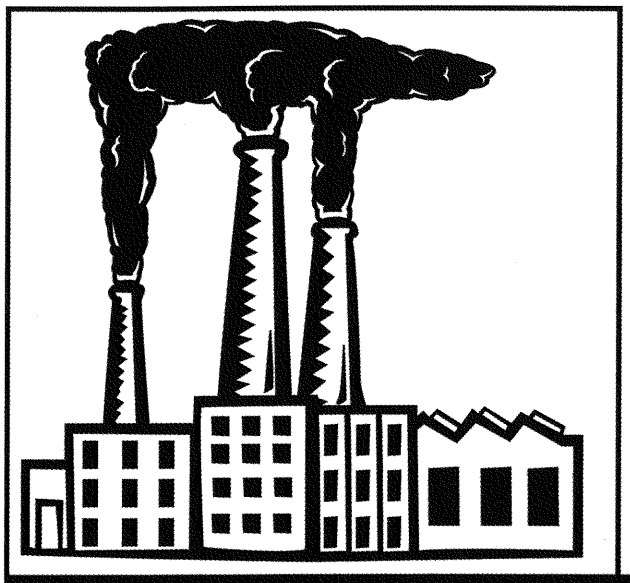
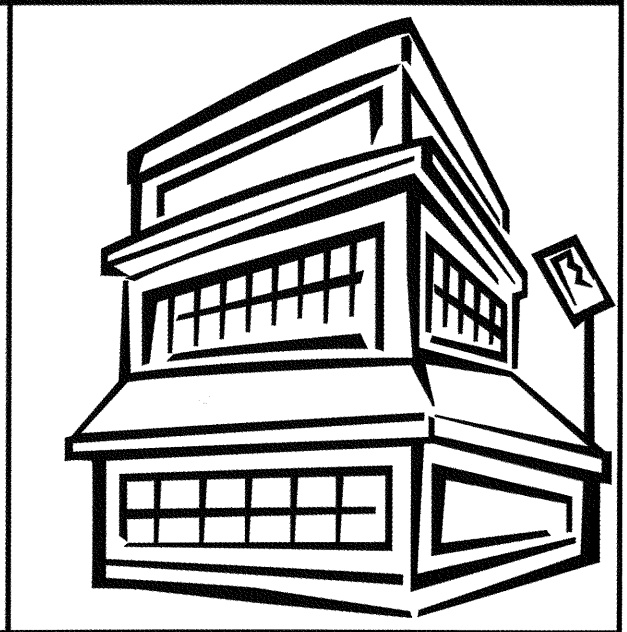


What Can They Do?

Limitations on the Power of Local Zoning Authorities



By Patrick B. Hughes

I. Introduction

If there had been any doubt, the recent Kansas Court of Appeals opinion in *R.H. Gump Revocable Trust v. City of Wichita*[1] removes it: spiritual and aesthetic considerations are enough to justify zoning restrictions.[2] In *R.H. Gump Revocable Trust,* a zoning applicant sought a conditional use to erect a flagpole along U.S. Highway 54, Wichita's major east-west thoroughfare. The flagpole would have been located in a commercial area near a Veterans Administration hospital, car dealerships, a shopping mall, and one of the busiest intersections in the city. At up to 165 feet tall, the Stars and Stripes flown would have to be large. Old Glory, however, was not welcomed to this neighborhood. The city council denied the zoning request that would have permitted such a public display of civic pride, finding it would be inconsistent with beautification efforts along the freeway and would have a negative visual impact. The district court and the Court of Appeals agreed and found that the decision was a proper use of zoning power to protect the "public welfare." It found that the public welfare included the "spiritual" and "aesthetic" concerns that had caused the city to reject the flagpole.

There is, as the gut of any lawyer discloses at this point, more to the story. The pole was near not only U.S. Highway 54, commercial development, and a busy intersection but it was also near the city of Eastborough, a city fully enclosed by the city of Wichita, known for its stately homes and tree-lined drives. The pole was not the idea of a patriotic landowner motivated to honor the nation that made such property ownership possible. Instead, its purpose was to house a cellular telephone antenna, and it was the third attempt to place such an antenna on the site. The flagpole was presented as a way to disguise the tall structure jutting up above the trees. It was a literal case of "wrapping yourself in the flag."

If, as the Court of Appeals confirms, local government authorities can make zoning decisions on such an inherently subjective basis as the visual impact of the American flag flying over a U.S. highway, that raises a question. What limitations are there on local land use regulation? This article addresses that question by examining how the Constitution of the United States, federal statutes, state statutes, and zoning review procedures impact and restrict the power of local zoning authorities to regulate land use.

FOOTNOTES

1. 35 Kan. App. 2d 501, 131 P.3d 1268 (2006).
2. *Id.* at Syl. ¶¶ 3, 4.

II. What power can local authorities exercise through zoning?

While some specific types of land uses are regulated by other laws, zoning regulation is the most comprehensive land use control device. In Kansas, state statutes empower cities and counties to adopt zoning regulations.[3] Those regulations can both control the uses allowed for a particular property and impose substantive limitations, or development controls, on the uses that are allowed, including controls of the height and size of buildings, the size of yards and open spaces, and the appearance of buildings.[4] Zoning accomplishes its use restrictions and development controls by establishing base zoning districts and permitting case-by-case deviations through conditional or special uses, community unit and planned unit development plans, and variances.

III. How far can zoning regulations go?

While land use can be regulated, the power of governmental regulation is not boundless. All governmental land-use regulation is subject to constitutional limitations. State and local land use controls are further restricted by certain specific federal statutes, and local land use controls are restricted by state statutes.

A. What limits does the Constitution impose?

Zoning regulations are constitutionally permissible as a legitimate exercise of police power by the states.[5] Nevertheless, they are restricted as are other exercises of police power by constitutional takings limitations and by due process, equal protection, and freedom of expression guarantees.

1. Constitutional limitations on taking property without compensation, nonconforming uses, and vested rights

Most regulations restricting the use of land or impairing its value do not require compensation under the Fifth and 14th amendments. Therefore, even though prohibiting a particular type of development, like a landfill, may reduce the value of land, it is not usually a taking if other economically viable uses remain available.[6] However, zoning restrictions constitute a "taking" for which compensation is required when the regulations deny "all economically beneficial or productive use of the land."[7]

In extraordinary circumstances, even when not all economically viable property uses are prohibited, a land owner might successfully argue that the impact of a zoning restriction on his or her investment-backed expectations, when compared to the government's interests being pursued by the regulation, is a taking.[8] However, the U.S. Supreme Court has refused to adopt a standard that would require the impact of a zoning restriction to be even *roughly proportional* to the benefit regulation provides.[9] The Court has also refused to embrace a test that would require regulatory action to "substantially advance" a legitimate governmental goal to avoid being a taking for which compensation is required.[10]

Despite these rather slight limitations on zoning regulations under the Takings Clause, state cases find a constitutional protection against land use regulation with more routine operation when new zoning regulations would require immediate cessation of an existing land use.[11] The Kansas Court of Appeals has said:

> "In order to avoid violation of constitutional provisions preventing the taking of private property without compensation, zoning ordinances must permit continuation of nonconforming uses in existence at the time of their enactment."[12]

Whether this protection truly has a constitutional basis or not is relatively unimportant, because Kansas statutes protect the right to continue a nonconforming use;[13] these statutes provide that zoning regulations do not apply to the "existing" lawful uses of land.[14]

As a matter of public policy, courts strictly construe the right to a nonconforming use.[15] In Kansas, the strong public interest in eliminating nonconforming uses allows zoning authorities to require such uses to be gradually phased out rather than requiring nonconforming uses to be permanently grandfathered.[16]

(continued on next page)

3. K.S.A. 12-741 *et seq.* (2001).
4. *See* K.S.A. 12-753(a) (2001).
5. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).
6. *McPherson Landfill v. Bd. of County Comm'rs*, 274 Kan. 303, 331-332, 49 P.3d 522 (2002).
7. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).
8. *See generally, Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *Garrett v. City of Topeka*, 259 Kan. 896, 916 P.2d 21 (1996).
9. *See City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 702, 119 S. Ct. 1624, 143 L. Ed. 2d 883 (1999).
10. *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).
11. *See, e.g., Goodwin v. City of Kansas City*, 244 Kan. 28, 766 P.2d 177 (1988) (nonconforming use is a sufficient property interest to require due process protection).
12. *M.S.W. Inc. v. Bd. of Zoning Appeals of Marion County*, 29 Kan. App. 2d 139, 152, 24 P.3d 175 (2001).
13. K.S.A. 12-758 and 19-2921.
14. K.S.A. 12-758 (2001) and K.S.A. 19-2921 (1995); *See Goodwin, supra* note 11, 244 Kan. at 32.
15. *Goodwin, supra* note 11, 244 Kan. at Syl. ¶ 6.
16. *Spurgeon v. Bd. of Comm'rs of Shawnee County*, 181 Kan. 1008, 317 P.2d 798 (1957); *see* K.S.A. 12-771 (2001) (authorizing gradual elimination of nonconforming uses).

Where the right to a nonconforming use exists and there is no mandatory phase-out of the use, the use may continue until it is abandoned, after which it cannot be reclaimed.[17] While the use cannot undergo a fundamental change in quality and remain a nonconforming use, an increase in the volume and intensity of the use, as for example by processing a greater volume of scrap at a wrecking yard, is not *per se* impermissible, or is the landowner necessarily prohibited from employing more modern instrumentalities to replace older methods of operation with modern means in conducting the nonconforming land use.[18] For mining and quarrying, under the "diminishing asset doctrine" the Kansas Supreme Court has permitted the expansion of mining and quarrying activities of a nonconforming mine or quarry over the entire land that is an integral part of the operation.[19]

However, the protections offered to nonconforming uses can easily be lost. Zoning authorities can, under penalty of forfeiture, require that nonconforming uses be registered by the landowner. A forfeiture is not a taking by the government because it deprives a landowner of nothing unless the landowner fails to register the use.[20]

Kansas statutes provide for a broader "vesting" of development rights, in limited circumstances, that gives the landowner the right to implement a plan for the land that existed before a zoning change that would prohibit it even though the planned use is not implemented far enough at the time the zoning restriction is imposed to be a nonconforming use. By statute, the recording of a plat allows a five-year window in which to commence construction of a single-family residential development, despite intervening changes in zoning regulations.[21] For other land uses the same statute allows a vesting of development rights when all permits required for the use have been issued, construction has started, and a substantial amount of work has been completed under a validly issued permit.[22]

2. Procedural due process

It is well established in Kansas state courts that procedural due process protections attach to rezoning and conditional use decisions.[23] Thus, those people and entities involved, both landowners and opponents to a zoning change, have procedural rights, including the right to notice, a fair and open hearing, and an impartial decision-maker.[24] A zoning decision that does not comport with due process has been said to be void,[25] but this is probably an overstatement, and a failure to provide due process protections probably would be found to invalidate a zoning decision only if there is a timely challenge.[26]

Under the rubric of due process, the fairness, openness, and impartiality of the rezoning or conditional use process used in a particular case all may be challenged.[27] As discussed in the following paragraphs, challenges of this type to zoning decisions include challenges that a decision resulted from improper *ex parte* communications, predetermination by a decision-maker, or the participation of a decision-maker with a personal interest in the matter being decided. In general, while communications with zoning decision-makers outside of public hearings are not favored, they are very common and even expected by some decision-makers, and they will be subject to a harmless error analysis.[28] Revealing or repeating *ex parte* communications in the record tend to make them harmless.[29] However, *ex parte* communications may raise the level of scrutiny applied to charges of bias or unfairness of the overall process.[30]

The standard for attacking a zoning decision as being a product of predetermination is high. In *Tri-County Concerned Citizens v. Board of County Commissioners of Harper County*,[31] the chairman of

17. *See Union Quarries Inc. v. Bd. of Comm'rs of Johnson County*, 206 Kan. 268, 478 P.2d 181 (1970) (rock quarry operation has a nonconforming use that had not been abandoned); *McPherson Landfill Inc. v. Bd. of County Comm'rs of Shawnee County, supra* note 6, (if C&D landfill were a nonconforming use, use was abandoned by discontinuation of operations).

18. *See State v. J.D. Scherer*, 11 Kan. App. 2d 362, 721 P.2d 743 (1986) (increased intensity); Cf. *Anderson v. Bd. of Adjustment for Zoning Appeals*, 931 P.2d 517 (Colo. App. 1996) (rejecting modern instrumentalities doctrine); *Chartiers v. William H. Martin Inc.*, 518 Pa. 181, 542 A.2d 985 (1988) (following modern instrumentalities doctrine). *See also* K.S.A. 12-758(a) (2001) (providing that zoning regulations apply to alterations of a building to provide for a change in use).

19. *See Crumbaker v. Hunt Midwest Mining Inc.*, 275 Kan. 872, 882, 69 P.3d 601 (2003)

20. *See U.S. v. Locke*, 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985); *Texaco Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982); *Stevenson v. Topeka City Council*, 245 Kan. 425, 429-430, 781 P.2d 689 (1989); *see also Rest. of Wichita Inc. v. City of Wichita*, 215 Kan. 636, 527 P.2d 969 (1974).

21. K.S.A. 12-764 (2001).

22. *Id.*

23. *See, e.g., McPherson Landfill Inc., supra* note 6; *but see Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1115-1117 (10th Cir. 1991).

24. K.S.A. 12-757 (2001); *McPherson Landfill Inc., supra* note 6, 49 P.3d 522 at Syl. ¶ 2.

25. *McPherson Landfill Inc., supra* note 6, 49 P.3d at Syl. ¶ 2, 524.

26. K.S.A. 12-760 (2001) (permits an appeal from a final decision of the city or county to "determine the reasonableness of such final decision").

27. *McPherson Landfill Inc., supra* note 6, 49 P.3d at Syl. ¶ 2, 524.

28. *See In re Petition of City of Overland Park*, 241 Kan. 365, 735 P.2d 923 (1987).

29. *McPherson Landfill Inc., supra* note 6, 49 P.3d at 533.

30. *See McPherson Landfill Inc., supra* note 6, 49 P.3d at 533; *see generally Suburban Med. Ctr. v. Olathe Cmty. Hosp.*, 226 Kan. 320, 597 P.2d 654 (1979).

31. 32 Kan. App. 2d 1168, 95 P.3d 1012 (2004).

the county commission was involved in the process of bringing a sanitary landfill to the county and had engaged legal counsel to assist in negotiations with a landfill developer. Another commissioner had expressed his (incorrect) opinion that he had no choice but to approve a zoning request to allow the landfill. The Kansas Court of Appeals reversed a district court's conclusion that both commissioners had inappropriately prejudged the zoning application. It is not sufficient that a decision-maker publicly discussed a personal view about a zoning issue before a public hearing.[32] To be fatal, an expression of prejudgment must preclude "the finding that the decision-maker maintained an open mind and continued to listen to all the evidence presented before making the final decision."[33] The Kansas Court of Appeals has recently said that prejudgment is determined as of when the decision-maker is presented with the relevant evidence (i.e., potentially before the public hearing), not when the evidence is considered in making a decision.[34] Whether any fact scenario can qualify as prejudgment under such a test is unclear.

Kansas courts have not determined what level of personal interest by a zoning decision-maker is improper. When, in one case, a member of the planning commission stepped down from the bench to advocate an applicant limited liability company's application for approval of a site plan, but did not disclose he was the majority owner, the court found that to be improper.[35] Other states look at such things as whether a decision-maker has a financial interest in the outcome that is more than speculative.[36] In some circumstances, a business relationship between decision-makers and the applicant may be sufficient to require the reversal of a decision.[37] Some courts have held that lack of an appearance of fairness alone is enough to reverse a quasi-judicial zoning decision.[38] However, even if one member of a governing body or planning commission has impermissibly participated in the decision, it appears that the decision will still stand unless that person's vote was necessary.[39]

While procedural due process apparently applies to zoning decisions, participants are not necessarily guaranteed the full scope of due process protections they might have in court. For example, there is not necessarily a right to cross-examine witnesses, at least in cases in which written questions of the witnesses are submitted to the decision-maker after the hearing for its consideration.[40] As a practical matter, cross-examination in zoning hearings is unusual. In addition, zoning controls imposed on a zoning district as a whole, and not simply on a particular parcel, are legislative decisions, which do not involve procedural due process requirements.

3. Substantive due process

Substantive due process provides little restriction to land-use regulation. A land use decision violates substantive due process only if its alleged purpose "has no conceivable rational relationship to the exercise of the state's traditional police power through zoning."[41] The actual purpose of the zoning regulation is not important, but rather the question is whether a "reasonably conceivable" rational basis exists.[42]

4. Equal protection

Zoning regulations based on illegitimate distinctions are subject to challenge under the Equal Protection Clause. For example, in *City of Cleburne, Tex. v. Cleburne Living Center*,[43] the U.S. Supreme Court struck down a requirement that a group home for the mentally handicapped obtain a special use permit. In the absence of any rational basis in the record for believing that a group home would pose a special threat to the city's legitimate interests, it appeared to rest on an irrational prejudice against the mentally handicapped. Likewise if a zoning ordinance "segregated one area only for one race, it would immediately be suspect ..."[44]

However, equal protection challenges are not usually successful when disparate treatment is not based on membership in a suspect class. "Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land use context, a plaintiff must

(continued on next page)

32. *See McPherson Landfill Inc., supra* note 6; *see also Tri-County Concerned Citizens Inc. v. Bd. of County Comm'rs of Harper Co.*, 32 Kan. App. 2d 1168, 95 P.3d 1012 (2004).

33. *McPherson Landfill Inc., supra* note 6, 49 P.3d at 531-532.

34. *See Tri-County Concerned Citizens Inc., supra* note 32, 95 P.3d 1012, Syl. ¶ 10.

35. *Dowling Realty v. City of Shawnee, Kan.*, 32 Kan. App. 2d 536, 85 P.3d 716 (2004).

36. *See Olley Valley Estates Inc. v. Fussell*, 232 Ga. 779, 208 S.E.2d 801 (1974); *see also Daly v. Town Plan and Zoning Comm'n of Town of Fairfield*, 150 Conn. 495, 191 A.2d 250 (1963).

37. *Wyman v. Popham*, 252 Ga. 247, 312 S.E.2d 795 (1984).

38. *See, e.g., Fleming v. City of Tacoma*, 81 Wn. 2d 292, 502 P.2d 327 (1972).

39. *Tri-County Concerned Citizens Inc., supra* note 32, 95 P.3d 1012, Syl. ¶ 9.

40. *In re Petition of the City of Overland Park supra* note 28, 241 Kan. at 371; *but see, e.g., Farmers Group v. Lee*, 29 Kan. App. 2d 382, 386, 28 P.3d 413 (2001).

41. *Crider v. Bd. of County Comm'rs of County of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001) (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 829 (4th Cir. 1995)).

42. *Id.* at 1290.

43. 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

44. *Belle Terre v. Boraas*, 416 U.S. 1, 6, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

demonstrate governmental action wholly impossible to relate to legitimate governmental objectives."[45] Even when a suspect class is involved, where the plaintiff cannot show that a zoning decision is **motivated** in part by racial discrimination, a racially discriminatory result will not invalidate the decision.[46]

5. The First Amendment

The First Amendment can be a restriction on the ability of governments to impose land use controls on expressive land uses, such as signs or adult entertainment.[47] The First Amendment poses a particular barrier to outright prohibitions of such uses.[48] It may also restrict the time within which a zoning body must act.[49] However, zoning regulations that are content neutral, like regulations designed to curb the secondary effects of sexually oriented businesses, may have an impact on expressive conduct without violating the Constitution if the "regulation (1) serves a substantial governmental interest, (2) is narrowly tailored, and (3) does not unreasonably limit alternative avenues of communication."[50]

B. What limits has Congress imposed?

Under the Supremacy Clause, the federal government by statute has limited the ability of local governments to regulate some land use issues. The question of whether a given federal law pre-empts local zoning regulations turns on whether (1) Congress has expressed an intention to pre-empt local zoning control, (2) Congress has so occupied the field involved that it is reasonable to assume an intent to displace all local control, or (3) the decision of the zoning authority actually conflicts with some specific requirement of the federal law.[51]

1. Religious Land Use and Institutionalized Persons Act of 2000

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA/Act)[52] marks a substantial foray by the federal government into land use control. The RLUIPA prohibits intentional discrimination and disparate treatment in land-use regulation between religious and nonreligious assemblies.[53] It also prohibits a local government from implementing a land-use regulation in any individual case in a way that imposes a substantial burden on religious exercise of a person or religious institution, unless the burden imposed is the least restrictive means of furthering a compelling government interest.[54] The potential impact of the RLUIPA is dramatic. It can bar local governments from imposing otherwise appropriate zoning restrictions. The "religious exercise" it protects can include not only such practices as prayer meetings,[55] religiously based college instruction,[56] and religious retreats,[57] but also activities with a religious component like day care programs.[58] Whenever a land use has a connection to a religious practice, the impact of the RLUIPA should be considered. If a landowner seeks to run a church camp, for example, the Act might pre-empt any zoning control that would otherwise bar the same sort of use by a nonreligious organization.

The RLUIPA does not immunize religious institutions from all zoning regulations or regulatory processes. Because the RLUIPA is concerned with the **results** of land use regulations on religious activity, religious institutions may be required to go through rezoning or variance processes, and the costs of going through those processes are not themselves a substantial burden on religious exercise.[59] Thus, in *Civil Liberties for Urban Believers v. City of Chicago*,[60] the 7th U.S. Circuit Court of Appeals rejected a claim that zoning regulations and processes that made it difficult and expensive for churches to find locations in Chicago placed an impermissible burden on those churches. In addition, the administrative facilities of religious institutions may not be covered by the RLUIPA.[61] Intrusions on a religious institution's aesthetic sensibilities from neighboring land uses will not be sufficient to evoke the protection of the RLUIPA.[62] The statute is relatively new and its full

45. *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000) (conditioning approval of plat on landowner conveying a buffer strip and failing to prevent storm water runoff for subdivision development was sufficient evidence of malicious conduct to show action was "wholly impossible to relate to legitimate governmental objectives" and state a bona fide equal protection claim); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (mental retardation does not call for a more exacting standard of review than applied to economic and social legislation where wide latitude is required, unlike classification by race, alienage or national origin).

46. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

47. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) (local restrictions on live entertainment applied to nude dancing infringed on protected First Amendment activity).

48. *Id.* (prohibition violated First Amendment) and *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (set back requirements from residential uses did not violate First Amendment).

49. *See City of Littleton, Colo. v. Z. J. Gifts D-4 LLC*, 541 U.S. 774, 780, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004) (licenses for First Amendment protected businesses, like adult bookstore, must be issued promptly and prompt judicial review must be available).

50. *Abilene Retail #30 Inc. v. Bd. of County Comm'rs of Dickinson County*, 402 F. Supp. 2d 1285, 1291 (D. Kan. 2005) (defendant County's motion granted for summary judgment upholding zoning restrictions on sexually oriented businesses including governing operating hours).

51. *Louisiana Pub. Ser. Comm'n v. FCC*, 476 U.S. 355, 369, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977); *Fidelity Fed. Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982); *Pacific Gas & Electric v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

52. 42 U.S.C. §§ 2000cc *et seq.* (2006).

53. 42 U.S.C. § 2000cc(b)(1), (2) (2006).

54. 42 U.S.C. § 2000cc(a)(1) (2006).

55. *Dilaura v. Ann Arbor Township*, 30 Fed. Appx. 501 (6th Cir. 2002) (challenge to denial of zoning variance to permit house to be used as retreat house for prayer and fellowship permitted to continue).

56. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004).

57. *Dilaura v. Township of Ann Arbor*, 112 Fed. Appx. 445, 2004 U.S. App. Lexis 21159 (6th Cir. 2004) (denial of rezoning application to change hospital into expansion of Christian college reversed under RLUIPA).

58. *See Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186 (D. Wyo. 2002) (RLUIPA applied to church request for variance for day care).

59. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003).

60. 342 F.3d 752 (7th Cir. 2003).

61. *See North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 74 P.3d 140 (Wash. Ct. App. Div. 2, 2003).

62. *See Omnipoint Communications Inc. v. City of White Plains*, 202 F.R.D. 402 (S.D. N.Y. 2001) (communications tower outside church window).

impact will only be seen as the cases it spawns work their way through the courts.

2. Transmission towers and the like

The federal Telecommunications Act of 1996 (TCA)[63] imposes certain restrictions on local zoning decision-making that impact the placement of wireless services facilities, like transmission towers. It applies to controls regarding the placement, construction, and modification of wireless facilities, regardless of whether they take the form of specific zoning regulations, conditional or special use permits, or variances.[64]

The TCA essentially imposes two restrictions on local zoning decision-making. First, the state or local decision-makers cannot "unreasonably discriminate among providers of functionally equivalent services."[65] By prohibiting only unreasonable discrimination, the TCA leaves substantial discretion to local decision-makers. The reasonableness test is essentially a comparison of the contribution an antenna would make to the availability of wireless services to the aesthetic, environmental, and safety impacts it will have.[66]

The second restriction imposed by the TCA is that the state or local government cannot impose regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services."[67] The focus is not limited to the intention of local governments to prohibit the facilities, but extends to the result of even facially neutral, objectively administered policies.[68] This means that zoning regulations that prevent closing gaps in the availability of wireless services are prohibited.[69]

In addition, the federal law regulates the procedure local or state regulators must follow when dealing with telecommunication land uses. It requires the governmental entity to take action within a reasonable period of time,[70] which has the potential to make moratoria on processing zoning applications or issuing building permits for cell towers unlawful.[71] The TCA also requires a decision to be in writing and supported by "substantial evidence contained in a written record."[72] Significantly, the TCA gives the applicant adversely affected by a state or local action that violates the TCA the right to challenge the decision in federal court.[73] However, it does not extend a similar right to those aggrieved by the approval of a telecommunication antenna by a local zoning authority.[74]

Other federal statutes and regulations limit the power of state and local governments to control satellite receiver dishes,[75] amateur radio facilities,[76] nuclear waste facilities,[77] and railroad-related land uses.[78] Federal law may also so thoroughly regulate a field, like radio frequency interference, that zoning authorities cannot use the regulated aspects of a land use in making zoning decisions.[79] In addition, zoning codes or decisions that discriminate in a way that does not violate the Equal Protection Clause may nevertheless be pre-empted by the Fair Housing Act.[80]

C. Limitations imposed on zoning power by Kansas statutes

1. The agricultural use exemption

The use of land for agricultural purposes outside of city limits is exempt from local zoning control. The agricultural use exemption provides that such zoning regulations, other than flood regulations, "shall not apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings are used for agricultural purposes and not otherwise."[81] Kansas statutes governing zoning do not define what is meant by the term "agricultural purposes." However, cases provide some general rules. The raising of canaries and chickens are agricultural pursuits.[82] Raising hogs is in the general realm of agriculture and is, therefore, exempt from zoning regulations by county government.[83] The Kansas Supreme Court has held that operation of a livestock feedlot is an agricultural enterprise, although by statute these feedlots are excepted from the agricultural use exemption.[84] It has also held that operation of a wildlife hunting preserve, where the owner planted crops specifically for the purpose of providing food for wildlife, was an agricultural use of the land, the court noting

63. 110 Stat. 56, PL 104-104 (1996).

64. 47 U.S.C. § 332(c)(7)(B)(I) (1996), *see, e.g., Nextel Communications of Mid-Atlantic Inc. v. City of Cambridge*, 246 F. Supp. 2d 118 (D. Mass. 2003).

65. 47 U.S.C. § 332(c)(7)(B)(i)(I) (2006).

66. *Prime Co. Personal Comm. L.P. v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003) (reversing city decision to deny permit to construct 70-foot antenna disguised as flagpole in church parking lot).

67. 47 U.S.C. § 332(c)(7)(B)(i)(II) (2006).

68. *Virginia Metronet Inc. v. Bd. of James City County*, 984 F. Supp. 966, 971 (E.D. Va. 1998).

69. *See National Tower LLC v. Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *Cellular Tel. Co. v. Bd. of Zoning Adjustment of Borough of Ho-Ho-Kus*, 197 F.3d 64 (3d Cir. 1999).

70. 47 U.S.C. § 332(c)(7)(B)(ii).

71. *See Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457, 1488 (N.D. Ala. 1997) (moratorium on cellular towers was unreasonable discrimination).

72. 47 U.S.C. § 332(c)(7)(B)(iii) (2006). To comply with the statute, a written decision should be separate from the written record, describe the reasons for the decision, and explain those reasons sufficiently for a court to evaluate whether the evidence in the record supports those reasons. *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002).

73. 47 U.S.C. § 332(c)(7)(B)(v) (2006).

74. *See Mason v. O'Brien*, 2002 WL 31972190 (N.D.N.Y. 2002).

75. *See* 47 C.F.R. § 1.4000 (2006).

76. 47 C.F.R. § 97.15(e) (2006).

77. *See Skull Valley Band of Gochute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004).

78. *See* 49 U.S.C. § 10102(6)(A), (C) (2006); *Grafton and Upton R.R. Co. v. Town of Milford*, 337 F. Supp. 2d 233 (D. Mass. 2004).

79. *See Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1192 (10th Cir. 1999) (Congress intends FCC pre-emption of radio frequency interference issues). *Compare, e.g., Lauderbaugh v. Hopewell Township*, 319 F.3d 568, 570 (3d Cir. 2003) (National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401-5426 pre-empts local construction and safety regulations but not regulation of aesthetics of manufactured homes).

80. *See* 42 U.S.C. § 3604(f) (2006); *Larkin v. Michigan*, 883 F. Supp. 172 (E.D. Mich. 1994); *Bangerter v. Oren City Corp.*, 46 F.3d 1491 (10th Cir. 1995).

81. K.S.A. 12-758 (2001); K.S.A. 19-2921 (1995).

82. *Bd. of County Comm'rs v. Brown*, 183 Kan. 19, 325 P.2d 382 (1958).

83. *Carp v. Bd. of County Comm'rs*, 190 Kan. 177, 373 P.2d 153 (1962).

84. *Fields v. Anderson Cattle Co.*, 193 Kan. 558, 563-565, 396 P.2d 276 (1964); K.S.A. 47- 1502 (2000).

that agriculture involves the "utilization of the resources of the land for production of plants and animals."[85] However, raising racing dogs or race horses is not an agricultural land use because the animals are not used for agricultural pursuits.[86]

If land is used for agriculture, land uses that would otherwise be regulated by zoning ordinances may be exempt if they further the agricultural operations on that land. Thus the Court has held the following to be exempt from zoning regulations: sale of excavated rock where the landowner was excavating to build an irrigation pond,[87] an airstrip used to monitor the growing of turf grass,[88] and a farmhouse used to support a family farm.[89]

The 1986 case of *State v. Scherer*[90] illustrates how the agricultural use exemption has the potential to cover a broad range of land uses and how important it can be for those involved in zoning disputes to explore the connection between an otherwise prohibited land use and agriculture. In *Scherer,* a landowner was prosecuted for operating a salvage yard in violation of zoning regulations. He had accumulated on his 10-acre property trucks, cars, washing machines, a badly damaged horse trailer, an old swimming pool, and more than 800 pieces of farm equipment, most of which were horse drawn. He admitted that he kept much of the collection to have a stock of repair parts and claimed that he hoped to use horses to plant corn, apparently in Missouri, in the future and had used horses for haying a little bit in the past. The district court refused to give the jury an instruction on the agricultural use exemption, and the Court of Appeals determined the failure to give the instruction was an error.

2. Group homes and manufactured homes

The Legislature has also limited the power of local zoning authorities to regulate group homes for 10 or fewer disabled people.[91] Group homes must be permitted in any district where single-family dwellings are allowed.[92] Likewise, local regulation of manufactured homes is limited by a statute that prohibits zoning regulations that have the effect of excluding manufactured homes from an entire zoning jurisdiction or excluding residential-design manufactured homes from single-family residential districts based solely on the fact they are manufactured homes.[93]

3. Direct control of siting particular land uses

As a general rule, Kansas statutes do not directly control the siting of land uses but leave the question to local authorities. However, the Kansas Legislature has adopted legislation to control the siting of two specific land uses: nuclear power facilities[94] and power transmission lines.[95] The Kansas Corporation Commission administers these siting processes.[96]

D. Restrictions on zoning power imposed by rezoning procedures

The power to zone is an exercise of police power. Cities and counties have the authority to adopt police power regulations apart from the power expressly granted in the zoning statutes. Can a unit of local government enact zoning regulations without following the procedures set out in the zoning statutes or are those procedures restrictions on its police power? If state statutes are the exclusive source of city and county zoning power,[97] those statutes serve as a limitation on that power. In many fields, cities and counties have broad home rule powers to decide for themselves how they will operate and what powers they will exercise.[98] However, they apparently have no home rule power to change the procedures concerning zoning established by state statute once they have decided to exercise zoning power under the statute.[99]

The zoning statutes set out specific procedures for adopting zoning regulations and changing those regulations.[100] All changes in zoning regulations or classifications of property under K.S.A. 12-757 require a public hearing of the local planning commission after proper notice.[101] At the public hearing, all interested parties are given the opportunity to be heard.[102]

While the planning commission holds the public hearing, it is not the ultimate decision-maker on rezoning requests or amendments to the zoning code. Its role is to advise the governing body. Planning commissions exist to limit the temptation of elected officials to view their power over land use a "mere prerequisite" attaching to their offices and to grant or withhold zoning changes "at their grace or caprice."[103]

While the vote of the planning commission is a recommendation and not a final decision, it nevertheless carries weight. To override the planning commission's recommendation without giving it the opportunity to further review the matter, the governing body must act by a two-thirds supermajority.[104] A simple majority can reach a result contrary to that recom-

85. *Corbet v. Shawnee County Comm'rs*, 14 Kan. App. 2d 123, 783 P.2d 1310 (1989).

86. *Weber v. Bd. of County Comm'rs of Franklin County*, 20 Kan. App. 2d 152, 884 P.2d 1159 (1994) (dogs are not livestock); *Seward County v. Navarro*, 2006 Kan. App. LEXIS 482, 133 P.3d 1283, 1288 (2006) (race horse training facility is not agricultural use).

87. *VanGundy v. Lyon County Zoning Bd.*, 237 Kan. 177, 179, 699 P.2d 442 (1985).

88. *Miami County v. Svoboda*, 264 Kan. 204, 955 P.2d 122 (1998).

89. *Blauvelt v. Leavenworth County Comm'rs*, 227 Kan. 110, 605 P.2d 132 (1980).

90. 11 Kan. App. 2d 362, 721, 721 P.2d 743 (1986).

91. K.S.A. 12-736 (2001).

92. K.S.A. 12-736(e) (2001). *But see Bd. of County Comm'rs of Leavenworth County v. Whitson*, 281 Kan. 678, 132, P.3d 920 (2006) (statute did not prevent county from excluding group home for disabled persons who had the additional characteristic of being sexually violent predators).

93. K.S.A. 12-763 (2001).

94. K.S.A. 66-1,158 *et seq.* (2002).

95. K.S.A. 66-1,177 *et seq.* (2002).

96. K.S.A. 66-1,159, 66-1,158 (2002).

97. *See Johnson County Mem'l Gardens Inc. v. City of Overland Park*, 239 Kan. 221, 224, 718 P.2d 1302 (1986) (municipalities lack inherent power to enact zoning laws; authority derives from K.S.A. 12-701 *et seq.* (2001)).

98. Kan. Const. Art. 12, § 5 (city home rule); K.S.A. 2005 Supp. 19-101 *et seq.* (county home rule power).

99. *City of Topeka v. Bd. of County Comm'rs of County of Shawnee*, 277 Kan. 874, 89 P.3d 924 (2004).

100. K.S.A. 12-757 (2001).

101. K.S.A. 12-757(b) (2001).

102. K.S.A. 12-757(b) (2001).

103. *Armourdale State Bank v. Kansas City*, 131 Kan. 419, 421, 422, 292 Pac. 745 (1930).

104. K.S.A. 12-257(d) (2001).

mended by the planning commission only if the governing body first returns the planning commission's recommendation with a statement specifying the basis of the governing body's failure to approve or disapprove the change and after the planning commission has the opportunity to respond.[105]

Kansas statutes further limit local zoning power by allowing nearby landowners in some circumstances to file a protest petition, which requires the governing body to have a three-fourths majority to approve a zoning change.[106]

E. Limitations on zoning regulations enforced by district court review

K.S.A. 12-760 allows any person aggrieved by a final zoning decision of the county or city governing body to "maintain an action in the district court ... to determine the reasonableness of such final decision."[107] Such a challenge is not an appeal, but is an action under K.S.A. Chapter 60, governed by the rules of evidence.[108] The issues the court can decide are limited to the reasonableness and lawfulness of the final decision.[109]

1. The reasonableness review

Cities and counties "are entitled to determine how they are to be zoned or rezoned ... No court should substitute its judgment ... merely on the basis of a differing opinion as to what is a better policy in a specific situation."[110] The standard of review is an onerous one for the plaintiff:

> An administrative action is unreasonable when [1] it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and [2] was so wide of the mark that its unreasonableness lies outside the realm of fair debate.[111]

The zoning decision-maker is entitled to a presumption that its decision was reasonable.[112] To prove a decision was unreasonable, the person challenging a zoning decision cannot come forth with a completely new case and new evidence that was not before the planning commission at its public hearing. This is because "whether the action is reasonable or not is a question of law, to be determined upon the basis of the facts, which were presented to the zoning authority,"[113] and the court is "not to retry the case on the merits of the application."[114] Nevertheless, the planning commission hearing may be a relatively informal process, and the introduction of evidence that was not before the planning commission is within the discretion of the court.[115]

To enable meaningful review of rezoning decisions, the Kansas Supreme Court recommended in *Golden v. City of Overland Park*,[116] that zoning decision-makers use specific factors in their analysis of a proposed change: the character of the neighborhood, the zoning and uses of nearby property, how suitable the subject property is for the uses to which it is restricted, the effect on nearby property of removing the restrictions, the length of time the property has been vacant as zoned, the public benefit of the restrictions versus their private burden, the recommendations of professional staff, and the conformance of the proposed change with any comprehensive plan. These same factors apply to conditional or special uses as well as rezoning decisions.[117] The factors recommended by the *Golden* Court have become widely used by planning commissions, cities, counties, and courts, and often zoning decision-makers articulate their decisions in terms of these factors.[118] However, courts have indicated that zoning decision-makers were only encouraged to use the *Golden* factors, and a failure to do so would be problematic only if the record is not sufficient to conduct a meaningful review.[119] When the factors are explicitly used, they do not need to be given equal weight and, once balanced by the zoning authority, will not be rebalanced by the courts. Consequently, even if the rezoning were inconsistent with the comprehensive plan, that is only one factor to be weighed and does not make a rezoning decision unreasonable.[120] In addition, analysis of any given factor will be upheld if the evidence on the factor is mixed.[121]

While the "reasonableness" standard results in broad deference to local zoning decision-makers, the standard is not so high that the court rubber stamps the result reached by the city or county. Courts have overturned some rezoning decisions as unreasonable, like not allowing a restaurant on a busy street because of the additional traffic it might generate.[122]

105. K.S.A. 12-257(d) (2001).
106. K.S.A. 12-757(f) (2001).
107. K.S.A. 12-760 (2001).
108. *Keeney v. City of Overland Park*, 203 Kan. 389, Syl. ¶ 2, 454 P.2d 456 (1969); *Bodine v. City of Overland Park*, 198 Kan. 371, 385-86, 424 P.2d 513 (1967); K.S.A. 60-201 (2005).
109. *Keeney, supra* note 108, 203 Kan. at 392-93.
110. *Landau v. City Council of Overland Park*, 244 Kan. 257, Syl. ¶ 4, 767 P.2d 1290 (1989).
111. *Id.*
112. *Bd. of County Comm'rs of Johnson County v. City of Olathe*, 263 Kan. 667, 676, 952 P.2d 1302 (1998).
113. *Davis v. City of Leavenworth*, 247 Kan. 486, 492, 802 P.2d 494 (1990); *Landau, supra* note 110, 244 Kan. at 263; *Bd. of County Comm'rs of Johnson County v. City of Olathe, supra* note 112, 263 Kan. at 676.
114. *Landau, supra* note 110, 244 Kan. at 271.
115. *Combined Inv. Co. v. Bd. of County Comm'rs of Butler County*, 227 Kan. 17, 27, 605 P.2d 533 (1980).
116. 224 Kan. 591, 598, 584 P.2d 130 (1978).
117. *K-S Center Co. v. City of Kansas City*, 238 Kan. 482, 495, 712 P.2d 1186 (1986).
118. *McPherson Landfill Inc. supra*, note 6, 49 P.3d at 525 (noting "The *Golden* factors have become standard considerations throughout Kansas.").
119. *E.g., Davis v. City of Leavenworth, supra* note 113; *Landau, supra* note 110; *Bd. of County Comm'rs of Johnson County v. City of Olathe, supra* note 112.
120. *Bd. of County Comm'rs of Johnson County v. City of Olathe, supra* note 112.
121. *Bd. of County Comm'rs of Johnson County v. City of Olathe, supra* note 112, 263 Kan. at 681.
122. *See Rolfe v. Jackson County*, 79 P.3d 795, 2003 WL 22831657 (Kan. App. 2003) (decision rezoning bowling alley for heavy industrial use reversed); *Taco Bell v. City of Mission*, 234 Kan. 879, 891, 678 P.2d 133 (1984) (denied rezoning to permit fast food restaurant based on generalized concerns of litter, noise, and traffic not reasonable under the circumstances); *Blessant v. Crawford County Bd. of County Comm'rs*, 81 P.3d 461, 2003 WL 23018238 (Kan. App. 2003) (denial of quarry unreasonable); *Combined Inv. Co. v. Bd. of County Comm'rs of Butler County, supra* note 115. 227 Kan. 17, 27, 605 P.2d 533 (1980) (denial of expansion of quarry into neighboring agricultural land unreasonable in light of the record).

2. The lawfulness review

The court's review of the lawfulness of the zoning action consists of determining "whether procedures in conformity with law were employed."[123] The courts will look not only at the provisions of the zoning statutes and zoning ordinances, but also at the bylaws adopted by the planning commission in evaluating whether all legally required procedures were followed.[124] Exact conformity with each jot and tittle of the law is not required for those requirements unrelated to the jurisdiction of the zoning authority and substantial compliance is sufficient.[125] For jurisdictional matters, however, such as proper notice to the public of a zoning hearing, substantial compliance is not enough, and a decision can be reversed even when there is no evidence that there was anyone interested in the matter who did not participate because of a defect in notice.[126]

IV. Conclusion

While zoning authorities have wide latitude in determining how to regulate the use of property to promote the interests of the public at large, they must act in an appropriate manner to do so. They may determine what is beautiful, as long as they don't do it in an ugly way. Their decisions must respect the confines placed on the zoning power by the Constitution of the United States, various federal laws, state statutes, and local zoning codes. Their views of beauty must not lie outside the realm of fair debate. The scope of the limitations on zoning power is an area with many open questions that provide all those involved in land use disputes with ammunition for their fight. ■

123. *Arkenburg v. City of Topeka*, 197 Kan. 731, 735, 421 P.2d 213 (1966).

124. *See Dowling Realty v. City of Shawnee, supra* note 35.

125. *See, e.g., City of Leawood v. City of Overland Park*, 245 Kan. 283, 286, 777 P.2d 830 (1989) (validity of municipality's action depended on substantial compliance).

126. *Ford v. City of Hutchinson*, 140 Kan. 307, 311, 37 P.2d 39 (1934); *see also Crumbaker, supra* note 19, 69 P.3d at 611.

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