive plan, a governing body may, after consultation with the secretary of transportation, establish building or setback lines and prohibit any new building from being located on that land.<sup>30</sup> Such restrictions, however, may not be adopted or amended without a public hearing before the governing body. After a governing body has established its requirements, construction is thereafter prohibited from those areas designated as future streets and highways. The public is thereby benefited by avoiding the cost of acquiring valuable structures through condemnation proceedings at the time the highway is constructed. However, because such setback regulations prevent the landowner from fully utilizing his land, the regulations should be imposed only on land where it is reasonably certain that future highways will be built.<sup>31</sup> K.S.A. 12-765 provides the board of zoning appeals the power to modify or vary the building setback restrictions in specific cases in order to avoid unwarranted hardship or complete deprivation of use. Such modifications are intended only for extreme cases, in that the board of zoning appeals must strictly observe the intended purpose of the regulations and ensure that the public welfare and safety are protected.

### § 1.2.7 G. Practice Suggestions

Except in situations where a client desires to annex new property into a city, the comprehensive plan's immediate impact upon the land use decisions confronting an attorney is typically small, particularly when compared with zoning and subdivision regulation

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27. Board of Johnson County Comm'rs v. City of Olathe, 263 Kan. 667, 683, 952 P.2d 1302 (1998); Coughlin v. City of Topeka, 206 Kan. 552, 480 P.2d 91 (1971); Taco Bell v. City of Mission, 234 Kan. 879, 678 P.2d 133 (1984).

28. K.S.A. 12-747(d); *Board of Johnson County Comm'rs*, 263 Kan. at 683.

29. Security Nat'l. Bank v. City of Olathe, 225 Kan. 220, 589 P.2d 589 (1979).

30. K.S.A. 12-765(a).

31. *See, e.g.*, Venture in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979) (holding that the city's refusal to approve a plat without highway setbacks, when exact location of highway was uncertain, constitutes inverse condemnation); *but see* Estate of Kirkpatrick v. City of Olathe, 39 Kan. App. 2d 162, 168-69, 178 P.3d 667 (2008) (holding that an inverse condemnation does not occur unless there is an acquisition of possession, as well as the right of possession and control of tangible property, to the exclusion of the former owner) (*citing* Lone Star Industries, Inc. v. Kansas Dept. of Transp., 235 Kan 121, 125, 671 P.2d 511 (1983)).

decisions. For urban rezoning requests and site plans, the interest of the attorney in comprehensive planning has been, therefore, marginal and is primarily limited to solving day to day problems of zoning and subdivision regulations. However, because many clients own investment property that is not yet annexed and zoned, the attorney representing clients involved in land development should be concerned with both the initial adoption of the comprehensive plan and subsequent revisions thereto. The attorney's concern should be translated into discussions with the planning staff and the planning commission and into providing specific input into the plan. Such matters as population projections should be specifically addressed since they will directly affect the plan's recommendations concerning commercial, industrial, and residential development needs. Once the plan has been adopted, the client's request for a change in zoning or for installation of public improvements will be evaluated in terms of the comprehensive plan. If the attorney has anticipated his client's needs and assists his client in having those needs considered at the time the plan is adopted, the opportunities for success will be greatly enhanced.

### § 1.3

## III. THE SUBSTANCE OF LAND USE CONTROLS

### § 1.3.1

### A. Methods of Controlling Land Use

The two principal methods available to local government for controlling land use in Kansas are zoning and subdivision regulations. Because of the fact that zoning regulations lend themselves, through amendment and variance, to political and other pressures, additional land use controls can be adopted by a local government. Although the Kansas enabling legislation does not specifically authorize many of these additional land use control devices, K.S.A. 12-741(a) provides that the planning and zoning statutes were "not intended to prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict with the provisions of this act." Thus, to the extent that these devices do not conflict with the planning and zoning act, their use should be lawful. However, because the statutes do not specifically address many of these devices, and because such devices are usually unique to each local government, they will be described only briefly in this chapter. The emphasis will instead be on the traditional land use control devices of zoning and subdivision regulation.<sup>32</sup>

### § 1.3.2

### B. Zoning Regulations

#### § 1.3.2(a)

#### 1. Relationship of Zoning Regulations to the Comprehensive Plan

The comprehensive plan represents the community's ideal for future land use development, based upon the information available at the time the plan was written. Although the comprehensive plan should be reviewed at least annually and consequently often is amended frequently, any comprehensive plan will inevitably conflict with the self interest of landowners. Unless prohibited by law, the landowner can be expected generally to use his land in the manner best suited to his needs, whether or not such use conforms to the comprehensive plan. Thus, in order for a comprehensive plan to achieve its goals and objectives, it must be implemented by legal controls upon the use of private land. Those controls are most conspicuously found in zoning regulations.

#### § 1.3.2(b)

#### 2. Constitutionality of Zoning Regulations: Rubric of General Welfare

The concept of regulating the use of private land through zoning is rooted in the police power. This concept introduced for the first time the elements of noncompensable and noncontractual limitations on land use arising out of something other than tort liability for nuisance. The employment of this new zoning power in the early years of the twentieth century received ultimate judicial sanction in the landmark case of *Euclid v. Ambler Realty*

32. For a comprehensive review of the various land use control devices, see JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW*, 43-65 (2003); ROBERT H. FREILICH, S. MARK WHITE, & KATE F. MURRAY, *21ST CENTURY LAND DEVELOPMENT CODE*, 1-27 (2008); PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, *LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW*, 162-175 (1998).

Co.<sup>33</sup> In *Euclid*, the United States Supreme Court upheld the constitutionality of zoning legislation on the ground that it was an exercise of the police power of the state designed to promote safety, health, and public welfare. Three years earlier, in 1923, the Kansas Supreme Court, in *Ware v. City of Wichita*,<sup>34</sup> sustained the zoning regulation of the City of Wichita on the same grounds. Both *Euclid* and *Ware* regarded zoning as a governmentally imposed system of regulation to protect designated areas and the individual properties within those areas from the intrusion of uses and structures that would produce adverse effects, to the ends that the value of all property could be maintained and enhanced and the general welfare secured. The constitutionality of zoning laws in Kansas is, therefore, a settled question.<sup>35</sup>

### § 1.3.2(c)

### 3. Kansas Statutory Scheme

Enabling legislation for city zoning regulations and county zoning resolutions is found in K.S.A. 12-753(a). A city or county governing body is authorized to adopt zoning regulations dividing the territory subject to its respective jurisdiction into districts for the purpose of restricting the use of land and buildings and the intensity of such uses as may be deemed suited to carry out the purposes of the enabling act as set out in K.S.A. 12-741. A governing body may regulate the minimum size of a lot, including the depth, width, and minimum yard size; the density of the population; the percentage of a lot that may be occupied; the size of any building; the location, use, and appearance of buildings and land; the conservation of natural resources; and the governing body shall define the boundaries of each district. Except as may be provided in the zoning regulations, the use of buildings and land must be uniform within any zone or district, but the uses may differ from district to district.<sup>36</sup>

The machinery for adoption and the structure for implementation of zoning regulations are found at K.S.A. 12-753 to 12-758. In addition, pursuant to K.S.A. 12-754(a), cities may define their zoning jurisdiction to include unincorporated portions of the county that are located within three miles from the boundaries of the city, but in no event more than half the distance to another city; provided, however, that the land is not subject to any county zoning regulations. The enabling legislation requires the zoning regulations to originate from a recommendation made by the planning commission after holding at least one public hearing.<sup>37</sup> Notice of each public hearing must be published at least once in the official city or county newspaper, with a clear 20 days between the date of publication and the date of hearing. In the case of a joint zoning board, notice must be published in both the official city newspaper and the official county newspaper.<sup>38</sup> The hearing may be adjourned from time to time.

If the planning commission adopts the proposed zoning regulations, the commission shall submit the proposed regulations and a written summary of the hearing to the governing body. The governing body has three options:

- a. Approve the planning commission's recommendations;
- b. Override the planning commission's recommendations by a 2/3 majority vote of the membership of the governing body; or

33. 272 U.S. 365 (1926).

34. 113 Kan. 153, 214 P. 99 (1923).

35. Although constitutional, zoning regulations may give rise to certain constitutional violations. See §§ 1.101-105, *infra*; see also Patrick B. Hughes, *What Can They Do? Limitation On The Power Of Local Zoning Authorities*, 76 J. KAN. BAR ASS'N 28 (2007).

36. K.S.A. 12-756.

37. K.S.A. 12-756(b).

38. *Id.*

- c. Return the recommendations to the planning commission for further consideration, together with a statement specifying the basis for the governing body's disapproval.<sup>39</sup>

The planning commission may resubmit its original recommendations giving the reasons for the resubmission, or the commission may submit new or amended recommendations. By a simple majority vote, the governing body may then adopt, revise, or amend such recommendations, or take no further action. If the planning commission fails to deliver its recommendations to the governing body following the planning commission's next regular meeting, the governing body treats the regulations as if the original recommendations had been resubmitted.<sup>40</sup>

Zoning regulations may describe the boundaries of zoning districts in the regulations themselves.<sup>41</sup> Alternatively, zoning district boundaries may be shown on a map incorporated and published as a part of the regulations or incorporated by reference on an official map which generally must be filed in the office of the city clerk for cities, and in the office of the county clerk for counties.<sup>42</sup>

A violation of a zoning regulation is a misdemeanor, punishable by a fine not to exceed \$500.00 or by imprisonment for not more than six months, or by both fine and imprisonment.<sup>43</sup> Each day a violation continues constitutes a separate offense. However, when a person is found guilty of violating a zoning regulation, the court cannot impose a fine on the defendant for a continuing violation following trial and before sentencing because the defendant has not been tried or convicted for post-trial zoning violations.<sup>44</sup> Injunctive relief may be sought by any city or county, or by any person whose property is or may be affected by an alleged violation.<sup>45</sup> If the violation pertains to flood-plain zoning, the attorney general and the chief engineer of the Division of Water Resources of the Kansas State Board of Agriculture may institute legal proceedings to enjoin the violation.<sup>46</sup>

### § 1.3.2(c)(1)

#### a. Districting

The common denominator of traditional "Euclidean" zoning is the concept of "districting"—the division of the jurisdictional area into districts or zones according to the type of uses and structures permitted in each district. Kansas zoning enabling legislation requires districting.<sup>47</sup> The typical zoning regulation, such as the one approved by the United States Supreme Court in *Euclid v. Amber Realty Co.*,<sup>48</sup> contains three basic districts: one for residential uses, one for commercial uses, and one for industrial uses. Kansas enabling legislation specifically includes the conservation of natural resources, including agricultural land and the use of land in areas designated as flood plains.<sup>49</sup> Most local government regulations further subdivide the districts according to the level of population density, or intensity of restrictive commercial or industrial use. The concept of districting is designed to protect the least intensive uses of land from the nuisance characteristic of the most intensive uses. Thus, for example, commercial or industrial uses are not permitted in districts designed for residential uses. The uses permitted within zoning districts and subdistricts are described in the locally enacted zoning regulations. If the regulations do not describe the specific use

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39. K.S.A. 12-756.

40. K.S.A. 12-756(b).

41. K.S.A. 12-753.

42. K.S.A. 12-753(a).

43. K.S.A. 12-761(a).

44. *State v. Scherer*, 11 Kan. App. 2d 362, 721 P.2d 743 (1986).

45. K.S.A. 12-761(b).

46. K.S.A. 12-761(c).

47. K.S.A. 12-753(a).

48. 272 U.S. 365 (1926).

49. K.S.A. 12-753(a).



under consideration, one must look at the general language of use descriptions within each district and the kinds of uses permitted within each district to determine where the desired use might be located.<sup>50</sup>

### § 1.3.2(c)(2) b. Cumulative Zoning Districts

The typical cumulative zoning regulation is premised on the classification of so-called “higher” and “lower” uses. Single family residences are considered to be the highest use, and industrial development is considered to be the lowest use. Generally, there are subdivisions within each of the use groups. For example, an R-1 district may be established for residential single family dwellings, an R-2 district for duplexes, and an R-3 district for apartments. As one progresses from the higher to lower uses in a cumulative regulation, each of the higher uses is included in the next lower and all subsequent lower districts. All forms of residential and commercial use would, therefore, be permitted in an industrial district. The reverse, however, is not true. An industrial use is not permitted in a commercial or residential district. Cumulative zoning regulations are now in disfavor, as the undesirable results of placing residences within industrial districts have often created slums and urban blight. Although cumulative districting is generally in disfavor, it appears permissible under Kansas zoning enabling legislation.

### § 1.3.2(c)(3) c. Noncumulative Zoning Districts

Under noncumulative districting, the zoning regulation lists for each district only those uses permitted in such district, and there is no accumulation of uses in a “lower” district from a “higher” district. Each zoning district thereby becomes a self contained unit. Because the noncumulative zoning regulation gives governing bodies more control over land use by protecting incompatible uses from each other, it is anticipated that most Kansas cities and counties will ultimately adopt the noncumulative form of zoning regulation.

The noncumulative zoning regulation appears to be preferable to the cumulative regulation. A noncumulative regulation could, however, weaken the effect of restrictive covenants, which are considered to be private or contractual forms of zoning and which generally cannot be impaired by zoning regulations.<sup>51</sup> If, for example, restrictive covenants require certain land to be used only for residential purposes, and the land has been zoned for commercial purposes by the city’s governing body, the juxtaposition of the restrictive covenants and the noncumulative zoning regulation prevents the use of the land for any purpose. The property cannot be used for residential purposes because the zoning regulation prohibits any use other than commercial use, and the property cannot be used for commercial purposes because the restrictive covenants subject the landowner to the threat of litigation if the land is used contrary to the restrictions. In this situation, a landowner may seek judicial determination that the restrictive covenants are unenforceable.<sup>52</sup> For example, a change of circumstances might give rise to a declaration that the restrictions are unenforceable, if the change in conditions is so great or radical as to neutralize the benefits of the restriction and destroy its purpose.<sup>53</sup>

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50. See *Phillips v. Vieux*, 210 Kan. 612, 504 P.2d 169 (1972) (supermarket permitted in shopping district designed for retail sales of convenience goods and services due to the fact that the zoning regulations also allowed businesses within that zoning district that had a dependence upon citywide patronage rather than a limited neighborhood residential patronage).

51. *McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals*, 10 Kan. App. 2d 235, 697 P.2d 69 (1985).

52. *Hecht v. Stephens*, 204 Kan. 559, 562, 464 P.2d 258 (1970) (The right to enforce the restrictions may be lost by laches, waiver, or by acquiescence in the violation of the provisions of such restrictions).

53. *Id.* A Kansas district court has held in a declaratory judgment action that noncumulative zoning regulations supersede the conflicting restrictive covenants, and, as to the particular tract involved, the restrictive covenants are ineffective to limit land use. See *Raymer v. Kerr-McGee Oil Indus., Inc.*, No. 27382, slip op. (Douglas Co., Kan., Dist. Ct., July 2, 1973); *Sheldon Heights Constr. Co. v. Shackelford*, No. 25241, slip op. (Douglas Co., Kan., Dist. Ct., Sept. 25, 1969); *Scott v. Harmon*, No. 24233, slip op. (Douglas Co., Kan., Dist. Ct., Mar. 18, 1968).

**§ 1.3.2(d)****4. Specialized Zones****§ 1.3.2(d)(1)****a. Flood Plain Zoning**

K.S.A. 12-766 provides for the creation of flood plain districts in cities and counties. K.S.A. 12-742(a)(3) defines a flood plain as “land adjacent to a watercourse subject to inundation from a flood having a chance occurrence in any one year of 1%.” However, the governing body may establish a flood plain on land subject to flooding of a lesser magnitude than that having a chance occurrence in any one year of one percent.<sup>54</sup> The one percent chance of flooding is commonly referred to as the one hundred year flood. All flood plain zoning regulations or plans must be approved by the chief engineer, Division of Water Resources of the Kansas State Board of Agriculture.<sup>55</sup> Designation of land as flood plain, with its concomitant use restrictions, presents a difficult question of whether a compensable taking has occurred, or whether the governing body has simply exercised its police power. Moreover, because of the expense in determining what land is subject to a one hundred year flood and accurately defining that land, a governing body may be tempted to establish flood plain zones by piecemeal regulations. It is questionable whether the piecemeal establishment of flood plain zoning districts is permissible under K.S.A. 12-754, which requires that any flood plain zone or district include the flood plain area within the incorporated area of the city.<sup>56</sup> Flood plain zoning by cities and counties must be carefully coordinated with the requirement of the National Flood Insurance Act of 1968 as amended or any rules and regulations adopted pursuant to the Act.<sup>57</sup>

**§ 1.3.2(d)(2)****b. Agricultural Zoning**

The right of a landowner to pursue agricultural activities in Kansas counties free from zoning restrictions is carefully protected by statute.<sup>58</sup> By enacting such statutes, the legislature intended to spare the farmer from governmental regulations and not to discourage the development of the farming industry.<sup>59</sup> These statutes provide that except for flood plain regulations, no zoning regulations shall apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon, so long as such land and buildings are used for agricultural purposes.<sup>60</sup>

Although the term “agricultural purpose” is not statutorily defined, the Kansas appellate courts have interpreted it to cover quarrying rock to construct a pond for irrigation purposes, building a farm house, raising hogs for market, raising canary birds, operating commercial feed lots, producing turf grass, and using a tract of land as an airstrip for purposes that are agricultural in nature; but it does not cover raising and keeping greyhounds or training horses for racing purposes.<sup>61</sup> There are no statutes prohibiting the regulation of agricultural land within an incorporated Kansas city.

**§ 1.3.2(d)(3)****c. Airport Zoning**


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54. K.S.A. 12-766(a).

55. K.S.A. 12-766(b).

56. For a comprehensive review of the purposes and problems of flood plain zoning, see Clifford L. Bertholf, Comment, *Ecological and Legal Aspects of Flood Plain Zoning*, 20 KAN. L. REV. 268 (1972).

57. 42 U.S.C. §§ 4001-4129. See also Myers & Rubin, *Complying with the Flood Disaster Protection Act*, 7 REAL EST. L.J. 114 (1978).

58. K.S.A. 19-2908; 19-2921; 12-758.

59. *Miami County v. Svoboda*, 264 Kan. 204, 208, 955 P.2d 122 (1998); *Weber v. Board of Franklin County Comm’rs*, 20 Kan. App. 2d 152, 155, 884 P.2d 1159 (1994).

60. K.S.A. 19-2908; 19-2921.

61. *Svoboda*, 264 Kan. at 207; *Weber*, 20 Kan. App. 2d 152, 884 P.2d 1159; *VanGundy v. Lyon County Zoning Bd.*, 237 Kan. 177, 699 P.2d 442 (1985); *Blauvelt v. Board of Leavenworth County Comm’rs*, 227 Kan. 110, 605 P.2d 132 (1980); *Fields v. Anderson Cattle Co.*, 193 Kan. 558, 396 P.2d 276 (1964); *Carp v. Board of County Comm’rs*, 190 Kan. 177, 373 P.2d 153 (1962); *Board of County Comm’rs v. Brown*, 183 Kan. 19, 325 P.2d 382 (1958); *Seward County ex rel. Seward County Bd. of Comm’rs v. Navarro*, 35 Kan. App. 2d 744, 751, 133 P.3d 1283 (2006).

K.S.A. 3-701 to 3-713 established the Kansas Airport Zoning Act. The purpose of the Airport Zoning Act is to enable cities and counties to control airport hazards, defined as “any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at any airport or is otherwise hazardous to such landing or taking-off of aircraft.”<sup>62</sup> The Airport Zoning Act is a self contained statute which provides a method for adopting the regulation,<sup>63</sup> issuing building permits within the zoning district,<sup>64</sup> issuing variances in the event of unnecessary hardship,<sup>65</sup> and appealing from a decision made by the airport zoning commission.<sup>66</sup> K.S.A. 12-755(a)(6) grants specific statutory authority to establish overlay zones, such as airport overlay districts. Even though regulations adopted pursuant to the Airport Zoning Act may be complex and impose height and use restrictions on property adjoining airports, they effectuate a substantial public purpose and will be judicially upheld.<sup>67</sup>

#### § 1.3.2(d)(4) d. Historic Preservation Zoning

Historic preservation is declared to be the policy of the State of Kansas in K.S.A. 75-2714, *et seq.* K.S.A. 12-755(a)(3) grants specific statutory authority to governing bodies to adopt zoning regulations to preserve the structures and districts listed on the local, state, or national historic registers. The governing body, however, “shall not undertake any project which will encroach upon, damage or destroy any historic property included in the national register of historic places or the state register of historic places or the environs of such property until the state historic preservation officer has been given notice, as provided herein, and an opportunity to investigate and comment upon the proposed project.”<sup>68</sup>

The word “project” is defined by K.S.A. 75-2716(e) to include “activities involving the issuance of a lease, permit, license, certificate or other entitlement for use, to any person by the state or any political subdivision of the state, or any instrumentality thereof.” The Kansas Administrative Regulations clarify when the notice requirements of K.S.A. 75-2724(a) apply.<sup>69</sup> The breadth of these statutes and regulations effectively requires every private project requiring a governmental permit or license to be subject to review by the State Historical Preservation Officer, except interior projects and any exterior projects in the environs of a listed property for replacement of deteriorated existing materials with new, matching materials, known as replacement-in-kind.<sup>70</sup> Such projects would include the issuance of special use permits, building permits, demolition permits, and the approval of plats and zoning amendments. The review process is applicable to projects located within 500 feet of the boundaries of a historic property located within a city, or within 1,000 feet of the boundaries of a historic property located in the unincorporated portion of a county. Unfortunately, however, the statute does not provide procedural safeguards such as notice to the affected property owner or a right to a hearing before the State Historical Preservation Officer. Challenges to the statute are, therefore, likely.<sup>71</sup>

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62. K.S.A. 3-701(2).

63. K.S.A. 3-705.

64. K.S.A.3-707(1).

65. K.S.A. 3-707(2).

66. K.S.A. 3-709.

67. *Kimberlin v. City of Topeka*, 238 Kan. 299, 710 P.2d 682 (1985); *see also Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994).

68. K.S.A. 75-2724(a). For a review of the National Historic Preservation Act, 16 U.S.C. §§ 470, *et seq.*, *see Brenda Mallory, Counseling the Client on the National Historic Preservation Act*, PRAC. REAL EST. LAW. 9 (1997).

69. K.A.R. 118-3-2, K.A.R. 118-3-3 (2008).

70. K.A.R. 118-3-3(b) (2008).

71. *See Reiter v. City of Beloit*, 263 Kan. 74, 947 P.2d 425 (1997); *Lawrence Preservation Alliance, Inc. v. Allen Realty, Inc.*, 16 Kan. App. 2d 93, 819 P.2d 138 (1991); *Allen Realty, Inc. v. City of Lawrence*, 14 Kan. App. 2d 361, 790 P.2d 948 (1990).

If during the review process the State Historical Preservation Officer determines, with or without having been given notice of the proposed project, that such proposed project will encroach upon, damage or destroy any historic property included in the national register of historic places or the state register of historic places or the environs of such property, such project shall not proceed until: (1) The governor, in the case of a project of the state or an instrumentality thereof, or the governing body of the political subdivision, in the case of a project of a political subdivision or an instrumentality thereof, has made a determination, based on a consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to such historic property resulting from such use; and (2) five days notice of such determination has been given, by certified mail, to the state historic preservation officer.<sup>72</sup>

### § 1.3.3 **C. Flexible Zoning Techniques**

In recent years, many persons involved in the land use planning process have concluded that the traditional Euclidean zoning, with its emphasis on lots and blocks in a grid pattern, together with minimum setbacks and lot sizes for each living unit, is too rigid to deal effectively with contemporary land use problems. As a result, a number of new zoning and land use techniques have received both legislative and judicial approval in many parts of the country. In Kansas some of these new techniques have received specific legislative sanction.<sup>73</sup> Although K.S.A. 12-755 authorizes only six of the new techniques, K.S.A. 12-741(a) provides that the planning and zoning act “is not intended to prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict with the provisions of this act.” Therefore, provided the land use techniques discussed below do not conflict with the provisions of the planning and zoning act, governing bodies may enact and enforce these techniques.

#### § 1.3.3(a) **1. Planned Unit Developments**

##### § 1.3.3(a)(1) **a. Overview**

The enabling legislation for Planned Unit Developments (“PUDs”) is found in K.S.A. 12-755(a)(1). PUDs permit a planned mix of uses such as residential, commercial, and industrial, subject to restrictions on density of uses, size of uses, and relationships of one use to another. The PUD is an attempt to escape from the rigidity of single use zoning districts with their attendant density, lot size, and setback requirements. To avoid this rigidity, the PUD is typically characterized by a unified blending of complimentary land uses, together with clustering of building units, open space or green area, and density, controlled not by the establishment of minimum lot sizes but by the establishment of a maximum density for the entire development. The PUD further permits a developer more fully to utilize the tract and perhaps to increase the density within the tract, and in exchange, exacts from the developer a portion of the tract that must be set apart as common area or unencroachable green space.

Because PUDs are authorized in a governing body’s zoning regulations, any zoning regulation containing PUD provisions must comply with the general zoning regulation requirements set forth in K.S.A. 12-753.<sup>74</sup> PUDs typically consolidate into one land use device the previously separate steps of zoning, platting, and obtaining a special use permit, and site planning, and the focus is on the applicant’s development plan. The development plan generally contains the information contained in the plat, a special use permit and a site plan.

The governing body has broad discretion in determining the minimum size of PUDs. The minimum size may be established in terms of number of dwelling units or in terms of

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72. K.S.A. 74-2724(a).

73. See K.S.A. 12-755.

74. See § 1.3.2(c), *supra*.

acreage. Although in most instances the PUD will exceed the minimum requirements, some provision should be made for small PUDs, as a one acre PUD may be justified in the urban center of a community.

The governing body is free to fashion any zoning regulation regarding PUDs, subject only to the general zoning requirements of K.S.A. 12-753. The application for a PUD is controlled by the zoning provisions found in K.S.A. 12-753 and 12-757.<sup>75</sup>

Similar to a PUD, traditional neighborhood development (“TND”) is one of several new urbanism concepts that have been embraced over the past 15 years as an alternative to the conventional development patterns that defined growth in the United States starting in the 1920’s.<sup>76</sup> As an alternative to urban sprawl, TNDs promote mixed use, pedestrian friendly communities of varied population, either standing free as villages or grouped into towns and cities.<sup>77</sup> Generally, TNDs strive to be self contained, walkable, typically using a grid layout, and to have a clear, focused center.<sup>78</sup>

**§ 1.3.3(a)(2) b. Enforcement and Modification of the PUD Plan**

Planned unit development zoning regulations, like any other zoning regulation, may be enforced by any city or county, or any person whose property is, or may be, affected by an alleged violation of the regulations.<sup>79</sup>

**§ 1.3.3(a)(3) c. Opportunities Under Planned Unit Development Legislation**

The planned unit development enabling legislation and the municipal zoning regulations enacted thereunder are most useful for the development of large tracts of land in areas that have previously been undeveloped, or for the redevelopment of urban areas, regardless of size. PUDs provide singular opportunities for creative development because they allow a blending of residential, commercial, and industrial uses. While in the past, a developer was required to secure separate rezoning for the residential and commercial parts of the development, the PUDs now enable the developer to combine them. This eliminates the recurring problem found when a large scale development builds up with residential uses, and the developer then determines that a fringe area should be rezoned to either multifamily or commercial uses. Upon applying for rezoning to multifamily or commercial uses, the developer is confronted with angry cries from homeowners who argue that the character of their neighborhood is being changed and that the rezoning should therefore not be approved. Under the PUD regulations, the preliminary development plan shows that commercial development is contemplated, and a person purchasing a residence in the development has prior notice that a certain portion of the property in the development will be used for commercial purposes. Moreover, commercial PUDs can obviate the frequent objection to commercial rezoning that, notwithstanding the stated intentions of the developer, once rezoning occurs any use permitted in the commercial zoning district may be constructed. The PUD also appears to eliminate the burden of proof requirement that is usually imposed on an applicant for a zoning amendment, in that if an applicant for a PUD meets the standards and criteria set forth in the PUD zoning regulation, the application should be approved without a showing of hardship, changed circumstances, or mistake in the original zoning designation.

**§ 1.3.3(a)(4) d. Planned Unit Development Problem Areas**

**§ 1.3.3(a)(4)(i) i. Size of Planned Unit Development**

If the zoning regulation establishing standards and criteria for planned unit developments concerns itself only with large scale developments, the usefulness of the planned unit

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75. See § 1.3.2(c), *supra*.  
 76. ROBERT H. FREILICH, S. MARK WHITE & KATE F. MURRAY, 21ST CENTURY LAND DEVELOPMENT CODE, 8-12 (2008).  
 77. *Id.*  
 78. *Id.*  
 79. K.S.A. 12-761.

development device is diminished. Although the zoning regulation must not establish a minimum size that is too small, and thus cause the PUD process to become a substitute for rezoning, it should nonetheless provide discretion to the governing body to deviate from large minimum acreage requirements to deal with the unique problems that may be occasioned by land in the urban center and in commercial or industrial developments.

**§ 1.3.3(a)(4)(ii) ii. Lack of Mutuality Between Municipality and Developer**

The land use benefits to be derived from planned unit developments can only be achieved by a heavy initial capital outlay by the developer. The degree of planning, engineering, legal work, and development plan requirements for a PUD are far greater than those required for the traditional rezoning, platting and site planning processes. As a result of this initial capital outlay, the developer should have some assurance that upon approval of the preliminary development plan, substantial changes will not occur that will frustrate the ultimate implementation of that plan. Although the governing body is not statutorily prohibited from making substantial changes to its zoning regulations or changing the zoning designation of the district in which the PUD is located, the governing body may be equitably estopped to change the zoning or the regulations upon which preliminary approval has been granted.<sup>80</sup>

**§ 1.3.3(a)(4)(iii) iii. Premature Commitment by Developer**

The PUD scheme requires substantial advance planning by the developer. Often, however, the direction of a large scale project which is to be developed over an extended time period cannot be determined many years prior to actual development. Such factors as housing trends, economic conditions, and zoning in adjacent areas may cause initial plans to become obsolete. Thus, if a developer is required to make development commitments that cannot reasonably be changed without the need for the full array of public hearings, neighbors' protests, and public criticism for failure to adhere to original plans, the developer may choose to use traditional Euclidean zoning rather than a PUD for the development. Therefore, in order for a governing body to make the PUD a tool that will be used by developers, it must ensure that the PUD regulation will provide flexibility to the developer in adapting the PUD plan to unforeseen and unforeseeable future conditions. Such flexibility can be provided, in part, by establishing a PUD zoning district that can be shown on the zoning district map prior to the submission of a preliminary development plan. The developer thus secures PUD (including perhaps commercial and office plan unit developments) zoning without the need to commit to a specific development plan.

**§ 1.3.3(a)(4)(iv) iv. Phasing of PUD and Non-Uniform Allocation of Open Space**

In its zoning regulations, governing bodies authorizing a PUD have the discretion to permit deviation from uniform allocation of open space in each stage of a multi-staged PUD. It is important for governing bodies to provide for this discretion in the enactment of its PUD zoning regulation. Because most PUDs involve large tracts of land, they are often developed in a phased or multi-staged development sequence. Many planned unit development regulations have unfortunately required the developer to include within the final plan of each stage enough open space so that the density or intensity prescribed for the overall plan is maintained with each stage. The consequence is to limit the flexibility in planning the overall development and generally to prevent the developer from beginning construction in those portions of the overall land area that are to be devoted to high density uses. The zoning regulation should, therefore, provide that the standards may, in the case of a development to be built over a period of years, allow the non-uniform allocation of densities over the various development phases, subject to the granting of a "floating open space easement" or by deeding subsequent open space to the municipality. The purpose of the floating open space

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80. See *Benson v. City of DeSoto*, 212 Kan. 415, 510 P.2d 1281 (1973). See also *Colonial Inv. Co. v. City of Leawood*, 7 Kan. App. 2d 660, 646 P.2d 1149 (1982); *City of DeSoto v. Centurion Homes, Inc.*, 1 Kan. App. 2d 634, 573 P.2d 1081 (1977); see also William E. Donnelly, III, *Downzoning and Vested Rights for the Real Estate Practitioner*, PRAC. REAL EST. LAW. 39 (1987).

easement is to assure the municipality and the residents of the first phases of the development that if the developer fails to proceed with subsequent phases, the municipality and the residents of the earlier phases will nonetheless have the open space they would have enjoyed had open space been allocated uniformly to each proposed phase of development. The common open space easement is called a “floating” open space easement because it defers the precise location of the common open space easement until an application is filed for final approval of the PUD.

### § 1.3.3(a)(4)(v) v. Dedication of Open Space

With the repeal of K.S.A.12-728 in 1991, there is no longer a statutory prohibition against requiring dedication of open space, and enabling legislation pertaining to platting expressly permits subdivision regulations to provide for the reservation or dedication of open space.<sup>81</sup> No such dedication will be permitted, however, unless there is a sufficient nexus between the required transfer and the proposed development.<sup>82</sup> If the nexus is not sufficient, then such requirements are essentially uncompensated takings of property in violation of the Fifth Amendment.<sup>83</sup>

## § 1.3.3(b) 2. Special Use Permits

### § 1.3.3(b)(1) a. Definition

The special or conditional use permit describes a device for permitting certain uses considered to be essential or desirable to the community to be placed in zoning districts in which they would ordinarily be incompatible, so long as the permitted use is reasonable and conforms to standards and conditions designed to protect the interests of adjoining owners.<sup>84</sup> The typical special use is one that does not fit conveniently within any zoning district or has particular characteristics which may cause it to be incompatible with the uses in the district into which it would most logically fit. Examples of special uses are mobile home parks, private clubs, hospitals, nursing homes, public utilities, and perhaps educational institutions. Special use permits are to be distinguished from variances, which authorize a landowner to establish or maintain a use which is prohibited by the zoning regulation, and from exceptions, which authorize a board of zoning appeals to permit a landowner to deviate from the strict requirements of the zoning regulation only when that deviation is specifically permitted by the regulation. Moreover, because special use permits are granted only for uses allowed in predefined zoning districts that are located on the zoning district map, they cannot be challenged as “spot zoning,” which arbitrarily and unreasonably classifies a small tract of property differently from surrounding property.<sup>85</sup>

### § 1.3.3(b)(2) b. Permissible Use in Kansas

Specific statutory authority for special use permits is granted by K.S.A. 12-755(a)(5).<sup>86</sup> The issuance of such permits has been sustained by the Kansas Supreme Court for many years.<sup>87</sup> A governing body may impose conditions on the granting of a special use permit,

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81. K.S.A. 12-749(b). *See generally*, A. S. Klein, Annotation, *Validity and Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof*, 43 A.L.R.3d 862 (1972).
  82. *Nollan v. California Coastal Comm'rs*, 483 U.S. 825 (1987).
  83. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). For a thorough discussion of *Dolan*, see Stephen P. Chinn, *et al.*, *Dolan v. City Of Tigard: Kansas Local Governments Beware--The Supreme Court Further Restricts the Authority of Municipalities to Condition Development Approvals*, 64 J. KAN. BAR ASS'N 30 (Nov. 1995); Georgette C. Poindexter, Comment, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *The Poor Relation Strikes It Rich*, Vol. 29 REAL PROP. PROB. & TR. J. 451 (1994); David S. Ardia, *Dolan v. City of Tigard: Takings Doctrine Moves Onto Unpaved Ground*, Vol. 24, No. 3 REAL EST. L.J. 195 (1996).
  84. *K-S Ctr. Co. v. City of Kansas City*, 238 Kan. 482, 712 P.2d 1186 (1986).
  85. *Weeks v. City of Bonner Springs*, 213 Kan. 622, 518 P.2d 427 (1974).
  86. *See also* K.S.A. 19-2960.
  87. *See, e.g.*, *Tri-County Concerned Citizens, Inc. v. Board of County Comm'rs of Harper County*, 32 Kan. App. 2d 1168, 95 P.3d 1012 (2004); *Johnson County Water Dist. No. 1 v. City of Kansas City*, 255 Kan. 183, 871 P.2d 1256 (1994); *International Villages Inc. v. Board of County Comm'rs*, 224 Kan. 654, 585 P.2d 999 (1978); *Weeks*, 213 Kan. 622, 518 P.2d 427; *Scherrer v. Board of County Comm'rs*, 201 Kan. 424, 441 P.2d 901 (1968); *Duggins v. Board of County Comm'rs*, 179 Kan. 101, 293 P.2d 258 (1956).

provided the conditions are rationally related to the objectives of promoting the general welfare, encouraging property development, and preserving the tax base, and are not unreasonable or oppressive.<sup>88</sup> To prevent a challenge to the special use permit process, governing bodies enacting special use permit regulations should ensure that the regulation establishes adequate standards, so that arbitrary power is not conferred on the governing body.<sup>89</sup> In addition, the governing body should ensure that its special use permit regulation complies with procedural due process requirements.

**§ 1.3.3(c)**

**3. Floating Zones**

**§ 1.3.3(c)(1)**

**a. Definition**

A “floating” zone is a zoning district described in detail in the text of the zoning regulation, but not located on the zoning district map. It has no defined boundaries in the regulation or on the zoning district map. It is, therefore, different from the special use which is permitted in predefined zoning districts that are located on the zoning district map. Floating zones are generally used for shopping centers, garden apartments, and light industrial areas. Their use is subject to conditions designed to make them compatible with adjoining properties.

**§ 1.3.3(c)(2)**

**b. Permissible Use in Kansas**

Although K.S.A. 12-741(a) authorizes governing bodies to enact and enforce additional laws and regulations not in conflict with the provisions set forth therein, the enactment by a governing body of a floating zone may conflict with certain provisions contained in the planning and zoning act. K.S.A. 12-753(a) requires that boundaries of zoning districts be defined, either by description in the zoning regulations, or by designation on the zoning district map. Since by definition a floating zone has no predetermined boundaries, it would be difficult to justify the floating zone under the Kansas enabling legislation. The special permit is not similarly vulnerable to K.S.A. 12-753(a) because it applies only to uses allowed in predetermined zoning districts. In addition, the floating zone may be considered to be “spot zoning,” and therefore invalid under Kansas enabling legislation that requires comprehensive zoning.<sup>90</sup>

**§ 1.3.3(d)**

**4. Clustering**

**§ 1.3.3(d)(1)**

**a. Definition**

Clustering is a technique combining both subdivision design and zoning. It generally features small lots, with the balance of land in the tract set aside as common area or open space. In this regard, it closely resembles the most significant features of a planned unit development. Thus, in a residential zoning district requiring 10,000 square feet for each dwelling unit, clustering would permit each dwelling unit to be placed on, for example, 5,000 square feet, with the remaining collective square footage in the development set aside as open space.

**§ 1.3.3(d)(2)**

**b. Permissible Use in Kansas**

Due to the language of K.S.A. 12-741(a), and because it seems not to conflict with any other planning and zoning statute, clustering may be a viable option for Kansas cities and counties whether the clustering occurs within or outside of a planned unit development.

**§ 1.3.3(e)**

**5. Density Zoning**

**§ 1.3.3(e)(1)**

**a. Definition**

88. Johnson County Water Dist. No. 1 v. City of Kansas City, 255 Kan. 183, 191, 871 P.2d 1256 (1994).

89. Cf. Hudson Props., Inc. v. City of Westwood, 181 Kan. 320, 310 P.2d 936 (1957). See also M.S.W., Inc. v. Marion County Bd. of Zoning Appeals, 29 Kan. App. 2d 139, 143-46, 24 P.3d 175 (2001); and Peggy Gatewood, Comment, *Judicial Review of Special Use Permits in Kansas*, 11 WASHBURN L.J. 440 (1972).

90. See Coughlin v. City of Topeka, 206 Kan. 552, 480 P.2d 91 (1971).



Density zoning is a technique by which residential zoning focuses on the number of dwelling units per acre, rather than on the particular kind of residential use permitted in the zoning district. Density zoning concerns itself with how many dwelling units are located within a given area, rather than whether those dwelling units are single family, duplex, or multifamily. It is particularly useful for large scale developments that are completed over a relatively short period of time. In such developments, density zoning permits the developer to concentrate on a proper blending of different residential uses within the development, thus avoiding the monotony of fragmenting the development into pockets of single family houses, duplexes, and apartments. It is the overall density, rather than the kind of use, that controls.

**§ 1.3.3(e)(2)**

**b. Permissible Use in Kansas**

The repeal of the former procedural and substantive laws relating to PUDs and in their place providing a blanket authorization of PUDs, coupled with K.S.A. 12-753, which authorizes zoning regulations to include, but not be limited to, “the density of population,” as well as the language of K.S.A. 12-741(a), should remove any questions regarding the permissibility of density zoning in Kansas.

**§ 1.3.3(f)**

**6. Contract and Conditional Zoning**

**§ 1.3.3(f)(1)**

**a. Definition**

Contract zoning describes a zoning amendment authorizing a particular use in exchange for the landowner’s agreement to restrict the land to the specific use that the governing body deems appropriate. It is, in effect, a bilateral agreement between the governing body and the landowner, and is usually held invalid as an illegal abrogation of the municipality’s police power and a restraint on its freedom to make future zoning changes.

Conditional zoning possesses a close conceptual kinship to contract zoning. It is, however, substantially different in implementation, and as a result is more likely to withstand judicial scrutiny. Conditional zoning refers to a zoning regulation amendment allowing the use of particular property which the property owner subjects to restrictions beyond those imposed upon surrounding property. In contract zoning, the governing body obligates itself to rezone property upon the property owner’s compliance with certain conditions. In conditional zoning, however, the governing body imposes the condition prior to the enactment of a zoning regulation, and without any contractual obligation on its part to effect the rezoning. Conditional zoning seeks to minimize the potentially deleterious effect of a zone change on neighboring properties through reasonably conceived conditions which harmonize the landowner’s need for rezoning with the public interest.<sup>91</sup> Conditional zoning may, in its broadest application, permit uses in a zoning district that would otherwise be disallowed, and in its more typical application, permit uses allowed in a zoning district only after the landowner has complied with certain conditions either imposed or suggested by the planning commission or governing body.

**§ 1.3.3(f)(2)**

**b. Permissible Use in Kansas**

Conditional zoning appears to have judicial support.<sup>92</sup> If it is used to benefit the community by applying more restrictions to a particular parcel, it may be permissible even though it is not uniform. However, several grounds may nonetheless exist upon which such zoning might be challenged. Among those grounds are the following: that the zoning authority has ignored environmental needs and standards because of the property owner’s

91. 83 AM. JUR. 2D *Zoning and Planning* § 162 (2003).

92. *See, e.g.*, *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978); *Hukle v. City of Kansas City*, 212 Kan. 627, 512 P.2d 457 (1973); *Benson v. City of Desoto*, 212 Kan. 415, 510 P.2d 1281 (1973); *Arkenberg v. City of Topeka*, 197 Kan. 731, 421 P.2d 213 (1966); *Hudson Oil Co. v. City of Wichita*, 193 Kan. 623, 396 P.2d 271 (1964).

concession in the form of a condition; that bargaining has blurred legislative judgment; that conditional zoning is prima facie spot zoning; that the property owner has received preferential treatment; that the concept of comprehensive planning and zoning is frustrated; that piecemeal rather than uniform zoning districts will result; and that since there are no standards for conditional zoning, the governing body can impose arbitrary and unreasonable conditions.<sup>93</sup>

### § 1.3.3(g)

## 7. Transferable Development Rights

#### § 1.3.3(g)(1)

### a. Definition

If a local government restricts the development on a particular parcel, it may compensate the landowner for those restrictions by permitting the landowner to transfer some or all of the development rights from the restricted parcel to another parcel within a specified district. These transferable development rights (“TDRs”) may be used to decrease the density on the restricted parcel while increasing the density permitted on the receiving parcel. The TDRs might also be sold independently of a parcel of land to be applied by the purchaser to another parcel.

#### § 1.3.3(g)(2)

### b. Permissible Use in Kansas

K.S.A. 12-755(a)(2) specifically grants local governing bodies the authority to adopt zoning regulations that permit the transfer of development rights.

The United States Supreme Court has not yet ruled on the constitutionality of TDR’s. However, TDR’s have been considered to mitigate the impact of regulation on a particular parcel of land. In *Penn Cent. Transp. Co. v. New York City*,<sup>94</sup> the United States Supreme Court considered the fact that Penn Central could sell its pre-existing air rights (TDR’s) without any further discretionary approvals, even though the New York City Landmarks Preservation Commission had refused to permit a 50 story office building on the site. The present use of the site could remain, and the air rights could be sold to the owner of nearby land, thus mitigating the negative impact of the regulation.<sup>95</sup>

### § 1.3.3(h)

## 8. Overlay Zones

#### § 1.3.3(h)(1)

### a. Definition

An overlay zone adds additional restrictions on top of the restrictions already present in a zoning district. An overlay zone is not an independent zoning district but is a set of restrictions supplemental to the underlying zoning. Overlay zones have been used to protect and preserve the quality of urban neighborhoods with the use of historic district or conservation district overlays.<sup>96</sup> Flood plain overlay districts have been used to restrict development in federally designated flood plains or floodways regardless of the underlying zoning and to restrict certain types of development in the fly-out path at an airport.

#### § 1.3.3(h)(2)

### b. Permissible Use in Kansas

K.S.A. 12-755(a)(6) specifically grants local governing bodies the authority to adopt zoning regulations that permit the establishment of overlay zones.

93. For further discussion of contract and conditional zoning problems and opportunities, see 2 KENNETH H. YOUNG, ANDERSON’S AMERICAN LAW OF ZONING, §§ 9.20-.21 (4th ed. 1996); Shapiro, *The Case for Conditional Zoning*, 41 TEMPLE L.Q. 267 (1968); Comment, *Use and Abuse of Contract Zoning*, 12 UCLA L. REV. 897 (1965); Note, *Contract and Conditional Zoning; A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825 (1972).

94. 438 U.S. 104 (1978).

95. *Id.* at 137.

96. *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d 966 (Ohio 1987).

The United States District Court of Kansas found that airport overlay districts established by the City of Wichita and Sedgwick County were reasonable, were not facially invalid, and did not create a taking *per se*.<sup>97</sup>

**§ 1.3.3(i)**

**§ 1.3.3(i)(1)**

**9. Design Control and Aesthetics**

**a. Definition**

Regulation of the design of buildings may be used in addition to use restrictions, locational criteria within a lot, and size restrictions to ensure compatibility with neighboring uses.

**§ 1.3.3(i)(2)**

**b. Permissible Use in Kansas**

K.S.A. 12-755(a)(4) specifically authorizes a local governing body to adopt zoning regulations to control the aesthetics of a new development or redevelopment, thus removing any doubt as to whether zoning solely for aesthetic purposes is within the police power of the State of Kansas. Relying on the statute and on *Houston v. Board of City Comm'rs*, 218 Kan. 323, 543 P.2d 1010 (1975) and *Robert L. Rieke Bldg. Co. v. City of Overland Park*, 232 Kan. 634, 657 P.2d 1121 (1983), the Kansas Court of Appeals approved the regulation of a store's awning design for aesthetic reasons.<sup>98</sup>

**§ 1.3.3(j)**

**§ 1.3.3(j)(1)**

**10. Growth Management**

**a. Definition**

Some communities have adopted a combination of land use regulations to control the timing and intensity of land development. These regulations are sometimes enacted to preserve downtown areas or to ensure that public facilities and utilities will be able to serve the new developments. Examples of growth management tools are moratoria on development, which are usually temporary bans on development until a new or more restrictive zoning ordinance can be enacted; performance zoning, which includes standards for the provision of adequate physical improvements, such as parking areas and which requires developers to guarantee their installation by posting bonds or cash; incentive zoning, which provides the developer with greater density if the development provides more amenities, involves the construction of public facilities, or is located in a targeted redevelopment area; and development impact analyses, which require the analysis of both the proposed use and its projected impact on the existing infrastructure.

**§ 1.3.3(j)(2)**

**b. Permissible Use in Kansas**

There are no prohibitions in the Kansas planning and zoning enabling legislation to prevent the use of any of the growth management tools identified in this section. The home rule amendment empowers cities to determine their own affairs, including taxes, fees and exactions unless prohibited by a state statute that applies uniformly to all cities.<sup>99</sup> K.S.A. 12-194 may be one such statute. The statute prohibits a city or county from imposing an excise tax, except for a retailers' sales tax and a compensating use tax. In 2006, the legislature amended the statute to provide that a city could retain a development excise tax as levied or imposed by such city in existence on January 1, 2006.<sup>100</sup> K.S.A. 12-194 includes the manner in which a city can increase the rate of a development excise tax that had been in existence on January 1, 2006.<sup>101</sup> Thus, K.S.A. 12-194 prohibits a city or county from imposing development excise taxes after January 1, 2006. Impact fees for road improvements in

97. *Harris v. City of Wichita*, 862 F. Supp. 287, 292 (D. Kan. 1994).

98. *Blockbuster Video, Inc. v. City of Overland Park*, 24 Kan. App. 2d 358, 948 P.2d 179 (1997); *see also* *R.H. Gump Revocable Trust v. City of Wichita*, 35 Kan. App. 2d 501, 131 P.3d 1268 (2006) and discussion at § 1.9.8, *infra*.

99. KAN. CONST. art. 12, § 5.

100. K.S.A. 12-194(a).

101. K.S.A. 12-194(c).

Leawood have been approved by the Kansas Supreme Court as a legitimate exercise of a city's home rule power.<sup>102</sup>

### § 1.3.4

## D. Regulation of Mobile and Manufactured Homes

### § 1.3.4(a)

### 1. Mobile Homes

Although the zoning enabling legislation does not discuss mobile home and mobile home park locations, most Kansas governing bodies seem to have undertaken some regulation for the location of mobile homes. Such regulations generally restrict mobile homes to approved mobile home parks or mobile home communities. One such restrictive regulation was approved by the Kansas Supreme Court in *City of Colby v. Hurtt*,<sup>103</sup> in which the court held that Colby's restriction of mobile homes to mobile home communities was a reasonable exercise of the city's police power.

The court observed that mobile homes involve potential hazards to public health if not properly located and supplied with utilities and sanitary facilities, and that if mobile homes are scattered promiscuously throughout a city's residential district, growth may be stunted and residential development stifled. Notwithstanding the court's decision in *City of Colby*, other problems of mobile home location remain.<sup>104</sup> Some municipalities have attempted to solve these problems by placing mobile homes in planned unit developments, or in special mobile home subdivisions. In such districts, mobile home lots may either be rented or sold. Permitting the sale of small lots upon which mobile homes are placed on permanent foundations involves a recognition that many mobile homes now meet all requirements of the Uniform Building Code. Any attempt to require mobile homes which have lost their mobility to be located in a separate mobile home park raises serious constitutional questions that the Supreme Court did not reach in *City of Colby*.<sup>105</sup>

### § 1.3.4(b)

### 2. Manufactured Homes

Manufactured homes, on the other hand, are defined by K.S.A. 12-742(a)(5) as structures subject to the federal manufactured home construction and safety standards established pursuant to 42 U.S.C. § 5403. Manufactured homes are distinguished from mobile homes, which may be shorter and are not subject to the federal manufactured home construction and safety standards established pursuant to 42 U.S.C. § 5403.<sup>106</sup>

K.S.A. 12-763(a) prohibits governing bodies from excluding manufactured homes from the entire zoning jurisdiction or excluding residential-design manufactured homes from single family residential districts solely because they are manufactured homes. Nonetheless, architectural or aesthetic standards may be established to ensure compatibility with other housing in the same district. Restrictive covenants running with the land, which exclude manufactured homes, remain enforceable.<sup>107</sup>

## § 1.4

## IV. SUBDIVISION CONTROLS

Subdivision controls began as a method to facilitate the sale of land by permitting a seller to plat his land into numbered blocks and lots. Conveyances were thus made by block and lot number, rather than by complicated metes and bounds descriptions. As urbanization intensified, the scope of subdivision controls broadened from being merely a method of

102. *McCarthy v. City of Leawood*, 257 Kan. 566, 894 P.2d 836 (1995).

103. 212 Kan. 113, 509 P.2d 1142 (1973).

104. *See, e.g., City of DeSoto v. Centurion Homes, Inc.*, 1 Kan. App. 2d 634, 573 P.2d 1081 (1977) (holding that the city was entitled to a mandatory injunction to remove a mobile home located in violation of zoning regulation and that the city's regulation was reasonable).

105. For a comprehensive analysis of mobile home zoning, see Gerald E. Hertach, Comment, *Mobile Home Zoning in Kansas*, 20 KAN. L. REV. 87 (1971).

106. *Cf. K.S.A. 58-4202(a) & (b)*.

107. *K.S.A. 12-763(c)*.

describing real estate to a method of establishing and enforcing standards for public facilities such as streets, sewers, and drainage easements. Subdivision controls do not, however, regulate the use of land or the bulk of structures placed thereon. Such regulations are, instead, found in zoning regulations.

More recently subdivision regulations have been expanded to manage the timing of development and in some local jurisdictions to require a showing that there are adequate public facilities to support the proposed development. This in turn has led to two forms of exactions: required dedications of land for public use and required payment of money, through impact fees, to pay all or part of the costs of the necessary public improvements.

### § 1.4.1

#### A. Enabling Legislation

Enabling legislation for city and county subdivision regulations is found at K.S.A. 12-749 and 12-750. Such regulations may include provisions for the orderly location of streets, reduction of vehicular congestion, reservation or dedication of land for open spaces, public improvements, recreational facilities, flood protection, building lines, compatibility of design, storm water runoff, and any other services, facilities, and improvements considered appropriate.<sup>108</sup>

After adopting a comprehensive plan, a city planning commission may adopt regulations governing the subdivision of land located within the city and of land lying within three miles outside of the city.<sup>109</sup> A county planning commission may adopt subdivision regulations for all or part of the unincorporated areas of the county. A public hearing is required before subdivision regulations can be adopted or amended, and cities and counties may still act together for purposes of adopting and administering subdivision regulations.<sup>110</sup> If the governing body of a city proposes to adopt subdivision regulations for land outside its city limits that is subject to county subdivision regulations, a joint committee for subdivision regulations should be appointed by the two planning commissions to adopt and administer such subdivision regulations.<sup>111</sup>

### § 1.4.2

#### B. Contents of Subdivision Regulations

Kansas subdivision regulations generally contain six principal elements: platting, lot splitting, design standards, public improvement requirements, public improvement standards, and mandatory dedication of open space.

#### § 1.4.2(a)

##### 1. Platting

K.S.A. 12-752 establishes broad guidelines for platting and leaves the details of the platting process to the local subdivision regulations. The purpose of a plat is to effect the subdivision of land by laying out blocks and lots on a map that also shows the location and dimensions of streets, alleys, parks, and other properties intended to be dedicated for public use and for the use of purchasers or owners of lots within the platted area.

Under Kansas enabling legislation, a plat must be submitted to the planning commission whenever the owner of land wishes to subdivide it into lots, blocks, tracts, or parcels for the purpose of laying out any subdivisions, suburban lots, building lots, tracts, or parcels.<sup>112</sup> Moreover, a plat is required when an owner of land establishes any street, alley, park, or other property intended for public use or for the use of purchasers or owners of land within the platted area. The breadth of these platting requirements presents troublesome questions, most of which are unanswered. These questions usually present themselves in the form of

108. K.S.A. 12-749(b).

109. K.S.A. 12-749(a).

110. K.S.A. 12-750(a).

111. *Id.*

112. K.S.A. 12-752(a).

exemptions built into subdivision regulations, even though the enabling legislation seems not to contemplate exemptions from the platting process. Exemptions, however, appear in most subdivision regulations because there are at least some divisions of land that do not seem to fit under the platting umbrella. Among these are divisions of land for agricultural purposes, division of rural land for large residential lots when new streets and easements are not required, transfers by testamentary disposition or by operation of law, and vacation of land impressed with a public use. Cities have also found troublesome questions of whether to require platting in condominium and townhouse developments, and whether a duplex owner may separately sell each half of a duplex building. When the duplex (or any row-type building sharing a party wall) is divided along the party wall, setback requirements of the subdivision regulations will usually be violated. Some cities have addressed this question by providing an exemption for such divisions.<sup>113</sup>

A majority of jurisdictions that have considered the question have found that converting existing property into condominiums and selling individual condominium units does not constitute a “subdivision” and therefore, the property does not have to be platted.<sup>114</sup> Because Kansas has yet to rule on this issue, some Kansas cities have gone against the weight of authority and found that a condominium conversion is subject to the platting process. Although without specific language in the subdivision regulations expressly including condominium conversion as a “subdivision,” such findings may be unreasonable and subject to challenge.

The platting process is usually a two step procedure. The first step involves filing the preliminary plat, which is primarily a planning document rather than a recording document. The preliminary plat typically includes a showing of existing zoning, natural and topographical features, land uses, and soil types. After the preliminary plat has been approved, the subdivider may submit a final plat which, after approval, becomes not only the recording document showing the dimensions of lots and blocks, but also the document by which streets, easements, and other public ways are dedicated to the public.

K.S.A. 12-752(a) requires that all plats be submitted to the planning commission for approval. The statutory criterion for approval is whether the plat conforms to the provisions of the subdivision regulations. The planning commission has 60 days after submission to the commission’s secretary to determine whether the plat conforms to the subdivision regulations. It is generally assumed that the 60-day provision pertains only to the submission of the final plat and not to the entire platting process covering both preliminary and final plats. Until 1982, only the planning commission was required to approve a plat. Now, however, not only must the planning commission approve a plat, but the governing body must, under K.S.A. 12-752(c), accept the plat’s dedication of land for public purposes. The register of deeds is prohibited from filing any plat that does not bear the endorsement of the planning commission and the governing body’s acceptance of dedication.<sup>115</sup> If the plat contains no dedication, it appears that the governing body would not be a participant in the platting process.

The enforcement mechanism in the platting process is the application for a building or zoning permit, because K.S.A. 12-752(e) prohibits the issuance of a building or zoning permit

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113. *See, e.g.*, Subdivision Regulations for Lawrence and the Unincorporated Areas of Douglas County, Kan., § 20-801(d)(2)(viii) (2007).

114. *In re Lowe*, 164 Vt. 167, 666 A.2d 1178 (1995) (stating that the overwhelming majority of decisions conclude that in the absence of a specific statute, no zoning or subdivision permit is required to establish condominium ownership of rental property); *see also* *Maplewood Village Tenants Ass’n. v. Maplewood Village*, 116 N.J. Super. 372, 282 A.2d 428 (1971); *Graham Court Assoc.’s. v. Town Council of the Town of Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981); *North Fork Motel, Inc. v. Grigonis*, 461 N.Y.S.2d 414, 93 A.D.2d 883 (1983); and *Town of York v. Cragin*, 541 A.2d 932 (Me. 1988).

115. K.S.A. 12-752(h).

for the use or construction of any structure upon a lot, tract, or parcel of land that has been subdivided, resubdivided, or replatted without plat approval.

The impact of subdivision regulations and decisions made thereunder on subdividers and adjoining property owners appears to justify the same kind of judicial inquiry as applies to zoning decisions. Such inquiry is, however, singularly unavailable in Kansas, as a result of *Sabatini v. Jayhawk Construction Co.*<sup>116</sup> In *Sabatini*, the court held that platting decisions are legislative functions which can only be reviewed *in quo warranto* proceedings. Thus, judicial review of platting decisions is limited to determining whether the governing body had the statutory authority to act, and if so, whether it acted within that authority. The reasonableness of platting actions cannot be judicially questioned as can the reasonableness of zoning actions. The effect of *Sabatini* is particularly troublesome in view of K.S.A. 12-752 which seems to place complete jurisdiction over the platting process, other than approval and acceptance of public dedications, in the planning commission. Thus, an appointed advisory body is given the authority to approve or disapprove plats without the effective safeguard of judicial review.

#### § 1.4.2(b)

### 2. Lot Splitting

K.S.A. 12-752(f) provides that subdivision regulations shall allow building permits to be issued on platted lots divided into not more than two tracts without requiring replatting of the lot. Further, the subdivision regulations may authorize and establish conditions for the issuance of building permits on lots divided into three or more tracts without having to replat such lots. The subdivision regulations must, therefore, provide for the issuance of building permits on lots that have been split into two tracts, but the regulations may condition the issuance of building permits on further lot splitting without requiring a replat. Lot splits can, however, be limited if street rights-of-way, easements, or other public services will be required as a result of the split. In that event, replatting is necessary.

#### § 1.4.2(c)

### 3. Design Standards

The term “design standards” refers to the provisions of subdivision regulations specifying the manner in which streets, alleys, utility and drainage easements, lots, and blocks shall be laid out or designed. The standards may be merely general statements of principle, or specific requirements of design. An example of the former is that local street layouts must discourage use by nonlocal traffic. An example of the latter is that the minimum radius of curvatures of the center line of a primary arterial street must be at least 500 feet. Compatibility of design standards are specifically authorized by K.S.A. 12-749(b).

#### § 1.4.2(d)

### 4. Public Improvements

In order to ensure that platted areas will contain adequate public improvements, subdivision regulations typically require the developer to install or to make provisions guaranteeing completion of public improvements prior to approval of the final plat. In urban areas, public improvements might include streets, storm and sanitary sewers, sidewalks, curbs, gutters, and water mains. In rural areas the improvements would be less extensive. An important consideration in subdivision regulations governing rural and suburban development is whether septic tanks will be permitted or whether community sanitary sewer facilities will be required. The use of septic tanks is generally limited to large lots and to rigid location, design, and layout requirements in suburban areas or areas where future urban development is anticipated.<sup>117</sup> The use of septic tanks is also stringently regulated in areas surrounding federal and state lakes and reservoirs.<sup>118</sup>

116. 214 Kan. 408, 520 P.2d 1230 (1974). See also *Venture In Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (1979).

117. See, e.g., Manual of Recommended Standards for Locating, Constructing, and Operating Septic Tank Systems for Rural Homes, Bulletin 402 of the Kansas State Department of Health (Nov. 1971).

118. K.A.R. 28-10-75 to 28-10-108.

**§ 1.4.2(e) 5. Public Improvement Construction Standards**

Public improvement construction standards consist of detailed requirements for the construction of public improvements within a subdivision. These standards are in most instances developed by city and county engineers for the guidance of other engineers in the construction of public improvements. Public improvement standards are highly technical, presenting exact construction specifications, and are, therefore, often incorporated by reference into the subdivision regulations.

**§ 1.4.2(f) 6. Mandatory Dedication of Open Space**

K.S.A.12-749 gives cities and counties the authority to provide for reservation or dedication of land for open space. This statutory provision does not place any restrictions on the use or size of the open space. In addition, express authority is now given for allowing the payment of a fee in lieu of the dedication of land.<sup>119</sup> These techniques for providing additional open space still raise some constitutional issues.<sup>120</sup>

**§ 1.5 V. SITE PLAN CONTROLS**

Site planning is a procedure by which either the planning commission or the governing body reviews specific plans for the construction of a permitted use on a specific tract of land. It is usually applied only to multifamily, commercial, or industrial uses, and is designed to encourage the compatible arrangement of buildings, off street parking, lighting, landscaping, ingress and egress, and drainage facilities. Its purpose is to ensure that the specific use will not create traffic hazards or adversely affect the enjoyment and value of surrounding property. Some Kansas municipalities have required the developer to file a performance bond before obtaining site plan approval. The performance bond is conditioned upon the developer completing approved landscaping, fencing, off street parking and loading and drainage facilities. The site plan requirement is enforced by conditioning the issuance of a building permit upon site plan approval.

**§ 1.6 VI. THE REZONING PROCESS****§ 1.6.1 A. Amending the Zoning Regulation**

Requirements for amending a zoning regulation are found in K.S.A. 12-757. These requirements are generally expanded by specific provisions in local zoning regulations. Such provisions are considered to be directory rather than mandatory, unless they are accompanied by negative words importing that the acts required shall not be done in any other manner than that designated in the regulations.<sup>121</sup> Amendments to zoning regulations, either in the form of boundary changes or text amendments, must initially be submitted to the planning commission. The planning commission must develop tentative recommendations, and thereafter hold a public hearing on the application. Before a public hearing can be held, however, the planning commission must give notice in the same manner as required for the original zoning regulation.<sup>122</sup> Written notice must fix the time and place of the hearing and include a statement about the proposed changes. If the proposed amendment is not a general revision of existing regulations, but is for a particular tract of property, that tract shall be designated by either a legal description or a general description sufficient to identify the property under consideration. Notice must be mailed at least 20 days before the public hearing to all owners of real property to be altered and to all owners of real property within

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119. K.S.A. 12-749(c).

120. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); for detailed discussion, see Charles J. Delaney and Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L.J. 195 (1989) and Stephen P. Chinn, Neil R. Shortlidge & N. Cason Boudreau, *Dolan v. City of Tigard: Kansas Local Governments Beware -- The Supreme Court Further Restricts the Authority of Municipalities to Condition Development Approval*, Vol. 64, No. 9 J. KAN. BAR ASS'N 30 (1995).

121. Board of County Comm'rs v. Berner, 5 Kan. App. 2d 104, 613 P.2d 676 (1980); Paul v. City of Manhattan, 212 Kan. 381, 511 P.2d 244 (1973).

122. K.S.A. 12-757(b).



200 feet of the area under consideration in a city and within 1,000 feet of the area under consideration in a county.<sup>123</sup>

If the proposed rezoning of property is initiated by five or more property owners who own ten or more contiguous or noncontiguous lots, tracts, or parcels of the same zoning classification, and the rezoning is sought to change a designation from a less restrictive to a more restrictive zoning classification, written notice to the landowners is not required and the rezoning is not subject to the provision authorizing protest petitions.<sup>124</sup>

If the proposed rezoning is initiated by a city or county from a less restrictive to a more restrictive zoning classification of ten or more contiguous or noncontiguous lots, tracts, or parcels of the same zoning classification that has five or more owners of record, written notice must be sent to the owners of record of the property to be rezoned.<sup>125</sup> In this situation, only the owners of record of the property to be rezoned are authorized to file a protest petition.<sup>126</sup>

Interested parties must be given an opportunity to be heard. Republication, and if required, remailing of notices is necessary if the proposed change by the planning commission is a lesser change than that set forth in the published notice. Republication and remailing is not necessary if the planning commission has previously established a table of lesser changes which designates what lesser changes are authorized within the published zoning classifications.<sup>127</sup>

A majority of the members of the planning commission present and voting at the hearing is required for the planning commission to recommend approval or disapproval of a proposed zoning amendment. The recommendation, along with supporting reasons, is then sent to the governing body. If the planning commission does not make any recommendation, it is deemed to have made a recommendation of disapproval.<sup>128</sup>

The governing body may adopt the planning commission's recommendation, override the planning commission's recommendation by a two-thirds majority vote, or return the recommendation to the planning commission with reasons why the governing body failed to approve or disapprove. If the governing body returns the planning commission's recommendation, after reconsideration, the planning commission may resubmit its original recommendation or submit a new and amended recommendation. On receipt of the planning commission's reconsidered recommendations, the governing body may adopt or revise the planning commission's reconsidered recommendation by a simple majority vote, or it may take no further action. If a rezoning amendment has been finally approved, the affected boundaries must be described in the ordinance or resolution or shown on the official zoning district map.<sup>129</sup>

Regardless of whether the planning commission approves, disapproves, or fails to recommend a zoning amendment, a governing body can only adopt such an amendment by a three-fourths vote of all of its members if a protest petition is filed with the city or county clerk. Such a petition must be filed within fourteen days after the conclusion of the planning commission hearing and, subject to the provisions of K.S.A. 12-757(c), signed by the owners of 20 percent or more of the real property proposed to be rezoned, or by the owners of 20 percent of the real property within the total area required to be notified of the proposed

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123. *Id.*

124. K.S.A. 12-757(c)(1).

125. K.S.A. 12-757(c)(2).

126. *Id.*

127. K.S.A. 12-757(b).

128. K.S.A. 12-757(d).

129. K.S.A. 12-757(e).

zoning, excepting public streets and highways. Furthermore, if the proposed rezoning was requested by the owner of the specific tract subject to the rezoning or the owner of the specific tract does not oppose in writing such rezoning, the property subject to the rezoning is not included when calculating the total area required to be notified of the proposed zoning.<sup>130</sup> In zoning matters in the unincorporated portions of counties that are designated urban areas, such a protest zoning amendment may only be approved by a positive vote of four-fifths of all of the members of the board of county commissioners.<sup>131</sup>

However, only one protest petition to a proposed zoning amendment may be filed.<sup>132</sup> The situation in which this finding may become important is where the planning commission recommends denial of a proposed zoning amendment and a party that supports the denial fails to file a protest petition. When the planning commission's denial is submitted to the governing body, the governing body returns the recommendation to the planning commission with direction for further study, and after further study, the planning commission submits an amended recommendation to grant the rezoning application.<sup>133</sup> The party favoring denial would not then be entitled to file a protest petition since the deadline to file the protest petition (within 14 days after conclusion of the public hearing) would have long since expired.<sup>134</sup> For this reason, a party desiring denial of the rezoning may decide to have a protest petition filed even if the planning commission recommends denial. A party favoring denial may also wish to organize the filing of a protest petition to require the supermajority vote by the governing body to approve the rezoning over the planning commission's recommended denial.

Finally, the signatures on the protest petition need not be notarized.<sup>135</sup> However, the signature of the person serving as the circulator of the protest petition must be verified upon oath.<sup>136</sup>

**§ 1.6.2**                    **B. The Lawyer's Role in the Rezoning Process**  
**§ 1.6.2(a)**                **1. Representing the Client in Rezoning**  
**§ 1.6.2(a)(1)**            **a. Determining the Client's Needs**

Persons generally seek rezoning either for the purpose of establishing a specific use that is not allowed under present zoning, or establishing a new zoning designation to make land saleable. Once the lawyer determines the client's general objectives, the lawyer should ascertain the existing zoning designation on the client's land and whether the client's objectives can be met under that designation. If they cannot, the lawyer must determine into what zoning district or districts the client's proposed use can be placed. To make this determination, the lawyer should carefully analyze the zoning regulation, the zoning district map, the comprehensive plan, and any land use maps adopted as part of the comprehensive plan. Because of the growing unpredictability in land use decisions, the lawyer should discuss thoroughly with the client the full range of difficulties that may be encountered in attaining the client's objectives within the time frame required by the client.

**§ 1.6.2(a)(2)**            **b. Application for Rezoning**

Having determined the zoning designation under which the client's proposed use will be permitted, the lawyer should assist the client in preparing the application for rezoning. Generally, the minimum change necessary to meet the client's objectives should be requested. However, if the lawyer and client anticipate substantial opposition to the request,

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130. K.S.A. 12-757(f)(2).  
 131. K.S.A. 19-2960(b).  
 132. Kan. Atty. Gen. Op. No. 2005-06.  
 133. *Id.*  
 134. *Id.*  
 135. Kan. Atty. Gen. Op. No. 2003-18.  
 136. *Id.*; K.S.A. 25-3602.

perhaps the application should seek a change greater than may actually be required for the client's needs. An opportunity to compromise down to the needed use is then possible.

### § 1.6.2(a)(3)

#### c. Conferences with Planning Staff and City Officials

A conference should be arranged with the planning staff no later than the time the application is filed. In most instances, such a conference should be (or frequently must be) arranged substantially in advance of filing the application. The client's general plans should be presented to the staff, and an effort should be made by the lawyer to gain the planning staff's support of the proposed rezoning. The staff should be given the opportunity to request additional data or information pertaining to the application, and the lawyer should endeavor to generate a positive staff feeling about the application. Conferences with the planning staff are invaluable, as it is the staff, in the first instance, that will make recommendations to the planning commission. If possible, the staff's recommendation should be ascertained by the lawyer prior to the planning commission meeting. The lawyer should always endeavor to obtain the support of planning staff, in many locations such support is a virtual prerequisite to obtaining the approval of the planning commission and the governing body, and in all other cases staff support makes the attorney's task far simpler. If the staff opposes the application, its basis for opposition should be determined and rebuttal prepared. Most planning commissions require the staff to prepare and distribute a memorandum outlining staff's position on each action item prior to the planning commission meeting, but the degree of detail and information provided in such reports vary by jurisdiction.

### § 1.6.2(a)(4)

#### d. Determining Burden of Proof

The burden of proof facing any rezoning applicant will typically be framed in the context of the *Golden* factors discussed in §§ 1.6.2(a)(8) note 143, & 1.8.4(a), *infra*. Within that framework, the applicant has wide latitude to provide evidence or testimony in support of the rezoning application. In "best case" situations where planning staff is supportive of the application, where the application is consistent with the comprehensive plan, and where the adjoining property owners and the public at large is in favor of the proposal, the need for additional new evidence is less than when the application is controversial. The attorney's challenge is to balance the need to make a strong case and thereby create a clear record of supporting evidence, versus the danger of taking too much time at public hearings or creating controversy where none previously existed.

Because the amendment of zoning regulations is primarily legislative rather than judicial in character,<sup>137</sup> the term "burden of proof" in a rezoning application has a different meaning than in judicial proceedings.<sup>138</sup> Unlike the appellate review of a typical judicial proceeding, the district court in reviewing the reasonableness of a rezoning decision must not weigh the evidence or substitute its judgment for that of the legislative body.<sup>139</sup> The court reviewing the resulting legislation is not concerned with the quantum of evidence heard by the legislators, and has no occasion to consider whether the applicant met any burden of proof when it prevailed upon the governing body.<sup>140</sup>

### § 1.6.2(a)(5)

#### e. Review of Zoning Regulation and Comprehensive Plan

The lawyer should not review the adopted zoning regulations with the narrow purpose of determining the zoning district applicable to the client's land, but also for the purpose of obtaining an overview of all zoning districts, bulk and setback requirements, and rezoning procedures. If the municipality has a comprehensive land use plan, the lawyer should study

137. *Paul v. City of Manhattan*, 212 Kan. 381, 389, 511 P.2d 244 (1973); *see Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978).

138. *Davis v. City of Leavenworth*, 247 Kan. 486, 802 P.2d 494 (1990); *Landau v. City Council of Overland Park*, 244 Kan. 257, 767 P.2d 1290 (1989).

139. *Paul*, 212 Kan. at 389.

140. *Id.*

the plan and determine how to reconcile the client's proposed use with the land use plan. Not only should the lawyer study the maps included within the plan, but the lawyer should also study the interpretative provisions of the text, which may often be more helpful than the land use maps themselves. The lawyer should know who prepared the plan, when it was prepared and adopted, what considerations led to its adoption, and what data were considered.

If the client's proposed use and accompanying desired zoning designation are not consistent with the comprehensive plan, the lawyer may be required to request that the comprehensive plan be amended concomitantly with or prior to consideration of the rezoning application. The difficulty in amending the comprehensive plan will depend on political concerns, the client's status in the community and type of the proposed land use, adopted amendment policies, public comment, and the cooperation of the professional planning staff. The lawyer must further study the plan's projections and whether, to date, such projections are being met. If the plan is outdated and has not been annually reviewed as required by statute, the lawyer is in a position to attack the validity of the plan.<sup>141</sup>

#### **§ 1.6.2(a)(6) f. Reducing Neighborhood Opposition**

In Kansas cities, all owners of property within 200 feet of the property to be rezoned receive notice of the planning commission's hearing and a general description of the proposed rezoning. In Kansas counties, such notice is given to owners of property within 1,000 feet of the property. In some Kansas communities, signs are required to be posted on the property to be rezoned. The lawyer and client should consider whether to visit with neighbors prior to their receipt of formal notice from the planning department. If little opposition is anticipated, a meeting with neighbors may create problems by bringing the neighbors into a meeting and thereby galvanizing organized opposition. If opposition is anticipated however, visits with the neighbors are usually recommended. Such visits might be with neighbors individually or as a group. At such meetings, renderings of the proposed use should be exhibited, and the applicant should describe specifically how the applicant intends to use the property, and if such use is potentially troublesome to the neighbors, how the applicant intends to ameliorate potential nuisances. Neighbors are often apprehensive over uncertainty. If the applicant can inject a degree of certainty into the land use plans, neighborhood opposition can often be reduced. Even if no compromise or mitigation is possible, the applicant's attempts to work with the neighbors and to incorporate their objectives into the plan at the very least establish a respectful relationship between the applicant and the neighbors. This relationship can serve to reduce hostility at the planning commission meeting. This lack of hostility will be quite important when the application is presented to the commission, as zoning is sometimes approved or denied on the emotions both of the persons heard at the hearing and of the planning commission itself. Planning commission and governing body members often do not have the experience and demeanor of judges, and they may at times be influenced by unsound arguments that are prompted by emotion and hostility.

#### **§ 1.6.2(a)(7) g. Exhibits**

Expert witnesses will generally prepare their own exhibits. However, if experts are not to be used, or if additional exhibits are needed beyond those to be utilized by experts, the lawyer should assume the responsibility for their preparation. Such exhibits may include the following: maps of existing zoning and land uses near the area proposed to be rezoned; aerial photographs showing zoning and land uses over a large area; ground level photographs taken from several angles; contour maps to illustrate problems of topography; traffic surveys and thoroughfare plans; and if the actual land use is known, professionally prepared renderings and detailed site drawings. The site drawings should be prepared by a land use planner or landscape architect who can be of great assistance in suggesting alternative methods for

141. *Security Nat'l. Bank v. City of Olathe*, 225 Kan. 220, 589 P.2d 589 (1979).

presenting the proposed land use plan to the commission. If the zoning application will be aggressively contested, or if it involves a large project, experts should be retained. Experts might include a real estate appraiser, a land planner, an architect, and an engineer. The use of one or more of these experts will depend on both the degree of controversy and the kind of presentation the lawyer wishes to make to the planning commission.<sup>142</sup> In addition to expert witnesses, influential members of the community who support the rezoning should attend and testify, if possible.

### § 1.6.2(a)(8)

#### h. Checklist of Additional Steps for Preparing Planning Commission Presentation

- ✓ The planning commission presentation should, if possible, emphasize compliance with the zoning regulations and the comprehensive plan. Because they are the benchmark factors used in Kansas communities, the factors deemed important by the Kansas Supreme Court in *Golden v. City of Overland Park*<sup>143</sup> should be carefully addressed. A carefully written record of the hearing should be established in the event an appeal is necessary. Most planning commissions take meeting minutes and retain audio or visual recordings of the meeting. In situations where litigation appears likely, the lawyer may consider having the meeting videotaped, if the meeting is not videotaped as a matter of course.
- ✓ The presentation should be structured to show how approval will promote the general welfare of the community. The lawyer's facts and arguments should show that a decision in favor of the client will be in the public interest. Facts and arguments that merely point out the special interest of the client should be de-emphasized. In addition, the opponents' arguments should be characterized as being selfish, or in their own interest, rather than in the public interest. Thus, while developers can usually be accused of exploiting the public with spot or incremental zoning, objecting property owners can be charged with selfishly attempting to block the healthy growth of a progressive community.
- ✓ The lawyer should personally inspect the property and its surrounding neighborhood. Decisions as to whether to use photographic exhibits should only be determined after the property has been inspected. Similar to the introduction of photographs in litigation, the photographs should be an accurate depiction of the site, rather than purposefully excluding features that might be harmful to the client's argument.
- ✓ Adjacent land uses and zonings should be determined and thoroughly analyzed. Age, condition, and growth patterns of the neighborhood should also be noted.
- ✓ The date the applicant acquired the property should be determined. Was it acquired before the zoning regulation was adopted? Was it acquired before annexation to the city and then, upon annexation, automatically zoned for an inappropriate use?
- ✓ The developing land use pattern in the area should be considered. Have there been any significant changes in the area? Have other tracts of land in the area been

142. See, Harvey S. Moskowitz, *How to Use Experts in Land Regulation Proceedings*, Vol. 3, No. 4 REAL EST. L.J. 359 (1975).

143. 224 Kan. 591, 584 P.2d 130 (1978). Those factors are: (1) the character of the neighborhood; (2) the zoning and uses of the properties nearby; (3) the suitability of the subject property for the uses to which it has been restricted; (4) the extent to which removal of the restrictions will detrimentally affect nearby property; (5) the length of time the subject property has remained vacant as zoned; (6) the relative gain to the public health, safety, and welfare by the destruction of the value of the applicant's property as compared to the hardship imposed on the applicant; (7) the recommendation of the professional planning staff; and (8) conformity to the comprehensive plan. See also *Taco Bell v. City of Mission*, 234 Kan. 879, 678 P.2d 133 (1984) (excellent example of application of *Golden* factors); *Dings v. Phillips*, 237 Kan. 551, 701 P.2d 961 (1985); *Landau v. City Council of Overland Park*, 244 Kan. 257, 767 P.2d 1290 (1989). See, generally, Simon B. Buckner, IV, Comment, *Rezoning in Kansas, Legislation, Adjudication, or Confusion*, 30 KAN. L. REV. 571 (1982), which provides helpful rezoning background and overview, but the reader is reminded that *Golden* has been further refined by *Landau* and *Davis v. City of Leavenworth*, 247 Kan. 486, 802 P.2d 494 (1990).

recently rezoned to the use requested or to a similar use? How many building permits have been issued in the neighborhood in recent years? Is development stagnant in the area? Are lenders reluctant to lend on existing structures in the neighborhood and for construction of new structures? The answers to these questions will not only show whether or not the application is in conformity with the trend of development in the area, but will also show the attitude of lenders, developers, builders, and home buyers toward the neighborhood.

- ✓ If the land is vacant, data should be obtained regarding the client's attempts to sell the land under present zoning. If the client has made a reasonable effort to sell, but has received no offers to buy, or if offers to buy have been unrealistically low, evidence may be presented that the land is unusable under present zoning.
- ✓ Opponents of rezoning often argue that the proposed land use will overtax existing facilities. The applicant should be prepared to show that any development, not just the development the applicant proposes, will have the same effect, even under present zoning. At times, an applicant may be able to obtain zoning by showing that the applicant's plans provide for construction of badly needed public improvements, or that platting will accompany rezoning and that needed street rights-of-way will be dedicated by the plat. Information pertaining to public improvements can usually be obtained from the city or county engineering department.
- ✓ Traffic and parking problems should be considered, and steps should also be taken to mitigate the argument that the requested zoning will cause increased traffic congestion. In this regard, traffic surveys and thoroughfare plans are important. If none are available, the client may need to hire a traffic engineer to prepare one. In addition, it may be possible to show that even though a commercial use is contemplated, fewer points of ingress and egress along a busy street will be required than the number permitted under present residential zoning where one curb cut is allowed for each of several lots along the street frontage. Typically, this information is obtained and discussed in the context of site planning or platting, but may be relevant in the rezoning process as well (especially if a site plan or plat is being heard simultaneously with the rezoning request).
- ✓ In large infill redevelopments and especially in new development on the fringe of the city limits, there will be a large increase in incremental real estate taxes generated by the client's proposed project. If known, an estimate of increases in the tax base may be a determining factor between approval or denial. Often the county appraiser can be of assistance in making such calculations. In addition to increases in the tax base, one should consider whether the proposed use will create needed jobs in the community; whether a new medical facility will attract needed doctors to the community; or whether a low or medium cost housing development will provide needed housing that will enhance community growth.
- ✓ Possible objections to the rezoning should be anticipated and rebuttal arguments developed. Most objections can be determined by meetings with the neighbors and the planning staff.<sup>144</sup> If neighbors object to the rezoning because any of the many uses set out in the zoning regulation for that zoning district would be permitted, it is important to show that the applicant is seeking zoning for a specific use which will be compatible with neighboring property. Although fears of adjoining property owners may be realistic in that once zoned, any permitted use is possible, these fears may be alleviated by a showing of building plans, financial arrangements, and other commitments made toward the establishment of the compatible use. Use of a planned

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144. Discussed at § 1.6.2(a)(6), *supra*.

unit development rather than a *Euclidean* or traditional zone may provide more certainty of use for neighbors or planning commissioners.

- ✓ If the rezoning will be opposed on the ground that it will depreciate the value of neighboring properties, a real estate appraiser could be retained to show that no depreciation will occur as a result of the proposed use. In addition to securing a real estate appraiser, the lawyer should determine if other depreciating factors exist in the neighborhood, and if other neighborhoods in the city have suffered because of similar rezonings. Thus, if the application is for multifamily rezoning on land adjacent to existing single family dwellings, the lawyer may determine if the property values of single family dwellings have depreciated in other areas where single family and multiple family developments are contiguous.
- ✓ If the rezoning application is for vacant land, an effort should be made to determine whether neighborhood opposition is based on the proposed land use, or whether it is based on the fact that adjoining property owners want the land to remain vacant. Because property owners have the right to use their property for reasonable purposes, the opposition's desire for the land to remain vacant should be given little weight by the planning commission.
- ✓ If those objecting to the rezoning argue that the change will be the first in a series of incremental zoning incursions into an existing neighborhood, it is important to be able to point out why the proposed zoning change can go no farther than the land under present application. If, for example, there are natural features or established uses that create barriers through which rezonings are not likely to proceed, the incremental zoning argument loses much of its thrust.
- ✓ The lawyer should also determine whether the proposed rezoning contributes to the problem of "urban sprawl." Does the application promote the effective utilization of land that is not presently being used, but which is adequately supplied with streets and sewers, or does it jump over such land and thereby require costly public improvements to be extended? If public improvements will be required, who will pay for them? Most cities have adopted policies that describe the extent to which the city will participate in the cost of new public infrastructure.
- ✓ Does the application contribute to instability of zoning? Homeowners frequently oppose rezoning applications on the ground that they bought their homes with the assurance that nearby properties would not be put to uses that detract from the desirability and value of their homes. Such homeowners further argue that if zoning regulations may be amended too easily, zoning fails to serve its function of comprehensive planning and stable land use. These concerns are typically only meritorious when the proposed rezoning is not consistent with the comprehensive plan. To rebut such opposition, it should be pointed out that if land use becomes so stable as to be rigid, it cannot change with the growth and needs of the community. Moreover, it should further be pointed out that the planning commissions who established zoning designations in earlier years could not foresee the many shifts in needs and in tastes that develop in subsequent years. The applicant can therefore demonstrate that the stability of zoning must often yield to the needs of a growing and changing community. If the rezoning request is preceded by a request to amend the comprehensive plan in a manner that would permit the requested rezoning, many of these issues can be diverted.
- ✓ Potential nuisance factors that might be caused by the proposed rezoning should be determined. Such factors might include smoke, vibration, noise, radiation, odors,

dust, and litter. The degree to which these nuisances are permitted in each zoning district are frequently codified in the zoning regulations.

- ✓ If available, neighborhood analyses made by the planning staff should be reviewed. These analyses often establish neighborhood units as the basis for land use planning. Community facilities and services are planned for these neighborhood units. The impact of the proposed rezoning on the neighborhood unit thus becomes significant.
- ✓ Areas of potential compromise with the city staff or public opposition should be determined. Thus, for example, a less intensive commercial use might meet the client's goals, and in most instances would be preferable to the commission's complete refusal to rezone. Similarly, the client might agree to the imposition of conditions in order to secure the rezoning. Such conditions might be necessary either to satisfy the planning commission that the use will be compatible with adjoining properties, or to satisfy neighboring property owners that the integrity of their neighborhoods will be maintained. The applicant must be prepared to compromise with both the planning staff and the planning commission at the public hearing. A willingness to compromise is particularly important if the objectors are intransigent in their unwillingness to accept any change in the present zoning pattern. The contrast in attitudes will be noticed by the planning commission, which is often looking for a way to bring about a compromise in zoning disputes.
- ✓ The lawyer will always be tempted to discuss an upcoming land use matter with one or more members of the planning commission or governing body prior to the hearing. However, each governing body and planning commission has different customs and comfort levels with *ex parte* communications, and the lawyer should always be aware that such communications could and perhaps should be disclosed at the public hearing. *See* § 1.9.3, *infra*. The planning commission is primarily an administrative body, except in rezoning matters where the planning commission is quasi-judicial, while city and county commissions are primarily legislative. If a commission member is comfortable discussing a matter with counsel prior to the meeting, the discussion of pending legislation with members of these commissions should involve no ethical problems so long as it is undertaken for the limited purposes of informing the members of the applicant's plans and seeking to determine the members' concerns and objections.<sup>145</sup> Not only can a conference with a commission member clarify the issues for that member, but it can alert the lawyer to the member's objections to the proposed rezoning. Based on those objections, the rezoning application may be revised, or arguments developed to assuage the fears of the member. It is important, moreover, for the lawyer to know the commission members, and to determine each member's particular interest, whether it be traffic, recreation, schools, or similar matters. The lawyer must be in a position to treat these different attitudes with care and respect. The lawyer should also know which of the commission members' opinions are most respected, and what kind of presentation might be most effective for those members. The lawyer should be cognizant of laws

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145. *But see* McPherson Landfill, Inc. v. Board of County Comm'rs of Shawnee County, 274 Kan. 303, 322, 49 P.3d 522 (2002) (holding that a local legislator may confer *ex parte* with persons interested in a proposed zoning amendment, but that *ex parte* communications come under stricter review in quasi-judicial zoning decisions, such as variances and special use permits, where courts will be more receptive to challenges to decisions on grounds of zoning bias. In such instances, the *ex parte* communications frequently become part of the record) (citations omitted); Tri-County Concerned Citizens, Inc. v. Board of County Comm'rs of Harper County, 32 Kan. App. 2d 1168, 1175-76, 95, P.3d 1012 (when the focus of a governing body shifts from legislative policy or executive duty to a quasi-judicial function, the requirements of due process attach and the proceedings must be fair, open, and impartial); *see also* J. Nick Badgerow, *Walking the Line: Government Lawyer Ethics*, 12 KAN. J.L. PUB. POL'Y 437 (2003) (discussing ethical considerations of attorneys representing a governmental entity); Theresa Marcel Nuckolls, *Kansas Sunshine Law: How Bright Does It Shine Now? The Kansas Open Meetings Act*, 72 J. KAN. BAR ASS'N 34 (2003) (summarizing the Kansas Open Meetings Act, K.S.A. 75-4317 *et seq.*).



regarding how many commission members may attend a private meeting without its being considered an open meeting.

- ✓ Commission minutes from prior meetings should be reviewed if the client's property or surrounding properties have been the subject of prior rezoning applications. If the prior rezoning was successful, the minutes should reflect the reasons for approval. If the prior rezoning was unsuccessful, the minutes should reflect why. Valuable guidance can thereby be secured for preparing a presentation for the current rezoning application. Knowledge of prior minutes may also prove valuable as a reminder to commissioners of positions they took and statements they made in prior meetings on similar rezoning applications.
- ✓ It should be determined whether private restrictive covenants have been imposed on the land for which rezoning is sought. If the client owns the property, these restrictions should appear as an exception to the client's title insurance policy. If the client is under contract to purchase the property in question, a title insurance policy should be available to determine whether the property is subject to any restrictive covenants.
- ✓ If the proposed rezoning is inconsistent with the comprehensive plan, a thorough analysis should be given to possible policy arguments such as spot zoning, strip zoning, exclusionary zoning, and urban sprawl.
- ✓ An inquiry should be made regarding alternatives to not rezoning the property. Often the consequences of not rezoning may be more deleterious to the community than if the property were rezoned as requested by the applicant.

## § 1.6.2(b)

### § 1.6.2(b)(1)

## 2. The Commission Meetings

### a. Unique Character of the Planning Commission Meeting

The planning commission meeting offers to the lawyer none of the security of the familiar rules-oriented structure of the courtroom. The planning commission is not bound by rules of evidence, and its hearings are usually characterized by a loose procedural format. Planning commission matters are, moreover, often heard before a full audience, with emotions high and restraint low. For the lawyer who anticipates this combination of factors, it is well to meet with the planning commission chairman in advance of the meeting for the purpose of attempting to establish certain ground rules. The planning commission should also be advised at the outset that the Kansas Supreme Court has ruled that even though adjoining landowners have a right to be heard, zoning decisions are not based on a plebiscite of the neighbors.<sup>146</sup>

### § 1.6.2(b)(2)

### b. The Lawyer's Role in the Planning Commission Meeting

The lawyer may be either a master of ceremonies, introducing expert witnesses, stating their credentials and qualifications, and summarizing their testimony, or the lawyer may be the featured speaker, stating the applicant's entire case. In most Kansas zoning matters, the lawyer fits into the latter category. The lawyer must, in effect, make an opening argument, present the case in the lawyer's own words, and summarize in closing argument. Similar to a courtroom trial, the lawyer should expect to "call" expert witnesses to speak on topics of their expertise, but regarding all issues of a legal nature, the lawyer should control the conversation. The lawyer must exercise care in preparing the presentation which should not be too long, too legal, too argumentative, or in most instances, too detailed. Questions from the commission should be invited. Questions should be directed either to the lawyer, the client, or to the expert witnesses. Open meeting discussions should be held only with those

146. Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213 (1967).

persons in a position to decide whether the application should be approved or denied. Discussions or argument between the lawyer and members of the audience should therefore be carefully avoided. When the lawyer expects extensive public comment in opposition to a rezoning application, the lawyer should attempt to reserve time at the end of the public hearing to rebut any comments that require further discussion. The lawyer should be cautious to avoid a point for point response to every opposing argument, however, and focus only on the arguments which raise determinative legal issues or which may have unduly influenced the commission.

**§ 1.6.2(b)(3) c. The City or County Commission Meeting**

Because the planning commission is only an advisory body, all zoning amendments must be submitted to either the city commission for city rezonings, or the county commission for county rezonings. Although many of the same arguments used before the planning commission will be available before the city or county commissions, the lawyer should build on the experience of the planning commission meeting to develop additional arguments. Also, governing bodies are often not as concerned with the planning principles involved in zoning decisions as are planning commissions. They are, instead, often more interested in matters of community growth and finances. The lawyer should, therefore, structure the lawyer's arguments to meet these interests, particularly if the rezoning might increase the community's tax base. Conversely, the attorney should attempt to keep financial and growth issues out of the planning commission's calculus, as those matters are expressly reserved for the elected governing body.

**§ 1.6.2(c) 3. Representing Opponents of Rezoning**

**§ 1.6.2(c)(1) a. Determining the Facts**

It is particularly important for the lawyer representing opponents of rezoning to make an independent determination of the facts. The rezoning opponents are usually apprehensive and suspicious, and are fearful that their property values and enjoyment of their homes will be destroyed.<sup>147</sup> Therefore, the lawyer should seek objective information. Such information can usually be obtained by conferences with the planning staff, or if the applicant is represented by an attorney, by conferences with the applicant's attorney. In addition, it is usually advisable to arrange a meeting between the applicant and the opponents for the purpose of obtaining full disclosure of the applicant's plans.

**§ 1.6.2(c)(2) b. Developing Neighborhood Opposition**

When rezoning is sought for property located within a developed or a developing neighborhood, neighborhood opposition can usually be anticipated. Such opposition is particularly predictable if the application is for multifamily or commercial development in or near an existing single family neighborhood. Typically, one or two persons will emerge as the most vocal members of the group, and they should be assigned the job of generating neighborhood opposition to the rezoning. Letters may be sent to persons not only in the neighborhood but in surrounding neighborhoods, and a telephone calling campaign may be organized. Once organized, the neighborhood group should meet with the lawyer to discuss the proposed rezoning and to plan how to structure the opposition. Concerned neighbors will often perform many of the tasks that the attorney must personally perform when the attorney represents an applicant for rezoning. Thus, tasks such as taking photographs, preparing drawings, and on occasion, arranging conferences with commission members, can be performed by members of the neighborhood, and the lawyer's job becomes primarily one of coordination.

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147. The Kansas Supreme Court has held that the protection of a neighborhood is a legitimate goal of zoning. *R.H. Gump Revocable Trust v. City of Wichita*, 35 Kan. App. 2d 501, 503, 131 P.3d 1268 (2006); *Houston v. Board of City Comm'rs*, 218 Kan. 323, 543 P.2d 1010 (1975).

**§ 1.6.2(c)(3) c. Publicizing the Opposition**

Although members of the neighborhood group will often desire to have their objections publicized, any publicity may need to be cautiously controlled by the lawyer. If letters to the editor are to be written, the lawyer should screen them in order that they will accurately state the neighborhood's real objections to the rezoning. If false or exaggerated statements are made, the applicant will certainly exploit them at the time of the hearing. Publicity may also take the form of newspaper advertising and press releases describing neighborhood meetings. The neighborhood's objections may also be communicated to local environmental or public interest groups in an effort to secure their support.

**§ 1.6.2(c)(4) d. The Commission Meeting**

Neighborhood members should be instructed to arrive early at the meeting and to sit together. An image of organization is important. Several members of the group should be selected to speak. Other members should avoid participating in the hearing. One of the lawyer's principal tasks in representing a neighborhood group is to avoid having each member state his opinion to the commission, thereby fragmenting the presentation into disjointed bits and pieces of argument. Each of the designated speakers should be introduced by the lawyer, and each should have a narrow topic for presentation. If traffic is one of the neighbors' concerns, perhaps a mother with small children could best state that concern. If depreciation in property values is a concern, a retired person whose home is the result of a lifetime of work might speak regarding the problems of encroaching commercialization. In this manner, the neighbors' concerns can be dramatized much more persuasively and sincerely than by the lawyer's often unsupported generalizations.

**§ 1.6.2(c)(5) e. Kinds of Opposition****§ 1.6.2(c)(5)(i) i. Opposition Based on Procedural Defects**

The lawyer representing opponents of rezoning should determine if statutory notice of the hearing was given. In addition, if procedural defects exist under the local zoning regulation, they should be raised at the planning commission hearing. If not, they may be waived.<sup>148</sup>

**§ 1.6.2(c)(5)(ii) ii. Opposition Based on Merits of the Application**

Opponents of a rezoning amendment should, if possible, avoid being solely negative or self interested. The opponents should instead appear anxious to show not only why the application is not in the public interest, but also that there are alternative methods for developing the applicant's land. The alternative may be that the land can be developed under present zoning uses, or that a change to a less intensive zoning designation would be more reasonable. Thus, for example, opponents of an application for apartment zoning might present testimony of a developer who had offered to buy the land at a substantial profit to the owner for the purpose of developing single family dwellings. If a reasonable alternative can be presented, it provides to the planning commission an opportunity to compromise. Opponents of many rezonings have lost because the opportunity for compromise did not exist. The planning commission was left with two choices, either to rezone in accordance with the application, or to deprive the property owner of the reasonable use of his land. If an alternative is not presented, planning commissions often accept the former choice. The checklist at § 1.6.2(a)(8), *supra*, should be reviewed by the lawyer for opponents of rezoning, as it contains many of the substantive arguments that should be raised against rezonings.

If substantive opposition appears to be ineffective, the lawyer for rezoning opponents may wish to delay the commission's vote on the application as long as possible. Developers often purchase land contingent on rezoning, or obtain an option, the exercise of which is contingent on rezoning. Financing commitments are generally for a short period of time and

148. Paul v. City of Manhattan, 212 Kan. 381, 511 P.2d 244 (1973).

may depend on rezoning. If the lawyer for a neighborhood group that opposes rezoning can cause substantial delay before a vote is taken, the developer's plans may be frustrated. Delays can often be caused by pointing out one of the following: procedural defects in the hearing; the need for comprehensive plan or sector plan revisions; the need for further engineering studies to determine if adequate sewage and drainage facilities exist for the contemplated rezoning; or the need for a neighborhood study to determine if the proposed rezoning will fit into an existing neighborhood unit. It should be kept in mind, however, that delays can also work to the disadvantage of a neighborhood group. A group's interest in the rezoning will be high at the first planning commission meeting. Thereafter it becomes increasingly difficult to generate adequate enthusiasm to fill a commission room with concerned and angry neighbors. With only a few members of the neighborhood in attendance, it is usually easier for the applicant to convince the commission that the neighborhood opposition is no longer strong enough to cause further delay or to prevent an affirmative vote on the rezoning application.

**§ 1.6.2(c)(6) f. The Protest Petition**

**§ 1.6.2(c)(6)(i) i. The Persuasive Petition**

Except where protest petitions by adjoining property owners are ineligible, as discussed in § 1.6.1, *supra*, opponents of rezoning should present to the planning commission a petition stating their opposition. The petition will often be signed by persons not only in the affected neighborhood, but throughout the entire community. This is the persuasive petition, and it is designed to show to the commission that there is widespread opposition to the rezoning application.

**§ 1.6.2(c)(6)(ii) ii. Legal Petition**

K.S.A. 12-757(f) describes how a "legal petition" is to be prepared and filed. A legal petition may only be filed after the planning commission meeting, and is directed to the governing body. In cities, a legal petition must contain signatures of the owners of 20 percent or more of any real property proposed to be rezoned or by the owners of 20 percent of the total area, excepting public streets and ways, located within the corporate limits of the city and located within 200 feet of the boundaries of the property proposed to be rezoned. In counties, the distance is 1,000 feet. If the property to be rezoned is on the corporate boundaries of a city, then the portion of the adjoining property that is within 200 feet and in the city limits and the portion of the adjoining property that is within 1000 feet and outside the city limits is within the "protest area." The legal petition must be filed with the city or county clerk within 14 days after the date of the conclusion of the public hearing at the planning commission. If a legal petition is properly filed, a rezoning amendment cannot be passed except by at least a three-fourths vote of all of the members of the governing body, regardless of whether the protest is to a city or county governing body. For three-member boards of county commissioners, the effect is to require a unanimous vote to approve a rezoning that has been validly protested.

**§ 1.7 VII. ADMINISTRATIVE RELIEF FROM LAND USE CONTROLS<sup>149</sup>**

**§ 1.7.1 A. Staff Relief**

The need for administrative relief from land use controls usually occurs when a property owner seeks a building permit and is told by the building inspector that the proposed use is not permitted by the zoning regulation or that the proposed use violates the bulk or setback requirements of the zoning regulation. If the building inspector is correct in his position, the landowner must either rezone, obtain a variance, or revise his plans. If, however, the matter is one requiring an interpretation of the zoning regulation, it is often possible to bring different points of view before the building inspector and perhaps change his position. Furthermore,

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149. For a general review of the methods of challenging zoning regulations, see Charles A. Szypszak, *How to Challenge Zoning Ordinances*, PRAC. REAL EST. LAW. 13 (1992).

since the building inspector often relies on the planning staff for interpretation of the zoning regulation, a conference with the planning staff may result in its recommendation to the building inspector that the proposed use is in compliance with the zoning regulation and should be permitted. Matters of staff interpretation generally occur in determining whether a specific use is permitted within the use groups established for the zoning district within which the land is located.

The need for administrative relief may also arise if the proposed building plans submitted for a building permit are deemed to be in violation of an approved site plan or final development plan. Again, a conference with planning staff and the building inspector may yield a different interpretation of what was previously approved, or an administrative approval of an amendment to a site plan or final development plan, or a staff recommendation for approval of an amendment to a site plan or final development plan that must be acted on by the body that originally approved the site plan or final development plan.

## § 1.7.2

### B. Statutory Relief

#### § 1.7.2(a)

#### 1. Board of Zoning Appeals

Kansas cities and counties that have adopted zoning regulations are required by statute to have boards of zoning appeals.<sup>150</sup> The board of zoning appeals is created by local ordinance or resolution, although its powers and duties are described in K.S.A. 12-759. The board of zoning appeals is a quasi-judicial administrative body whose purpose is to act as a safety valve by granting exceptions and variances for hardship cases and resolving unanticipated interpretative problems arising under the zoning regulations.

#### § 1.7.2(b)

#### 2. Powers and Duties of Board of Zoning Appeals

The board is vested with the power and duty of administering appeals from decisions regarding the application of a zoning regulation. The board may hear appeals from any person aggrieved, or by any officer of the city, county, or other governmental agency affected by any decision of the officer administering the provisions of the zoning.<sup>151</sup> Usually, that officer is the building inspector, but it may be a member of the planning staff. The board is given the power to hear and decide appeals when it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official in the interpretation or enforcement of the zoning regulation. In addition to its interpretative powers, the board is given the power to grant variances and exceptions from the terms of the zoning regulation. In fulfilling its statutory duties, the board may order a building permit to be issued if it disagrees with the decision of the building inspector.

#### § 1.7.2(b)(1)

##### a. Variances—Definition

A variance is an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning regulation.<sup>152</sup> It is designed as an escape hatch from the literal terms of the regulation which, if strictly applied, would deny a property owner all beneficial use of his land and amount to confiscation.<sup>153</sup> The objective of a variance is to assure the community and the property owner that property will not remain unused. Variances are usually requested for waiver of lot size, side yard, setback, or height requirements. Variances for a use that is not permitted in the zoning district in which the property is located are called use variances. Use variances are specifically prohibited by Kansas statute<sup>154</sup> and judicial decision.<sup>155</sup> Only area

150. K.S.A. 12-759(a).

151. K.S.A. 12-759(d).

152. 3 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING, § 20.02 (4th ed. 1996); see also JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW, § 5.14, p. 186 (2003).

153. *Id.*

154. K.S.A. 12-759(e).

variances are permitted in Kansas. An “area variance” has no relation to change of use of property, but instead involves a variance from structural or lot area.<sup>156</sup> Variances should be distinguished from a special use permit, which permits a use authorized by the zoning regulation subject to certain conditions.<sup>157</sup>

### § 1.7.2(b)(2) **b. Criteria for Issuance of a Variance**

The criteria upon which variances can be granted are rigid. It appears, however, that until recently, boards of zoning appeals recognized their safety valve role and typically granted variances even though an applicant did not fully comply with the statutory criteria. If judicially challenged, however, the board’s flexibility would probably succumb to a court’s rigidity.<sup>158</sup> Judicial rigidity is due to five conditions that a variance request must satisfy. Those conditions are set forth in K.S.A. 12-759(e), and are as follows:

- (i) The variance requested must arise from a condition that is unique to the property, and which is not ordinarily found in the same zone or district. Moreover, the condition must not be created by the action of the property owner or the applicant. The first part of this criterion is difficult to meet, the second often insurmountable. Thus, if the owner of a standard size residential lot seeks to add a room to his home, but the addition would violate the zoning regulations’ side yard requirements, the owner might reasonably conclude that the board of zoning appeals will grant a variance. However, since the condition, a standard size lot, is not unique to his property, but is ordinarily found throughout the zoning district, and because the need for the variance is created by his own desire to add a room to his home, neither of the two parts of the first statutory criterion can be met. The criterion is intended, instead, to permit the beneficial use of land that is subject to unique topographical and locational factors. It is not the uniqueness of the plight of the owner, but the uniqueness of the land that is the criterion.
- (ii) Granting a variance must not adversely affect the rights of adjacent property owners or residents. In applying this criterion, the same kind of considerations should be used as in determining whether a rezoning will adversely affect adjacent property owners.
- (iii) The strict application of the provisions of the zoning regulation will constitute unnecessary hardship on the applicant. “Unnecessary hardship” is usually considered to exist when a zoning limitation, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of ownership of property.<sup>159</sup> In addition, to constitute unnecessary hardship, the hardship complained of must originate in the zoning regulation and not from the actions of the applicant. Thus, if the applicant purchases land in anticipation of procuring a variance to enable him to use it in a manner forbidden by a zoning regulation, the applicant

155. *City of Merriam v. Board of Zoning Appeals*, 242 Kan. 532, 748 P.2d 883 (1988); *City of Olathe v. Board of Zoning Appeals*, 10 Kan. App. 2d 218, 696 P.2d 409 (1985); *Stice v. Gribben-Allen Motors, Inc.*, 216 Kan. 744, 534 P.2d 1267 (1975).

156. *City of Merriam*, 242 Kan. at 537.

157. *See* § 1.3.3(b)(1), *supra*.

158. *City of Olathe v. Board of Zoning Appeals*, 10 Kan. App. 2d 218, 696 P.2d 409 (1985).

159. *Stice v. Gribben-Allen Motors, Inc.*, 216 Kan. 744, 534 P.2d 1267 (1975); 8 MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS*, § 25 at 167 (3d ed. 1965); *see also* JULIAN CONRAD JUERGENSEMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW*, § 5.16, p. 189-90 (2003).

cannot later complain of hardship if a variance is denied.<sup>160</sup> If, however, the restriction is imposed on an existing use of property, an unnecessary hardship may be created.<sup>161</sup> For instance, a property purchaser bought a tract of land knowing of a 75-foot maximum height restriction. The Kansas Supreme Court held that the 75-foot height restriction did not make the property impossible to use for a conforming use; neither did it interfere with an existing business.<sup>162</sup>

- (iv) The variance must not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.
- (v) Granting the variance will not be contrary to the general spirit and intent of the zoning regulation. A request to vary a 75-foot height restriction by more than 900 feet was found to be contrary to the general spirit and intent of the zoning regulation.<sup>163</sup>

**§ 1.7.2(b)(3) c. Exceptions–Definition**

An exception is a specific exemption from provisions of the zoning regulation. As contrasted with the variance, the exception can be asserted as a matter of right by the applicant, but may only be granted if the applicant complies with the conditions set out in the zoning regulation. Exceptions that will be permitted must be specifically listed as an exception or use in the zoning regulations.<sup>164</sup>

**§ 1.7.2(b)(4) d. Use of the Exception**

The kinds of exceptions that boards of zoning appeals are often given authority to grant may include the following: reduction in width of side yards; extension of height limits for chimneys, church steeples, and radio and television antennas; construction of joint fallout shelters by two or more property owners where such shelters violate side and rear yard requirements set out in the regulation; or permitting the owner of a lot which lies in two zones to extend the use in the less restrictive zone a certain distance into the more restrictive zone.

**§ 1.8 VIII. JUDICIAL CONTROL OF ZONING AND LAND USE DECISIONS<sup>165</sup>**

**§ 1.8.1 A. Timeliness of a Challenge to a Zoning Regulation or a Board of Zoning Appeals Decision**

**§ 1.8.1(a) 1. Zoning Regulation**

A challenge to the reasonableness of a zoning regulation must be brought within thirty days of the “final decision.”<sup>166</sup> In the case of a denial of a zoning change, the final decision is made when the vote is taken by the governing body. However, when the governing body grants a zoning change, the final decision is made on the date the new regulation is published.<sup>167</sup> When a zoning change from county to city zoning is made in connection with the annexation of property into a city, publication must occur after annexation takes effect. Annexation ordinances of cities shall take effect on publication as provided by law, except

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160. *City of Merriam v. Board of Zoning Appeals*, 242 Kan. 532, 748 P.2d 883 (holding that there was no unnecessary hardship where a variance was denied for building a 990 foot tower, because the land was purchased subject to a 75 foot height limitation).

161. *City of Olathe v. Board of Zoning Appeals*, 10 Kan. App. 2d 218, 696 P.2d 409 (1985) (affirming the granting of a variance to a regulation that provided that name changes on signs would require signs to comply with reduced height requirements, allowing the applicant to change the name on a pre-existing sign even though the sign did not comply with the height requirement).

162. *City of Merriam*, 242 Kan. 532, 748 P.2d 883.

163. *Id.*

164. K.S.A. 12-759(e)(2).

165. For a general discussion of the appeal process see Roger W. Badeker, *Tell it to the Judge: Appealing a Zoning Decision*, 67 J. KAN. BAR ASS’N 33 (1998); see also Patrick B. Hughes, *What Can They Do? Limitation on the Power of Local Zoning Authorities*, 76 J. KAN. BAR ASS’N 28 (2007).

166. K.S.A. 12-760.

167. *Davis v. City of Leavenworth*, 243 Kan. 522, 759 P.2d 113 (1988).

that any annexation ordinance published within 60 days before any (1) primary and general election of state, county and national officers, (2) primary and general city elections, and (3) primary and general school elections, shall become effective on the day following such election, unless such day is also within 60 days before any election specified in this section in which case such ordinance shall become effective on the day following the last such election.<sup>168</sup>

### § 1.8.1(b) **2. Board of Zoning Appeals Order or Determination**

Any person, official, or government agency may bring an action in district court to challenge the reasonableness of a board of zoning appeals order or determination, within 30 days of the formal order or determination of the board.<sup>169</sup>

### § 1.8.2 **B. Standing to Challenge a Zoning Regulation**

Any person aggrieved by the final zoning decision of the city or county may bring an action in district court of the county in which the governing body is located to determine the reasonableness of the final zoning decision. A contract purchaser of real estate has standing to challenge the reasonableness of a zoning change affecting the property being purchased.<sup>170</sup> A lessee under a 92-year lease is a real party in interest qualified to seek an amendment to a zoning regulation.<sup>171</sup> An amendment to the zoning regulation and the issuance of a special use permit are both considered to be regulations, and their reasonableness can thus be judicially determined.<sup>172</sup> Approving or denying a plat is not, however, a regulation, and the reasonableness of its approval or disapproval is not subject to judicial review.<sup>173</sup> Moreover, in order to have standing to challenge the procedure through which the zoning or land use decision was made, the party must have objected to the proceedings at the administrative level.<sup>174</sup> Those interested parties wishing to intervene in zoning litigation must make a timely application to intervene, have a substantial interest in the subject matter, and lack adequate representation without the requested intervention.<sup>175</sup>

### § 1.8.3 **C. Remedies in Zoning Cases**

Zoning decisions are usually challenged by declaratory judgment actions. They may also be challenged by an action brought to enjoin the municipality from enforcing its zoning regulation. Although both actions are generally brought for the purpose of challenging the reasonableness of the governing body's action, an injunction has been permitted on the ground that a property owner substantially changed his position and incurred expenditures in reliance upon an existing regulation.<sup>176</sup>

### § 1.8.4 **D. Scope of Judicial Review**

#### § 1.8.4(a) **1. Zoning**

In reviewing a zoning decision, a trial court is limited to determining whether the procedures were in conformity with the controlling statutes and ordinances, and whether the decision was reasonable.<sup>177</sup> The procedures utilized must strictly conform to the controlling

168. K.S.A. 12-523.

169. K.S.A. 12-759(f).

170. *Taco Bell v. City of Mission*, 234 Kan. 879, 678 P.2d 133 (1984).

171. *Bonanza, Inc. v. McLean*, 242 Kan. 209, 747 P.2d 792 (1987).

172. *Gaslight Villa, Inc. v. City of Lansing*, 213 Kan. 862, 518 P.2d 410 (1974); *Bodine v. City of Overland Park*, 198 Kan. 371, 424 P.2d 513 (1967); *Sprint Print, Inc. v. City of Overland Park*, 238 Kan. 230, 708 P.2d 210 (1985).

173. *Sabatini v. Jayhawk Constr. Co.*, 214 Kan. 408, 520 P.2d 1230 (1974); *Venture in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (1979).

174. *Paul v. City of Manhattan*, 212 Kan. 381, 511 P.2d 244 (1973).

175. *Montoy v. State*, 278 Kan. 765, 767-68, 102 P.3d 1158 (2005) (*citing Hukle v. City of Kansas City*, 212 Kan. 627, 512 P.2d 457 (1973)).

176. *Benson v. City of DeSoto*, 212 Kan. 415, 510 P.2d 1281 (1973).

177. *Arkenberg v. City of Topeka*, 197 Kan. 731, 421 P.2d 213 (1966).



statute.<sup>178</sup> The determination of reasonableness should be made from the issues created by the pleadings and the evidence submitted thereon.<sup>179</sup> Although the trial court may hear evidence not submitted to the governing body, the action to test the reasonableness of the governing body's decision is not a trial de novo, and the trial court may not substitute its judgment for that of the governing body.<sup>180</sup> Nonetheless, since an amendment to a zoning regulation, rather than the enactment of the zoning regulation itself, involves a quasi-judicial rather than a legislative function, a reviewing court will be permitted broad inquiry into the factors used by the governing body in making its zoning decision.<sup>181</sup>

*Combined Investment Company v. Board of Butler County Commissioners*,<sup>182</sup> summarizes the scope of judicial review, as follows:

1. A local zoning authority, and not the court, has the right to prescribe change, or refuse to change zoning.
2. The district court's power is limited to determining: (a) the lawfulness of the action taken; and (b) the reasonableness of such action.
3. There is a presumption that the zoning authority acted reasonably.
4. The landowner has the burden of proving unreasonableness by a preponderance of the evidence.
5. The court may not substitute its judgment for that of the administrative body and should not declare the action unreasonable unless clearly compelled to do so by the evidence.
6. The action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was *so wide of the mark* that its unreasonableness lies outside the realm of fair debate.
7. Whether the action is reasonable or not is a question of law, to be determined upon the basis of the facts that were presented to the zoning authority.
8. An appellate court must make the same review of the zoning authority's action as did the district court.

Proceedings under K.S.A. 12-760 are the exclusive remedies to challenge a zoning regulation.<sup>183</sup> The standard of reasonableness required in appellate review is intended to encompass all challenges to the validity of any such regulation.<sup>184</sup> Thus, any challenge to the enactment of the regulation, the constitutionality of the regulation, the constitutionality of the

178. Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113 (1962).

179. Bodine v. City of Overland Park, 198 Kan. 371, 424 P.2d 513 (1967).

180. Combined Inv. Co. v. Board of County Comm'rs, 227 Kan. 17, 605 P.2d 533 (1980).

181. Golden v. City of Overland Park, 224 Kan. 591, 584 P.2d 130 (1978).

182. 227 Kan. 17, 28, 605 P.2d 533 (1980) cited with approval in VanGundy v. Lyon County Zoning Board, 237 Kan. 177, 699 P.2d 442 (1985) and Weber v. Board of Franklin County Comm'rs, 20 Kan. App. 2d 152, 884 P.2d 1159 (1994). See Johnson County Water Dist. No. 1 v. City of Kansas City, 255 Kan. 183, 184, 871 P.2d 1256 (1994) (applying *Combined Investment* concepts to special use permit decisions); M.S.W., Inc. v. Marion County Bd. of Zoning Appeals, 29 Kan. App. 2d 139, 143-46, 24 P.3d 175 (2001) (applying *Combined Investment* concepts to conditional use decisions).

183. Bolser v. Zoning Bd. for Aubrey Township, 228 Kan. 6, 612 P.2d 563 (1980); St. John v. City of Salina, 9 Kan. App. 2d 636, 684 P.2d 464 (1983). Although the decisions rely on the predecessors to K.S.A. 12-760, the reasoning supporting the decisions holding this procedure to be the exclusive remedy should remain valid. See Davis v. City of Leavenworth, 247 Kan. 486, 802 P.2d 494 (1990).

184. Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113 (1962); Amerine v. Board of Jefferson County Comm'rs, 7 Kan. App. 2d 491, 644 P.2d 477 (1982); St. John v. City of Salina, 9 Kan. App. 2d 636, 684 P.2d 464 (1983).

process, or the bias or arbitrary action of a commissioner is subsumed under the test of reasonableness.

Since *Golden v. City of Overland Park*, the courts have determined the reasonableness of a zoning decision in light of the following factors (the “*Golden* factors”):

1. The character of the neighborhood;
2. The zoning uses of nearby properties;
3. Suitability of the property for the uses to which it is restricted;
4. The extent to which the change will detrimentally affect nearby property;
5. The length of time the property has been vacant as zoned;
6. The gain to the public health, safety and welfare by the possible diminution in value of the plaintiff’s property as compared to the hardship imposed on the plaintiff if his request were denied;
7. The recommendations of a permanent or professional planning staff; and
8. The conformance of the requested change to the city’s master or comprehensive plan.<sup>185</sup>

These factors became the basis for both the district court and appellate court to review the reasonableness of the action of a governing body in a zoning matter.<sup>186</sup> The *Golden* factors were not intended to be mandatory nor even the exclusive factors considered by either the district court or the appellate court.<sup>187</sup> For instance, the recognition of the impact of a proposed zoning change on the water supply in the area of the proposed change is acknowledged to be another valid consideration in the determination.<sup>188</sup> The Kansas Supreme Court, in *Landau v. City Council of Overland Park*, emphasized the importance of an adequate written record of the evidence presented to the governing body and the factors relied upon by the governing body in making its zoning decision. The court suggested that if a trial court finds the written record of the governing body’s zoning decision inadequate, then the court may remand the case to the local governing body for further findings of fact and conclusions of law. The court stated:

Our standard of review is reasonableness. In our view cities and counties in Kansas are entitled to determine how they are to be zoned or rezoned. Elected officials are closer to the electorate than the courts and, consequently, are more reflective of the community’s perception of its image. No court should substitute its judgment for the judgment of the elected governing body merely on the basis of a differing opinion as to what is a better policy in a specific zoning situation. We will rely on the good judgment of the trial court to determine whether the specific tract zoning decision appealed arrives for review accompanied by an adequate record. If, in the view of the trial court, the findings of fact and conclusions of law are deficient under *Golden* and inadequate for a “reasonableness” determination, the trial court may, in exercising its discretion, select the alternative of

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185. *Golden*, 224 Kan. at 598, 584 P.2d 130.

186. *Taco Bell v. City of Mission*, 234 Kan. 879, 887, 678 P.2d 133 (1984); *Rieke Bldg. Co. v. City of Olathe*, 10 Kan. App. 2d 239, 697 P.2d 72 (1985).

187. *Landau v. City Council of Overland Park*, 244 Kan. 257, 262-63, 767 P.2d 1290 (1989).

188. *Dings v. Phillips*, 237 Kan. 551, 701 P.2d 961 (1985).

remanding the case to the local governing authority for further findings and conclusions.<sup>189</sup>

The *Landau* court did not object to the city's presentation of its findings of fact and conclusions of law more than six months after the governing body made its decision and the plaintiff had filed his notice of appeal. In *Landau*, the court not only retreated from the *Golden* factors, but substituted a mere written record from which evidence can be drawn to support the zoning conclusion of the governing body for a rigorous analysis of a set of controlling factors. If zoning changes are to be based on elected officials' perceptions of the image of the city or county, then zoning decisions may all become reasonable if the written record is adequate. The factors considered by the city or county need not be enumerated, if they are apparent from reading the minutes of the planning commission and the governing body.<sup>190</sup> Formal findings and conclusions are no longer necessary.<sup>191</sup> The concerns about validity or lawfulness of the governing body's actions and issues of constitutionality would appear to be subordinate to the one issue of whether under all the circumstances the governing body acted reasonably in making its zoning determinations.

### § 1.8.4(b)

#### 2. Platting

The scope of judicial review in platting matters is more restrictive than in zoning matters. Because the platting of land is a legislative function, a court may not inquire into the reasonableness of the governing body's decision. Courts are limited, instead, to determining whether the governing body had statutory authority to act, and if so, whether it acted within that authority.<sup>192</sup> However, the Court of Appeals of Kansas has reviewed the reasonableness of a planning commission's decision to deny approval of a plat.<sup>193</sup> The court held that the approval of a plat is improperly denied where the plat conforms to all zoning and subdivision regulations and planning commission standards.<sup>194</sup>

### § 1.8.4(c)

#### 3. Special Use Permits

No statutory provision specifically addresses judicial review of special use permits. The board of zoning appeals, however, reviews zoning regulations, and K.S.A. 12-759(f) permits actions filed within 30 days of the final decision of the board to determine the reasonableness of the board's decisions. Challenges to the reasonableness of granting or denying a special use permit may be brought under this section.<sup>195</sup> In reviewing a special use permit decision, a court is required to consider the eight concepts set forth in *Combined Inv. Co. v. Board of Butler County Comm'rs*.<sup>196</sup> Further, the reviewing court should consider the *Golden* factors in determining the reasonableness and validity of zoning determinations.<sup>197</sup>

In reviewing the applicable statutes, it appears that there may be a disparity between special use permit proceedings and zoning proceedings. Under K.S.A. 12-757, if a protest petition is filed against a zoning amendment, the measure must pass by a three-fourths vote of all members of the governing body.<sup>198</sup> There are no similar statutes relating to protest petitions against special use permits except in urban counties.<sup>199</sup> The fact that the legislature

189. *Landau*, 244 Kan. at 274.

190. *Davis v. City of Leavenworth*, 247 Kan. 486, 802 P.2d 494 (1990).

191. *Board of County Comm'rs of Johnson County v. City of Olathe*, 263 Kan. 667, 952 P.2d 1302 (1998).

192. *Sabatini v. Jayhawk Constr. Co.*, 214 Kan. 408, 520 P.2d 1230 (1974); *Venture in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (1979).

193. *Rodrock Enterprises, L.P. v. City of Olathe*, 28 Kan. App. 2d 860, 863-64, 21 P.3d 598 (2001).

194. *Id.*

195. *Contra, Johnson County Water Dist. No. 1 v. City of Kansas City*, 255 Kan. 183, 871 P.2d 1256 (1994) (stating, without discussion, that the applicant appealed the imposition of conditions in the granting of a special use permit under K.S.A. 12-760).

196. 227 Kan. 17, 605 P.2d 533 (1980).

197. *Johnson County Water Dist.*, 255 Kan. at 184.

198. K.S.A. 12-757(f).

199. K.S.A. 19-2960(b) (currently applicable only to Johnson County. K.S.A. 19-2654).

authorized protest petitions against special use permits in urban counties, but failed to similarly authorize the protest petitions in cities or non-urban counties, suggests that the legislature did so intentionally. Therefore, it would seem that the only protest provisions relevant to special permits are those contained in local zoning regulations, and absent any local regulations, a simple majority in favor of issuing a special use permit would constitute approval of the permit.<sup>200</sup> This logical inference, however, has been upset by a casual statement made by the Kansas Supreme Court in *Johnson County Water Dist. No. 1 v. City of Kansas City*.<sup>201</sup>

In *Johnson County Water District*, the court stated, without discussion, that if a planning commission recommends approval of a special use permit, the governing body may only override the planning commission's recommendation by a two-thirds majority vote pursuant to K.S.A. 12-757(d).<sup>202</sup> The Court did not provide any authority, analysis, or reasoning to support this statement. If K.S.A. 12-757(d) applies to special use permits, then presumably all provisions of K.S.A. 12-757 should apply as well, including the use of protest petitions found in K.S.A. 12-757(f). The *Johnson County Water District* Court's unsupported statement of the applicability of K.S.A. 12-757 to the special use permit process places this issue into question.

#### § 1.8.4(d) 4. Nonconforming Uses

Judicial review of nonconforming uses, discussed at § 1.9.11(a), *infra*, involves different considerations from those found in judicial review of zoning matters. The usual question is whether a nonconforming use has been abandoned, thereby preventing its resumption at a later time. Since the determination of "abandonment" is not a legislative decision, the Kansas Supreme Court has held that trial courts have jurisdiction in a *de novo* inquiry to determine whether there has been a voluntary abandonment of a nonconforming use.<sup>203</sup>

#### § 1.8.4(e) 5. Burden of Proof

In an action brought under K.S.A. 12-760, the plaintiff has the burden of establishing his cause of action by a preponderance of the evidence. To meet that burden, the plaintiff must show that the governing body's action was unreasonable. A court reviewing the reasonableness of a zoning decision will not consider whether the applicant for rezoning met his burden of proof before the governing body.<sup>204</sup>

#### § 1.8.4(f) 6. Evidence

The Kansas Code of Civil Procedure governs the rules of evidence in actions challenging the reasonableness of a city or county zoning decision.<sup>205</sup>

#### § 1.8.4(g) 7. Presumptions

K.S.A. 12-757(a) provides that a zoning amendment based on the comprehensive land use plan shall be presumed to be reasonable. However, a governing body's zoning decision may be reasonable even if it does not conform to the governing body's comprehensive plan, if changes such as the extension of sewer service have occurred since the adoption of the comprehensive plan.<sup>206</sup> In addition, there is a presumption that a governing body acted

200. *Martin Marietta Aggregates v. Board of County Comm'rs*, 5 Kan. App. 2d 774, 625 P.2d 516 (1981).

201. 255 Kan. 183, 871 P.2d 1256 (1994).

202. *Id.* at 186 (in *Johnson County Water District* the court cited K.S.A. 12-757(c), which is now 12-757(d)).

203. *Union Quarries, Inc. v. Board of Butler County Comm'rs*, 206 Kan. 268, 478 P.2d 181 (1970).

204. *Paul v. City of Manhattan*, 212 Kan. 381, 511 P.2d 244 (1973).

205. *Bodine v. City of Overland Park*, 198 Kan. 371, 424 P.2d 513 (1967); *Combined Inv. Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 605 P.2d 533 (1980).

206. *Board of County Comm'rs of Johnson County v. City of Olathe*, 263 Kan. 667, 952 P.2d 1302 (1998).

reasonably in effecting zoning changes.<sup>207</sup> A plaintiff challenging the governing body's action must overcome these presumptions.

#### § 1.8.4(h)

### 8. Construction of Zoning Regulations

Established rules for judicial construction of statutes are applicable to zoning regulations.<sup>208</sup> The primary rule for the construction of a statute is to determine the legislative intent from the language used therein. If the language used is plain and unambiguous, the court should follow the intent expressed by the words within the statute and not look beyond them in search of some other purpose or meaning. Courts should attempt to reconcile various provisions of a zoning regulation in order to make them consistent, harmonious, and sensible.<sup>209</sup> However, because zoning ordinances are in derogation of the right of private property, they should be liberally construed in the property owner's favor.<sup>210</sup>

#### § 1.9

### IX. LIMITATIONS ON LAND USE CONTROLS

#### § 1.9.1

#### A. Police Power or Eminent Domain

Comprehensive zoning controls have been constitutionally sanctioned since *Euclid v. Ambler Realty Co.*,<sup>211</sup> as a reasonable exercise of a municipality's police power. At some point, however, the power to regulate through comprehensive zoning controls must end, and the obligation to compensate the landowner for a taking must begin. The location of that point in the continuum from regulation to taking is not fixed.

In Kansas, downzoning property from a commercial to a residential use in order to preserve the residential character of a neighborhood appears not to constitute a taking.<sup>212</sup> The Kansas Supreme Court has also held that height and use restrictions under an airport hazard zoning regulation do not constitute a taking because they effectuate a substantial public purpose.<sup>213</sup> Further, an oil and gas zoning regulation that may have deprived a plaintiff of any economically viable use of its oil and gas leasehold does not constitute a taking when the surface rights remain unaffected.<sup>214</sup> A Kansas city may not, however, in the name of the police power, require a property owner to refrain indefinitely and without compensation, from using and enjoying his property.<sup>215</sup>

The takings analysis must consider some applicable United States Supreme Court decisions. The decisions attempt to balance the rights of landowners productively to use their property over the government's power freely to regulate property to protect the community's health, safety, and general welfare. Although a full discussion of these cases is beyond the scope of this chapter, their broad holdings will be summarized.

In *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>216</sup> the Court held that if a regulatory taking occurs, the United States Constitution requires the government to pay compensation, even if the taking is temporary. The invalidation of a land use regulation is not an adequate remedy, and compensation will be required for the deprivation of use from

207. *Hukle v. City of Kansas City*, 212 Kan. 627, 512 P.2d 457 (1973).

208. *Phillips v. Vieux*, 210 Kan. 612, 504 P.2d 196 (1972).

209. *Id.*

210. *M.S.W., Inc. v. Board of Zoning Appeals of Marion County*, 29 Kan. App. 2d 139, 151, 24 P.3d 175 (2001) (citing *Koppel v. City of Fairway*, 189 Kan. 710, 713, 371 P.2d 113 (1962)).

211. 272 U.S. 365 (1926).

212. *Houston v. Board of City Comm'rs*, 218 Kan. 323, 543 P.2d 1010 (1975) (downzoning limited to undeveloped property which had not been used in accordance with its commercial zoning).

213. *Kimberlin v. City of Topeka*, 238 Kan. 299, 710 P.2d 682 (1985); see also *Harris v. City of Wichita*, 862 F. Supp. 287, 292 (D. Kan. 1994).

214. *Mid-Gulf Inc. v. Bishop*, 792 F. Supp. 1214 (D. Kan. 1992).

215. *Venture in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (1979), but see *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) discussed *infra* at n. 226.

216. 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987).

the time of the “taking” to the time of judicial invalidation or legislative abrogation. The Court appeared to require that before a taking occurs, however, the regulation must deprive the property owner of all use of the property. On remand to the California Court of Appeals, the court held that since some limited use of the property remained, a taking had not occurred, and compensation was not therefore required.<sup>217</sup>

In *Keystone Bituminous Coal Ass’n v. DeBenedictis*,<sup>218</sup> the Court held that a regulatory taking of only a partial interest in property was not a taking for which compensation was required. If an economically viable use remains, no taking occurs. Even though a significant part of the *Keystone* landowner’s coal reserves would be affected by the *Keystone* legislation, the Court stated that “taking jurisprudence does not divide a single parcel into discrete segments in an attempt to determine whether rights in a particular segment have been entirely abrogated.”<sup>219</sup> *Keystone* nonetheless seems to recognize that a taking occurs if the owner is denied the economical use of its land, even if the regulation substantially advances a legitimate governmental objective.

In *Nollan v. California Coastal Comm’n*,<sup>220</sup> the Court invalidated a requirement of the California Coastal Commission that compelled private property owners to provide public access to beaches in order to obtain permits for beach front property projects. The Court held that the Coastal Commission failed to establish a “nexus” between building a larger home on the property and the legitimate state objective of ocean accessibility to the public. The public access requirement was considered by the Court as a constitutionally impermissible taking of an easement for a legitimate state purpose without payment of compensation. Since the impact of building a larger beach front home did not affect public access to the beach, no nexus existed to justify the condition of dedicating an easement for such public access.

In *Dolan v. City of Tigard*,<sup>221</sup> the Court extended the *Nollan* rule that there must be an essential nexus between the dedication of an easement exacted by a city as a condition for the issuance of a building permit to also require that a “rough proportionality” test be used to determine whether the degree of exactions required was roughly proportional to the impact of the proposed development. The Court determined that neither the nature nor the extent of the required dedication of pedestrian and bicycle pathways was proportionate to the additional number of vehicular or bicycle trips generated by the proposed expansion of the commercial use.

Although *First English* and *Nollan* may tip the judicial scales in favor of landowners in takings cases, intimidating procedural hurdles prevent easy victory. Finality and ripeness are the two most daunting hurdles. They preclude maturity of a taking claim until the local government renders a final decision on the development application and the landowner seeks and is denied state remedies for compensation. Thus, even after a zoning application is denied, a taking claim may not be ripe for constitutional review if the landowner fails to seek a variance from the zoning denial.<sup>222</sup> Because use variances are not allowed in Kansas, ripeness should not force a landowner futilely to seek a variance from a board of zoning appeals. Ripeness will, however, require the landowner to seek compensation for inverse condemnation in a state court.<sup>223</sup>

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217. 258 Cal. Rptr. 893 (Cal. Ct. App. 1989).

218. 480 U.S. 470, 107 S. Ct. 1232, 94 L.Ed.2d 472 (1987).

219. *Keystone*, 480 U.S. at 497.

220. 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987).

221. 512 U.S. 374 (1994).

222. See *Bateman v. City of West Bountiful*, 89 F.3d 704, 707 (10th Cir. 1996); *Harris v. City of Wichita*, 862 F. Supp. 287, 290 (D. Kan. 1994); see also *Wintercreek Apts. v. City of St. Peters*, 682 F. Supp. 989 (E.D. Mo. 1988).

223. *Bateman*, 89 F.3d at 708-09; *Harris*, 862 F. Supp. at 291; *SK Finance SA v. LaPlata County, Bd. of Comm’rs*, 126 F.3d 1272, 1276 (10th Cir. 1997).

In 1992, the United States Supreme Court decided *Lucas v. South Carolina Coastal Council*.<sup>224</sup> The *Lucas* Court stated that there were at least two discrete categories of actions which amount to a regulatory taking: first, when the regulation compels the property owner to suffer a physical invasion, no matter how trivial; second, when the regulation denies all economically beneficial or productive use of the land.<sup>225</sup> Under *Lucas*, “compensation is required when a regulation deprives an owner of all economically beneficial uses of his land.”<sup>226</sup>

To determine if a landowner has lost all economically beneficial or productive use of the land, the owner must have lost a use that was a part of the estate.<sup>227</sup> Under this test, the extent of the estate is limited by the restrictions that the laws of property and nuisance have already placed upon the property.

Following the decision in *Lucas*, the Supreme Court took up the question of whether land use planning was a taking in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>228</sup> In *Tahoe-Sierra*, the Supreme Court held that a moratorium that temporarily prohibited all economic use of the land did not constitute a *per se* taking of the land. The Court did not rule that a temporary moratorium could never constitute a taking, but rather only ruled that in determining whether a temporary moratorium that prohibits all economic use of land constitutes a taking, a court should conduct the analysis provided under *Penn Central*.<sup>229</sup>

### § 1.9.2 B. Unlawful Delegation of Power and Discretion

A zoning regulation must establish sufficient standards by which the administrative agency can be guided. If the regulation leaves decisions to the unlimited discretion of the administrative agency, it is invalid. Moreover, if the regulation permits a decision of a governing body to turn on the consent of adjoining property owners, it will be declared invalid as an unlawful delegation of legislative powers.<sup>230</sup>

### § 1.9.3 C. Procedural Due Process

The governing body’s zoning decision might be challenged for failing to meet the due process requirements of the Fourteenth Amendment under 42 U.S.C. § 1983. Because procedural due process requires that before taking property a full and fair hearing must be given before an impartial tribunal, allegations of bias, prejudice, prejudgment, or inadequate hearing opportunity should permit a § 1983 challenge. However, in order to support such a challenge, the plaintiff must establish that it has a protected property interest at stake in the rezoning application, or alternatively, in the rezoning process itself. Thus, a Kansas federal district court has held that an applicant for commercial zoning for a suburban mall was not entitled to § 1983 protection since its application for a change in zoning was not a property interest under Kansas law.<sup>231</sup>

Where the focus of the zoning authority shifts from the entire city or county to one specific tract of land for which a zoning change is requested, the zoning authority’s function becomes quasi-judicial in nature rather than legislative, and in such proceedings, the zoning

224. 505 U.S. 1003 (1992).

225. *Id.* at 1015. The Court’s use of the words “at least” indicates that other regulatory actions may also amount to takings. See Laura Mcknight, Comment, *Regulatory Takings: Sorting out Supreme Court Standards after Lucas v. South Carolina Coastal Council*, 41 KAN. L. REV. 615 (1993).

226. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L.Ed.2d 517 (2002) (citing *Lucas*, 505 U.S. at 1019, 112 S. Ct. at 2886).

227. *Lucas*, 505 U.S. at 1027-28, 112 S. Ct. at 2899-2900.

228. 535 U.S. 302, 122 S. Ct. 1465, 152 L.Ed.2d 517 (2002).

229. *Id.* at 321 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978)).

230. *Schulte v. City of Garnett*, 186 Kan. 117, 348 P.2d 629 (1960).

231. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 715 F. Supp. 1000 (D. Kan. 1989), *aff’d*, 927 F.2d 1111 (10th Cir. 1991).

authority must comply with the requirements of due process in its proceedings.<sup>232</sup> An inherent conflict exists between a person's role as a legislative officer and as the decision maker on a board that performs a quasi-judicial function (for example, a person who serves on a county board of commissioners, which also serves as the board of zoning appeals) and a court should exercise caution in examining the actions of those officials.<sup>233</sup>

In *McPherson Landfill, Inc. v. Board of County Comm'rs*, the board of county commissioners denied a landfill owner's application for a conditional use permit, and the owner claimed that the commissioners had prejudged the merits of the application before all the evidence was presented.<sup>234</sup> In order to succeed on a claim of violation of due process based on an issue of prejudgment, a party must show that the decision maker did not maintain an open mind and did not listen to the evidence presented before making a decision; in other words, the party must show that the decision maker has an irrevocably closed mind on the subject.<sup>235</sup>

A second issue in *McPherson* was that *ex parte* communications invalidated the county's decision. Although local legislators may confer *ex parte* with persons interested in zoning amendments, when *ex parte* contacts are present in the context of quasi-judicial zoning decisions (those involving a specific tract of land) courts may be more open to challenges to those decisions.<sup>236</sup> However, the Court in *McPherson* held that because the plaintiff knew about the substance of the *ex parte* contact and that plaintiff had had *ex parte* communications himself, the Court found that the *ex parte* communications did not violate the plaintiff's due process rights.<sup>237</sup>

#### § 1.9.4 D. Substantive Due Process

A governing body's arbitrary and capricious zoning decision may be challenged as violating federally protected substantive due process. Substantive due process protects individuals against oppressive government acts regardless of the procedures used to implement those acts.<sup>238</sup> To be successful, a plaintiff must prove that the purpose behind the governing body's action has no conceivable rational relationship to the exercise of the governing body's traditional police power through zoning.<sup>239</sup> As with procedural due process, however, a claimant must have a constitutionally protected property interest in order to assert an infringement of substantive due process.<sup>240</sup> Because a desire for rezoning is not a constitutionally protected property right, an allegation that the governing body acted arbitrarily and capriciously in denying rezoning will not create a substantive due process claim. If such a claim were created by the allegation of arbitrary and capricious action, "garden variety" zoning disputes would be converted into federal cases and federal courts would become surrogate zoning appeal boards.<sup>241</sup>

#### § 1.9.5 E. Equal Protection of the Law

The Equal Protection Clause of the Fourteenth Amendment generally requires that local governments treat all similarly situated persons alike.<sup>242</sup> If a zoning applicant is treated differently from another applicant, similarly situated, equal protection under local zoning

232. *McPherson Landfill, Inc. v. Board of County Comm'rs*, 274 Kan. 303, 49 P.3d 522 (2002).

233. *Tri-County Concerned Citizens, Inc. v. Board of County Comm'rs*, 32 Kan. App. 2d 1168, 1178, 95 P.3d 1012 (2004).

234. *Id.* at 317.

235. *Id.* at 318. *See also Tri-County*, 32 Kan. App. 2d at 1179-80.

236. *McPherson*, 274 Kan. at 322.

237. *Id.*

238. *Nishiyama v. Dickson County*, 814 F.2d 277, 281 (6th Cir. 1987).

239. *Norton v. Village of Corrales*, 103 F.3d 928, 932 (10th Cir. 1996) (citing *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827-28 (4th Cir. 1995)).

240. *See Norton*, 103 F.3d at 931-32.

241. *Norton*, 103 F.3d at 933; *RRI Realty Corp. v. Inc. Village of Southampton*, 870 F.2d 911 (2d Cir. 1989).

242. *Norton*, 103 F.3d at 933.



laws may have been denied. Disparate treatment of similarly situated landowners is not, however, enough to deny equal protection. Unless a claim involves discrimination based on race, sex or other suspect classifications, which require heightened scrutiny, equal protection will only be found to have been denied if the decision is not rationally related to a legitimate governmental interest.<sup>243</sup> Thus, even though similarly situated zoning applicants are classified differently, if the classification's purpose rationally fits the governing body's legitimate objective, equal protection is satisfied. This principle supported the Kansas federal district court's conclusion that large scale commercial zoning (a classification) would be permitted downtown and not on the city's fringe in order to protect the integrity of the central business district (a legitimate city objective).<sup>244</sup>

In *Franklin v. City of Merriam*,<sup>245</sup> the plaintiff, in an equal protection case, intended to develop a parcel of property and to construct a car dealership on a tract. In his efforts, the plaintiff submitted a planned unit development application to convert the use of the tract from restaurant to a car dealership. The planning staff recommended denial of the application, the planning commission followed this recommendation, and the city also denied the application. At depositions of city council members, two members said that they wanted a restaurant at the site and two others testified that they did not believe the site was large enough for a car dealership, which was consistent with the planning commission's reasons for recommending denial of the application. The plaintiff sold the tract to a third party who sold the property to a developer. The developer also purchased an adjacent parcel of property and over a year after plaintiff's application, the developer filed an application for a planned unit development so that the developer could operate a car dealership. The developer's PUD application was approved. The plaintiff filed the case alleging that the city had denied his constitutional rights to equal protection.

The federal district court stated that unless a party making an equal protection claim is a member of a suspect class, the party making the claim must do so under the "class-of-one" theory.<sup>246</sup> Under the class-of-one theory, a claimant must demonstrate that a public official inflicts a cost or burden on one person without imposing it on those who are similarly situated in material respects, and does so without any conceivable basis other than wholly illegitimate motives.<sup>247</sup> In rejecting plaintiff's claims, the court found that there were several important differences between the applications of plaintiff and the developer, in that the developer's application included an adjacent tract, because of the different tracts, the application involved different zoning and use requests, and that the developer's application was made over a year after plaintiff's application.<sup>248</sup> The court also found that the plaintiff failed to demonstrate that the reasons for granting the developer's application were irrational and wholly arbitrary.<sup>249</sup>

Equal protection as a potential remedy should not, however, be hurriedly discarded, particularly if rezoning is denied for a site similarly situated to a site for which rezoning has been approved and there are no material differences in the situations. The existence of rational and legitimate justifications for the disparate treatment will in that situation be more difficult to find than when clearly defined municipal goals are at issue. Nonetheless, local governments have surprising breadth to discriminate in economic and commercial matters, as "[t]he structure of economic and commercial life is a matter of political compromise, not

243. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

244. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 715 F. Supp. 1000 (D. Kan. 1989), *aff'd*, 927 F.2d 1111 10th Cir. 1991).

245. 2008 WL 1884189 at \*4 (D. Kan. 2008).

246. *Id.*, at \*4 (D. Kan. 2008) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

247. *Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1209 (10th Cir. 2006).

248. *Franklin*, 2008 WL 1884189 at \*5.

249. *Id.* at \*6.

constitutional principle, and no norm of equality requires that there be as many opticians as optometrists or new businesses as old.”<sup>250</sup>

### § 1.9.6 F. Federal Antitrust Laws

If a local government’s land use policies result in anticompetitive restraints, the Sherman Act,<sup>251</sup> may provide a remedy. The United States Supreme Court, however, has diluted the efficacy of antitrust laws to reverse a municipality’s zoning decisions. The Court has strengthened the state action exemption from the Sherman Act. The Court in *Town of Hallie v. City of Eau Claire*,<sup>252</sup> held that the state action exemption applies where a state statute authorizes the actions taken, and the anticompetitive effects logically would result from statutory authority to regulate particular activities, such as land use. A two-step analysis thus results: did the state legislature authorize the city’s challenged activity; and if so, did the legislature’s authorization contemplate the resulting anticompetitive effects and were they reasonably foreseeable?<sup>253</sup>

Because the Kansas legislature has authorized cities and counties to rezone their jurisdictions into zones and districts, and to regulate and restrict the location and use of buildings and land within each district, the Kansas federal district court held in *Russell and Jacobs, Visconsi, Jacobs* that zoning and land use decisions have been authorized by the Kansas legislature. This threshold decision appears to lead, almost *a fortiori*, to the conclusion that if a governing body is given the power to zone, that zoning will lead to anticompetitive results. Therefore, when a city determines, through its comprehensive plan and zoning decisions that zoning will be approved for a regional shopping center in the central business district, but not on the city’s fringe, there is no antitrust violation, even if the determination creates a near monopoly position for the central business district.<sup>254</sup>

### § 1.9.7 G. Exclusionary Zoning

Exclusionary zoning is the term given to a zoning pattern that excludes racial, economic, or social minorities. The most common exclusionary regulations are those designed to maintain the homogeneity of a neighborhood. Among the techniques used to accomplish exclusionary zoning are the following: minimum building size requirements; minimum lot size requirements; exclusion of mobile and modular homes; rigid land improvement restrictions; regulation of the number of persons who may live in a single dwelling; and heavy assessments for special improvements. One such technique was sanctioned by the United States Supreme Court in *Village of Belle Terre v. Boraas*.<sup>255</sup> In that case, the Court approved a local zoning regulation restricting land use to one-family dwellings occupied by traditional family units. The Court held that the regulation was rationally related to the permissible state objective of providing a quiet, uncongested place addressed to family needs.<sup>256</sup> Perhaps the landmark exclusionary zoning decision, however, was *Southern Burlington County NAACP v. Mt. Laurel*.<sup>257</sup> In *Mt. Laurel*, the New Jersey court held that a municipality could not permissibly exclude certain classes of citizens by limiting the amount

250. *City of Cleburne*, 473 U.S. at 471 (Marshall, J., concurring).

251. 15 U.S.C. §§ 1 and 2.

252. 471 U.S. 34 (1985).

253. *Russell v. City of Kansas City*, 690 F. Supp. 947 (D. Kan. 1988); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 715 F. Supp. 1000 (D. Kan. 1989), *aff’d*, 927 F.2d 1111 10th Cir. 1991).

254. *Jacobs, Visconsi & Jacobs*. See generally, Deutsch, *Antitrust Challenges to Local Zoning and Other Land Use Controls*, 60 CHICAGO-KENT L. REV. 63 (1984).

255. 416 U.S. 1 (1974).

256. However, a governing body must carefully define “one-family dwellings” to prevent the regulation from violating the Fair Housing Act. See discussion at § 1.9.9(a), *infra*.

257. 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 432 U.S. 808 (1975).

of low and moderate income housing, and that a developing municipality must, by its land use regulations, make realistically possible an appropriate variety and choice of housing.<sup>258</sup>

Zoning regulations, resolutions, or regulations excluding group homes for physically, mentally, or developmentally handicapped persons are prohibited by K.S.A. 12-736(a), which provides that it is “declared to be the policy of the state of Kansas that persons with a disability shall not be excluded from the benefits of single family residential surroundings.”

## § 1.9.8

### H. Aesthetic Zoning

Zoning for aesthetic purposes is expressly permitted by K.S.A. 12-755(a)(4). K.S.A. 12-755(a)(4) is simply a codification of the long recognized view that there is an aesthetic and cultural side of municipal development, which can be regulated within reasonable limits.<sup>259</sup> One of the potential limitations to aesthetic zoning, however, is § 1121(b) of the Lanham Trade Mark Act, which the Ninth Circuit has held to prohibit governing bodies from requiring alteration of a registered mark through zoning regulations. Section 1121(b) provides, in pertinent part, that “[n]o State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark.”<sup>260</sup> In *Blockbuster Videos, Inc. v. City of Tempe*,<sup>261</sup> the Ninth Circuit held that although a zoning regulation may preclude the display of a registered mark, the regulation may not require a change in the mark to fit an uniform, aesthetically pleasing look, without violating § 1121(b).<sup>262</sup> The Ninth Circuit’s holding is certain to spawn a number of challenges to zoning regulations for aesthetic purposes based on § 1121(b). As with exclusionary zoning, aesthetic zoning has been the subject of numerous legal articles.<sup>263</sup>

The Kansas Court of Appeals, in *R.H. Gump Revocable Trust v. City of Wichita*,<sup>264</sup> upheld the denial of a conditional use permit to allow the construction of a “stealth flagpole” tower for use as a wireless communication tower based almost wholly upon aesthetics or the visual appearance of the tower. The proposed tower would have an initial height of 135 feet, with provisions to extend the height of the tower to 165 feet if necessary to allow other carriers to use the same support structure in the future. A large United States flag would be flown from the flagpole to help disguise its utilitarian purpose.<sup>265</sup> The City of Wichita denied the permit and in upholding the city’s denial, the court of appeals rejected appellant’s argument that the city’s decision was pure subjectivity and that there had to be some type of objective standard by which the court could determine the reasonableness of the decision. The court stated that “[w]hile aesthetic considerations may not be as precise as more technical measures and must be carefully reviewed to assure that they are not just a vague justification for arbitrary and capricious decisions, they may be considered as a basis for zoning rulings.”<sup>266</sup>

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258. For literature on the subject of exclusionary zoning, see Stephen David Galowitz, *Interstate Metro-Regional Response to Exclusionary Zoning*, Vol. 27, No. 1 REAL PROP, PROB., & TR. J. 49 (1992); David C. Keating, Comment, *Exclusionary Zoning: In Whose Interests Should the Police Power Be Exercised?*, Vol. 23, No. 4 REAL EST. L.J. 304 (1995).
259. *Blockbuster Video, Inc. v. City of Overland Park*, 24 Kan. App. 2d 358, 360, 948 P.2d 179 (1997) (holding that a city’s aesthetic zoning regulation was not applied in a vague manner when the applicant understood that its preferred exterior design scheme was unacceptable to the city).
260. 15 U.S.C. § 1121(b).
261. 141 F.3d 1295 (9th Cir. 1998).
262. *Id.* at 1300.
263. See, e.g., Comment, *Aesthetic Zoning: The Creation of a New Standard*, 48 J. URBAN L. 741 (1971); Annotation, *Aesthetic Objectives or Considerations as Affecting Validity of Zoning Ordinance*, 21 A.L.R. 3d 1222 (1968).
264. 35 Kan. App. 2d 501, 131 P.3d 1268 (2006).
265. *Id.* (citing *Houston v. Board of City Comm’rs*, 218 Kan. 323, 543 P.2d 1010 (1975)).
266. *Id.* at 512. However, the court does not make clear how a zoning decision based purely on a stated subjective consideration like aesthetics can ever have been “carefully reviewed” to ensure that the decision is not really a “vague justification for arbitrary and capricious decision.”

However, aesthetics can only be a permissible ground in a zoning decision for a wireless communication facility under the Telecommunications Act if the decision is supported by substantial evidence, which is more than generalized concerns regarding aesthetics.<sup>267</sup>

## § 1.9.9

### I. Federal Acts

#### § 1.9.9(a)

#### 1. The Fair Housing Act

The Fair Housing Act (FHA), codified at 42 U.S.C. §§ 3601, *et seq.*, and its state counterpart, codified at K.S.A. 44-1015, *et seq.*, prohibit housing discrimination on the basis of race, color, religion, sex, national origin, handicap, or familial status. Section 3607(b)(1) of the FHA however, allows reasonable local restrictions regarding the maximum number of occupants permitted to occupy a dwelling.<sup>268</sup> Thus, a governing body may pass reasonable zoning regulations limiting the number of residents allowed in a particular zoning district without violating the FHA. If a zoning regulation, however, limits buildings within a zoning district to “single family dwellings,” and then defines “family” in a way as to limit the number of nonrelated persons who may occupy such dwellings without equally limiting the number of related persons, a violation of the FHA may be found.

In *City of Edmonds v. Oxford House, Inc.*,<sup>269</sup> the Court held that a city regulation that zoned an area for single family dwelling units and defined “family” as “persons related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons” does not fit within the exemption provided by § 3607(b)(1). The Court reasoned that because the regulation did not limit the number of related persons in a single family dwelling, but only limited the number of unrelated persons in a single family dwelling, the city’s regulation did not apply uniformly to all residents of all dwelling units, and thus the regulation did not fall within § 3607(b)(1)’s absolute exemption. The Court stated that “rules that cap the total number of occupants in order to prevent overcrowding of a dwelling ‘plainly and unmistakably’ fall within the § 3607(b)(1) absolute exemption from the FHA’s governance; rules designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain, do not.”<sup>270</sup> The Court did not decide that the regulation violated the FHA, but only that the city could not rely on the exemption provided by § 3607(b)(1).<sup>271</sup> Zoning regulations and decisions that have a discriminatory impact on the classes protected by the FHA may be a violation as well.<sup>272</sup>

#### § 1.9.9(b)

#### 2. The Religious Land Use and Institutionalized Persons Act of 2000

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), to prevent government from substantially burdening religious exercise through land use regulation. Specifically, the statute prohibits implementing land use regulations “in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”<sup>273</sup> Any land use regulation that substantially burdens the religious exercise of a person, assembly or institution must be the least restrictive means of furthering a compelling government interest.<sup>274</sup>

267. *Verizon Wireless (VAW) LLC v. Douglas County, Kansas, Board of County Comm’rs*, 544 F. Supp. 2d 1218, 1248-49 (D. Kan. 2008); see discussion in § 1.9.9(c), *infra*.

268. See also K.S.A. 44-1018(c)(1).

269. 514 U.S. 725 (1995).

270. *Id.* at 735 (citations omitted).

271. *Id.* (the Court affirmed the Ninth Circuit Court of Appeal’s order remanding the case to the trial court to determine whether the city had failed to make reasonable accommodation in violation of the FHA).

272. See PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, *LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW* 104 (1998) (citing *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937-38 (2d Cir. 1988), *reh’g denied*, 488 U.S. 1023 (1989)).

273. 42 U.S.C. § 2000cc(b)(1) (2006).

274. 42 U.S.C. § 2000cc(a)(1) (2006).

While Kansas courts have yet to construe the provisions of the Act, it has been the subject of litigation in the Tenth Circuit. In *Grace United Methodist Church v. City of Cheyenne*,<sup>275</sup> a church brought an action under RLUIPA when it was denied a license to run a 100-child daycare program in a residential zone. At trial, the jury found against the church on grounds that its proposed operation of the daycare was not a sincere exercise of religion under RLUIPA.<sup>276</sup> At issue on appeal was whether a jury instruction defining “religious exercise” as activities which were “fundamental” to the practice of religion was an error. The Tenth Circuit held that in light of the statute’s broad definition of “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,”<sup>277</sup> the jury instruction was erroneous.<sup>278</sup>

As a result of this holding and the broad language in RLUIPA, land use regulations’ impact on a religious institution should be reviewed under RLUIPA.<sup>279</sup> For example, RLUIPA’s strict scrutiny standard makes it likely that traffic or parking concerns, which may be relevant in land use decisions with regard to nonreligious institutions, will not qualify as “compelling government interests” with regard to religious institutions. It remains to be seen how Kansas courts will construe RLUIPA’s “substantially burdens” language in the land use context. However, in a recent opinion regarding RLUIPA’s impact on a prison inmate, the Kansas federal district court stated that although “RLUIPA fails to define ‘substantial burden,’ the Tenth Circuit has relied on RLUIPA’s legislative history, which reveals that ‘substantial burden’ in the statute is to be interpreted by reference to First Amendment jurisprudence.”<sup>280</sup>

### § 1.9.9(c)

### 3. Telecommunications Act of 1996

In 1996, Congress passed the Telecommunications Act of 1996 (TCA), which imposes certain restrictions on local zoning decision making that impact the placement of wireless services facilities.<sup>281</sup> By passing the TCA, Congress has sought to reduce impediments imposed by local governments upon the installation of wireless communications facilities, such as antenna towers.<sup>282</sup> The TCA places six restrictions on the authority of local government to regulate the placement, construction, and modification of personal wireless service facilities.<sup>283</sup> The six restrictions are: Any decision by a local authority denying a request to place, construct, or modify a personal wireless facility (1) shall not unreasonably discriminate among providers of functionally equivalent services; and (2) shall not prohibit or have the effect of prohibiting the provisions of personal wireless services.<sup>284</sup> Furthermore, (3) the local authority must act on any request for authorization to place, construct or modify personal wireless service facilities within a reasonable period of time after the request is duly filed.<sup>285</sup> Any decision by the local authority to deny a request to place, construct or modify personal wireless services facilities (4) must be in writing and (5) must be supported by substantial evidence contained in a written record.<sup>286</sup> Finally, (6) the local authority may not

275. 451 F.3d 643 (10th Cir. 2006).

276. *Id.* at 648.

277. 42 U.S.C. § 2000cc-5(7)(a) (2006).

278. *Grace*, at 663.

279. For a good summary of RLUIPA, see Patrick B. Hughes, *What Can They Do? Limitations on the Power of Local Zoning Authorities*, 76 J. KAN. BAR ASS’N at 28, 32 (Jan. 2007).

280. *Strope v. Cummings*, No. 06-3021-KHV, 2008 WL 508698, \*7 (D. Kan. Feb. 22, 2008) (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006)).

281. 47 U.S.C. § 332; see also Patrick B. Hughes, *What Can They Do? Limitations on the Power of Local Zoning Authorities*, 76 J. KAN. BAR ASS’N at 33 (Jan. 2007).

282. *T-Mobile Central, LLC v. Unified Gov’t of Wyandotte County/Kansas City, Kansas*, 528 F. Supp.2d 1128, 1146-47 (D. Kan. 2007).

283. *Id.* at 1147 (citing *U.S. Cellular Tel. of Greater Tulsa, L.L.C. v. City of Broken Arrow*, 340 F.3d 1122, 1132-33 (10th Cir. 2003); 47 U.S.C. § 332(c)(7)(B)).

284. 47 U.S.C. § 332(c)(7)(i)(I)-(II).

285. 47 U.S.C. § 332(c)(7)(ii)

286. 47 U.S.C. § 332(c)(7)(iii).

regulate the placement, construction or modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions so long as the facilities comply with regulations of the Federal Communications Commission.<sup>287</sup>

A person adversely affected by any final action or failure to act by a local authority may file a lawsuit within 30 days after the action or failure to act in any court of competent jurisdiction.<sup>288</sup>

In two separate cases, Judge David Waxse reviewed whether the local authority's denial of an application for a special or conditional use permit to construct a wireless telecommunications facility violated the TCA. In *T-Mobile Central, LLC v. Unified Government of Wyandotte County/Kansas City, Kansas*,<sup>289</sup> the issues were whether the local authority's decision was supported by substantial competent evidence and had the effect of prohibiting the provision of wireless services, and in *Verizon Wireless (VAW) LLC v. Douglas County, Kansas, Board of County Comm'rs*,<sup>290</sup> the issue was whether the decision was based upon substantial evidence.

In zoning decisions for wireless communications facilities, parties and courts reviewing similar denials should closely review Judge Waxse's thorough analysis in each case and should conduct a similar analysis to determine whether the local authority's decision violates the TCA. Courts should keep in mind that, as Judge Waxse stated, although "[j]udicial review under the substantial evidence standard is quite narrow. . . the Court's review, though highly deferential, is not a rubber stamp."<sup>291</sup>

In *T-Mobile*, Judge Waxse determined that the legal standard courts should use in Kansas regarding the legal issue of whether a local authority may violate the TCA's "effective prohibition" clause is if it prevents a wireless provider from closing a "significant gap" in service coverage and whether the "significant gap" in service coverage is found to be a gap in coverage by all providers or the specific provider seeking the special use permit. After discussing the split in authority between the Second and Third Circuits which found that a "significant gap" in service exists only if no provider is able to serve the gap and the First and Ninth Circuit which found that a "significant gap" exists if the provider in question is prevented from filling a significant gap in its own service network,<sup>292</sup> Judge Waxse determined that a local authority violates the TCA if the local authority prevents a provider from filling a significant gap in its own service coverage.<sup>293</sup>

In *Verizon*, Judge Waxse determined that a "decision that is based on the resolution of technical issues cannot be sustained under the substantial evidence standard where the determination was made based not on testimony and evidence in the record but rather on the adjudicator's own independent findings on the technical issues."<sup>294</sup> Thus, to survive a challenge to the local authority's decision to deny an application of a wireless communications provider based on technical issues, there must be evidence and testimony that supports the denial. A local authority may not rely on its own interpretation of the evidence presented by the applicant if that is the only evidence presented.

Judge Waxse also reviewed the county's decision that the wireless communication tower presented a detrimental effect on the health, safety and general welfare of the community

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287. 47 U.S.C. § 332(c)(7)(iv).

288. 47 U.S.C. § 332(c)(7)(v).

289. 528 F. Supp. 2d 1128 (D. Kan. 2007).

290. 544 F. Supp. 2d 1218 (D. Kan. 2008).

291. 528 F. Supp. 2d at 1148.

292. *Id.* at 1154.

293. *Id.* at 1155.

294. 544 F. Supp. 2d at 1247 (quoting *Primeco Personal Communications Ltd. P'ship v. City of Mequon*, 242 F. Supp. 2d 567, 577-78 (E.D. Wis. 2003).

when the only evidence supporting the decision was testimony from residents opposing the application who opposed the tower based on fears that it might create a hazard, might cause local television reception interference, might create a potential hazard during storms, wind and lightning or might reduce property values. Judge Waxse found that the opinions expressed by the residents were not supported by any facts and therefore their stated concerns, on which the county relied, did not constitute substantial evidence to support the county's decision.<sup>295</sup> Finally, Judge Waxse found that although aesthetics can be a valid ground for a local zoning decision, "it can only be a permissible ground for denial of a permit under the TCA if it is supported by substantial evidence" and "[g]eneralized concerns regarding aesthetics do not constitute sufficient evidence for purposes of the TCA."<sup>296</sup>

### § 1.9.10 J. Zoning to Limit or Retard Community Growth

An analysis of the various techniques to limit or retard community growth is beyond the scope of this chapter. The topic is, however, significant as cities attempt to combat urban sprawl, deterioration of central business districts, and the escalating costs of public improvements. Thus, substantial literature has been devoted to this topic.<sup>297</sup>

### § 1.9.11 K. Nonconforming Uses

#### § 1.9.11(a) 1. Definition

A nonconforming use has typically been defined by courts and commentators as a use of land which lawfully existed prior to the enactment of a zoning regulation, and which is maintained after the effective date of the regulation, although it does not comply with the use restrictions applicable to the area in which it is situated.<sup>298</sup> Thus, for example, a restaurant lawfully permitted under an existing regulation will become nonconforming under a new zoning regulation that places the land upon which the restaurant is located in a residential zoning district. Nonconformity may also occur by a change in bulk restrictions as, for example, where a building originally complied with side yard set back requirements. Nonconforming use questions generally pertain to how the use was created, its duration, whether it can be altered, modified, or extended, whether it has been abandoned, and whether it can be legislatively eliminated over a period of years through the process of amortization.

Most of these questions are resolved by statute. A nonconforming use may not be established through a use which from its inception violated a zoning regulation. For instance, excavating land to supply fill dirt in a residential area is only permissible if the fill dirt operation existed prior to any residential zoning being applied to the area.<sup>299</sup>

#### § 1.9.11(b) 2. Kansas Nonconforming Use Statutes

K.S.A. 12-758(a) provides that zoning regulations shall not apply to the existing use of any building or land, but shall apply to any alteration that changes the use of any building after the effective date of the regulation. Moreover, if a building is damaged and its structural value is not reduced by more than fifty percent, it may be restored notwithstanding the fact that it continues to be nonconforming.

Enabling legislation regarding amortization of nonconforming uses for counties was previously upheld in *Spurgeon v. Board of Commissioners*.<sup>300</sup> Whether a Kansas city could gradually eliminate nonconforming uses by a home rule regulation, notwithstanding the lack

295. 544 F. Supp. 2d at 1248.

296. *Id.* at 1248-49.

297. *See generally*, 2 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING §§ 10.01-.20 (4th ed. 1996); John Wachter, Note, *Zoning-Preservation of a Small Town Character*, 16 WASHBURN L.J. 225 (1976).

298. *City of Norton v. Hutson*, 142 Kan. 305, Syl. ¶ 11, 46 P.2d 630 (1935); *Johnson County Memorial Gardens, Inc. v. City of Overland Park*, 239 Kan. 221, 718 P.2d 1302 (1986); K.S.A. 12-758.

299. *Goodwin v. City of Kansas City*, 244 Kan. 28, 766 P.2d 477 (1988).

300. 181 Kan. 1008, 317 P.2d 798 (1957).

of express enabling legislation, is open to question. One commentator has answered this question affirmatively.<sup>301</sup> K.S.A. 12-771 provides some support for this position, as the statute provides that nothing in the act expressly authorizing gradual elimination of sexually oriented businesses is intended to preclude cities and counties from enforcing local ordinances for the gradual elimination of nonconforming uses.

K.S.A. 12-770(b), enacted in 1997, authorizes a governing body to gradually eliminate sexually oriented businesses which constitute nonconforming uses. K.S.A. 12-770(a) thoroughly defines what types of businesses constitute “sexually oriented businesses.”

Nonconforming uses in a county are regulated by K.S.A. 19-2921, which prohibits any restrictions on nonconforming agricultural uses of land or buildings. For instance, if quarrying rock is for an agricultural purpose, it may not be prohibited by any zoning regulation.<sup>302</sup>

### § 1.9.11(c) 3. Extension, Enlargement, or Alteration of Nonconforming Uses

The right to continue a nonconforming use does not include the right to enlarge it. The fact that a use such as a cemetery is regulated by the state does not prohibit a city from zoning the cemetery as a residential use, thus making the cemetery nonconforming.<sup>303</sup> Mere intensification in the volume of the use without changing its character or location are not proscribed enlargements of the use.<sup>304</sup> In addition, most nonconforming use regulations also permit a change in a nonconforming use to a more restrictive category of use in the same zoning classification. Finally, in situations like mining or quarrying operations, a nonconforming use may be expanded by virtue of the “diminishing asset doctrine.”<sup>305</sup> Where the land itself is a resource consumed during operations, the doctrine acknowledges that excavation cannot occur simultaneously on the whole of the land. Where evidence of intent to expand excavation to any other portion of the land at the time the zoning laws are created, expanded excavation is not considered an unlawful nonconforming use.<sup>306</sup>

### § 1.9.11(d) 4. Abandonment of Nonconforming Uses

Zoning regulations typically provide that if a nonconforming use is discontinued for a period of time, it may not be re-established. In applying such regulations to specific facts, two important questions exist: first, what constitutes a discontinuance; and second, who is to determine whether a discontinuance has occurred? These questions were both answered by the Kansas Supreme Court in *Union Quarries, Inc. v. Board of County Comm’rs*.<sup>307</sup>

In *Union Quarries*, the court held that discontinuance of a nonconforming use occurs only when the use has been abandoned. In determining whether a use has been abandoned, two tests are used: (1) an intention to abandon; and (2) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use. Mere cessation of use does not of itself amount to abandonment, although the duration of nonuse may be a factor in determining whether abandonment has occurred. The question of whether a nonconforming use has been abandoned is a judicial rather than a legislative question. Thus, county or city governing bodies are not authorized to make binding decisions that a nonconforming use is lost by discontinuance. It is, rather, within the jurisdiction of Kansas district courts to determine whether a discontinuance of a nonconforming use has occurred. The court does not simply review the reasonableness of the

301. Barkley Clark, *State Control of Local Government in Kansas: Special Legislation, Home Rule*, 20 KAN. L. REV. 631, 674 (1972).

302. *VanGundy v. Lyon County Zoning Bd.*, 237 Kan. 177, 699 P.2d 442 (1985).

303. *Johnson County Memorial Gardens, Inc. v. City of Overland Park*, 239 Kan. 221, 718 P.2d 1302 (1986).

304. *Union Quarries, Inc. v. Board of County Comm’rs*, 206 Kan. 268, 478 P.2d 181 (1970).

305. *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 882, 69 P.3d 601 (2003).

306. *Id.*

307. *Union Quarries*, 206 Kan. 268.



governing body's determination, but determines in a *de novo* inquiry whether the use has been voluntarily discontinued.

**§ 1.9.12**

**§ 1.9.12(a)**

**L. Municipal Land Use Controls Over State Property**

**1. Zoning Controls**

In *Brown v. Kansas Forestry, Fish and Game Comm'n*,<sup>308</sup> the Kansas Court of Appeals held that a state agency is not automatically immune from municipal zoning regulations. In holding state agencies to be within local zoning controls, the court adopted a "balancing of interests" test which weighs the benefit to the public interests favoring the use against the adverse consequences to the local interests opposing the use. Legislative intent must be inferred by the court in applying this test.

**§ 1.9.12(b)**

**2. Building Codes**

The result in *State v. City of Kansas City*,<sup>309</sup> differed from that in *Brown v. Forestry, Fish and Game*, in that the Court, after inferring legislative intent and applying the balancing of interests test, held that the Kansas Board of Regents is not subject to the building permit and building code ordinances of Kansas City for construction of facilities at the University of Kansas Medical Center.

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308. 2 Kan. App. 2d 102, 576 P.2d 230 (1978).

309. 228 Kan. 25, 612 P.2d 578 (1980).