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THE CONSISTENCY DOCTRINE AS APPLIED TO COMPREHEMSIVE PLANS AND ZONING IN NEBRASKA COUNTIES: AN ARGUMENT FOR PERIODIC PLAN UPDATES

By

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CONSISTENCY DOCTRINE

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A citizen's participation in the process of formulating goals for a particular locality is essential to the idealistic development of a comprehensive plan. Adopting a comprehensive plan is a manifestation of goals and ideals expressed by those participating in formulating the comprehensive plan. Consistency doctrine requires zoning regulations have a certain level of conformance to an adopted comprehensive plan. An adopted comprehensive plan should be reviewed at a certain level of regularity to ensure that citizens have a voice in the constantly shifting developmental alterations. Nebraska county zoning enabling statutes require zoning regulations be consistent with an adopted comprehensive plan but do not specify the regularity, if any, the comprehensive plan must be reviewed. Nebraska counties should review their comprehensive plans at least every 10 years to allow citizens a consistent avenue to participate in the formation of the future development in the County. Zoning regulations cannot effectively express citizen's participation if they are based on an outdated comprehensive plan.

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Chapter 1

Introduction

Not all comprehensive plans are created equal. Infinite variability exists in the material a comprehensive plan contains. Moreover, the statutory requirements of the comprehensive plans' contents also varies across jurisdictions. But the degree of regularity at which a comprehensive plan must be updated and/or reviewed is specified far less often. Some Nebraska counties have had little incentive or reason to maintain an up-to-date comprehensive plan. This paper's purpose is to uncover whether legal requirements exist for maintaining an up-to-date comprehensive plan. Uncovering whether legal requirements exist requires review of the Nebraska statutory and common law framework regarding consistency between a comprehensive plan and zoning ordinances/regulations. Additionally, the roots of the consistency requirement itself will be explored to determine whether the standard enabling acts contemplated consistency doctrine. Research on the history of consistency doctrine will be done by reviewing the content of the standard enabling acts themselves and also by reviewing who was actually part of the committee that put the standard acts together. This review will lead the author to conclude there is no direct legal authority requiring regulatory in the updating of a comprehensive plan.

But this paper will show this lack of a legal requirement for Nebraska counties to maintain a up-to-date comprehensive plan *should not* encourage counties to ignore regular maintenance of the county's comprehensive plan. Rather, there are three general reasons that counties should still maintain an up-to-date

comprehensive plan, regardless of the lack of specific legal requirements for doing so. First, maintaining an up-to-date comprehensive plan allows citizen engagement in the planning process. Second, maintaining a up-to-date comprehensive plan reduces the chances a county may face potential litigation regarding the lack of consistency between a zoning regulation and a out-of-date comprehensive plan. Finally, zoning regulations may not be as effective if they fail to match up with a comprehensive plan.

The statutory relationship between the comprehensive plan and zoning regulations differs among the states. Some states place a strict requirement that zoning regulations are to be in direct conformance with a comprehensive plan. But others view the comprehensive plan as statutorily insignificant and simply a single tool to guide zoning decisions. A legal requirement that zoning regulations should be rooted in the comprehensive plan is referred to as "consistency doctrine." This consistency doctrine requirement is not a new trend in zoning regulation. "The desirability of a requirement that zoning and land use controls, like subdivision regulations, must be consistent with an independently adopted local comprehensive plan is a question that has occupied state legislators, judges, professional planners, and attorneys since the 1920s."[1]

Zoning serves a vital role in the orderly formation of a locality. "Of all the implementary tools available to city planners, zoning is by far the most frequently utilized, and the most likely to have an immediately discernible impact upon the

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[1] Stuart Meck, "The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute," *Washington University Journal of Law & Policy* 3:295 (2000).

lives of the citizens in the community. Yet the relationship between the zoning ordinance and its parent, the overall city plan, has been explored surprisingly seldom by courts and legislatures; and there is an apparent tendency to lose sight of the very fact the fundamental and necessary interrelation exists."[2] No doubt exists that these principles have been further explored by courts since the mid-1950s when Charles Haar's observation was made, but it still illustrates the slow manner in which courts have examined the relationship between the comprehensive plan and zoning after standard enabling acts were released.

Courts were slow to determine the relationship between the comprehensive plan and zoning. Even when they did review consistency issues they did so with differing opinions on what exactly it meant. For that reason there are a variety of different definitions of consistency, which complicates the connection between the comprehensive plan and zoning. Joseph DiMento discusses the difficulty in defining consistency doctrine, "[p]erhaps most fundamental is the ambiguity and variability in the definition of "consistency."[3] The existing ambiguity in the term leads different state's courts to view it differently and this can result in significant variation when it comes to defining the connection between planning and zoning. Illustration of the differences in the definitions of consistency can be found in *A Planners Dictionary*[4], which provides three different definitions of consistency:

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[2] Charles M. Haar, "In Accordance with A Comprehensive Plan," 68 *Harvard Law Review 1154* (1955).
[3] Joseph F. Dimento, *The Consistency Doctrine and the Limits of Planning.* Cambridge, Mass.: Oelgeschlager, Gunn and Hain (1980); 18.
[4] PAS Report Number 521/522, April 2004

- All regulations that are used to implement the local comprehensive plans must be consistent with the recommendations and policies of the plan, and state and local funding decisions must be consistent with the local plan. [Rhode Island Statutes].
- Free from variation or contradiction. Programs and the general plan are to be consistent, not contradictory or preferential. State law requires consistency between a general plan and implementation measures such as the zoning ordinance [California Planning Roundtable].
- Compatibility and agreement with the general plan of the [municipality]. Consistency exists when the standards and criteria of the city General plan are met or exceeded [Moorpark, California].

Clearly, consistency in the context of the relationship of zoning to the comprehensive plan has a variety of definitions. Determining whether consistency exists between a proposed zoning regulation and the enacted comprehensive plan is an act each jurisdiction with consistency doctrine statutes in place must undertake. Determining if a zoning action follows the framework of a comprehensive plan relies on a variety of factors. For example, the overall comprehensive plan's completeness, or the entirety of its contents, must be sufficient to guide a zoning decision. Because of the completeness required of the comprehensive plan to guide a zoning decision, it seems necessary for the comprehensive plan to not only be comprehensive, but also up-to-date. It is that issue this paper explores, whether the regularity at which a

comprehensive plan is reviewed and updated is significant in its application to zoning decisions.

This paper explores the origin of consistency doctrine through its unveiling, of sorts, during the creation and release of the standard enabling acts by the U.S. Department of Commerce in the 1920s. The standard enabling acts are necessary to review because many of the states' statutory framework regarding planning and zoning rely on the language promulgated by those enabling acts. Moreover, Nebraska's consistency doctrine statutes, which enable various jurisdictions to enact zoning regulations based on their respective comprehensive plans, share similar language to the standard enabling acts. Review of the standard enabling acts will allow for the determination of whether a degree of the relevancy of a comprehensive plan is based on when it was enacted and/or reviewed.

Most statutes provide for a process by which the comprehensive plan can be modified to meet the needs a zoning regulation in order for the zoning regulation to be legally enacted. But this appears to run counterintuitive to the purpose of a comprehensive plan. The comprehensive plan can be generally summed up as

> … the physical development of the community, embodies information, judgments, and objectives collected and formulated by experts to serve as both a guiding and predictive force. Based on comprehensive surveys and analysis of existing social, economic, and physical conditions in the community and of the factors which generate them, the plan directs attention to the goals selected by the community from the various alternatives propounded and clarified by planning

> experts, and delimits the means (within available resources) for arriving at these objectives.[5]

This definition of a comprehensive plan does not contemplate the issue of whether or not a comprehensive plan is up to date. Conversely, it seems to assume that a comprehensive plan is a sort of living and breathing document which is more of a real-time perspective on the path toward which a community wishes to progress.

But it is not practical for a comprehensive plan to be constantly updated for a variety of reasons. When looking specifically at the Nebraska counties, there are a variety reasons for not maintaining a continually updated comprehensive plan. At the top of the list of reasons would have to be the expense of doing so. No doubt the expense of keeping a comprehensive plan up-to-date relies directly upon the regularity at which the periodic review is to take place. With increasing pressure on budgetary constraints that counties face, there simply isn't the money to invest in reevaluating the comprehensive plan at the same regularity as a large municipality, where the comprehensive plan is analyzed and updated often.

But, as will be discussed at greater length further in the paper, because a statutory requirement exists for Nebraska counties zoning decisions to be based upon a comprehensive plan, there is a necessity that a comprehensive plan exists. If a comprehensive plan exists, and zoning

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[5] Haar, "In Accordance," 1155.

decisions are to be based upon it, then the comprehensive plan for counties must be updated at some regularity to ensure their relevance. Without a predictable regularity in updating the comprehensive plans, citizens are neglected the ability to participate in the developmental formation of their locality.

Chapter 2

Standard Enabling Acts

Section 2:1 – History of the Standard Enabling Acts

Because there is a vast array of differences among state statutes in the United States regarding consistency doctrine, one must look at the original enabling acts to determine what those who designed the model statutes hoped to accomplish. The forewords in both the State Zoning Enabling Act (SZEA) and the Standard City Planning Enabling Act (SCPEA) provide useful information to perceived problems that the advisory committee, the group that designed the standard enabling acts, hoped to address.

The forewords to both the SZEA and SCPEA were written by Herbert Hoover, the secretary of commerce at the time, and contain some interesting observations and ideas. The foreword of the SZEA states that the importance of the standard state zoning enabling act cannot well be over emphasized.[6] The writers of the SZEA took time to analyze state statutes existing at the time and attempted to design an enabling act that took into account a wide range of those intricacies.

> The standard act endeavors to provide, so far as it is practicable to foresee, that proper zoning can be undertaken under it without injustice and without violating property rights. The committee did not make it public until it had given it the most exacting and painstaking study in relation to existing state acts and court decisions and with

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[6] Advisory Committee on Zoning, U.S. Department of Commerce, State Zoning Enabling Act (SZEA) revised. (Washington, D.C.: U.S. GPO, 1928) [Hereinafter SZEA]

> reference to zoning as it has been practiced and found successful in cities and towns throughout the country.[7]

The foreword to the SZEA describes the act as being generally functional in nature. But conversely, the foreword to the SCPEA, also written by Herbert Hoover is more idealistic in nature. The SCPEA foreword seems to cast the act as a means of addressing problems in city development that existed at the time.

> In several hundred American cities and regions planning commissioners are working with public officials and private groups in order to obtain more orderly and efficient physical development of their land area. They're concerned partly with rectifying past mistakes, but more with securing such location and development of streets, parks, public utilities, and public and private buildings as will best serve the needs of the people for their homes, their industry and trade, their travel about the city, and their recreation. The extent to which they succeed effects in no small degree the return, in terms of practical usefulness now and for years to come, of several hundred million dollars of taxpayers' money spent each year for public improvements, as well as the value and serviceability of new private construction costing several billion dollars each year.[8]

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[7] SZEA.

[8] Hebert Hoover, Foreword, Advisory Committee on Planning and Zoning, U.S. Department of Commerce, *A Standard City Planning Enabling Act* (SCPEA)(Washington, D.C.: U.S. GPO, 1929)[Hereinafter SCPEA]

This paper analyzes both the SZEA and the SCPEA individually in order to determine what the writers of both acts hoped to accomplish. Following individual assessment of the enabling acts, the paper will present commentators' views on the acts and, specifically, an assessment in consideration of the timing of the acts. It is in the timing of the acts that a great deal of controversy, or least confusion, comes from the relationship of the standard enabling acts to consistency doctrine. One commentator points out this issue:

> . . . despite the words of caution from the drafters of the standard state zoning enabling act (SZEA) and the standard city planning enabling act that zoning ordinances should be prepared "in accordance with the comprehensive plan," a number of preeminent land-use law commentators have pointed out that the connection between the two was calling the question from the beginning. This zoning-planning enigma might have resulted from the unfortunate fact that the authority to zone contained in the SZEA (1926) preceded the authority to plan in the SCPEA (1928). Many communities enacted zoning ordinances before they ever prepared and adopted a comprehensive plan, creating the analytical disconnection that has spawned a large body of litigation and corresponding commentary and analysis on the question of regulatory consistency.

But some communities had already enacted comprehensive plans.

"Comprehensive planning for the development of American communities has a long and respectable history."[9] Comprehensive planning prior to the enabling legislation was basically designed for communities to enhance livability through controlling the development of public facilities and land use.[10] But there was no legal requirement to do so. "Conservative judicial opinions neither required municipalities to adopt comprehensive plans as the basis for exercising land-use control powers nor immediately recognized that the policies underlying local comprehensive plans should play a significant role in land-use control administration."[11]

In reviewing the history of the enabling acts, one must look at who was instrumental in the process, and the reasons why. Herbert Hoover was the secretary of commerce under Presidents Warren G. Harding and Calvin Coolidge in the 1920s and was instrumental in the formation of the enabling legislation. Three commentators describe Secretary Hoover as "a progressive who hoped to reform society by reforming the operations of government."[12] These authors also state that "[t]o some extent, in fact, the Commerce Department under Hoover could be said to be the first activist federal agency—presaging the New Deal vigor of the

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[9] Daniel R. Mandelker, "The Role of the Local Comprehensive Plan in Land Use Regulation," 74 Michigan Law Review 899 (1976) 899.
[10] Ibid, 899.
[11] Ibid, 899.
[12] Ruth Knack, Stuart Meck, & Isreael Stollman, "The Real Story Behind the Standard Planning and Zoning Acts of the 1920s," *Land Use Law* (February 1996) 3

administration of Pres. Franklin D. Roosevelt."[13] Hoover was interested in planning and wrote about it early in Roosevelt's administration,

> [t]he enormous losses in human happiness and money, which have resulted from lack of city plans which take into account the conditions of modern life, need little proof. The lack of adequate open spaces, of playgrounds and parks, the congestion of streets, the misery of tenement life and its repercussions upon each new generation, are an untold charge against our American life. Our cities do not produce their full contribution to sinews of American life and national character. The moral and social issues can only be solved by a new conception of city building.[14]

A growing awareness by the public of the various issues that could be dealt with through comprehensive planning instigated the desire for requiring planning and zoning. Concern over issues such as growth management, the environment, low income housing by the general public added additional pressures to reform and require comprehensive planning at a local level.[15]

Hoover appointed John Gries to head up the newly created Division of Building and Housing within the National Bureau of Standards. Because of this appointment, Hoover later asked Gries to head up a group formally known as the

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[13] Ibid, 3.
[14] Ibid, 3, citing – Robert K. Murray, Herbert Hoover and the Harding Cabinet, in Herbert Hoover As secretary of Commerce: Studies in New Era Thought and Practice, 21 (E. Hawley ed. 1974)
[15] Mandelker, "The Role," 900.

Advisory Committee on City Planning and Zoning.[16] Hoover put Gries in charge of making appointments to the committee. Gries was under a lot of pressure to make sure that the committee had all the various relevant interests represented. The various interests included the United States Chamber of Commerce, the National Association of Real Estate Boards, the American Civic Association, the National Municipal League, the National Housing Association, and the National Conference on City Planning.[17]

But the letters that were sent from Gries seeking prospective members went out under Hoover's name.[18] The letter's contents are of particular interest. On July 28, 1921, Hoover wrote to Joseph H. Defrees, who was the president of the U.S. Chamber of Commerce, and asked him to appoint a representative to the committee that would be able to work on the project as directed. Hoover wrote that the representative would need "to consider the question of zones. I believe that such committees could have considerable influence by outlining some definite ideas as to principles upon which municipalities should take action on this important point."[19]

The individuals making up the committee would have considerable influence on the areas of zoning and planning for decades to come. Because of this influence the makeup of the group is of particular interest. The group does seem to take into account the various interests at stake. It does so by the diversity in the people that makeup the group, at least in terms of professions.

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[16] Knack, Meck & Stollman, "The Real Story," 3.
[17] Ibid, 3.
[18] Ibid, 3.
[19] Ibid, 3.

According to Knack, Meck, and Stollman one of the big names on the committee was a landscape architect named Frederick Law Olmsted who had just stepped down as chair of the National Conference on City Planning.[20] Gries wrote to Hoover about Olmsted and described him as "probably the most eminent city planner in the country."[21] Consequently, one can surmise that the planning profession was well represented on the board. This would, in theory, allow the planning profession and its ideals to have a great deal of influence on the formation of the SCPEA and SZEA.

Other committee members included a sanitary engineer, a real estate expert, a housing consultant, two engineers, a conservationist, and a housing expert. Additionally, two lawyers were also on the committee, one of which was Edward M. Bassett. Gries touted Bassett in a memo to Hoover, which stated "he is thoroughly familiar with the legal and political aspects of zoning." Mr. Bassett's background would also be instrumental in how the acts were designed. Because he was one of only two lawyers on the committee, he no doubt had a great deal of influence on the writing of the legal documents. His contributions to the writing of the SCPEA and SZEA likely reflected his background.

According to Bassett's autobiography, he became heavily interested in planning on a trip to Germany in 1908.[22] While in Germany he visited a town-planning exhibition and some models and illustrations of improved streets and

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[20] Ibid, 3.
[21] Ibid, 3.
[22] Ibid. at 4, citing Autobiography of Edward M. Basssett 116 (1939).

buildings, which were the products of city planners.[23] When he returned to New York, he joined the national conference on city planning because he had realized the kind of work that interested him and "first saw that the whole subject was almost unexplored in this country and that it offered a vast field of progressive legislation."[24] Bassett went on to form the first planning commission in Brooklyn, where he lived.

Bassett's biggest concerns seem largely centered around the big city problems. He wrote of his concern regarding the congestion caused by the new subways and the new skyscrapers being built with no regulations in place to control them. [25] He also noted "for 30 years my work outside of my regular law practice has been the prevention of congestion. My aim has been the distribution of light and air—openness—whether in residences, stores, offices or industries."[26]

The planning profession and the ideals associated with the profession seem to have been clearly represented in the designing of the SCPEA and SZEA, at least according to the makeup of the individual committee members and their respective interests and professional positions.

Section 2.2: The Standard Zoning Enabling Act (SZEA)

Hoover's interest in land-use control and planning played a large role in the development of the standard enabling acts. He wanted to further this interest by

[23] Ibid, 4.
[24] Ibid, 4.
[25] Ibid, 4.
[26] Ibid, 4.

creating a statutory authority to enable localities to engage in land-use control and planning. Hoover wanted "to devise a uniform national framework that could survive a challenge on state and federal constitutional grounds."[27]

The explanatory notes in the SZEA include a number of interesting comments. The first note starts with the following subtitle, "[a]n enabling act is advisable in all cases,"[28] and this is the opening line to the explanatory notes in the SZEA. The same note goes on to say that "a general state enabling act is always advisable, and while the power to zone may, in some states, be derived from constitutional as distinguished from statutory home rule, still it is seldom that the home rule powers will cover all the necessary provisions for successful zoning."[29] This note basically tells those considering adopting the SZEA that regardless of their current constitutional and statutory situation, this enabling act is necessary.

The second explanatory note addresses whether a constitutional amendment is necessary to enact this enabling legislation. It says "[n]o amendment to the state constitution, as a rule, is necessary."[30] The same note goes on to explain that "[z]oning is undertaken under the police power and is well within the powers granted to the legislature by the constitutions of the various States."[31]

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[27] Stuart Meck, "Model Planning and Zoning Enabling Legislation: A Short History" *The Growing Smart Working Papers; American Planning Association,* Volume 1 *(March 1996)* 1.
[28] Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act (SZEA)*
[29] SZEA.
[30] SZEA.
[31] SZEA.

The third note directly addresses the issue of modifying the act to address local court decisions. It states the act "was prepared with the full knowledge of the decisions of the courts in every case in which zoning acts have been under review, and has been carefully checked with reference to subsequent decisions."[32] But the note does not ignore the reality that the different states' statutory frameworks are linguistically different, even if incrementally different in nature, and may require some slight alterations. The third note goes on to say "[a] safe course to follow is to make only those changes necessary to have the act conform to local legislative customs and modes of expression."[33] Similarly, the fourth cautions states against adding words and phrases that may restrict the meaning of the acts, from a legal point of view.

The notes seem to indicate a desire that the SZEA be enacted in the states in nearly the exact same way that they were presented. These notes indicate that, at least according to those in the committee, that very little negotiation or alteration of the act is necessary, and that if alteration did occur, it could significantly negate the purpose of the acts. But, when work on the standard acts was undertaken, there had not been a challenge to the constitutional validity of zoning in the United States Supreme Court. However, zoning's validity had been upheld in several state courts.[34] Edward Bassett recognized an apparent need for standard acts when he told the National Conference on City Planning in New York City in 1928:

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[32] SZEA
[33] SZEA
[34] Meck, "A Short History," 2.

> [r]eserve powers of legislatures which would lie dormant and useless unless brought to life by enabling acts initiated by our conference are now invoked throughout the United States. We have helped the courts prove that these slumbering powers of legislatures can be used for the benefit of growing cities. The courts fell into line because they saw that the new powers were needed on account of new conditions that exist in great modern cities.[35]

The SZEA was designed to fulfill needs that Edward Bassett discussed. "The SZEA was intended to delegate the state's police power to municipalities in order to remove any question over their authority to enact zoning ordinances."[36] The SZEA had nine sections, the first of which was a grant of power. It stated "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residents, or other purposes."[37] This portion of the act fairly clearly defines the physical limitations of urban development that would be controlled by local governments through the powers granted in the SZEA. But the limitations are fairly broad when

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[35] Meck at 2, citing E.M. Bassett, President's Address, in Natinoal Converence on City Planning, *Planning Problems of Town, City and Region: Papers and Discussions* (Philadelphia, Pa.: William F. Fell, 1928),2.
[36] Meck, "The Legislative Requirement," 298.
[37] SZEA.

looking strictly at the purpose of zoning. The purpose of promoting health is incredibly broad. Additionally, safety and the general welfare of the community are also very broad ideals that do little, actually, to define the purpose of the granting of power. Moreover, the inclusion of the purpose of promoting morals is also unnecessarily broad, and simply hard to define. While the term health is further defined within the SZEA to not be limited to public health, because it would narrow the application of the Standard Acts, the term morals goes undefined.

The SZEA contains procedures for creating zoning ordinances by forming temporary zoning commissions within cities. The zoning commission would recommend proposed zoning district boundaries and the proposed written text of the ordinance.[38] The construction of the SZEA's model zoning regulations was

> . . . built carefully on the nuisance concept as applied in land-use conflict cases. They noted that the courts draw lines to determine the established residential districts, which are protected from invading offensive uses. The zoning act adopted this concept as the basis for the zoning ordinance. The act authorized municipalities to designate zoning districts in which only compatible uses are allowed and incompatible uses are excluded. As implemented at the local level, the zoning ordinance establishes a land-use hierarchy with residential districts at the top of the land-use pyramid. [39]

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[38] Meck, "The Legislative Requirement," 297.
[39] D.R. Madelker, *Land Use Law,* 3d ed (Charlottesville, Va: Michie, 1993), Sec. 4.15, 113-114.

After the initial ordinances were enacted, the zoning commission was to dissolve. Next, a board of adjustment was to be created to listen to and grant or deny appeals relating to the enforcement of the new zoning ordinances. "The board was an independent body given the authority to grant variances—minor departures from the terms of the zoning ordinance—and to allow special exceptions (also known as conditional uses) in a zone where certain criteria were satisfied.[40] But a note to the SZEA that defines the zoning commission states, in a somewhat parenthetical way, that "it is before a zoning ordinance is established that the necessity exists for that careful study and investigation which a zoning commission can so well perform. Amendments to the original ordinance do not as a rule require such comprehensive study and maybe passed upon by the legislative body, provided that proper notice and opportunity for the public to express its views have been given." [41]

Much of the confusion which comes from the SZEA regarding the relationship of zoning to the comprehensive plan comes from section 3 of the SZEA, which states, "[s]uch regulations shall be made *in accordance with the comprehensive plan*"[42] (emphasis added). The issue of the language of "in accordance with" will be discussed in further depth later in the paper.

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[40] Meck, "The Legislative Requirement," 297.
[41] SZEA, footnote – "zoning commission."
[42] SZEA, Section 3.

Section 2.3: The Standard City Planning Enabling Act (SCPEA)

After completing the SZEA, the advisory committee on city planning and zoning moved on to working on a city planning enabling act. It was at that time that a Cincinnati attorney Alfred Bettman joined the committee.[43] This attorney is now widely known for the brief that he wrote defending zoning in the U.S. Supreme Court case of *Village of Euclid v. Amber Reality Co.,* 272 U.S. 365(1926).[44] Bettman helped draft a 1915 Ohio law that authorized the creation of municipal planning commissions and later became Cincinnati's planning commission chairman.[45] He likely had significant influence on the development of the SPCEA, evidenced by the similarities between it and the 1915 Ohio law.

The SPCEA was designed to complement the SPZA, and, unlike the SPZA, it could be adopted in whole or individually selected titles that cover various subjects.[46] The SPCEA was designed to cover six subjects, which include "the organization and power of the planning commission, which was directed to prepare and adopt a 'master plan'; the content of a master plan for the physical development of the territory; provision for adoption of a master street plan by the governing body; provision for approval of all public events by the planning commission; control of private subdivision of land; and a provision for the establishment of a regional planning commission and a regional plan."[47]

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[43] Knack, Meck and Stollman, "The Real Story," 6.
[44] Ibid, 6.
[45] Ibid, 6.
[46] Meck, "A Short History," 2.
[47] Ibid, 2.

Much like the SPZA, the SPCEA describes its purpose within itself. The SPCEA's purpose is very similar to the SPZA. It describes the purpose of the preparation of a comprehensive plan put together by the commission. It states the plan:

> shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with the present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development; including among other things, adequate provisions for traffic, the promotion of safety from fire and other damages, adequate provisions for light and air, the full and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements.[48]

The SPCEA and some of the state acts that were based upon it came with their fair share of criticism, some of which contained the familiar charges of communism.[49] Indeed, the drafters were nervous about some of the constitutionality issues of the mapped street provision, which gave the city the right to keep a particular location from being developed with buildings for a specified

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[48] SCPEA, 17.
[49] Knack, Meck & Stollman, "The Real Story," 6.

period so that in the future roads could be built there.[50] Consequently, the SPCEA included language that allowed the local government to compensate the landowner for lands that were reserved for a period of time for the purposes of the potential building of roads on them in the future.

But communism was not the only criticism the SPCEA faced. Whether the consistency doctrine was actually intended as a consequence of the SPCEA has been a question, too. Going back to an earlier point, the language of the SPZA that stated zoning "shall be in accordance with the comprehensive plan"[51] was referred to by one commentator as "enigmatic,"[52] which can be defined as "perplexing or mysterious."[53] Daniel Mandelker points to some of the confusion caused by this particular language—the question of whether it is required that zoning must be in accordance with the comprehensive plan.

> It can be argued that these words impose such requirements and the literal application of this language might have been zoning in the absence of a comprehensive plan. But this interpretation presents two difficulties. First, since the Zoning Enabling Act was drafted before the planning act, there was at the time of its issuance no statutory planning process to which zoning could be related. Second, when the

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[50] Meck, "A Short History," 2.
[51] SPZEA, section 3.
[52] Mandelker, "The Role," 902.
[53] Dictionary.com, "Enigmatic," http://dictionary.reference.com/browse/enigmatic, (accessed March 12, 2012).

> planning enabling act was finally proposed, it made local planning optional.[54]

To further clarify the issue, the SZEA could hardly require a comprehensive plan be in place for zoning when there was no statutory process in place for the preparation of a comprehensive plan. Mandelker goes on to further explain some of the consistency doctrine issues that arise when looking at and interpreting the draftsmen's intent through their footnotes.

> Notes appended to the standard zoning act also indicate, but the draftsmen did not contemplate, an independently adopted comprehensive plan. The footnotes state that the "in accordance" requirement "to prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study."[55] This comment suggests that zoning was to be undertaken on the basis of the comprehensive review of local conditions, *not that the preparation of an independent comprehensive plan was intended as a condition to the exercise of zoning power* (emphasis added).[56]

While Mandelker forms a convincing argument, based on the language of the footnote, that perhaps the consistency doctrine was not contemplated or required by the SPZA and SPCEA, one could also make an equal argument on the opposite side. Mandelker relies on the assertion that there is a difference between a comprehensive review of local conditions which the footnote contemplates and a

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[54] Mandelker, "The Role," 902.
[55] Mandelker, citing SSZEA Section 3, n.22.
[56] Mandelker, "The Role," 902.

comprehensive plan. There seems to be an equal argument that there are vast similarities between the two and perhaps a comprehensive plan is exactly what the draftsmen meant when they wrote "comprehensive study."

But Mandelker points out that the provisions of the Standard City Planning Enabling Act that define the content and role of the comprehensive plan tend to reinforce his interpretation of the language. "These notes do not clarify the exact relationship between the zoning and comprehensive plans, but leave the distinct impression that the zoning plan is a separate document from that part of the comprehensive plan covering public facilities."[57] This leads Mandelker to believe that if the zoning enabling act's "in accordance with a comprehensive plan" language did require an independently prepared plan, it would be fulfilled by the zoning plan contemplated by the SCPEA and not by a zoning-related component of a comprehensive plan that also covers public facilities.[58] But Mandelker goes on to point out an exception to the "advisory status" that he perceives the comprehensive plan should be given under the enabling acts when he discusses the subdivision control provisions found in the SPCEA. [59] He points out that planning commission approval of subdivision plats is apparently contingent on the adoption of a major street plan.[60] He states, "[t]he street plan that is contemplated is clearly an element of a comprehensive plan covering public facilities, and is not part of the zoning plan

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[57] Ibid, 903.
[58] Ibid, 903.
[59] Ibid, 903.
[60] Ibid, citing SCPEA Section 13, 903.

that was also contemplated by the planning act." [61] This leads Mandelker to conclude, "the planning and zoning acts fail to define the zoning plan and leave its relationship to the zoning process unclear."[62]

Thus, it can be established that there is unarguable confusion regarding the status of the consistency doctrine when looking at the SZEA and SPCEA on their own. To briefly summarize, arguments can be made in both directions. Arguments can be made that the "in accordance with" language implies a required legal connection between zoning and the comprehensive plan. But one can also argue the footnotes included in the acts indicate otherwise, that the comprehensive plan is a mere tool to aid in zoning decisions and not to be a strict legal constraint placed upon zoning. This apparent confusion can be resolved if the statute is both enacted and judicially challenged. Without the acts being enacted, consistency doctrine questions are moot, and unnecessary to answer. Furthermore, if the acts were adopted, and never challenged judicially, it would be likely that the plain meaning of the language would likely be the manner in which the acts would be interpreted.

Interestingly enough, Edward M. Bassett, the New York as City attorney and General Counsel to the committee, seemed to foresee that these standard acts would require judicial review in order to determine their meaning. "Bassett was dogmatic in his belief that enabling legislation should simply enable and not be terribly directive. Consequently, the SZEA lacks definitions and is devoid of substantive

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[61] Ibid, 903-904.
[62] Ibid, 904.

direction in the preparation of the zoning plan."[63] Stuart Meck believes that Bassett thought the judiciary would provide that guidance on a case by case basis.[64]

Relying on a judiciary to provide guidance on a case-by-case basis introduces uncertainty into the standard enabling acts. While uncertainty in statutory language can be beneficial for those who make a living off of contesting these issues, it can be a confusing and cumbersome hurdle for local governments. This confusion can sometimes result in local governments guessing at the intent of the statutory language, or ignoring it altogether. Consequently, the next logical step is to analyze how the courts have dealt with local government actions coming from the confusing language built into the standard enabling acts.

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[63] Meck, "The Legislative Requirement, 301.
[64] Ibid, 301.

Chapter 3

Consistency Doctrine Applied

Section 3:1 – Treatment of Consistency Doctrine Principles

The Standard Zoning Enabling Act contains within its language a phrase of particular consequence for consistency doctrine analysis. The phrase refers to zoning regulations and states that they must be "in accordance with the comprehensive plan." The necessary question is, "What exactly does that phrase mean, or does it mean anything at all?" The American Land Planning Law treatise attempts to put the meaning of the "in accordance with" language into five different categories.[65] The treatise suggests the judiciary may use one or more of the following tests to determine what was intended by the statutes with the "in accordance with" language utilized.[66]

> There has been a long controversy as to exactly what was intended by these words in various legislatures, and the courts have come up with essentially 5 tests to interpret that meaning:
>
> > (1) this is merely a restatement of the general principles of the police power—that is, that regulation must be based on public health, safety, morals, and welfare;
> >
> > (2) all this refers to is a complete geographic coverage of the enacting municipality;

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[65] Norman Williams Jr., *American Planning Law: Land Use and The Police Power* (1988 Revision) § 23, 521-522.
[66] Ibid, 522.

> (3) we don't quite know what this means, but it does not refer to the master plan authorized under the planning act;
>
> (4) what is required is consistency to a particular policy throughout a municipality—either the theory underlying the text, or the practice in mapping; and
>
> (5) what is required is a complete plan, including designations of future land use.[67]

But these five tests are in no way exclusive of each other in their use by a particular judiciary. The same treatise goes on to say, "[i]t should be emphasized that these tests have not been regarded as mutually exclusive. In fact, it is not unusual to find 2, 3, or even 4 of these adopted in the same opinion—which does not always serve to clarify matters."[68]

Early interpretations of the enabling statutes largely followed a narrow reading that the comprehensive plan with which zoning was to be in accordance could be actually found in the zoning ordinance.[69] In a court case similar to a Nebraska consistency doctrine case, *Enterprise Partners v. County of Perkins*, which will be discussed later in the paper, the New Jersey Supreme Court, in *Kozesnik v. Montgomery Township,* [70] addressed a situation where no independent comprehensive plan had been prepared or adopted by a township. This 1957 case dealt with New Jersey zoning enabling legislation that had incorporated the "in

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[67] Ibid, 522.
[68] Ibid, 522.
[69] Mandelker, "The Role," 904.
[70] Kozesnik v. Montgomery Township, 24 N.J. 154 (1957).

accordance with" language. The plaintiff argued the zoning amendment was ultra vires because the statutory requirements of having zoning in accordance with comprehensive plan had not been met; in fact, no comprehensive plan had been enacted or adopted.[71] But the New Jersey court upheld the amendment "reasoning that the history of planning and zoning legislation in the state indicated that no comprehensive plan external to the zoning ordinance was required."[72]

The reasoning for the New Jersey decision was based on the timing of the enabling acts, as previously discussed. New Jersey followed the same idea as the enabling acts and had adopted enabling acts for zoning prior to adopting enabling acts for planning. The court uses the timing issue and states "[i]t is thus clear that the 'comprehensive plan' of the zoning statute is not identical with the 'master plan' of the Planning Act and need not meet the formal requirements of a master plan."[73] The court reasons that "[t]he Zoning Act nowhere provides that the comprehensive plan shall exist in some physical form outside the ordinance itself."[74] Consequently, the New Jersey Supreme Court rejected the idea that the "in accordance with" language of the standard enabling acts requires any sort of comprehensive plan.

But the New Jersey court's assertion that a comprehensive plan was not required by the enabling acts was not the only way judiciaries were reading the "in accordance" language. In 1960, the Pennsylvania Supreme Court, in *Eves v. Zoning*

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[71] Mandelker, "The Role," 904.
[72] Mandelker, "The Role," citing 24 N.J. at 164-166, 131 A.2d at 6-8, 905.
[73] Kozesnik v. Montgomery Township, 166.
[74] Kozesnik v. Montgomery Township, 166.

Board of Adjustment refused to uphold a type of zoning technique when there wasn't an independently adopted comprehensive plan already in place.[75]

The Oregon Supreme Court discussed the connection between planning and zoning in *Fasanos v. Board of County Commissioners of Washington County.*

> Although we are aware of the analytical distinction between zoning and planning, it is clear that under our statutes the plan adopted by the planning commission in the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land-use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles.[76]

Fasanos further illustrates the presumption of an existing correlation between comprehensive planning and zoning. Moreover, *Fasanos* magnifies that level of correlation by explaining that comprehensive planning and zoning ordinances must team up, or work together, for effective land use control.

Section 3:2 Periodic Review of the Comprehensive Plan

Whether a comprehensive plan is required to be in place for zoning to be valid is a perplexing question that has been dealt with in different ways by different

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[75] Mandelker, "The Role," 908.
[76] Fasanos v. Board of County Commissioners of Washington County, 265 Ore. 574, 582 (1973).

jurisdictions. But another intriguing question arises; If a jurisdiction does indeed have a comprehensive plan in place, and a zoning alteration is to be made, does the age of the comprehensive plan adopted by the local jurisdiction factor into whether or not a zoning regulation must be consistent with it. Said otherwise, does a jurisdiction have an interest in keeping its comprehensive plan up-to-date? Moreover, how up-to-date?

"Most states with comprehensive plan statutes require that the plans be reevaluated every few years in the light of changing conditions."[77] States can handle the consequences of not keeping a comprehensive plan updated in a variety of ways. For example, if a re-examination of a municipality's comprehensive plan is not carried out in the state of Vermont, the municipality would lose the power to make amendments to the zoning law until the periodic re-examination is complete.[78]

In *Fritz v. Lexington-Fayette Urban County Government,* the Kentucky judiciary addressed the failure to keep a comprehensive plan up-to-date. A Kentucky state statute requires that zoning decisions based upon zoning regulations that are formulated on the basis of an out-of-date comprehensive plan, would be rendered void.[79] *Fritz* dealt with a request by some property owners and developer's request for rezoning of land from a single-family residential classification to a shopping center use. The plaintiff property owners filed suit against the local government after the local government denied the plaintiff's request for rezoning. The local

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[77] Williams, Am Land Plan § 23.16, 540.
[78] Ibid, 540.
[79] Ibid, 540.

government bases their decision on the comprehensive plan, determining that the requested rezoning was not in compliance with the comprehensive plan. The plaintiffs claimed the decision was based on an outdated comprehensive plan, which had not been updated or periodically reviewed as required by Kentucky statutes. But the judiciary relied on a statue that gives the opportunity for the local government to review and update its comprehensive plan. The holding recognized that the adoption of the periodic review statute was due to the fact that "our society is constantly changing."[80] The Kentucky statute "requires review and updates or amendments at least every 5 years for "social, economic, technical, and physical advancements or changes."[81] However, in the event the planning commission and/or legislative body do not kindly review the plan, it does not become inapplicable or arbitrary as matter of law."[82] The holding includes the portion of the Kentucky statute that provides the consequences for the failure of a jurisdiction to timely update the comprehensive plan:

> . . . If the review is not performed, any property owner in the planning unit may file suit in the Circuit Court. If the Circuit Court finds that the review has not been performed, it shall order the planning commission, or the legislative body in the cases of the statement of goals and objectives element, to perform the review, and it may set a schedule or deadline of not less than nine (9) months for the

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[80] Fritz v. Lexington-Fayette Urban County Government, 986 S.W.2d 456, 460 (Ky. Ct. App. 1998)
[81] Ibid, 460.
[82] Ibid, 460.

> completion of the review. No comprehensive plan shall be declared invalid by the Circuit Court unless the planning commission fails to perform the review according to the court's schedule or deadline. The procedure set forth in this section shall be the exclusive remedy for failure to perform review.[83]

The Kentucky statute provides a good example of a statute that requires a locality to keep its comprehensive plan up-to-date. But perhaps more importantly, the requirement to keep the comprehensive plan up-to-date includes consequences for the failure to do so. Is important to note that the consequences prescribed in the Kentucky statute are not necessarily overly burdensome, or punitive. The statute allows for flexibility and for a locality to deal with an inconsistency between zoning in the comprehensive plan. This sort of flexibility seems to be ideal, especially when it applies to certain levels of local government that do not require through their own policies and procedures that the comprehensive plan be reviewed and changed at specified regularity. Whereas it is no doubt important for a comprehensive plan to remain as up-to-date as possible, the Kentucky statute provides an excellent framework for dealing with the occasional lapse in comprehensive plan review regularity that could otherwise be required by statute.

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[83] Ibid, 459 – 460.

Chapter 4

Nebraska's Consistency Doctrine for Counties

Section 4:1 Statutory and Common Law Analysis

Consistency doctrine for Nebraska counties emerged in 1967 with the passing of LB 463.[84] Like previous statutes enacted before it that required some degree of connection between zoning and a comprehensive plan, this new statute operated in much the same way. But the new statute utilized slightly different language than the previous consistency doctrine statutes, which applied only to cities and villages.

The statutes that apply to cities of the first or second class and villages state that "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative bodies in the cities of the first and second-class and villages may adopt zoning regulations. . ."[85] The same section goes on to define when those particular cities may adopt zoning regulations. "Such powers shall be exercised only after the municipal legislative body has established a planning commission, received from its planning commission a recommended comprehensive development plan . . . , *adopted such comprehensive development plan*, and received the specific recommendations of the planning commission on the adoption or amendment of zoning regulations"[86] (emphasis added).

The enabling statute relating to zoning regulations in counties have some linguistic similarities to the statute pertaining to zoning in cities and villages.

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[84] Neb. Rev. Stat. Ann. § 23-114 to 114.05.
[85] Neb. Rev. Stat. Ann. § 19-901(1).
[86] Neb. Rev. Stat. Ann. § 19-901(2).

Section 23-114.03 states "[z]oning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan. . ."[87] This clearly requires a comprehensive plan be in place prior to enacting zoning regulations. *Deans v. West,* 189 Neb. 518 (1973) cleared this issue at least to a certain degree. This case was shortly after the enactment of the county zoning enabling legislation, which became effective in 1967. The case held that a county, which adopted zoning and subdivision regulations three and a half years prior to the adoption of a comprehensive development plan, was unreasonable, and the court deemed the zoning and subdivision regulations invalid.[88] "Three and a half years without adopting a comprehensive development plan was clearly unreasonable, and zoning and subdivision regulations purportedly adopted in October of 1970, before a comprehensive development plan was adopted, were therefore invalid."[89]

A Nebraska case decided in 2000 rendered a couple of zoning regulations invalid when a comprehensive plan had not been adopted.[90] *Enterprise Partners v. County of Perkins,* dealt with the Perkins County Board of Commissioners discovering proposals to build hog confinement facilities within the county. At first, the board attempted to address the issue by writing a letter to the Nebraska Department of Environmental Quality (DEQ) and "voicing its concerns and going on

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[87] Neb. Rev. Stat. Ann. § 23-114.03.
[88] Deans v. West, 189 Neb. 519 (1973).
[89] Ibid, 522.
[90] Enterprise Partners v. County of Perkins, 260 Neb. 650, (2000).

the record as opposing the approval of a permit to allow Enterprise to construct a hog confinement facility in Perkins County."[91]

The DEQ responded by stating that they did not have authority to regulate the issues the board raised, which were the odor and insects and the impact on county roads that the livestock facility would cause.[92] The DEQ wrote back that "[t]he Legislature has given counties the authority to implement land-use planning and adopt zoning regulations which could govern the location of livestock facilities. Odors, dust and insects are considered to be nuisances and are not regulated by the DEQ."[93]

Perkins County then enacted regulations that attempted to locally regulate livestock confinement facilities locations. Subsequently, Enterprise challenged the new regulations "arguing that the regulations are zoning regulations and were passed in violation of Neb. Rev. Stat. § 23.114.03 (Reissue 1997)(full text in appendix), which requires the board to have a county comprehensive development plan before the adoption of the zoning regulations."[94] The Perkins County board had agreed that it had not adopted a comprehensive zoning plan.[95] The court held the regulations were zoning regulations and, as such, were invalid because of the failure of the board to adopt a comprehensive zoning plan as required by § 23-114.03.[96]

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[91] Ibid, 651.
[92] Ibid, 651.
[93] Ibid, 651.
[94] Ibid, 652.
[95] Ibid, 652.
[96] Ibid, 659.

Consequently, *Perkins County* aided in clarifying that, indeed, a comprehensive plan must be in place for a County to enact zoning regulations, but it did not give much more insight to other consistency doctrine issues. Requiring a comprehensive plan be in place does not define the comprehensive plan's relationship to zoning regulations. The relationship between the comprehensive plan and zoning differs slightly, at least linguistically, in the enabling statutes for the various sizes of Nebraska cities, as well as for Nebraska counties. This distinction was discussed in *Holmgren v. City of Lincoln,* 199 Neb. 178 (1977), the Nebraska Supreme Court addresses a consistency issue pertaining to a city of the primary class, Lincoln.

> An examination of § 15 – 1102, R.R.S.1943 (full text in appendix) convinces us that the plan was intended to be a general guide. It refers to "general distribution and general location of business and industry, residential areas, utilities, and recreational, educational, and other categories of public and private land uses," as well as to "the recommended standards of population density based upon population estimates." This language clearly leads us to the conclusion that "the" or "a" comprehensive plan is the guide.[97]

Moreover, the Nebraska Supreme Court seemed to clearly articulate this idea in *Simpson v. City of North Platte,* 206 Neb. 240, 292 N.W.2d 297 (1980) when it held ". . . a comprehensive plan is nothing more than a guideline and is not binding."[98] But

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[97] Holmgren v. City of Lincoln, 199 Neb. 178, (1977).
[98] Simpson v. City of North Platte, 206 Neb. 240, (1980).

the issue does not revolve around whether the comprehensive plan is binding. The issue questions whether the zoning ordinance is required to be consistent with the comprehensive plan. Said otherwise, a comprehensive plan on its own, without a zoning ordinance relying on it, would have no legal significance. The lack of legal significance of a comprehensive plan without a zoning regulation relying on it would render the comprehensive plan little more than an expression of the locality's goals for the future. The amount of expense required to formulate a comprehensive plan negates this reasoning. Consequently, it would be unlikely for a locality to formulate a comprehensive plan, expressing only idealistic goals, if it had no legal significance. Moreover, Nebraska counties with particularly low budgets, small populations, and relatively few land-use regulation issues, would be even less inclined to produce comprehensive plans. But because the Nebraska statutes require some connectivity between zoning regulations and a comprehensive plan, there is reason to have a comprehensive plan in place.

The next question, then, is whether the comprehensive plan as a guide differs from the "in accordance with" language that the original standard enabling acts included. The Nebraska Supreme Court in *Village of McGrew v. Steidley,* 208 Neb. 726 (1981) discussed the alterations in the statues that added the requirement that a comprehensive plan must be adopted in Nebraska Revised Statute § 19-903 (full text in appendix).

> It is clear from the language found in § 19-901 that a comprehensive development plan (as defined in § 19-903) must precede the adoption of any zoning regulations by the village. We note that prior to 1967,

> neither § 19-901 nor § 19-903 contain the requirement that a comprehensive development plan be adopted by a community prior to enacting zoning regulations; rather, the statute only required that zoning regulations be made "in accordance with comprehensive plan." . . . However, s 19-901 was amended in 1967, and now includes the requirement that a comprehensive development plan be adopted before the passage of any zoning regulations. [99]

So, the alteration of the statute in 1967 was to require that not only the zoning ordinance be in accordance with a comprehensive plan, but also that the comprehensive plan must be adopted at the time or prior to the time that zoning regulations are put in place. The court utilized the language "in accord with the comprehensive plan" in defining the validity the spot zoning ordinance for a city of the primary class.

> Generally, the test of validity of a zoning action or zoning ordinance is whether or not such action or ordinance is *in accordance with a comprehensive plan* of zoning as required by enabling statutes, and whether or not it is lawfully designed to promote the general welfare or other objectives specified in the enabling statute, rather than merely to benefit individual property owners or to relieve them from the harshness of the general regulation as applied to their property. (emphasis added)[100]

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[99] Village of McGrew v. Steidley, 208 Neb. 726, (1981).
[100] Weber v. City of Grand Island, 165 Neb. 827, (1958).

The utilization of the phrase "in accord with" is very similar to the language of the original enabling acts. This would imply that Nebraska would require zoning to be in accordance with the comprehensive plan, which is consistent at least with the statute with regard to cities of the primary class. But how does this language relate to the county zoning enabling statutes?

Earlier in this section, the need to have comprehensive plan in place, or adopted, prior to enacting the zoning ordinance was discussed. But there is an additional requirement that the county zoning enabling statute includes in its next sentence. "Such zoning regulations *shall be consistent* with an adopted comprehensive development plan and designed for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of Nebraska…"(emphasis added)[101] The County zoning enabling statute utilizes slightly different language than the original standard enabling acts. Where the standard enabling acts utilized the "in accordance with" language referring to the connection between zoning actions in the comprehensive plan, the Nebraska county zoning enabling act utilizes "consistent with" language instead. But the difference in language is only slight, and perhaps there is no significance to the distinction. Regardless of the slight distinction, neither phrase sheds much light on the question of how up-to-date a comprehensive plan must be in order to be viable.

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[101] Neb. Rev. Stat. § 23-114.03.

Section 4:2 Analysis of the Purpose of the County Zoning Enabling Statute

Perhaps the best way, or only remaining way, to review a county zoning enabling statute's requirement for consistency in terms of the date of the comprehensive plan's enactment or last review, is to review the purpose of the county zoning enabling statute itself. As previously stated, the statue requires zoning regulations to be consistent with an adopted comprehensive plan. But the statute also states that not only must zoning regulations be consistent with the comprehensive plan, they must also meet the purposes the statute sets forth. The statute includes an exhaustive list of specific purposes that a zoning regulation must aim to fulfill. Consequently, requiring a zoning regulation be consistent with an outdated comprehensive plan could hinder the ability of the zoning regulation to further the purposes established within the statute. The statute lists the purposes of county zoning as follows:

> Such zoning regulations shall be consistent with an adopted comprehensive development plan and designed for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of Nebraska, including, among others, such specific purposes as:
>
> (1) Developing both urban and nonurban areas;
>
> (2) Lessening congestion in the streets or roads;
>
> (3) Reducing the waste of excessive amounts of roads;
>
> (4) Securing safety from fire and other dangers;

> (5) Lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters;
>
> (6) Providing adequate light and air;
>
> (7) Preventing excessive concentration of population and excessive and wasteful scattering of population or settlement;
>
> (8) Promoting such distribution of population, such classification of land uses, and such distribution of land development as will assure adequate provisions for transportation, water flowage, water supply, drainage, sanitation, recreation, soil fertility, food supply, and other public requirements;
>
> (9) Protecting the tax base;
>
> (10) Protecting property against blight and depreciation;
>
> (11) Securing economy in governmental expenditures;
>
> (12) Fostering the state's agriculture, recreation, and other industries;
>
> (13) Encouraging the most appropriate use of land in the county; and
>
> (14) Preserving, protecting, and enhancing historic buildings, places, and districts.[102]

The general ideals the statute promulgates for enabling counties zoning are not particularly helpful when analyzing this issue. The purposes of "promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present

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[102] Neb. Rev. Stat. § 23-114.03.

and future inhabitants Nebraska"[103] gives little to aid in the question of why a comprehensive plan should be kept up-to-date. But the list of 14 specific purposes are relevant for determining if there is a relation to keeping zoning regulations consistent with a *current* comprehensive development plan. Additionally, these specific purposes are nearly identical to the purposes listed in the standard enabling acts. Because of this connection we can also assume that the purposes for the standard enabling acts, already discussed, also apply.

Analyzing each individual purpose should give us an idea of whether a zoning regulation that is consistent with an outdated comprehensive plan would allow for these individual purposes being fulfilled. Each individual purpose stated in the statute is examined below to determine whether an outdated comprehensive plan would interfere with the county's ability to fulfill the specific purposes if the county's zoning regulations were based on that outdated comprehensive plan.

A chart summarizing the degree of connection between the purpose for zoning specified in the county zoning enabling statute and an up-to-date comprehensive plan entitled "Connection Between Purpose of Zoning Regulations and an Up-to-date Comprehensive Plan" is included on page 54. The review of each purpose, as shown on the chart, will show that there is an arguable degree of connection in every purpose of county zoning to an up-to-date comprehensive plan.

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[103] Neb. Rev. Stat. § 23-114.03.

(1)Developing both urban and nonurban areas;

An outdated comprehensive plan could hinder development of any given geographic area within the county because of people's limited ability to predict the sort of development that may or should occur in the distant future. The degree to which the comprehensive plan is outdated could have a corresponding affect on the level to which development is hindered. For instance, comprehensive plan adopted 40 years ago unlikely would have foreseen or predicted all of the development present today. An outdated comprehensive plan likely would not have foreseen such things as large future employers coming into an area that would require significant zoning alterations. It is difficult to think of situations where an outdated comprehensive plan would allow for changes in zoning regulations to be made to accommodate significant development while still remaining consistent with the outdated comprehensive plan.

(2) Lessening congestion in the streets or roads;

Zoning regulations with the purpose of lessening congestion on streets would be particularly reliant on a current comprehensive plan for a variety of reasons. One of the reasons would be that, as discussed in the previous purpose, the development of a locality is difficult to predict with precision in the long-term future. An outdated comprehensive plan would be unlikely to predict with any degree of accuracy, in the long term, population of particular area, an even the modes of transportation available to that population. Consequently, if a zoning regulation's purpose was to lesson traffic congestion, and the zoning regulation

must be in conformance with the comprehensive plan, then the comprehensive plan would need to be up-to-date to take into account those sorts of variability.

(3) Reducing the waste of excessive amounts of roads;

A comprehensive plan must be able to foresee the necessary number of roads that a particular area requires to handle it's day-to-day traffic. A comprehensive plan that is up-to-date is necessary to determine where and how many roads are necessary. The variability of the specific location of a localities development in a local jurisdiction plays a large role in this particular zoning regulation purpose. Particularly, the variability of development that may occur over an extended period of time would require an up-to-date comprehensive plan.

(4) Securing safety from fire and other dangers;

Protection from fire and other dangers by way of zoning ordinances would also rely on the comprehensive plan being current. But this particular purpose for requiring consistency between a current comprehensive plan and zoning regulations more difficult to explain, at least in terms of requiring the comprehensive plan to be current. But like the other sections, the degree of development that a locality may or may not anticipate a number of years into the future can greatly vary. The amount to which the development varies, as well as the specific type of development, could influence the necessity of requiring provisions in the zoning regulations to protect against fire and other dangers.

(5) Lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters;

Recorded flooding history only goes back so far in time. Outdated comprehensive plans based on historical flooding data are likely to be insufficient. These outdated comprehensive plans would be unlikely to account for new advances in flood prediction or to adequately define the extent of floodways and flood plains. Moreover, changes in methods for mitigating flooding are also likely to occur with the passage of time and may not be adequately delineated or prescribed in an outdated comprehensive plan. Other factors relating to storm waters and flooding would again relate back to the development which occurs within the locality, as well as development that has occurred or likely will occur in localities upstream. Additionally, alterations to the amount of paved surfaces within an area would have a large effect on the storm water runoff and flooding possibilities that exist within a locality. Consequently, an outdated comprehensive plan would not provide sufficiently accurate guidance for the development of zoning regulations that would help to fulfill the purpose of avoiding or mitigating flood damages.

(6) Providing adequate light and air;

Fulfillment of this particular purpose of zoning regulations, which may be based upon an outdated comprehensive plan, will depend on the level of development that the particular county has dealt with since the adoption of its outdated comprehensive plan. Assuming a reasonable level of development, however, county zoning regulations enacted to fulfill this purpose do not seem to

hinge directly or heavily on whether or not a comprehensive plan is kept up-to-date, since development in the jurisdiction of a county board of commissioners is typically very low density development that does not compromise access to adequate light and air.

(7) Preventing excessive concentration of population and excessive and wasteful scattering of population or settlement;

This purpose is substantially similar to the first purpose, which deals with urban and nonurban development. A county comprehensive plan dealing with urban sprawl must be up-to-date, taking into account the threat level that this issue presents. But, perhaps, more importantly, a comprehensive plan that does not take into account a certain level of growth may force too high of a level population into too small of an area. Additionally, a comprehensive plan is also necessary in order to accurately address the costs associated with sprawl and particularly, the cost of unnecessary infrastructure. An up-to-date comprehensive plan would help county's costs by minimizing wasteful expansion of infrastructure. Regardless of the situation, and up-to-date comprehensive plan is absolutely vital to provide proper guidance for this particular purpose of the zoning regulation. The zoning regulations must related directly to the current and future size of the county's population, as well as the density of development, all of which should be delineated in an up-to-date comprehensive plan.

(8)Promoting such distribution of population, such classification of land uses, and such distribution of land development as will assure adequate provisions for transportation, water flowage, water supply, drainage, sanitation, recreation, soil fertility, food supply, and other public requirements;

Providing for a population's day-to-day necessities, much like the previous purpose, requires an accurate population count in order to enact appropriate and necessary zoning regulations. An outdated comprehensive plan may not adequately provide for these basic needs because of the extent of changes that occur with the passage of time.

(9) Protecting the tax base;

The extent to which zoning can protect the tax base requires knowledge of the current issues a locality faces in terms of threats to the tax base, as well as opportunities for new growth and expansion of particular types of business and industries, as well as residential areas. Adequate land zoned for these uses situated in desirable locations can be addressed by an up-to-date comprehensive plan. A comprehensive plan that is 40 years old would not be able to address this tax issue adequately because of the changes in a variety of areas that would occur, or could occur, as time passes.

(10) Protecting property against blight and depreciation;

Fulfillment of this particular purpose of zoning depends directly on a comprehensive plan that is relatively current because an outdated comprehensive

plan likely would not foresee issues that could arise resulting in property blight and depreciation. For example, large changes are likely to occur if a large employer in an area forces others out out of business, thereby resulting in a high percentage of population moving away from an area and, perhaps, resulting in several business places and houses left unoccupied. An outdated comprehensive plan would not foresee this being an issue, and, consequently, it is unlikely that zoning regulations based on the outdated comprehensive plan would be inadequate to remediate the situation.

(11) Securing economy in governmental expenditures;

Economy in government total expenditures relies on a current knowledge of what sort of activities the government must undertake. Proper distribution of land uses allows for economies in the provision and maintenance of county infrastructure. A comprehensive plan that is out of date will be unlikely to accurately predict what sort of expenditures are necessary. This could result in a discrepancy between a proposed zoning regulation and the comprehensive plan which, like other sections, would result in a problem in enacting the proposed zoning ordinance.

(12) Fostering the state's agriculture, recreation, and other industries;

In order for zoning regulations to conform with the comprehensive plan in regards to agriculture, recreation, and other industries, the comprehensive plan must adequately address the current trends in these particular areas. Trends in

agriculture change drastically with the passage of time, especially with relatively long passages of time. A comprehensive plan based on an outdated agricultural norm may fail to take into account alterations necessary to foster agriculture through zoning regulations. If zoning regulations are not modified to respond to or encourage innovation, then agricultural interests could be harmed. An up-to-date comprehensive plan will more likely accommodate current change in technology, lifestyles, user preferences, etc., as well as anticipate such changes in the future.

(13) Encouraging the most appropriate use of land in the county;

A comprehensive plan that purports to allocate the use of land in the most appropriate manner requires a knowledge of current situation the locality is facing. Similar to the other purposes previously discussed, this purpose of zoning requires the comprehensive plan be up-to-date simply because the constant change a locality deals with requires periodic alterations to the zoning regulations. Because such alterations are desired and needed by residents in the county on an ongoing basis and because the alterations must be "consistent with adopted comprehensive development plan," the comprehensive plan must be reasonably up-to-date.

(14) Preserving, protecting, and enhancing historic buildings, places, and districts.

This last statutory purpose of zoning probably requires, to the least degree, the comprehensive plan being up-to-date, because this purpose is the preservation and protection of historic places. But even the preservation of historical areas would require the comprehensive plan to articulate the specific sites that are

worthy of historic preservation. While a plan update timeframe of a few years in some of the other areas would render a comprehensive plan obsolete for addressing other specific purposes of zoning regulations, this particular purpose would allow more time to pass before a comprehensive plan is updated and/or reviewed. While a longer time frame would be acceptable with this specific purpose, there still must be a reasonable limit as to the length of time between updates of the comprehensive plan. For example, a comprehensive plan that had not been reviewed for 40 years might fail to recognize a historic district for its value, because at the time the comprehensive plan was originally developed, the area was not recognized for its historical value. Consequently, even this purpose requires periodic review of the comprehensive plan with a certain degree of regularity.

The preceding review of each individual statutory purpose of zoning illustrates that there is, at minimum, an argument that each requires an up-to-date comprehensive plan. But there is a varying degree to which the individual statutory purpose for zoning relates to an up-to-date comprehensive plan. This variance can cause difficulty in grasping the entirety of the argument. Consequently, a chart on the next page entitled "Connection Between Purpose of Zoning Regulations and an Up-to-date Comprehensive Plan" attempts to summarize the degree of connectivity required between proposed zoning regulation and an up-to-date comprehensive plan.

There is no doubt the level of connection between the statutory purpose for zoning and up-to-date comprehensive plan can be argued in slightly different

directions and the assignment to the level of connection is a somewhat arbitrary exercise. But the fundamental purpose of the chart is not to draw distinctions between the individual levels of connection; rather, it is to further illustrate that in all statutory purposes of zoning there is some degree of connectivity to an up-to-date comprehensive plan. This conclusion establishes a degree of reason to require Nebraska counties to maintain a reasonably up-to-date comprehensive plan.

Connection Between Purpose of Zoning Regulations and an Up-to-date Comprehensive Plan			
	Degree of importance for counties to have an up-to-date comprehensive plan as a basis for zoning regulations that fulfill the purposes of zoning as specified in Nebraska Revised Statutes § 23 - 114.03		
Purposes of county zoning articulated in Nebraska Revised Statute § 23-114.03	Not Important	Minimally Important	Moderately Important
(1) Developing both urban and nonurban areas;			**X**
(2) Lessening congestion in the streets or roads;		**X**	
(3) Reducing the waste of excessive amounts of roads;			**X**
(4) Securing safety from fire and other dangers;		**X**	
(5) Lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters;			**X**
(6) Providing adequate light and air;		**X**	
(7) Preventing excessive concentration of population and excessive and wasteful scattering of population or settlement;			**X**
(8) Promoting such distribution of population, such classification of land uses, and such distribution of land development as will assure adequate provisions for transportation, water flowage, water supply, drainage, sanitation, recreation, soil fertility, food supply, and other public requirements;			**X**
(9) Protecting the tax base;		**X**	
(10) Protecting property against blight and depreciation;		**X**	
(11) Securing economy in governmental expenditures;			**X**
(12) Fostering the state's agriculture, recreation, and other industries;			**X**
(13) Encouraging the most appropriate use of land in the county; and			**X**
(14) Preserving, protecting, and enhancing historic buildings, places, and districts.		**X**	

Section 4.3: Modifying the Nebraska County Zoning Enabling Statute

The purposes for zoning listed in the Nebraska county zoning enabling act seem to require an up-to-date comprehensive plan. As shown, an argument can be made for each individual purpose of zoning stated in the statute that, in order for a zoning regulation to fulfill the stated purposes, the adopted comprehensive plan must be reasonably up-to-date, since the zoning regulations must be consistent with the comprehensive plan. If a zoning regulation must be consistent with the comprehensive plan, and the goals of the zoning regulation require the comprehensive plan to be current, then one can surmise that in order to conform with § 23-114.03, an up-to-date comprehensive plan must be in place. The requirement that the comprehensive plan be up-to-date requires an assessment of the necessary frequency of updating or reviewing the comprehensive plan. Where the pace and extent of development in a county is low, and envisioned to be low into the future, the review would not need to be as often.

The state of Nebraska should consider an addition to the county zoning enabling act to define the regularity at which a county comprehensive plan must be reviewed. However, the necessity of defining the regularity at which cities of all classes must update their comprehensive plans is of less importance, because of the day-to-day impact that the comprehensive plan has on proposed zoning regulations. In essence, the municipalities have a higher degree of regulation in terms of keeping the comprehensive plan up-to-date, simply because of the necessity to keep it up-to-date. Consistency doctrine requires that regardless of the level of consistency between the comprehensive plan and zoning regulations, there must be at least

some degree of connection. Because of this connection cities have a vested interest in keeping the comprehensive plan reasonably up-to-date.

But at least some of the counties in Nebraska do not have this sort of self-governing regularity for updating their comprehensive plans. Because of this lack of regulation, counties can have comprehensive plans in place that are significantly out-of-date. Small alterations to the comprehensive plan can be made in order to allow a proposed zoning regulation to pass in compliance with the current zoning enabling statutes, but this fails to utilize a comprehensive plan for the reasons a comprehensive plan exists. A comprehensive plan exists to formulate the path for necessary stability or alterations through a future time period. The fact that counties may not have growth does not diminish the necessity of a requirement that the comprehensive plan be regularly updated. This is because regardless of whether growth is to take place, the direction a county proceeds should still take into account citizen's participation. "In a democratic society, the residents of the community express their goals for the future by participating in a public planning process culminating in the adoption of the comprehensive plan."[104] Citizens participate in the direction of locality, or County, through their contributions to the comprehensive planning process. By failing to maintain an up-to-date comprehensive plan, counties fail to take into account their own citizen's desires for how to proceed. The need for citizens to participate in the formulation of their

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[104] Lora A. Lucero, "The Consistency Doctrine: Merging Intentions with Actions," *Zoning Practice; American Planning Association* (August, 2008): 2.

county's future is what seems to encourage an addition to the Nebraska county zoning enabling statutes.

Altering the state statute to require up-to-date county comprehensive plans in Nebraska counties would be ideal in the author's opinion. But statutory changes are time-consuming, expensive, and cumbersome. This proposed change also presents difficulty in that there is not a crystal clear argument for it based on the current statutory framework, common law, or the history of the enabling acts. Additionally, an alteration to the Nebraska statutory framework, unsupported by similar legal requirements in a wide variety of other states, is unlikely to occur. Consequently, modification of the Nebraska statutes to require an up-to-date comprehensive plan in Nebraska counties is also unlikely to occur.

Conclusion

The Standard Enabling Acts of the 1920s considered and required zoning regulations and ordinances be consistent with a comprehensive plan. The degree of consistency was left open for individual judicial interpretation. These interpretations have varied across the jurisdictions and over the years since their creation. Nebraska county zoning statues require a comprehensive plan be in place prior to enacting zoning regulations. But Nebraska statutes and case law do not resolve how often the comprehensive plans should be reviewed and/or updated.

Nebraska counties should regularly update their comprehensive plans, regardless of the lack of a legal requirement to do so. Periodic review would allow for citizen participation in alterations to the comprehensive plan. Allowing citizen participation in formulating a county's comprehensive plan is necessary to provide an avenue for citizens to address concerns in a county's development. A citizen's ability to participate in formulating and maintaining a comprehensive plan is fundamental to the planning process.

The standard enabling acts required connection between the comprehensive plan and zoning. This connection illustrates the important role that citizens have been given in formulating plans for their particular locality's development. Nebraska counties' regularity in going through the planning process cements the ability of a citizen to have an ongoing role in the continuing developmental evolution of their locality. Allowing citizen engagement in the public planning process may reduce the probability that legal challenges could be made in regards to a zoning regulation that related to an out-of-date comprehensive plan.

Additionally, Nebraska counties should review their comprehensive plans regularly to reduce the temptation to continually alter the comprehensive plan as required to conform with proposed zoning regulations. Continual alteration of a comprehensive plan, to conform to a proposed zoning regulation, fundamentally negates the purpose of a public planning process. The public planning process and the comprehensive plan are not intended to be a reactionary process to changes that have already occurred. Consequently, a proposed zoning regulation should not require change to comprehensive plan. Rather, the comprehensive plan should be up-to-date so that zoning regulation decisions can truly be made *in accordance with a comprehensive plan.*

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Appendix

Nebraska Revised Statutes – Selected Sections

§ 15 – 1102 Comprehensive plan; requirements; contents

The general plan for the improvement and development of the city of the primary class shall be known as the comprehensive plan. This plan for governmental policies and action shall include the pattern and intensity of land use, the provision of public facilities including transportation and other governmental services, the effective development and utilization of human and natural resources, the identification and evaluation of area needs including housing, employment, education, and health and the formulation of programs to meet such needs, surveys of structures and sites determined to be of historic, cultural, archaeological, or architectural significance or value, long-range physical and fiscal plans for governmental policies and action, and coordination of all related plans and activities of the state and local governments and agencies concerned. The comprehensive plan, with the accompanying maps, plats, charts and descriptive and explanatory materials, shall show the recommendations concerning the physical development pattern of such city and of any land outside its boundaries related thereto, taking into account the availability of and need for conserving land and other irreplaceable natural resources, the preservation of sites of historic, cultural, archaeological, and architectural significance or value, the projected changes in size, movement, and composition of population, the necessity for expanding housing and employment opportunities, and the need for methods of achieving modernization, simplification,

and improvements in governmental structures, systems, and procedures related to growth objectives. The comprehensive plan shall, among other things, show:

(1) The general location, character, and extent of existing and proposed streets and highways and railroad, air, and other transportation routes and terminals;

(2) Existing and proposed public ways, parks, grounds, and open spaces;

(3) The general location, character, and extent of schools, school grounds, and other educational facilities and properties;

(4) The general location and extent of existing and proposed public utility installations;

(5) The general location and extent of community development and housing activities;

(6) The general location of existing and proposed public buildings, structures, and facilities; and

(7) When a new comprehensive plan or a full update to an existing comprehensive plan is developed on or after July 15, 2010, but not later than January 1, 2015, an energy element which: Assesses energy infrastructure and energy use by sector, including residential, commercial, and industrial sectors; evaluates utilization of renewable energy sources; and promotes energy conservation measures that benefit the community.

The comprehensive plan shall include a land-use plan showing the proposed general distribution and general location of business and industry, residential areas, utilities, and recreational, educational, and other categories of public and private

land uses. The land-use plan shall also show the recommended standards of population density based upon population estimates and providing for activities for which space should be supplied within the area covered by the plan. The comprehensive plan shall include and show proposals for acquisition, extension, widening, narrowing, removal, vacation, abandonment, sale, and other actions affecting public improvements.

§ 19 – 903 Comprehensive development plan; requirements; regulation and restrictions made in accordance with plan; considerations

The regulations and restrictions authorized by sections 19-901 to 19-915 shall be in accordance with a comprehensive development plan which shall consist of both graphic and textual material and shall be designed to accommodate anticipated long-range future growth which shall be based upon documented population and economic projections. The comprehensive development plan shall, among other possible elements, include:

(1) A land-use element which designates the proposed general distributions, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land;

(2) The general location, character, and extent of existing and proposed major roads, streets, and highways, and air and other transportation routes and facilities;

(3) The general location, type, capacity, and area served of present and projected or needed community facilities including recreation facilities, schools, libraries, other public buildings, and public utilities and services;

(4) When a new comprehensive plan or a full update to an existing comprehensive plan is developed on or after July 15, 2010, but not later than January 1, 2015, an energy element which: Assesses energy infrastructure and energy use by sector, including residential, commercial, and industrial sectors; evaluates utilization of renewable energy sources; and promotes energy conservation measures that benefit the community. This subdivision shall not apply to villages; and

(5)(a) When next amended after January 1, 1995, an identification of sanitary and improvement districts, subdivisions, industrial tracts, commercial tracts, and other discrete developed areas which are or in the future may be appropriate subjects for annexation and (b) a general review of the standards and qualifications that should be met to enable the municipality to undertake annexation of such areas. Failure of the plan to identify subjects for annexation or to set out standards or qualifications for annexation shall not serve as the basis for any challenge to the validity of an annexation ordinance.

Regulations shall be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to secure safety from flood; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other

public requirements; to protect property against blight and depreciation; to protect the tax base; to secure economy in governmental expenditures; and to preserve, protect, and enhance historic buildings, places, and districts.

Such regulations shall be made with reasonable consideration, among other things, for the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

§ 23 – 114.03 Zoning regulations; purpose; districts

Zoning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board and the receipt of the planning commission's specific recommendations or by adopting temporary zoning as provided in sections 23-115 to 23-115.02. Such zoning regulations shall be consistent with an adopted comprehensive development plan and designed for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of Nebraska, including, among others, such specific purposes as:

(1) Developing both urban and nonurban areas;

(2) Lessening congestion in the streets or roads;

(3) Reducing the waste of excessive amounts of roads;

(4) Securing safety from fire and other dangers;

(5) Lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters;

(6) Providing adequate light and air;

(7) Preventing excessive concentration of population and excessive and wasteful scattering of population or settlement;

(8) Promoting such distribution of population, such classification of land uses, and such distribution of land development as will assure adequate provisions for transportation, water flowage, water supply, drainage, sanitation, recreation, soil fertility, food supply, and other public requirements;

(9) Protecting the tax base;

(10) Protecting property against blight and depreciation;

(11) Securing economy in governmental expenditures;

(12) Fostering the state's agriculture, recreation, and other industries;

(13) Encouraging the most appropriate use of land in the county; and

(14) Preserving, protecting, and enhancing historic buildings, places, and districts.

Within the area of jurisdiction and powers established by section 23-114, the county board may divide the county into districts of such number, shape, and area as may be best suited to carry out the purposes of this section and regulate, restrict, or prohibit the erection, construction, reconstruction, alteration, or use of nonfarm buildings or structures and the use, conditions of use, or occupancy of land. All such regulations shall be uniform for each class or kind of land or buildings throughout each district, but the regulations in one district may differ from those in other districts. An official map or maps indicating the districts and regulations shall be

adopted, and within fifteen days after adoption of such regulations or maps, they shall be published in book or pamphlet form or once in a legal newspaper published in and of general circulation in the county or, if none is published in the county, in a legal newspaper of general circulation in the county. Such regulations shall also be spread in the minutes of the proceedings of the county board and such map or maps filed with the county clerk. The county board may decide whether buildings located on farmsteads used as residences shall be subject to such county's zoning regulations and permit requirements.

For purposes of this section and section 23-114.04, nonfarm buildings are all buildings except those buildings utilized for agricultural purposes on a farmstead of twenty acres or more which produces one thousand dollars or more of farm products each year.

§ 23-174.10 Public health, safety, and welfare regulations; county board may adopt

In any county which has adopted county zoning regulations, the county board, by resolution, may make regulations as may be necessary or expedient to promote the public health, safety, and welfare, including regulations to prevent the introduction or spread of contagious, infectious, or malignant diseases; to provide rules for the prevention, abatement, and removal of nuisances, including the pollution of air and water; and make and prescribe regulations for the construction, location, and keeping in order of all slaughterhouses, stockyards, warehouses, sheds, stables, barns, commercial feedlots, dairies, junk and salvage yards, or other places where

offensive matter is kept, or is likely to accumulate. Such regulations shall be not inconsistent with the general laws of the state and shall apply to all of the county except within the limits of any incorporated city or village, and except within the unincorporated area where a city or village has been granted zoning jurisdiction and is exercising such jurisdiction.