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RURAL ZONING IN NEBRASKA

I. INTRODUCTION*

Historically, the law of real property evolved as a concept of individual rights, and use of real estate was regarded as a matter of an individual property owner's discretion, free from outside control. Blackstone described this early law by stating: "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."¹ This tenacious concern for the private landowner has been weakened within the past eighty years, however, by a transformation of our social and economic structure.²

With the advent of industrialization, the rapid shift from an agrarian to an urban society produced a situation which seriously threatened the well-being of expanding communities. Crowded areas became blighted by "the lack of sanitation, the mere one-toilet-for-an-entire-floor of families, the windowless bedrooms, the crowding of families into the tiniest of spaces, the lack of fire preventions, and the filth that went with all of those conditions . . ."³ As the situation worsened, society began to realize that the property owner's privilege of determining land use had to be controlled as well as protected.

Control came in the form of community planning and zoning which regulated building and land uses to assure the orderly development of cities and to prevent city blight.⁴ These controls

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¹ 1 BLACKSTONE, COMMENTARIES 138 (3d ed. Cooley 1884).

² Cross, *The Diminishing Fee*, 20 LAW & CONTEMP. PROB. 517 (1955).

³ Metzenbaum, *The History of Zoning—"A Thumbnail Sketch"*, 9 W. RES. L. REV. 36, 37 (1957).

⁴ Zoning has been defined as "the regulation by districts under the police power of the height, bulk, and use of buildings, the use of land, and the density of population." BASSETT, ZONING 45 (1940). Zoning has also been illustratively defined as keeping "the kitchen stove out of the parlor, the bookcase out of the pantry and the dinner table out of the bedroom." 1 METZENBAUM, LAW OF ZONING 9 (2d ed. 1955). "[Z]oning serves a two-fold purpose—one, to preserve the true character of a neighborhood by excluding new uses and structures prejudicial to the restricted purposes of the area, and gradual elimination of such existing structures and uses; and, second, to protect an owner's property or existing residence, business or industry from impairment which would result from enforced accommodation to new restrictions." 1 YOKLEY, ZONING LAW AND PRACTICE 13 (2d ed. 1953). For comprehensive statements of zoning law see BASSETT, ZONING (1940); METZEN-

were established upon a growing belief that the public possessed a right to be protected from land uses which were detrimental to the general welfare of the society.⁵

The change to an urban-oriented society has also produced a situation in rural areas which, although slower in developing, promises to be just as serious as the aforementioned problems faced by the cities. Agricultural land has been beset with many new demands, serving not only as our source of foodstuffs, but also as a source of space for growing urban areas, public facilities, and recreation. Because of increasing nonrural requirements, economists calculate that seventy-one million acres should be lifted from use as cropland by 1980.⁶ Efficient and orderly transition of rural areas to accommodate nonagricultural uses without waste of productive agricultural land is becoming a serious problem throughout the country. As a solution, many states have utilized zoning, but the application of this traditionally urban device has not been extensive.⁷

It is the purpose of this comment to examine the rural problems in Nebraska and the possible solutions available through zoning. Zoning has evolved from the police power reserved to the individual states by the United States Constitution,⁸ subject to certain constitutional limitations and safeguards.⁹ Thus, to determine the absolute limits of valid zoning legislation, an examination must be made of the United States Supreme Court's interpretation of the

BAUM, *LAW OF ZONING* (2d ed. 1955); POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* (1961); RATHKOPF, *THE LAW OF PLANNING* (3d ed. 1964); YOKLEY, *ZONING LAW AND PRACTICE* (2d ed. 1953).

⁵ "It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. . . . Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare." *State ex rel. Carter v. Harper*, 182 Wis. 148, 153, 196 N.W. 451, 453 (1923).

⁶ U.S. DEP'T OF AGRICULTURE, *A PLACE TO LIVE* 57 (1963) [hereinafter cited as USDA, *YEARBOOK OF AGRICULTURE* (1963)].

⁷ For a complete list of state statutes which give the power to zone unincorporated areas see Note, 45 IOWA L. REV. 743, 744 n.4 (1960).

⁸ U.S. CONST. art. X.

⁹ Under this power, the state can prevent misuses of property or rights which impair the public health, safety, morals, and general welfare. As due process protects the individual from the public, the police power protects the public from the individual. The police power, however, cannot be used in violation of due process. U.S. CONST. art. XIV, § 1; NEB. CONST. art. 1, §§ 1, 3, 21.

police power. Since zoning is a power exercised by the individual states, however, the absolute limits allowed by the federal constitution may be further narrowed and constricted by state law, as interpreted by local courts. The attitude of the Nebraska Supreme Court toward zoning must also be examined, therefore, and compared with the federal limitations before any meaningful analysis can be obtained. Revisions of present Nebraska rural zoning statutes will be suggested in light of such examination and consideration of the Nebraska Supreme Court's interpretation of the zoning power.

II. THE DEVELOPMENT OF THE FEDERAL CONCEPT OF ZONING

Although state police power had been accepted and applied in other areas early in our history, the development of zoning as part of that power did not occur in the United States until comparatively recently due to a prevalent public and judicial distrust of control over individual property rights.¹⁰ In 1926, the United States Supreme Court gave explicit approval of zoning as a valid exercise of the state police power. In *Village of Euclid v. Ambler Realty Co.*,¹¹ the Court held that comprehensive zoning and regulation of municipalities, when reasonable, were constitutional and to be encouraged. In determining the reasonableness of such regulations, the Court indicated that the standard police power test of "public health, safety, morals and general welfare" should apply.¹² When such public interests were present, the state could constitutionally limit individual activities which would adversely affect them.¹³

¹⁰ E.g., "Zoning legislation is one of the latest examples of the interference with private rights upon the claim of a promotion of what is rather indefinitely termed the general welfare." *City of Providence v. Stephens*, 47 R.I. 387, 391, 133 Atl. 614, 616 (1926). See also 1 YOKLEY, *op. cit. supra* note 4, at 4.

¹¹ 272 U.S. 365 (1926). The United States Supreme Court had earlier exhibited a favorable attitude toward land use regulation within a municipality in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The Court, upholding an ordinance excluding brick-making within a certain district, ignored the petitioner's contention that the ordinance operated as a taking of property due to the reduction of the land's value from \$800,000 to \$60,000.

¹² 272 U.S. at 387.

¹³ Since the zoning power is based upon the police power concept, it is necessary to distinguish the police power from the power of eminent domain. While both are exercised for the public benefit, the police power controls the use of property for the public good, its use otherwise being harmful, while eminent domain takes property for public

Prior to the *Euclid* decision, many state courts, apparently uncertain about the constitutional limits involved in the vague term "general welfare," confined their decisions on zoning ordinances to standards regarding public health, safety, or morals.¹⁴ This restriction often resulted in tenuous opinions from courts realizing a social need for certain land use regulations, but lacking clear foundations for upholding them. In *St. Louis Gunning Advertisement Co. v. City of St. Louis*,¹⁵ for example, the Missouri court sustained the validity of an ordinance regulating billboards, stating:

The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and the dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine and air which are so conducive to health and comfort.¹⁶

Expressions such as this were a result of judicial reluctance to recognize aesthetic considerations as a valid basis for invoking the

use. The exercise of the latter results in compensation to the property owner while the former does not. "Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful" FREUND, *THE POLICE POWER* § 511 (1904). See generally *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928); *2700 Irving Park Bldg. Corp. v. City of Chicago*, 395 Ill. 138, 69 N.E.2d 827 (1946); 1 METZENBAUM, *op. cit. supra* note 4, at 70-79; 1 RATHKOPF, *op. cit. supra* note 4, c. 2, § 2. "The difference is rather the result of a process the basic premise of which is the view that the claims of government to regulate private conduct as a means of achieving vague social objectives must be balanced against those of private persons to be protected against the sacrifice of their individual rights." Warp, *The Legal Status of Rural Zoning*, 36 ILL. L. REV. 153, 161 (1941). See also Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 ILL. L. REV. 135 (1929). If a police power regulation goes too far in regulating land use, it will be recognized as a taking of property and will be invalidated. *Goldman v. Crowther*, 147 Md. 282, 128 Atl. 50 (1925); *Yara Eng'r Corp. v. City of Newark*, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945).

¹⁴ This limitation is still found in many decisions. For cases see 1 YOKLEY, *op. cit. supra* note 4, at 54 n.65.

¹⁵ 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913).

¹⁶ *Id.* at 145, 137 S.W. at 942.

zoning power. The extreme reasoning expressed by courts unwilling to consider the zoning power in relation to the general welfare of society evoked criticism from many authors demanding a realistic appraisal of society's right to control use of property. Such criticism was typified by one writer who remarked:

Has the time not come, or at least is it not almost here, when the courts will drop the mask of an exclusive concern for safety and health that in the case of bill-boards is not real, and frankly approve reasonable regulation of the use of property in the interest of beauty?¹⁷

The encouragement of the *Euclid* case induced state courts to expand their constitutional tests of zoning power and to adapt previous interpretations of general welfare to land regulation. In 1906, the United States Supreme Court had interpreted state police power to include "regulations designed to promote the *public convenience* or the *general prosperity*, as well as regulations designed to promote the public health, the public morals or the public safety."¹⁸ Such language readily provided solid foundation for upholding zoning regulations difficult to include under previous tests. In *Best v. Zoning Bd. of Adjustment*,¹⁹ for example, the petitioner, who maintained a multi-family dwelling in a district zoned for single family units, argued that the public health, safety, and morals were not affected by her activities. The Pennsylvania court, sustaining the zoning ordinance, replied that anything which tended to destroy property values in the neighborhood necessarily affected the prosperity, and therefore, the general welfare of the entire community.²⁰

¹⁷ Chandler, *The Attitude of the Law Toward Beauty*, 8 A.B.A.J. 470, 472 (1922). See generally Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124 (1926); Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Light, *Aesthetics in Zoning*, 14 MINN. L. REV. 109 (1930); Rodda, *The Accomplishment of Aesthetic Purpose Under the Police Power*, 27 SO. CAL. L. REV. 149 (1954); Sayre, *Aesthetic and Property Values: Does Zoning Promote the Public Welfare?*, 35 A.B.A.J. 471 (1949); Comment, 64 COLUM. L. REV. 81 (1964); Comment, 29 FORDHAM L. REV. 729 (1961); Note, 23 GEO. WASH. L. REV. 730 (1955); Note, 35 NEB. L. REV. 143 (1956); Note, 32 U. CHIC. L. REV. 367 (1963).

¹⁸ *Chicago, B. & Q. Ry. v. Illinois ex rel. Drainage Comm'rs*, 200 U.S. 561, 592 (1906). (Emphasis added.)

¹⁹ 393 Pa. 106, 141 A.2d 606 (1958).

²⁰ "In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for 'the general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legiti-

The expanding general welfare concept also gave state courts the basis necessary to sustain the establishment of aesthetic values in society. In 1936, the Massachusetts court, regarding an ordinance regulating billboards, observed:

Grandeur and beauty of scenery contribute highly important factors to the public welfare of a State. . . . Even if the rules and regulations of bill-boards . . . did not rest upon the safety of public travel and the promotion of the comfort of travellers by exclusion of undesired intrusion, we think that the preservation of scenic beauty and places of historical interest would be a sufficient support for them.²¹

More recently, the Wisconsin Supreme Court upheld a zoning ordinance requiring the exterior architectural appeal and functional plan of proposed structures to conform with other structures in the neighborhood.²²

In agreement with the growing number of interests held to be within the general welfare by state courts, the United States Supreme Court, in 1954, considered the scope of general welfare, and stated:

The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern . . . decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.²³

mate object for the exercise of the police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience and general prosperity of the community.' " *Miller v. Board of Pub. Works*, 195 Cal. 477, 485, 234 Pac. 381, 383 (1925), *appeal dismissed*, 273 U.S. 781 (1927).

²¹ *General Outdoor Advertising Co. v. Department of Pub. Works*, 289 Mass. 149, 185-87, 193 N.E. 799, 816-17 (1935). See also *General Outdoor Advertising Co. v. Department of Pub. Works*, 220 Ind. 85, 172 N.E. 309 (1930). Concerning regulation of billboards along highways, see Levin, *Highway Zoning and Roadside Protection in Wisconsin*, 1951 Wis. L. Rev. 197. The passage of the Federal Aid Highway Act of 1958 has presented another interesting problem to this field. For the legislative history, see U.S. CODE CONG. & AD. NEWS, 85th Cong., 2d Sess. 2367 (1958). For discussion of the federal act, see Comment, 46 CALIF. L. REV. 796 (1958).

²² *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955), *cert. denied*, 350 U.S. 841 (1955). While specifically upholding zoning for aesthetics, the court also noted that a structure in variance with surrounding structures would cause substantial depreciation in nearby property values.

²³ *Berman v. Parker*, 348 U.S. 26, 33 (1954).

According to the Court, the "traditional applications" of the general welfare are merely illustrations, not limitations upon it.

The present scope of zoning power with regard to federal limitations appears to be exceptionally comprehensive. The concept of individual property rights, once absolute and inviolate, has effectively been subordinated to the rights of society, and zoning devices may be constitutionally applied as the surrounding circumstances demand their utilization.

III. THE ZONING POWER AS VIEWED BY THE NEBRASKA SUPREME COURT

Early attempts to utilize zoning regulations in Nebraska were met with the typical reluctance to interfere with property interests that prevailed throughout the nation. The Nebraska court, in 1922, displayed its distrust of the zoning power in *State ex rel. Westminster Presbyterian Church v. Edgecomb*,²⁴ involving a zoning ordinance which restricted to twenty-five per cent of the lot the land occupied by buildings. The court, holding the regulation inapplicable to a church, reasoned that the fact that the building would cover thirty-seven per cent of the lot did not constitute a greater threat to the health, safety, and morals of the community.

Federal approval of zoning in the *Euclid* decision brought about an apparent change of attitude in the Nebraska Supreme Court.²⁵ Just one year later, in *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*,²⁶ the court, citing *Euclid*, upheld a zoning ordinance designating an area family-residential. Applying the ordinance, the court refused to allow the establishment of a fraternity house in this residential district. Acceptance of zoning as a valid exercise of the police power was demonstrated again in *City of Lincoln v. Foss*.²⁷ The court affirmed a decree enjoining defendants from conducting a restaurant at their home, observing:

It is difficult, if not impossible, to lay down any general rules describing the exact field of operation of such power (zoning) that will fit cases arising in the future. Each must be controlled by special conditions and circumstances surrounding it. *It must be controlled by constitutional principles, the meaning of which does not change but the application of which to new conditions varies with the everchanging conditions of a growing civilization.*²⁸

²⁴ 108 Neb. 859, 189 N.W. 617 (1922).

²⁵ The *Euclid* decision exerted an influence upon courts and legislatures throughout the nation. 1 YOKLEY, *op. cit. supra* note 4, § 22.

²⁶ 115 Neb. 525, 213 N.W. 835 (1927). See *City of Lincoln v. Logan-Jones*, 120 Neb. 827, 235 N.W. 583 (1931).

²⁷ 119 Neb. 666, 230 N.W. 592 (1930). Note 9 NEB. L. BULL. 208 (1930).

In determining the validity of zoning ordinances, the Nebraska Supreme Court has established several principles both favoring and limiting the zoning power. It is established, for example, that a zoning ordinance will be presumed valid absent clear and satisfactory evidence to the contrary.²⁹ This presumption applies to the zoning authority's determination in designating an area, for example, either residential or commercial. The authority of the zoning board, however, is carefully limited to powers expressly granted to them by the legislature. The extent to which the police power may be exercised by a delegated authority was enunciated by the Nebraska Supreme Court in *Lang v. Sanitary Dist.*:

The rule has long been established . . . that a municipal corporation possesses, and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.³⁰

Four years later, in *Board of County Comm'rs v. McNally*,³¹ a county zoning resolution was held invalid due to the county board's failure to publish a zoning map along with the text of the resolution as required by the enabling statute. The court justified its holding by stating:

A zoning resolution is in derogation of the rights of an owner under the common law and it follows that the procedure prescribed by the Legislature in the exercise of the police power is strictly construed and must be rigidly followed.³²

Although this case involved a failure to comply with the express language of the enabling statute, the implication of the court's reasoning is that a zoning authority may exercise only those powers expressly granted, and no others. The delegation of police power in the case of zoning, therefore, is not judged under the *Lang* rule, but is confined solely to powers expressly delegated. When viewed in this light, the zoning authority's scope of power is hampered by the court's narrow construction of the enabling statute.

²⁸ 119 Neb. at 675, 230 N.W. at 595 (1930). (Emphasis added.)

²⁹ *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed*, 339 U.S. 960 (1949), *rehearing denied*, 340 U.S. 847 (1950); *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 13 N.W.2d 634 (1944); *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, 213 N.W. 835 (1927).

³⁰ 160 Neb. 754, 763-64, 71 N.W.2d 608, 613 (1955). See also *County of Johnson v. Weber*, 160 Neb. 432, 70 N.W.2d 440 (1955); *State ex rel. Johnson v. Gage County*, 154 Neb. 822, 49 N.W.2d 672 (1951).

³¹ 168 Neb. 23, 95 N.W.2d 153 (1959).

³² *Id.* at 35, 95 N.W.2d at 160.

The Nebraska statutes, furthermore, require all zoning ordinances to be made "in accordance with a comprehensive plan."³³ While there is no statutory definition of "comprehensive plan," some interpretation is provided in *City of Milford v. Schmidt*,³⁴ involving an ordinance which divided a city into three districts without attempting "to define in any manner what activities may be carried on"³⁵ The court noted that the ordinance in question, even if a zoning ordinance, could not be sustained because there was no comprehensive plan. A comprehensive plan, therefore, must enumerate the activities allowed and excluded in various areas. This enumeration necessarily requires a determination of the public good by the zoning authority which, if reasonable, should be controlling.

An additional requirement of a comprehensive plan was enunciated in *Davis v. City of Omaha*,³⁶ where the court stated:

[I]t [comprehensive plan] was designed to embrace all property within the city and to include all permissible areas outside with due consideration to its existing uses and occupancy and the use to which it could feasibly and equitably be put conformable to the power contained in the statute.³⁷

By this statement, the court appears to construe "comprehensive plan" under the "entire area theory" which, according to one author, is undesirable, since the theory emphasizes the question of whether the zoning ordinance itself is a comprehensive plan, not whether it is in accordance with a comprehensive plan.³⁸ This result has been caused, in part, by the "legislative failure to equate the 'comprehensive plan' of the zoning enabling act with the master plan for land use, [thus] courts have found it difficult to assign any independent meaning to the term."³⁹

³³ E.g., NEB. REV. STAT. § 23-163 (Reissue 1962).

³⁴ 175 Neb. 12, 120 N.W.2d 262 (1963).

³⁵ *Id.* at 21, 120 N.W.2d at 267.

³⁶ 153 Neb. 460, 45 N.W.2d 172 (1950). The case was the subject of discussion in Note, 50 MICH. L. REV. 163 (1951).

³⁷ 153 Neb. at 464, 45 N.W.2d at 175.

³⁸ Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955). See also Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955).

³⁹ Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955). The planning element in a master plan should be emphasized rather than the inflexible notions of geographical coverage. Planning, a broader term than zoning, is concerned with physical development of the community and its environment in relation to its social and economic well being. It is based upon careful and comprehensive surveys and studies of present conditions and predicted future growth. See also POOLEY, *op. cit. supra* note 4, c. I.

It should be further noted that "spot zoning" has been consistently held invalid as not being part of a comprehensive plan.⁴⁰ The Nebraska Supreme Court has defined spot zoning "as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and other owners therein."⁴¹ At what point a zoning ordinance will cease to be spot regulation and be deemed to cover a sufficient area to be part of a comprehensive plan has not been precisely explained by the court, but apparently will be determined upon the facts presented in each instance. It is implicit, furthermore, that the court itself will also determine public welfare when considering an ordinance which might possibly be classified as spot zoning.⁴²

From the foregoing discussion it appears that the determinations of a zoning authority are not as final as a cursory glance at the cases would indicate. A particular zoning ordinance itself cannot determine or promote general welfare not enumerated in the enabling statute.⁴³ Furthermore, determinations evinced in a comprehensive plan, while presumed valid, do not prevent the court's own finding of the purposes of a specific ordinance and then discerning whether or not such purpose fits within the plan.⁴⁴

While the Nebraska Supreme Court has viewed particular zoning ordinances as being absolutely limited within a comprehensive plan, it has recently demonstrated a more liberal attitude toward the permissible scope of the plan itself. In *Schlientz v. City of North Platte*,⁴⁵ the Nebraska Supreme Court sustained the validity of a statute authorizing cities of the first class to zone an area one mile beyond and adjacent to their corporate boundaries. No constitutional infirmity was found to exist merely because the residents in the affected area had no voice in selecting the city officials enacting the ordinance.⁴⁶ The court approved of the statute, stat-

⁴⁰ *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *Weber v. City of Grand Island*, 165 Neb. 827, 87 N.W.2d 575 (1958). See also Comment, 29 *FORDHAM L. REV.* 740 (1961); Note, 10 *SYRACUSE L. REV.* 303 (1959).

⁴¹ *Weber v. City of Grand Island*, *supra* note 40, at 832, 87 N.W.2d at 579.

⁴² See authorities cited note 40 *supra*.

⁴³ See text accompanying note 31 *supra*.

⁴⁴ See text accompanying note 33 *supra*.

⁴⁵ 172 Neb. 477, 110 N.W.2d 58 (1961). See Lyman, *The Personal Notice in Matters of Zoning Which Is Necessary in Cities of the First and Second Class*, 37 *NEB. L. REV.* 232 (1958).

⁴⁶ In *Peterson v. Vasak*, 162 Neb. 498, 76 N.W.2d 420 (1956), the Nebraska Supreme Court sidestepped the constitutional issue of extraterritorial

ing:

[I]t is apparent that the Legislature recognized that cities of the first class in this state are growing and expanding. The Legislature also recognized that the area within 1 mile of the corporate limits of such cities in the future would doubtless become a part of the cities and that such extension of the boundaries of the cities of the first class should, when required, be permitted. The zoning laws and ordinances incident thereto relating to the regulations of buildings, structures and improvements are generally for the welfare and health of the citizens under the police power of the state.⁴⁷

Under this language, the court recognizes that zoning power may be used for the future, as well as the immediate, welfare of the public. The legislature, therefore, can prevent uses which will become undesirable later, even though such uses do not now adversely affect the public.

The Nebraska Supreme Court has stated that adverse effects upon the property rights of individuals will not necessarily invalidate a zoning ordinance.⁴⁸ The ordinance must not be arbitrary, confiscatory, or discriminatory, however, and must bear a reasonable relationship to the health, safety, and morals of the public.⁴⁹ Whether an ordinance falls within these categories depends upon the particular circumstances of each case. Thus, in *City of Scottsbluff v. Winters Creek Canal Co.*,⁵⁰ an ordinance was held to be confiscatory where compliance would have cost the defendant \$140,000. In *Coulthard v. Board of Adjustment*,⁵¹ an ordinance which per-

zoning. See Bartelt, *Extraterritorial Zoning: Reflections on Its Validity*, 32 NOTRE DAME LAW. 367 (1957); Bouwsma, *The Validity of Extraterritorial Municipal Zoning*, 8 VAND. L. REV. 806 (1955); Delehant, *Representing the Land Developer: Step by Step Techniques*, 40 NEB. L. REV. 330 (1961); Smith, *The Dilemma Faced by Municipalities in Controlling Nearby Land Developments*, 40 NEB. L. REV. 318 (1961).

⁴⁷ *Schlientz v. City of North Platte*, 172 Neb. 477, 493, 110 N.W.2d 58, 68 (1961).

⁴⁸ *Crane v. Board of County Comm'rs*, 175 Neb. 568, 122 N.W.2d 520 (1963); *Graham v. Graybar Elec. Co.*, 158 Neb. 527, 63 N.W.2d 774 (1954); *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 13 N.W.2d 634 (1944). However, a regulation will be invalidated if it creates an unnecessary hardship. "An unnecessary hardship exists when all the relevant factors taken together convince that the plight of the location concerned is unique in that it cannot be put to a conforming use because of the limitations imposed upon the property by reason of its classification in a specific zone." *Peterson v. Vasak*, 162 Neb. 498, 508, 76 N.W.2d 420, 426 (1956).

⁴⁹ See cases cited notes 50 and 51 *infra*.

⁵⁰ 155 Neb. 723, 53 N.W.2d 543 (1952).

⁵¹ 130 Neb. 543, 265 N.W. 530 (1936). See also *Panebianco v. City of Omaha*, 151 Neb. 463, 37 N.W.2d 731 (1949).

mitted one person to construct a gas station but prohibited another from doing so, was held to be discriminatory. It should be noted, however, that an ordinance permitting no service stations in the district would probably be upheld.⁵²

While zoning may affect property interests, it cannot operate retroactively in Nebraska to exclude uses legally maintained before the ordinance.⁵³ Such "nonconforming uses" were given full protection by state legislatures and courts in the early zoning regulations.⁵⁴ Apparently this protection resulted from fear that attempts to eliminate such uses could be invalidated as confiscatory and courts generally felt that it would be unjust to prohibit property use which was lawful in operation before an ordinance became effective.⁵⁵ Furthermore, there was a belief that undesirable uses eventually would disappear as ordinances prohibited future expansion or alteration. Contrary to this belief, the existing nonconforming uses were strengthened, because the zoning ordinance effectively created a monopolistic advantage by preventing similar uses from entering into the district.⁵⁶

To eliminate nonconforming uses, the Nebraska Legislature has authorized zoning authorities to make "reasonable provisions regarding nonconforming uses and their gradual elimination."⁵⁷ Under this authorization, the "reconstruction"⁵⁸ and "abandonment"⁵⁹ methods have been utilized. Even when construed liber-

⁵² NEB. REV. STAT. § 23-162 (Reissue 1962), which provides in part: "All such regulations shall be uniform for each class or kind of buildings or structures throughout each district, but the regulations in one district may differ from those in other districts so long as the regulations are designed to promote the public health, public safety and public welfare."

⁵³ *Schlientz v. City of North Platte*, 172 Neb. 477, 110 N.W.2d 58 (1961); *Board of County Comm'rs v. Petsch*, 172 Neb. 263, 109 N.W.2d 388 (1961); *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944). The *Cassel* case was discussed in Comment, 30 IOWA L. REV. 135 (1944).

⁵⁴ 1 YORLEY, *op. cit. supra* note 4, at 362.

⁵⁵ *E.g.*, *Jenney v. Hynes*, 282 Mass. 182, 184 N.E. 444 (1933).

⁵⁶ Comment, *The Elimination of Nonconforming Uses*, 1951 WIS. L. REV. 685.

⁵⁷ NEB. REV. STAT. § 23-161 (Reissue 1962).

⁵⁸ "Any non-conforming structure or use that is destroyed by fire, accident, or natural causes to the extent of more than 50% of its assessed valuation, may not be rebuilt except for a conforming use." KEARNEY COUNTY, NEB., ZONING REGULATION § 502 (1963).

⁵⁹ "If any non-conforming use of land, building, or structure is abandoned for a period exceeding one year, no non-conforming use may be re-

ally, these tools share the common defect of being dependent upon fortuitous events.⁶⁰ As a result, any hope for eliminating these nonconforming uses is virtually nonexistent through the use of these tools.⁶¹

Comparison of Nebraska decisions with those of other jurisdictions demonstrates the greater tendency of other courts to validate zoning ordinances. Where other courts have construed zoning power to include public convenience, general prosperity, and aesthetics,⁶² the Nebraska court, while tacitly recognizing these elements,⁶³ has adhered to the original doctrine that zoning regulations must bear a reasonable relationship to the health, safety, or morals of the public. The Nebraska court, as well as other courts, has placed particular emphasis on the factual situation of each case. Factors such as character of the neighborhood,⁶⁴ rate of

established upon such land or within such building or structure." KEARNEY COUNTY, NEB., ZONING REGULATION § 503 (1963).

⁶⁰ Abandonment has also been frustrated in that the court may construe the time of abandonment as being determined by the intent of the landowner and not by the physical state of the premises. *Comstock v. New Britain*, 112 Conn. 25, 151 Atl. 335 (1930); *State ex rel. Schaetz v. Manders*, 206 Wis. 121, 238 N.W. 835 (1931).

⁶¹ A question that often arises concerning "nonconforming" uses is to what extent the uses have to be established prior to enactment of the ordinance to become a vested right. In *Board of County Comm'rs v. Petsch*, 172 Neb. 263, 109 N.W.2d 388 (1961), the owner of three acres had, prior to the passage of the zoning ordinance: (1) installed thirteen trailers; (2) staked out spaces for a total of fifty-nine trailers; and (3) constructed the utilities. The court held there was a vested right to continue the nonconforming use. In each case involving such a question, the court examines the surrounding conditions and circumstances.

⁶² See text accompanying note 17 *supra*.

⁶³ See, e.g., *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944); *Pettis v. Alpha Alpha Chapter of Phi Beta Pi*, 115 Neb. 525, 213 N.W. 835 (1927). Concerning zoning for aesthetics, see *Baker v. Somerville*, 138 Neb. 466, 293 N.W. 326 (1940). The defendants were building a home not in compliance with the minimum floor area restrictions and the Nebraska Supreme Court held the ordinance invalid because it was based on aesthetic motives. The court stated that "aesthetics alone for the purpose of zoning ordinances do not seem to be a source of police power . . ." *Id.* at 471, 293 N.W. at 328. (Emphasis added.) See Note, 35 NEB. L. REV. 143 (1955). In *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 13 N.W.2d 634 (1944), the Nebraska court stated in dictum that a similar restriction was valid because it was based upon public health, safety, and welfare.

⁶⁴ See, e.g., *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed*, 339 U.S. 960 (1949), *rehearing denied*, 340 U.S. 847 (1950). The petitioner had purchased land with the intent to

growth,⁶⁵ and the immediate loss to the owner are considered.⁶⁶ Consequently, it is difficult to predict whether the Nebraska court will hold a particular zoning ordinance valid.

IV. THE NEED FOR RURAL ZONING IN NEBRASKA

A. CONTROL OF URBANIZATION

At current growth rates, it is estimated that the United States will have approximately fifty million additional inhabitants by 1975, at least seventy per cent of whom are expected to live in suburbs.⁶⁷ This rapid growth in suburban areas will significantly affect the agricultural land of the nation. The most immediate effect is the direct absorption of rural land for home sites to sustain the expansion. Once residences are established in the suburbs, other urban elements follow. Industries follow to avoid heavy metropolitan taxes, as do various businesses established to service the new area.⁶⁸ Such suburban expansion without adequate zoning control has three serious consequences.

First, residences, retail businesses, and industry settle in the same areas causing instability in property values, especially resi-

construct a commercial development then permissible under the zoning ordinance, but prior to construction the area was rezoned as residential. The zoning ordinance was upheld because the facts showed that there was no commercial development in the immediate area. Compare *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944). In *Crane v. Board of County Comm'rs*, 175 Neb. 568, 122 N.W.2d 520 (1963), the Nebraska court denied the plaintiff's application to extend a trailer camp at a certain location which was zoned residential and excluded trailer camps. Adjacent to the location in controversy, the plaintiffs operated a motel and trailer camp which were established prior to the enactment of the ordinance. The court, noting the residential development, refused permission to extend the trailer camp because "many of the occupants may be transients who are not as interested in creating a desirable neighborhood influence as those persons who intend to live in the area for a long time." *Id.* at 575, 122 N.W.2d at 525.

⁶⁵ *E.g.*, *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950); *Baker v. Somerville*, 138 Neb. 466, 293 N.W. 326 (1940).

⁶⁶ *E.g.*, *Crane v. Board of County Comm'rs*, 175 Neb. 568, 122 N.W.2d 520 (1963); *Board of County Comm'rs v. Petsch*, 172 Neb. 263, 109 N.W.2d 388 (1961).

⁶⁷ *Taeuber, Rural Americans and the Rest of Us*, in USDA, *YEARBOOK OF AGRICULTURE* 13 (1963). See also *The Way the U.S. Is Growing—What It Means?*, U.S. News & World Report, Jan. 13, 1964, p. 82.

⁶⁸ See generally Whyte, *A Plan to Save Vanishing U.S. Countryside*, *Life*, Aug. 17, 1959, p. 88.

dential property.⁶⁹ This condition is often undesirable to residents, who then move on to new suburbs, consuming still more land and re-establishing the entire pattern.

Second, the pattern of these developments usually takes place along main highways or county roads decreasing their capacity by causing congestion and increasing road hazards. This ribbon pattern creates wide spread urban "sprawl" and results in public expense in the relocation of highways.⁷⁰

Finally, and probably most significant to the rural areas, suburban expansion not only absorbs a large quantity of land,⁷¹ but also the "flattest, least erodible, and most fertile farmlands."⁷² While the total number of acres absorbed per year may not appear significant, the percentage of productive farm land lost in the same period is substantial.⁷³ In this connection, it should be noted that once agricultural land is engulfed by suburban growth it is effectively irretrievable and the feasibility of restoring it to agricultural use is virtually nonexistent.

The increase of population in Nebraska has not been comparatively rapid, but, in accordance with the national trend, major growth has occurred around urban areas.⁷⁴ The growth pattern

⁶⁹ *E.g.*, the establishment of industry in a residential neighborhood reduces the value of residential property because of their inherent conflicts, such as noise, smoke, etc. See SOLBERG, *THE WHY AND HOW OF RURAL ZONING* (USDA, Bull. No. 196, 1958).

⁷⁰ See generally OTTOSON, *LAND USE POLICY AND PROBLEMS IN THE UNITED STATES* (1963); SOLBERG, *THE WHY AND HOW OF RURAL ZONING* (USDA, Bull. No. 196, 1958); Regan & Wooten, *Land Use Trends and Urbanization*, in USDA, *YEARBOOK OF AGRICULTURE* 62 (1963); Scofield, *Values and Competition for Land*, in USDA, *YEARBOOK OF AGRICULTURE* 64 (1963); Stocker, *Governmental Problems on the Urban Fringe*, 13 *AGRICULTURAL ECONOMICS RESEARCH* 117 (1961).

⁷¹ "The average rate of absorption of rural land by special-purpose uses during the 1950's was about 2 million acres a year. Cropland and grassland pasture were the source of about 40 percent of the land shifted to special-purpose uses since 1950." Regan & Wooten, *Land Use Trends and Urbanization*, in USDA, *YEARBOOK OF AGRICULTURE* 59, 62 (1963). These special-purpose uses include intensive uses, such as urban areas, and extensive uses, such as recreation or public installations and facilities.

⁷² SOLBERG, *THE WHY AND HOW OF RURAL ZONING* 22 (USDA, Bull. No. 196, 1958).

⁷³ See note 71 *supra*.

⁷⁴ Population of Nebraska, Urban and Rural, 1940 to 1960:

Class	1960	1950	1940
Total	1,411,330	1,325,510	1,315,834
Urban	766,053	621,905	514,148
Urban-farm		1,273	2,773

has also been haphazard as demonstrated by the ribbon districts along the highways outside the cities of Omaha and Lincoln. The problems are further compounded by the prediction that within the near future a "strip-city" will be established from Sioux Falls, South Dakota, along the entire eastern border of Nebraska, to Kansas City, Kansas.⁷⁵ In the absence of control, rural-urban conflicts would inevitably occur in this predicted "strip-city."

B. PREVENTION OF UNREALISTIC TAX ASSESSMENT AND UNEQUAL COST OF GOVERNMENT SERVICES

Uncontrolled suburban development has caused an overburdening shift of property taxes to nearby farmers in some instances. In recent years, taxes on farmlands in communities affected by suburban developments have averaged at least twice as high on farms outside the zone of influence, and the former have been increasing about twice as rapidly as the latter.⁷⁶ Tax increases evolve as suburban development pushes out into the countryside. The demand for space to meet urban needs inflates undeveloped rural land to values far greater than can be supported on an agricultural basis. Tax assessments, which are based upon market value, undergo a corresponding inflation resulting in subplanning because the farmer cannot afford to farm.⁷⁷

Rural	645,277	703,605	801,686
Rural-nonfarm	336,518	312,170	306,239
Rural-farm	308,759	391,435	495,447
Percent Distribution	100.0	100.0	100.0
Urban	54.3	46.9	39.1
Rural	45.7	53.1	60.9
Rural-nonfarm	23.8	23.6	23.3
Rural-farm	21.9	29.5	37.6

The chart is found in 1962 NEBRASKA BLUE BOOK 599.

⁷⁵ *The Way the U.S. Is Growing—What It Means?*, U.S. News & World Report, Jan. 13, 1964, p. 82. The article predicts a population by 1970 of 2.4 million which is a 17% increase over the 1960 population of 2.1 million. The University of Nebraska College of Architecture is currently making a study concerning the validity of this prediction.

⁷⁶ Stocker, *supra* note 70, at 118. See also HOUSE, PREFERENTIAL ASSESSMENT OF FARMLAND IN THE RURAL-URBAN FRINGE OF MARYLAND (USDA, Econ. Research Serv., 1961); Waldo, *Farming on the Urban Fringe*, in USDA, YEARBOOK OF AGRICULTURE 139 (1963); FARM REAL ESTATE TAXES: RECENT TRENDS AND DEVELOPMENTS (USDA, Agricultural Research Serv., RET-1, 1961).

⁷⁷ To meet this problem, many states have passed statutes which give preferential assessment to farmland. *E.g.*, CAL. REV. & TAX CODE § 402.5 (Supp. 1964) provides: "In assessing property which is zoned and used exclusively for agricultural, airport or recreational purposes, and as to

The tax assessment problem, described above, does not exist in Nebraska at the present time. Although the Nebraska Supreme Court has construed actual value of farm property to mean the market value,⁷⁸ tax assessors, in practice, raise the valuation only when the new use has become a "use in fact." Thus, the valuation of land in demand for urban subplatting is not increased until the urban uses have been realized.⁷⁹ The possibility, however, always exists that Nebraska farmers living close to urban centers might experience unjust tax assessment in the future.

Although market value of rural property in development areas increases due to speculated uses, the actual value of existing agricultural use often decreases due to special burdens imposed upon such land. As suburbs begin to evolve in a rural area, public expenses are incurred to provide adequate fire protection, police surveillance, road maintenance, and sewage and water facilities required by the growing population. Other costs indirectly occur through

a lowering of the underground water table, as a result of pumping to supply scattered subdivisions; more frequent flooding of farmlands because of rapid runoff from roofs and streets of subdivisions;

which there is no reasonable probability of the removal or modification of the zoning restriction within the near future, the assessor shall consider no factors other than those relative to such use." Assessment in this manner, however, protects the land speculator through his acquiring the land, leasing it back to a farmer, and waiting until the possibility of urban development has become a reality. With less taxes in this period, the speculator's profit is increased. Thus, productive land should be zoned agricultural to keep taxes down, plus thwarting speculation, and less productive land should be zoned commercial or residential and should be taxed higher to keep the cost of land down and to induce subplatting.

⁷⁸ *Boyd County v. State Bd. of Equalization & Assessment*, 138 Neb. 896, 296 N.W. 152 (1941); *Schulz v. Dixon County*, 134 Neb. 549, 279 N.W. 179 (1938).

⁷⁹ County Assessor Joe C. Stolinski of Omaha, Nebraska, described the assessment process in a newspaper interview: "A builder goes into what used to be farm land and develops it. . . . The first assessment on the occupied lots is based on the total value of the areas divided by the number of lots. . . . Then the area is built up. More people move in. Paving, sewer and other utilities are put in. *That's when the realistic value is placed on the lot.*" *Omaha World Herald*, March 23, 1964, p. 2, col. 4. (Emphasis added.) NEB. REV. STAT. § 77-201 (Reissue 1962) provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value." With the market value of farm land increasing with the suburban expansion, the current practice of assessment is questionable in view of the Nebraska Supreme Court's interpretation. See note 78 *supra*.

injury to irrigated crops because of pollution to streamflows; and injury to crops because of air pollution.⁸⁰

Damage to farming operations and cost of providing added public services substantially fall upon the surrounding farm owners.

Support of rural school districts in rapidly growing regions presents another potential burden to farmers within such districts. The establishment of many new families within the confines of a school district increases the mill levy. It does not tax the imagination to predict the serious consequences accompanying the establishment of a trailer camp of thirty or more young families within a small rural school district. With the trailer camp providing very little financial support, the additional cost of education made necessary by such a camp would fall upon the surrounding farm owners.⁸¹

Perhaps the most unfortunate facet of the foregoing problems is the inability on the part of individual farmers to insure the stability of their agricultural use. Without adequate control, the rural land owner is subject to an unguided and damaging suburban expansion without regard to the farming interests.

C. DEVELOPMENT OF RECREATIONAL AREAS

The industrialization and subsequent urbanization of this country has greatly altered the living habits of its citizens. Society has become extremely mobile. Working hours are continuously being shortened, leaving individuals more leisure time to enjoy a

⁸⁰ SOLBERG, *THE WHY AND HOW OF RURAL ZONING* (USDA, Bull. No. 196, 1958).

⁸¹ An example of this problem was described to me in an interview with Mr. Douglas Brogden of the Lincoln-Lancaster County Zoning Commission. An individual had made an application to the Commission to construct a trailer camp (100 trailers or more) at a site within a small rural school district composed of fifteen or more students. Since the county was zoned, the inevitable problem was avoided. In the absence of zoning, he stated, the cost of providing educational facilities would have indeed been burdensome upon the surrounding farm owners.

Educational expenses are also a problem for small communities near large urban centers. An example is seen by examining the rise of the mill levy at Papillion, Nebraska, with the establishment of a large residential development.

	Assessed Valuations	Mills Levied
1960-61	6,191,519	31.00
1961-62	7,743,645	44.00
1962-63	9,695,683	46.00

See the NEBRASKA EDUCATIONAL DIRECTORY for the listed years.

high standard of living. The increasing population and growing congestion in urban areas, moreover, have caused a growing psychological desire among urban dwellers to escape from their environment into a more relaxed atmosphere. The result has been a tremendous demand for outdoor recreational facilities.⁸²

A recent study by the United States Department of Agriculture points out Nebraska's role in this demand by indicating that American farms and ranches possess the greatest potential for meeting future recreational needs of the country.⁸³ State studies indicate that development of this recreational source would provide

farm ponds for fishing and boating, picknicking or camping areas in woodlands, playgrounds and parking areas on fields and open spaces, food and lodging for paying guesting in the farm home or in new facilities, and other services city people want from rural areas.⁸⁴

To encourage recreational development of farms and ranches, the federal government has provided loans to rural property owners for development of suitable facilities.⁸⁵

Also significant for Nebraska is its potential as a resource for a variety of recreational areas. The state has recognized this fact and is making an effort to promote historical and recreational areas. Long-range plans include "reservoir development, access facilities to recreational areas, boating facilities, restoration of antelope herds, the building of lakes and development along the Missouri River."⁸⁶

⁸² "Nine-tenths of the American population participated more than 4 billion times in one or another of 17 forms of outdoor recreation in the summer of 1962. Very likely the participation will be three times greater than that before the year 2000" Johnson & Tharp, *Meeting the Demand for Outdoor Recreation*, in USDA, *YEARBOOK OF AGRICULTURE* 309 (1963). See generally USDA, *YEARBOOK OF AGRICULTURE* 297-364 (1963); Johnson, *Outdoor Recreation and Resource Conservation*, 18 J. SOIL & WATER CONSERVATION 47 (1963).

⁸³ Johnson, *supra* note 82.

⁸⁴ *Ibid.* See also JOHNSON, *PRIVATE ENTERPRISE IN THE DEVELOPMENT OF OUTDOOR RECREATION* (USDA, Econ. Research Serv., 1962); JORDAN, *OPPORTUNITIES FOR IMPROVING RURAL-FAMILY INCOME THROUGH RECREATION ENTERPRISES* (USDA, Econ. Research Serv., Bull. No. 673, 1963); WITTE, SOLBERG & MARTIN, *LAND-USE PLANNING AND ZONING IN ARKANSAS RURAL AREAS: LEGAL AND ECONOMIC ASPECTS* (USDA, Econ. Research Serv., Bull. No. 657, 1962).

⁸⁵ "This whole problem of recreation is going to be one of our most promising and important areas of human activity the next 10 or 15 years." Address by President John F. Kennedy, University of North Dakota, Sept. 25, 1963.

⁸⁶ NEBRASKA LEGISLATIVE COUNCIL COMMITTEE REPORT No. 107, 12 (1960).

Effective growth of recreational areas within the state will, however, depend greatly upon the control exerted over other uses of rural property. The state must insure that potential recreation sites are not lost to other uses less adapted to the areas. Control is necessary, moreover, to prevent degeneration of recreational areas, once established, by an influx of undesirable uses into and around such regions.

V. SUGGESTED LEGISLATION FOR RURAL AREAS

A. ZONING PROVISIONS

At the present time, incorporated areas have statutory authority to zone regions, within limits, outside their municipal boundaries.⁸⁷ The objective of such extraterritorial zoning, however, is not to protect or promote rural uses, but to prevent uses undesirable to urban areas from becoming established before the city expands into the area. Nebraska counties are also authorized to zone areas within their jurisdictions,⁸⁸ but the enabling statutes are similarly urban-oriented in objectives⁸⁹ and methods.⁹⁰ While the

⁸⁷ Nebraska statutes giving jurisdiction over zoning, platting, streets, sewers, and construction are as follows: NEB. REV. STAT. §§ 17-1001 to -1003 (Reissue 1962) (villages and second class cities—within one-half mile of village or city limits); NEB. REV. STAT. §§ 16-901 to -904 (Reissue 1962) (first class cities—within one mile of city); NEB. REV. STAT. §§ 15-901 to -902 (Reissue 1962) (primary cities—within three miles of city); NEB. REV. STAT. §§ 14-116, 14-418 to -419 (Reissue 1962) (metropolitan cities—within three miles of city).

⁸⁸ NEB. REV. STAT. § 23-114 (Reissue 1962): "The county board shall have power to adopt by a majority vote of its members-elect a zoning resolution, which shall have the force and effect of law . . ." Rural zoning in Nebraska began in 1941 with the creation of a State Zoning Agency to coordinate zoning activities in defense areas. Neb. Laws c. 131, § 495, at 503 (1941). The purpose of the act was to prevent undesirable elements from developing around military establishments. The agency was empowered to group cities, villages, counties, or portions thereof into state zoning districts, whenever a military reservation was, or was about to be, located in such areas. After the war, however, the State Zoning Agency dissolved. With the statutes allowing the counties to zone, further legislation was enacted which allowed a city of primary size and the county in which it was situated to coordinate their activities in zoning. NEB. REV. STAT. §§ 23-174.01 to -174.09 (Reissue 1962).

⁸⁹ NEB. REV. STAT. § 23-163 (Reissue 1962) provides: "[T]o lessen the congestion in the streets, roads, and highways, 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 lands, to avoid undue concentration of population, and to facilitate the adequate provision of transportation, water, sewage,

county and extraterritorial zoning statutes allow control of urban growth, they do not authorize protection of agricultural or recreational areas as a consideration in determining the designation of zoning districts.⁹¹ To meet the rural needs of the state, therefore, new comprehensive legislation must be enacted.

Legislation authorizing reasonable zoning to promote agricultural and recreational uses would be valid under the federal constitution. The broad interpretation given the police power by the United States Supreme Court would include all zoning necessary to meet the rural needs of Nebraska.⁹² Although zoning for these purposes has been sustained in other states,⁹³ attention must still

school, parks, and other public requirements. Such regulations shall be made . . . with a view to conserving the value of buildings and encouraging the most appropriate use of land" The special 1957 legislation added the phrase "with a view to conserving property values." NEB. REV. STAT. § 23-174.01 (Reissue 1962). It is to be noted that the protection and fostering of agriculture or recreation are not mentioned as a purpose of county zoning.

⁹⁰ The methods of zoning are provided in NEB. REV. STAT. § 23-161 (Reissue 1962): "[T]he county boards are hereby empowered to regulate and restrict the location, height, bulk and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures, automobile trailers, house trailers and land for trade, industry, business, residence or other purposes, redistricting the location of trades and industries and the location of buildings for specific uses; and the county boards may also establish setback building lines in all districts" While these methods could be used to alleviate some of the rural problems, they cannot be used for the specific purpose of retaining productive land in agriculture.

⁹¹ This lack of authorization to protect and to foster agriculture or recreation may be the reason for the inactivity of county zoning activities. At the present time only five of the ninety-three counties have enacted ordinances (Dawson, Hall, Lancaster, Sarpy, and Washington), Kearney County has proposed a zoning resolution, and Saunders and Douglas are in the process of creating a zoning ordinance. On a more favorable note, two counties have provided for flood plain zoning which is allowed in the enabling statute. See NEB. REV. STAT. § 23-161 (Reissue 1962); SARPY COUNTY, NEB., ZONING REGULATION § 15(B)(a) (1959); WASHINGTON COUNTY, NEB., ZONING RESOLUTION § 16 (1962). Flood plain zoning controls development along streams and rivers which flood periodically. By such zoning, property damage is reduced by excluding the erection of structures in these flood prone areas. For further discussion, see Beuchert, *Zoning on the Flood Plain*, 49 A.B.A.J. 258 (1963); Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959).

⁹² See text accompanying pt. II *supra*.

⁹³ For cases and examination of this much discussed area, see Baker, *The Constitutionality of Zoning Laws*, 20 ILL. L. REV. 213 (1925);

be directed to the propriety of such zoning as it may be viewed by the Nebraska Supreme Court.

Viewing the limitations which it has placed upon zoning power, the Nebraska Supreme Court might be reluctant to extend the zoning power further than presently allowed. The court, however, has stated that the legislature or its delegated authority "is the sole judge as to what laws should be enacted for the welfare of the people, and as to whom and how such police power should be exercised."⁹⁴ With the legislature determining that zoning power can be exercised in controlling agricultural and recreational areas, the *McNally* rule, requiring that zoning power may be used only for expressly stated purposes, would be satisfied.⁹⁵ Validity may also be predicted from the *Schlientz* opinion which displayed the court's favorable tendency to allow zoning to prevent future problems.⁹⁶ The fact that Nebraska is an agricultural state might also incline the Nebraska Supreme Court toward favoring the validity of such legislation.⁹⁷

While zoning for the fostering of agriculture and recreation may be valid, the constitutionality of rural zoning ordinances would be determined by the principles also applicable to urban ordinances. As enunciated by the Nebraska court, each zoning ordinance must bear a reasonable relationship to health, safety, morals, and general welfare, and must not be arbitrary, confiscatory, or discriminatory. Applying these vague principles, the Nebraska court has examined the particular circumstances of each case rather than stating standards or tests.⁹⁸ The validity of rural ordinances, therefore, would be determined upon the same basis. To have effective and valid rural zoning, revisions of the enabling statutes are suggested.

Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199 (1955); Phair, *Planning and Zoning: Principles and Practice*, 29 TENN. L. REV. 514 (1962); Reps, *The Zoning of Underdeveloped Areas*, 3 SYRACUSE L. REV. 292 (1952); Trackett, *Rural Zoning in Wisconsin*, 25 NAT'L MUNIC. REV. 609 (1936); Wershow, *Agricultural Zoning in Florida—Its Implications and Problems*, 13 U. FLA. L. REV. 479 (1960); Wertheimer, *Constitutionality of Rural Zoning*, 26 CALIF. L. REV. 175 (1938); Comment, 37 HARV. L. REV. 834 (1924); Comment, 8 SYRACUSE L. REV. 230 (1957); Note, 45 IOWA L. REV. 743 (1960); Note, 40 MINN. L. REV. 286 (1956); Note, 29 ROCKY MT. L. REV. 202 (1957).

⁹⁴ *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 461, 13 N.W.2d 634, 640 (1944).

⁹⁵ See text accompanying note 31 *supra*.

⁹⁶ See text accompanying note 47 *supra*.

⁹⁷ BEUSCHER, *LAND USE CONTROLS* 133 (1955).

⁹⁸ See text accompanying note 48 *supra*.

The avowed purpose of protecting and promoting agriculture and recreation should be incorporated into the county zoning statutes. The South Dakota statute is representative of the applicable language:

Such regulations shall be made in accordance with a comprehensive plan and designed for any or all of the following purposes: To protect and guide the development of rural areas; to secure safety from fire and other dangers; to protect the tax base or decrease tax delinquency; to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provision of transportation, roads, water supply, drainage, sanitation, education, recreation, police protection, parks, or other public requirements; to lessen governmental expenditures; to conserve and develop natural resources; to prevent soil erosion; to foster the state's agriculture or other industries; or to protect the food supply. Such regulations shall be made with a reasonable consideration of the character of the district and its peculiar suitability or unsuitability for particular uses.⁹⁹

With this statute, traditional zoning tools can be used to guide urban development into a more orderly pattern with due consideration given to agricultural productivity in the choice of lands to be developed. Zoning works at the very source of rural problems by separating agricultural uses from nonagricultural uses, thus avoiding increased tax assessments, higher public expenses, and uneconomical use of land. Justification rests in the argument that where there is a sizeable difference between individual (private) and social (public) costs of a particular action affecting land use, intervention by the public or the government is necessary to reduce or to prevent this detrimental public cost.¹⁰⁰ One commentator has said:

At the very least, society should be authorized to prohibit land-use patterns that will significantly increase costs of providing necessary public services, or to charge the full costs of providing such services to landowners whose decisions are responsible for raising costs of the services.¹⁰¹

⁹⁹ S.D. CODE § 12.20A03 (Supp. 1960). See also MINN. STAT. ANN. § 394.09 (1957); WIS. STAT. ANN. § 59.97 (1957).

¹⁰⁰ In other words, where the cost to the public (providing fire protection, police surveillance, water facilities) is excessive, the use of control should be allowed despite the loss to the private owner of profits in subplattling his land.

¹⁰¹ WITTE, SOLBERG & MARTIN, LAND-USE PLANNING AND ZONING IN ARKANSAS RURAL AREAS: LEGAL AND ECONOMIC ASPECTS 8 (USDA, Econ. Research Serv., Bull. No. 657, 1962). Another author stated that "when these private volitional controls produce consequences which . . . are too costly for our society to bear, then I know of no alternative but the establishment of controls which reduce the potential freedom of private persons to do with their land as they see fit." Smith, *The*

A statute similar to that of South Dakota would also promote and preserve recreational areas in Nebraska. A number of examples can be mentioned in which zoning would achieve these results. Around state parks, lakes, historical interest points, and other recreational areas zoning could be used to prevent the establishment of unwanted uses. With approximately one million acres of forest land in Nebraska, zoning could be used to prohibit the establishment of urban uses. To preserve hunting and fishing areas, zoning could exclude uses which would conflict with this type of recreation. Scenic areas in Nebraska could be aided by the regulation of billboards along the highways.

Another possible use of rural zoning is control of erosion with adjustment of land uses in light of soil characteristics. Rural zoning, in this sense, has been defined as involving "the division of rural areas into districts and the adoption of regulations setting forth the *strictly rural uses of land* that are permitted and prohibited in each district."¹⁰² By this definition, rural zoning attempts to develop the "best uses" of the soil, thus preserving the soil and its fertility. To attain this objective, planning and zoning would entail detailed study of the land's physical characteristics and fertility components. By such studies, use of land (e.g., grazing or crop production) and the method of farming (conservation practices) could be determined.¹⁰³

While such zoning is not a new idea, it has been sparsely used. In Wisconsin, the problem of cutover land left by the lumber barons and settlers attempting to farm this submarginal land led to passage of statutes which allowed counties to zone land for forestry, grazing, or recreation.¹⁰⁴ Furthermore, the state actually relocated settlers to allow the development of these submarginal areas for the forest industry.

Land use regulation has also been allowed by a few states through the Standard Soil Conservation Districts which have two types of powers: (1) power to assist land operators in combatting erosion on a voluntary, cooperative basis, and (2) power to *compel*

Dilemma Faced by Municipalities in Controlling Nearby Land Developments, 40 NEB. L. REV. 318, 322 (1961). See also Calrow, *The Planner Faces a New Job*, 25 NAT'L MUNIC. REV. 613 (1936); Wertheimer, *Constitutionality of Rural Zoning*, 26 CALIF. L. REV. 175 (1938).

¹⁰² Warp, *The Legal Status of Rural Zoning*, 36 ILL. L. REV. 153 (1942).

¹⁰³ Klingebiel, *Land Classification for Use in Planning*, in USDA, YEAR-BOOK OF AGRICULTURE 399 (1963).

¹⁰⁴ Wis. Laws c. 279, p. 356 (1929). The present provision is WIS. STAT. ANN. § 59.97 (1957).

proper land use.¹⁰⁵ The latter power has seldom been used because of the success in using educational means and technical assistance. Where used, however, as in Colorado, the power to compel proper land use has been upheld as constitutional in lower court decisions.¹⁰⁶

Zoning for land use adjustment or control of conservation practices may be justified constitutionally by analogy to the use of the police power in controlling waste or destruction of other natural resources.¹⁰⁷ Under that power, regulations have been sustained requiring landowners to perform certain operations at their own expense.¹⁰⁸ The United States Supreme Court, considering the constitutionality of a cedar rust law,¹⁰⁹ stated that the state could choose between the preservation of apple trees or cedar trees where both existed in close proximity:

When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in judgment of the legislature, is of greater value to the public . . . [F]or it is obvious that there may be . . . a preponderant public concern in the preservation of

¹⁰⁵ See BEUSCHER, *op. cit. supra* note 97, at 127.

¹⁰⁶ *Horse & Rush Creek Soil Erosion Dist. v. Stevens*, Civil No. 1199, D., Elbert County, Colo., Aug. 12, 1943; *Smoky Hill Soil Erosion Dist. v. Zorn*, Civil No. 3426, D., Kit Carson County, Colo., July 2, 1941. For discussion of these cases and land use regulation by soil conservation districts, see Ferguson, *Nation-Wide Erosion Control: Soil Conservation Districts and the Power of Land-Use Regulation*, 34 *Iowa L. Rev.* 166 (1949); Hannah, *Legal Devices for Controlling the Use of Farmland*, 38 *VA. L. REV.* 451 (1952); Comment, 50 *YALE L.J.* 1056 (1941).

¹⁰⁷ "[T]he protection and conservation of the natural resources of the state are in the general welfare and serve a public purpose, and so constitute a reasonable exercise of the police power." *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 *Cal. 2d* 489, 529, 45 *P.2d* 972, 988 (1935).

¹⁰⁸ *E.g.*, *Chaput v. Demars*, 120 *Kan.* 273, 243 *Pac.* 311 (1926) (statute requiring property owners to trim hedges abutting public highways); *Greenwood v. City of Lincoln*, 156 *Neb.* 142, 55 *N.W.2d* 343 (1952) (ordinance requiring destruction and removal of weeds upheld as within the police power for the benefit, comfort, and health of the public). In the interest of conservation, see *Bandini Petroleum Co. v. Superior Court*, 284 *U.S.* 8 (1931) (statute prohibiting the waste of natural gas and crude oil); *Geer v. Connecticut*, 161 *U.S.* 519 (1895) (regulations of land use in the interest of preserving fish and wildlife); *Eccles v. Ditto*, 23 *N.M.* 235, 167 *Pac.* 726 (1917) (statute assuring adequate drainage of farm lands).

¹⁰⁹ *Miller v. Schoene*, 276 *U.S.* 272 (1928). See *Upton v. Felton*, 4 *F. Supp.* 585 (D. Neb. 1932). A Nebraska statute on destroying cedar trees with cedar rust near apple trees was upheld. The court stated that the regulation was "something in the nature of rural zoning." *Id.* at 589.

the one interest over the other And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.¹¹⁰

This case is analogous to the situation where a farmer fails to use such conservation practices as waterways, terraces, or drainage ditches, thereby causing damage to neighbors' lands through the rapid runoff of water. Applying the above quoted reasoning, the police power could arguably be invoked to halt farming malpractices and to implement conservation practices. Furthermore, failure to practice "best uses" of land could arguably damage society's interest in being protected from harmful, uneconomical uses of land. With conservation malpractices or improper land use, the future food supply may be endangered and the state's prosperity damaged. Such arguments have been used by legislatures in establishing, and the courts in sustaining, regulations concerning the control and preservation of forests, natural gas, and water.¹¹¹

Despite the aforementioned arguments, the Nebraska Supreme Court would probably strike down such zoning activities as being confiscatory. Compelling a landowner, for instance, to use his land for grazing rather than crop production or to adopt certain conservation practices would probably be regarded by the Nebraska court as beyond valid exercise of zoning power.¹¹² Present reaction would be adverse, but future circumstances may necessitate such regulation. While land may appear to be in bountiful supply at the present time, future population growth, with its attendant needs, may lead to the necessity of controlling conservation practices or land use adjustment. As expressed by the Maine Supreme Court: "[I]f the owners of large tracts can waste them at will without state restriction, the state and its people may be helplessly impoverished and one great purpose of government defeated."¹¹³

B. REVISIONS TO SUPPLEMENT ZONING ACTIVITIES

First, effective rural zoning requires legislation to include a regional zoning commission or a state zoning agency for the following purposes:¹¹⁴ (1) to give advice and technical assistance in the

¹¹⁰ *Miller v. Schoene*, *supra* note 109, at 279-80.

¹¹¹ See cases collected in *BEUSCHER*, *op. cit. supra* note 97, at 133.

¹¹² It would be presumptuous to assume that the present legislature would even consider enacting legislation to allow such control.

¹¹³ *In re Opinion of the Justices*, 103 Me. 506, 511, 69 Atl. 627, 629 (1908).

¹¹⁴ Nebraska previously had a State Zoning Agency. See note 88 *supra*. See generally McDougal, *Regional Planning and Development: The*

planning program and the creation of county zoning ordinances; (2) to coordinate and insure county zoning activity;¹¹⁵ and (3) to allocate financial aid to counties in their zoning activities. Regional zoning would insure coordinated planning, thus avoiding unrelated and dissimilar county to county planning.

Second, the doctrine of "amortization" or "outlawing" of nonconforming uses should be incorporated within the rural zoning statutes. Amortization is the process of eliminating nonconforming uses over a reasonable amount of time and thereby enabling the owners to recoup their losses.¹¹⁶ A typical statute authorizing this scheme states:

The county commissioners may in any zoning ordinance 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 or formulae 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.¹¹⁷

Courts sustaining amortization schemes have insisted that the elimination period be reasonable so the owner's loss would be small in comparison with the benefit to the public.¹¹⁸ In the recent decision

Process of Using Intelligence, Under Conditions of Resource and Institutional Interdependence, for Securing Community Values, 32 IOWA L. REV. 193 (1947); Wehrwein, *County Zoning and Consolidation*, 11 WIS. L. REV. 136 (1936).

¹¹⁵ This would be absolutely necessary in light of present county inactivity and the predicted "strip city" along Nebraska's eastern border. Zoning inactivity is sometimes caused by the elected zoning officials who are sensitive to adverse public opinion. At the time of this writing, a heated discussion was taking place in Kearney County by farmers who oppose the suggested county zoning ordinance. For this reason, state control may partially solve the problem by reducing political pressure.

¹¹⁶ For discussion of amortization, see generally Anderson, *The Nonconforming Use—A Product of Euclidean Zoning*, 10 SYRACUSE L. REV. 214 (1959); Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305 (1955); Note, 7 STAN. L. REV. 415 (1955); Comment, 57 NW. U.L. REV. 323 (1962); Comment, 4 VILL. L. REV. 416 (1959); Comment, 1955 WIS. L. REV. 685.

¹¹⁷ PA. STAT. ANN. tit. 16, § 5233 (1956). See also COLO. REV. STAT. ANN. § 106-2-19 (1953); KAN. GEN. STAT. ANN. § 19-2919 (1949).

¹¹⁸ "Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. . . . The loss he [owner] suffers, if any, is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small

of *Wolf v. City of Omaha*,¹¹⁹ the Nebraska court upheld as constitutional and reasonable an ordinance providing for the amortization of dog kennels within the very liberal period of five years. What the court's attitude would be toward shorter amortization periods of more expensive uses is unknown. Favor toward shorter amortization periods, however, can be inferred from the court's citation of many decisions upholding short amortization periods¹²⁰ and the listing of many cities using amortization as a zoning tool.¹²¹

Third, the method of acquiring development rights or easements for the preservation of recreational areas should be considered.¹²² The easement is given either for appropriate consideration or by gift, and once a county has acquired the easement, any right to develop such land for commercial, industrial, or residential purposes lies solely with the county, since the landowner could use the land only for agricultural or recreational purposes.

Some states would hesitate to adopt such a program unless public funds were plentiful. Also, many states, including Nebraska, would rather buy the land in fee in order to have complete control in developing an area for recreation.¹²³ With the easement method, however, the original cost may be less than the fee cost, and there would be no expense for maintenance of the land.

when compared with the benefit to the public." *Los Angeles v. Gage*, 127 Cal. App. 2d 442, 460, 274 P.2d 34, 44 (1954).

¹¹⁹ *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964).

¹²⁰ Among the decisions cited were *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950) (amortization of nonconforming filling station within six months held valid); *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929), *cert. denied*, 280 U.S. 556 (1929) (amortization of nonconforming grocery store within one year held valid).

¹²¹ The power of eminent domain offers another possibility in eliminating nonconforming uses in a shorter period of time. The power could be given to the zoning authority or even perhaps to the people within a particular zoned district. The first delegation might meet the problem of availability of funds and the later delegation might meet problems of neighborhood co-operation.

¹²² *E.g.*, CAL. GOV'T CODE §§ 6950-54. Section 6950 provides: "It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment." See Comment, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960).

¹²³ Interview with Mel Steen, Director of the State Game, Forestation & Parks Commission.

VI. CONCLUSION

By timely and appropriate action through zoning, nonfarm uses can be guided to less fertile lands; better soils for farming can be reserved; and both agricultural and urban uses can continue their growth. While Nebraska rural areas have not been acutely affected by the urban demands, to do nothing would be a serious mistake. Nebraska's situation was aptly expressed by an eminent zoning authority:

The urban fringe and the countryside beyond is in transition. In many areas the new pattern has not set, but it is "later than you think." The time for applying needed planning and zoning guidance has arrived. Tomorrow may be too late.¹²⁴

With effective rural zoning, the transition from rural to urban uses can be controlled to allow continued agricultural and recreational development.¹²⁵

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¹²⁴ Address by Erling D. Solberg, National Planning Conference, Oct. 12, 1953.

¹²⁵ "It augurs well for America, that, by one plan or another, Rural or County zoning is gaining in popularity and in area, for these steps may save the outlying districts from the sad situation . . . [of having] to rescue their lands after congestion, blight and injury have become rooted and imbedded." 2 METZENBAUM, LAW OF ZONING 1798 (2d ed. 1955).