

**A BASIS FOR REVISION TO THE KANSAS PLANNING
AND ZONING ENABLING STATUTES**

by

John Beekman Pine
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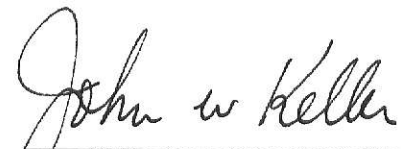
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Department of Regional and Community Planning

KANSAS STATE UNIVERSITY
Manhattan, Kansas

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Approved by:


Major Professor

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INTRODUCTION

This paper is about the Kansas Planning Enabling Statutes. It is the feeling of the author that these statutes need to be revised. The primary aim of this study will be to prove that this need exists, by demonstrating the problems inherent in the present law. These problems have been identified by local planning professionals knowledgeable in this field, as well as by national figures in planning and law.

A second aim of the paper will be to provide the reader with both a historical background of, and a look at, current enabling law. Enabling legislation will be traced back to its beginnings in Kansas. On the national level, the origins of the standard planning and zoning enabling acts will be examined, along with new approaches to land use law instituted by various states.

A major part of the paper will be devoted to the analysis of a questionnaire given to three planners, who are currently working in Kansas, and are recognized within their profession as proficient in the area of enabling law. They were asked a series of open-ended questions that were formulated on the basis of research into the American Law Institute's Model Planning Enabling Code, and into the Kansas Planning and Zoning Enabling Statutes. The information gathered from all of these sources will be used to suggest possible strategies to follow in modifying the present Kansas statutes.

CHAPTER ONE

THE NEED FOR REVISION

The Kansas Planning Enabling Statutes give local governments the authority to regulate land use, and provide guidelines for the administration of such regulations. With this authority, local governments can plan, zone, subdivide, and form Planned Unit Developments (PUDs). Typically, zoning and subdivision regulations are the first to be adopted; later, as the area develops, PUD regulations may follow.

PROBLEMS IDENTIFIED IN LEGISLATIVE HEARINGS

Because the enabling laws provide the framework on which all local land use regulations are based, it is important that they be as clear, concise, and up-to-date as possible. Yet planning officials involved in Kansas legislative hearings have identified the following problem areas in the statutes.¹

1) Planning commissions usually do not fully utilize the comprehensive plan. Often the plan is ignored, and in some cases may even come to be seen as a hindrance, rather than as a useful planning tool.²

In the Kansas enabling laws, the planning commission is the agency authorized to create the comprehensive plan, as well as to adopt it as "the official plan of the city."³ The governing body is barely involved; it is only required to "consider" the proposed plan, and to submit its

recommendations regarding it to the commission within sixty days. The statutes go on to say that "such plan...shall constitute the basis or guide for public action."⁴ Unfortunately, a plan conceived and adopted without the ongoing participation of the community's elected representatives may not reflect the desires of their constituents.

Many of the early planners believed that rational and consistent planning could only be achieved by separating it from the political machine. Their beliefs were incorporated into the Standard City Planning Enabling Act of 1928. This document, which set the course for almost all planning enabling law in the United States, advanced the concept that planning and politics do not mix. The stage was set for planning to be put on an ideological pedestal, where unfortunately it can have only limited impact. It remains much the same today, 54 years later.

2) Kansas enabling law contains no provision for the adoption of local policy statements by city commissions.⁵ Again, this reflects the lack of input by local officials into the long-term goals of the community. Over a period of time, this omission can lead to uncoordinated planning, since policies will tend to change to fit temporary conditions. This process can be seen at virtually any planning commission hearing or governing body meeting. The planning commission, having no set policies on which to base its decision, reviews each case on immediate rather than long-range conditions, as does the governing body. The result is often undirected growth, and conflicting land uses with the community.

One of the possible reasons for the lack of policy formation in local governments may be the reluctance of elected officials to commit themselves to a preordained path, especially with the existence of so many interest groups today.⁶ But policies can be drafted to be flexible,

leaving the official room to maneuver. One way to do this is to allow input from the community at large, through the use of public hearings especially designed for formulating policy. Another way might be to allow for joint sessions of planning and governing commissions, so that they may better exchange ideas. Whatever the device used, it is essential that some basis for community development be initiated and adhered to by the elected representatives of that community.

3) Zoning procedures are too complicated for the common citizen to understand, as anyone who has tried to decipher them can testify. A prime example is the procedure to initiate a zoning amendment. The process involves shuffling the proposal back and forth several times between the planning commission and the governing body.⁷ This complicated ritual was probably meant to ensure meaningful dialogue between the two bodies. Whether it does or not is questionable, because neither has any policy upon which to base its decisions, so each case is viewed on an individual basis. In many cases, the planning commission's only role is to legitimize the governing body's decision. In the meantime, the unnecessary complexity discourages citizen participation, and increases the likelihood of procedural mistakes that can lead to costly delays and litigation.

4) The laws governing the subdivision of land are inadequate. First, there is no mention in the statutes of the multiphase approval process (preliminary and final plat) that typically exists in many communities. Many planning officials feel that since this process is so widely utilized and endorsed throughout the state, it should be incorporated in the statutes as standard procedure.⁸

Second, some planning officials would like the authority to require "in lieu" payments for open space, parks, and schools and/or development

fees. This authority already exists to provide for the completion of certain utility improvements such as streets, sewers, and drainage. In the case of open space or other related public facilities, however, the jurisdiction may only require that the developer reserve or "dedicate" a certain percentage of the land for these uses. This percentage may not exceed one tenth of the land being subdivided, excluding streets, alleys, easements and other public ways. But many subdivisions are so small that even a ten percent dedication cannot fulfill the public facility needs of the new community, even though it takes a big chunk out of what the developer has to build on. In lieu payments for these facilities can be used by the local government to buy the needed land separately. Where there are several small subdivisions clustered together, their combined payments could purchase more total land than can be acquired from separate dedications.⁹

Finally, by providing few guidelines for the approval of subdivisions plats, the statutes have contributed to the lack of uniform standards for residential development. This does not mean that extremely specific guidelines should be incorporated into the law. Obviously, it is important that local communities have a fair degree of flexibility in the regulation of their subdivisions. Nevertheless, some general standards could be provided or referenced to in the statutes. This would be particularly helpful to joint city/county commissions, who sometimes find it difficult to agree on the formation of subdivision regulations. As one planning official puts it, "subdivision regulations by joint city/county commissions are a total disaster."¹⁰ Whether this is because the officials cannot get along, or because the two governing bodies cannot agree, is debatable and probably of little consequence. No law can mandate

cooperation, but with some guidelines at least there would be less to disagree on.

PROBLEMS IDENTIFIED IN THE LITERATURE

In their book, The States and Land Use Control, R. Robert Linowes and Don T. Allensworth discuss the need for changes in the enabling laws.¹¹ Some of the problems that are applicable to Kansas are:

1) Fragmented decision-making in the community. Most local governments have a less-than-unified strategy for land development, and much of this can be attributed to state enabling legislation. For example, in Kansas the laws are broken up into sections for planning and zoning in cities, in townships, and in counties. Also, within each section, planning, zoning, and subdivisions are separated from one another, implying that each is independent and exclusive of the others.¹² The result is a large amount of duplication and a fragmented decision-making process.

2) State enabling laws are too detailed. The enabling laws are overly concerned with minor planning and zoning considerations, particularly with procedural and administrative matters. For example, the Kansas enabling statutes specify the number of members on the planning commission, their length of service, and how often they should meet.¹³ It may be wise to fix the maximum term of planning commission members, but the other matters are best left to the judgment of the community.

On the other hand, some planning officials have complained that the statutes are not detailed enough in such areas as notice and hearing procedures, which they assert causes too many due process errors.¹⁴ But

even very explicit laws cannot eliminate the possibility of errors. It would be sufficient for the state to establish some widely accepted standards of due process and fair procedures, and leave it at that. The broader approach may well afford more protection to the general citizenry and private groups than excessively detailed legislation would.

3) Enabling legislation views zoning in negative terms. Formerly, zoning legislation emphasized what was not permitted. An ideal community was defined not in terms of what it was, but in terms of what it was not. In other words, zoning was used as a device to keep commercial uses out of residential neighborhoods.¹⁵

Today, the nature of zoning is typically seen in more positive terms and planning no longer is just an afterthought; planning sets the objectives and zoning carries them out. Of course, this ideal is not frequently achieved. If this philosophy is to be promoted, however, state enabling laws must be altered to accommodate it.

4) Enabling legislation excludes regional factors. Under state enabling legislation, and this is particularly true in Kansas, the context of planning and zoning decision-making is decidedly local. This isolation is legally sanctioned by the state legislature, a situation that fits in nicely with the anti-city feelings of the emerging suburbs, and the individualistic character of the rural population.

Communities throughout the country are increasingly critical of the metropolitan area, the region, and the state. This attitude is exemplified by the growing number of court cases dealing with matters such as exclusionary zoning and the regional growth responsibilities of local governments. The following case illustrates how the exclusion of regional factors in a local zoning ordinance can affect housing. In Southern

Burlington County NAACP v. Mount Laurel,¹⁶ the zoning ordinance of Mount Laurel, New Jersey, contained zones for industrial, single family, and commercial uses, plus a small area for one- and two-bedroom apartments. A developer applied for a zoning change to allow apartments of more than two bedrooms, but his request was denied. The case eventually came before the State Supreme Court, where Justice Hall contended that a community has an affirmative duty to provide its fair share of regional housing. By restricting the development of larger apartments, the town had, in effect, excluded larger families from settling in the area.

The Kansas statutes do include authorization for the establishment of joint or regional commissions in order to provide for "the unified development of the area, eliminate planning duplication, provide for community development, and promote economy and efficiency in the coordinated development of the area."¹⁷ The decision to join in a cooperative effort is entirely up to the jurisdictions themselves; an example is the cooperation between the City of Wichita and Sedgewick County. However, the statutes clearly state that "all legislative power with respect to zoning and other planning legislation shall remain with the governing body of the cooperating cities and counties."¹⁸ This makes it very clear that local control is still most important in Kansas.

5) Enabling legislation overlooks public facilities. Enabling legislation is aimed primarily at private uses and private property. Public uses are virtually overlooked, even though such public facilities as sewer lines, water systems, recreational networks, and mass transit have an important effect on both the timing and the location of development. At least one planning official in Kansas has suggested that if the capital improvements budget was more closely tied to planning, land

development might proceed in a much more reasonable and cost efficient manner.¹⁹

It has been a law of land use that growth tends to follow the construction of public facilities, which are usually not coordinated with the planning process. This causal effect can be clearly seen in the case of Petaluma, California. Once a small valley outside of San Francisco devoted primarily to dairy and poultry production, Petaluma is now part of the city's metropolitan area. Its change of status started with the construction of a road linking it to San Francisco. Within two years, 5000 people had moved into the area, living mostly in tract housing. By 1972, housing had become very tight. To protect the town's central area and establish orderly growth, the local officials formulated a citizens' growth strategy, tying the rate of public development to the maximum achievable rate of public utilities. Specifically, the program tried to limit the number of dwelling units by creating a series of concentric zones around the town and then limiting building permits in those zones. A citizens' board was established to ensure that different types of housing would be available in each zone, but a lack of rental and low-to-moderate income housing developed. On January 7, 1975, a suit was filed in the Federal District Court against Petaluma on the basis of the 11th amendment, and the 1866 Civil Rights Act.²⁰ The contention of the plaintiff, the Sanora Construction agency, was that by limiting the number of permits issued a year, the town was restricting the right of people to move into the area. The plaintiff noted that there were delays of up to three years between the initial request for a building permit and its subsequent approval. In addition, they asserted that low- and moderate-income groups were being excluded from the community, due to the insufficient number of

units available for them, and that this in effect was a violation of their civil rights. The plaintiff's case was upheld in the District Court, but later dismissed in the Circuit Court of Appeals.

It is obvious that the construction of the highway linking Petaluma with San Francisco drastically altered the character of the area. The state highway department and local highway agencies are exempt from local zoning regulations, as are most public facility agencies. This practice is meant to eliminate necessary red tape, but sometimes it causes more problems than it solves.

6) Planning and zoning are permissive. State enabling laws do not require planning, zoning, and subdivision controls, but "permit" them. The prevalent attitude in Kansas is to preserve this approach, though there have been proposals to create more incentives for planning at the local level. These incentives are typically based on the desire of most local governments to have more and greater regulatory power, for example, the power to initiate PUDs only when a comprehensive land use plan is in effect. Politically, this may be a better solution for Kansas. Nevertheless, some fairly convincing arguments still exist for mandating planning and zoning at the local level.

First, planning and zoning can improve land use and development patterns, eliminating problems that might arise without them. This is especially true in rural areas, where unplanned development, overflowing septic tanks, and indiscriminate removal of trees are possible. Second, if localities do not adopt proper ordinances, they are inviting state, and as exemplified by the Prairie Park debate, possibly even federal controls. Third, the absence of a planning and zoning ordinance can lead to control by some private power structure. Certainly, it is better to deal with land

use on a legal, rather than an unwritten and invisible, basis. The latter is often blatantly political, prejudiced, and simply unfair. Finally, planning and zoning force communities to think in advance about what they want and where they are going. This does not mean that all decisions are final, since the plan is meant to be flexible. It simply reflects the community's desire to provide itself with some guidance.

CONCLUSION

In conclusion, a review of the literature shows that the present Kansas enabling statutes have serious shortcomings. Among them are the absence of a comprehensive policy at the local level; the fragmentation of planning efforts by governmental bodies having overlapping jurisdictions; antiquated legislation that has failed to keep pace with new developments in the field; and the abstruse and repetitious text of the laws themselves. The following chapters will examine the historical development of enabling legislation; will explore the strategies used by other states to deal with some of the above problems; will present the opinions of local experts on these matters; and will offer suggestions for the updating of the Kansas planning and zoning enabling laws.

NOTES

- ¹ Kansas Senate, Special Kansas Legislative Committee on Land Use Planning and Management, A Summary of the July 9, 1973, Hearing of the Special Kansas Legislative Committee on Land Use Planning and Management, Hearing, 9 July 1973, and Remarks Addressed to the Special Committee on Land Use Planning of the Kansas Legislature (Topeka, Kansas) 22 July 1974.
- ² Charles M. Harr, "In Accordance with a Comprehensive Plan," Harvard Law Review, 91 (1954), 1155-1175.
- ³ Kansas Statutes Annotated (KSA), 12-704.
- ⁴ Id.
- ⁵ KSA 12-701, et seq.
- ⁶ Marvin Harder and Carolyn Rampey, The Kansas Legislature, (Wichita: The University Press of Kansas, 1972), pp. 191-210.
- ⁷ KSA 12-708 et seq.
- ⁸ Telephone interview with Robert Lakin, director of the Metropolitan Area Planning Dept., Wichita/Sedgewick County, 23 February 1982.
- ⁹ Id.
- ¹⁰ Telephone interview with David Yearout, director of the Johnson County Planning Dept., 4 June 1982.
- ¹¹ R. Robert Linowes and Don T. Allensworth, The States and Land Use Control (New York: Praeger Publishers, 1975), pp. 153-171.
- ¹² KSA 12-701 et seq., KSA 19-2901 et seq., KSA 12-716 et seq.
- ¹³ KSA 12-701, 12-702, 12-703.
- ¹⁴ Telephone interview with Ronald Williamson, city planner for Bucker and Willis, Kansas City, July 1981.
- ¹⁵ Supra, note 11 at p. 159.
- ¹⁶ Southern Burlington County NAACP v. Mount Laurel, 67 NJ 151, 336A. 2d 713.
- ¹⁷ KSA 19-2918.

18 Id.

19 Interview with David Yearout, planning director of Johnson County, June 1981.

20 Petaluma v. Sanora Construction Company, 375 Fed. Supp. 574 N. Distr. Calif. 1974.

CHAPTER TWO

ENABLING LEGISLATION - A HISTORICAL PERSPECTIVE

It is often instructive to review the history of a subject. This is particularly true when investigating the law, because it is shaped by a variety of societal and environmental conditions. In this chapter, planning and zoning enabling law will be traced back to its origins, nationally and then within Kansas. Before this, however, some of the legal aspects of enabling law should be discussed.

"Enabling legislation" does not refer to all state legislation and further, it is not another name for planning law. It is a special form of state enactment, authorizing local governments to carry out specific functions or projects. More simply, it "enables" local governments to perform a function that they otherwise would not be able to. It does not mandate or require sections, as is the case with most state legislation, but permits them, under certain conditions.

Enabling legislation sometimes defines which local governments are authorized to execute planning or zoning. For example, in the Kansas enabling statutes, Township Zoning Boards are only permitted in counties with certain populations. The statutes may also deal with substantive matters, including the nature and composition of the planning commission. In Kansas, planning commissions must consist of not less than seven or more than fifteen members, two of which must reside outside of, but within three miles of, the corporate limits of the city.¹ Incidentally, enabling

legislation is not limited to planning and zoning. It is used by the states in many other areas as well, such as public housing, urban renewal, recreation, and sanitation.

In our system of government, police power rests with the states, and not with the federal or local government. "Police power" refers to the general authority of a government or sovereign entity to take action and legislate in the public interest, for the general health, safety, and welfare of the people.² While the U.S. Supreme Court has not sought to limit the scope of these powers, it has required that they meet certain standards with regard to constitutional issues, such as the right to nondiscrimination, equal protection, and due process under the law.

Federalism, as practiced in this country, has placed the police power at the subnational level. The national government is limited to those functions and duties authorized and listed in the Constitution of the United States.³ Unspecified powers or those not given to the national government are reserved for the states under the tenth amendment.⁴

A distinction should be made between federalism as it is practiced today (cooperative federalism), and federalism as it existed before 1937 (dual federalism). Under dual federalism, the states and the national government had separate spheres of influence, in which each was dominant. The Supreme Court acted as the umpire in this system, by limiting congressional action on the grounds that it conflicted with the authority given to the states by the Constitution. At other times, the Court concluded that some state activities were invalid because they could only be dealt with by Congress.

After 1937, the national government placed more emphasis on pooling resources to meet common problems. Cooperative federalism stresses a

partnership between different levels of government. Congress used the categorical grant-in-aid program to become the umpire of the federal system; block grants and revenue sharing were added later.⁵ These changes are important because they determine how much control the states have with regard to police power.

Under President Reagan's "new federalism," which sounds remarkably similar to the old dual federalism, states will again have a greater role in the exercise of their police power. But some states may not be ready for this new responsibility, especially if their enabling legislation is outdated.

Within the states, the political system is "unitary." This means that all police power resides with the state government, and that the local governments are subservient to, or merely creatures, of the former. This precedent was established by the Dillon rule decision, named after the Chief Justice of the Iowa Supreme Court, John F. Dillon.⁶ The unitary principle is usually applied to all local governments, even though the actual ruling dealt only with municipalities. Since localities are creatures of the state, they can do only what the state permits or mandates them to do, and this is where enabling legislation becomes important. State laws have to be drafted to allow local zoning and planning.

The states enacted zoning enabling legislation first; planning legislation was not considered until later. Perhaps this explains the present relationship between the two. Although theoretically planning should precede zoning, in reality it rarely does. This is because zoning is law, which must be obeyed. It sets absolute criteria for land use while planning only suggests uses for the land. Planning is regarded as a tool for the future, whereas zoning takes place in the present.

Our colonial period did not reflect the present concept of land use regulation. During the sixteen and seventeen hundreds, land use regulation was strongly biased towards meeting future needs, especially in terms of agriculture. In 1631, the Virginia House of Burgesses passed an act requiring each white adult male to grow two acres of corn.⁷ The penalty for noncompliance was the forfeiture of an entire tobacco crop. In 1653, planters were also required to sow equal amounts of corn, peas, or grain as tobacco.⁸ These laws were necessary to ensure the population's food supply.

In the nineteenth century, regulations in urban areas resembled our present building codes. To prevent the spread of fire, Boston laws required buildings to be of brick or stone, and their roofs to be of slate or tile. In Philadelphia, the laws required the construction of party walls, specified their thickness, and levied fines for violations.⁹

It was not until our urban areas began to grow in size and density that use restrictions were formed in various districts. The first restrictions pertained mostly to slaughterhouses: in New York City the slaughtering of animals was periodically banned altogether. But these districts were still scarce, a situation that did not begin to change until the early 1900s.¹⁰

THE ORIGINS OF PLANNING AND ZONING ENABLING LAWS

In 1916 the first comprehensive zoning measure was adopted in New York City.¹¹ The new zoning clauses of the charter provided for the adoption of regulations affecting the height, area, and use of buildings, as well as the use of land. But rather than give a detailed account of its

provisions, it would be more instructive to examine what motivated the leaders of the time to create such a device.

As the transportation network of New York City grew, so did congestion. Increasing numbers of people from outlying areas were being brought into the city to work every day. The need for increased work space and the scarcity of land encouraged the construction of very tall buildings, which reduced the supply of light and fresh air at and near the street level. At that time, structures could legally rise to any height, assume any form, be put to any use, and cover all of the lot from the ground to the sky. In the southern part of Manhattan, these buildings made narrow streets look like dark gorges. Building conditions were chaotic, as described in Basset's book Zoning:¹²

The first skyscraper to be erected in a block would cover the entire lot up to the roof and open its windows on neighboring lots. A high building so erected prevented other similar buildings from being constructed in its immediate vicinity. The reason for this was that the desired building would have no light on the side toward the existing high building. Moreover, if the first builder set his structure back from the lot line in order to have open space in which to front his windows, the builder on the next adjoining lot would front his windows on such open space. In other words, where the building on each lot could legally cover the entire space, the first builder obtained a virtual monopoly of the light and air.

The commissioners charged with studying this matter realized that the city needed more than simple height restrictions. Setbacks and lot coverage had to be established in order to relieve the congestion. But this in itself does not constitute zoning. Zoning is concerned primarily with use, and is not essential as a tool for ensuring adequate divisions of light and air in a congested area. Hence, there must have been other, less ideological reasons why the commissioners initiated zoning.

The government's intervention in land use was not so much utopian as political. Various interest groups wanted to restrict certain uses from

their neighborhoods. For example, the group of leading merchants known as the Fifth Avenue Association wanted government help to protect their shops from factories that were encroaching on their commercial district. Under pressure from this and similar groups, city officials felt that it would be advantageous to their political careers to act promptly. Thus, they inadvertently established the "zoning first" pattern, which would be followed by the U.S. Department of Commerce when they published A Standard State Zoning Enabling Act in 1926.¹³

This model legislation was meant to act as a guide for those states that wanted to authorize local zoning. It covered only thirteen pages, but it was precise and to the point. The model was first published in mimeographed form in 1922. It was revised in 1923, and printed for the first time in 1924. The latest revision was published in 1926. Within a year of the original draft, eleven states had approved zoning enabling legislation, all patterned after the Federal act. By 1925, a total of nineteen states had adopted legislation virtually identical to the model bill. Most of the remaining states followed within ten years. At present, all the states have some form of enabling legislation, which is in most cases not appreciably different from the model act written sixty years ago.¹⁴

In their book The States and Land Use Control, Robert Linowes and Don Allensworth provide a list of the members of the advisory committee that drafted the model code.¹⁵ The list includes:

- * Charles B. Ball, secretary-treasurer of the American Society of Civil Engineers, City Planning Division;
- * Edward M. Bassett, council of the Zoning Committee of New York, and a big name in city planning at the time;

- * Alfred Bettman, director of the National Conference on City Planning, and well known in planning circles, who was based in Cincinnati;
- * Irving B. Hiet, past president of the National Association of Real Estate Boards, the main builder-developer lobby at the time;
- * John Ehlder, of the Chamber of Commerce of the United States;
- * Morris Knowles, also of the Chamber of Commerce, and the American Society of Civil Engineers;
- * Nelson F. Lewis, of the National Conference on City Planning and the American City Planning Institute;
- * J. Horace McFarland, affiliated with the American Civic Association;
- * Frederick Law Olmsted, ex-president of the American City Planning Institute, also associated with the American Association of Landscape Architects, and a leading name in city planning over the years;
- * Lawrence Vieller, secretary and director of the National Housing Association.

The authors feel that the membership of this committee provides a clue to the original base of support for zoning in the United States. As they explain in their book,

Almost without exception, the members were taken from major interest groups that could be expected to be concerned with planning and zoning and to have a concrete stake in it, and they included not only representatives of professional organizations such as engineers, architects and planners but business groups as well. To top it off, they were appointed not by a liberal Democrat or an advocate of foreign collectivism, but a conservative Republican, Herbert Hoover, Secretary of Commerce during most of the 1920s. Hoover, it seems, became so impressed with the prospects of zoning that he decided to lend the weight of the federal government to the movement, and he was clearly the one who sparked the trend politically and on a national scale.

The facts so far suggest that it is hard to substantiate the charge that planning and zoning are "antibusiness" and "contrary to the principles of the free enterprise system."¹⁶

It appears that the model bill encouraged cities to enact zoning laws, whether they had enabling legislation or not. In 1921, a year before the Advisory Committee put out its first draft, only 48 local governments in the United States had local zoning. By the early 1930s, approximately 800 cities had initiated zoning ordinances. At present, some 10,000 cities, counties, and other localities exercise zoning power. It is interesting that Kansas, Nebraska, Missouri, and Indiana all provided their localities with zoning power before 1922.¹⁷

In 1928, the same experts that served on the zoning Advisory Committee came up with a model planning enabling act. The U.S. Advisory Committee on City Planning and Zoning released A Standard City Planning Enabling Act, which was considerably more extensive than the zoning model. As before, the Committee was appointed by the Secretary of Commerce, Herbert Hoover. Besides addressing itself to city planning, the Act dealt with such matters as the development of local subdivision controls, the official map, and regional planning.¹⁸

Within a few years, most states had either emulated or adopted directly the provisions of the model planning code, just as they had done earlier with zoning. But as before, their motives were less than altruistic. They were not so much concerned with regional planning and official maps, as they were with subdivision controls. Around this time, the mid-30s, cities began to experience a large influx of population from rural areas, especially from the South. Additionally, there was the increase in the number of migrants who settled in the major cities of the east coast. Urban areas became overcrowded, and wealthy inner city

neighborhoods were gradually converted into housing for the new populace. The old residents fled to the outskirts of town, where they could afford to build new communities. Many developers sought to make a quick profit from this trend, and an increasing number of people found themselves in substandard housing. As a result, the upper and newly developing middle classes embraced planning legislation, with its opportunity for controlling subdivisions.

Zoning and planning as conceived and adopted on the national level had little, if anything, to do with a socialistic dream of obtaining state control over private property. At a superficial glance, the legislation may have seemed like such a device, but in practice it was very much capitalistic, and uniquely American. From the beginning, the immigrants of the United States had a strong sense of individual property rights, and were prepared to use any means to protect their land. But as the population increased, the environment became more complex, and force was no longer an appropriate means for discouraging undesirable uses in adjacent properties. Its place was taken by zoning.

It may seem like a contradiction that people so fiercely independent would forfeit any control over their land to zoning. In fact, not all did: in Kansas, zoning agricultural land was and still is prohibited. But the farmers of Kansas were not subjected to the same pressures as the merchants and residents of urban areas. They felt no need to compromise, as the urban residents had, by relinquishing some of their property rights in exchange for the protection of their land. However, this situation may now be changing.

In the western region of Nebraska, the Prudential Insurance Company recently bought land for cultivation. The company intends to tap water

from the aquifer below and use it for crop irrigation. The soil in the area is very sandy, and the ranchers who live nearby are concerned that farming will loosen the topsoil and create "blow-outs" similar to those experienced in the 1930s. Ranchers are traditionally suspicious of farming, especially if it is initiated by outside investors. The livestock producers in the area have now formed a group to prevent large-scale agriculture in their territory.¹⁹

HISTORY OF LAND USE REGULATION IN KANSAS

The cities of Kansas were interested in planning before the first zoning ordinance was passed in New York City. Planning for Kansas cities was discussed at the sixth annual convention of the League of Kansas Municipalities, in October 1914. Interest in planning declined during World War I, but two planning bills were introduced into the legislature in 1921. Senate bill no. 20 provided for the establishment and maintenance of city planning commissions in cities of the first class of over 20,000 population. House bill no. 6 authorized cities of the first class to zone.²⁰ Together, they provided a basis upon which future land use regulation would rest.

The zoning bill was divided into 9 sections and covered about three pages. Section one authorized the mayor and council or the board of commissioners to divide the city into zones and to regulate the uses of land within. Sections two and three required the elected officials to consider recommendations from either a planning commission, or if they did not have one, an appointed "special commission" before determining the boundaries of the various districts. They also required that the planning

commission or its equivalent hold public hearings on completion of a tentative report, after which they would submit a final report to the governing body. Finally, hearing and protest procedures were described. The remaining sections dealt with enforcement provisions, conflict with constitutional law, judicial relief, and nonapplication of the Act to existing structures.²¹

The planning bill consisted of seven sections and was approximately two pages long. Section one gave the mayor and council or board of commissioners power to create a city planning commission by ordinance. Sections two and three concerned themselves with procedural matters such as length of appointments, meeting schedules, and record keeping. Sections four and five pertained to the powers and duties of the commission. They included the creation of an official map of the city and the power to review "all plans, plats or replats of land laid out in building lots." The latter amounted to subdivision control, and was by far the most powerful part of the legislation in that it had a direct and immediate effect upon developers. The remaining sections dealt with the commission's budget, and the effective date that the legislation was to be in force.²²

THE COURTS AND KANSAS ENABLING LAW

What motivated the legislators of the time to pass these laws? The model enabling codes had not even been published yet. Were the law-makers simply ahead of their time, or were their actions precipitated by specific events?

In January of 1920 the case of *Smith v. Hosferd* was brought before the appellate court, only one year before the enactment of planning and zoning enabling legislation.²³ The case was an appeal from the Wyandotte District Court, in which the plaintiff, Frank Smith, was refused a permit to erect a garage. The defendant, R. R. Hosferd, a building inspector of Kansas City, pleaded that he was at all times acting under the orders of the Board of Commissioners of Kansas City, Kansas. The Board had instructed him in writing not to grant the permit because it was in violation of an ordinance which prohibited the city clerk from issuing "a license to any person, firm or corporation, for the purpose of carrying on the business of a garage or automobile repair shop, unless the application for such license be approved by the Board of Commissioners of Kansas City, Kansas."²⁴ The plaintiff argued that the ordinance was arbitrary because it did not lay down general rules, and because it "knew no limitations and acknowledged no restrictions."²⁵ The defendant sought to justify the ordinance under the general welfare clause, section 1508 of the General Statutes of 1915, which read as follows:

To make all needful police regulations necessary for the preservation of good order and peace of the city, and to prevent injury to or destruction of or interference with public or private property.²⁶

The central issue of the case was whether the municipality restrained the property rights of the individual in an arbitrary and capricious manner, by enacting an ordinance that had no uniform rule. A no less important consideration was whether a municipal corporation had the inherent power to enact police regulations, or whether such authority had to be expressly granted by the state. In both instances, the court ruled in favor of the plaintiff. They declared the ordinance void on the grounds that it was an arbitrary use of power to enact police regulations. The

latter problem was solved at the next regular session of the legislature with the creation of enabling legislation for zoning.

For a law to continue and to have any lasting effect, it must first be tested by the courts to ensure that it is a valid exercise of power. In 1923, the new planning and zoning enabling laws were scrutinized by the court in the case of *Ware v. City of Wichita*.²⁷ The main issues of the case were:

1) Whether the ordinance adopted by the City of Wichita, which forbid the construction of a business building in a residential district, constituted a valid exercise of the police power.

2) Whether chapters 99 and 100 of the Laws of 1921, which authorized cities of 20,000 to establish districts or zones within their corporate limits and to create city planning commissions, were constitutional.

The court determined the validity of the ordinance by showing that it was adopted pursuant to express statutory authority, namely chapters 99 and 100 of the Laws of 1921. The only consideration that remained was whether these laws were constitutional; i.e., did they violate any provisions of the State or Federal Constitution. The court, in referring to the Opinion of the Justices of Massachusetts, reasoned that:

We are of the opinion that the proposed statute cannot be pronounced on its face contrary to any of the provisions of the Federal Constitution or its Amendments. The segregation of manufacturing, commercial, and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community.²⁸

The judgment in favor of zoning in the Ware case awakened an interest in local officials across the state. Building codes were no longer sufficient to maintain the overall welfare of their communities. As pressure from their constituents increased, the elected officials found it

politically expedient to push for zoning and subdivision enabling legislation that would apply to cities of all classes. Their determination was rewarded shortly after the *Ware v. City of Wichita* decision. In 1923, planning commissions were authorized for all cities.²⁹ Four years later, in 1927, the legislature extended the same authority with regards to zoning.³⁰

ENABLING LEGISLATION ADDITIONS AND REVISIONS

For the next several years there was little substantial revision to the enabling statutes. In 1931, the sections dealing with plans and plats and the dedication of streets were amended. Prior to 1931, the city planning commission was not required to adopt a uniform set of regulations governing the subdivision of land; each developer's plat was reviewed individually. The developers claimed that this was an arbitrary process, and that while it may have benefited some, it certainly hurt others. The remedy was a single sentence which stated that, "before exercising the powers (of subdivision approval)...the city planning commission shall adopt regulations governing the subdivision of land within its jurisdiction."³¹ Another change made in the same year was the extension of the planning commission's authority to review plats outside of the city boundaries to a three-mile radius, provided that the territory was within the same county.³² This provision was meant to ensure that developments on the fringe of town could easily be tied into city services at a future date.

One of the most important additions to the Kansas Zoning Enabling Laws came in 1939. That year, legislature passed an Act providing for the

creation of boards of zoning appeals (BZAs), and prescribing their powers and duties.³³ Most zoning ordinances already provided for boards of zoning appeals, but local officials were hesitant to utilize them, because they were suspicious of their legal status. As a result, by 1943 only two cities, Topeka and Lawrence, maintained a board of appeals under the statute of 1939. This lack of confidence still exists today, and will be discussed at greater length later in the paper.

In 1943, the League of Kansas Municipalities published a treatise entitled Twenty Years of Zoning in Kansas.³⁴ The report found that zoning had been successful in Kansas: 57 percent of the city population lived in zoned cities, and 66 percent of the total assessed valuation of the cities was zoned. Municipalities that were experiencing considerable growth were the most interested in maintaining and improving their land use regulations, but those with little growth were inclined to let their ordinances remain simple.

The League found wide deviations in the procedures for amending ordinances, but concluded that the fault lay less with the local officials than with the enabling statutes, which were vague in several areas. One of the least distinct parts of the law was the procedure for reclassifying property. Since a permanent planning commission was not required, many cities left the matter of reclassification up to their governing bodies, or appointed special committees. The responsibility for holding public hearings and publishing notices differed from town to town. In some cities the planning commissions held public hearings, in other cities the governing body did. Notices were signed sometimes by the chairman of the planning commission, at other times by the mayor, and occasionally by both. Often, hearings were not held at all, and in some instances notices were

not published. Because of the above discrepancies, it was suggested that the whole reclassification process be left up to the governing body, and that a separate board of appeals not be required for smaller cities. As it was stated in the report, "Theory is one thing, and practical operation is another."

A questionnaire administered to public officials by the League indicated that the citizens' attitude towards zoning was favorable. Of course, some people were opposed to zoning in principle, and others were against it when it affected them personally. Generally, though, the activities of planning commissions in the larger cities indicated that zoning was firmly established. With the exception of Junction City, no municipality which had passed a zoning ordinance had repealed it, and the list of cities having initiated zoning continued to grow. But it was not until after World War II that planning and zoning enabling legislation began to flourish.

In the period from 1947 to the early 1970s, there were numerous additions and amendments to enabling law. Airport zoning was first authorized in 1947. It allowed political subdivisions to "promulgate, administer, and enforce airport zoning regulations" in hazard areas adjacent to an airport.³⁵ This act was superficially amended in 1949, and again in 1955.³⁶

County zoning enabling legislation was first enacted in 1939, although it only pertained to three counties: Johnson, Wyandotte, and Shawnee.³⁷ In 1951 and 1953 other counties were allowed to zone, but only if they met certain requirements. For example, in 1951 planning and zoning were authorized in counties with a population of 10,000 to 150,000 inhabitants.³⁸ The population requirements was changed in 1953 to 15,000-

200,000, and again in 1957, to 10,000-250,000.³⁹ In 1953, counties were allowed to zone within three miles of a municipality, provided that the city was of the first class and within the county boundaries.⁴⁰ In 1961, this law was amended to allow counties to zone adjacent to second class cities,⁴¹ and in 1963, third class cities.⁴² In all, there have been six amendments to county zoning in the last twenty years. Accordingly, the history of county zoning is repetitive and confusing.

Legislation requiring a board of zoning appeals was enacted in 1957. Prior to this, boards of zoning appeals were authorized but not required by the statutes.⁴³ The law was subjected to minor amendments, concerning the number and length of tenure of BZA members, in 1961, 1965, and 1975.⁴⁴

In the 1950s and 60s, enabling legislation began to place greater emphasis on planning as a prerequisite to zoning. In 1955, for instance, the act entitled Zoning and Planning, Master Plan required cities with a population exceeding 60,000 to adopt a master plan for the "physical development of the municipality and any land outside of the municipality, which in the opinion of the (planning) commission bears relation to the planning of the municipality."⁴⁵ Ten years later, in 1965, provisions for regional planning were enacted, zoning legislation for both cities and counties was revised, and authority to enact subdivision regulations by counties was extended. The regional planning laws authorized "any two or more cities or counties...having adjoining planning jurisdictions...(to) cooperate in the exercise and performance of planning powers." They also provided for the establishment of a joint planning commission, and a joint board of zoning appeals. The laws revising zoning and subdivision authority carefully outlined notice and hearing procedures to prevent due

process errors, and attempted to anticipate every possible contingency. The following sentences are typical of the acts in general:

Written notice of such proposed (zoning) change shall be mailed to all of the owners of lands located within two hundred (200) feet of the area proposed to be altered and an opportunity granted to interested parties to be heard. Failure to receive such notice shall not invalidate any subsequent action taken.⁴⁶

Although these sentences were taken from the city zoning act, they are virtually identical to those found in the county zoning act. In fact, the content and wording of the two laws are so similar that one could almost be substituted for the other.

The latest significant addition to the enabling statutes came in 1969. Planned Unit Development (PUD) laws were enacted because of concern on the part of planners that traditional zoning techniques were not allowing cities enough flexibility to provide for community needs. A PUD designation can provide neighborhoods with housing, commercial areas and open space, all within one area. Because PUDs are more complex than districts, they have to be regulated more stringently. The drafters of the enabling legislation realized this, and made the legislation appropriately detailed. The Act provides definitions, determines standards and conditions for development, and identifies the types of information the developer should include in a preliminary development plan. In addition, it covers public hearings, enforcement, and modification of the plan, and the designation of an approving agency. This last point is noteworthy, because it is the first time that the use of professional personnel was expressly condoned by enabling legislation for the approval of development plans: "Such administrative body may be the planning commission of such governmental unit or may be a professional staff person in the employ of such governmental unit."⁴⁷

Two areas of land use legislation deserve special attention. The first involves state review of local zoning. In 1955, legislation was enacted providing for a state zoning area within the city of Topeka, comprised primarily of state office buildings. A state office building commission was established and charged with the responsibility of reviewing all changes in zoning within this area. The City of Topeka was required to submit proposed zoning changes to the state commission for approval. The decision of the board would be final: no zoning modifications were to be confirmed without their express sanction.⁴⁸ The law was meaningful because it showed that the state government was not hesitant to intervene in local affairs if it felt there was an overriding state interest involved. The legislators were concerned with preserving the integrity of the state capitol, because it is the seat of government of Kansas; the job was considered too important to be left up to the local government alone. It has been proposed that other regions in Kansas also require state control, such as wildlife areas, farmland, and prairies. But as any legislator would point out, there is a big difference between state and private property, especially in Kansas.

The second area of interest involves the zoning of agricultural land. The abiding rule in Kansas has been that agricultural land is exempt from zoning. The only exception was a law enacted in 1963, which authorized cities to regulate agricultural land within their boundaries, because certain agricultural uses within an urban area could become a nuisance.⁴⁹ The philosophy of excluding agricultural land from regulation still exists today, but the reasons for this are not clear. The important issue is whether this trend should continue, a question that will be discussed later in the paper.

CONCLUSIONS

The history of planning and zoning enabling law, from its beginnings in the Hoover Commission, to its implementation in the State of Kansas, leaves us with at least one powerful insight: enabling law as devised in the United States is a capitalistic phenomenon. Its primary purpose is to protect, not restrict, the rights of individual property owners. As cities grew into metropolitan areas, the role of planning and zoning expanded. The high population density in urban areas aggravated the consequences of uncontrolled industrial, commercial, and residential growth. Unlike the rural populations, urban residents had no place to hide from these conditions, so they demanded the protection of the law, and enabling legislation came into being. When society grew even more complex, it was only natural that enabling law also would. Thus there were few additions to the Kansas Planning and Zoning Enabling Statutes during the first twenty years of their existence, but increasingly more additions and innovations later on, paralleling the growth of the state's urban areas. Society is once more experiencing a "new wave" of changes, and it is important that the evolution of planning law continue in the late decades of the century.

NOTES

- ¹ Kansas Statutes Annotated (KSA) 12-702.
- ² Jerome G. Rose, Legal Foundations of Land Use Planning (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers-The State Univ. of New Jersey, 1979), p. 8.
- ³ U.S. Constitution, art. I, sec. 8.
- ⁴ U.S. Constitution, amendment X.
- ⁵ David R. Berman, State and Local Politics (Boston: Holbrook Press, 1975), pp. 27, 28.
- ⁶ R. Robert Linowes and Don T. Allensworth, The States and Land Use Control (New York: Preager Publishers, 1975), p. 40.
- ⁷ Fred Bosselman et al., The Taking Issue (Washington, D.C.: GPO, 1973), p. 82.
- ⁸ Supra, note 7 at p. 83.
- ⁹ Id.
- ¹⁰ Supra, note 7 at p. 84.
- ¹¹ Robert M. Anderson, American Law of Zoning, 2d ed., 4 vols. (Rochester: Lawyers Cooperative, 1967-1976), 1:85.
- ¹² Bassett, Zoning (New York: Russell Sage Foundation, 1936), pp. 23, 24.
- ¹³ U.S. Advisory Committee on Zoning, Dept. of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations, rev. ed. (Washington, D.C.: GPO, 1926).
- ¹⁴ Supra, note 6 at p. 43.
- ¹⁵ Supra, note 6 at p. 42.
- ¹⁶ Id.
- ¹⁷ Supra, note 6 at p. 43.
- ¹⁸ U.S. Advisory Committee on City Planning and Zoning, Dept. of Commerce, A Standard City Planning Enabling Act (Washington, D.C.: 1928).

- 19 Telephone interview with Tom Burns, Deputy Director of Water Resources Division, Univ. of Nebraska, 7 March 1982.
- 20 League of Kansas Municipalities, Twenty Years of Zoning (Topeka: League of Kansas Municipalities, 1943), p. 5.
- 21 Laws of Kansas, 1921 ch. 100.
- 22 Supra, note 21 at ch. 99.
- 23 Smith v. Hosferd, 106 Kan. 366, 187 Pacific 685.
- 24 Id.
- 25 Id.
- 26 Id.
- 27 Ware v. City of Wichita, 113 Kan. 153.
- 28 Id.
- 29 Supra, note 21 at ch. 92.
- 30 Supra, note 21 at ch. 56.
- 31 Supra, note 21 at ch. 111.
- 32 Id.
- 33 Supra, note 21 at ch. 22.
- 34 Supra, note 20 at p. 6.
- 35 Supra, note 21 at ch. 13.
- 36 Supra, note 21 at chs. 62 and 10.
- 37 Supra, note 21 at chs. 164 and 165.
- 38 Supra, note 21 at ch. 155.
- 39 Supra, note 21 at ch. 185.
- 40 Supra, note 21 at ch. 153.
- 41 Supra, note 21 at ch. 153.
- 42 Supra, note 21 at ch. 195.
- 43 Supra, note 21 at ch. 27.
- 44 Supra, note 21 at chs. 154, 180, and 58.

⁴⁵ Supra, note 21 at ch. 96.

⁴⁶ Supra, note 21 at chs. 97, 98, 99, 177, 178, and 179.

⁴⁷ Supra, note 21 at ch. 75.

⁴⁸ Supra, note 21 at ch. 377.

⁴⁹ Supra, note 21 at ch. 195.

CHAPTER THREE

ADVANCES IN STATE ENABLING LAW AND LAND USE LEGISLATION

In the last decade, several states have experimented with new types of land use legislation. Most of their efforts have been geared towards creating laws that allow greater state involvement in local land use decision-making; little energy has been spent on updating current planning and zoning enabling statutes.

State governments seeking to gain more control over their land resources have used basically three stratagems: state comprehensive plans, developments of regional interest, and areas of critical state concern. The state comprehensive plans are substantially similar to local land use plans: they provide descriptions of the physical environment, and delineate the types of land uses that would be acceptable in particular areas. A development of regional interest (DRI), as defined in the Florida statutes, is "any development which because of its character, magnitude, or location would have a substantial effect upon the health, safety or welfare of citizens of more than one county."¹ When read in conjunction with the broad statutory definition of "development," the DRI designation is quite comprehensive. Development is defined to include, with some exceptions, "the carrying out of any building or mining operation or the making of any material change in the use or appearance of any structure or land, and the dividing of land into three or more parcels."² Areas of critical state concern (CSC), sometimes referred to as areas of state

interest or areas of critical environmental concern, are discrete geographical territories possessing unique characteristics that make them of significant interest to inhabitants beyond the boundaries of local governments.

Each of the preceding measures has been viewed with considerable suspicion by local politicians and planners alike, as well as by individual property owners, especially those residing in rural areas. As Idaho Congressman Steve Symms explains, under state land use controls "the duke and baron of old will be replaced by the State, supposedly acting in the name of the people. Today's independent landowner will become the serf of tomorrow's New Feudalism."³ It is safe to assume that this attitude is shared by many of Congressman Symms' constituents. Idaho is a predominantly rural state, with most of its land devoted to agriculture. It has no coastline, little tourist trade, and few publicly-owned areas. Most of its land is owned by private individuals, such as farmers and ranchers, and they have no desire to be regulated by the state.

Local planners may also view state control of local land uses negatively, although for different reasons. In Maryland, where counties have traditionally had strong political influence, a Montgomery County supervisor argued,

We...recognize that 193 elected officials (in the Washington, D.C. area) from fifteen major jurisdictions in two states and the Federal District cannot act completely independently to solve these problems. On the other hand, we do not believe it necessary to create a new supergovernment to deal with these problems. We believe that local officials, acting together with a sense of the metropolitan consequences of our actions, can help make us (sic) better decisions.⁴

Not surprisingly, the planners and rural inhabitants of Kansas frequently feel that state involvement in land use planning would be an unnecessary encroachment on local control, and on individual property

rights. And although several states have initiated what seem to be state-controlled programs, for the most part they are locally initiated and supervised efforts.

SPECIFIC APPROACHES TO STATE CONTROL OF LAND USE

In the continental United States only two states, Florida and Oregon, have instituted a "comprehensive state-wide land use program." Basically, this means that planning is instituted throughout the state on all levels of government. Planning, in this instance, is mandatory for cities and counties, and planning issues which affect the whole state, as well as large regions within the state, are addressed from a broader perspective. But while the goal of both states is to coordinate planning at all levels of government, the strategies they use are markedly different.

Oregon: A Direct Approach

In 1973, the Oregon Legislature created the Oregon Land Conservation and Development Commission, whose purpose was to adopt "state-wide planning goals and guidelines" by January 1, 1975.⁵ It consisted of seven members, appointed by the governor and approved by the state senate, for a term of two to four years each. Before any goal could be adopted, the Commission was required to hold at least one public hearing to discuss it.

The agency charged with formulating goals and guidelines was the Department of Land Conservation and Development. By law, it was required to hold at least ten public hearings throughout the state, and to consider existing comprehensive plans of state agencies and local governments, to

preserve "functional and local aspects of land conservation and development."⁶ In addition, priority consideration was given to activities of state-wide interest, such as public transportation systems, public sewage, water supplies, solid waste systems, public schools, and agricultural land.

After sixty public hearings throughout the state, the goals conceived by the Department were adopted by the Commission on December 27, 1974, and given the force of law. They were presented in a 24-page publication which contained a total of nineteen goals. These included guidelines for land use planning, forest lands, open space, natural resources, citizen involvement, and agricultural land, which were in turn separated into planning and implementation sections. The implementation instructions are deliberately specific in nature, reflecting the state's commitment to truly direct land use in Oregon. An example of a goal is given here to illustrate the Oregon approach:⁷

Goal: To Preserve and Maintain Agricultural Lands

Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest, and open space. These lands shall be inventoried and preserved by adopting exclusive farm use zones pursuant to ORS Chapter 215. Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area. Conversion of rural agricultural land to urbanized land shall be based on consideration of the following factors:

- (1) environmental, energy, social, and economic consequences;
- (2) demonstrated need consistent with LDCD goals;
- (3) unavailability of an

alternative suitable location for the request use; (4) compatibility of the proposed use with related agricultural land; and (5) the retention of class I, II, III, and IV soils in farm use. A governing body proposing to convert rural agricultural land to urbanizable land shall follow the procedures and requirements set forth in the Land Use Planning goal (Goal 2).

Guidelines

A. Planning

1. Urban growth should be separated from agricultural lands by buffer or transitional areas of open space.
2. Plans providing for the preservation and maintenance of farm land for farm use, should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources.

B. Implementation

1. Nonfarm uses permitted within farm use zones under ORS 215.213 (2) and (3) should be minimized to allow for maximum agricultural productivity.
2. Extension of services, such as sewer and water supplies, into rural areas should be appropriate for the needs of agriculture, farm use and nonfarm uses established under ORS 215.213.
3. Services that need to pass through agricultural lands should not be connected with any use that is not allowed under ORS 215.203 and 215.213, should not be assessed as part of the farm unit and should

be limited in capacity to serve specific service areas and identified needs.

4. Forest and open spaces should be permitted on agricultural land that is being preserved for future agricultural growth. The interchange of such lands should not be subject to tax penalties.

To achieve consistency between state-wide goals, local land use plans, and local regulations, the Oregon Land Conservation and Development Commission was given power by the Legislature to create a "compliance acknowledgement procedure" in 1977.⁸ The purpose of the procedure is to assure that the local governments prepare and adopt plans which are consistent with state-wide goals within a negotiated length of time. Review of the plans and subsequent regulations can be initiated by the Commission upon petition by a county, city, special district, state agency, or "person or group of persons whose interests are substantially affected."⁹ Review can also take place if it is alleged that the plan or its implementing regulations are in violation of the state-wide goals. State inspection of local plans is conducted by a hearing officer whose recommendations are delivered to the Commission for final consideration.

Local comprehensive planning is required as the means to implement the state-wide goals. Each county is required to report on the status of its comprehensive plan annually. Further, it is the county's responsibility to coordinate all local plans within its jurisdiction and to ensure that they are consistent with the state goals and guidelines. Coordination, as defined by the Oregon Statutes, is achieved when "the needs of all levels of government, semi-public and private agencies, and the citizens of Oregon have been considered and accommodated as much as possible." State agency planning activities are also evaluated by the

Commission, to avoid duplication and conflict with local planning officials.¹⁰

Ironically, local planning enabling legislation has not been revised in Oregon. Zoning and subdivision enabling law is still similar to the standard model published in 1926. Thus, local governments must meet the requirements of the state within the antiquated framework of their present statutes.

Seaman v. City of Durham¹¹ illustrates the problems inherent in combining new state goals with old enabling laws. In this case, landowners alleged that the reduction of a single-family residential zone by fifty percent was in violation of the state-wide housing goal, "to provide for the housing needs of the citizens of the state." The court found that Durham, in amending its zoning ordinance, failed to consider the low-cost housing needs of its residents.¹² If the enabling legislation for city zoning had had more substantive requirements, similar to those contained in the state housing goal, maybe this conflict could have been avoided.

Florida: A Land Use Laboratory

In the past ten years, Florida has enacted more land use legislation than any other state. Between April of 1970 and July of 1974, the population of Florida increased 19.2 percent, compelling state officials to support a number of radical new laws for protecting the environment and controlling growth.¹³ Among those were a state comprehensive planning act, an environmental land and water management act, and a local government comprehensive planning act.

The Florida State Comprehensive Planning Act of 1972 charged the Division of State Planning with preparing a state comprehensive plan which would provide long-range guidance for the orderly social, economic and physical growth of the state, by setting forth goals, objectives and policies." The Division was instructed to consider the studies and plans of federal and state agencies, local governments, and regional planning agencies before actual preparation of the plan began. A policy-oriented approach, rather than a land use plan, was also encouraged to avoid political repercussions from local governments.¹⁴

In 1978, after six years of work, the plan was presented to the state legislature, but because it was so complex and broad in scope, it was approved as an advisory document only. How it differs from Oregon's direct approach can be seen in the following example:¹⁵

Beaches and Dunes

Objective T: Protection

The state's beaches and dunes should be maintained and protected.

Objective U: Use

The state's beaches and dunes should be maintained for uses that are related primarily recreation.

Policies

125. Encourage the use of beaches for recreational activities which do not alter or disturb these resources.
126. Discourage urban, residential or other development along sandy beaches or dunes that would threaten the integrity of the primary dunes and beaches.

127. Protect estuarine beaches against incompatible uses and closely regulate any development of state significance that, by its general purpose, requires location in or near beaches and shores.
128. Encourage upland development along the beaches and dunes for only those purposes which will not alter or disturb these resources.
129. Encourage the protection and maintenance of the natural functions and values of the barrier islands of the state.
130. Provide adequate access to public beaches in a manner which will not alter or disturb the primary dunes and beaches.
131. Support projects for dune stabilization and the protection and restoration of beaches in areas where significant erosion and damage have occurred, and seek to control development in and around such areas to protect the public investment.

To supplement state planning efforts, the Florida legislature passed the Florida Environmental Land and Water Management Act of 1972 (ELWMA). In doing so, they became the first state to adopt Article 7 of the American Law Institute's Model Code. This article proposes two techniques for injecting a state and regional perspective into local land use decision-making: the designations "area of critical state concern" (CRC), and "development of regional impact" (DRI). These techniques originated from the American Law Institute's Model Land Development Code and both were incorporated into the Florida act.¹⁶

The Florida legislation defined a DRI as "any development which because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."¹⁷ This definition proved to be too broad, though, prompting the legislature to create an Administrative Commission responsible for

adopting and administering DRI guidelines and standards. The Commission established twelve categories of DRI, including airports, shopping centers, mining operations, industrial plants and parks, hospitals, residential developments, and office parks.¹⁸ With the exception of airports, each category has a minimum DRI threshold in terms of the physical dimensions of the development. The administrative guideline for shopping centers is typical of the DRI categories:¹⁹

Any proposed retail or wholesales business establishment or group of establishments operated under one common property ownership or management, such as a shopping or trade center, that (1) occupies more than forty (40) acres of land; (2) encompasses more than four hundred thousand (400,000) square feet of gross floor area; or (3) provides parking spaces for more than two thousand five hundred (2,500) cars.

The procedure for designating a specific development DRI is usually initiated by a developer, who must file an application for approval with the local government having jurisdiction, and with the appropriate regional planning agency. The local government must give at least sixty day's notice of a public hearing to be held on the application, and must consider several statutorily enumerated criteria, including the report and recommendations submitted by the regional planning agency, in deciding whether the application should be approved, denied, or approved subject to conditions.²⁰ Appeals are taken to an Adjudicatory Commission composed of the governor and his cabinet; any further appeals are taken to the District Court.²¹

At least five problems have been identified in Florida's use of the DRI concepts:²²

1. Decision-makers have accorded more weight to ecological factors than to social and economic factors.

2. The responsibility for presenting evidence of regional impact is vested in a series of voluntary regional councils controlled by local governments, rather than in an independent planning agency.
3. The Adjudicatory Commission lacks the time and expertise to deal adequately with appeals.
4. Local governments are required merely to consider, not to follow, the regional planning agency's recommendations on whether a development should be classified as a DRI.
5. Developers complain that the process offers few incentives for development, because it is essentially negative and adversarial.

Not all of these would be perceived by local officials as problems: many feel that the state is already too involved in land use decision-making, and intend to tenaciously hold on to the power they have left.

The second component of ELWMA was the designation of areas of critical state concern (CSC). Again, the Administrative Commission is given the power to designate areas of CSC, but only on recommendation from the Division of State Planning, which in turn must consider recommendations from various regional planning agencies, who in turn must consult with local governments. Further, in adopting a designation rule, the Administrative Commission must comply with the procedural requirements of the Florida Administrative Procedure Act (APA). Among other things, the Act requires that the Commission give notice of its intention to adopt a proposed designation rule, prepare a detailed statement of the rule's economic impact, give affected persons an opportunity to argue any issues raised by the proposed rule, and conduct a public hearing on the request on any affected person. Finally, the Commission may not designate more than five percent of the state's land CSC.²³

The most obvious problem with Florida's CSC concept is its complexity, which makes it difficult to designate sensitive areas. Of Florida's four critical areas, only two, the Green Swamp and the Florida Keys, were the result of official administrative designations.²⁴ The rest were specified directly by the Florida Legislature, not only because of the reason stated above, but also because the Florida Supreme Court held that it is an unlawful delegation of legislative power to allow an administrative agency to denominate areas of CSC.²⁴

Florida passed its latest major piece of land use legislation in 1975. The Florida Local Government Comprehensive Planning Act is a complete revision of enabling law for planning at the substate level. The most conspicuous feature of the Act is its mandatory planning requirement for all local governments, to be complied with no later than July 1, 1979. Cities and special districts which fail to comply with the deadline would be subject to the rules of the county's plan. If a county defaults on its statutory responsibility, the Division of State Planning would be required to prepare its plan, as well as plans for any defaulting local governmental units within the county. The new statutes require that all local governments designate and establish a local planning agency to prepare its land use plan, and to evaluate its effectiveness every five years. The evaluation must be submitted to the local governing body, the state land planning agency, and any appropriate regional planning agency, and must address the following issues:²⁵

- (a) The major problems of development, physical deterioration, and location of land uses, and the social and economic effects of such use in the area;

- (b) the condition of each element in the comprehensive plan at the time of adoption and at the date of the report;
- (c) the comprehensive plan objectives as compared with actual results at date of report; and
- (d) the extent to which unanticipated and unforeseen problems and opportunities occurred between date of adoption and date of report.

In addition, the report can propose changes in the comprehensive plan, which the governing body can adopt as amendments. Adoption and amendment of the plan are instituted within a procedural framework that must provide for "broad dissemination of the proposals and alternatives, opportunity for written comments, public hearings after due process notice, provisions for open discussion, communications programs, information services, and consideration of and response to public comments."²⁶ There are two types of amendments recognized by the statutes: specific, which consist of use or residential density changes and require a majority vote of the governing body; and comprehensive, which must be adopted in accordance with the same procedures as the original comprehensive plan. Comprehensive amendments are simply all modifications that cannot be categorized as specific.²⁷

One of the major shortcomings of traditional local planning enabling legislation is its failure to establish substantive requirements for the local plan. The Florida Act addressed this problem, and imposed minimal substantive requirements for all local plans. There are three types: mandatory general requirements, mandatory specific requirements, and optional specific requirements. The following list specifies the characteristics of each category:²⁸

Mandatory General Requirements:

1. Each plan must consist of descriptive materials, written or graphic, that appropriately describe principles, guidelines, and standards for development of the area.
2. The various elements of the plan must be consistent with one another.
3. The plan must be economically feasible, and the economic assumptions on which it is based must be analyzed and included as part of the plan.
4. Each local plan must include a specific policy statement of the relationship of the area's development to the comprehensive plans of the county, adjacent municipalities and counties, the region, and the state.
5. Both the comprehensive plan and its elements must contain policy recommendations for their implementation.

Mandatory Specific Requirements:

The Act mandates the inclusion of nine specific elements in the comprehensive plan: future land use; traffic circulation; general sanitary sewer, solid waste, drainage, and potable water; conservation; recreation and open space; housing; intergovernmental coordination; and utilities.

Optional Specific Requirements:

Optional elements expressly mentioned by the Act are mass transit, airport and aviation facilities, nonautomotive traffic circulation, off-street parking, public services and facilities,

public buildings, community design, area redevelopment, safety, historical and scenic preservation, and an economic plan.

To ensure that regulations are consistent with the comprehensive plan, the statutes require that before adopting land development regulations or amendments, the governing body must submit the proposed legislation to the planning agency for review. The statutes also direct the court to consider the relationship of the comprehensive plan to the development regulation in court cases.²⁹

The problem with Florida's local planning enabling legislation is a basic one. To accommodate local governments' desire for autonomy, the legislature has resisted mandating any harsh methods to enforce compliance with the statutes. While the plan must be periodically assessed, there is no limit for the review. In addition, while the planning agency is required to review all amendments, their recommendations are only advisory, and they can be blatantly ignored by the governing body. Finally, reviews by the state and by regional agencies are purely advisory, so coordination between different levels of government can easily be evaded by the local governing body.³⁰

Vermont: State Zoning

In 1970, the Vermont Legislature passed the Land Use and Development Control Law, known popularly as Act 250. The fundamental purpose of the law was to preserve the natural forested areas of Vermont. The legislation was engineered by Governor Davis in 1969. He appointed a Governor's Commission on Environmental Control to examine what measures could be taken by the state to control new developments in the southern part of

Vermont. The panel recommended a state-wide system of planning and land use controls, which was later accepted almost verbatim by the state legislature. Traditional interest groups seemed to play a minor role in the legislation. Most of the support came from public sentiment, and concern over a proposed development by the International Paper Company. It was not until after the legislation was enacted that interest groups became active in their concern over the loss of local control.³¹

Act 250 focuses on large-scale development, although small-scale developments are controlled in areas that do not have land use regulations. The law establishes nine district commissions, made up of local citizens, to approve subdivisions of more than ten units and commercial/industrial developments of greater than ten acres. In unregulated areas, these amounts drop to one unit and one acre respectively, providing an incentive for local governments to enact appropriate regulations. Upon approval by the Commission, the State Environmental Review Board issues a permit for a proposed development. In granting the permit, the following criteria must be considered: effects of development on water pollution, public schools, soil erosion, agricultural land, scenery, and state, local and regional plans.³²

Under the Act, three plans were required to be prepared: the Interim Capability Plan, which catalogs existing land uses; the Land Capability and Development Plan, which provides general guidelines for development; and the Land Use Plan, which pinpoints specific uses for the land. The Land Capability and Development Plan, passed in 1973, is currently in effect, and is the basis by which developments are either approved or disapproved. The Land Use Plan, although completed, has not been enacted

yet, because of controversy over its ability to affect land values throughout the state.³³

The Land Use Plan is designed to achieve two aims: mandate planning on the local level and establish a state-wide system of land uses, which local and regional plans and zoning are to be governed by. Specifically, the Land Use Plan mandates that towns and regional planning commissions "shall establish uses of land generally in accordance" with the following system of categorized land uses:³⁴

1. Urban, or residential, commercial, industrial, and other development in cities, including lands needed to accommodate growth for at least thirty years and at densities of about 2,000 persons per square mile or higher.
2. Village, or uses that are settled at a density significantly greater than the surrounding area, and that have an intensity of development of one or more principle buildings per acre, with supporting public or private facilities.
3. Rural, or land near urban and village concentrations, shopping, employment, and containing residential development including "second" or "vacation" homes, and suitable for low-to-moderate densities.
4. Natural resources, or lands that generally have potential for agriculture, forestry, or mineral extraction, and not conveniently located to employment, shopping facilities and improved roads.
5. Conservation, or lands generally of a size of five square miles or more and which are undeveloped or predominately forested and which have potential for commercial forestry, are in excess of

15,000 feet of elevation, or have significant natural, recreational, scenic, or other similar features.

6. Roadside, or lands that are located within 100 feet of an interstate, state or local highway in a rural, natural resource, or conservation area.
7. Shoreline, or land immediately around or beside lakes and waterways.

For each of the seven areas, the plan sets forth "permitted" and "conditional" uses, but they are more flexible and less detailed than in a typical zoning ordinance. Nevertheless, there has been some stiff resistance to the plan by groups such as the Institute for Liberty and Community, and the Landowners Steering Committee. The latter has described the plan as an "invasion of private property rights (which)... undercuts local government (and) assures bureaucratic rule."³⁵

Developers have also identified a major problem by questioning where local authority stops and state authority begins. They give the example of a development that was approved by a district commission, and later rejected by a local planning commission. This "dual regulation," they insist, has discouraged residential development by forcing up the price of housing.

Finally, Vermont, like the rest of New England, has traditionally opted for local control and grass roots democracy, and will find it hard to submit to central control.³⁶

Nebraska: Mandated Planning and Procedural Review

Nebraska's major attempt to revise its enabling statutes came about in 1967, when the comprehensive planning process was incorporated into the zoning enabling legislation. Essentially the same as in Kansas, the process required that planning commissions be established and that they prepare a comprehensive plan prior to the local government adoption of zoning regulations.

Except for a few additions in 1975, Nebraska enabling law is still much the same as it was thirty years ago: an antiquated version of the Standard Zoning Enabling Act. Enabling legislation for local subdivisions regulations is very general in nature.³⁷ There are no clear provisions for dedication of open space or for in lieu payments, which have prompted questions regarding the authority cities have in these matters. PUD enabling legislation does not exist, and even though cities like Omaha have been utilizing the designation, some state officials wonder if "what the cities are doing could be challenged"³⁸ in court. In short, Nebraska has not effectuated any comprehensive changes in its enabling statutes; however, the state has passed a few noteworthy additions.

In 1975, Nebraska Law 317 mandated that certain cities and counties adopt planning and zoning regulations, and that all local governments be subject to state procedural review of their zoning regulations. The planning and zoning mandate applied to first and second class cities and villages located in one of four counties presently included in a Standard Metropolitan Statistical Area (SMSA). The law required that all such local governments "prepare, adopt, and enforce zoning and subdivision regulations...based upon a comprehensive development plan" by no later

than July 1, 1977.³⁹ If a local government failed to comply with the law by the prescribed date, the county in which it was located was required to prepare necessary plans and enforce zoning and subdivision regulations for the area within the municipality. The law also "strongly encouraged" counties containing first class cities to prepare a comprehensive development plan, and to begin a program to enforce zoning and subdivision regulations.⁴⁰

The state procedural review process authorized the Policy Research Office, formally the State Office of Planning and Programming, to examine the "procedures and practices utilized in municipalities (and) counties...to ensure that such procedures (were)...consistent with state laws that relate to land use regulations."⁴¹ Substantive matters and constitutional issues were specifically excluded from the examination. Under the statute, cities and counties were to send in a copy of their zoning and subdivision regulations to the Policy Research Office. Upon examination, if the procedures were found to be inconsistent with state law, a letter would be sent to the locality informing them of their noncompliance, at which point they would have 120 days to make the necessary corrections. If, after 120 days, the local government still had not made the appropriate changes, the Policy Research Office was required to publish the inconsistency in a local newspaper.⁴² It was thought that by publishing the illegality in a local newspaper, the local officials would become embarrassed, as well as fearful about possible court actions to be taken against them, and would promptly correct the situation. In reality, it seems that few people, "notice, much less read, the announcements."⁴³

The 1975 law also revised certain sections dealing with the Board of Zoning Appeals (BZA). It was found that several communities were regulating land use through a BZA rather than through a planning commission. Since BZAs are empowered to grant variances and exceptions, many people were bypassing the planning commission, and in some cases the governing body, in seeking interpretation of local ordinances. In order that the BZA could not "frustrate the purpose of the zoning regulations" of a local government, the state legislators stripped the power to grant exceptions from the BZA and gave it to the planning commission.⁴⁴

Gary G. Krumland, Deputy Director of the Policy Research Office of the State of Nebraska, summed up his feelings about the role of planning and enabling legislation in Nebraska in the following manner:⁴⁵

I think it would be helpful to do a complete study of what Nebraska has, and try and coordinate and combine some of the various enabling statutes. Generally, I think Nebraska's procedures that they require a city to go through...are good. I would say if there is any problem, it is that Nebraska so closely follows the 1926 Department of Commerce Modeling Enabling Act that there are real questions of whether any new sorts of land use management techniques would be valid.

In addressing the state review of regulations for procedural compliance, Mr. Krumland advises that if

...another state would want to adopt something like this they would have to make that choice of whether they want to be a real enforcement agency, or if they want to basically set up a mechanism to help cities and counties follow the proper procedures.

He goes on to explain,

...we find very few errors anymore and we are reaching the point... where the errors we are finding are probably not worth the red tape we are imposing on everybody else, and so it would probably be a recommendation that the legislature consider repealing this whole procedure, or at least modifying it to make it voluntary.⁴⁶

The States and Farmland Preservation

Concern over the loss of prime farmland has increased over the last ten years. Says Douglas P. Wheeler, president of the American Farmland Trust:

Land conservation has become very important to all sorts of Americans--not just the government. It shows a maturing of our country and a desire to keep our rural and agricultural heritage as intact as possible.⁴⁷

The allure of farmland to the developer is clear: "It is generally flat and well drained, thus good for building. It is probably outside of town limits and therefore taxed at a cheaper county rate."⁴⁸ Past experience shows that development will happen first "on the best lands, leaving land that is impossible or much more expensive to farm to meet the growing need."⁴⁹

"Mostly small farmers adjacent to urban growth areas are the ones pressured into selling their land," explains former Secretary of the Interior, Cecil Andrus, in an interview with Zack Sklar.⁵⁰ In Kansas, however, the

...largest losses of agricultural land are in more rural sections of the state...There is a weak relationship between population change and change in farmland in the urban counties...Thus it is difficult to conclude that growth in the larger urban areas is the prime factor causing reduction of agricultural land in Kansas.⁵¹

The major tool for protecting farmland, in most states, is differential assessment. Its main feature is that it provides for "the levy of real estate taxes on the basis of the agricultural production value rather than on the market value for which it could be sold for nonfarm use."⁵² The objectives of differential assessment are to ease the tax burdens of farmers and to preserve agricultural land. In Kansas, the first

objective overrides the second, although it seems that regardless of the stated objectives, programs to assess agricultural land on its use value are not effective in preserving farmland.⁵³ In any case, Kansas does not presently have a differential assessment law, and there has been little discussion regarding it in the 1982 state legislature.⁵⁴

Farm use value tax assessment programs have had some success in protecting agricultural land, in states where the programs are linked to comprehensive planning and zoning. In Oregon, a state-wide agricultural goal defines which land types are to be identified as agricultural and protected by local comprehensive plans. The goal further states that the lands so identified must be placed in "Environmental Use Zones" (EUZ), unless they are already committed to or needed for urban or rural nonfarm use. The program also specified which agricultural lands are to be placed in the EUZ category and given special tax assessments on the basis of the soil's resource capability.⁵⁵

Wisconsin has a similar program, except that it does not require local governments to directly link comprehensive planning and zoning with their tax assessment programs. The Wisconsin Farmland Preservation Act has two stages. The first stage, begun in 1977, gave farmers the ability to qualify for tax credits, by voluntarily signing a contract agreeing to not develop their land in exchange for state income tax credits. The second stage, which began in 1982, requires county governments to take some planning and zoning action in order for farmers to remain eligible for the tax credits. In urban counties, the land has to be under a certified exclusive agricultural zoning ordinance, and in rural counties, it must be under either a farmland preservation plan or an exclusive agricultural zoning ordinance, in order to be eligible for credits.⁵⁶ The McHenry

County Regional Planning Commission, in Illinois, has tried to achieve the same ends by creating agricultural zones with a 160-acre minimum lot size. Their zoning ordinance was almost immediately challenged as unconstitutional, but was upheld by the Illinois Second District Appellate Court.⁵⁷ As Wisconsin implements its own program, similar challenges will probably arise.

A technique more suited by Kansas is the one used by the state of New York. Here, the local government plays the role of initial and final decision-maker in the creation of an agricultural district. A grass roots approach is taken: one or more farmers spend a number of days contacting other farmers and rural landowners about the creation of an agricultural district. After obtaining signatures from participating landowners, the proposal is referred to the county planning board and agricultural advisory committee. After one or more public hearings, the county legislature may accept the proposal for referral to the State Commissioner of Environmental Conservation. The Commissioner refers the proposal to the Agricultural Resources Commission and the Office of Planning Services for review; then the proposal is sent back, and either approved or disapproved by the county legislative body. While the process is complicated, it provides ample opportunity for increasing public awareness of the importance of agriculture. Land use within an agricultural district may be affected by various provisions of the law, which are designed to encourage the continuance of a strong agricultural industry in the face of growing urban pressure and speculation. The following is a list of some of the provisions:⁵⁸

1. Agricultural Value Assessments - Farmers may have the value of their land in excess of its value for farming exempt from

taxation, if they produce \$10,000 worth of farm products and file an annual application. Land which has received this exemption is subject to a maximum five-year rollback if converted to a nonfarm use.

2. Local Ordinances - Local governments may not enact ordinances that would restrict or regulate farm structures or farm practices beyond the requirements of health and safety.
3. State Regulations - State agencies must modify administrative regulations and procedures to encourage the maintenance of commercial agriculture to the extent compatible with health, safety, and any applicable federal regulations.
- 4a. Eminent Domain - The right of public agencies to acquire farmland by eminent domain is modified, though not removed. These agencies are required to give serious consideration to alternative areas before good farmland can be taken for public use.
- 4b. Development Funds - The right of public agencies to advance funds for sewer, water, and other facilities that would encourage nonfarm development is modified.
5. Special Service Tax Assessments - The power of special districts to impose benefit assessments or special ad valorem levies on farmland for sewer, water, lighting, nonfarm drainage, solid waste disposal, or other landfill operations is limited.

Compared to differential assessment, agricultural districts are a more comprehensive approach to farmland preservation. Response to the District Law in New York has been particularly high in semi-rural areas.⁵⁹ As was mentioned earlier, most farm loss occurs in the rural to semi-rural

areas of Kansas, so perhaps a similar strategy would work here. Also, the elements of local initiative and control would appeal to many in Kansas.

There are two final approaches to agricultural preservation that are worth a cursory examination: purchasing of development rights (PDR), and transfer of development rights (TDR). The former is almost self explanatory. In PDR, the development rights of a farm are purchased by a local or state government and held in check so that the land can be used for crop production. Suffolk County, New York, is currently using this technique to preserve farmland along the urban fringe.⁶⁰ TDR is a somewhat more complicated process whereby development rights are purchased to be used in another location. These rights are not withdrawn as with the PDRs, but are placed in the private market. TDR is still a relatively new concept, and as such, has rarely been utilized for farmland preservation.

CONCLUSION

In the last ten years, states have experimented with a variety of land use techniques aimed at improving the management of land and resources within their boundaries. Some states, like Oregon, have used a centralized approach, concentrating land use management powers in the state government. Others, like Florida, have attempted to initiate state comprehensive planning without usurping the local governments' power. Still others, like Vermont, have concentrated on single issues, such as the preservation of natural and scenic resources, or like Nebraska, on the establishment of mandatory planning in small towns on the fringe of metropolitan areas.

What ties these states together is that they all share a common problem: how do you balance the need of local governments to be autonomous with the simultaneous need of the state government to protect its land resources? Florida has tried to do it by establishing an elaborate set of due process and review procedures, but one wonders whether this complexity allows anything to get accomplished. Oregon has resolved the question by putting most of the power into the hands of the state government, while Nebraska has conveniently sought to evade the question altogether.

Perhaps, Kansas should use a combination of these approaches, depending upon the issues involved. For example, control of water preservation in western Kansas is better left to the state, since it is a concern that may one day affect all Kansans. On the other hand, it would be too cumbersome to mandate detailed procedural requirements without first considering the cost involved to local communities. In short, the author feels that the local enabling legislation should be as flexible as possible, unless there are regional or state-wide concerns involved.

NOTES

- ¹ Florida Statutes Annotated (Fla. Stat.), sec. 380.06 (1)
- ² Supra, note 1 at sec. 380.04 (1)
- ³ Robert G. Healy, Land Use and the States (Washington, D.C.: Johns Hopkins University Press, 1976), p. 162.
- ⁴ Supra, note 3 at pp. 162, 163.
- ⁵ Thomas G. Pelham, State Land Use Planning and Regulation (Lexington, Mass.: D.C. Heath, 1979), pp. 152, 153.
- ⁶ Supra, note 5 at p. 154.
- ⁷ Supra, note 5 at p. 159.
- ⁸ Supra, note 5 at p. 162.
- ⁹ Supra, note 5 at p. 163.
- ¹⁰ Supra, note 5 at p. 164.
- ¹¹ Supra, note 5 at p. 163, also see no. 77-25, hearing of the Oregon Land Development and Conservation Commission, April 18, 1975.
- ¹² Id.
- ¹³ Supra, note 3 at p. 135.
- ¹⁴ Supra, note 5 at p. 152.
- ¹⁵ Supra, note 5 at pp. 157, 158.
- ¹⁶ Supra, note 5 at p. 5.
- ¹⁷ Supra, note 5 at p. 29.
- ¹⁸ Supra, note 5 at p. 33.
- ¹⁹ Supra, note 5 at p. 34.
- ²⁰ Supra, note 5 at p. 37.

- 21 Robert Linowes and Don T. Allensworth, The States and Land Use Control (New York: Praeger Publishers, 1975), p. 12.
- 22 Supra, note 5 at pp. 193-195.
- 23 Gilbert L. Binnell, Jr., "Florida's State Land Use Laws and the ALI Model Development Code," in Land Use: Planning Politics and Policy, ed. Richard Cowart (Berkely: Univ. Extension Publications, 1976), p. 38.
- 24 Patricia A. Simko, J.D. et al., "Subdivisions and the Law," vol. 3 of Promised Lands, ed. Jean M. Halloran (New York: Inform, 1978), p. 93; see also Cross Key Waterways v. Ashew, 351 So. 2d 1062.
- 25 Supra, note 5 at p. 171.
- 26 Supra, note 5 at p. 173.
- 27 Supra, note 5 at p. 174.
- 28 Supra, note 5 at p. 175.
- 29 Supra, note 5 at p. 179.
- 30 Supra, note 23 at pp. 43-46.
- 31 Supra, note 21 at pp. 79, 81.
- 32 Supra, note 21 at p. 83.
- 33 Supra, note 21 at p. 85.
- 34 Supra, note 21 at p. 86.
- 35 Supra, note 21 at p. 93.
- 36 Supra, note 21 at p. 92.
- 37 Personal interview with Gary G. Krumland, Deputy Director of the Policy Research Office, State of Nebraska, 9 March 1982.
- 38 Id.
- 39 Nebraska Statutes Annotated (Neb. Stat.) 84-151; cities of the first class are 5000-100,000 pop., second class cities are under 5000 pop.
- 40 Supra, note 39 at 84-152.
- 41 Supra, note 39 at 84-156.
- 42 Id.
- 43 Supra, note 37.
- 44 Id.

- 45 Id.
- 46 Id.
- 47 William L. MacDougall, "Private Money Pours in to Save Green Space," U.S. News and World Report, 26 Oct. 1981, p. 64.
- 48 Eugene Carlson, "Governments Struggle to Keep Farms Away from Developers," Wall Street Journal, 23 June 1981, n.p.
- 49 "Vanishing Farm Land," The Washington Post, 5 Aug. 1981, n.a., n.p.
- 50 Zach Sklar, "The Vanishing Farmland," Mainliner, Oct 1981, n.p.
- 51 G. Leithauser, "The Effectiveness of Differential Assessment as a Land Use Control," Thesis, Kansas State Univ., 1979, pp. 86-94.
- 52 Supra, note 51 at p. 23.
- 53 Id.
- 54 Paul Johnson, Info. Coordinator, Public Assistance Coalition of Kansas at seminar given at Kansas State Univ., Dept. of Regional and Community Planning, 26 March 1982.
- 55 Frederick Steiner, Ecological Planning for Farmlands Preservation (Pullman, Washington: Washington State Univ., Cooperative Extension, 1980), p. 70.
- 56 Supra, note 55 at pp. 71-73.
- 57 "Illinois Court Upholds Farmland Preservation Law," Planning, 47 (1981), 5, n.a.
- 58 William R. Bryant and Howard E. Conklin, "New Farmland Preservation Programs in New York," AIP Journal, 41 (1975), 390-396.
- 59 Id.
- 60 Id.

CHAPTER FOUR

KANSAS PLANNERS - THEIR OPINIONS AND ATTITUDES

A detailed study was undertaken of the opinions of Kansas planners on the current state planning and zoning enabling statutes. By identifying some of the problems encountered by planning professionals in the state, it may be possible to determine how enabling law should be changed. It is hoped that examining planners's perceptions of enabling legislation will result in a more realistic approach in formulating revisions to the statutes.

METHODOLOGY

Three Kansas planners where chosen for this study. Each is currently working in the state of Kansas, and is knowledgeable in the field of planning law, particularly as it applies to the state. Their familiarity with the current planning and zoning enabling legislation was a prime consideration in their selection. A list of the respondents and their qualifications follows:

Robert Lakin - Mr. Lakin is the Director of the Wichita Sedgewick County Metropolitan Area Planning Department. He has more than 25 years' experience in City Hall, the last twelve as planning director. Mr. Lakin has been described as "one of the city's most influential

administrators,"¹ and was instrumental in designing the current PUD section of the enabling statutes.

David Yearout - Mr. Yearout is Director of the Johnson County Planning Department, a rapidly growing area on the fringe of Kansas City. He is also Chairman of the APA Committee to Revise the Enabling Statutes, and as such has an intimate knowledge of present enabling legislation.

Ronald Williamson - Mr. Williamson is a city planner who currently works for the independent developing firm of Bucher and Willis, in Kansas City. His experience in private development and city planning, and his service as Chapter President of the American Planning Association, have all contributed to his understanding of enabling law and its deficiencies.

Because of the specialized nature of the subject, this study was limited to three planners. Familiarity with enabling law is rare in the planning field, and it was felt that by instituting a smaller, yet more detailed study, the responses elicited would be more constructive. Because of the small sample size, the study is more qualitative than quantitative in nature, although a few statistics describing the level of agreement among the planners will be presented at the end of the chapter.

The planners were given a 22-question, open-ended, verbally-administered questionnaire. The questionnaire was designed to allow the subject to respond in as broad a manner as possible, so that any pertinent issues would not be avoided. The questions themselves were formulated on the basis of research into the Kansas Planning and Zoning Enabling Statutes,² the Model Planning Enabling Code of the American Law Institute,³ and assorted literature presented in the preceding chapters.⁴

The primary advantage of the format use was its ability to elicit detailed information from the respondents. Also, misunderstandings over the meaning of questions were minimized because the instrument was verbally administered. The major disadvantage of the format was its inability to accommodate precise, quantifiable statements. Most of the questions were complex and did not lend themselves to simple, categorical answers. It was felt that in this study, however, the advantages of the open-ended format greatly outweigh its disadvantages.

The remaining portion of the chapter is devoted to the in-depth analysis of the questionnaire. A brief discussion will precede the actual responses given by the subjects. Its purpose is to give the reader some background on each question before it is answered by the planners. A copy of the survey instrument is provided in the Appendix.

SURVEY QUESTIONNAIRE

Enabling Legislation and the Local Regulatory Environment

1. Do the present enabling statutes need a list of definitions, for example, a definition of agriculture?

Discussion

The Kansas planning and zoning statutes provide few definitions for key words used throughout their text. As a result, there has been some confusion among planners and private landowners over the precise meaning of several words. "Development" and "agriculture" are two examples of words which fall into this category. Other, more basic terms frequently

used in the planning field are defined in the procedural guide published by the Kansas League of Municipalities.

Planning law has the unique characteristic of using common words to describe the uses of land. Embodied in planning legislation, these terms are subject to many interpretations as they are scrutinized by the layman and professional alike. Consequently, as Anderson points out in his American Law of Zoning, "a meticulous attention to the definition of terms" must be given.⁵ In the absence of such definitions, it becomes the prerogative of the courts to attach precise meanings to words--a process which over time may imbue a term with meanings not anticipated by the legislature. Kansas has had a number of court cases dealing with what constitutes "agriculture," among them, one in which agriculture was defined to include the feeding of hogs on a 160-acre farm.⁶ As urban areas continue to expand into the rural counties, litigation of this nature will undoubtedly increase.

Responses

All planners agreed that there is a need for more definitions in the enabling statutes. According to Mr. Yearout, a definition of agriculture is especially crucial. "We get people walking in here with a half an acre with a garden plot and two cows and a goat, and they claim they are farmers...and want to be exempted from all regulations." He goes on to explain that "agriculture is going to be different for different parts of the state," and that one way to approach the problem would be to "mandate that one of the things that has to be done before a county or local jurisdiction...gets involved (in planning) is that they reasonably define agriculture."

Establishing criteria for what constitutes agriculture may not be an easy task. As Mr. Williamson observed, "That's a real difficult one...Do you go by earnings, number of acres, or what?" Mr. Lakin also acknowledged that "There are going to be difficulties coming up with the definitions."

2. In an effort to increase planning and land use regulation at the local level, Oregon enabling statutes have made the regulation of development at the local level mandatory. On the other hand, the model code has sought to increase responsibilities for land use decisions at the local level by granting more power to local governments that adopt a land use plan. Do you agree with either of these alternatives for increasing local governmental regulation in Kansas? Do you have any additional strategies? Or do you feel that the concept itself is faulty?

Discussion

In Kansas enabling law, land use regulation by a local jurisdiction is optional.⁷ If, however, a city elects to become involved in certain land use activities, such as regulating subdivisions, a comprehensive plan is required.⁸ A plan is not required, though, for instituting zoning or PUD regulations.⁹

Planning has been mandated in several states, although for varying reasons. In Oregon, its primary purpose is to ensure that local governmental regulation is consistent with state-wide planning goals.¹⁰ Nebraska's objective, on the other hand, is to control growth in the urban fringe areas of its SMSAs.¹¹ Whatever the reason, it seems that an increasing number of states have considered instituting mandated planning.¹²

Responses

All of the planners felt that mandate planning in the state of Kansas is politically unfeasible, and perhaps unnecessary as well. "We are not

seeing the development pressures state-wide that other parts of the country are seeing," claimed Mr. Yearout. On the other hand, Mr. Williamson conceded that "one way you possibly could make planning mandatory...is have the state be willing to fund it." He elaborates, "most of the cities and counties resent the state dictating that you have to do this and you have to do that and...not helping to subsidize...in some manner." As an example, he cites the requirement that each county provide for the management of solid waste without any state funding, and maintains that "it really left a bad taste in the mouth of those counties...They really resented that type of thing."

Mr. Lakin summed up the respondents' feelings, asserting that "the carrot and stick process is probably...better...than mandating (planning)," and that "if there is a special interest in doing something in a community then you should have a plan."

3. The model code allows governments to require developers to provide streets, open space, and homeowners' associations as a condition of approval, but only as much as is needed by the development. Do you think the KSA statutes should be revised to reflect the model code's philosophy?

Discussion

In the KSA statutes, approval of a subdivision plat is dependent on the presence of various improvements such as streets, sanitation facilities, and open space.¹³ The level of commitment of the developer in providing these improvements has been left to the discretion of the local governments--with the exception of the dedication of land, which is limited by statute to 10% of the tract.¹⁴ If a developer feels that he is being required to provide an unfair amount of improvements on his property, the reasonableness of the conditions can be decided by the courts. The

model code, seeking to minimize legal conflict between the local government and the developer, has suggested that the statutes require that a direct relationship be shown to exist between the level of improvements required and those actually needed by the development.¹⁵

Responses

There was agreement among the subjects that this type of provision would severely limit the planner's ability to provide the necessary facilities needed by a community. Mr. Lakin argued that one cannot "always snip the line between what is generated onsite and offsite," and that it would be "extremely difficult...to just simply say that no offsite impacts be required to be solved by (a) particular developer."

Mr. Williamson feels that such a provision would build more rigidity into an already inflexible system. As an example, he observes that the amount of land that must be dedicated in a small subdivision would not be large enough to be used as a park. He maintains that a cash equivalent of the land, put into escrow, would allow the government to eventually buy enough land to truly meet the needs of the residents. In his American Law of Zoning, Anderson concurs, saying that sometimes "the size, shape, topography or location of some plats is such that the establishment of a park or playground on part of it would be impractical."¹⁶

"One solution would be to have the statutes set up alternatives that cities could use in dealing with developers," advises Mr. Williamson. Alternatives have already been used by some cities in Kansas, but without express statutory authority, they can be invalidated by the courts. For example, a regulation allowing developers to contribute money in lieu of

park land in McPherson, Kansas was found invalid in 1962 because it was not authorized in the statutes.¹⁷

4. The model code suggests that detailed transcripts be made of all required hearings for development permits. The reason is that if litigation does occur, the courts can have a written record of the reasoning used to arrive at a particular decision. Do you feel such a procedure is warranted in Kansas?

Discussion

Transcript procedures in the Kansas enabling statutes differ according to the type of hearing. For zoning amendment hearings, it is only necessary that there be an "accurate written summary" of the proceedings.¹⁸ In contrast, the Board of Zoning Appeals must "keep minutes of its proceedings, showing evidence presented, finding of fact by the board and (a) vote upon each question."¹⁹

New Jersey has one of the strictest requirements for the detailed recording of hearings. Its statutes mandate the "verbatim recording of all hearings and decisions on applications for development" and must include "findings of fact and conclusions."²⁰

Responses

The prevailing attitude of the planners was that requiring detailed transcripts would be too expensive, especially for smaller communities. As Mr. Williamson remarked, "I don't think that communities are going to be willing to make that kind of financial sacrifice--they will run the risk of losing a lawsuit instead." Mr. Lakin wondered if such a law would be enforceable in the first place. "If you require them to state their reasons on record, then what are you going to do if they still do not." Nevertheless, Mr. Yearout held that "there should be some type of

guidelines in the statutes to encourage better record-keeping, but a certain amount of discretion (should be) allowed as to when more detailed transcripts might be necessary."

5. Various attempts have been made to partially remove the legislative body from the regulatory process in municipalities. For example, the city of St. Petersburg, Florida has delegated the power to amend zoning to its zoning board. The model code, not going quite so far, has suggested that an appointed body have the power to adopt rules and recommend amendments, through a legislative type hearing. This hearing would be very similar to those held by city commissions for adoption of a new ordinance or amendment. It is alleged that the primary advantage of such a hearing would be its ability to remove the legislature from the day-to-day decisions that must be made concerning zoning matters, thus allowing them more free time to concentrate on policy considerations of a broader context. How do you feel about this issue?

Discussion

The planning commission, as an appointed body, already has the power to make recommendations to the city commission, although it cannot adopt rules, other than those which pertain to its membership.²¹ The model code would extend the appointed body's rule-making power, likening it to a U.S. government agency, which can publish rules in the Federal Register.²²

At least two other states have delegated the power to amend the zoning ordinance to appointed boards. In Connecticut, a zoning commission may adopt zoning amendments; and in Georgia, a county planning and zoning commission is vested with similar authority.²³

Responses

All of the subjects were concerned with the potential dangers of such a measure. "The possibility is too great that you're removing...from the people the ability to have a say about the decisions being made in their community," declared Mr. Yearout. Mr. Lakin, addressing the root of the

problem, observed that "a more consistent body of law" could be achieved through "the zoning administrator process, as practiced generally in the State of Oregon, where you have people...trained in the law."²⁴

6. Often a developer or common landowner is reluctant to initiate plans for the development of his land because he is concerned about when his rights become vested (in other words, at which point does his right to develop the land become irreversible). It has been suggested that the enabling statutes make clear exactly when a landowner's rights are vested, i.e. when he is issued a building permit. What are your thoughts on this?

Discussion

The KSA statutes do not address the issue of vested rights.²⁵ It is probably assumed that a property owner's rights become vested when a building permit is issued. But at least one Kansas court case, in which a permit was issued and then later revoked, indicates that a permit does not always guarantee an owner to continue with his development plans.²⁶

A more common problem is when a landowner, seeking to sell his property, is faced with a hesitant buyer concerned with use restrictions on the realty. Understanding the reluctance of the buyer to acquire land on which various uses may be prohibited, the model code has suggested that local governments issue "declaratory orders" to individuals selling their land, specifying the type of development that would be permitted. Such a legal document would clarify to the buyer and seller alike, exactly what uses would be allowed on the property.²⁷

Responses

With regard to the use of declaratory orders, all of the planners insisted that by reading the zoning ordinance, a potential buyer can determine for himself, whether he can develop as he wants. They added that

if the buyer is relying on a zoning change, it is his own gamble, and he should not expect the local government to make any promises in advance.

As to the vested rights issue, Mr. Lakin is not sure that "this is a problem in Kansas," but that if it is, it can be handled in a straightforward manner in the statutes. Mr. Yearout and Mr. Williamson believe that it should be clarified in the statutes. As Mr. Williamson remarked, "It would make the inspection process a little more responsible on the part of the cities."

7. Often, zoning amendments enacted by legislative bodies, especially for smaller parcels of land, are presumed to be valid by the courts. In other words, since the amendment is an act of the people's elected representatives, the courts feel that in most cases the amendment should be presumed to be reasonable and legitimate. The model code suggests that amendments that deal with small parcels of land should not automatically be given a presumption of validity, unless the legislative body's decision to adopt such an amendment was based on and supported by findings of its planning board. What are your views on this proposal?

Discussion

The model code statutorily directs the courts to strip the presumption of validity from amendments that deal with small parcels of land. It is felt that this will help prevent spot zoning, and other inconsistencies which could subvert the land use plan for a city.

The current practice of the courts is to sustain zoning amendments if there is any legal basis for them. As Anderson points out, "the burden of proving the invalidity of a zoning amendment is upon the litigants attacking such amendments, (and) a reviewing court will not substitute its judgment for that of the legislative authority."²⁸ If the measure suggested by the model code was implemented, the courts would have the authority to scrutinize legislative reasoning more carefully than before, a

role that according to Babcock (The Zoning Game) is needed to prevent exclusionary zoning on the fringes of metropolitan areas.²⁹

Responses

Mr. Lakin, while he was not sure that he agreed completely with the model code's proposal, did complain that, "those things which can be defined as quasi-judicial need to have a better explanation, and that's essentially the small parcel of land argument here, as I see it."

Mr. Yearout was primarily concerned about the arbitrariness of defining "a small parcel of land." He also contended that requiring the legislative body to base its findings on planning board recommendations would give an appointed body too much power. He added that "as it is now, there are protest procedures to deal with zoning amendments for small parcels of land," although he agreed that these procedures may be inadequate.

Mr. Williamson questions the assumption that basing legislative decisions on planning board findings will prevent spot zoning and other subversions of the land use plan. As he confides, "I have not really seen this as a problem between the two bodies," but rather, the problem is that "they both do it together a lot of times." His solution is "to write a plan...more policy oriented (that) sets out standards and criteria..." for various forms of development.

8. Do you think the present KSA statutes allow too much room for due process errors by the local officials, such as poor notice and hearing procedures?

Discussion

The most conspicuous feature of the notice procedures in the Kansas statutes is that they differ from one another according to the jurisdiction involved. The city planning section requires that notices be published once in an official city newspaper, 20 days prior to the hearing date.³⁰ The county planning section requires notice to be published once each week for two consecutive weeks in an official county newspaper.³¹ While both sections mandate that the time, date, and place of the hearing be included in the notice, only the city provisions insist that in a zoning change, a legal description of the property be provided along with written notice to adjacent property owners.³² Except for the county section, the hearing procedures in the enabling statutes appear to meet the test of reasonableness as established in the courts. The courts focus primarily on "whether (the notice) was published or served in a timely manner (and)... whether it was sufficient to inform the public of the essence and scope of the zoning regulation under consideration."³³ Whether the individual local governments conform to the procedures, as outlined in the statutes, is another question entirely.

The Kansas Statutes do not contain guidelines for determining the precise nature of the hearing itself. The absence of such guidelines does not seem to bother the court, since they place the primary emphasis on the basic fairness of the proceedings, rather than on technical considerations.³⁴

In its attempt to ensure due process, the model code has emphasized the judicial nature of the hearing proceedings. Written notice is given to as many as six different groups or entities, and cross examination of witnesses by council is afforded to any party and presided over by a

hearing master. It can be argued that such measures are too complex, however, as is illustrated in a 1976 Pennsylvania court case in which the following decision was rendered: "At a public hearing on a proposed zoning amendment, members of the public may not, through council or otherwise, examine or cross-examine witnesses called to testify by the municipality and may not call members of the governing body as witnesses."³⁵

Responses

Two of the planners, Mr. Yearout and Mr. Williamson, commented briefly that there may be a need for more specific guidelines in hearing and notice procedures. Mr. Lakin contended that it was not the statutes, but the jurisdictions themselves that were the basic problem. "We do not do a good job in Kansas, in most jurisdictions, of following even the most basic requirements of the statutes." Mr. Lakin's observation is supported by a number of Kansas court cases that deal with the inadequacy of local government in providing due process.³⁶

Local Land Development Planning

9. Should the comprehensive plan be mandatory or, as the model code has suggested, only an instrument used to provide incentive to achieve further planning powers?

Discussion

The adoption of a comprehensive plan in the Kansas enabling statutes is permissive rather than mandatory.³⁷ What this means is that any local entity in Kansas may adopt zoning regulations without first implementing a comprehensive study of the physical and economic environment. Charles Hall, in his article In Accordance with a Comprehensive Plan, urged that "a

city undertaking to exercise the land regulatory powers granted to it by a state enabling legislation should be required initially to formulate a master plan, upon which regulatory ordinances, of which the zoning ordinance is but one, would then be based."³⁸

The courts are adhering to this view more frequently, stating that zoning and planning are "two facets of an integrated land use control program," and that they "will review changes (in a zoning ordinance) to be certain that they conform to the comprehensive plan."³⁹

Responses

All of the planners declared their support for a measure requiring a comprehensive plan to be prepared before the enactment of any local land use regulations. Mr. Williamson's brief comment is indicative of all of the responses: "The plan should be mandatory if they (the local governments) are going to do any type of (land use) regulation, whether it is zoning subdivision, whatever."⁴⁰

10. In the model code no specific body is required to prepare a comprehensive plan. In the KSA statutes a planning commission is required to prepare a comprehensive plan. Many, however, feel that the planning commission "is a dodo" (Babcock, The Zoning Game, p. 40), and further, that it does not usually adhere to the plan that it prepared. Given this, do you think it would be better to replace the planning commission with a professional staff or hearing master?

Discussion

It is a safe assumption that most planning commission members in Kansas do not have an intimate knowledge of planning, especially in the more rural areas of the state. Also, since most comprehensive plans are prepared by a private firm for a community, when the firm leaves the

community planning board may not really have a good understanding of the plan. Together, these deficiencies could upset the planning process, leading to uncoordinated development and misplaced public facilities.

Babcock's 1966 book The Zoning Game contested the use of the planning commission: "It undoubtedly did make sense in the early days of municipal planning, when well trained professionals were scarce and pressures on land use were light, but today it is the principal deterrent to more meaningful communication between the professional planner and the politically responsible decision-maker."⁴¹

Responses

There was general disagreement among the planners on this question, but it was one of degree more than anything else. Mr. Lakin believed that while the planning commission "provided some balance against professionalism," a hearing master might be able to take its place. Mr. Williamson, while generally in favor of retaining planning commissions, confided that even if a substitute were available, the political realities in Kansas are such that "we are not in a position...to do away with the planning commission yet."

Mr. Yearout, on the other hand, said that he could not "envisage getting away from the lay-advisory body," although he did admit that some problems do exist. "I cannot disagree with Babcock, a good many planning commissions are dodos, but I think that goes back to the fact that either they have to educate themselves, or whoever is providing staff support to them has got to make an effort to education them." On replacing the commission with a hearing master, Mr. Yearout remarked, "...the big developers would love it, because then they would not have to talk to these

dodos; (however,) the people would lose something if we removed citizen participation."

11. Should the comprehensive plan be required to be adopted by the local legislative body incorporating policies?

Discussion

In Kansas, the planning commission adopts the comprehensive plan. Before adoption, a public hearing must be held to accommodate citizen input. Also, to ensure involvement by the legislature, recommendations from the governing body must be reviewed by the commission.⁴² It is questionable whether these procedures advance the purpose of the plan and bring "its substance forcibly to the attention of the legislature."⁴³

Some states, like Illinois and California, have required the governing body to formally adopt the comprehensive plan of their community.⁴⁴ In California, this led to an unexpected problem when the comprehensive plan was interpreted by the court as "a constitution for all future development within a city," and making amendments subject to the referendum process.⁴⁵ The resulting rigidity made the plan almost unworkable. A later court decision ruled that the comprehensive plan need not be subject to judicial control, unless its conclusions are without a rational basis.⁴⁶

Responses

The planners all agreed that the comprehensive plan should be the document of the elected officials, especially since, as Mr. Yearout noted, "they are the only ones in power (who) can implement (the plan)." Mr. Lakin objected to the role of the planning commission as keeper of the

comprehensive plan, insisting that "it (the plan) should be the policy statement of the governing body, not the policy statement of the planning commission." Finally, Mr. Williamson felt that the governing body should adopt the plan, but the commission should still prepare it.

12. The model code suggests using a short-term program which would help implement and detail desired objectives of the comprehensive plan in approximately one- to five-year units. This would probably require more planning analysis skills and computer technology than before. Do you think this is a realistic idea, given present planning technology in Kansas?

Discussion

In the KSA statutes there are provisions for amendments or additions to the comprehensive plan, but there are none for implementing short-term programs. For the most part, the comprehensive plan is presented as a long-term document. For example, the statutes refer to "long-range financial plans for the financing of public facilities."⁴⁷ This is contrary to the short-term capital improvements budget (CIP), which is usually implemented in one- to five-year increments. As a result, there is little or no coordination between planning and the CIP process. Anderson stresses that this problem should be corrected. He insists that programs designed to implement certain objectives "must be consistent with the public improvements program."⁴⁸

The model code acknowledges the need to bridge the gap between the general recommendations of the plan and community action, and has suggested a program with three primary aims. They are:

- 1) devoting major attention to accomplishing desired objectives rather than simply formulating them;
- 2) giving meaning to objectives by detailing their costs; and

- 3) making the plan more realistic by reducing the programming time enough to be comprehended.⁴⁹

Responses

The planners felt that the incorporation of short-term programs into the comprehensive plan would be beneficial, though Mr. Lakin thought this is probably not a realistic idea for all of Kansas. If applied "to the ten to twelve places in Kansas that might be able to handle it, it might be all right to use," he supposed.

Mr. Yearout insists that it would be feasible to institute short-term programming in small communities as well as large ones. "Really, what we are talking about is identifying community needs and proposing solutions to address...those needs. It is not that difficult on a small level.... A large jurisdiction, like Salina or Manhattan (has) dynamics involved that are difficult to address manually (and)...may need some in-depth analytical skills--but they have also got the resources to call upon."

The static nature of the plan was what concerned Mr. Williamson. He noticed that some communities have the mistaken idea that their plan is "the gospel for the next 20 years." Short-term planning, he claimed, might be a good device to dispel this notion.

13. The model code has added a provision which would allow a local legislative body to enact a reservation ordinance. A reservation ordinance pertains to land used for public purposes only. It would either prohibit all development in a designated area, or allow only development that is consistent with the land use plan; it also has a time limit. Do you feel that such a provision in our statutes would be helpful?

Discussion

A form of the reservation ordinance already exists in the Kansas statutes as the Major Street Plan Official Map. According to this section, a local government may prohibit the erection of structures within mapped roads after adopting an official street map.⁵⁰ Building setbacks are also a type of land reservation, whose legality has been formally established in Kansas.⁵¹

The model code extends this principle to lands acquired for any public purpose; not just streets. For example, land classified to be used as a park would be reserved for development consistent with that use, such as a riding stable or swimming pool. The authors of the ALI code feel that such an ordinance would not be considered by the courts as a "taking" of land. A landowner seeking to develop his land in a manner inconsistent with the ordinance would of course be able to challenge its reasonableness in court.⁵²

Responses

There was disagreement among the planners on this question. Mr. Lakin thought that, at least theoretically, the authority to reserve land would be helpful, especially for urban areas. Before such a practice could be implemented, though, certain logistical problems would have to be resolved, such as the scale involved, and the amount of time a parcel of land could be reserved. He also warned that, regardless of what the authors of the model code claimed, there is a distinct possibility that a reservation ordinance would be ruled as a "taking" in Kansas.

Mr. Yearout and Mr. Williamson contended that a device for reserving land would ultimately be misused, and would result in a decrease of

available land for development. "I thing if the cities, counties or any public agencies want (land) they can go out and buy it," remarked Mr. Williamson. He added that land is not so scarce in Kansas to really create a problem in most places.

Discontinuance and Enforcement of Land Use

14. Two parts of the model code are devoted to discontinuance of non-conforming uses. Part I lists the grounds for discontinuance, and Part II the means of enforcement. Do you feel that we could use something like this in the Kansas statutes?

Discussion

Kansas enabling law contains no express provisions for the termination of non-conforming uses.⁵³ There is an implied power, however. As Anderson states: "In most jurisdictions, the power to terminate non-conforming uses, through amortization or otherwise, is derived from the general delegation of zoning power, and from the firm judicial policy of regarding non-conforming uses as inconsistent with the zoning scheme and a fair target for strict regulation and even final extermination."⁵⁴

The model code seeks to strengthen the principle of termination of non-conforming uses through express statutory authority.⁵⁵ Presumably, this would cover instances in which amortization ordinances have been disapproved by the courts, because the statutes do not authorize the enactment of such measures.⁵⁶

The principles used to terminate non-conforming uses in the model code are essentially the same as those practiced widely today. Summary termination, or retroactive zoning, the process in which existing uses are not exempt from a zoning ordinance and are terminated immediately, is not

advocated by the authors of the code.⁵⁷ As Anderson points out, retroactive zoning "is so offensive to the Anglo-Saxon sense of justice that it is never favored."⁵⁸

Responses

That the Kansas statutes should address themselves to this issue was evident to Mr. Yearout and Mr. Williamson. "Enabling legislation should have specific guidelines and criteria to be followed before you can tell someone they have to amortize their non-conforming use," affirms Mr. Yearout. He also advocates that "a mandatory zoning review should take place when new zoning regulations are enacted so that one has a chance...to be brought into compliance with the new regulations." Mr. Williamson's thoughts were similar, but he added that the non-conforming sections of the statutes should offer "as many different options" as possible to the local jurisdiction.

A less traditional view was taken Mr. Lakin, who felt that provisions for allowing amortization were basically fruitless. The value of property, he contested, is rarely amortized to zero. He observes that at the fifteenth year of the amortization period, for example, property can be bought by someone who needs another 20 years to amortize. When the property, in turn, reaches the end of another period, the owner often asks for a change of zoning, which is frequently approved by the governing board, either because of political reasons, or because of a lack of established policy in maintaining a specific neighborhood character.

Mr. Lakin proposed two solutions to the problem. First, if the non-conforming use is an egregious nuisance to the community, then it should be eliminated immediately. A test for the reasonableness of this approach

would be the neighborhood's willingness to bear at least part of the cost of the condemnation of the property, through special assessment taxes. "The basic test," Mr. Lakin concludes, "is can they pay at least something."

Mr. Lakin's alternative solution is to "let the property go ahead and expand...be competitive in the market place, even though you have given that particular property a monopoly position as to geographical location." The model code takes a similar approach by providing for possible exemptions of discontinuance, if it can be shown that the land is capable of realizing a reasonable monetary gain and can integrate itself well into the character of the neighborhood.⁵⁹

Mr. Lakin's concluding remark is an important one and worth mentioning: "Non-conforming uses go away because they are economically obsolescent, not because they are non-conforming."

15. Do you feel the enabling statutes should contain a section dealing with the enforcement of local regulations, such as enforcement notices and hearings?

Discussion

A brief statement, regarding procedures available to local governments in enforcing their land use regulations, is provided in the Kansas statutes. Authority is given to punish violations with a fine of up to \$500.00 per offense. Local jurisdictions are also instructed to seek remedies from the courts, if the need arises. Such remedies would include a writ of mandamus, in which the court orders a government official to perform an affirmative act; or an injunction, in which the court orders someone to stop what he or she is doing.⁶⁰

In content, the model code provisions are similar to those of Kansas, except that they are stated more expressly. The only major difference is that the model code authorizes the local jurisdiction to enter the property and take the necessary action to correct or abate the violation. "Necessary action" is an ambiguous word, however, and its definition would undoubtedly be challenged in court.⁶¹

Responses

The planners agreed that enforcement procedures should be clarified, but only Mr. Yearout elaborated. "The statutes (allude) to what the penalties are and the remedies available to alleviate violations, but they do not talk about that interim period between when you find out about a violation and what you do to resolve it--it might not hurt to have some guidelines in there (concerning this)."

Acquisition and Disposition of Land Uses

16. Do you think that the way to define the line between regulation of property and a taking of property is by legal enactment or judicial interpretation?

Discussion

The definition of what the courts have considered to constitute a taking has changed considerably over time. It is an evolutionary process, for which the courts have devised a number of tests. One of the more notable tests was established by Justice Holmes, in the *Pennsylvania Coal v. Mahon* case. He decided that the loss of value of the individual's property ought to be balanced by the benefit received by the public in maintaining a land use regulation. Although other tests have been applied

throughout the years, this "balancing test" is still used frequently by the courts.⁶²

It has been proposed that legislative bodies define the line between the regulation and the taking of property more precisely, "as a means of limiting the operation of the taking clause, and preventing its use against types of regulation that are clearly necessary in the public interest."⁶³ England, the country in which the taking clause originated, has had statutory standards that define the limits of regulation and determine when compensation should be paid for a number of years.⁶⁴ It is also asserted that while the courts are the final arbitrators of interpretation, they would welcome legislative assistance in the form of statutory guidance in interpreting the application of the taking issue.⁶⁵

Responses

All of the planners were adamant that the taking issue should remain an evolutionary process. Even if the statutes did try to define taking, the issue would end up in the courts anyway, they insisted. Assuming that a definition could be held up as legitimate by the courts, the planners still believed that it would be unproductive and perhaps dangerous to stop a process which ensures flexibility as our society changes.

17. Often, local governments wish to phase their development in order to provide for public facilities. The desire to do this is illustrated in the *Golden v. Planning Board of Ramapo* case. Although the *Golden* case was upheld, other have not been. In order to ensure a municipality's ability to phase its development, the model case has suggested what it refers to as a condemnation of a temporary interest. The basic idea is to condemn an area for a limited amount of time, presumably the time needed to meet the public service demands for that area. For this time period, a compensation would be awarded either annually or in one lump sum. After this time period, the condemnation of the property would terminate, compensation would stop, and development would be allowed to proceed. Do you think this would be a helpful instrument in controlling the timing of development?

Discussion

The use of growth control techniques across the country has already become an established practice. As the post-war "baby boomers" mature and seek residences of their own, the pressure for housing space will undoubtedly increase throughout the nation, accompanied by new techniques to limit the growth of communities already strained by overburdened public utilities and services.

The Golden case illustrates one technique for limiting development in an area with inadequate public facilities. In order to correspond the timing of residential development with the town's ability to provide public facilities, the city of Golden, New York enacted an ordinance creating a new class of "special permit uses," one of which was a "residential development use." The ordinance required that a residential developer secure a special permit from the legislature. Approval of the permit was dependent on the developers' ability to earn a number of points, awarded by the city for various facilities already located in the proposed development area. For example, points were awarded for roads, sewers and firehouses. The developer had to gather a total of 15 development points to have his permit approved. Clearly, many developers could not accumulate enough points, and it was not long before the matter was taken to court. The town of Golden prevailed, and the courts upheld the ordinance as a "rational basis for phased growth," ostensibly because it conformed to the comprehensive plan.⁶⁶

Other methods used have not fared so well. In the town of Boca Villas, Florida, an absolute limit on the number of dwelling units allowed was ruled as unconstitutional, because it could not be shown that the ordinance bore an adequate relation "to the public health, safety or

welfare, or the ability of the city to meet continued growth."⁶⁷ In the village of South Nyack, New York, an ordinance prohibiting the construction of multiple dwelling units was also struck down by the courts, as unconstitutionally depriving the owner of all economically viable uses of his property.

The model code has suggested using temporary condemnation powers in an attempt to supplement the power of regulation, in cases where potential constitutional problems might arise.

Responses

Both Mr. Lakin and Mr. Williamson felt that the compensation required for a temporary condemnation would be too costly for most Kansas jurisdictions. Mr. Lakin added that his alternative to this scheme would be to use the capital improvements program to control the timing of development. "Give me the capital improvements program and you can have your zoning ordinance and your subdivision regulations," he contested.

Mr. Yearout thought that it was a conceivable method but that it would have to be originated at the state level. He felt that the chances of this occurring are slim, unless the legislation is heavily pushed by a special interest group, such as the League of Municipalities. A more urgent problem, warned Mr. Yearout, is the degree to which existing facilities are ignored by elected officials. People in the rural and core city areas of the state are increasingly having to contend with substandard public facilities, while the politicians focus their attention on the newly developed areas. If this problem is not corrected, says Mr. Yearout, it could lead to an uprising by the rural and core city residents, which could eventually promote "referendum planning."

State Land Development Regulation

18. Would you look favorably on provision in the statutes which would create and authorize a State Land Planning Agency to:
- a. assemble land for large scale development through condemnation;
 - b. provide standards for improving local decision-making;
 - c. regulate areas on its own in the absence of local regulations; and
 - d. serve as an arbitration board for conflicts between local governments.

Discussion

In 1980, Governor Carlin indicated his feelings about state planning by dismantling the Department of State Planning in Kansas. Undoubtedly, there were those who agreed with the decision, who maybe felt that the department was not providing any truly necessary services. Whether it was or not is not within the province of this paper.

The authors of the model code believe that a central state planning agency can provide at least two useful functions. It can acquire land for large-scale development, and it can establish procedures for the regulation of land in environmentally sensitive areas. The latter function would include giving power to the state to regulate areas on its own, and to settle conflicts between opposing local governments.⁶⁸ The next two questions will detail these two function more clearly. The main purpose now is to focus on the issue of whether any of the state planning powers mentioned above are viewed favorably by the respondents or any other planning figures.

In his book, The Zoning Game, Babcock has advocated the use of a centralized state agency to perform three functions. First, it would regulate procedural practices at the local level in greater detail. Second, it would "speak on matters of substance where the state believes a

delineation is essential between those things essentially local and those matters where regional interests must be weighed." Third, it would review local procedures to ensure that they are fair and consistent state-wide.⁶⁹

Responses

The planners charged that a State Planning Agency with any of the powers listed in question 18 would be politically unrealistic, and in their view, undesirable as well. The enabling legislation should provide more clearly defined remedies for conflicts between jurisdictions, Mr. Yearout agreed, but not by creating an "arbitrary board," because "we have enough bureaucracy at the state level already."

Mr. Williamson added that the powers mentioned would be an infringement by the state on the local government's ability to rule itself. With regard to the use of an arbitration board, he concurred with Mr. Yearout that "it would create more problems than it could solve, with the local governments ending up suing the state as well as other jurisdictions.

19. One of the ways that states have dealt with sensitive areas such as forest land and natural vistas is to designate them areas of Critical State Concern (CSC). The model code has included this concept in its statutes with sections for designation procedures, initiation of regulations, and provisions for takeover of the area by the local government. Do you feel the CSC designation would be useful for areas in Kansas?

Discussion

The basic idea behind the CSC designation is to provide the state with a way to protect natural resources within its boundaries, that may otherwise be neglected or abused by local governments. Florida has used the CSC concept to protect its everglades and coastal areas, and Vermont has used a similar method to protect its forest land. The Florida statutes

authorizing CSC are almost identical to the model code. For this reason, the reader is referred back to Chapter Three for a more detailed discussion of the CSC method and its use in Florida, as well as in Vermont.

Responses

Mr. Yearout and Mr. Williamson agreed that the CSC concept could be useful in Kansas, although Mr. Williamson, not familiar with the details of how a CSC designation would operate, had some reservations. Mr. Yearout was more assured. In response to the question he remarked, "Absolutely...I am afraid that there are things that if you leave it up to the local level it will never get resolved. A classic example is the water issue in the western part of the state. As long as you leave it up to the individual or small localities, that issue is never going to be resolved until all of a sudden they have killed their crops because they are pouring salt water on them." He advised that if such a system were to be used, the designation process would have to be initiated by the legislature, rather than an administrative arm of the state.

Mr. Lakin replied, "I just do not feel that (the CSC concept) is terribly applicable to Kansas," although he did concede that "one could argue that the prime agricultural land in western Kansas is itself very sensitive in terms of water depletion, and that a CSC designation might be used to preserve water supply there."

None of the planners felt that the CSC process would be appropriate for protecting farmland from urban sprawl. As Mr. Lakin reasoned, "County zoning is preferable, and probably better." Also, the planners thought that other than the water problem in western Kansas, there were probably not many other areas in the state that could be classified as "sensitive."

20. One of the problems we have seen in Kansas is the often lengthy disputes between local jurisdictions, which have sometimes led to costly litigation. Disagreements frequently arise over the impact of major development on neighboring jurisdictions. In an effort to coordinate major developments the model code has proposed a concept known as Development of Regional Impact (DRI). Under DRI, a state agency would adopt rules distinguishing the types of development that would have an impact outside the boundaries of a single local government (i.e., airport construction, power plant facilities, hazardous waste sites, and landfills). In the model code, anyone may request such a designation, and the land involved may be either public or private. A State Land Adjudiciary Board is established to settle any disputes between jurisdictions. The local government's regulations may be overruled by the state if it feels that the benefits of a DRI designation would be greater than the detriments. Could you comment generally on the concept itself, and then address some of the specifications that such a program would need in your view to be successful?

Discussion

Anyone who doubts that certain types of development have significant economic and environmental effects over large areas of land need only look around at the number of sport stadiums, rural factories, thermal and nuclear power plants, regional jetports, amusement parks, universities and other very large facilities that have so often been surrounded by controversy.⁷⁰

The spillover effects of large developments have been recognized not only by the authors of the model code. As Robert Healy observes in his book, Land Use and the States, "The sheer size of many of the projects proposed or built in the last few years has made their impacts on their surroundings more obvious." He continues by explaining the local government's role in this process. "To date, the general practice in this country has been to give the power to regulate land uses to the jurisdiction containing the project, not to all those affected by it. Thus, we find some large projects approved even though they impose substantial costs on other jurisdictions, while other projects are

rejected even though they would confer substantial regional benefits. Moreover, many of these projects are so large...that their evaluation is far beyond the analytical capability of the local governments that now bear the responsibility for regulating them."⁷¹

Although Kansas is primarily a rural state, it has not been exempt from the problems of locating and regulating large-scale development. From the heated protests surrounding the placement of the Furley Hazardous Waste Factory or the Wolf Creek power plant, to the lengthy discussions regarding the location of a regional shopping mall in Manhattan, large projects are continually bringing land use issues to the public attention.

An airport situated along the boundaries of the City of Olathe and Johnson County illustrates how large developments can have an impact upon surrounding areas. Several years ago, the City of Olathe sold its airport to Johnson County. The north boundary of the airport ran along 151st Street, which was also the city limit of Olathe. Everything north of 151st Street is within the jurisdiction of Olathe, and therefore subject to city zoning. To the south, the land was subject to county zoning. Shortly after purchasing the airport, the County adopted a master plan which called for the construction of an additional north-to-south runway, parallel and to the east of an existing runway. As the County prepared to initiate its plans for the new runway, a developer purchased a tract of land to the northeast of the airport, located entirely within the city limits of Olathe. Acting within city land use regulations, the developer constructed a residential subdivision that found itself directly within the flight path of the proposed runway. The residents of the new subdivision, upon discovering that aircraft would be taking off and landing over their houses, protested the completion of the runway and its

construction was stopped. At present, the County does not have an additional runway even though the need for one still exists.⁷²

For more detailed information on the DRI concept and its use in Florida the reader is referred to Chapter Three and its accompanying footnotes. DRIs as used in Florida are essentially the same as those proposed in the model code.

Responses

All of the planners recognized that a problems exists, and that there should be some device to ensure that large-scale developments are located and regulated correctly. They had some reservations, though, over whether the model code version of DRIs is appropriate for Kansas. "The thing that concerns me," replied Mr. Yearout, "is the overriding of local regulations, because then they are (the state) taking a judicial action into their hands...and there is some danger in that. If there is a way of doing it shy of overriding local regulations (then) I have got less problems with it."⁷³

Mr. Lakin acknowledged that there are uses that "genuinely have major impacts (on surrounding areas). Wolf Creek is probably a prime example; a hazardous wastes site is also probably another prime example...Whether or not a regional shopping center or a housing development really has that much impact, I do not know." A more difficult problem, he added, would be deciding exactly what constitutes a DRI designation. Should shopping centers be included as a DRI? Should landfills be excluded? As he explains, "It would be difficult developing a list on which you could get reasonable consensus."

Priorities and Strategies for Enabling Revision

21. Could you list, in order of importance, what you consider to be the five most urgent revisions needed by the KSA planning and zoning enabling statutes? Your answers may be either general or specific.

Discussion

The previous questions have given the planners an opportunity to voice their opinions on many different subjects. The aim now, is to determine which problems the planners think should be addressed first in revising the enabling statutes. Though each planner's priorities are different, there are some similarities, which will be examined after the responses are given. The reader will observe that the presentation format for this question is different from that of previous questions; the responses are not presented in a narrative form but are listed according to priority.

Responses

The five most urgent revisions as perceived by the planners were:

Mr. Lakin:

1. Reviewing the client relationship; i.e. who should adopt the plan and who is the plan ultimately for?
2. Subdivisions adjustments to accommodate the multi-phase approval process, and authority for in-lieu payments, in place of dedication, for open space, parks and schools.
3. Better notice provisions; i.e. the publishing of maps to be sent to landowners within 200 feet of a proposed zoning amendment change.

4. Dealing with contract zoning; what constitutes it and are there any allowable forms?
5. Specifying the authority of the joint city-county planning board more clearly; i.e. exactly what decision-making powers does it have, and how is this authority constrained by the independent city commissions of the jurisdictions involved in the joint effort?

Mr. Yearout:

1. A clear, precise definition of agriculture.
2. Consistency of procedural regulations for establishing planning and zoning between the various jurisdictions in Kansas: cities, counties, townships, joint city-county.
3. Making clear that the county-elected officials, not the township officials, have final authority with regard to planning and zoning within the county.
4. Requirements similar to the city statutes, which mandate that county commissions review recommendations from the planning board and return those recommendations within a definite time limit.
5. Defining the relationship between the city and the county more clearly in terms of extra-territorial zoning. For example, if the county has no regulations within a three mile radius of the city boundaries, the city may regulate the area; if in the future, the county does establish regulations, they may override the city's regulations immediately.

Mr. Williamson:

1. A precise definition of the term "agriculture."
2. More substantive requirements for joint subdivision regulations by the city/county.
3. Uniform zoning amendment, adoption, and notification procedures throughout all levels of government.
4. Limiting the power of the board of zoning appeals to granting variances, and delegating their existing power of granting exceptions to the planning commission.
5. Mandating that the comprehensive plan be adopted by the local governing body.

The planners' professional interests, whether city, county or regional, seemed to have little bearing on their choice of priorities for revision. All of the planners felt that a review of the relationship between the city and county should take place, especially where the two have established a joint city-county planning agency. Mr. Lakin and Mr. Yearout emphasized that the review should be more procedural in nature, defining clearly the powers of each of the players involved in a joint effort.

The importance of defining agriculture was listed as the highest priority by both Mr. Yearout and Mr. Williamson. This choice may have been precipitated by their experiences in working in high-growth areas, where conflicts between rural and urban uses occur frequently. They also listed as a high priority the need for uniform procedures throughout all levels of government. Mr. Yearout listed this as his second priority, which is again consistent with his working experiences in a growth area, where many different levels of government are involved.

Mr. Lakin's first priority was to review the client relationship, by examining who should adopt the comprehensive plan, and who the plan is ultimately for. Mr. Williamson expressed a similar desire but gave it the least importance. Mr. Lakin may have chosen the relationship as an urgent problem because his working experience in a regional planning agency has left him and other staff members confused as to exactly who their client is. A client can change, after all, several times in the course of a few years, depending on which way the political winds blow. That Mr. Lakin has remained with the agency for 25 years is a testament to his ability to navigate the political climate.

Finally, while the planners listed the revisions in order of preference, they all indicated that this does not mean that they are favoring one revision over another.

22. Some people have approached the question of revisions to the KSA statutes in a piecemeal fashion, choosing to fix up the present statutes as needed; others would prefer making substantial changes and additions. Do you favor one of these strategies over another or do you feel they can be used together?

Discussion

Only the state of Florida has completely revised its planning and zoning enabling statutes. Oregon has made substantial revisions, but its local planning enabling laws have still not been updated. Nebraska has added a few relatively innovative sections to its statutes, but for the most part, their laws are antiquated compared to those of many states.⁷⁴

So far, the approach of Kansas has been to revise the statutes in a piecemeal fashion.⁷⁵ This is not an uncommon practice; most states deal with enabling revision in a similar way. To say that this approach is wrong would be an irresponsible simplification. After all, it can be

argued that incremental revisions are more appropriate, because they follow the natural evolution of society, providing new laws only when they are most needed.

Conversely, a case can be made that the evolution of enabling law has not kept up with the pace of change in an increasingly complex society, and that to correct the situation nothing less than a full-scale revision of the statutes is needed.

Finally, a moderate approach could be taken, in which both strategies would be utilized at once. The purpose of this question is to determine which method the planners would prefer, and more importantly, why.

Responses

The planners thought that the planning and zoning enabling statutes should be substantially revised. In the interim period needed to formulate major revisions, they conceded that a piecemeal approach should be taken.

Mr. Lakin and Mr. Yearout described almost exactly the same process for establishing changes in enabling legislation. They expressed a need to gather a consortium of experts for formulating major revisions. The participants would include individuals from the American Planning Association (APA), planning practitioners in Kansas, educators, and a major involvement by the development industry. Mr. Lakin concluded by stressing the importance of including as many different interest groups in the process as possible. "Substantial changes can be made only if we build a clientele and show a need of the people for change rather than for planners (alone).

CONCLUSIONS

It is difficult to summarize the results of an open-ended questionnaire in a precise, quantitative manner. Nevertheless, it was felt that some type of statistics should be available to the reader, so that he could formulate general conclusions concerning the responses.

Since a major purpose of the questionnaire was to determine the planners' feelings about proposed changes in planning enabling legislation, it seemed appropriate to measure levels of agreement and/or disagreement between them. To do this, each answer was interpreted as either a negative or positive response, except for questions nine, 16, and 22, where the subject was asked to choose between two or more possible answers. A negative response means that the subject disagreed entirely with, or took exception to, major parts of the question. A positive response means the opposite. The answers given by the planners were then coded 01 for a positive response and 02 for a negative response. Questions nine, 16, and 22 were coded with letters representing possible responses. Questions seven and 21 are coded with a "0," meaning that they cannot be interpreted accurately in a negative/positive fashion, and are so eliminated from the analysis. In these questions the respondent was simply asked to state his views on an issue, rather than making a definite judgment. The reader is also directed to question 18, which is broken up into four parts, each one coded independently. Interpretation of the responses is tabulated in Table 1.

The most obvious result gleaned from the table is the high level of agreement between the planners. Excluding questions seven and 21, the planners agreed 17 out of a possible 23 times, which translates to a 74%

TABLE 1

Question #	Mr. Lakin	Mr. Yearout	Mr. Williamson
1	01	01	01
2	02	02	02
3	02	02	02
4	02	02	02
5	02	02	02
6	01	01	01
7*	0	0	0
8	02	01	01
9	M	M	M
10	01	02	02
11	01	01	01
12	01	01	01
13	01	02	02
14	02	01	01
15	01	01	01
16	J	J	J
17	02	01	02
18a	02	02	02
18b	02	02	02
18c	02	02	02
18d	02	02	02
19	02	01	01
20	01	01	01
21*	0	0	0
22	B	B	B

Code: 01 - positive response

02 - negative response

B - both strategies (see question 22)

M - mandatory comprehensive plan (see question nine)

J - judicial interpretation (see question 16)

*0 - open-ended (see question seven and 21); excluded from analysis

level of agreement. Agreement was especially high in question 18 (a through d), where the planners were asked to express their feelings about state planning, and some of the functions it could perform in Kansas. Clearly, the planners viewed state involvement, as illustrated in the question, in negative terms; they were unanimous in rejecting the functions proposed by the model code for a state planning agency.

Many of the suggestions offered by the model code were rejected by the planners as either unrealistic or unwarranted in Kansas. All three of the planners took exception to at least of major part of a question 35% of the time.

The 74% incidence of agreement is somewhat misleading. Although it does indicate that the planners agreed a large amount of the time, it does not distinguish between general and specific answers. For example, all of the planners agreed in question 12 that a short-term program would be helpful in implementing objectives of the comprehensive plan. They did not agree, however, on the details of such a program. Thus they were in "partial" rather than in "total" agreement; this was true in questions four, five, and 12. If these are subtracted from 17, the initial number used to determine the level of agreement between the planners, we are left with a "total agreement" figure of 14 out of 23, or 61%. "Partial agreement" accounts for 3 out of 23 responses, or 13%. Finally, disagreement accounts for 6 out of 23 responses, or 26%. Even with this adjustment, agreement between the planners was quite high. Only one-fourth of the time did they genuinely disagree with each other.

The implications of these results are twofold. First, planners may not disagree with each other as often as some of them might think. And when they do disagree, they may not be disagreeing in principle, but in

regard to specifics only. Second, if planners agree on paper, maybe they can also agree face-to-face. This is important if any headway at all is going to be made in revising the statutes. Mr. Lakin already noted that substantial changes can be made only if we build a clientele. Perhaps the best place to start would be among planners.

Finally, the author recognizes that by interpreting the questions so that they could be quantified, he has biased the results. This was inevitable to provide summary statistics. The main value of the survey, though, is not the statistics, but the opinions elicited from the cooperative planners who participated in the study.

NOTES

- ¹ Wichita Eagle-Beacon, 2 May 1982, p. 1.
- ² KSA 12-705 et seq.
- ³ American Law Institute, Model Land Development Code, article 1 et seq.
- ⁴ See Chapters One and Three, and accompanying notes.
- ⁵ Robert M. Anderson, American Law of Zoning, 2d ed., (Boston: The Lawyers Co-operative Publishing Co., 1976), Ill., p. 2.
- ⁶ Carp v. Board of County Commissioners of Sedgewick County, 373 P2d 153, 190 Kansas 177.
- ⁷ KSA 12-701 et seq.
- ⁸ KSA 17-707.
- ⁹ KSA 12-727.
- ¹⁰ See Chapter Three, p. 40.
- ¹¹ See Chapter Three, p. 54.
- ¹² Robert Linowes and Don T. Allensworth, The States and Land Use Control (New York: Praeger Publishers, 1975), pp. 168-170.
- ¹³ KSA 12-705.
- ¹⁴ Id.
- ¹⁵ Supra, note 3 at 2-103.
- ¹⁶ Supra, note 5 at p. 145, vol. 4.
- ¹⁷ Coronado Development Corporation v. City of McPherson, 189 Kansas 174, 368 P2d 51 (1962).
- ¹⁸ KSA 12-708.
- ¹⁹ KSA 12-714.
- ²⁰ Supra, note 5 at p. 628, vol. 3.
- ²¹ KSA 12-708.

- 22 Supra, note 3 at 2-302, 2-305.
- 23 Supra, note 5 at p. 234, vol. 1.
- 24 The zoning administrator or hearing master is a trained professional that is used in the State of Oregon in place of a full commission. It is thought that such an individual will make more consistent and well-informed decisions.
- 25 KSA 12-704 et seq., a close examination of the statutes has revealed no mention of when a property owner's rights become vested.
- 26 *Fink v. Smith*, 36 P2d 976, 140 Kansas 345.
- 27 Supra, note 3 at 2-308.
- 28 Supra, note 4 at p. 264, vol. 4.
- 29 Richard F. Babcock, The Zoning Game, (Madison: The University of Wisconsin Press, 1966), p. 107.
- 30 KSA 12-715.
- 31 KSA 19-2920.
- 32 KSA 12-715.
- 33 Supra, note 5 at p. 206, vol. 1.
- 34 Id., at p. 215, vol. 1.
- 35 Id., at p. 87, vol. 1, supp.
- 36 Kansas Digest, sections 194, 195, 199, 134-138.
- 37 KSA 12-704.
- 38 Charles M. Harr, "In Accordance with a Comprehensive Plan," Harvard Law Review, 91 (1954), 1155-1175.
- 39 *Fasano v. Board of County Commissioners*, 264 or 574, 507 P2d 23 (1973).
- 40 A comprehensive plan is already required before enacting subdivision regulations. See KSA 12-705.
- 41 Supra, note 29 at p. 40.
- 42 KSA 12-704.
- 43 Supra, note 5 at p. 604, vol. 3.
- 44 Id.
- 45 *O'Loane v. O'Rourke*, 231 Cal. App 2d 744, 42 Cal Rptr. 283 (1965).

- 46 Higganbotham v. Barrett, 473 F2d 745 (1973 CA5 Ga.).
- 47 KSA 12-704.
- 48 Supra, note 5 at p. 598, vol. 3.
- 49 Supra, note 3 at 3-105.
- 50 KSA 12-705 c.
- 51 Id., the legality of setbacks has been established in City of Wichita v. Boles 135 P2d 542, 156 Kansas 619.
- 52 Supra, note 3 at 3-201.
- 53 KSA 12-704 et seq.
- 54 Supra, note 5 at p. 508, vol. 1.
- 55 Supra, note 3 at 4-102, 4-202.
- 56 Supra, note 5 at p. 512, vol. 1.
- 57 Supra, note 55.
- 58 Supra, note 5, p. 368, vol. 1.
- 59 Supra, note 3 at 4-102.
- 60 Penalties differ across the statutes; fines are from 200 to 500 dollars and maximum jail terms are one year; see Jerome G. Rose, Legal Foundations of Land Use Planning, (New Jersey: Center for Urban Policy Research, 1979), p. 2 for discussion of legal remedies.
- 61 Supra, note 3 at 10-101, 10-102, 10-201, to 10-204.
- 62 Fred Bosselman et al., The Taking Issue, (Washington D.C., U.S. Government Printing Office, 1973), p. 126.
- 63 Id. at 266.
- 64 Id. at 267.
- 65 Id.
- 66 Golden v. Planning Board of Ramapo, 30 NY2d 356, 285 NE 2d 291.
- 67 Boca Villas Corp. v. Arvida Corp. 371 So 2d 160.
- 68 Supra, note 3 at Article 7 et seq.
- 69 Supra, note 29 at pp. 166, 167.

- 70 Examples are Three Mile Island, the Love Canal, Wolf Creek Power Plant, and the proposal for a regional shopping center in Manhattan.
- 71 Robert G. Healy, Land Use and the States, (Washington, D.C.: Johns Hopkins University Press, 1976), p. 25.
- 72 Telephone interview with Larry Priest, Airport Manager of Manhattan Airport, 24 May 1982.
- 73 As practiced in Florida, the possibility is left open for the state to overrule a local government's decision in the designation of a DRI. The state, however, has rarely intervened except in cases where a pressing regional need has been ignored; for more information see Gilbert R. Finnell, Jr., "Florida's State Land Use Laws and the ALI Model Land Development Code," in Land Use, ed. Richard Cowart, (Berkely: University Extension Publications, 1976), pp. 35-54.
- 74 See Chapter Three, pp. 54.
- 75 See Chapter Two, pp. 29.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

The preceeding chapters have shown that enabling legislation, throughout the nation and in Kansas, is outdated and requires substantial revisions. Chapter One pointed out some of the problems with enabling law, as identified by experts on both the national and local level. Chapter Two traced the evolution of enabling legislation, and gave an in-depth description of changes that have occurred in the Kansas statutes from the early 1920s to the present. In Chapter Three, the revised enabling laws of various states were presented; and in Chapter Four, Kansas planners voiced their opinions on many issues that were generated through discussion of the current Kansas planning and zoning enabling statutes.

Evidence indicating a need for change in land use legislation is visible not only in the arguments of the planner, or the literary works of the university professor, but in the changing political climate of the country itself. Under President Reagan's "New Federalism," the states' responsibility for taking care of their own problems on the local level will be dramatically increased. In order to meet this challenge after years of Federal guidance, the states will have to take a hard look at their current legislation, to ensure that it meets the needs of their people in the most efficient and streamlined manner possible. Laws which provide flexibility without being convoluted, protection without being overly restrictive, and security without being economically burdensome are

essential, given the realities which we face today. The planner, and the people he serves, must be given the proper tools to initiate and maintain growth in the State of Kansas, as well as to preserve the natural resources so important to the welfare of the state. The deficiencies of the Kansas statutes have hampered this effort, and therefore they must be corrected.

Unfortunately, planners in Kansas are sometimes viewed in a harsh way. Various groups are reluctant to see planners leading the forefront in any type of endeavor. The idea that the planner is the personification of a socialist dream is not uncommon, although misfounded, if one reviews the history of planning and planning legislation.¹ This attitude is reinforced by the press in, for example, articles about the latest schemes proposed by "Soviet planners."² These negative connotations often force the planner into a defensive position, making him seem more suspect than ever. If the planning profession wants to make changes in enabling legislation, it must first deal with these common misconceptions, and promote itself in a more positive way to the legislators and special interest groups within Kansas.

THE KANSAS APPROACH

Like any state, Kansas has a unique set of environmental, social and political conditions that will influence how enabling legislation should be drafted. The primary interest of the states of Florida, Oregon, and Vermont is to protect their environmentally sensitive lands. Kansas, having low population density, has no need to adopt complex laws like those of Florida, or restrictive ones like those of Oregon and Vermont. Nor would such laws be conceivable in a state with a Republican-dominated

legislature, highly influenced by special interest groups like the Farmers Bureau. Nebraska's approach, which tailors its enabling law to fit specific problems (such as the incidence of uncontrolled growth in the urban fringe areas) is better suited to Kansas.

This is not to say that there should not be any across-the-board changes in Kansas enabling law. The planners of this study have already indicated, for example, that comprehensive planning should be a prerequisite to land-use regulation at all levels of government.³ On the other hand, they realize the mistake of envisioning grandiose revisions to the statutes without first considering the environmental and political contexts within which these revisions would take place. For instance, setting up areas of critical state concern across the state would be absurd; although one could, as Mr. Yearout argued, justify a CSC designation in the western regions of the state, where water conservation is becoming a crucial problem.⁴

In general, the planners interviewed reflect the individualistic character exhibited by the people of Kansas. Their reluctance to be tied down by excessive or restrictive regulations was evident throughout their discussions. The subjects desired greater flexibility in the statutes, with more opportunities for seeking alternatives, especially in areas of subdivision control.⁵ They are also highly attuned to economic considerations, and quickly discarded any proposals that would be too costly in view of the probable benefits.⁶ In short, they are realists.

One of their biggest objections is state involvement in local affairs. State controlling of local activities is viewed as "interference" by the planners, and an unnecessary influx of bureaucracy

into the local environment. The planners unanimously objected to the four functions proposed for the state to influence local affairs.⁷

Enabling legislation pertaining to the local regulatory environment is of significant concern to the respondents. In questions one through eight of the questionnaire, the planners expressed similar views on various subjects including: the need for mandated planning prior to the enactment of regulations; better hearing procedural requirements; the need for consistency with regard to zoning amendments; and the clarification of vested rights. Of particular concern was the absence of definitions in the statutes, especially for agriculture.⁸ People in the urban fringe are increasingly insisting that they be exempt from regulations because they are involved in an agricultural activity. The planner, having a limited basis on which to define agriculture, must take a calculated risk in deciding whether an individual is truly exempt from regulations. If his decision is contested in court and found to be wrong, it becomes the courts's prerogative to rule whether or not an activity constitutes agriculture. And because they do not even have legislative intent to go by, their rulings will most likely be arbitrary.

Agricultural preservation is not a critical concern for these planners, at least not at this point in time. They are more concerned with maintaining the present integrity of agriculture through water conservation in the western portions of the state. Although water conservation districts have already been established in Kansas, they are for the most part locally administered. At least one of the planners feels that the state should be more directly involved in conservation of the water table in western Kansas. Further, since the Oglalla aquifer extends into the neighboring states of Colorado and Nebraska, it is felt that a

regional approach for planning and coordination in the tri-state area should be initiated.⁹

All the planners agree on the strategy to be used to initiate changes in the enabling statutes. They emphasize the need to gather a number of professionals from various fields such as law, planning, real estate and the construction industry.¹⁰ Together, members from these professions would be able to work out changes that would be advantageous for both the planning agency and private industry alike. In addition, any proposals developed by such a diversified group would be taken more seriously by the state legislators. One group not mentioned by the planners that would be crucial in talks designed to address the water issue is the Farm Bureau. While traditionally there has been little cooperation between the professions of farming and planning, it may be well worth the effort for Kansas planners to establish closer ties with the agricultural industry, especially if they have any hopes of addressing state-wide concerns.

The responses to the survey provided some interesting and surprising results. The planners' negative view of state planning functions, for example, was unexpected. The design of question number 18 may have been responsible for the negative responses. The list of state planning functions provided is certainly not exhaustive; the planners may simply not have had any acceptable options to choose from. In addition, a subsequent question which asked the planners what role, if any, they thought a state planning agency could assume was not included.

Conversely, it was evident throughout the interviews that the planners presented their ideas freely, and would have addressed the state planning issue positively if they had had any such feelings on the subject, whether they were expressly given the opportunity to do so or not.

Although the planners may view some state planning functions favorably, the fact that none were mentioned is an indication of their general attitude regarding the subject.

The assumption that these attitudes are characteristic of all planners in Kansas is simply not supported by this study. While each planner works in a different environment (i.e., metropolitan, county, and private consulting firm), none is statistically representative of planners in his area. Additionally, the respondents are involved mostly in metropolitan planning rather than exclusively rural planning--a fact which undoubtedly conditions their answers, and limits their concerns to varying degrees.

It was not the author's intent to provide a statistically verifiable basis for revision to the statutes. This would have been extremely difficult, if not impossible, given the current level of familiarity with enabling legislation of planners throughout the state. Given this restraint, it was more meaningful to institute an in-depth study of the opinions of a few planners, recognized as experts in the field. The results are admittedly biased; however, they are also considerably informative.

Whether the implications of the study are misleading is debatable. Are planners in Kansas truly suspicious of state planning, or are the three respondents chosen a minority? Are rural Kansans unfairly stereotyped as ultra-conservative in regards to the issue of central planning? Do planners really agree with one another as much as this study suggests, or is the high level of agreement simply a consequence of the small number of respondents? These questions can best be answered by quantifiable research, although the author wonders whether a suitable data base can be

found in the state. The challenge is left to the curious and the skeptical.

THE POLITICAL ENVIRONMENT -- THE BEGINNING OF THE END?

Before concluding, a brief discussion of some of the pitfalls encountered in trying to advance legislation in Kansas should be provided.

"A typical Kansan is thought to be one who knows how to work, and expects to work, believes in God even if he does not attend church regularly, relies upon his own resources, obeys the law, and respects authority." This is how the authors of The Kansas Legislature view Kansans, and more importantly, their representatives.¹¹ It is wise to convince the legislators that your organization also adheres to these values; but additionally, the authors have listed some other techniques to help ideas pass from the imagined to the implemented stage.

Statutory change starts with the introduction of a bill. Whether or not a particular bill has a chance of becoming law depends, in part, on certain actions taken to enhance the position of a bill. According to the authors, political strategies must be consistent with four realities.

1. The legislator who supports or opposes a bill is often more important than the case that can be made in support of or in opposition to a bill. Therefore, it is advisable to find a legislator who is either popular, or known to be diligent and hard-working, to carry a bill successfully. This is especially important in committee, where a bill sponsored by an unpopular representative will never be given serious attention.

2. At no time is the justification of a bill a matter of no consequence. In the Kansas legislature, the representatives are in their seats most of the time when bills are introduced. This situation, which incidentally does not prevail in the U.S. Congress, makes the justification of a bill a matter of greater importance than it might be otherwise. Thus it behooves the strategist to prepare a well-researched and organized argument, before presenting his bill to committee.
3. While constitutionally every vote counts as one and only one, the votes of only a few decide at certain stages whether or not a bill will progress along the way to becoming a law. A bill proposed in the House must pass by three people with considerable power: the Speaker, who decides which committee the bill will be sent to; the Majority Leader, who along with the Speaker, decides when the bill will be put on the calendar to be heard by the House at large (Committee of the Whole); and the Committee Chairman, who sets the time of committee meetings. To ensure smooth passage for the bill, its supportive arguments should not be likely to make it politically difficult for the leaders to move it along. Otherwise, the bill could end up at the end of a long list in the calendar, and would probably never be reached before the end of a session.
4. The public is omnipresent in the legislative process. Decisions are made according to the way the public's interest and mood are read. This is why large special-interest groups are so powerful; they speak for, or are thought to speak for, a substantial segment of the public. Mobilizing a few powerful interest groups can greatly increase the chances of gaining support for a bill. The Chamber of Commerce and the

Kansas League of Municipalities are two groups that could provide a strong base for enabling revisions.

The most advantaged bill is one in which each of these efforts achieves its maximum potential. Rarely is a bill fully advantaged, however. It becomes the job of the strategists, or in this case the planners, to seek those areas where there is the most chance of attaining success. In terms of the objective of enabling revisions, this probably means concentrating on the preparation of arguments in favor of revisions, along with marshalling strong support by various groups. Along the way, it would not hurt to converse with other powerful lobbies about how certain revisions could favorably affect their members. Many powerful lobbies have in-House members who are sympathetic to their groups' causes. In the game of politics, these individuals are important resources, which if approached sincerely can lend valuable support to a proposed bill, or can pave the way for a bill to be presented later. Finally, when there is a strong leader, it may be necessary only to persuade him to support the bill. Whatever the case, it should be obvious to the reader by now that coming up with the enabling revisions themselves is only part of the process required in implementing changes to the Kansas planning and zoning enabling statutes.

NOTES

- ¹ See chapter two, pp. 14-25.
- ² "Making Rivers Run Backward," Time, 14 June 1982, p. 80.
- ³ See chapter four, p. 79.
- ⁴ Id. at p. 94.
- ⁵ Id. at p. 72.
- ⁶ Id. at p. 73.
- ⁷ Id. at p. 93.
- ⁸ Id. at pp. 66-79.
- ⁹ Supra, note 4.
- ¹⁰ See chapter four, p. 101.
- ¹¹ Marvin Harder and Carolyn Rampey, The Kansas Legislature, (Wichita: The University Press of Kansas, 1972), pp. 110-115. While the author acknowledges that this is a stereotype and is not true of many people in Kansas, he nevertheless feels that the originator, the late Mr. White of the Emporium Gazette, was fairly accurate in his description of the "typical Kansan." The author's feelings are based partially upon his work experience in a project studying rural elderly populations in the northeast portion of the state for two years.

APPENDIX
SURVEY QUESTIONNAIRE

SURVEY QUESTIONNAIRE

Researcher: John B. Pine

Department of Regional and Community Planning

Kansas State University

Manhattan, Kansas

The following questions concern planning enabling legislation in Kansas. Many individuals from varied professions, such as law, planning, and environmental sciences, have expressed a desire to see modifications in the Kansas Planning Enabling Statutes. Their concerns have initiated this research, which is based on detailed study of the present Kansas Enabling Statutes, and several articles of the American Law Institute Model Enabling Code, as well as comments from qualified sources, and specialized materials written on the subject. Your help in providing thoughtful answers to these questions will enable the researcher to suggest strategies for needed revisions to the present statutes. Thank you for your gracious cooperation.

1. Do the present enabling statutes need a list of definitions, for example, a definition of agriculture?
2. In an effort to increase planning and land use regulation at the local level, Oregon enabling statutes have made the regulation of development at the local level mandatory. On the other hand, the model code has sought to increase responsibilities for land use decisions at the local level by granting more power to local governments that adopt a land use plan. Do you agree with either of these alternatives for increasing local governmental regulation in Kansas? Do you have any additional strategies? Or do you feel that the concept itself is faulty?
3. The model code allows governments to require developers to provide streets, open space, and homeowners' associations as a condition of approval, but only as much as is needed by the development. Do you think the KSA statutes should be revised to reflect the model code's philosophy?
4. The model code suggests that detailed transcripts be made of all required hearings for development permits. The reason is that if litigation does occur, the courts can have a written record of the reasoning used to arrive at a particular decision. Do you feel such a procedure is warranted in Kansas?
5. Various attempts have been made to partially remove the legislative body from the regulatory process in municipalities. For example, the city of St. Petersburg, Florida has delegated the power to amend zoning to its zoning board. The model code, not going quite so far, has suggested that an appointed body have the power to adopt rules and recommend amendments, through a legislative type hearing. This

hearing would be very similar to those held by city commissions for adoption of a new ordinance or amendment. It is alleged that the primary advantage of such a hearing would be its ability to remove the legislature from the day-to-day decisions that must be made concerning zoning matters, thus allowing them more free time to concentrate on policy considerations of a broader context. How do you feel about this issue?

6. Often a developer or common landowner is reluctant to initiate plans for the development of his land because he is concerned about when his rights become vested (in other words, at which point does his right to develop the land become irreversible). It has been suggested that the enabling statutes make clear exactly when a landowner's rights are vested, i.e. when he is issued a building permit. What are your thoughts on this?
7. Often, zoning amendments enacted by legislative bodies, especially for smaller parcels of land, are presumed to be valid by the courts. In other words, since the amendment is an act of the people's elected representatives, the courts feel that in most cases the amendment should be presumed to be reasonable and legitimate. The model code suggests that amendments that deal with small parcels of land should not automatically be given a presumption of validity, unless the legislative body's decision to adopt such an amendment was based on and supported by findings of its planning board. What are your views on this proposal?
8. Do you think the present KSA statutes allow too much room for due process errors by the local officials, such as poor notice and hearing procedures?

9. Should the comprehensive plan be mandatory or, as the model code has suggested, only an instrument used to provide incentive to achieve further planning powers?
10. In the model code no specific body is required to prepare a comprehensive plan. In the KSA statutes a planning commission is required to prepare a comprehensive plan. Many, however, feel that the planning commission "is a dodo" (Babcock, The Zoning Game, p. 40), and further, that it does not usually adhere to the plan that it prepared. Given this, do you think it would be better to replace the planning commission with a professional staff or hearing master?
11. Should the comprehensive plan be required to be adopted by the local legislative body incorporating policies?
12. The model code suggests using a short-term program which would help implement and detail desired objectives of the comprehensive plan in approximately one- to five-year units. This would probably require more planning analysis skills and computer technology than before. Do you think this is a realistic idea, given present planning technology in Kansas?
13. The model code has added a provision which would allow a local legislative body to enact a reservation ordinance. A reservation ordinance pertains to land used for public purposes only. It would either prohibit all development in a designated area, or allow only development that is consistent with the land use plan; it also has a time limit. Do you feel that such a provision in our statutes would be helpful?
14. Two parts of the model code are devoted to discontinuance of non-conforming uses. Part I lists the grounds for discontinuance, and

Part II the means of enforcement. Do you feel that we could use something like this in the Kansas statutes?

15. Do you feel the enabling statues should contain a section dealing with the enforcement of local regulations, such as enforcement notices and hearings?
16. Do you think that the way to define the line between regulation of property and a taking of property is by legal enactment or judicial interpretation?
17. Often, local governments wish to phase their development in order to provide for public facilities. The desire to do this is illustrated in the Golden v. Planning Board of Ramapo case. Although the Golden case was upheld, other have not been. In order to ensure a municipality's ability to phase its development, the model case has suggested what it refers to as a condemnation of a temporary interest. The basic idea is to condemn an area for a limited amount of time, presumably the time needed to meet the public service demands for that area. For this time period, a compensation would be awarded either annually or in one lump sum. After this time period, the condemnation of the property would terminate, compensation would stop, and development would be allowed to proceed. Do you think this would be a helpful instrument in controlling the timing of development?
18. Would you look favorably on provision in the statutes which would create and authorize a State Land Planning Agency to:
 - a. assemble land for large scale development through condemnation;
 - b. provide standards for improving local decision-making;
 - c. regulate areas on its own in the absence of local regulations; and
 - d. serve as an arbitration board for conflicts between local governments.

19. One of the ways that states have dealt with sensitive areas such as forest land and natural vistas is to designate them areas of Critical State Concern (CSC). The model code has included this concept in its statutes with sections for designation procedures, initiation of regulations, and provisions for takeover of the area by the local government. Do you feel the CSC designation would be useful for areas in Kansas?
20. One of the problems we have seen in Kansas is the often lengthy disputes between local jurisdictions, which have sometimes led to costly litigation. Disagreements frequently arise over the impact of major development on neighboring jurisdictions. In an effort to coordinate major developments the model code has proposed a concept known as Development of Regional Impact (DRI). Under DRI, a state agency would adopt rules distinguishing the types of development that would have an impact outside the boundaries of a single local government (i.e., airport construction, power plant facilities, hazardous waste sites, and landfills). In the model code, anyone may request such a designation, and the land involved may be either public or private. A State Land Adjudiciary Board is established to settle any disputes between jurisdictions. The local government's regulations may be overruled by the state if it feels that the benefits of a DRI designation would be greater than the detriments. Could you comment generally on the concept itself, and then address some of the specifications that such a program would need in your view to be successful?

21. Could you list, in order of importance, what you consider to be the five most urgent revisions needed by the KSA planning and zoning enabling statutes? Your answers may be either general or specific.
22. Some people have approached the question of revisions to the KSA statutes in a piecemeal fashion, choosing to fix up the present statutes as needed; others would prefer making substantial changes and additions. Do you favor one of these strategies over another or do you feel they can be used together?

CITES

All cites refer to ALI Model Land Use Development Code, except where otherwise noted. For question:

1. 1-201
2. 2-101
3. 2-103; KSA 12-705
4. 2-304; KSA 12-714
5. 2-302, 2-305; KSA 12-708
6. 2-308
7. 2-312
8. 2-306
9. 3-101; KSA 12-704
10. 3-101; Id.
11. 3-104; Id.
12. 3-105; Id.
13. 3-201, 3-202
14. 4-101, 4-102, 4-201, 4-202
15. 10-101, 10-102, and 10-201 to 10-204
16. 5-101
17. 5-304
- 18a. 5-201 to 5-204 and 7-101 et seq.
- 18b. Id.
- 18c. Id.

18d. Id.

19. 7-201 to 7-206

20. 7-301 to 7-305, 7-401 to 7-403, and 7-501 to 7-504

21. no cite

22. no cite

A BASIS FOR REVISION TO THE KANSAS PLANNING AND ZONING
ENABLING STATUTES

by

JOHN BEEKMAN PINE

B. A., West Virginia University, 1978

AN ABSTRACT OF A MASTER'S THESIS

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MASTER OF REGIONAL AND COMMUNITY PLANNING

Department of Regional and Community Planning

KANSAS STATE UNIVERSITY

Manhattan, Kansas

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This study attempts to demonstrate that planning and zoning enabling legislation in Kansas is outdated and requires substantial revision.

In Chapter one, some of the problems with enabling law, as identified by experts on both the national and local level, are presented. Chapter two traces the evolution of enabling legislation, and gives an in-depth description of changes that have occurred in the Kansas statutes from the early 1920s to the present. In Chapter three, the revised enabling laws of various states are discussed; and in Chapter four, a detailed study is undertaken of the opinions of Kansas planners on the current state planning and zoning enabling statutes.

An examination of the planner's opinions showed that there were significant problems in the Kansas statutes, that there were ways to correct these problems, and that, generally, the planners agreed on how the statutes should be revised. This, along with the information presented in Chapters two and three, suggested what type of approach should be taken in Kansas for revising the enabling statutes. It was concluded that changes in the statutes be simple, consistent with the political and physical environment of the state, economically feasible, locally oriented, and attuned to the private sectors needs whenever possible.

Finally, political strategies were given, outlining various ways in which to secure political support for changes in the statutes.