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By Robert Coupland\*

## Rural Zoning In Nebraska

### I. INTRODUCTION

Land use regulation has become a popular phrase.<sup>1</sup> The concept of land as "belonging, at least partially, to society and not entirely to individuals . . ." <sup>2</sup> has recently surfaced in opposition to the land equals profit attitude. Useful land is becoming scarce. Preservationists are pointing out the need for retaining areas formerly regarded as useless, such as swampland, which are now considered to be essential to perpetuation of our environmental cycle. Along with the advent of industry and modern farming methods has come an increasing need for greater limitations on land use. At one time a pure commodity, to be used until no longer useful, land is becoming a resource for enjoyment, beauty, and preservation of wildlife. Whereas it was once felt that the use of land should be restricted only where it harmed the value of neighboring land, "a realization is growing that important social and environmental goals require more specific controls on the use that may be made of scarce land resources."<sup>3</sup> It was, in part, this realization that gave birth to zoning. Whether zoning has successfully answered land use problems, however, is debatable.<sup>4</sup>

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1. For an historical overview of the concept of property, see G. Sprick, F. Miller & D.R. Levi, *Rural Zoning in Missouri* 5 (Dep't of Agricultural Economics, Univ. of Mo., 1967).

2. *Id.* at 6.

3. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 24 (Council on Environmental Quality 1971) (emphasis added).

4. It is interesting to note that initially zoning was challenged as being unconstitutional. In *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), a comprehensive zoning plan which excluded business and industrial operations from residential areas was tested for reasonableness and constitutionality. The United States Supreme Court approved the plan and upheld zoning as a legitimate exercise of the police power of the State, stating that:

[S]egregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life;

The background rumblings indicate that if the state and local governments do not implement effective plans to control the misuse of land and resources, the federal government will step in with a uniform plan. People who share the belief that local problems are best solved by local people have thus turned to examining the various methods of local land use regulation. One such method that is available in Nebraska is comprehensive zoning. Its mechanics and possible applications are the subjects of the analysis of this article.

## II. STATUTORY STRUCTURE FOR ZONING

### A. The Planning Commission

Enabling legislation in 1967 gave county boards in Nebraska the power to appoint a County Planning Commission with powers to develop a comprehensive development plan and adopt a zoning resolution for the county desiring land use control. The Commission cannot regulate within the limits of any incorporated city or village and in cases of jurisdictional conflicts, the city or village has superior authority.<sup>5</sup>

The Planning Commission must consist of residents of the county to be planned,<sup>6</sup> and "shall be appointed with due consideration to geographical and population factors."<sup>7</sup> Serving without compensation except for expenses, these appointees cannot be elected or appointed local officials.<sup>8</sup> They serve for three year terms, with each third of the membership staggered.<sup>9</sup> Their job is the most important one in a zoning program, for they have to determine, from all available input, the course the county is to take in the near and distant future.

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greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. . . .

If these reasons . . . do not demonstrate the wisdom or sound policy . . . of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying . . . that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

*Id.* at 394-95.

5. NEB. REV. STAT. § 23-114 (Reissue 1974).

6. *Id.* at § 23-114.01(1).

7. *Id.*

8. *Id.*

9. *Id.*

## B. The Comprehensive Development Plan

The determination of how a county will develop is through the preparation and adoption by the county commission of a policy statement consisting of a comprehensive development plan and a means of implementing the plan, such as a capital improvement program, subdivision regulation, building codes, and zoning resolutions.<sup>10</sup> Input into the plan comes from public officials and agencies, organizations, educational institutions, and citizens. The county board is not authorized to have hearings on the plan until the commission has made its recommendations known to the county board.<sup>11</sup>

The comprehensive development plan as outlined in the statute has three parts:

(1) A land-use element which designates the proposed general distribution, 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 uses of land;

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

(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.

The comprehensive development plan 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.<sup>12</sup>

The importance of the comprehensive plan, and its parts, cannot be over-emphasized.<sup>13</sup> In order to prepare a zoning ordinance, the county must have a clear picture of its existing situation and its prospects for the future. Is it growing? Declining? What are its natural resources? What are the housing conditions? What are

10. *Id.* at § 24-114.01(2).

11. *Id.*

12. *Id.* at § 23-114.02 (emphasis added).

13. U.S. DEPT. OF AGRICULTURE, *THE WHY AND HOW OF RURAL ZONING* 5 (1967) (emphasis added).

The idea is to achieve a reasonable harmony of *public* plans for future investments in roads, water supplies, sewers, schools, parks, and so on, and for the *private* development of properties for residential, business, or industrial uses. . . . With a good comprehensive plan to provide guidelines, a community can use more wisely its zoning and related tools to assure that each new private development will be in reasonable accordance with and contribute to the overall harmonious growth of the local community.

the major uses of land resources? How can natural resources be conserved?

To be the most effective in answering these and other questions, the first step in planning is a survey of current assets, problems, needs and potentials. The land use survey should produce a detailed accounting of the present use of each parcel of land and should include

public and private improvements of all kinds; its land and other natural resources, both developed and unused; its industries, business and residential areas, and farms; and, most important, its people with their many different skills.<sup>14</sup>

One method of compiling and categorizing land uses<sup>15</sup> suggests that an inspector examine each property in the survey area and record the location and present use. General land use classifications give each reference point a number which can be placed on a map of the area. The map acts as an inventory for the planning commission in determining how much area is devoted to various uses and how much space is yet available for development. Later, zoning proposals can be checked against the map for reasonableness. A more recent publication suggests an even more comprehensive set of maps, showing information about land, improvements, economic base, people, and government.<sup>16</sup>

14. *Id.* at 6.

15. U.S. DEP'T OF TRANSPORTATION, STANDARD LAND USE CODING MANUAL (1969).

16. *Land*

1. An accurate base map of the area of the local unit of government and relevant surroundings.
2. Aerial photographs of the entire community.
3. Maps showing topography, geology, mineral resources, including sand, gravel, valuable clays, and rock.
4. Maps showing drainages and watersheds, rivers, streams, lakes, ponds, and other bodies of water, underground water sources, swampy areas, and flood plains.
5. Maps showing main soil types, land use capability classes, and side [sic] suitability for nonfarm uses.
6. Map of present land uses, indicating the location of industrial, business, residential, farming, forest and recreational areas.

*Improvements*

7. Maps showing transportation facilities, including waterways, railroads, truck and bus lines, highways, streets, and roads, and reports on the condition and adequacy of all public thoroughfares.
8. Map indicating location and capacities of public service plants and facilities, including water and gas mains, powerlines, and storm sewers.
9. Map showing location of public and private schools, school district boundaries, school bus routes, and reports on the conditions, capacity, and adequacy of school facilities.

Although these maps would contain much of the necessary description of present uses, they should be accompanied by: textual data collected on employment and wages to go with economic base maps; population statistics, educational and technical abilities, and data on welfare and cultural facilities to go with maps of people; and tax studies and construction data to accompany the maps on government.

In addition to ascertaining the present status, planning must also project into the future. This is the second step of planning and should include economic analysis, population projections, and agricultural soil surveys.

The economic analysis should indicate the amount of space that will be devoted to industrial, commercial or business uses. The projection should indicate the kinds of industries that will grow, the areas most likely to support the industries, and how the types of

10. Map and reports on the location, condition, and adequacy of public buildings, parks, playgrounds, other recreational facilities, and public properties.

*Economic base*

11. Map showing location of industrial and business areas and studies of the economic base of present industries.
12. Reports on local trade areas and market areas, both local and more distant.
13. Data on unemployment, wage rates and income.
14. Map of farming areas showing types of farming and location of farm and nonfarm homes.
15. Studies of the total contribution to the community's economic base of agriculture plus related processing industries, supply firms, and associated employment.
16. Map and data on existing and potential forest areas and on related forest industries and recreational facilities showing location of farms, both operating and abandoned, and of tax-delinquent lands.
17. Map of present and potential fish, wildlife, and recreational lands indicating location of improvements.

*People*

18. Map of existing 1-family, 2-family, and multifamily housing areas, and report on condition of housing, housing supply, and rate of construction.
21. Information on existing churches, hospitals, and health facilities.

*Government*

23. Map showing publicly owned land, including Federal, State, County, city, town townships, or other local public ownerships.
26. Copies of existing plans for physical development in the area by public agencies, including local, State, and Federal agencies.
27. Copies of the community's present subdivision code and zoning ordinance and map, if any.

industrial growth will interrelate, for example, railroads or highways vis-à-vis cattle shipping, and food processing.

Population projections will aid in estimating the future number of schools, parks and residents. "The purpose of population projections is to learn how much and what type of land can be absorbed in the future."<sup>17</sup> Based on present indications, a land area per person basis will indicate the land mass which should be reserved. Accurate studies will help prevent over-estimating or under-estimating future land needs.

Agricultural soil surveys also add important information to future projections. "These studies should indicate (1) the kind of agricultural lands to preserve at all costs; (2) those that are marginal and might better be reserved for urban uses, parks, timberlands; and (3) those in which agricultural uses are harmful and should be discouraged and eventually stopped."<sup>18</sup> The soil surveys take into account topography, areas in which building could be hazardous, and possible flood lands. The projection of this information provides another basis for determining needs and the proper direction of growth.

Future improvement plans can be done by a series or set of maps,<sup>19</sup> just as current land use was. In addition, the studies relating to economic base and government should be packaged by using a series of reports.<sup>20</sup> The information for these maps and

17. U.S. DEP'T OF COMMERCE, ZONING FOR SMALL TOWNS AND RURAL COUNTIES 8 (1966).

18. *Id.* at 8.

19. *Land and improvements*

1. Map showing a desirable future land use pattern, with areas suitable for industry, business, homes, farming, forests, recreation, and other uses indicated.
2. Map showing location of proposed roads and streets.
3. Map showing location of proposed public service plants and facilities, including water, gas and power lines, and storm and sanitary sewers.
4. Map indicating future locations for public buildings, schools, playgrounds, and parks.

THE WHY AND HOW OF RURAL ZONING, *supra* note 13, at 8.

20. *People and the economic base*

5. Suggestions for fostering business, industrial, and agricultural development with a view to obtaining a balanced economic base.
6. Reports on undeveloped natural resources of all kinds that are available in the area.
7. Suggestions for restoring and then protecting with proper use, neglected water, soil and forest resources.
8. Reports on market trends and changing shopping habits.
9. Reports on population trends, employment and income.
10. Reports on future needs for public housing, and health and welfare facilities.
11. Reports on future needs for educational, cultural and recreational facilities.

studies should come from a broader range than just a few people doing limited work. Consultant services, who maintain experts in these areas, are capable of the insight often needed. The people in the areas to be zoned should also be consulted for two reasons: it helps the planners determine needs and it gets people involved in deciding their own future. A person who has helped plan will be more receptive to the plan than the person who has a finished product thrust upon him.

### C. The Zoning Ordinance

The first two stages of planning involved ascertaining present status and making future projections. The comprehensive plan results from the assimilation and packaging of this information into an efficient and workable pattern. Carrying out the comprehensive plan is the third stage, known as the zoning stage, and is the enactment of the land use regulation or ordinance.

The public relations work should be continued through the enactment stage. The success or failure of the plan and regulation relies heavily upon the cooperation of public and private individuals. The proposed public improvements and objectives of the plan must be expressed to the people. Educational programs, newspaper, radio, and local meetings must continue to encourage and enable the people to express their views. A plan drawn for the next twenty years is not to be considered done and forgotten. It must be up-dated, revised and amended to accommodate changes in needs and circumstances of the people.

"[The zoning ordinance] provides local measures for assuring that the community's growth is orderly."<sup>21</sup> It consists of two major parts: the zoning map and the zoning text.

The map must show, without ambiguity, the exact location of district boundary lines. The regulations in one district may vary from the regulations in another district, but within any one district the regulations must be uniform for each class or kind of land or buildings.<sup>22</sup> The map should be to scale and where questions are anticipated, distances involved should be shown. Areas should be

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#### *Government*

12. Studies indicating trends in the community and area.
13. A long-range program of public improvements and a related financial program.
14. Studies of tax measures designed to encourage the allocation of resources, including land, to their most suitable uses.

#### *Id.*

21. *Id.* at 9.
22. NEB. REV. STAT. § 23-113.03 (Reissue 1974).

labeled as to uses allowed. This is a two-step process designating predominant uses and the allowable narrower restrictions within the broad areas. Thus, areas may be designated as Residential, Agricultural, Business (Commercial), Industrial, Unrestricted or a combination of any of these classes. Within the areas themselves there may be a further breakdown; for example, an area designated Residential (R) may contain areas where only single family dwellings (1) are allowed, or duplexes (2), or apartments (3). On the map, these would be shown as R-1, R-2, R-1 or R-2. The kinds of zoning districts and the number of each subdivision will depend upon those factors discovered at the planning stage.

The zoning text is divided into several sections: title and purpose, definitions of terms, and the text per se. It is the text per se which describes each of the districts (or zones) and the types of uses which may be maintained therein. The zoning text itself should also outline the enforcement procedure,<sup>23</sup> including fees and penalties, describe the duties of the zoning enforcement officer, and explain the procedure used to contest the regulations set forth. It becomes the reference manual for the county, and therefore, should cover as many areas of concern as practical:

The zoning text describes the procedure for making adjustments in the zoning ordinances. These changes may occur in the text or in the map. The zoning text describes the functions of the Board of Adjustment, the rules for the granting of a variance, conditional use permits, when notice must be given, how public hearings should be conducted, and the procedure for appeal to judicial review. Finally, the zoning text may describe those uses that are "nonconforming" at the time of the enactment of the zoning ordinance. It may include a section describing how such "nonconforming" uses may be terminated.<sup>24</sup>

The map and text collectively are the zoning ordinance. Each should be simple, clear, precise and complementary since they comprise a document upon which individuals will depend. The ordinance should contain enough flexibility to be kept current with

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23. Enforcement in Nebraska is done by "the issuance of permits prior to the erection, construction, reconstruction, alteration, repair, or conversion of any nonfarm building or structure within a zoned area. . . ." NEB. REV. STAT. § 23-114.04(1) (Reissue 1974). The County Board may withhold the permit if it conflicts with the zoning provisions. *Id.* § 23-114.04(2).

Violation of the regulations is a misdemeanor and punishable by fine up to \$250 per offense, plus cost of prosecution, or by confinement in county jail for up to thirty days. *Id.* § 23-114.05. The board may institute proceedings to enjoin the violation or force the violator to remedy the violation in addition to the criminal sanctions. *Id.*

24. STANDARD LAND USE CODING MANUAL, *supra* note 15, at 13.

changing times. Furthermore, although it will have been preceded by surveys and analyses and will represent the comprehensive plan and its objectives, unpredictable circumstances arise and must be accommodated on a day-to-day basis.

### III. SOURCES OF FLEXIBILITY

#### A. Administration

Nebraska statutes provide the skeleton for the implementation and administration of zoning, but leave much to the county itself.<sup>25</sup> By following the statutes, the county adheres to the minimal constitutional requirements of notice, reasonable exercise of police power, and representation of the people.

The county board can determine, establish, amend, and enforce zoning regulations;<sup>26</sup> however, prior to any such action by the county board, parties in interest and citizens must have been given an opportunity to be heard.<sup>27</sup> If frequent hearings and open meetings have taken place during the planning stage, the required open hearings will go more smoothly than if the public has been ignored until the last minute. Hearings are also required prior to changes or amendments in restrictions or boundaries.<sup>28</sup> If the owners of more than twenty per cent of an area to be changed (or those owners of specified adjacent areas) protest a change or revision, the board must affirm the changes by not less than a two-thirds majority vote.<sup>29</sup> In this way the people to be affected have the right to be heard.

In addition to adopting a zoning resolution, the county board must prepare, adopt and publish a building code.<sup>30</sup> The county board has the option of adopting other codes, including but not limited to plumbing, electrical and fire prevention codes; this may be done by reference to published standard codes.<sup>31</sup> The codes must be filed with the county clerk for public examination and provision made for additional resolutions to be adopted after the zoning district has been created.<sup>32</sup>

25. NEB. REV. STAT. §§ 23-164 to 23-174.10 (Reissue 1974).

26. *Id.*

27. Notices of the time and place of the open hearing must be published in certain local, legal newspapers of general circulation one time at least ten days prior to such hearing. L.B. 410, 84th Neb. Leg., 1st Sess. (1975), *amending* NEB. REV. STAT. § 23-164 (Reissue 1974).

28. NEB. REV. STAT. § 23-165 (Reissue 1974).

29. *Id.*

30. *Id.* § 23-171.

31. *Id.* § 23-172.

32. *Id.* § 23-173.

Prior to making use of a zoned area, a permit must be issued by the zoning officer.<sup>33</sup> If the use involves a building, a follow-up permit, called an occupancy permit, should be utilized.<sup>34</sup> This device allows the zoning officer to inspect the building to assure that zoning regulations have been met before allowing occupancy. In exercising his discretionary power, the zoning officer may refuse to issue the permit until he is satisfied that all standards have been met.

At this point, the property owner, or *any other aggrieved person or county officer*<sup>35</sup> who feels that an injustice has been done may appeal the decision to the board of adjustment. In Nebraska, the board of adjustment may not be the county board itself, rather it must be a five member board appointed by the county board.<sup>36</sup> The duties of this board are threefold:<sup>37</sup> to hear

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33. *Id.* § 23-114.04.

34. *Id.*

35. *Id.* § 23-168.02(1) (emphasis added).

36. L.B. 410, 84th Neb. Leg., 1st Sess. (1975), amending NEB. REV. STAT. § 23-168.01 (Reissue 1974).

37. The board of adjustment shall, subject to such appropriate conditions and safeguards as may be established by the county board, have the following powers:

(1) To hear and decide appeals where it is alleged by the appellant that there is an error in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of any zoning regulation or any regulation relating to the location or soundness of structures;

(2) To hear and decide, in accordance with the provisions of any regulation, requests for interpretation of any map, or for decisions upon other special questions upon which the board is authorized by any such regulation to pass; and

(3) Where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the adoption of the zoning regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation under this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning regulations, but no such variance shall be authorized unless the board of adjustment finds that: (a) The strict application of the resolution would produce undue hardship; (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and (d) the granting of such variance is based upon reasons of demonstra-

appeals where an error is alleged; to hear and decide special exceptions to the terms of the ordinance;<sup>38</sup> and to authorize variances from the terms.<sup>39</sup>

## B. Special Exceptions and Variances

The board of adjustment's duty to decide special exceptions and authorize variances where appropriate are important zoning tools. They permit flexibility in adhering to the zoning ordinance and for this reason merit attention.

Special exceptions are uses that are not necessarily objectionable, but would be disallowed by strict application of the definition of a given area. For example, a hospital, not otherwise objectionable, could be kept from a residential area because it is not a residence. The special exception allows a use without redefining the area's classification. The statute provides that special exceptions may be made "in appropriate cases and subject to appropriate conditions and safeguards. . . ."<sup>40</sup> Appropriateness is not to be interpreted as meeting individual desires, but should fit into the purpose of zoning, *i.e.*, to promote the health, welfare, morals or safety of the community. The ordinance should set out the conditions necessary for a special exception and these conditions should be specifically met prior to the granting of an exception. Without this, the power to grant exceptions could be misused and thereby defeat an effective zoning ordinance.

Variances are used in resolving problems peculiar to a particular area. For instance, if the zoning ordinance requires lots for homes in a given district to be 100 feet by 60 feet and the owner, due to the land topography, has only a 90 foot by 60 foot lot, the board of adjustment may grant a variance because the owner has

ble and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice.

No variance shall be authorized unless the board finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations. . . .

*Id. amending* NEB. REV. STAT. § 23-168.03 (Reissue 1974).

38. A *special exception* is a use such as a hospital, social club, etc., which is specifically listed in the zoning ordinance as being allowable in certain or all districts by action of the Board of Adjustment providing certain state conditions are complied with.

LEO A. DALY CO., FUNDAMENTALS OF ZONING at 7.

39. "A *variance*, on the other hand, is concerned with departing to a minor degree from the terms of the ordinance in direct regard to a hardship peculiar to an individual lot." *Id.*

40. NEB. REV. STAT. § 23-168 (Reissue 1970).

no other remedy besides the variance. Thus, variances give added flexibility to an otherwise rigid zoning ordinance and allow the reasonableness of the situation to be determinative in regard to compliance or non-compliance with the zoning ordinance.

The granting of variances must be done impartially because to treat different individuals according to different standards is discriminatory and may be contested as such. To protect against this situation, the court in *Otto v. Steinhilber*, an important case in this area, set out the requirements that must exist before a variance can be granted:

(1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.<sup>41</sup>

A recent study done in Nebraska suggested factors to be considered prior to the granting of a variance. They included:

- a. That the applicant has shown the premises cannot reasonably be used in conformity with the regulations;
- b. That the difficulty or hardship alleged relates solely to the premises involved and not to other premises of the applicant;
- c. That the difficulty or hardship arises from the application of the regulations and not from some act of the applicant or someone acting in his behalf;
- d. That the difficulty or hardship relates only to the premises involved and not to some factor which applies equally to all other land in the same zone classifications;
- e. That the difficulty or hardship is something more than mere financial loss to the applicant;
- f. That the particular variance is not *expressly* prohibited or excluded by the regulations;
- g. That the permission requested refers to a use of or structure on the land itself and not to some use or structure which the applicant can have, but others may not have;
- h. If the Board has had a previous hearing concerning the same use of the same premises, then it does not hold a rehearing without an allegation in the application and proof at the hearing that there has been a change of conditions affecting that same property since the prior decision or that other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen in the meantime.<sup>42</sup>

Such detailed consideration prevents the abuse of the board's discretion. "There has been confided to the board a delicate jurisdic-

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41. *Otto v. Steinhilber*, 282 N.Y. 71, 73, 24 N.E.2d 851, 853 (1939).

42. FUNDAMENTALS OF ZONING, *supra* note 38, at 8 (emphasis added).

tion and one easily abused."<sup>43</sup> Such abuse of discretion would open the door to attack in the courts. Furthermore, the integrity of the zoning ordinance would be undermined. If local pressures to grant exceptions or variances are very strong, then the proper course would be to amend the ordinance itself rather than violate its provisions by granting exceptions or variances when the situation does not call for them. Amending the ordinance opens the problem to public scrutiny and thereby avoids the charges of abuse of discretion.

### C. Judicial Review

If the board of adjustment fails to dispose of an aggrieved person's problem in a satisfactory manner, the person can appeal to the district court for the county,<sup>44</sup> alleging that the action taken was illegal and specifying the grounds of illegality. The court will be very reluctant to overturn decisions made by the board if the basis for appeal is only that the board made the wrong decision. The board is considered the expert in their own decisions and the courts dislike overruling the board's judgment if such judgment has been based on reason.<sup>45</sup> In *Frank v. Russell*<sup>46</sup> the Nebraska Supreme Court stated that this general rule which was applicable to other administrative agencies also applied to questions of fact in zoning cases. The case involved a corner lot upon which the owners desired to build a house closer to the street than would be allowed by the zoning ordinance. The board of adjustment had ruled to allow an exception because the house did not front the street along which the restriction ran. The court overturned a decision by the board of adjustment of the city of Scottsbluff and held that the grant of the board was arbitrary because there was no showing of unnecessary hardship, a requisite for granting zoning variances;<sup>47</sup> therefore, the finding and order of the board were violative of powers granted to it. The court expanded the rule dealing with when a variance may be granted:

It appears that the rule respecting the right of a board of adjustment, such as the one here, to grant a variance from zoning regulations on the ground of unnecessary hardship is generally that

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43. *Fordham Manor Reformed Church v. Walsh*, 244 N.Y. 280, 290, 155 N.E. 575, 578 (1927).

44. NEB. REV. STAT. § 23-168.04 (Reissue 1970).

45. "The decisions of [the Board of Adjustment] are subject to remedial court action only for errors of law and to give relief against orders which are arbitrary, oppressive or represent abuse of authority." RURAL ZONING IN MISSOURI, *supra* note 1, at 15.

46. 160 Neb. 354, 70 N.W.2d 306 (1955).

47. See notes 41-42 and accompanying text *supra*.

it may not be granted: Unless the denial would constitute an unnecessary and unjust invasion of the right of property; if the grant relates to a condition or situation special and peculiar to the applicant; if it relates only to a financial situation or hardship to the applicant; if the hardship is based on a condition created by the applicant; if the hardship was intentionally created by the owner; if the variation would be in derogation of the spirit, intent, purpose, or general plan of the zoning ordinance; if the variation would affect adversely or injure or result in injustice to others; or ordinarily, if the applicant purchased his premises after enactment of the ordinance.<sup>48</sup>

In addition to reviewing the board's decision upon an allegation that the action was illegal, the court will also review, in some instances, the issue of constitutionality. If the litigant alleges an ordinance to be unconstitutional as it applies to himself he must first have exhausted his administrative remedies before the court will review the decision. If the constitutionality of the entire ordinance is attacked, however, then it is not necessary to exhaust all other administrative remedies.

The court has other functions in the area of zoning ordinances. Violation of the ordinance is a misdemeanor and punishable by a fine up to \$250 or 30 days in jail, or both.<sup>49</sup> Other legal proceedings may be brought to enjoin the action of an individual or provide relief from a misuse by ordering abatement or correction.<sup>50</sup> Nebraska law further provides that *any taxpayer* may institute proceedings to compel specific performance by the proper official or officials.<sup>51</sup> Violation of the court order may result in the violator being held in contempt of court, punishable by fine or imprisonment.

#### D. Nonconforming Uses

The general rule at one time was that zoning could not be retroactive in effect.<sup>52</sup> A problem thus arose where an area was zoned for a particular use, but within the zoned area there existed a previous use not consistent with the zoning ordinance, for example,

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48. 160 Neb. at 362-63, 70 N.W.2d at 312.

49. L.B. 410, 84th Neb. Leg., 1st Sess. (1975), *amending* NEB. REV. STAT. § 23-114.05 (Reissue 1974).

50. NEB. REV. STAT. § 23-114.05 (Reissue 1974).

51. *Id.* § 23-114.05, § 23-174.

52. "It is fundamental that a zoning regulation may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning regulation cannot deprive the owner of a use of which is property was put before the zoning regulation became effective." Board of County Comm'rs of County of Sarpy v. Petsch, 172 Neb. 263, 109 N.W.2d 388, 390 (1961). See also Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N.W.2d 600 (1944).

a lumberyard in a residential area or a junkyard in an agricultural area. Nebraska's enabling legislation now provides for alternatives so as to promote removal of nonconforming uses; the general rule has not been superseded by the statutes. Instead, it is recognized as having some exceptions. This allows nonconforming uses in existence at the time of adopting the ordinance to be continued, subject to certain restrictions.<sup>53</sup> To encourage conformity within the zoned area Nebraska law disallows structural alteration for the purpose of extending the life of a nonconforming use. In addition if the use is discontinued for a twelve-month period, further use must conform to the zoning regulation.<sup>54</sup>

A more direct exception to the rule that zoning is not retroactive is contained in a statute adopted by Nebraska in 1967. The statute reads in part:

The county board may, in any zoning regulation, provide for the termination of nonconforming uses, either by specifying the period or periods in which nonconforming uses shall be required to cease, or by providing a formula whereby the compulsory termination of a nonconforming use may be so fixed as to allow for the recovery or amortization of the investment in the nonconformance.<sup>55</sup>

The statute is silent as to whether it is necessary to provide a reasonable time for gradual termination. Courts are likely to require giving the user a reasonable time in order to protect him against undue hardship and allow him to recover possible losses. Two Louisiana cases, however, have held that arbitrary amortization periods are valid and each case is subject to interpretation of the particular circumstances involved.<sup>56</sup> On the other hand, the Missouri Supreme Court has rejected amortization statutes as being a deprivation of private property without just compensation.<sup>57</sup>

The language of the Nebraska statute requires that the use be existing at the time of zoning.<sup>58</sup> A contemplated or intended use is not sufficient to constitute a nonconforming use.<sup>59</sup> Failure to be within the definition of existence means that the general thrust of the zoning regulation will prevent the use from arising, without resort to the rule against nonconforming uses.

53. NEB. REV. STAT. § 23-173.01 (Reissue 1974).

54. *Id.*

55. *Id.*

56. *Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929); *Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314 (1929).

57. *Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo. 1965).

58. NEB. REV. STAT. § 23-173.01 (Reissue 1974).

59. "The general rule is . . . that an 'existing use' means the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose." *County of Saunders v. Moore*, 182 Neb. 377, 378, 155 N.W.2d 317, 319 (1967).

## IV. CONCLUSION

Zoning is a tool for orderly growth and alleviates many problems in land use by providing a basis for logical, well-ordered expansion. One of these problems has arisen from the "leap frog" movement of residential and industrial land uses into rural areas adjacent to urban areas. This occurs when people are motivated to "get away from it all," or wish to invest in housing developments along proposed highways, or seek to avoid higher urban taxes by moving to rural areas. The result of such movement is an unorganized expansion creating unwise mixing of land uses and causing conflicts between adjacent land users. Comprehensive planning helps prevent this and other hazards.<sup>60</sup> Despite its achievements, zoning is not positively received by all. Some people fear zoning. Zoning is criticized as being too subjective<sup>61</sup> because the plan relies on local people and their experiences and interpretations of problems. It has been suggested that the planners' tasks are enormous and should therefore not even be attempted.<sup>62</sup> One author has argued that peoples' needs, desires and wants will control the development of a plan and that this is undesirable. In answer to this criticism it can be said that it is necessary that one be aware of possible "political pressures" that can affect zoning regulations or amendments; however, it should further be recognized that zoning does not pretend to be without limitation. Although allowing people to decide land use for themselves can be viewed as a weakness, cooperation by local people in orderly development to fulfill local needs should be considered as one of the advantages of zoning. This is true particularly where those people who would otherwise impose controls on rural areas are located in the larger urban areas far away from the problems peculiar to the counties involved.

Under zoning there is some assurance that a use permitted under the zoning ordinance will not be halted by a nuisance lawsuit. Farmers and ranchers are thus not precluded from operation of their

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60. Zoning can:

1. Lessen congestion in streets and roads;
2. Secure safety from fires;
3. Reduce property damage created by accumulation or run-off of storm or flood waters;
4. Provide adequate light and air;
5. Protect the tax base;
6. Facilitate provisions for transportation, water flowage, water supply, drainage, sanitation, recreation, soil fertility, food supply, etc.;
7. Preserve recreation areas, historical landmarks, and beauty of country-side.

61. B. SIEGAN, *LAND USE WITHOUT ZONING* 19 (1972).

62. *Id.* at 19.

businesses, but instead are protected from an incompatible industry moving in adjacent to the agricultural area.

Zoning is not a cure-all. It is not retroactive in application. "Zoning does not usually affect what has been done in the past, only what can be done in the future . . . . In most zoning ordinances, [nonconforming] uses may continue to operate."<sup>63</sup> Although Nebraska has an amortization provision, it is still subject to the safeguards of not being applied capriciously or discriminatorily.<sup>64</sup> Zoning, is not inflexible; through proper procedures, if circumstances change, zoning ordinances can be amended. However, there is a danger that the zoning ordinance may be changed too frequently. Whether the possibility of this occurring is a great enough reason to avoid zoning altogether, however, is doubtful.

Zoning purports to be a workable plan only as long as people are willing to allow it to work. This is true of law in general, since it is made in response to people's needs and desires. Perhaps the ultimate conclusion to be made about zoning is that it cannot be effective unless it represents the interests, cooperation and desires of residents of the community.

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63. NEBRASKA STATE OFFICE OF PROGRAM & PLANNING, PLANNING AND ZONING PAMPHLET 9 (Draft Copy, 1973).

64. *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964).