Zoning and Subdivision Regulations in Kansas: What They Are, How They Work, and Their Relationship to the Comprehensive Plan

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Introduction

Local governments in North America have felt pressure from urban growth almost from their very beginnings. Early on people learned that individual attempts to solve many problems of urban life were ineffective and began collective efforts to address them, often surrendering some personal freedoms to the government in exchange for protection from those problems. Planning, as we know it, came into being in the late nineteenth century. Herbert H. Smith defines it as ". . . a systematic means of problem prevention and problem solving for people in a democratic society, working together, through their government, for the institution of programmed governmental pre-action to direct and shape a desired, comprehensive, coordinated result in all aspects of the urban form and urban society." Implied in Smith's definition is the idea that the planning process must find ways to reach compromises between the social benefits of development, the use of natural resources, and protection of those resources. Planning decisions in the end consume natural resources, pollute the environment, create health hazards, and increase congestion. How much (or how little) damage results from these decisions is in part a function of the planning process.

Central to any definition of planning is the idea of some pre-determined set of goals and objectives that in theory form a framework for public and private decision-making, and are indispensable to the process. The comprehensive plan is the policy document that defines those goals and objectives. Having a plan is fine, but in order to achieve its goals, build its city of dreams, a community needs a set of tools with which to implement its plan. The two most important of those tools are zoning ordinances and subdivision regulations.

This paper looks briefly at the history and development of comprehensive planning. Next, the practice of zoning is reviewed, as well as how zoning ordinances and procedures are adopted and implemented in Kansas. Both traditional and more innovative methods of zoning are considered. Finally, subdivision regulations are defined, and their relationship to zoning and the comprehensive plan is discussed.

COMPREHENSIVE PLANNING

What Is Comprehensive Planning?

The comprehensive plan is an official policy document adopted by a local government to guide development decisions in the community. It provides a broad general vision of how the community wants to develop for the next twenty to thirty years. A comprehensive plan is the product of a multi-year process that defines the goals, characteristics, and policies of a community, and guides the type, location, and appearance of community growth and development. Once adopted, it becomes the

foundation for later decisions related to development or redevelopment, including rezonings, conditional use permits, changes to zoning and subdivision ordinances, utility extensions, parks, and roads.

Comprehensive planning, as we know it, began with Frederick Law Olmsted and Alfred Bettman. Olmsted described the plan as a piece of ". . . machinery for preparing, and keeping constantly up to date, a unified forecast and definition of all the important changes, additions, and extensions of the physical equipment . . . of the city . . . ." Bettman referred to it as ". . . a master design for the physical development of the territory of the city." Both men were members of the committee that prepared the Standard City Planning Enabling Act (SCPEA), published by the U. S. Department of Commerce in 1928. The Act was very influential in promoting city planning throughout the United States, and eventually was adopted by almost every state.

The SCPEA provided guidance in six areas:

- Organization and powers of planning commissions
- Contents of the master plan for the development of the community
- Provisions for the adoption of a master street plan
- Procedures for the approval of public improvements by the planning commission
- Control over the private subdivision of land
- Establishment of regional planning commissions and regional plans

Although the SCPEA was a major influence on the development of comprehensive plans for more than twenty years, it created confusion about the difference between the comprehensive plan and zoning regulations. This confusion, along with the rapid population growth of the 1950s and a new federal requirement that local governments requesting urban renewal assistance adopt long-range plans, persuaded T.J. Kent to develop a new definition of the comprehensive plan. Writing in *The Urban General Plan*, Kent defined the comprehensive plan as:

> The official statement of a municipal legislative body which sets forth its major policies concerning desirable future physical development; the published general plan document must include a single, unified general physical design for the community, and it must attempt to clarify the relationships between physical-development policies and social and economic goals.

Developing the Comprehensive Plan

Planning was essentially an elitist activity from its beginnings in the City Beautiful movement following the 1893 Columbian Exposition through the 1960s. This practice came under criticism during the 1960s and 1970s as American society changed, resulting in new approaches emphasizing grassroots advocacy, environmental protection, and growth management. This shift toward more citizen participation in the planning process led to new planning models such as policy planning, strategic community planning, and consensus building or vision planning.

The goal of ***Policy planning*** is to reconcile competing goals and values, and strengthen a plan's legitimacy by emphasizing participation by as many residents, activists, politicians, administrators, and others as possible. ***Strategic planning*** considers a variety of policies and strategies to attain the political

and organizational knowledge needed to address threats and take advantage of opportunities. ***Consensus building*** focuses on the ". . . rational integration of diverse goals through shared deliberations." It relies on the tacit norms that people use to communicate sincerely, honestly, and respectfully; requires that all interests be included in the process; and insists that consensus be reached through democratic deliberation. While other trends will no doubt influence planning in the future, several factors have emerged in recent years as key elements of successful planning. They are:

- Values driven: Comprehensive planning today is increasingly driven by issues and values expressed by citizens. It is becoming a process through which the collective values and aspirations of the community are expressed.
- Collaborative: There is a growing realization that meaningful citizen participation must be a part of the comprehensive planning process.
- Thematic: Plans historically were based on elements such as housing, land use, transportation, and community facilities. This often hides the interrelatedness of the plan's elements. Today, plans are more often based on themes, like balanced growth, regionalism, environmental protection, and core area revitalization.
- Linking process and outcomes: In the past, comprehensive plans often ended up on the shelf, having little impact on a community's development. Increasingly, plans are including specific goals and objectives, and action steps. Some plans even identify those responsible for performing certain tasks.
- Regional in focus: Comprehensive plans historically have demonstrated little consideration for surrounding areas. This is changing as communities realize that many issues do not recognize artificial governmental boundaries.
- Beyond paper: Information technology has changed how plans are prepared and presented. Plans are becoming more accessible to the public, and there has been a shift away from relying exclusively on text toward the use of diagrams and illustrations to communicate alternatives and outcomes.

Comprehensive Planning in Kansas

Legal authority for Kansas local governments to develop comprehensive plans, both individually and with other jurisdictions, is found at K.S.A 12-747 and K.S.A. 19-2958. K.S.A. 12-747 authorizes city planning commissions to develop comprehensive plans for their jurisdictions, and for any unincorporated territory outside the city that lies within the same county and forms part of the city's overall community. The statute also authorizes county planning commissions to develop comprehensive plans for unincorporated areas, and for cities, where appropriate, by means of inter-local agreements. K.S.A. 19-2958 promotes efficiency and coordination, and discourages the duplication of planning efforts. It also authorizes local governments to develop and adopt joint comprehensive plans.

ZONING

The terms comprehensive planning and zoning are often used interchangeably, yet they are two separate and distinct concepts. The purpose of a comprehensive plan is to provide a vision of what the community will be like in the future. Zoning is a tool used to realize that vision.

Once the comprehensive plan is adopted, it must be implemented. This requires the imposition of legal controls on the use of private property. Zoning is not the only, but it may be the most important, legal device used by communities to implement their comprehensive plans.

Zoning is a system of controlling land uses to ensure they are appropriately situated in relation to one another. It allows local governments to manage development densities so they can provide adequate and appropriate infrastructure to each property; and it directs new growth into appropriate areas, thereby protecting existing property by assuring adequate light, air, and privacy for everyone living and working in the community.

Zoning divides the territory of a community into classifications or zones, and regulates land use within each of those zones. It defines the land uses envisioned by the comprehensive plan, and protects property from the effects of incompatible uses. Finally, zoning specifies the activities and intensity or density of use for each class, along with building size and setbacks.

Zoning has a number of historical roots, but is generally considered to have originated in 1916 with New York City's adoption of an ordinance regulating the use and location of buildings. The success of New York's ordinance led, in part, to the U.S. Commerce Department's 1924 Standard State Zoning Enabling Act (SZEA), which defined zoning as the division of a local government's territory into districts or "zones," and established regulations within those zones for (1) the height and bulk of structures; (2) the area of each lot that may be occupied by a structure(s); and the amount of open space required; (3) population density; and (4) the use of land and structures for residential, commercial, industrial, or other purposes.

Zoning and the Police Power

Zoning is an exercise of the community's police power to enact laws protecting the public health, safety, and welfare. Regulations contained in zoning ordinances must bear a reasonable relationship toward those ends, or run the risk of being found in violation of the "due process" clauses of the state and federal constitutions. The constitutionality of zoning as an exercise of the police power was established by the U.S. Supreme Court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Consequently, zoning decisions have generally been upheld by the courts as a valid exercise of the police power, even though they limit property owners' use of their land. The constitutionality of zoning in Kansas was established by the Kansas Supreme Court three years earlier, in 1923, in *Ware v. City of Wichita* 113 Kan. 153, 214 P. 99 (1923), which sustained Wichita's zoning regulation on the same grounds.

The standard for determining the reasonableness of zoning in Kansas was established in *Golden v. City of Overland Park* [224 Kan. 591, 584 P.2d 130 (1978)]. In this case, the Kansas Court identified six "Golden" factors the courts should consider when determining the reasonableness of a zoning decision. They are (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; and (6) the gain to

the public health, safety and welfare made possible by the loss in value of the plaintiff's property compared to the hardship imposed on the plaintiff if his request were denied. While these factors have become the standard for determining the reasonableness of zoning decisions in Kansas, they are neither mandatory nor exclusive.

The scope of judicial review of zoning decisions in Kansas was further clarified in *Combined Investment Company v. Board of Butler County Commissioners*, 227 Kan. 17, 605 P.2d 533 (1980), when the Kansas Supreme Court, referring to *Golden v. City of Overland Park,* concluded that:

- The local zoning authority, and not the court, has the right to prescribe, change, or refuse to change, zoning.
- The district court's power is limited to determining (a) the lawfulness of the action taken, and (b) the reasonableness of such action.
- There is a presumption that the zoning authority acted reasonably.
- The landowner has the burden of proving unreasonableness by a preponderance of the evidence.
- A 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.
- 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.
- Whether 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.
- An appellate court must make the same review of the zoning authority's action, as did the district court.

The courts have not only tied the validity of zoning ordinances to the public health, safety and welfare, they have also emphasized the importance of the written record of evidence, and the factors relied upon by the governing body in making a zoning decision. In *Landau v. City Council of Overland Park*, 244 Kan. 257, 767 P.2d 1290 (1989), the Kansas Supreme Court concluded: "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 . . . . 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." However, the Court also ruled that if a local zoning decision lacks sufficient findings of fact vis-à-vis the "Golden" factors, it might return the case to the local governing body for further finding and conclusions.

The *Landau* decision lessened somewhat the standard for determining reasonableness that was established in "Golden." Although the Court affirmed the reasonableness of the "Golden" factors, it allowed the substitution of a written record of the evidence considered by the local governing body for those factors. The Court concluded that the factors considered by the local government no longer had to be specified if they were apparent from a reading of the minutes of the planning commission or governing body.

Limits to the Police Power

Although zoning as an expression of a local government's police power has received constitutional sanction, at some point the reasonable exercise of that power must end, and the obligation to compensate a property owner for a taking must begin. That point is not permanent, nor is it absolute. Rather, it is open to interpretation. However, if a zoning decision fails to promote the public health, safety, and welfare, denies the property owner of virtually all economic benefit, or prohibits an otherwise legal and allowable activity, just compensation will likely be required.

In some instances, a zoning decision imposed by the government will not be considered a taking; in others, it will be. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the U.S. Supreme Court found that an owner of some beachfront property was entitled to compensation following the state's enactment of coastline regulations. The Court identified ". . . at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first occurs when a government regulation compels the property owner to suffer a physical invasion of his or her property. In this instance, the Court stated that "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." The second instance occurs when a regulation denies the owner all economically beneficial or productive use of land.

In *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987), the U.S. Supreme Court declined to rule whether a taking had occurred, but it did establish that the invalidation of a zoning regulation may be insufficient; that an additional remedy for a temporary taking may be compensation for the period the taking was in effect. The Court also ruled that an owner must be deprived of all use of the property if compensation is to be paid, but that compensation did not have to be for the entire value of the property. This standard of total loss was echoed by the Court in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). In *Keystone*, the Supreme Court ruled that the loss of only a portion of the economic use of the property did not constitute a compensable taking. Quoting *Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978),* the Court stated that:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

The relationship, or nexus, between the public need and the property owner's loss, particularly when the owner is asked to donate a portion of his or her property for public use, must be clear and reasonable. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the U.S. Supreme Court ruled against a California Coastal Commission requirement that compelled the owners of some private property to provide public access to beaches in exchange for a building permit. The Court held that the Coastal Commission failed to establish any connection between the public easement and the building permit. Although the decisions in *First English*, *Keystone, and Nollan* upheld the right of local governments to exercise eminent domain, they also helped define the limits to which governments can freely regulate private property.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the U.S. Supreme Court reiterated the *Nollan* rule that there must be a nexus between the granting of a public easement and the issuance of a building permit. However, the Court also ruled that requiring a public easement as a condition to expand or build on an existing property is an unconstitutional taking unless the local government can demonstrate a "rough proportionality" between the taking and the harm or impact of the proposed development.

The Contents of Zoning Regulations

Zoning regulations typically have two parts—a text and a map. While ordinances vary from community to community and state to state, they generally contain the following elements: definitions, general provisions, zoning district regulations, special development standards, and administration and enforcement provisions.

General provisions include procedures for amending the zoning map and the text. In most cases, amending the zoning map begins with a petition by the property owner or some person with an interest in the property; however, occasionally a local government initiates a rezoning. Rezoning may include the entire community, or a specific parcel or parcels. Text amendments are made in the same manner as zoning district amendments; either by specific changes to the language or by complete reorganization of the document. Additional procedures may address conditional uses, site plans, and other elements, such as density bonuses.

The idea of zoning is to protect lower density (i.e., residential) uses from the nuisances related to more intensive higher density uses. Traditional zoning is rooted in the notion of assigning different zones or districts to different types of uses and structures. Zoning districts provide a hierarchy of uses ranging from higher or less intensive uses (i.e., single-family residential) to lower or more intensive uses (i.e., industrial). A typical zoning ordinance contains three basic classifications: residential, commercial, and industrial. Most local zoning ordinances today include several subtypes within these classifications.

Early zoning ordinances were cumulative; uses that were allowed in higher or less intensive classifications (single-family residential) were also allowed in lower or more intensive classifications (commercial). However, the reverse was not true. Higher intensity uses, such as manufacturing, were not allowed in lower density commercial or residential areas. Today, zoning ordinances are rarely cumulative. Modern zoning regulations are usually non-cumulative or exclusive in nature. Lower intensity uses such as single-family residences may be allowed in multi-family residential districts. However, residential uses are rarely allowed in commercial or industrial districts. This reduces the possibility of future conflicts between uses.

Zoning in Kansas

Legal authority for Kansas local governments to adopt and implement zoning regulations is found at K.S.A. 12-741, which provides ". . . for the enactment of planning and zoning laws and regulations by cities and counties for the protection of the public health, safety and welfare, and 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." The components of local zoning ordinances are detailed at K.S.A. 12-753(a). They include, but are not limited to . . .

- Provisions for the adoption or amendment of zoning regulations

- The governing body may divide the territory subject to its jurisdiction into districts of such number, shape, area and of such different classes, according to the use of land and buildings and the intensity of such use, as may be deemed suited to carry out the purposes of this act
- Provisions restricting and regulating the height, number of stories and size of buildings
- The percentage of each lot that may be occupied; the size of yards, courts and other open spaces
- The density of population
- The location, use and appearance of buildings, structures and land for residential, commercial, industrial and other purposes
- The conservation of natural resources, including agricultural land; and the use of land located in areas designated as flood plains and other areas, including the distance of any buildings and structures from a street or highway

The statute also requires that local governments ". . . define the boundaries of zoning districts by description contained therein or by setting out such boundaries upon a map or maps incorporated and published as part of such regulations or by providing for the incorporation by reference . . . of an official map or maps upon which such boundaries shall be fixed."

K.S.A. 12-755 provides authorization for local governments to include additional regulations that may include, but are not limited to provisions that:

- Provide for planned unit developments
- Permit the transfer of development rights
- Preserve structures and districts listed on the local, state or national historic registers
- Control the aesthetics of redevelopment or new development
- Provide for the issuance of special use or conditional use permits
- Establish overlay zones

K.S.A. 12-756 stipulates that no city or county in Kansas may establish any zone or district, or regulate or restrict the use of buildings or land until the planning commission recommends the nature and number of zones or districts to be used, and the boundaries and regulations to be enforced within each zone. Except as provided within the zoning ordinance, all regulations must be uniform within each class or type of building or land use within each district. However, the regulations for one district may differ from those in other districts or classifications; and special uses may be designated for each district, with conditions attached.

Public Hearing Requirements

K.S.A. 12-756(b) requires local planning commissions to conduct a public hearing before establishing any zoning regulation. The hearing requirements for the adoption of zoning regulations are the same as those for comprehensive plans, and include:

- Publication of a notice of hearing 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 of the hearing

- In the case of a joint zoning board, notice of such hearing shall be published in the official city and official county newspapers
- The notice must fix the time and place for the hearing and describe the proposal in general terms
- The hearing may be adjourned from time to time and at its conclusion, the planning commission must prepare its recommendations and by an affirmative vote of a majority of the entire membership of the commission adopt those recommendations in the form of proposed zoning regulations and submit them, together with the written summary of the hearing thereon, to the governing body for consideration

Only a majority of the planning commission present and voting at the public hearing is required to recommend approval or denial of changes or revisions to the zoning regulations; and the failure of the planning commission to make any recommendation regarding a zoning request is deemed a recommendation of denial to the governing body. No plan, amendment, or change can take effect unless the governing body:

- Approves the plan and adopts it by ordinance or resolution
- Overrides the planning commission's recommendation by a 2/3 vote
- Returns the recommendation to the planning commission for additional consideration, together with a statement specifying the reasons for the governing body's failure to approve or disapprove

If a recommendation is returned to the planning commission for reconsideration, the commission may resubmit the original proposal, or submit a new or modified proposal to the governing body for consideration. Failure to submit any recommendation is considered a resubmission of the original proposal. The governing body must then either adopt the recommendation; or by simple majority revise or amend and adopt it by ordinance or resolution, or the governing body may take no further action. The plan and its amendments take effect upon their publication in the official government publication of record.

Regardless of whether the planning commission approves or disapproves a zoning amendment, if a protest petition signed by 20% or more of the owners of any of the real property proposed for rezoning; or 20% of the owners of property that must be notified of the public hearing is filed in the clerk's office within fourteen days after the public hearing, the governing body can adopt an ordinance or resolution amending the zoning by no less than a ¾ vote of all members of the governing body.

The Board of Zoning Appeals (BZA)

There are times when the enforcement of the zoning ordinance may cause unnecessary hardship for a property owner. Most zoning ordinances or enabling acts contain provisions for the establishment of a board of zoning appeals (BZA) to (1) hear appeals of decisions or interpretations made by zoning staff, and (2) grant conditional uses or special exceptions that are listed in the zoning ordinance. In Kansas, any local government that enacts a zoning ordinance or resolution must establish a board of zoning appeals as specified in K.S.A. 12-759.

The BZA is a quasi-judicial body whose functions fall into three basic categories: (1) interpretation of the zoning ordinance; (2) granting of special use permits or special exceptions; and (3) granting of variances. The BZA's role in interpreting the zoning regulations is similar to that of a court. It consists of hearing an appeal of the zoning regulations, determining the facts of the case, and reaching a judgment.

Special use or special exception permits may be granted for uses that are considered necessary in some zoning districts, but are deemed detrimental to neighbors, if safeguards are not imposed. The usual method for granting an exception is to do so provided the owner complies with certain conditions imposed by the board to protect the surrounding neighborhood and the community. Exceptions must be specifically listed in the zoning ordinances, and address such issues as reductions in the width of side yards, and the extension of height limits.

Occasionally, special situations arise that cannot be resolved within the zoning regulations. Variances are authorizations to engage in activities that are prohibited by the zoning regulations. They are of two types. The first, area or bulk variances, allows deviations from yard and height requirements, including sign and parking standards. The second type, use variances, authorizes uses that are not permitted in the zoning regulations either expressly or by implication. Kansas law does not permit the granting of use variances, only bulk variances are permitted. The conditions giving rise to a variance must be the result of the particular characteristic of the property, and have nothing to do with the plight of the property owner.

Land Use

Permitted uses are specific activities that are allowed in a zoning district without review by the planning commission or the governing body. When a particular proposed use is not included in the zoning ordinance, the existing descriptions and kinds of uses permitted within each district must be reviewed to determine where the desired use might best be located.

Conditional uses are exceptions to the zoning regulations that require discretionary review because of their scale, location, or potential safety issues. Like permitted uses, they are specified in the local zoning ordinances; but unlike permitted uses, in Kansas they are subject to a public hearing. Any conditions imposed by the planning commission or board of zoning appeals must be objective, clear, and enforceable, and the decision to approve the use must be supported by the written record.

Local governments are allowed to supplement, change, and revise the boundaries or regulations in their zoning ordinances. Changes may be initiated by the planning commission, governing body, or by the owner of the property affected; and any amendment, if in accord with the community's land use plan or comprehensive plan, will be deemed reasonable by the State.

Proposed changes must first be considered by the planning commission, and are subject to the public hearing requirements of K.S.A. 12-757(b). Property owners who wish to rezone their property from a less restrictive to a more restrictive zoning classification are also subject to the provisions of this statute, with two exceptions: (1) written notification of hearing is not required and (2) the change of zoning is not subject to protest petition as provided in 12-757(f). This is not the case when a local government initiates a rezoning from a less restrictive to a more restrictive classification; cities and counties are subject to all the requirements of K.S.A. 12-757(b) and K.S.A. 12-757(f).

One issue of special importance is how to zone areas subject to flooding. Kansas local

governments are authorized by statute to ". . . establish flood plain zones and districts and restrict the use of land therein . . . to lands . . . subject to floods of a lesser magnitude than that having a chance occurrence in any one year of 1 percent." Local regulations must comply with the National Flood Insurance Act of 1968, as amended (42 U.S.C. §4001 *et seq.*), and any rules and regulations adopted pursuant to K.S.A. 12-766. The local government must also receive approval from the chief engineer of the division of water resources. Designating a flood plain can raise the issue of whether a compensable taking has occurred, or whether the governing body has simply exercised its police power. Therefore, it is important that cities and counties coordinate floodplain zoning with the requirements of the National Flood Insurance Act of 1968, and state rules and regulations.

Historic preservation is another important issue. Historic preservation is a declared policy of the State of Kansas; and K.S.A. 12-755(a)(3) provides local governments the authority they need to adopt zoning regulations to preserve structures listed on local, state, or national historic registers. However, local governments cannot ". . . 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."

There has existed for many years a bias against mobile homes in many communities. Many, if not most local governments in Kansas have adopted some form of regulation for the location of mobile homes that restricts them to specific zoning classifications. Although restrictions on the location of mobile homes have been challenged, the Kansas Supreme Court in *City of Colby v. Hurtt*, [212 Kan. 113, 509 P.2d 1142 (1973)] upheld them on the ground that they are a reasonable exercise of the city's police power. Having said this, the issue is not necessarily settled. Many communities in Kansas allow the placement of mobile homes on permanent foundations, which acknowledges that many of these homes meet all local building code requirements. Requiring mobile homes that have been placed on permanent foundations and lost all of their mobility to be located in a separate mobile home park raises constitutional questions not addressed in *City of Colby*.

Contrary to mobile homes, K.S.A. 12-763(a) prohibits the exclusion of manufactured homes from single-family residential districts solely because they are manufactured homes. However, this prohibition does not prevent the establishment of architectural or aesthetic standards applicable to manufactured housing that make it compatible with site-built housing in the same zoning district; nor does it preclude or supersede restrictive covenants running with the land.

Other zoning issues include the protection of agricultural land and activities from urbanization and residential development, and the control of airport hazards. K.S.A. 12-755(a) (6) authorizes local governments to establish overlay zones, and this is one method regularly used to impose land use controls in and around airports.

Criticisms of Zoning

A number of criticisms have been leveled at zoning over the years. They can be grouped into four broad categories:

- Zoning can be exclusionary, often reflecting narrow interests who wish to exclude certain types of development at the expense of broader concerns. This is usually reflected in policies prohibiting or discouraging construction of affordable housing.

- Zoning decisions are often made at the expense of regional interests. Local governments often fail to consider the impact of their zoning decisions on neighboring jurisdictions, ignoring the adverse impacts of congestion, pollution, and the loss of natural resources.
- Zoning is often done outside the planning framework. That is, the relationship between zoning and the comprehensive plan is often overlooked or ignored.
- Zoning has often been overly bureaucratic, detail-oriented, and resistant to change.

Exclusionary zoning refers to zoning that excludes certain types of development that is usually associated with racial, economic, or social minorities. Although it can be discriminatory, exclusionary zoning has received court sanction. The U.S. Supreme Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), upheld a local zoning ordinance restricting land use to single-family dwellings. The Court noted, "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a [permissible] state objective.'"

The criticism that zoning is often overly bureaucratic, detail-oriented, and resistant to change has convinced many to conclude that traditional zoning, with its emphasis on lots and blocks, and minimum setbacks and lot sizes, is ineffective in dealing with contemporary land use issues. This conclusion has in turn led to a number of more flexible zoning and land use practices.

Innovative or Specialized Zoning Practices

The need for more flexibility in planning and zoning in Kansas has been recognized, but is addressed only in part by statute. However, K.S.A. 12-741(a) does allow local governments to enact and enforce additional laws and regulations, as long as they are not in conflict with the act. K.S.A. 12-755 authorizes specific zoning regulations, but does not restrict local governments to those regulations alone. Those provisions (1) Provide for planned unit developments; (2) Permit the transfer of development rights; (3) Preserve structures and districts listed on the local, state or national historic register; (4) Control the aesthetics of redevelopment or new development; (5) Provide for the issuance of special use or conditional use permits; and (6) Establish overlay zones.

Planned unit development (PUD) zoning is more flexible than conventional zoning. PUDs allow mixed uses, and flexibility in the application of development regulations. They also can improve site design, preserve open space, and lower the costs of public improvements. Two of the most important characteristics of PUDs are their shift in emphasis from minimum lot sizes to the control of development density, and the preservation of green space. In Kansas, PUDs are authorized in K.S.A. 12-755, and like other zoning regulations, must comply with the conditions of K.S.A. 12-753.

The PUD process generally is a consolidation of the zoning, platting, special use permitting, and site development processes. The final PUD plan will contain information found on a conventional plat, along with the uses permitted, and a site plan. The application, enforcement, and amendment requirements for a PUD classification are the same as those for any other zoning classification.

K.S.A. 75-755(a) (5) authorizes local governments to ". . . provide for the issuance of ***special use or conditional use permits***." These permits allow certain uses and activities that may be necessary or desirable, but do not fit well or are not allowed by right within a zoning district because they are incompatible with other uses in the district. Special uses include halfway houses, public facilities, cemeteries, bed and breakfast facilities, and animal hospitals. A special use permit is granted only for a

use specifically defined as an allowed special use in a zoning district. Governing bodies may attach conditions to the issuance of a special use permit, as long as those conditions promote the general welfare of the community. Special use permits should not be confused with variances, which allow a property owner to engage in an activity that is prohibited by the zoning regulations; nor are they the same as exceptions, which allow a property owner to deviate from the zoning regulations only when the deviation is specifically permitted by the regulation.

Other types of flexible zoning practices include floating zones; clustering; overlay zones; inclusionary zoning; mixed-use zoning; density zoning; contract and conditional zoning; and transferable development rights.

Unlike other zoning classifications, ***floating zones*** have no defined boundaries. Floating zones allow uses that would not otherwise be permitted on a given piece of property; but they also impose specific conditions to make the development more compatible with surrounding developments. Kansas statute requires that the boundaries of zoning districts be defined, thus making it difficult for local governments in Kansas to defend the use of floating zones.

Clustering is a form of PUD that entails the grouping together of buildings on part of the site in a manner that preserves open space or environmentally sensitive areas. Clustering is permissible under K.S.A. 12-741(a) because, unlike floating zones, it does not appear to conflict with any other state statutes.

An ***Overlay zone*** is an additional layer of development regulations or restrictions placed over an existing zoning classification to address special circumstances. Historic preservation regulations are often imposed using overlay zones; other overlays may protect natural resources such as flood plains.

The purpose of ***inclusionary zoning*** is to encourage the construction of affordable housing. This often takes the form of requirements to set aside a certain percentage of a residential development for affordable housing. However, it can also include incentives such as density bonuses, which allow a developer to increase the number of dwelling units in a development if he or she agrees to build low- and moderate-income housing. Other incentives may include reductions in development standards such as street widths, the number, and placement of sidewalks, and development fees.

Mixed-use zoning is a direct response to the segregation of land uses found in zoning ordinances. This approach creates higher-density developments that include a variety of residential and light commercial activities such as banks, groceries, laundries, and drug stores. Mixed-use zoning may be accomplished in a variety of ways, including overlay districts and special districts.

Density zoning focuses on the population density per acre, instead of the type of residential use permitted in a zoning district. It is especially useful when a developer wants to integrate residential uses instead of segregating them into single-family, two-family or multi-family neighborhoods. Kansas law does allow local governments to consider population density when making zoning decisions.

Contract zoning and conditional zoning place limits on the use of property in exchange for the governing body's authorization of a particular use. ***Contract zoning*** involves a negotiated agreement between the government and a landowner that allows the landowner to use a property for a purpose that is either not permitted in the zoning ordinances or that is incompatible with surrounding uses. In exchange, the landowner agrees to specific restrictions on the use of that property.

There are at least three problems with contract zoning in Kansas. First, it amounts to spot zoning, thus making it susceptible to legal challenge. Second, local governments should not enter into contracts relating to the exercise of the police power. Finally, some have expressed concern that once a municipality enters into a contract zoning agreement, it will be unable to rezone the property in the future.

Conditional zoning is similar to contract zoning. It provides some flexibility in the overall zoning scheme by allowing uses in a zoning district that are not normally allowed; but in contrast to contract zoning, it does so only after the property owner has complied with certain conditions imposed by the planning commission or governing body. In contrast to contract zoning, conditional zoning places no contractual obligations on the local government; and although it appears less susceptible to legal challenge than contract zoning, it still may be challenged on several grounds if it is not clearly used to benefit the community.

The ***transfer of development rights*** is usually a result of a local government's need to reduce the density of development on a property due to concerns with public health, safety, and welfare. Kansas law specifically allows local governments to transfer development rights to compensate property owners for restrictions placed on a particular parcel by allowing increased density on another parcel.

SUBDIVISION REGULATIONS

Subdivision regulations, together with the zoning ordinances, are the two most important tools communities have at their disposal to implement their comprehensive plans. Subdivision regulations control the design, layout, division, and improvement of land as it is developed. They provide for schools, parks, water and sewer lines, and rights-of-way; and are most effective when they are closely coordinated with other local government laws, policies, and activities. The most important of these are the comprehensive plan, and the zoning ordinances. Like zoning regulations, subdivision regulations are an exercise of the local government's police power, and are governed by the authority granted them by state statutes. Unlike zoning regulations, they do not regulate land use or the bulk of structures.

Subdivision regulations provide the procedures a subdivider must follow to obtain approval from the local government; the criteria for the internal design of a subdivision; and the construction standards for public improvements within the development.

The subdivision of land in the United States has occurred since colonial times. However, subdivision regulations as we know them evolved out of two needs that arose in the 19th century. The first was the need for communities to be accurately surveyed and platted in order to provide free and clear title to individual properties to facilitate the sale of land. The second reflected the need to determine accurately public rights-of-way to assist in the design of street, sewers, and drainage systems.

Contents of Subdivision Regulations

The 20th century saw subdivision regulations become a part of the comprehensive planning and zoning process. In the 1920s, a new model of subdivision regulations emerged based primarily on a 1928 U.S. Commerce Department pamphlet entitled *A Standard City Planning Enabling Act* (SCPEA). The act addressed six issues:

- The organization and powers of planning commissions
- Contents of the master plan for the development of the municipality's territory
- Provisions for the adoption of a master street plan
- Provision for approval of all public improvements by the planning commission
- Control of the private subdivision of land
- Provisions for the establishment of a regional planning commission

The SCPEA helped establish the process of land subdivision as a system whereby local governments could control development, particularly through requirements for on-site improvements. Since that time, communities have enlarged the scope of subdivision regulations to help manage the timing of development and ensure the provision of adequate public facilities. Fees and exactions are the methods most often used to achieve this. The earliest and most common form of exaction was the mandatory dedication of land to the government for roads, utility easements, and parkland. More recently, impact fees have come to be imposed when building permits are issued, or when utility connections are made.

Many subdivision regulations suggest, and some require, a developer to submit a "sketch plat" of the proposed subdivision to staff, along with an area map showing the location and principal features of the area. This allows staff to provide guidance concerning what will be required of the developer before he or she incurs any great expense in making detailed plans.

The first formal action that is usually required of a development is the submission of a "preliminary plat" that is reviewed and approved by the local planning commission. This is perhaps the most important step in the process; for it is here that the details and requirements of the project are determined and agreed on. The subdivision regulations provide substantial detail about the information that must be included on a preliminary plat. A short list of the information required on preliminary plats includes a legal description; lots and blocks; date of survey; vicinity map; total acreage; rights-of-way and easements; building setbacks; and topographic contours and other site features.

Following review and approval of a preliminary plat by the planning commission, a developer may submit a final plat. This plat is often accompanied by engineering studies or drawings that address issues such as stormwater. A partial list of the contents of final plats includes a legal description; lots and blocks; instrument of survey; total acreage; rights-of-way and easements; building setbacks; special notations required as a condition of platting by the planning commission; and the required certificates. The final plat is the final stage at which the planning commission can influence the development of the subdivision. In some jurisdictions, the planning commission makes the final decision to approve a plat; in others, the local governing body makes that decision.

The final step in the platting process is the recording of the approved plat. The filing of the plat does two things. First, it is the legal dedication to the public of the streets, utility easements, and parks and other lands. Second it serves as an easy and convenient way of describing a particular piece of property that the developer wishes to deed to a purchaser.

Subdivision Regulations in Kansas

State enabling legislation varies widely. As with zoning ordinances, subdivision regulations are an expression of the local government's police power to enact laws protecting the public health, safety, and welfare. Therefore, they must bear a reasonable relationship toward those ends, or run the risk of being found in violation of the "due process" clauses of the state and federal constitutions. However, the scope of judicial review of subdivision regulations is more restrictive in platting matters than it is in zoning issues. This is because platting is a legislative function, which limits a court's scope of inquiry to questions of whether a local government had statutory authority to act, and if so, whether it acted within its authority. Such a challenge did occur in *Sabatini v. Jayhawk Construction Co.*, 214 Kan. 408, 520 P.2d 1230 (1974). The decision of the Kansas Supreme Court in this case was that (1) the City of Topeka did have the authority to act (annex the subdivision), and (2) as with zoning regulations, it is not a proper judicial function for a court to inquire into the reasonableness, wisdom, necessity, or advisability of platting and annexing land.

K.S.A. 12-749 authorizes Kansas local governments who adopt comprehensive plans also to adopt subdivision regulations. These regulations must be applied to all land located within the city; but they may also be applied to land outside the city, if it is located within the same county, and does not extend more than one-half the distance between that city and another city also having subdivision regulations. County planning commissions may establish subdivision regulations for all or parts of the unincorporated areas within the county. These regulations may include, but are not limited to provisions for:

- Efficient and orderly location of streets
- Reduction of vehicular congestion
- Reservation or dedication of land for open spaces
- Off-site and on-site public improvements
- Recreational facilities
- Flood protection
- Building lines
- Compatibility of design
- Stormwater runoff, including consideration of historic and anticipated 100-year rain and snowfall precipitation records and patterns
- Any other services, facilities and improvements deemed appropriate

The subdivision regulations may also provide for administrative changes to land elevations on the plat such as:

- Conditioning plat approval upon conformance with the comprehensive plan
- Requiring the payment of a fee in lieu of dedication of land
- That in lieu of the completion of any work or improvements prior to approval of the final plat, the governing body may accept a corporate surety bond, cashier's check, escrow

account, letter of credit or other like security . . . conditioned upon the actual completion of such work or improvements within a specified period

Before it can adopt or amend any subdivision regulations, the planning commission must hold a public hearing, not unlike that required for zoning regulations. Notice of the hearing must be published at least once in the local jurisdiction's newspaper of record, and must:

- Be published at least 20 days prior to the hearing
- Fix the time and place for the hearing, and describe the proposal in general terms
- In the case of a joint committee on subdivision regulations, be published in the official city and official county newspapers
- The hearing may be adjourned from time to time and at its conclusion, the planning commission must prepare its recommendations and by an affirmative vote of a majority of the entire membership of the commission adopt those recommendations in the form of proposed subdivision regulations and submit them, together with the written summary of the hearing thereon, to the governing body for consideration

Following the public hearing, the planning commission forwards its recommendation to the governing body, which may:

- Approve the recommendations by ordinance in a city or resolution in a county
- Override the planning commission's recommendations by a 2/3 majority vote
- Return the recommendations to the planning commission for further consideration, together with a statement specifying the basis for the governing body's failure to approve or disapprove

If a recommendation is returned to the planning commission for reconsideration, the commission may resubmit the original proposal, or submit a new or modified proposal to the governing body for consideration. Failure to submit any recommendation is considered a resubmission of the original proposal. The governing body must then either adopt the recommendation; or by simple majority revise or amend and adopt it by ordinance or resolution, or the governing body may take no further action. The plan and its amendments become law upon their publication in the official government publication of record.

K.S.A. 12-750 requires cities that propose to adopt subdivision regulations affecting property outside their boundaries to provide a certified copy of the regulations designating the area to the county commission for consideration and approval. If approved, the county commission must adopt a resolution designating the area as subject to the city's subdivision regulations. Within 60 days, then, a joint committee for subdivision must be established to administer the regulations within the area of joint regulation.

Any owner of land located within an area governed by subdivision regulations who wishes to develop a subdivision must have a plat prepared per those regulations. The plat must be submitted to the planning commission and must ". . . accurately describe the subdivision, lots, tracts or parcels of land giving the location and dimensions thereof and the location and dimensions of all streets, alleys, parks

or other properties intended to be dedicated to public use or for the use of purchasers or owners of lots, tracts or parcels of land fronting thereon or adjacent thereto."

Kansas communities typically follow the platting process outlined earlier. First, a preliminary plat is submitted, which includes a legal description; lots and blocks; date of survey; vicinity map; total acreage; rights-of-way and easements; building setbacks; topographic contours and other site features; and any other requirements of the local regulations. Following review and approval of the preliminary plat by the planning commission, the developer submits a final plat. This plat is often accompanied by engineering studies or drawings addressing issues such as and stormwater. The final plat includes a legal description; lots and blocks; instrument of survey; total acreage; rights-of-way and easements; building setbacks; dedications of land for public purposes; special notations required as a condition of platting by the planning commission; required certificates; and any other items required by the subdivision regulations or the planning commission. Once the planning commission has approved the final plat, it is forwarded to the governing body for consideration. The governing body must accept or refuse the dedication of land for public purposes within 30 days of first considering the final plat, although this decision may be deferred another 30 days to allow modifications.

Some communities have adopted regulations to control both the timing and the density of development in their communities. Although they are not prevalent in Kansas, local governments may adopt growth management tools using their home rule powers. Growth management allows local governments to pursue outcomes the private sector would not likely pursue on their own. Growth management generally considers six broad goals:

- Protection of lands that provide public and quasi-public goods
- Accommodation of development needs
- Provision of adequate public facilities and services at minimum cost and with equitable distribution
- Fair distribution of costs and benefits
- Prevention or mitigation of negative externalities, and fostering of positive externalities
- Administrative efficiency

Conclusion

Benjamin Franklin said, "By failing to prepare, you are preparing to fail." This is true in a great many instances, but never more so than when planning the urban form and urban society. The three primary building blocks of community planning are the comprehensive plan, zoning regulations, and subdivision regulations. The comprehensive plan is the foundation upon which a community's future is built. Zoning ordinances are the skeleton or framework. They determine the size and location of various land uses. Subdivision regulations flesh out the framework, providing for the subdivision of land, public facilities, good design, and managing the growth of communities.

The comprehensive plan is the foundation of planning in the United States. It provides a broad general vision of how the community wants to develop for the next twenty to thirty years. A comprehensive plan is the product of a multi-year process that defines the goals, characteristics, and policies of a community, and guides the type, location, and appearance of community growth and development. Once adopted, it becomes the foundation for later decisions related to development or

redevelopment, including rezonings, conditional use permits, changes to zoning and subdivision ordinances, utility extensions, parks, and roads.

Zoning is a system of controlling land uses to ensure they are appropriately situated in relation to one another. It allows local governments to manage development densities so they can provide adequate and appropriate infrastructure to each property; and it directs new growth into appropriate areas thereby protecting existing property by assuring adequate light, air, and privacy for everyone living and working in the community.

Zoning divides the territory of a community into classifications or zones, and regulates land use within each of those zones. It specifies the activities and intensity or density of use for each class, along with building size and setbacks; and it defines the land uses envisioned by the comprehensive plan and protects property from the effects of incompatible uses.

Subdivision regulations control the design, layout, division, and improvement of land as it is developed. They provide for schools, parks, water and sewer lines, and rights-of-way. Subdivision regulations are most effective when they are closely coordinated with other local government laws, policies, and activities.

“The direction planning is headed is being questioned by more and more people, planners and others involved in community development.” However, one thing seems certain. Comprehensive planning, zoning, and subdivision regulations are here to stay. The forms they take, and how they are implemented may fluctuate, but there seems to be little prospect for their abandonment.