I. THE ROLE AND FUNCTION OF CITY COMPREHENSIVE PLANS IN KANSAS LAND USE LAW

INTRODUCTION

City planning is neither defined in, nor required by, Kansas law. Cities may, at their discretion, undertake planning and comprehensive plans for the benefit of their citizens and jurisdictions. What motivates a local unit of government to engage in planning varies from one place to another. While some undertake it as an act consistent with "good government", others do so in direct response (*i.e.*, reaction) to an event that challenges the community, sometimes for the better and sometimes for the worse, and for which the community is unprepared.

As shown below, comprehensive plans typically cover many more subjects than land use, land development and growth management. For example the availability of social services, the community's need to promote economic development, the condition of public parks, the utility and transportation infrastructure, the adequacy of law enforcement and firefighting, the state of physical and mental health in the community, the types and conditions of housing, the fiscal condition of the local government, etc., are often discussed, analyzed and their futures projected in many comprehensive plans. In short, the comprehensive plan addresses not only the use and development of land, but also a broad range of goals and objectives of the community. For purposes of this workshop, however, the emphasis will be on how the comprehensive plan is used in land use decision-making. In many communities in Kansas, the comprehensive plan is the principal policy guide used by the planning commission and elected governing body when considering action on a rezoning application or subdivision plat.

Kansas statutes and case law are quite sparse in their dealings with comprehensive plans. This is not surprising given the historical relationship between state and local governments in Kansas, *i.e.*, the state law sets out the parameters and then empowers the local governments to put flesh on the bone. State law governs as to specifying which local government bodies prepare and adopt plans, and the basic components of those plans, but leaves it to cities to develop and draft the substance of the plans, and how to then work towards reaching the goals set out in the adopted plan.

A. HOW CITIES PORTRAY THEIR COMPREHENSIVE PLANS

CITY-COUNTY COMPREHENSIVE PLAN

The following excerpt from a recent joint plan of the City of Lawrence and Douglas County is an excellent statement of what makes up a comprehensive plan, and its utilization:

> **WHY DOES A COMMUNITY HAVE A COMPREHENSIVE PLAN?**
> A Comprehensive Plan expresses a community's desires about the future image of the community. It provides the foundation and framework for making physical development and policy decisions in the future.
>
> **WHAT IS A COMPREHENSIVE PLAN?**
> The Comprehensive Plan is a policy guide which describes in text and displays in graphics the community's vision for directing future land development. A Plan includes several components:

- It is a policy plan, stating the community's desires for directing land use decisions through the identified goals and policies.
- It provides a physical plan component by mapping generalized land uses and describing in policies the relationships between different land uses.
- It is long-range, considering Lawrence and Douglas County's expected growth in the future. Future land use maps graphically display the potential development of the community.
- It is comprehensive, considering issues such as demographic, economic and transportation factors which have shaped and will continue to influence land development in Lawrence and the unincorporated areas of Douglas County.

HOW IS THE COMPREHENSIVE PLAN USED?

The Comprehensive Plan provides a vision for the community. It is used as a policy guide that identifies the community's goals for directing future land use decisions. The Plan is also used by property owners to identify where and how development should occur; by residents to understand what the city and county anticipates for future land uses within the community; and by the city, county and other public agencies to plan for future improvements to serve the growing population of the community.

Specifically, the city and county use the Comprehensive Plan to evaluate development proposals; to coordinate development at the fringes of the county's cities; to form the foundation for specific area plans; to project future service and facilities needs; and to meet the requirements for federal and state grant programs. The Comprehensive Plan is used most often as a tool to assist the community's decision makers in evaluating the appropriateness of land development proposals. The Comprehensive Plan allows the decision makers to look at the entire community and the effects of land use decisions on the community as a whole to determine whether individual proposals are consistent with the overall goals of the community. (Emphasis added.)

ASSUMPTIONS OF THE PLAN AND THE PLAN'S MAPS

The plan maps are a supportive part of the Comprehensive Plan. The foundation of the plan is the Goals and Policies. The maps provide a graphic representation of the community's land use goals and policies. The maps, together with the text, will help decision makers understand how the community envisions future development.

B. A CITY-ONLY COMPREHENSIVE PLAN

The Comprehensive Plan of the City of Concordia (KS) also provides a thoughtful statement of the plan's purpose and its component parts:

COMPREHENSIVE PLAN INTRODUCTION

INTRODUCTION

A comprehensive plan is an official public document adopted by the Planning Commission and the City Commission as a policy guide to decisions about the physical development of the community. It indicates in general how the citizens of the community want the city to develop in the near-term as well as in the next 20 to 30 years.

Long-range in nature, the Plan is intended to be a source of direction and guidance towards a desired end, rather than a static blueprint of future development of Concordia.

The primary purpose of the Plan is to provide a comprehensive, long-term, and general policy framework that will direct the future growth of the city. It is long-term because it represents the long-term vision of the future physical condition of the community and its socio-economic well being. It is general in order to accommodate the very dynamic nature of community planning. The Plan strives to ensure orderly, healthy and harmonious growth that maximizes public benefit while minimizing public cost.

The Plan also has a near-term focus. It provides a foundation for land use and development control regulations. Any proposals or actions that are not in conformity with this Plan are deemed inappropriate unless proper procedures as outlined in the Procedures Manual are followed to amend the Plan. The development of the Plan itself serves another important function or purpose: To obtain public input through a public participation process in the identification of long-term community development policies. The policies represent the community's common understanding of what growth they expect.

Major Components of the Plan

The Comprehensive Plan is a multi-faceted document that contains many components, each of which serves an intended function. These components and their major functions are summarized below:

- **Introduction and Roles of the Participants** explains the participants in the planning process and their responsibilities.
- **Analysis of Existing Conditions and Demographic Information** contains projections of population, households, and land use based on the analysis of the historic trends and the anticipated future growth pattern in a regional context. These projections help in the formulation of strategies to effectively adapt the community to the future possibilities. The analytical information promotes an understanding of the existing services and opportunities that should be appreciated and taken advantage of and the constraints and problems that should be resolved.
- **Future Land Use Plan** contains specific goals, objectives and policies as related to socio-economic development, land use pattern, public

infrastructure improvements, and public service provision. These policies establish the foundation for the development proposals that follow. The future development proposals outlined in these sections represent the desired strategies for accomplishing the established goals. Some plans also include development standards and requirements to prevent undesirable design and construction of public facilities.

- **Annexation** summarizes strategies and legalities related to future extension of city boundaries.
- **Capital Facilities Planning** provides an annual process of identifying and establishing priorities for achieving capital improvements.
- **Policy Summation** outlines goals, objectives and action steps formulated from community input of the desired types of living, working and business environments for the future of Concordia.

C. AN OVERVIEW TO KANSAS STATUTORY LAW ON PLANNING

WHAT PLANNING IS NOT

City planning is mandated by neither Kansas nor federal law. Further, even when a plan is prepared and adopted, a city taking actions inconsistent with, even in conflict with, the plan does not (generally speaking) create legal issues.

KANSAS PLANNING STATUTES, K.S.A. 12-741 *et seq*.

1. Governing body creates planning commission by ordinance and appoints members. Must have at least five members. City planning commissions must have at least two nonresidents if the city plans, zones or has subdivision regulations applicable outside the city's limits. Members serve without compensation.
2. Planning commission creates "comprehensive plan". Consists of maps, charts, reports and studies primarily for the physical development of the city. Among the components of the plan (K.S.A. 12-747(b)):
   a. Description of the general location, extent, and relationship of different uses of land.
   b. Population and building intensities and restrictions.
   c. Public facilities, including transportation.
   d. Priority of public improvements.
   e. Capital improvement plans.
   f. Utilization and conservation of natural resources.
   g. Any other element deemed necessary by the planning commission.
3. Planning commission gives notice and holds a public hearing before adoption of plan.
4. Favorable action requires majority vote of the planning commission for approval. Once approved, the plan is submitted to governing body for final approval or other action.
5. Governing body approval.
   a. Comprehensive plan takes effect upon approval by the governing body.
   b. Governing body options for action:
      (1) Approve planning commission recommendation by enactment of ordinance;
      (2) Disapprove planning commission recommendation by two-thirds majority vote of the membership of the governing body; or
      (3) Return the plan to planning commission for further consideration.
6. Planning commission is to consider comprehensive plan annually and suggest changes if appropriate (K.S.A. 12-747(d)).

7. Significance of a comprehensive plan:
   a. Guides zoning decisions on individual parcels of property. Zoning actions should be consistent with comprehensive plan (but are not required to be). (See *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (Kan. 1978); *Board of County Commissioners of Johnson County v. City of Olathe*, 263 Kan. 667, 952 P.2d 1302 (Kan. 1998).)
   b. Once a plan is adopted, a planning commission can prepare, adopt and submit to governing body subdivision regulations to govern platting and development of land.
   c. Approval of public facilities. Once comprehensive plan is approved, proposed public improvements, facilities and utilities are to be reviewed by city planning commission for conformance with comprehensive plan. (K.S.A. 12-748)
8. Again, while no city is required by state law to have a plan, the law does provide that a city must have an adopted plan if it is to:
   - Plan for areas outside the city's limits;
   - Zone land outside the city's limits; or
   - Have subdivision regulations
9. For purposes of land use planning, a key part of the comprehensive plan is the future land use map (FLUM). The purpose of the FLUM is to provide a visual representation of the city's view of the uses of land that will be present over time. It is not a zoning map, nor is it meant to be a map which merely shows existing uses of land. The FLUM should be consistent with the text, goals and objectives of the comprehensive plan. For example, a plan which has a goal of expanding land area zoned for industrial uses should have a FLUM that identifies areas of the community suitable for future industrial use, regardless of the current zoning of those areas. A comprehensive plan which promotes residential development would likely have a FLUM that shows presently-undeveloped land transitioning into residential use.

   The legal significance of the FLUM is that a rezoning that is consistent with the FLUM is presumed to be reasonable. (K.S.A. 12-757(a))

D. OPPORTUNITIES FOR THE CREATIVE UTILIZATION OF COMPREHENSIVE PLANS

1. Too many Kansas cities lack a tradition of making land use decisions which properly take into account their adopted comprehensive plan. It seems at times overlooked, that a well-drafted comprehensive plan can be the single-most important expression of what the "public interest" is.

   Predictably this practice can result in the adopted plan losing its legitimacy. It also represents a lost opportunity to make the plan's "vision" for the community a reality on the ground.

   The following Kansas appellate court decisions show a trend, of sorts, towards greater understanding of, and appreciation for, the potential importance of comprehensive plans.

2. ***R.H. GUMP REVOCABLE TRUST, et al. v. CITY OF WICHITA*** (35 Kan. App. 2d 501, 131 P.3d 1268 (2006))

   In this Kansas Court of Appeals decision the court spoke favorably of the purposes to which zoning authority can be put. Those purposes can easily find expression in a community's comprehensive plan. When they do the linkage between plan and actual land use, regulation is strengthened.

- There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations. Such legislation is merely a liberalized application of the general welfare purposes of state and federal constitutions.
- The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.
- While aesthetic considerations may not be as precise as more technical measures and must be carefully reviewed to assure that they are not just a vague justification for arbitrary and capricious decisions, they may be considered as a basis for zoning rulings.

3. ***BAGGETT, et al. v. DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS AND CITY OF LAWRENCE***, 46 Kan. App. 2d 148 (2011)

In this Kansas Court of Appeals decision the issue was a K.S.A. 12-520c "island annexation" by the City of Lawrence. The question of what uses of land were anticipated for the area proposed to be annexed was seen as a matter of great importance to the Court of Appeals, and the Court turned to the adopted county comprehensive plan to help it understand what the "proper growth and development of the area" (see K.S.A. 12-520c) looked like.

The Court of Appeals also gave importance to the availability of public infrastructure, and Lawrence's comprehensive plan's statements that areas should have adequate infrastructure in place, or planned for, to support industrial uses before land is zoned industrial.

Overall the Court of Appeals indicated that comprehensive plans, including growth management policies found in those plans, and the recommendations of planning staff, carried weight in a K.S.A. 12-520c annexation.

4. **OPPORTUNITIES AVAILABLE**

a. Decisions like *Gump* present opportunities for cities to buttress the reasonableness of aesthetic-based land use regulations via the contents of their comprehensive plans. For example, setting out in the plan the community's need for greater landscaping, open space, screening and fencing should be useful in the defense of zoning regulations designed to meet those needs.
b. Likewise if the plan speaks to the need for, e.g., more public health facilities, or housing for the elderly, or for the need to restrict the location of adult entertainment businesses, such plan provisions will help justify zoning regulations which specifically address those needs, and zoning actions taken in accordance with those regulations.
c. The *Baggett* decision is a reminder to cities that the courts expect land use actions to be grounded in sound planning principles and objectives, and that adopted planning documents play a significant role in land use decisions. It is also a reminder to advocates for property owners, developers, and opponents to zoning actions that the local comprehensive plan may contain text which is relevant to the zoning action. That relevant text may show the zoning action to be consistent with the goals/objectives of the plan, or inconsistent.
d. Comprehensive plans can be used much more affirmatively and creatively by Kansas cities than they typically are today.
    - *Golden v. Overland Park* said zoning consistent with the comprehensive plan was relevant to the analysis of whether a local government's zoning action was reasonable.

- The *Golden* court did not express how much, or how little, weight should be given plan/zoning consistency -- the Court left that to the community to determine.
- A community that wants to give as much importance as possible to its comprehensive plan can do so by having zoning and subdivision regulations which require consistency unless findings are made that justify deviation, *e.g.*, changed conditions, public health or safety concerns, or inadequacy/error in the comprehensive plan. For example, a city can have zoning regulations stating that a rezoning application that is not in conformance with the adopted FLUM will not be approved unless findings are made explaining why a deviation from the FLUM is appropriate given the facts, *e.g*., there are changed circumstances and the rezoning is in the public interest.

II. ZONING AUTHORITY, APPLICATION AND JURISDICTION FOR CITIES IN KANSAS

CITY ZONING AUTHORITY IN KANSAS

A. AN OVERVIEW

1. **Authority to Zone Comes from the State.** City regulation of land use is an exercise of the police power, a power delegated to cities by the sovereign state. K.S.A. 12-741 *et seq*., the city and county planning and zoning enabling act.

2. **Why Zone?** Why do cities have zoning in the first place? Among other reasons:

   a. To reduce the bad and unintended consequences of land development. *E.g*., fouling the air, smoke, noise, etc. traveling beyond property lines.
   b. To reduce the burden that new development places on infrastructure that city taxpayers paid to construct and pay to maintain. *E.g*., a cement plant running its trucks over streets constructed to carry light, local traffic.
   c. To prevent perceived changes to what citizens see as the character of the community. E.g., adult entertainment businesses in close proximity to houses, schools and places of worship.

3. **Due Process.** To be lawful, local land use regulations must be able to survive challenges based on substantive due process (the regulations cover a subject not a matter of legitimate public interest or are otherwise unreasonable), or based on procedural due process (the regulations fail to comply with mandated procedures for their consideration and action).

4. **Judicial Review**. Land use decisions made by cities are subject to review in the district court if an appeal is made within 30 days of a final decision. K.S.A. 12-760. The district court is to review the reasonableness of the governing body's decision and conformance of the decision to state and local law. *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (Kan. 1978). Zoning bodies are generally granted wide discretion, and reasonableness remains the standard of review. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111 (1991).

5. To be rejected for arbitrariness a zoning decision must be "so arbitrary that it can be said to have been taken without regard to the benefit or harm to the community at large, an action so wide of the mark that its reasonableness is outside the realm of fair debate." *Martin Marietta v. Board of County Commissioners*, 5 Kan. App.2d 774, 625 P.2d 516 (1981).

B. HOME RULE AND LAND USE AUTHORITY

1. **Constitutional Home Rule.** Home Rule is the single most important source of a Kansas city's legal authority to act. Cities have constitutional Home Rule, a direct grant of the power of local self-government from the people of Kansas to each and all cities of this state. Home Rule rises from a 1960 amendment to the Kansas Constitution (Article 12, Section 5).

2. **Pre-Home Rule.** Prior to the grant of Home Rule powers, cities in Kansas were entirely dependent upon laws passed by the state legislature for their authority to take any action. Cities were subject to a court-made rule of law known as Dillon's Rule which states that political subdivisions of the state have only such powers as are expressly or impliedly conferred upon

them by the state legislature. Under Dillon's Rule, unless there was in effect an enabling statute which authorized the action desired to be taken, there was no power to act. State legislative silence on a subject was tantamount to a prohibition against local lawmaking or action on that subject. Dillon's Rule no longer applies to cities and counties in Kansas because of the adoption of Home Rule. Under Home Rule, cities and counties have the power to initiate local legislation without the need for authority granted by the state legislature.

3. **Home Rule Basics.** The basic plan of the Kansas Home Rule Amendment is to provide for a broad grant of powers to cities and counties to pass laws on any subject without regard to whether the subject the local government proposes to act upon is strictly a "local affair" or is a matter of "statewide concern." This broad power is tempered by the state legislature's ability to effectively make virtually any subject into a matter of statewide importance by simply passing a law that applies uniformly to all cities in the state.

4. **State-Local Law Conflicts**. Kansas Home Rule does not prohibit the state legislature from continuing to enact laws relating to local affairs and government. Nor does Kansas Home Rule allow a city to ignore those state laws which are applicable to that city. The state and a city may legislate on the same subject. In the event of a conflict between the provisions of a Home Rule local law and a state law, the state law prevails. However, cities are not necessarily bound to abide by the state law that it objects to. Home Rule enables cities to pass charter ordinances to exempt themselves from certain state laws which apply to that city but do not apply uniformly to all cities.

5. Home Rule made two fundamental changes in the state-local distribution of governmental powers. First, it granted cities the power to legislate in regard to local affairs and government. Second, it restricted the power of the state legislature to treat cities differently and to enact binding nonuniform restrictions on local affairs. Because they have the ability to exempt themselves from state laws by passage of charter ordinances, cities are not bound to follow state laws (except in certain specified areas) unless those state laws are uniformly applicable to all cities. The Kansas legislature has the final and ultimate power, but Home Rule operates to place restraints on the manner in which the legislature exercises its ability to preempt local lawmaking on a given subject.

6. K.S.A. 12-741 of the city and county planning and zoning enabling act states:

> This act is enabling legislation for the enactment of planning and zoning laws and regulations by cities and counties for the protection of the public health, safety and welfare, and is not intended to prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict with the provisions of the act.

This statement is an express statement of legislative intent that the state planning and zoning enabling legislation does not preempt city or county home rule powers.

7. The Kansas Supreme Court has answered some long-standing questions about the interplay between Home Rule and local governments' powers to plan and zone. At the same time those decisions have generated new questions. In *Crumbaker v. Hunt Midwest Mining, Inc*., 275 Kan. 872, 69 P.3d 601 (2003) the Supreme Court struck down a city's attempt to deviate from K.S.A. 12-741 *et seq*., reaffirming the rule in *Moore v. City of Lawrence*, 232 Kan. 353, 654 P.2d 445 (1982) "…that once a city chooses to adopt this method the legislature intended for these

statutes…to be binding…we therefore hold these statutes are uniformly applicable to all cities which elect to follow the procedure set forth therein." 232 Kan. at 357.

The Court in *Crumbaker* went on to hold "…the power of a city government to change the zoning of property…can only be exercised in conformity with the statute which authorizes the zoning." 275 Kan. at 876.

Crumbaker held that the statutory procedures to zone and rezone property are uniformly applicable to all cities and are therefore mandatory for any city that voluntarily elects to conduct planning or zoning. Consequently no city can use its Home Rule power to exempt from any or all of K.S.A. 12-741 *et seq*.

Within the past several years the argument has resurfaced that cities can use Home Rule to charter out from any or all of K.S.A. 12-741 *et seq*. That argument is that because (1) the planning and zoning enabling act does not expressly preempt cities from enacting laws on the same subject (and the Supreme Court has rejected implied preemption); and (2) statutes regarding city planning and land use regulations, including a number of statutes outside the enabling act, when viewed in *pari materia*, are shown to not be uniformly applicable to all cities. Any city electing to so use Home Rule will want to proceed carefully, especially if modifying recognized procedural or substantive due process rights. The Supreme Court's decision in *Dwagfys Mfg., Inc. v. City of Topeka*, 309 Kan. 1336, 443 P.3d 1052 (2019), and the line of Home Rule cases cited in that decision, are instructive as to preemption and conflict, and for the argument that the legislature's "comprehensive scheme" of regulation does not clearly manifest an intent to preempt the subject matter.

8. In a 2004 decision on the subject of Home Rule and zoning authority the Supreme Court carved out the rule for counties. It is a rule that creates much opportunity for counties, although so far it appears to have not been utilized. In *City of Topeka v. Board of County Commissioners or Shawnee County, et al*., 277 Kan. 874, 89 P.3d 924 (2004), the Court struck down the county's exercise of Home Rule to exempt itself from certain provisions in K.S.A. 12-741 *et seq*. The Court faulted the county not for its exemption from some provisions of K.S.A. 12-741 *et seq*., but rather for not exempting from enough of the State's enabling act in order to do what it did. The Court held that the "…charter resolution at issue here was ineffective, by its own language and under *Moore*, to exempt the County from the procedure it elected and agreed to follow."

C. ZONING REGULATIONS

1. **Zoning Regulations; Definition.** Zoning regulations are the primary regulatory tool for implementing a comprehensive plan. There are two parts to zoning regulations - a zoning map and regulation text. A zoning map graphically depicts the geographical boundaries of zoning districts. The zoning text identifies land uses allowable in each district, as well as bulk regulations for development size, such as minimum lot size and side yard requirements. K.S.A. 12-742 (a)(10) defines "zoning" as "the regulation or restriction of the location and uses of buildings and uses of land." K.S.A. 12-742 (a)(11) defines "zoning regulations" as, "the lawfully adopted zoning ordinances of a city and the lawfully adopted zoning resolutions of a county."

2. The following chart depicts the roles of the planning commission, the governing body, the board of zoning appeals and the public in the adoption and administration of zoning regulations under the Kansas planning and zoning statutes:

ZONING REGULATIONS

	Preparation and Review	Action	Map Amendment (Rezoning)	Text Amendment
Governing Body (GB)	n/a	May: 1. Approve by ordinance, 2. Override PC recommendation by 2/3 majority vote, or 3. Return to PC K.S.A. 12-756(b)	May: 1. Approve by ordinance, 2. Override PC recommendation by 2/3 majority vote, or 3. Return to PC K.S.A. 12-757(c) 4. If protest petition filed, need 3/4 majority to adopt rezoning May initiate amendment K.S.A. 12-757(a)	May: 1. Approve by ordinance, 2. Override PC recommendation by 2/3 majority vote, or 3. Return to PC K.S.A. 12-757(c) May initiate amendment K.S.A. 12-757(a)
Planning Commission (PC)	**Public Hearing** prior to recommendation Notice by publication K.S.A. 12-756(a) Initial preparation and recommendation K.S.A. 12-756(a)	Adopts recommendation by majority vote K.S.A. 12-756(b)	**Public Hearing** - Notice = Publication + Written notice K.S.A. 12-757(b) Adopts recommendation by majority vote of quorum K.S.A. 12-757(c) May initiate rezoning K.S.A. 12-757(a)	**Public Hearing -** Notice = Publication. K.S.A. 12-757(b) Adopts recommendation by majority vote of quorum K.S.A. 12-757(c) May initiate amendment K.S.A. 12-757(a)
Board of Zoning Appeals (BZA)	n/a	n/a	1. Hears appeals **Public Hearing** Notice by publication and written notice K.S.A. 12-759(c); 2. Grants variances and exceptions K.S.A. 12-759(e); 3. Appeals from BZA decisions to District Court K.S.A. 12-759(f)	1. Hears appeals **Public Hearing** Notice by publication and written notice K.S.A. 12-759(c) 2. Grants variances and exceptions K.S.A. 12-759(e) 3. Appeals from BZA decisions to District Court K.S.A. 12-759(f)
Public	May attend public hearing/ interested parties given opportunity to be heard K.S.A. 12-757(b)	May attend public hearing/ interested parties given opportunity to be heard K.S.A. 12-757(b)	Property owners may initiate K.S.A. 12-757(a)	May attend public hearings

3. **Requirements for Zoning Regulations**

   a. Must define the boundaries of zoning districts by description (i.e. block-by-block or by incorporation of an official zoning map). K.S.A. 12-753(a).

   b. The governing body must create a Board of Zoning Appeals. K.S.A. 12-753(a). Some or all the members of a planning commission may also be designated as the Board of Zoning Appeals. K.S.A. 12-759(g).

4. **Zoning Regulations May Include, But Are Not Limited to:**

   a. Regulations for height, stories and size of buildings;

   b. Maximum lot coverage;

   c. Size of yards, courts and other open spaces;

   d. Density of population;

   e. Location, use and appearance of buildings;

   f. Structure and land for residential, commercial, industrial and other purposes;

   g. Conservation of natural resources;

   h. Floodplain regulation. K.S.A. 12-753(a).

5. **Agricultural Purpose Exemption.** K.S.A. 12-758 makes land used for agricultural purposes exempt from county zoning regulations. Land used for agricultural purposes located within a city's limits is subject to that city's zoning regulations. However land located in an extraterritorial area zoned by a city pursuant to K.S.A. 12-715b is not subject to the zoning regulations so long as the land, and buildings thereon, is used only for agricultural purposes. This exemption does not apply to flood plain regulations in areas designated as flood plain.

6. **Vested Rights and Zoning**. A property owner has no vested right in the existing zoning of property, but instead holds it subject to the right of the governing body to rezone it by a reasonable enactment adopted in the valid exercise of the police power. Statutes protect existing uses against subsequent zoning, but do not protect either existing zoning or uses that are merely anticipated at some indefinite time in the future. See *Houston v. Board of County Commissioners*, 218 Kan. 323 (1975).

7. **Variances.** The Board of Zoning Appeals (BZA) may grant variances in cases where application of the zoning regulations would, in an individual case, create unnecessary hardship. Before the BZA may grant a variance, the following conditions must be found:

   a. The variance requested arises from a condition unique to the property, and is not created by the owner;

   b. Granting the variance will not adversely affect the rights of adjacent property owners or residents;

c. Strict application of zoning regulations will result in unnecessary hardship;

d. The variance will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare; and

e. Granting the variance will not be opposed to the general spirit and intent of the zoning regulations. K.S.A. 12-759(e). For an appellate court decision on the granting of variances by a BZA, see *Hacker, et al., v. Sedgwick County* (Kan.App., 286 P.3d 222 (2012)).

8. **Exceptions.** In order to grant an exception from a zoning requirement BZA must be specifically authorized to grant exceptions to the zoning regulations, and then must grant them only under terms as established by the zoning regulations.

9. **Statutorily-Authorized Zoning Techniques, K.S.A. 12-755.**

a. Planned Unit Developments;

b. Transfer of Development Rights;

c. Historic Preservation;

d. Aesthetic Zoning;

e. Overlay Districts; and

f. Special and Conditional Use Permits.

10. **Special and Conditional Use Permits.** The interchangeable terms "special use" or "conditional use" refer to zoning regulations which permit certain uses considered to be essential or desirable in a zoning district in which they would ordinarily be incompatible. Examples of special or conditional uses are hospitals, nursing homes, mobile home parks and public utilities. Special use permits or conditional use permits are granted for uses so allowed in zoning districts where the use conforms to conditions and standards designed to protect the interests of adjoining owners and the public. In granting or denying a special or conditional use permit the planning commission and governing body are to consider the same procedural requirements as they would in determining the reasonableness of a rezoning case. See *K-S center Co. v. City of Kansas City*, 238 Kan. 482, 495, 712 P.2d 1186 (1986).

Granting a special or conditional use permit has been declared a "change of zoning", therefore the same statutory procedures for a rezoning, K.S.A. 12-757, must be followed for a permit. See *American Warrior, Inc. and Brian F. Price v. Finney County BOCC and Huber Sand, Inc*. Kan. Crt. App., case no. 124,998 (2023).

NOTE: Kansas has a special rule regarding special or conditional use permits for mining operations. See K.S.A. 12-757a.

D. REZONING AND SPECIAL AND CONDITIONAL USE PERMIT PROCEDURES

1. *GOLDEN V. CITY OF OVERLAND PARK*, 224 Kan. 591, 584 P.2d 130 (1978)

Land use decisions of city planning commissions and governing bodies relating to particular properties are quasi-judicial, not legislative, actions. In Kansas, when considering a quasi-judicial matter, planning commissioners, and governing body members are acting as judges – making decisions based upon information that is in the record. The record encompasses the application, staff reports and recommendations and the input from the public hearing.

Being a quasi-judicial action has significant consequences for the procedures a city is to follow, and for how a court reviews a challenge to the land use decision that is made. Kansas courts review zoning decisions on a reasonableness standard. A decision is reasonable if it is supported by the facts. The *Golden* decision, detailed below, established guidelines for determining whether a zoning decision is reasonable.

2. ***GOLDEN* PLACES CERTAIN DUE PROCESS RESPONSIBILITIES** on city planning commissions and governing bodies when making "site-specific" land use decisions. These are in addition to the statutory procedural requirements of K.S.A. 12-757.

Golden requires:

a. Land use decisions made by a fair and impartial tribunal.

b. Notice given of all meetings involving the planning commission or governing body members relating to the proposal.

c. An opportunity given for all interested persons to comment on proposal at meetings.

d. A record of proceedings.

e. A written order summarizing the evidence and explaining the factors considered in making the decision made.

3. The Kansas Supreme Court in *Golden* suggested eight factors a planning commission and governing body should consider in making rezoning and conditional or special use permit decisions. Consideration of these factors goes to the reasonableness of the decision. These factors are not exclusive of other factors which a local government determines to be appropriate:

a. The character of the neighborhood.

b. The zoning and uses of nearby properties.

c. The suitability of the subject property for the uses to which it has been restricted.

d. The extent to which removal of the restrictions will detrimentally affect nearby property.

e. The length of time the subject property has remained vacant as zoned.

f. The relative gain to public health, safety and welfare by the destruction of the value of applicant's property as compared to the hardship imposed upon the individual landowners.

g. Recommendations of planning staff.

h. Conformance of the requested change to the master plan.

NOTE: Neither *Golden* nor the rezoning court decisions following it have given direction as to how much weight any of the factors should receive in a given case, or even whether there needs to be a consensus as to whether a particular *Golden* factor favors a rezoning. Also, while written findings as to the factors considered are desirable, such is not a requirement of Kansas law. (*Board of County Comm'rs of Johnson County v. City of Olathe*, 263 Kan. 667, 952 P.2d 1302 (1998).

4. The text to some cities' zoning regulations include detail as to the meaning and purpose of the Golden factors. An example from a Kansas city:

Factors to be Considered in a Rezoning. When a proposed amendment would result in a change of the zoning classification of any specific property, the recommendation of the Planning Commission, accompanied by a copy of the record of the hearing, shall contain statements as to the present classification, the classification under the proposed amendment, the reasons for seeking such reclassification, a summary of the facts presented, and a statement of the factors upon which the recommendation of the Planning Commission is based, using the following guidelines:

a. Whether the change in classification would be consistent with the intent and purpose of these regulations.

b. The character and condition of the surrounding neighborhood and its effect on the proposed change: This entails a description of the neighborhood as to existing land uses, intensity of development, age and general condition of structures.

c. Whether the proposed amendment is made necessary because of changed or changing conditions in the area affected, and, if so, the nature of such changed or changing conditions.

d. The current zoning and uses of nearby properties, and the effect on existing nearby land uses upon such a change in classification: The zoning surrounding the property at issue, along with the actual uses on those properties, is to be considered.

e. Whether every use that would be permitted on the property as reclassified would be compatible with the uses permitted on other property in the immediate vicinity: Consideration is to be given as to whether each of the permitted uses under the proposed rezoning would be compatible with existing uses. The focus is upon issues which can be addressed via zoning, such as structure height, yards and setbacks, and minimum lot sizes.

f. The suitability of the applicant's property for the uses to which it has been restricted: How the property at issue is presently zoned, and the uses permitted under that zoning is to be considered, as well as whether those uses are appropriate given the zoning of the surrounding neighborhood. Also to be considered is whether the

presently allowed uses are the only uses appropriate for the subject property.

g. The length of time the subject property has remained vacant or undeveloped as zoned: Consideration is to be given as to whether the subject property is vacant because its present zoning is unsuitable, or whether it is vacant for reasons unrelated to zoning, *e.g.*, a surplus of similarly-zoned property, problems with financing, lack of infrastructure or other development problems.

h. Whether adequate sewer and water facilities, and all other needed public services exist or can be provided to serve the uses that would be permitted on the property if it were reclassified.

i. The general amount of vacant land that currently has the same zoning classification proposed for the subject property, particularly in the vicinity of the subject property, and any special circumstances that make a substantial part of such vacant land available or not available for development.

j. The recommendations of professional staff and advisors: Staff recommendations should be based upon the factors set out in this section, the adopted comprehensive plan, other adopted plans and reports, and the evidence in the record.

k. Whether the proposed amendment would be in conformance to and further enhance the implementation of the adopted Comprehensive Plan: The question here is whether the requested rezoning is consistent with the recommendations of the adopted comprehensive plan. If it is not, is the incompatibility because the plan is outdated or have conditions changed in the area or neighborhood of the subject property?

l. Whether the relative gain to the public health, safety, and general welfare outweighs the hardship imposed upon the applicant by not upgrading the value of the property by such reclassification: This factor acknowledges that the basis for zoning is protection of public health, safety and welfare. Any rezoning request involves balancing the property owner's interests with the interests of the public.

m. Such other factors as the Planning Commission may deem relevant from the facts and evidence presented in the application.

5. Some Kansas local governments have formally included the consideration of additional factors, such as the following, as part of their consideration of site-specific land use actions.

a. The extent to which the proposed use would substantially harm the value of nearby property.

b. The extent to which the proposed use would adversely affect the capacity or safety of that portion of the transportation system influenced by the proposed use, or present parking problems in the vicinity of the property.

c. The extent to which utilities and municipal services, including but not limited to, sewers, water, police and fire protection, and parks and recreation facilities, are available and adequate to serve the proposed use.

d. The extent to which the proposed use would create stormwater runoff, air pollution, water pollution, noise pollution or other environmental harm.

e. The extent to which there is a need for the use in the community.

f. The economic impact of the proposed use on the community.

g. The ability of the applicant to satisfy requirements applicable to the specific use imposed pursuant to the rezoning district regulations.

6. Elements of the Rezoning Decision.

Conducting the public hearing.

a. The planning commission should formally open and close public hearings. Closing of the public hearing begins the statutory 14-day protest period. K.S.A. 12-757(f).

b. Any documentary evidence not submitted before the meeting to the staff or commission should be formally received and made a part of the record.

c. Following public comments, allow for rebuttal by applicant.

d. Staff should summarize its professional recommendation (its report, including proposed findings) and address issues raised during the public hearing.

e. Commissioners should discuss the application in light of *Golden* factors, city plans and policies, and applicable ordinances prior to voting.

f. Despite the lack of a statutory requirement for public hearing at the governing body meeting, it is a common practice for the governing body to follow the same process as the planning commission (i.e. allowing interested persons an opportunity to be heard, however do so without going through the formalities of notice of a public hearing). Some governing bodies will limit their role to a review of the record received from the planning commission, with no, or greatly limited, opportunity to supplement that record. (See 9 below.)

7. Some Court Statements About Public Comments.

The Court of Appeals has rules that when analyzing *Golden* Factor No. 6 ("the relative gain to the public…") that the "public" is the community-at-large, not the immediate neighborhood. Neighborhood objections alone are not legally sufficient to deny a particular use for the subject property. *R.H. Gump Rev. Trust v. City of Wichita*, 35 Kan. App.2d 501 (2006).

"Zoning is not based upon a plebiscite of the neighbors, and although their wishes are to be considered, the final ruling is to be governed by consideration of the benefit or harm involved to the community at-large." *Waterstadt v. Bd. Of Comm'r*, 203 Kan. 317 (1969). Neighbors may complain that they bought their property believing that their neighbor's zoning and use of their property would remain unchanged. But no one has a legally-recognized "right" to the continuation of their neighbor's current zoning, or for that matter the continuation of their own current zoning.

8. Planning commission and governing body members should abstain from discussion and voting if there exist any conflicts of interest or bias. (More on this subject at Part IV.)

   a. Conflicts of interest are defined in terms of substantial interest in K.S.A. 75-4301. If a member has some relationship to the applicant or interest in the proposal but chooses not to abstain, the member should, at a minimum, disclose the potential conflict on record with a statement that the personal interest will not affect his or her impartiality.

   b. Conflicts of interest should result in not only abstention, but no participation whatsoever in the body's proceedings, including preferably leaving the meeting room. Such action should be noted in the record.

   c. *Ex parte* communications between decision-makers and applicants and other interested parties should be avoided if possible. If they occur they should be disclosed and noted in the record.

9. Cities can show deference to the role and decisions of their planning commissions by provisions such as the following:

   > In its consideration of an amendment to a zoning classification or a Conditional Use Permit the Governing Body shall rely upon the record as prepared by the Planning Commission, such record to be supplemented only by information provided by staff. Additional new information for Governing Body consideration shall be allowed only upon findings by the Governing Body that (1) good cause exists as to why the evidence or testimony sought to be presented to the Governing Body was not presented to the Planning Commission and (2) it is in the best interests of both the applicant and the public that the evidence or testimony be presented to the Governing Body rather than having the matter sent back to the Planning Commission for its consideration of the evidence or testimony.

E. THE REZONING RECORD

WHAT THE LAW REQUIRES

What constitutes a proper record on appeal, according to the Kansas Supreme Court?

1. Any documents central to the decision must be included in the record or the court will rule the appellant failed to meet his/her burden of proof. *Glacier Dev. Co., LLC v. United Govt. of Wyandotte County/Kansas City, Kansas*, 86 P.3d 1025 (2004).

2. *Golden v. City of Overland Park*:

   > "A mere yes or no vote upon a motion to grant or deny leaves a reviewing court, be it trial or appellate, in a quandary as to why or on what basis the board took its action. A board, council or commission, in denying or granting a specific zoning change, should enter a written order, summarizing the evidence before it and stating the factors which it considered in arriving at its determination." 224 Kan. At 597, 584 P.2d 130.

3. Best practice calls for all supporting evidence be presented before the formal closure of the public hearing at the planning commission. It is not unusual for additional public testimony and evidence to be offered to the governing body directly before a final decision is made. Whatever the case, all the evidence must be on the record before the governing body makes its final decision. It is safest to make certain that it is introduced prior to the closure of the public hearing by the planning commission before it makes its final recommendations to the governing body.

4. While formal findings and conclusions from the zoning authority are not mandatory (*Board of County Comm'rs of Johnson County v. City of Olathe*, 263 Kan. 667, 678, 952 P.2d 1302 (1998)), if, in the view of the trial court, a city's finding of fact and conclusions of law are deficient under Golden and inadequate for a "reasonableness" determination, the trial court may remand the case to the local governing authority for further findings and conclusions. *Davis v. City of Leavenworth*, 247 Kan. 486, 802 P.2d 494 (1990).

5. On appeal the district court will examine the record made below to determine if there was sufficient evidence to support the decision. It is important to make certain that all testimonial evidence and written evidence be made a part of the record. All proposed record material should be submitted prior to the time the governing body makes its final decision. Effort should be made to make sure that every member of the planning commission, staff and governing body has an opportunity to review exhibits prior to the hearing.

6. It is unusual for the district court to allow any new evidence. There are exceptions, however. See *Landau v. City of Overland Park*. Courts also can take additional evidence of reasonableness and legality (see *Internet Villages, Inc. of America v. Board of County Commissioners of Jefferson County*, 585 P.2d 999, 224 Kan. 654 (1978)).

7. In summary, the objective is to create a record that has sufficient evidence from which factual decisions can be made on the *Golden* and any other factors which are taken into consideration so that a reviewing court can understand not only what the evidence was, but what factual conclusions were made from it.

F. JUDICIAL REVIEW

1. **THE SCOPE OF REVIEW IN ZONING CASES** is governed by these tenets set out years ago by the Kansas Supreme Court in *Combined Investment Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 28, 605 P.2d 533 (1980):

> "(1) The local zoning authority, and not the court, has the right to prescribe, change or refuse to change, zoning.
>
> "(2) The district court's power is limited to determining
>
> (a) the lawfulness of the action taken, and
>
> (b) the reasonableness of such action.
>
> "(3) There is a presumption that the zoning authority acted reasonably.

"(4) The landowner has the burden of proving unreasonableness by a preponderance of the evidence.

"(5) A court may not substitute its judgment for that of the administrative body, and should not declare the action unreasonable unless clearly compelled to do so by the evidence.

"(6) Action is unreasonable when 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 was so wide off the mark that its unreasonableness lies outside the realm of fair debate.

"(7) Whether 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.

"(8) An appellate court must make the same review of the zoning authority's action as did the district court."

2. **THESE *COMBINED INVESTMENT CO.* TENETS SERVE AS A BACKDROP** against which the factors considered by a city in reaching its zoning decision are to be viewed. *Davis v. City of Leavenworth*, 247 Kan. 486, 493, 802 P.2d 494 (1990).

3. **IN THE APPEAL FROM A REZONING DECISION** the courts sit, even at the district court level, as an appellate body which makes a decision on the zoning record as to whether the local government's decision is supported by the record evidence or not.

4. **APPELLATE COURTS DO HAVE SOME ABILITY TO EXPAND ON THE RECORD** if on appeal the court believes it is not possible to understand why a decision was made based on the evidence presented or if it is unclear to the court what evidence was actually considered.

   Courts in reviewing a rezoning record may find the action to be unreasonable, arbitrary and capricious if from the record it is impossible to determine that there was sufficient evidence to support the decision. Or the court can take the step of remanding the case back to the governing body for further findings of fact, conclusions of law, or clarification of its decision.

5. **A DISTRICT COURT IS NOT FREE TO MAKE FINDINGS OR FACTUAL DETERMINATIONS INDEPENDENT** of those found by the governing body but is limited to determine whether facts could reasonably have been found by the zoning body to justify its decision. *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978).

6. **THERE IS A PRESUMPTION THAT THE PLANNING COMMISSION ACTED REASONABLY**, and the court on appeal may not substitute its judgment for that of the administrative body. *Rodrock Enterprises, L.P. v. City of Olathe*, 28 Kan.App.2d 860, 21 P.3d 598 (2001).

7. **OTHER KANSAS DECISIONS** regarding the presumption of reasonableness to which governing bodies are entitled include *Board of County Commissioners of Johnson County, Kansas v. City of Olathe, Kansas (1998)*; *Golden v. City of Overland Park (1975)*; and *Gaslight Villa, Inc. v. Governing Body of Lansing*, 518 P.2d 410, 213 Kan. 862 (1974).

G. BURDEN OF PROOF IN A CHALLENGE TO A REZONING DECISION

1. **A CITY'S REZONING DECISION CARRIES A PRESUMPTION THAT IT IS REASONABLE.**

2. **THE PARTY SEEKING REVIEW MUST CARRY ITS BURDEN OF PROVING** by a preponderance of the evidence that the action was taken without regard to the benefit or harm involved. *Glazier Dev. Co., LLC v. Unified Govt. of Wyandotte County/Kansas City, Kansas,* 86 P.3d 1025 (2004).

3. **ONCE A GOVERNING BODY HAS MADE A DECISION** to approve or deny a rezoning, a party challenging that decision cannot expect it to be reversed by a court merely because substantial contrary evidence was presented to the city. See *Gaslight Villa, Inc. v. Governing Body of Lansing,* 518 P.2d 410, 213 Kan. 862 (1974) discussing the presumption of reasonableness. Once a governing body has made its decision, if there is competent evidence on the record to support the decision it is unlikely that it will be reversed on appeal.

H. VESTING OF DEVELOPMENT RIGHTS

Development procedures can be lengthy and often require several layers of approvals. Questions often arise regarding at what point in the process does a property owner acquire the right to develop his or her property without being subject to further or different regulations adopted subsequent to the time the landowner began his or her development approval process. Generally, a property owner is insulated from further regulation once he or she reaches the "vesting" point, or the point where a sufficient property right to develop arises and a government can no longer require that a development proposal be altered notwithstanding the adoption of new regulations. In Kansas, the point of vesting of property rights in proposed development is determined by statute, although local vesting rules may also come into play. K.S.A. 12-764 prescribes vesting for platted and unplatted developments:

1. If the plat is for residential development, development rights in such land use statutorily vest upon recording of the plat. If construction has not commenced, however, within 10 years of recording the plat, the development rights will expire. K.S.A. 12-764(b).

2. For any purpose other than residential development, the right to develop property for a particular purpose vests upon the issuance of all permits required for the use by a city or county and construction has begun and substantial amounts of work have been completed. Development rights expire if substantial amounts of work are not completed within 10 years of permit issuance. K.S.A. 12-764(b)(2).

3. Local governments can provide for vesting to occur at a point in time earlier in the development process than the statutory rule, but cannot adopt a point later in time. Vesting must occur in the same manner for all uses of land within the same land-use classification under adopted zoning regulations. K.S.A. 12-764(b)(3).

4. As a general rule, a landowner does not acquire a vested right to develop property in accordance with an existing zoning classification where he or she has neither performed substantial work nor incurred substantial liabilities pursuant to a valid building permit. *Colonial Investment Company, Inc. v. The City of Leawood, Kansas*, 7 Kan. App. 2d 660, 646 P.2d 1149 (1982).

5. The vesting statute does not necessarily preclude a cause of action by a developer against a local government claiming that the local government is estopped from applying new or different land use regulations to the developer's project because he or she has detrimentally relied on previous regulations.

6. **Vested Rights and Zoning.** A property owner has no vested right in the existing zoning of property, but instead holds it subject to the right of the governing body to rezone it by a reasonable enactment adopted in the valid exercise of the police power. Statutes protect existing uses against subsequent zoning, but do not protect either existing zoning or uses that are merely anticipated at some indefinite time in the future. See *Houston v. Board of County Commissioners*, 218 Kan. 323 (1975).

I. NONCONFORMING USE AND NONCONFORMING STRUCTURE LAW IN KANSAS

INTRODUCTION

1. Lawful nonconforming use principles are the "grandfather" principles of land use law. Basically, if property is rezoned with the result that its pre-existing use or improvements are not in conformance with zoning regulations applicable to the property's new zoning classification, then the prior use and improvements are protected, or "grandfathered," as a "lawful nonconformance." With few exceptions, zoning laws apply to *future* uses of property, not to the current use (assuming that use is lawful at the time). Otherwise, a rezoning would often amount to a taking of property for which just compensation would have to be paid.

2. Lawful nonconformance status is a mixed bag for the property owner. It can be economically valuable since properties having fewer zoning restrictions can be more valuable to their owners. On the other hand, lawful nonconformance status is not favored in the law, and can be lost by operation of local or state laws governing abandonment, change of use, extension, expansion, enlargement, destruction or amortization.

3. To a large degree lawful nonconformance is an accommodation to protect the constitutionality of zoning laws. Part of the thinking at the time zoning laws were being adopted in the early 20th Century was that lawful nonconforming uses and structures gradually would "go away" as those properties deteriorated over time, were destroyed by fire or lost protected status by changes in use. However, it has not always worked that way. Events may play out so that nonconforming properties perpetuate themselves, and do so oftentimes without being properly maintained. Because making improvements to nonconforming properties can, by operation of local laws, result in loss of protected ("legal nonconforming") status, owners sometimes are hit with a disincentive to improving their nonconforming properties.

4. Nonconformance laws are a product of tension between communities' conflicting desires to force nonconforming properties out of existence but at the same time to encourage maintenance, if not improvement. As a consequence, some regulations and legal principles focus on eliminating nonconformance based on abandonment, change of use and physical destruction while others focus on incremental improvement by permitting modest expansions of nonconforming uses or changes to "lesser" nonconforming uses, without loss of protected status.

5. When do questions and conflicts arise regarding nonconformance? The following categories come to mind:

   a. Nonconformance resulting from a city's initial adoption of zoning regulations.

      - Going from an unzoned to zoned status, it is a certainty that some of the hundreds or thousands of parcels will have existing uses and/or lots and/or structures that are in nonconformance with the new zoning regulations and/or zoning designations (map).

   b. Nonconformance resulting from zoning text amendments.

      - E.g., Duplex located in R-1 zone. When built duplex was a permitted use. Amendment to R-1 regulations excludes duplexes from R-1 zone.

   c. Nonconformance resulting from site-specific rezoning.

      - E.g., Residence lawfully located in R-1 zone, then rezoned to C-1.

   d. Nonconforming lots, as a result of text amendment.

      - E.g., Minimum lot size in zoning district increased from 10,000 to 12,000 sq. ft.

   e. Nonconforming structures, as a result of text amendment.

      - E.g., C-1 regulations set 35-foot height maximum, then amended to lower the maximum to 30 feet.

BASIC RULES, FROM *GOODWIN V. CITY OF KANSAS CITY*, 244 Kan. 28, 766 P.2d 177 (Kan. 1988).

1. A nonconforming use is "[a] use which lawfully existed prior to the enactment of a zoning ordinance, and….does not comply with the zoning restrictions applicable to the district in which it is situated."

2. A legal nonconforming use is a "vested" right under K.S.A. 12-758, which states zoning regulations "shall not apply to the existing use of any building or land, but shall apply to any alteration of a building to provide for a change of use or a change in the use of any building or land after the effective date" of such zoning regulations.

3. Rights to nonconformance are "strictly construed" against the property owner.

4. Property owner bears the burden of proof by a preponderance of evidence to establish a lawful nonconformance.

TWO TYPES OF NONCONFORMANCE COVERED IN THIS PRESENTATION:

1. <u>Nonconforming Use</u> - Example: Property used as retail business in an area rezoned for residential use.

2. Nonconforming Structure (Building or Sign) - Example : Building built right up to the street right-of-way line with no setback in an area later rezoned to a district with regulations requiring front, rear and side setbacks within which the building now encroaches.

3. Possibilities of nonconformance(s) –

   a. Nonconforming use without a structure

   b. Nonconforming use with a nonconforming structure

   c. Nonconforming use with a conforming structure

   d. Conforming use with a nonconforming structure

TWO REQUIREMENTS TO ESTABLISH A LAWFUL NONCONFORMANCE: EXISTING USE AND LAWFULLY ESTABLISHED

1. Requirement that use be existing.

   a. Use must have "vested" in the property owner

      (1) Developed property - generally not a problem.

      - Must be an *actual*, not *contemplated*, use.
      - Must exist at the time of the new regulation's enactment, not some time in the past.

      (2) "Vesting" – Applicable to both undeveloped or developing property.

      - Kansas has a state statute on vesting, K.S.A. 12-764, which provides:
        For residential developments, "vesting" occurs upon recording of plat, subject to loss of vested development rights if construction is not commenced within 10 years of platting.
        For other than residential developments, "vesting" occurs upon "issuance of all permits required for such use" *and* "construction has begun and substantial amounts of work have been completed." If "substantial amounts of work" is not completed within 10 years of the issuance of the permits, the development rights expire.
      - Cities may adopt their own "vesting" rules, within their zoning regulations. A local vesting rule cannot fix time of vesting later than it is under the statutory rule but can have an earlier "trigger" for vesting.

2. Requirement that use be lawful.

   a. Use must have been properly zoned or otherwise lawful under prior zoning regulation.

      Goodwin v. City of Kansas City, 244 Kan. 28, 766 P.2d 177 (1988). Use of land for excavation of fill dirt in residentially zoned district without a special use permit required under 1984 ordinance was not a lawful nonconforming use where owner who purchased property and commenced use one year earlier could not establish that land at that time was zoned for excavation and fill purposes. Property was residentially zoned at time use

commenced and excavation was not a permitted use in residential area, nor had a special use permit been obtained under earlier special use permit ordinance.

3. If conditional use permit or variance required under prior zoning regulation, must have had conditional use permit or variance and must not have expired. *Goodwin v. City of Kansas City*, 244 Kan. 28, 766 P.2d 177 (1988).

NONCONFORMANCE "RUNS WITH THE LAND."

1. Use, not user, is the issue, therefore, can sell property to a new owner or tenant who can continue the nonconformance. But, if *part* of property with lawful nonconformance sold, lawful nonconformance does not extent to part of property sold that was not actually used for the lawful nonconforming use.

2. Owner of property with nonconformance cannot move the nonconformance to another property.

OVERVIEW OF COMMON FEATURES IN ZONING REGULATIONS AFFECTING LAWFUL NONCONFORMING USES AND STRUCTURES.

1. ***Elimination*** of nonconformance (sanctions or "sticks" to eliminate nonconformance).

   - *Abandonment* of a nonconforming use or structure
   - *Change* from one nonconforming use to a new nonconforming use
   - *Destruction* by Act of God, etc. of a nonconforming use or structure
   - *Amortization* of a nonconforming use or structure
   - *Forced termination* of a nonconforming use or structure

2. ***Regulation*** of nonconformance (incentives or "carrots" to improve nonconformance).

   - *Change* from one nonconforming use to a *new*, less offensive, nonconforming use
   - *Extension* or *enlargement* of a nonconforming use or structure
   - *Variance* to convert a nonconformance to conformance

MEANS OF ELIMINATING NONCONFORMANCE

1. *Abandonment* of an *existing* nonconforming use or structure. Regulations may establish specific period of time of nonuse, frequently called "discontinuance," after which nonconforming use will be deemed abandoned.

   a. Abandonment is the "intentional relinquishment of a known right" to use property for a nonconforming use. *Union Quarries, Inc. v. Board of County Commissioners of Johnson* County, 206 Kan. 268, 478 P.2d 181, 186 (1970). Must be evidenced by an *overt act* or *failure to act* sufficient to support the inference of intent to abandon.

   b. Owner's intent is key, lack of use alone generally is insufficient to establish abandonment, at least in situations where there are no local regulations regarding abandonment and only the state court case law is applied.

c. Kansas Supreme Court has tended to uphold local abandonment regulations as lawful. *McPherson Landfill, Inc. v. Board of County Commissioners of Shawnee County*, 274 Kan. 303, 49 P.3d 522, 535 (2002) (Topeka's one-year abandonment ordinance); Union *Quarries, Inc. v. Board of County Commissioners of Johnson* County, 206 Kan. 268, 478 P.2d 181, 184 (1970) (Court "assumes without deciding" that township's six month abandonment regulation is lawful; finds no abandonment during six months on the facts). *See also M.S.W., Inc. v. Board of Zoning Appeals of Marion County*, 29 Kan. App.2d 139, 24 P.3d 175, 187 (2001) (Marion County's six month abandonment regulation for conditional use permits).

2. *Change* from one nonconforming use to a *new* use.

   a. Some city regulations expressly prohibit change from one lawful nonconforming use to another nonconforming use.

   b. Problem arises where "change" is so similar to pre-existing use that it really is not a change.

3. *Destruction* by casualty (fire, flood, tornado, etc.) of nonconforming use or structure. K.S.A. 12-758: "If a building is damaged by more than 50% of its fair market value such building shall not be restored if the use of such building is not in conformance" with the zoning regulations of the city.

4. *Amortization* of existing lawful nonconforming use or structure.

   a. Regulations sometimes provide for "phasing out" of nonconformance over period of time intended to be adequate for owner to realize value of the investment in the property.

   b. Courts split on constitutionality of amortization. Reasonableness of the "phase out" period is the principal issue.

5. *Forced termination* of lawful nonconforming use or structure

   a. Nuisance declaration.

   b. Eminent domain.

REGULATION OF NONCONFORMANCE

1. *Change* from one nonconforming use to a *new*, less offensive, nonconforming use.

2. *Extension* or *enlargement* of a nonconforming use or structure. Four common situations:

   - *Extension* of nonconforming use to another portion of *existing* building
   - *Enlargement* of existing *structure*
   - *Extension* in *land* area devoted to nonconforming use
   - *Increase* in volume or *intensity* of activity

3. Variances to make structures conforming.

III. SUBDIVISION REGULATIONS

1. **Subdivision Regulations; General Definition.** A principal purpose of subdivision regulations is to ensure the marketability of individual lots. A subdivision generally involves the division of a single parcel of land into two or more parcels. Subdivision regulations govern the size and shape of lots as well as the public services required for a lot to be considered buildable. Subdivision regulations provide standards for public utilities, sewer or private septic connections and streets, as well as standards for such private utilities and streets to ensure that these private facilities adequately fit into the public facility system. Subdivision regulations are commonly thought to apply only to new subdivisions of land, especially in connection with new residential subdivisions. However, subdivision regulations can, and often do, apply to redevelopment of land and can even apply to redevelopment of a single lot.

2. **Subdivision Regulations and K.S.A. 12-741 *et seq*.** K.S.A. 12-742(a)(8) defines "subdivision" as "the division of a lot, tract or parcel of land into two or more parts for the purpose, whether immediate or future of sale or building development, including resubdivision." K.S.A. 12-742(a)(9) defines "subdivision regulations" as "the lawfully adopted subdivision ordinances of a city and the lawfully adopted subdivision resolutions of a county". The following chart depicts the roles of the governing body, the planning commission, and the public in the preparation and adoption of subdivision regulations under the Kansas planning and zoning statutes:

SUBDIVISION REGULATIONS

	Preparation and Review	Adoption/ Amendment	Public Hearing	Plats	Requirements	Authorized Fees
Governing Body (GB)	n/a	May: 1. Approve by ordinance, as recommended by PC, 2. Override PC recommenda-tions by 2/3 majority vote, or 3. Return to PC	Action taken at regular or special meeting, in open session	Accept or refuse dedications K.S.A. 12-752(c); Local regulation may provide for GB approval of plats.	1. Cannot require plats for lot splits provided the tracts are not again divided K.S.A. 12-752(f) 2. Time limits for GB and PC actions K.S.A. 12-752(g) 3. Register of Deeds can only file plats endorsed by GB K.S.A. 12-752(h)*	1. GB may establish reasonable fees – paid to PC for approval for each plat filed K.S.A. 12-752(d); 2. "In-lieu" fees K.S.A. 12-749(b)
Planning Commission (PC)	Initial preparation K.S.A. 12-749(a)	Initial adoption: Amendments – by majority vote of entire membership K.S.A. 12-749(a)	Holds prior to adoption or amendment K.S.A. 12-749(c) Newspaper publication	Determines conformity with subdivision regs (within 60 days – or deemed approved) K.S.A. 12-752(b)		
Public	n/a	n/a	Right to attend and observe	n/a		

* Some subdividers utilize "certificates of surveys" rather than plats. The county register of deeds will usually file them. While the statute requires that only approved plats be filed (K.S.A. 12-752(h), some read this as a mere qualification of the type of plat which can be filed, not as prohibiting filing "certificates of surveys." Purchasers of such lots may find they have unbuildable lots because the land does not conform with subdivision regulations and, therefore, they cannot get a building permit pursuant to K.S.A. 12-752(e), requiring no building or zoning permit to be issued for subdivided land for which the governing body has not approved the plat.

SUBDIVISION REGULATIONS	
May Include Provisions for, but not limited to:	**May require:**
1. efficient and orderly location of streets; 2. reduction of vehicular congestion; 3. reservation or dedication of land for open spaces; 4. off-site and on-site public improvements; 5. recreational facilities, such as dedication of land area for park purposes; 6. flood protection; 7. building lines; 8. compatibility of design; and 9. any other services, facilities and improvements deemed appropriate. K.S.A. 12-749(a)	1. plat approval conditional upon conformance with comprehensive plan; 2. payment of a fee in lieu of dedication of land; 3. surety bonds, cashier's checks, escrow accounts, letters of credit, or other like security in an amount to be fixed by the GB and conditioned upon the actual completion of improvements. GB may enforce such bonds by all equitable remedies. K.S.A. 12-749(b).

3. **Scope of Subdivision Regulations**. While subdivision regulations control developments involving division of land into separate tracts, K.S.A. 12-751(a) provides that "[c]ompliance with subdivision regulations may be required as the condition of an issuance of a building or zoning permit when so specified in the subdivision regulations." Therefore, subdivision regulations can be made applicable to land which will not be subdivided as a result of development (*e.g.*, a requirement of platting in order to receive city services).

4. **Authorized Development Exactions and Fees in Kansas.**

a. Requiring Dedication of Land as a Prerequisite to Plat Approval.

(1) K.S.A. 12-749(a) provides that subdivision regulations may provide for "reservation or dedication of land for open spaces" and "the dedication of land area for park purposes."

(2) K.S.A. 12-752(a) requires a plat to accurately describe "streets, alleys, parks or other properties intended to be dedicated to public use."

(i) these public purpose land dedications are not expressly permitted to be required in order to conform with subdivision regulations.
(ii) The list of permitted provisions for subdivision regulations in K.S.A. 12-749(a) is not inclusive.

b. Requiring Fees "In-Lieu" of Dedication of Land as a Prerequisite to Plat Approval.

(1) K.S.A. 12-749(b) authorizes "payment of a fee in-lieu of dedication of land." A restrictive reading of the statute would authorize such fees only for those purposes for which land dedication is expressly authorized (i.e., open spaces and parks). A less restrictive reading would authorize "in-lieu" fees for public improvements which could be achieved through required dedication of land under Home Rule powers (e.g., streets, sidewalks, schools, electricity, water and sewer lines).

(2) "In-lieu" fees may be collected on developments which do not require the subdivision of land if such is specified in the subdivision regulations pursuant to K.S.A. 12-751(a).

c. Impact Fees. Impact fees are an exaction device which is more flexible than in-lieu fees. Impact fees are imposed on a development in an attempt to help offset the public costs it creates for public facilities, such as schools, sewage treatment plants, landfills, main roadways, etc. Impact fees are generally collected as building permit charges, and not imposed as a condition precedent to plat approval (see McQuillin Mun. Corp. § 25.118.5). The Kansas statutes do not expressly authorize such impact fees, nor are such fees prohibited. In 1995 the Kansas Supreme Court upheld a street impact fee system in *McCarthy v. City of Leawood*, 257 Kan. 566.

5. **Other Methods of Financing Improvements – Improvement Guarantees.** K.S.A. 12-749(b) authorizes subdivision regulations to "provide that in lieu of the completion of any work or improvements prior to the final approval of the plat, the governing body may accept a corporate surety bond, cashier's check, escrow account, letter of credit or other like security … conditioned upon the actual completion of such work or improvements."

a. **Completion Bond**. The developer, prior to selling the subdivided land, must demonstrate, to the satisfaction of the local governing body, that all required improvements have been completed.

b. **Corporate Surety Bonds**. The developer insures that the improvement will be installed through a qualified insurance company. Should the developer fail to install the required

improvements, the local unit of government is the first beneficiary of the policy and is guaranteed that the improvements will be installed.

c. **Escrow Accounts**. A developer is required to deposit some or all the cost of improvements into an escrow account. The funds are then made available when construction begins. An escrow agent holds the money for benefit of the city.

d. **Letters of Credit**. A letter of credit is issued by a local financial institution, which retains title to the property as collateral.

e. **Special Assessments**. The city lends its credit to assist the developer to fund the installation of improvements. The development is put up as collateral. The local government borrows money, and the developer repays the loan. The bonds are usually repaid by means of assessments against properties benefited by the public improvement and by city at-large contributions. See K.S.A. 12-6901 *et seq*.

f. **Property Escrow**. The city takes title to the property and places it into an escrow account. As the developer completes improvements, title is returned.

g. **Sequential (Staged) Subdividing**. A developer is put on a phased development schedule. The developer cannot begin the next phase without first completing the previous phase.

A. PLATTING PROCEDURES AND THE APPROVAL PROCESS

Platting procedures will vary in complexity from jurisdiction to jurisdiction. A typical Kansas municipality may have a platting procedure similar to the following:

1. Participation in a preapplication conference or sketch plan conference with the zoning administrator.

2. Subdivision of a preliminary plat to the zoning administrator who will determine whether the plat is complete. The plat will be required to contain specific information listed within that community's subdivision regulations. A preliminary plat requirement is commonly used, but is not required by the Kansas statutes. Such preliminary plats usually will require a public hearing before the planning commission.

3. When the plat is complete, the zoning administrator will prepare a report to the planning commission recommending approval, conditional approval, or denial of the preliminary plat.

4. An applicant will be responsible for providing the zoning administrator with the names of all property owners of land located within a specified number of feet of the subdivision so the zoning administrator can provide these landowners with notice of the public hearing.

5. The planning commission will hold a public hearing on the matter, which will usually be held at the next regularly scheduled meeting of the commission following planning staff determination that it is complete.

6. The planning commission will determine whether the preliminary plat conforms to the adopted subdivision regulations. The subdivision regulations are to specify a time limit for such action.

K.S.A. 12-752(g). It is unclear whether preliminary plats are held to the same statutory requirements as final plats as the statutes do not provide for a preliminary plat procedure. (Final plats are required to have action taken by the planning commission within 60 days after the first meeting of the planning commission following the date the plat is submitted to the commission. K.S.A. 12-752(b).) It is not uncommon for local regulations to expressly provide for extensions of time for review and action, with mutual consent of the subdivider and governmental unit.

7. Approval of a preliminary plat will usually only authorize preparation of a final plat, it will usually not constitute any of the following:

   (a) Acceptance by the city of property dedicated to public use;
   (b) Authorization to begin construction of improvements; or
   (c) Vesting of any right to develop the land.

8. After the preliminary plat has been approved, a final plat will be prepared and submitted to the planning commission.

9. Typically, no final plat will be heard by the planning commission if it differs from the preliminary plat. Many regulations will provide a degree of acceptable variation from the preliminary plat. Changes on a final plat which exceed the permitted variations from a preliminary plat will usually be considered a new development proposal which must begin, again, with a preliminary plat.

10. The information required to be on a final plat will be more detailed than on a preliminary plat. A final plat will usually include detailed engineering drawings of required improvements, such as street and drainage plans.

11. The final plat will go through the same procedures as a preliminary plat, such as notice, and hearing before the planning commission. The commission will be required to determine whether a final plat conforms with the subdivision regulations within 60 days, or the plat will be deemed approved. K.S.A. 12-752(b).

12. The final plat is submitted to the governing body for its acceptance or refusal of dedication of land for public purposes. Under state law the governing body is required to take action on a final plat within 30 days after its first meeting following the date of the plat's submission to the city clerk, or it may defer action for an additional 30 days to allow for modifications for compliance with requirements it has established. K.S.A. 12-752(c).

13. After the governing body accepts the dedication, the final plat can be filed with the register of deeds. For a final plat to be properly filed, it will be required to bear the endorsement of the governing body. K.S.A. 12-752(h).

Some cities' subdivision regulations provide for final approval of a plat by the governing body, not just acceptance or refusal of public dedications.

IV. CONFLICT OF INTERESTS AND CODES OF ETHICS

INTRODUCTION

Site-specific zoning actions, such as rezonings and conditional or special use permits, are labeled by the Kansas courts as "quasi-judicial".

Because of that classification, certain constitutional protections are triggered, and local governments must adhere to those protections as they make their decisions, lest those decisions are undone once challenged.

The Kansas courts have stated frequently, in zoning cases as well as other contexts, that the key feature of due process procedures that help ensure those constitutional protections is that they are fair, full, adequate and open, including a meaningful opportunity to know the claims made and a meaningful opportunity to respond to them, and to have the **outcome determined by a fair, impartial decision maker**.

In a 1979 Kansas Supreme Court decision (not involving zoning) Due Process requirements were expressed as follows:

> "An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence." *Suburban Medical Center v. Olathe Community Hospital*, 226 Kan. 320, Syl. ¶ 4, 597 P.2d 654.

While the fine points of Due Process are not identical for all types of local government actions (*e.g.*, the courts do not require cross-examination in zoning actions), the baseline is a fair procedure that will enable decision makers to make lawful, reasonable decisions.

KANSAS STATUTES ON STATEMENTS OF SUBSTANTIAL INTEREST/CONFLICT OF INTERESTS

1. K.S.A. 75-4301a *et seq*. defines "substantial interest" to mean any of the following:

   - If an individual or an individual's spouse, either or collectively, has owned within the preceding 12 months a legal or equitable interest exceeding $5,000 or 5% of the business, whichever is less, the individual has a substantial interest in that business.

   - If an individual or an individual's spouse, either individually or collectively, has received during the preceding year compensation which is or will be required to be included as taxable income on federal income tax returns in an aggregate amount of $2,000 from any business or

combination of businesses, the individual has an interest in that business or combination of businesses.

- If an individual or an individual's spouse, either individually or collectively, has received in the preceding year, without reasonable and valuable consideration, goods or services having an aggregate value of $500 or more from a business or combination of businesses, the individual has a substantial interest in that business or combination of businesses.

- If an individual or an individual's spouse holds the position of officer, director, associate, partner of other than a tax exempt organization the individual has a substantial interest in that business, irrespective of the amount of compensation received by the individual or individual's spouse.

2. If an individual or an individual's spouse receives compensation which is a portion or percentage of each fee or commission paid to a business or combination of businesses, the individual has a substantial interest in the customer who pays fees or commissions to the business or combination of businesses from which fees or commissions the individual or the individual's spouse, either individually or collectively, received an aggregate of $2,000 or more in the calendar year.

3. The following are required to file a statement of substantial interest in the office where declarations of candidacy for the local government office sought or held are filed. K.S.A. 75-4302a.

   - Candidates for elective office
   - Persons appointed to fill a vacancy in an elective office
   - Persons holding elective office, between April 15-30 of any year if, during the preceding year, any change occurred in that person's substantial interests.

4. If an individual or an individual's spouse holds the position of officer, director, associate, partner or proprietor in an exempt organization, the individual must disclose substantial interests in these corporations.

5. No local governmental officer or employee shall, in the capacity of such an officer or employee, make or participate in the making of a contract with any person or business by which the officer or employee is employed or in whose business the officer or employee has a substantial interest. K.S.A. 75-4304. A conviction for a violation of that statute results in a forfeiture of the office or employment. It is also a class B misdemeanor. K.S.A. 75-4306.

6. Any local government officer or employee who has not filed a disclosure of substantial interests shall, before acting upon any matter which will affect any business in which the officer or employee has a substantial interest, file a written report of the nature of the interest with the county election officer. An officer or employee does not "act upon" a matter if the officer or employee abstains from any action in regard to the matter. K.S.A. 75-4305.

PREJUDGMENT, BIAS AND EX PARTE COMMUNICATIONS

The Kansas appellate courts have addressed whether, when and how prejudgment, bias and ex parte communications in the context of zoning can violate Due Process.

1. In *McPherson Landfill, Inc. v. Brd. Of County Commr's of Shawnee County*, 274 Kan. 303, 49 P.3d 522 (2002) the Supreme Court held:

> "[P]arties must be informed of the evidence submitted for consideration and must be provided an opportunity to respond and rebut the evidence. *Suburban Medical Center. v. Olathe Community Hosp.*, 226 Kan. 320, 331, 597 P.2d 654 (1979). The American Jurisprudence, Second, encyclopedia notes that "a local legislator may confer *ex parte* with persons interested in a proposed zoning amendment." 83 Am. Jur. 2d, Zoning and Planning § 602. But in the present context, ex parte communications come under stricter review:
>
> "However, when *ex parte* contacts are present in the context of quasi- judicial zoning decisions, such as variances and special use permits, courts will be more receptive to challenges to decisions on grounds of zoning bias. Still courts may simply try to avoid the issue altogether by concluding that the ex parte communications were eventually made part of the record decision, so that there was no denial of the due process right to a fair and impartial hearing." 32 Proof of Facts 531, § 16.

The Court found that in this case the opposing party had an "opportunity to respond" to the communications involved and, therefore, the ex parte communications did not violate due process.

The Court in *McPherson* also held that prejudgment statements by a decision maker are not fatal to the validity of a zoning determination "as long as the statement[s] [do] not 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." 274 Kan. At 318, 49 P.3d 522. The court cited with apparent approval *Madison River R.V. Ltd. V. Town of Ennis*, 298 Mont. 91, 94, 994 P.2d 1098 (2000), where the Montana court held that to prevail on a claim of prejudice or bias against an administrative decision maker, a petitioner must show that the decision maker has an **"'irrevocably closed' mind"** on the subject under investigation or adjudication.

2. In *In re Petition of City of Overland Park for Annexation of Land*, 241 Kan. 365, 736 P.2d 923 (1987), the Supreme Court held that there was no Due Process violation where there were letters exchanged between the BOCC and the City concerning the minimum lot size for septic tank purposes, a letter containing a copy of an editorial on the annexation from a local paper, and a phone call between the mayor and a commissioner prior to the inception of the annexation proceeding, and the record showed these communications were revealed to the opposing party, who had an opportunity to respond.

3. In *Combined Inv. Co. v. Bd. Of County Comm'rs of Butler County*, 227 Kan. 17, 605 P.2d 533 (1980), the court cited "private and undisclosed ex parte statements of three interested people" as evidence considered by the commission, and for that reason and others, held the commission's action in denying rezoning was unreasonable as a matter of law.

4. In *Tri-County Concerned Citizens, Inc. v. Board of County Com'rs of Harper County*, 32 Kan. App.2d 1168, 95 P.3d 1012 (2004), plaintiffs alleged the BOCC had prejudged a company's request for a special use permit for a landfill. The Court of Appeals held:

> "Our Supreme Court has acknowledged that when the focus of such a governing body "shifts" from legislative policy or executive duty to a zoning determination as to one specific tract of land, the function becomes quasi-judicial in nature. When this "shift" in function occurs, the requirements of due process attach, and the proceeding must be fair, open and impartial. If these due process requirements are not fulfilled, the resulting action is void."

The court in *Tri-County* went on to say:

> "[M]ere evidence that a zoning official has a particular political view or general opinion about a given issue will generally not suffice to show bias. Courts recognize that public officials have opinions like everyone else and inevitably hold particular political views related to their public office. In fact, zoning officials are typically chosen to serve in their official capacity because they are expected to represent certain views about local land use planning and development."

In *Tri-County*, the Court held bias by the zoning administrator was not demonstrated, stating, "[A]ctions taken to explore feasibility and potential economic benefits of a particular special use are not necessarily indicative of prejudgment of a subsequent special use zoning application, and they do not preclude a finding that the decision maker maintained an open mind and listened to all the evidence presented before making the final decision." *Id*. At 1179.

[**NOTE**: It violates K.S.A. 75-4305 for a zoning official to advocate approval of a project that official has an interest in without identifying substantial interest in the project. *Dowling Realty v. City of Shawnee*, 32 Kan. App.2d 536, 85 P.3d 716 (2004). In such a case, the entire process must be redone, "since it was tainted from the very beginning."]

5. In the Court of Appeals decision in *Pishney*, the Johnson County/Overland Park K.S.A. 12-521 annexation case, that Court held the following regarding ex parte contacts between city and county staff:

> "There is some evidence that suggests Johnson County officials were communicating with the City and Fire District about some concerns… On appeal, the Board actually acknowledges a meeting among the attorneys for the City, Johnson County, and Fire District in which it says the County's attorney asked for "clarification" with regard to the fire services agreement.
>
> "Despite this, the No Coalition has not shown how these alleged communications between the County and City deprived it of notice or the opportunity to be heard. In the end, the fire services agreement was negotiated between the City and Fire District—two governmental entities—and was included in the record, which made it available for inspection by members of the public and the Board.
>
> "Going further, the No Coalition fails to acknowledge that the wishes and concerns apparently expressed by the Board to the City actually benefitted the County and the No Coalition's positions."

The Court in *Pishney* also addressed the plaintiffs' allegation that ex parte communications involving BOCC members violated Due Process:

"For its final claim in this area, the No Coalition alleges there were a number of substantive ex parte communications between particular Commissioners and members of the public regarding the annexation.

"First, a careful reading of the email exchanges cited by the No Coalition reveal they were not substantive… The only email of considerable length composed by (a BOCC member) discussed his view of long-term development and community concerns *in general*. No information contained in the alleged ex parte communications between (a BOCC member) and private citizens is meaningful.

"Second, the record reveals that plaintiff Tom Watson engaged in these alleged ex parte communications himself. As the County points out on appeal, Kansas courts are not receptive to complaints about ex parte communications from those who have also participated in such communications.

"To summarize, the No Coalition has not shown their rights to due process were violated as a result of ex parte communications concerning the fire services agreement, an inconsistent procedure for communicating with the County, or email communications between Commissioners and persons from the community. We do not see how the No Coalition was deprived of any due process rights. The No Coalition had more than ample opportunity to participate and be heard throughout this annexation proceeding."

V. EXTRATERRITORIAL JURISDICTION

A. COMPREHENSIVE PLANNING

A city planning commission is authorized to make a comprehensive plan for the development of such city and any unincorporated territory lying outside of the city but within the same county in which that city is located. K.S.A. 12-747(a). The planning commission of any city that plans, zones or administers subdivision regulations extraterritorially must have at least two members who reside outside the city limits.

B. ZONING REGULATIONS

A city may apply its zoning regulations to land located outside the city which is not subject to county zoning regulations, and is within 3 miles of the city limits and not more than one-half the distance to the nearest city. To use this power a city must have a planning commission and its adopted comprehensive plan must "include" the extraterritorial area. K.S.A. 12-715b; K.S.A. 12-754(a). Subsequent county zoning "displaces" city extraterritorial zoning - the city's regulations terminate upon county zoning regulations taking effect in the extraterritorial area. K.S.A. 12-715d. Extraterritorial zoning can also occur pursuant to an interlocal agreement between a county and city.

C. SUBDIVISION REGULATIONS

1. In situations where no county subdivision regulations are in effect outside a city's limits, a city may exercise its power under K.S.A. 12-749(a) to regulate the subdivision of land that is up to three miles beyond its corporate limits, but not more than 1/2 the distance to another city which has adopted subdivision regulations. A city and county can also provide for such extraterritorial regulation by the city, or even "shared" city-county regulation, by means of an interlocal agreement.

2. In situations where a county has subdivision regulations in effect, a city may acquire subdivision regulatory authority either (1) by K.S.A. 12-750 or (2) by interlocal agreement with the county. Such authority may extend up to 3 miles outside the city, but not more than one-half the distance to another city. K.S.A. 12-750.

   If a city decides to exercise subdivision regulation control outside the city pursuant to K.S.A. 12-750 a joint committee for subdivision regulation is to be established by joint resolution of the city and the county. The joint committee is to recommend a single set of subdivision regulations for the area designated.

   If the county does not have subdivision regulation controls when the city first exercises its extraterritorial authority, but decides later to exercise subdivision control within that area, the county must notify the city by resolution. A joint committee for subdivision regulation as described above is then established. Unlike the case with zoning, the county cannot simply "displace" the city once the city lawfully commences subdivision regulation in the unincorporated area.

D. BUILDING CODES

While any county may adopt and enforce building codes for the unincorporated areas regardless of whether the county also engages in planning, zoning or subdivision regulation, a city may only enforce building codes outside its limits under the authority of K.S.A. 12-751 or pursuant to an interlocal agreement. K.S.A. 12-751 allows such extraterritorial actions by cities "in conjunction with subdivision or zoning regulations."

> K.S.A. 12-751a adds an opportunity for a protest petition before cities may adopt and enforce building codes extraterritorially. K.S.A. 12-751a establishes a protest petition and election procedure to be conducted in the area outside the corporate limits of a city which adopts an ordinance providing for the enforcement of building codes in this unincorporated area. A sufficient protest petition (20 percent of the qualified electors residing within the extraterritorial area) must be filed within 90 days of the effective date of the ordinance. If a majority vote in favor of rejecting the building code regulation, the city must modify its ordinance to exclude the area and the city may not adopt any ordinance extending building codes in that area for at least four years.

E. INTERLOCAL AGREEMENTS

The Kansas Interlocal Cooperation Act (K.S.A. 12-2901, *et seq*.) is a broad, liberal grant of authority that cities and counties can use to craft regulatory arrangements best-suited for local needs and conditions. The Act has been used many times and in many places to provide for effective, efficient regulation of development at the urban fringe. While the Act is broad, and allows for creative arrangements, there are parameters that must be recognized. Among the most important of these are:

1. Interlocal agreements cannot delegate authority that an entity does not have, *e.g*., county power to regulate land used for agricultural purposes is limited by K.S.A. 12-758. This limits the power it can pass to a city.

2. Interlocal agreements cannot delegate authority which an entity is prohibited by state law from exercising, *e.g*., city exercising zoning power over land more than 3 miles beyond city limits.

3. Any procedures or requirements created by an interlocal agreement must meet recognized legal standards, most notably procedural and substantive due process of law.

The table following this text illustrates differences between Kansas statutes which authorize joint city and county land use regulation. The table also provides examples of joint land use regulation approaches of several interlocal (city-county) cooperation agreements. Note that these interlocal agreements are described below in the form in which they were adopted. The agreements are not necessarily presently in the form described, and some are no longer in effect. Specifically, the following statutes and agreements are shown:

1. K.S.A. 12-744 - Planning and zoning statutes; authorizing joint planning commissions to be created. Also recognizing interlocal agreements.

2. K.S.A. 12-2901 - Interlocal agreements; authorizing interlocal agreements among and between public agencies, including cities and counties.

3. K.S.A. 12-750 - Planning and zoning statutes; authorizing creation of joint (city - county) committees for subdivision regulation.

4. K.S.A. 12-754(a) - Planning and zoning statutes; authorizing cities to regulate zoning within a three mile extraterritorial area.

5. K.S.A. 12-2908 - Interlocal contracts; authorizing any two municipalities (municipality defined as both counties and cities) to contract for services.

6. Miami County - Paola, *et al*. Interlocal Agreement. (No longer in effect.)

7. Hamilton County - Syracuse Interlocal Agreement.

8. Dickinson County - Abilene *et al*. Interlocal Agreement.

9. Ford County - Dodge City, *et al*. Interlocal Agreement.

10. Franklin County - City of Ottawa Interlocal Agreement. (No longer in effect.)

INTERLOCAL COOPERATION FOR LAND USE REGULATION

Statute / Agreement	Body created or used / Role of City and County Governing Body	Area of Jurisdiction	Form and Procedures of Agreement	Scope of Authority to Regulate Land Use
K.S.A. 12-744; Planning and Zoning Authority	Joint Planning Commission Statute does not address how Board of Zoning Appeals (BZA) or governing body authority will be divided or administered.	"as... shall be designated by the joint ordinances and resolutions." K.S.A. 12-744(c)	Pursuant to K.S.A. 12-2901 *et seq.* "... by ordinance of each city and by resolutions of the board of county commissioners." K.S.A. 12-744(c)	"... the exercise and performance of planning powers duties and functions..." K.S.A. 12-744(c) (i.e. - initial preparation of comprehensive plan, zoning and subdivision regulations; hold public hearings on text, map, amendments, and plat recom-mendations)
K.S.A. 12-2901; Interlocal Agreement (Interlocal Cooperation Act)	"any separate legal or administrative entity ... provided such entity may be legally created." K.S.A. 12-2904(c)(2). "shall constitute a body corporate or politic" K.S.A. 12-1904(a). - or - if no separate entity created - an administrator or joint board or one public agency is to be responsible for administering agreement. K.S.A. 12-2904(d)(1).	No geographical limitations expressly stated under this statue.	City ordinance or county resolution necessary. K.S.A. 12-2904(b). Submitted to A.G. for approval. K.S.A. 12-2904(e). Filed with register of deeds and secretary of state. K.S.A. 12-2905.	"services and facilities" K.S.A. 12-2901. "Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state ... may be exercised and enjoyed jointly." K.S.A. 12-2904(a).

Statute / Agreement	Body created or used / Role of City and County Governing Body	Area of Jurisdiction	Form and Procedures of Agreement	Scope of Authority to Regulate Land Use
K.S.A. 12-750; Joint Subdivision Regulation	Joint Committee for Subdivision Regulation; composed of 3 members of county planning commission and 3 members of city planning commission + 1 selected by the other 6 members. Must adopt new regulations within 6 months. K.S.A. 12-750(a).	"land outside of but within three miles of the nearest point of the city limits ... and does not extend more than 1/2 the distance between such city and another city which has adopted regulations under this section." K.S.A. 12-749(a).	Notice requirements under K.S.A. 12-743. Certification of county resolution to city or city ordinance to county; within 60 days establish joint committee by joint resolution. K.S.A. 12-750(a)	"such joint committee shall have such authority as provided by law for county planning and city planning commissions relating to the adoption and administration of regulations governing the subdivision of land within the area of joint regulation." K.S.A. 12-750(a).
K.S.A. 12-754(a); Extraterritorial Zoning and K.S.A. 12-715(b)	City planning commission; City BZA; City governing body	"land located outside the city which is not currently subject to county zoning regulations and is within 3 miles of the city limits, but in no case shall it include land which is located more than 1/2 the distance to another city." K.S.A. 12-754(a).	Notice by city to county commission under K.S.A. 12-743 and K.S.A. 12-754.	Application of zoning regulations.
K.S.A. 12-2908; Interlocal contracts	None prescribed in statute.	No geographic limitations under this statute.	Contract authorized by governing bodies of both city and county.	"any governmental service, activity, or undertaking which each contracting municipality is authorized by law to perform." K.S.A. 12-2908(b).

Statute / Agreement	Body created or used / Role of City and County Governing Body	Area of Jurisdiction	Form and Procedures of Agreement	Scope of Authority to Regulate Land Use
Interlocal Agreement between Hamilton County and City of Syracuse	Joint planning commission; which also acts as joint board of zoning appeals. Joint commission serves both governing bodies which maintain their sole legislative authority over land depending whether located in city or unincorporated county.	Incorporated boundaries of the City of Syracuse and unincorporated territory of Hamilton County minus other city zoning or subdivision extraterritorial jurisdiction.	By interlocal agreement authorized and executed per K.S.A. 12-2901 *et seq*.	Joint exercise of planning commission and BZA powers and duties.
Interlocal Agreements between Dickinson County and cities of Abilene, Chapman, Enterprise, Herington and Solomon	Joint planning commission and BZA to serve with regard to land within "Areas of Influence." County Board has final approval authority of all actions of joint planning commission.	"Areas of Influence" designated and initially adopted by both city and county governing bodies. Incorporated areas of city maintains city planning commission; unincorporated area of county maintains county planning commission.	By interlocal agreement authorized and executed per K.S.A. 12-2901 *et seq*.	Applies Dickinson County zoning and subdivision regulations within areas of influence.
Interlocal Agreements between Miami County and cities of Paola, Louisburg, Osawatomie and Spring Hill.	Delegation of county's authority for zoning, subdivision and building code regulation to the city. County must approve initial city regulations and certain types of amendments thereto. Otherwise area is subject to city regulations enforced by city officials and bodies.	"Community Growth Areas" are designated by the Interlocal Agreement.	By interlocal agreement authorized and executed per K.S.A. 12-2901 *et seq*.	Applies city - adopted zoning, subdivision and building code regulations to land within designated "Community Growth Areas".

Statute / Agreement	Body created or used / Role of City and County Governing Body	Area of Jurisdiction	Form and Procedures of Agreement	Scope of Authority to Regulate Land Use
Interlocal Agreements between Ford County and cities of Bucklin, Dodge City, Ford and Spearville	Joint planning commission has countywide responsibilities. Commission made up of 1 member from each of the 5 zoning boards (4 cities plus county), and 6 persons appointed by County. Each city and the County have separate Zoning Boards for its own jurisdiction. Zoning Boards also sit as BZAs.	Generally, responsibilities follow jurisdictional lines. There is a special review of zoning matters within "Areas of Influence" around each city, however final decisions on such matters remain with the County.	By interlocal agreement authorized and executed per K.S.A. 12-2901 *et seq*.	Joint planning commission handles planning functions for all entities, while zoning continues under respective city and county zoning boards for land within jurisdiction of each.
Interlocal Agreement between Franklin County and City of Ottawa	Delegation of County's zoning, subdivision and building code regulatory authority to the City. County is to be consulted on rezonings and text amendments and if object to such amendments can only be approved with supermajority vote of City Commission.	"Urban Growth Area" as designated by the Interlocal Agreement.	By interlocal agreement authorized and executed per K.S.A. 12-2901 *et seq*. and the Home Rule authority of the City (Kansas Constitution, Art. 12, Sec. 5) and the County (K.S.A. 19-101a).	Applies City's zoning and subdivision regulations to land in the "Urban Growth Area," however property retains its County zoning classification unless and until rezoned pursuant to City's regulations.