

**OVERVIEW OF
KANSAS PLANNING, ZONING AND
SUBDIVISION LAW**

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ZONING LAW

A. ZONING REGULATIONS – AN OVERVIEW

- 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."
- 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/ resolution, 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/ resolution, 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/ resolution, 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 of entire membership 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).
8. **Exceptions.** A 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 term "special use" or "conditional use" refers 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 should 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).

B. REZONING AND SPECIAL AND CONDITIONAL USE PERMIT PROCEDURES UNDER THE KANSAS PLANNING AND ZONING ENABLING ACT AND THE *GOLDEN DECISION*

1. *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978).

- Land use decisions of city and county planning commissions and governing bodies relating to particular properties are quasi-judicial, not legislative, actions.
- This has direct consequences for the procedures a local government is to follow, and for how a court reviews a challenge to the land use decision that is made.

2. *Golden* placed new due process responsibilities on city and county planning commissions and governing bodies when making "site-specific" land use decisions. These are in addition to statutory requirements of K.S.A. 12-757. *Golden* requires:

- Land use decisions made by a fair and impartial tribunal.
- Notice given of all meetings involving the planning commission or governing body members relating to the proposal.

- An opportunity given for all interested persons to comment on proposal at meetings.
- A record of proceedings.
- A written order summarizing the evidence and explaining the factors considered in making the decision made.

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

- 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.

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

- The extent to which the proposed use would substantially harm the value of the nearby property.
- 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.
- 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.
- The extent to which the proposed use would create stormwater runoff, air pollution, water pollution, noise pollution or other environmental harm.
- The extent to which there is a need for the use in the community.
- The economic impact of the proposed use on the community.

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

3. **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).
- e. Commissioners should discuss application in light of Golden factors and applicable ordinances or resolutions 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.

4. Planning commission or governing body members should abstain from discussion and voting if there exist any conflicts of interest or bias.
 - 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 revealing that the said 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 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.

SUBDIVISION REGULATIONS AND DEVELOPMENT

A. SUBDIVISION REGULATIONS – AN OVERVIEW

The most universal type of control for new developments is subdivision regulations. City and county planning commissions have the authority to develop such a set of standards and submit them to their appropriate governing body for approval by adoption of an ordinance (city) or resolution (county). Once approved, they become the basis of an established development review process that is geared to help achieve thoughtful, cost-effective development of an area.

Subdivision regulations are a set of standards which establish the way in which land is developed. A typical set of subdivision regulations will have minimum design standards such as the arrangement of streets, alleys and other public ways, as well as the length and width of blocks and lots and minimum area requirement for lots. Regulations usually also include utility requirements that anticipate future sewer and water needs, requirements for the dedication or reservation of public sites and open spaces, and policies relating to the finance of public improvements such as streets, water and sewer lines, sidewalks, etc. A financing policy may direct the developer or the city or county to pay for all required improvements or a cost-sharing formula may be developed between the developer and the city or county.

Subdivision regulations provide a mechanism by which governmental services, public improvements and private developments may be better coordinated. Public services such as fire, police, sewer and water service

have to expand as land develops, and in the interest of efficient and economical expansion, the review of subdivision development is critical. A thorough set of subdivision regulations should include construction standards for the initial development and the continued maintenance of such improvements. If a proposed development conflicts with the orderly expansion of public services or improvements, the development should be modified so it will conform with the basic standards set out in the subdivision regulation.

B. HOW SUBDIVISION REGULATIONS WORK

Subdivision regulations are developed by the city or county planning commission, discussed at publicized public hearings, and approved by the city or county governing body. If a city wants to regulate an area not directly under its jurisdiction, a joint committee for subdivision regulation may be formed with the county to develop the subdivision regulations, or an interlocal agreement entered into between the city and county providing for such extraterritorial regulation.

The action portion of subdivision regulations is the plat review and approval sequence. In brief, when a city or county has adopted subdivision regulations an area that is being subdivided into lots must conform to the regulations. A plat must be submitted for approval to the planning commission.

In many cities and counties involvement of the local governing body in the approval of subdivision is limited to the action of approval or rejection of the dedication of lands for public purposes. In addition to the 60 days within which the statute provides the planning commission must approve or disapprove a plat, the governing body has 30 days to review and approve dedications. Action may be deferred an additional 30 days for modifications to the plat, and reasons must be given if the governing body defers or disapproves a dedication. In some cities and counties the governing body itself takes final action on plat approval.

After the plat is received, the subdivider is notified of the conditions under which the plat will be approved. When the plat is found to conform to the subdivision regulations, the plat is endorsed by the planning commission.

There are two basic enforcement mechanisms:

1. A building permit may be denied for the construction of a structure on any parcel of land subject to the subdivision regulations which has been subdivided, resubdivided or replatted after the adoption of the regulations and the plat has not been approved.
2. The county register of deeds cannot record any plat unless it is endorsed by the planning commission and land dedicated to public purposes has been approved by the governing body (or plat approval by the governing body, if the regulations call for such).

Additional controlling devices may be developed and implemented. For example, the governmental unit may institute a series of on-site inspections to maintain first-hand knowledge of an area's progress. These inspections provide a check to make sure the subdivision regulations are being followed.

When there is a policy of directing the developer to provide part or all of the required public improvements, the planning commission may withhold final plat approval until the required improvements are installed.

Another control device involves the withholding of public utilities until the area conforms to established standards. The developer may also be required to post a performance bond. The bond represents the developer's promise that certain installations – streets, sewers, etc., will be completed within a given time. The subject of guaranteeing public improvements is discussed later in this section.

C. THE PLANNING COMMISSION AND 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. (See *generally* American Planning Association, *Planning Made Easy*, Planners Press (1994) p. 15.)

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 (city) or resolution (county), as recommended by PC, 2. Override PC recommendations 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)	1. GB may establish reasonable fees – paid to PC for approval for each plat filed K.S.A. 12-752(d);
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)	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)*	2. “In-lieu” fees K.S.A. 12-749(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:
<ol style="list-style-type: none"> 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) 	<ol style="list-style-type: none"> 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. **Vested Development Rights.**

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

year rule can be modified (*i.e.*, extended but not shortened) by exercise of Home Rule.

- b. If the plat is for any purpose other than single-family, the right to use land for a particular purpose will vest upon the issuance of all permits required for such use by a city or county and construction has begun and substantially completed under a validly issued permit. K.S.A. 12-765(b).
- c. Local governments may, by Home Rule, 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(c).
- d. 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. **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.

6. **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.”

K.S.A. 19-2961(a) authorizes the board of county commissioners to accept "...a completion bond, cashier's check, escrow account or other like security..." In addition, however, the county board may require a maintenance bond, cashier's check, escrow account or other like security in a reasonable amount to be in force for a period of one year, after approval 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 local unit of government.
- 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 or county 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 or county at-large contributions. See K.S.A. 12-6901 *et seq.*
- f. **Property Escrow.** The local government 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.

D. 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 or county 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 preliminary plat, a 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 or county 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).
14. Some regulations provide for final approval of a plat by the governing body, not just acceptance or refusal of public dedications.

SESSION II:

**HOME RULE AS
LEGAL AUTHORITY FOR
CITY AND COUNTY REGULATION OF
LAND USE AND DEVELOPMENT**

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CITY AND COUNTY POWER TO ZONE

A. AN OVERVIEW

1. City and county regulation of land use is an exercise of the police power, a power delegated to cities and counties by the sovereign state. K.S.A. 12-741 *et seq.*, the city and county planning and zoning enabling act.
2. 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).
3. **Judicial Review.** Land use decisions made by cities and counties 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).
4. 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. Home Rule is the single most important source of a Kansas city or county's legal authority to act. In the case of cities, having constitutional Home Rule, it is 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). Counties enjoy Home Rule by a 1974 enactment of the Kansas Legislature (K.S.A. 19-101(a) *et seq.* All counties may exercise Home Rule consistent with the powers, and limitations upon use, set out in those statutes.
2. Prior to the grant of Home Rule powers, cities and counties in Kansas were entirely dependent upon laws passed by the state legislature for their authority to take any action. Cities and counties 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. 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, or to all counties, 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 or county to ignore those state laws which are applicable to that city or county. The state and a city or county 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, local governments are not necessarily bound to abide by the state law that it objects to. Home Rule enables cities to pass charter ordinances and counties to pass charter resolutions to exempt

themselves from certain state laws which apply to that city or county but do not apply uniformly to all cities or counties.

5. Home Rule made two fundamental changes in the state-local distribution of governmental powers. First, it granted cities and counties the power to legislate in regard to local affairs and government. Second, it restricted the power of the state legislature to treat cities and counties 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) or resolutions (counties), cities and counties are not bound to follow state laws (except in certain specified areas) unless those state laws are uniformly applicable to all cities or counties. 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. In several recent decisions 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.*

8. In a 2004 decision on the subject of Home Rule and zoning authority the Supreme Court carved out a new, and important, 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."

In short, the Court held:

- a. K.S.A. 12-741 *et seq.* was not uniformly applicable to all counties. Therefore the statutes in the planning and zoning enabling act are subject to exemption via a county charter resolution.
- b. If a county elects to exempt from some but not all of K.S.A. 12-741 *et seq.*, it has to comply with what it does not exempt from.

- c. The question not asked in *City of Topeka* is if a county does exempt from the entirety of the Enabling Act, under what authority does it then plan and zone? *Crumbaker*, and earlier decisions, emphasize that planning and zoning powers of a municipality are “derived solely from the grant contained in K.S.A. 12-741 *et seq.*” 275 Kan. at 874, *Johnson County Memorial Gardens*, 239 Kan. at 224. Can a county exempt from the entirety of the Enabling Act, and then pass laws on planning and zoning under authority of Home Rule? Or use Home Rule as the vehicle for the exercise of the Police Power? Or take the position that the Police Power itself carries with it the legal authority to regulate land use via planning and zoning?
- d. Beware – on the same date it released its *Topeka v. Shawnee County* ruling on the “charter” Home Rule powers of counties, the Supreme Court also decided a case involving the “ordinary” Home Rule powers of counties. In *David et al v. Board of County Commissioners of Norton County*, 277 Kan. 753, 89 P.3d 893 (2004), the Court drew a bold line between city constitutional Home Rule and county statutory Home Rule. In brief, the Court said that the long line of caselaw rejecting implied preemption by the state of city lawmaking authority was not applicable to an analysis of state preemption of county Home Rule lawmaking.

Consequently county lawmaking on a subject the state has also passed laws upon is fraught with danger of creating conflicts with state laws, and conflict always ends with the invalidation of the county law. How severe an erosion of county Home rule authority will result from *David* is not yet known.

KANSAS HOME RULE DECISIONS

City of Topeka v. Board of Shawnee County Commissioners, et al., 277 Kan. 874, 89 P.3d 924 (2004)

David et al., v. Board of Commissioners of Norton County, 277 Kan. 753, 89 P.3d 893 (2004)

Crumbacker v. Hunt Midwest Mining, Inc., 275 Kan. 872, 69 P.3d 601 (2003)

SESSION IV:

**NONCONFORMING USES,
LOTS AND STRUCTURES**

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NONCONFORMING USE AND NONCONFORMING STRUCTURE LAW IN KANSAS

A. INTRODUCTION

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 lawful 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 compensable taking of property.

Lawful nonconformance status is a mixed bag for the property owner. It can be economically valuable since zoning laws generally become more restrictive over time. 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 due to regulations and legal principles based upon abandonment, change of use, extension, expansion, enlargement, destruction or amortization.

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 these 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 maintained. Because a lawful nonconformance can increase a property's value but updating and other improvements to the properties can, by operation of local laws, result in loss of protected status, owners sometimes have little incentive to improve their nonconforming properties.

Therefore, 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 less offensive nonconforming uses, without loss of protected status.

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

1. "A 'nonconforming use' is defined as '[a] use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it

does not comply with the zoning restrictions applicable to the district in which it is situated."

2. A nonconforming use is considered 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.

C. TWO TYPES OF NONCONFORMANCE COVERED IN THIS PRESENTATION:

1. Nonconforming Use - 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. Or, there is no rezoning involved, but rather a text amendment that has the same result.
3. Possibilities of nonconformance(s) –
 - a. Nonconforming use without a structure (e.g., a quarry)

- b. Nonconforming use with a nonconforming structure
- c. Nonconforming use with a conforming structure
- d. Conforming use with a nonconforming structure

C. TWO BASIC REQUIREMENTS TO ESTABLISH A LAWFUL NONCONFORMANCE

1. Requirements

- a. Must be an *existing* use
- b. Must have been *lawfully* established

2. *Existing* use requirement.

- 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 undeveloped or developing property.

- To be "vested," must have a building permit for the use or structure *and* must have undertaken substantial investment or activity to construct the nonconformance, sometimes quantified by local zoning regulation.
- Kansas has a state statute on vesting, K.S.A. 12-764, which provides:

For single family residential developments,
"vesting" occurs upon recording of plat, subject
to loss of vesting if construction not
commenced within 5 years of platting.

For other than single family 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 under a
validly issued permit."

- Cities and counties may adopt their own
"vesting" rules, usually found in zoning
regulations. A local vesting rule cannot fix time
of vesting later than it is under the statutory
rule. A local rule can have an earlier "trigger"
for vesting, e.g., mere issuance of permits.

3. *Lawful* when use initiated requirement.
 - a. Must have been properly zoned or otherwise lawful under
prior zoning regulation.

(1) *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 new 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.

Property owner could not rely on city official's erroneous statement at time use commenced that use for excavation and fill was unrestricted other than need for hauling permit.

- b. 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).

E. NONCONFORMANCE "RUNS WITH THE LAND."

1. Use, not user, is the issue, therefore, owner 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 extend 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.

F. SOME LOCAL GOVERNMENTS REQUIRE REGISTRATION OR CERTIFICATION OF LAWFUL NONCONFORMING USES AND STRUCTURES

1. In such localities, it is not enough to be a lawful nonconforming use or structure. Property owners *must also apply to the local government for certificates of lawful conformance* within specified period of time after becoming nonconforming, or lawful nonconforming status is lost.
2. Lawfulness of such registration or certification requirements? Regulations may be challenged as conflicting with state law's protection of lawful nonconforming status.

G. 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 the condition or character of the 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

H. 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.
- (1) Reduction in level or degree of nonconforming activity is not an abandonment.

- (2) Examples of intent to abandon - overt act or failure to act.
 - (i) Removal of equipment and machinery necessary for the nonconforming use.
 - (ii) Use of property for a different nonconforming use.
 - (iii) Use of property for a conforming use.
- (3) Examples not constituting intent to abandon - basically, matters beyond the owner's control.
 - (i) In the event of temporary nonuse, mere intent to resume use without an accompanying overt act.
 - (ii) Delay in use caused by litigation or probate of owner's estate.
 - (iii) Delay caused by loss of tenant and seeking new tenant.
 - (iv) Shortage of materials or supplies necessary to carry on the nonconforming use.
 - (v) Nonuse due to seasonal nature of business.
 - (vi) Suspension of activity while repairing structure on the property used for the nonconforming activity.

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).

d. *Union Quarries, Inc. v. Board of County Commissioners of Johnson County*, 206 Kan. 268, 478 P.2d 181 (1970).

(1) Facts

- (i) Quarrying activity moved off quarry for just over two years.
- (ii) Left loader and 20,000 tons of crushed rock.
- (iii) Quarrying operations conducted on other quarries during time period.
- (iv) Significant increase in level of activity when quarrying resumed.
- (v) Township had six month "discontinuance" regulation. Court "assumes without deciding" six month abandonment regulation is lawful.

- (2) Ruling - Quarrying at site not abandoned
- (i) "Discontinuance" synonymous with "abandonment"
 - (ii) "Abandonment" is "voluntary or intentional release of a known right" requiring showing of:
 - Intent to abandon; and
 - Overt act or failure to act carrying the implication that the owner does not claim or retain any interest in the right to the nonconforming use.
 - (iii) "Mere cessation of use does not of itself amount to abandonment although the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned".
 - (iv) Evidence showed common practice was to move portable crushing and other equipment to sites as needed to maintain stockpiles, occasional sales from stockpile, continued payment of minimum royalties.

2. Change from one nonconforming use to a *new* use.
- a. City and county regulations: Some 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. Courts must decide these situations on a case-by-case fact-intensive basis to determine if the use is "substantially the same".

Factors:

- (1) Whether the uses reflect the same nature and purpose.
 - (2) Whether the uses differ in quality, character or degree.
 - (3) Whether the uses have the same impact on the neighborhood.
- 3. Destruction by casualty (fire, flood, tornado, etc.) of nonconforming use or structure.
 - a. Kansas statutes specifically address destruction by casualty. 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 or county.
 - b. City and county regulations generally prohibit reconstruction and continuation of nonconformance if destroyed by percentage specified in the regulation, usually 50% of fair market value, consistent with K.S.A. 12-758.
 - 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. Some courts will allow amortization for the termination of a nonconforming use after a specified period of time (years) if deemed to be sufficient for the owner to receive the benefit of the owner's investment in the property. Reasonableness of the "phase out" period is the principal issue.
 - c. The City of Wichita proposes to amortize nonconforming sexually oriented businesses effective January 1, 2008 and following the filing of a lawsuit by the city attorney "to obtain an independent judicial review of the provisions (of the city code) relating to amortization of nonconformities."
5. Forced termination of lawful nonconforming use or structure
- a. Nuisance declaration.
 - b. Eminent domain. Acquisition of private property for a public purpose upon payment of just compensation.

I. REGULATION OF NONCONFORMANCE

- 1. Change from one nonconforming use to a *new*, less offensive, nonconforming use. Some local regulations allow limited changes (a) to a similar lawful nonconforming use or (b) to a less intensive 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

a. Regulations generally permit *extension* of nonconforming use to another portion of *existing* building as long as original building design permits expansion.

b. *Enlargement of existing structure* with a nonconforming use.

(1) Regulations generally prohibit or significantly limit enlargement of an existing structure.

(2) Extension of *land area* used for nonconforming use generally prohibited. Refers to increase in land area or extension of use into land area not previously used. Usually comes up where only part of parcel was used for nonconforming use and owner wants to extend use to more of the parcel.

(3) Special Rules for mining and extraction industries.

- By its very nature, mining causes gradual expansion of land use - the *use itself* is the gradual consumption of land over an expanding area over time. The land is not

incidental to the use carried on upon it. Sometimes referred to as "natural expansion" or "diminishing asset" doctrines.

- Still subject to rules of abandonment - owner must manifest intent to continue to use quarry.
- *Union Quarries, Inc. v. Board of County Commissioners of Johnson County*, 206 Kan. 268, 478 P.2d 181 (1970):
 - (a) Upon resumption of quarrying, operation substantially increased in volume and intensity. Court held the increase in activity was not an impermissible enlargement, recognizing that a nonconforming use may modernize its operations, if "ordinarily and reasonably adapted to make the use in question available to the owner" and the "original nature and purpose of the undertaking must remain unchanged." Court then adds that "a nonconforming use is not limited to the precise magnitude thereof which existed at the date of the ordinance, but may be increased by *natural expansion*, and a nonconforming use is not unlawfully enlarged or extended although the number of employees has almost doubled.

The natural growth of a business or an increase in the amount of business done is not a change from the nonconforming use permitted by the zoning ordinances.”

3. Variances to make structures conforming.
 - a. Variance procedure before boards of zoning appeals may, in some circumstances, be used to convert a lawful nonconforming structure to a conforming structure.
 - b. Standard for relief.
 - (1) For nonconforming structure, application for variance must show "unnecessary hardship" attributable to the property, not the owner, e.g., topography or lot shape.
 - (2) More specifically, must show hardship for any variance under K.S.A. 12-759(e)(1).
 - (3) Granting of variance makes property "lawfully conforming" as opposed to "lawfully nonconforming".
 - (4) Use variances are not lawful under Kansas law. See K.S.A. Sec. 12-159(e); *City of Merriam v. Board of Zoning Appeals*, 242 Kan. 532, 748 P.2d 883 (1988); *City of Olathe v. Board of Zoning Appeals*, 10 Kan. App. 2d 218, 696 P.2d 409 (1985).

J. UTILIZATION OF CONDITIONAL USE PERMITS TO PREEMPT THE ESTABLISHMENT OF A LAWFUL NONCONFORMING USE - M.S.W.,

Inc. v. Board of Zoning Appeals, 29 Kan. App. 2d 139, 24 P.3d 175 (2001).

1. Property owner began operation of landfill in unincorporated part of county in 1974 - no county zoning existed at that time. In 1992 county adopts zoning regulations for first time and landfill property is zoned agricultural (AG). Agricultural zoning did not recognize a landfill as a permitted use. Consequently, under just the AG zoning the existing landfill would be a nonconforming use. Simultaneous with adoption of these initial county zoning regulations, county unilaterally grants conditional use permit for landfill. Conditions include loss of conditional use permit if property not used as landfill for six consecutive months.
2. Landfill ceases operations in 1996. In 1998, M.S.W. purchases landfill and applies to state for landfill permit.
3. County refuses to certify to state that landfill would be consistent with county land use restrictions. Such certification is required for state licensure for landfill operation. County position: Conditional use permit issued to previous owner lapsed due to non-use for six months. Lawful nonconformance never existed because landfill operated under conditional use permit from moment zoning regulations took effect until time permit lapsed.
4. Board of zoning appeals, district court and Kansas Court of Appeals all deny relief to M.S.W.

- a. Conditional use permit clearly lost due to six-month non-use condition.
- b. Landfill was never a lawful nonconforming use.
 - (1) Became a lawful conforming use at moment of granting of conditional use permit.
 - (2) Therefore, abandonment of lawful nonconformance not even an issue.

5. Lessons

- a. Status of lawful nonconformance risky due to dangers of loss based on abandonment, change of use, destruction of casualty.
- b. Risk of loss for these reasons eliminated with variance or conditional use permit.
- c. But, must be very careful to follow conditions imposed by variance or conditional use permit.

K. HOME RULE – NEW RULES FOR KANSAS COUNTIES

1. *City of Topeka v. Board of Shawnee County Commissioners, et al.*, 277 Kan. 874, 89 P.3d 924 (2004). In this 2004 decision, the Kansas Supreme Court for the first time declared the planning and zoning enabling act for cities and counties, K.S.A. 12-741 *et seq.* was nonuniform for counties. Consequently any county could, by enactment of a charter resolution passed pursuant to its statutory Home Rule power (K.S.A. 19-101a), exempt itself from any or all parts of that law. The identified nonuniformity applied only to

counties. For cities the enabling act appears to be uniformly applicable, therefore cities (at least for now) do not have the same ability as counties do to exempt themselves from the enabling act.

2. The ability to exempt from state laws directly relates to the above discussion of nonconformance in at least two respects:
 - a. The rule in K.S.A. 12-758(a) that requires nonconforming uses and structures to become conforming after damage of 50% or higher fair market value. A county could exempt from this state law and either substitute its own requirement, or make no provision for such a loss of lawful nonconformance due to fire, windstorm, etc.
 - b. The prohibition against use variances being granted by board of zoning appeals (K.S.A. 12-759(e)) could likewise be exempted from. This would open the door to variances being used to transform legal nonconforming uses to legal conforming uses.
3. While counties may use Home Rule to exempt themselves from these, and other, statutory provisions, such does not necessarily place them outside the reach and applicability of caselaw that turns on other statutes or on constitutional considerations. *e.g.*, the exercise of Home Rule to adopt new regulations for how nonconforming use status is lost still must comply with 5th Amendment takings standards.

Kansas Nonconforming Use Decisions

McPherson Landfill, Inc. v. Board of County Commissioners of Shawnee County, Kansas, 274 Kan. 303, 49 P.3d 522 (2002)

M. S. W., Inc. v. Board of Zoning Appeals, 29 Kan.App.2d 139, 24 P.3d 175 (2001)

Ringler Trust v. Meyer Land and Cattle Co., Inc., 25 Kan. App.2d 122, 958 P.2d 1162 (1998)

Goodwin v. City of Kansas City, 244 Kan. 28, 766 P.2d 177 (1988)

Johnson County Memorial Gardens, Inc. v. City of Overland Park, 239 Kan. 221, 718 P.2d 1302 (1986)

Union Quarries, Inc. v. Board of County Commissioners of Johnson County, 206 Kan. 268, 478 P.2d 181 (1970)

SESSION V:

**TAKINGS OF PROPERTY
AND VESTED RIGHTS**

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VESTING OF PROPERTY RIGHTS AND TAKINGS OF PROPERTY

A. 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 a single-family residential development, development rights in such land use statutorily vest upon recording of the plat. If construction has not commenced, however, within five years of recording the plat, the development rights will expire. K.S.A. 12-764(a). This five-year rule could be lengthened, but not shortened, by exercise of Home Rule.
2. If the application or plat is for any purpose other than single-family, the right to develop property for a particular purpose will vest upon the issuance of all permits required for the use by a city or county

and construction has begun and substantially completed under a validly issued permit. K.S.A. 12-764(b).

3. Local governments may, by Home Rule, 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(c).
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 may not 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.

B. TAKING OF PROPERTY

Introductory Comment:

The law of takings derives from these 12 words of the 5th Amendment: "...nor shall private property be taken for public use without just compensation." In general terms, a taking occurs when a governmental

body either condemns property (eminent domain) or physically occupies or damages property. While the Takings Clause does not prohibit those governmental actions it does require payment of just compensation.

For more than 100 years the Takings Clause was applied only to cases where the government appropriated property for a public purpose. In 1922 the U.S. Supreme Court held, in *Pennsylvania Coal v. Mahon*, that if a governmental regulation “goes too far” it has the same effect as though the government had physically appropriated the property.

As noted in the following paragraphs, compensable regulatory takings occur rarely. Usually the key question will be whether the regulation at issue denies the owner of all economically viable use of the property, or interferes with fundamental attribute of ownership.

1. The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without payment of just compensation. This restriction applies to actions of state and local governments through the Fourteenth Amendment. *Chicago B. & Q.R. Co. v. Chicago*, 155 U.S. 226, 241, 41 L.Ed. 979, 986 (1897). The Fourteenth Amendment to the United States Constitution and Section 18 of the Bill of Rights of the Kansas Constitution give due process rights designed to protect individuals' property from arbitrary regulations. *State ex rel. Stephan v. Smith*, 242 Kan. 336 (1987). The test for determining whether due

process has been afforded is whether the legislation has a real and substantial relationship to the objective sought, whether it is reasonable in relation to the subject, and whether it was adopted in the interest of the community. *Joe Self Chevrolet, Inc. v. Board of Sedgwick County Comm'rs*, 257 Kan. 625 (1990). See also *Noel v. Menninger Foundation*, 175 Kan. 751 (1954).

2. The Kansas Supreme Court has defined taking to mean "the acquiring of possession as well as the right of possession and control of tangible property to the exclusion of the former owner." *Lone Star Industries, Inc. v. Kansas Dept. of Transp.*, 234 Kan. 1231, 125 (1983). The requirement that there must be an actual taking of property by the government in order for an individual to receive compensation has been modified. Where the government has imposed significant restrictions on private property, a "regulatory taking" may be found and the government may be required to pay compensation. While a state or local government has the right to regulate or limit the use of property through its police power, if a regulation goes too far it will be recognized as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed.2d 322, 326 (1922).
3. Property owners may challenge governmental action impacting private property as an unconstitutional taking or as inverse condemnation. "Inverse condemnation is an action or eminent domain proceeding initiated by a property owner rather than the

condemnor and is available when private property has been actually taken for public use without formal condemnation proceedings and where it appears there is no intention or willingness of the taker to bring an action." *Ventures in Property 1 v. City of Wichita*, 225 Kan. 698 (1979). See also *Wittke v. Kusel*, 215 Kan. 403 (1974). In *Mount St. Scholastica v. City of Atchison*, 2007 WL 782196 (D.Kan) the federal court wrote:

Kansas has procedures to provide compensation for takings claims. First, Kansas courts recognize inverse condemnation actions for compensation when a government entity takes private property. *Kau Kau Take Home No. 1 v. City of Wichita*, 135 P.3d 1221, 1222 (Kan. 2006). "To establish a claim for inverse condemnation a party must establish an interest in the real property and a taking." *Id.* (citing *Deisher v. Kan. Dep't of Transp.* 958 P.2d 656 (Kan. 1998)). When evaluating an inverse condemnation action, whether there has been a taking is a question of law. *Eberth v. Carlson*, 971 P.2d 1182, 1186 (Kan. 1999).

4. There is no absolute test for establishing whether governmental actions constitute a use of police power or an eminent domain taking:

Eminent domain takes property because it is useful to the public, while the police power regulates the use of property or impairs rights in property because the free exercise of these rights is detrimental to public interest; and the police power, although it may take property, does not, as a general rule, appropriate it to another use, but destroys the property, while by eminent domain property is taken from the owner and transferred to the public agency to be enjoyed by the latter as its own.

29A C.J.S. Eminent Domain ' 6 (1965)

5. Statutory and case law authority allow governmental entities to impose restrictions upon some uses of private property. See e.g. K.S.A. 12-741 *et seq.* (city and county zoning authority); *City of Merriam v. Board of zoning Appeals of City of Merriam*, 242 Kan. 532 (1988); *Water Dist. No. 1 of Johnson County v. City Council of City of Kansas City*, 255 Kan. 183 (1994); *Johnson County Memorial Gardens, Inc. v. City of Overland Park*, 239 Kan. 221 (1986); *Lawrence Preservation Alliance, Inc. v. Allen Realty, Inc.*, 16 Kan. App.2d 93 (1991); *Kimberlin v. City of Topeka*, 238 Kan. 299 (1985); *Robert L. Rieke Bldg. Co., Inc. v. City of Overland Park*, 232 Kan. 634 (1983).

The police power may be used in a way that adversely affects the entire value of privately owned property. Constitutional limitations form no impediment to the exercise of police power land use regulations where the regulation is reasonable and bears a fair relationship to the object sought to be attained. See *Schaake v. Dolley*, 85 Kan. 598 (1911); *Dey v. Knights & Ladies of Security*, 113 Kan. 86 (1923); *McNaughton v. Johnson*, 242 U.S. 344, 37 S.Ct. 178, 61 L.Ed. 354 (1916); *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed 369 (1910); *Armour & Co. v. State of North Dakota*, 240 U.S. 510, 36 S.Ct. 440, 60 L.Ed. 771 (1915).

6. Decisions by the Kansas Supreme Court recognize that the government may properly control the use of private property as an exercise of police power. Constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power. *Small v. Kemp*, 240 Kan. 113 (1986). Police power is an inherent power of the sovereign and is essential to protect members of the community from injury. It rests upon the fundamental principle that all property is owned subject to the limitation that its use may be regulated for the safety, health, morals, and general welfare of the community in which it is located. *Rey v. State Highway Commission*, 196 Kan. at 22-23, cert. denied 385 U.S. 820, 87 S.Ct. 43, 17 L.Ed.2d 57 (1966). See also *Kansas Power & Light Co. v. Kansas Corporation Commission*, 238 Kan. 842, 850 (1986).
7. Among the decisions of Kansas courts holding that certain land use regulations were lawful exercises of the police power and were not takings, are the following:
 - a. *Houston v. Board of City Commissioners*, 218 Kan. 323, 543 P.2d 1010 (1975). Downzoning of undeveloped property from commercial to residential zoning.
 - b. *Kimberlin v. City of Topeka*, 238 Kan. 299, 710 P.2d 682 (1985). Height restrictions and use restrictions relating to airport zoning.

- c. *Harris v. City of Wichita, et al.*, 862 F.Supp. 287 (D.Kan. 1994). Use restrictions.
 - d. *MidGulf v. Bishop*, 841 F.Supp. 1205 (D.Kan. 1992). Restrictions on oil and gas drilling within city's limits.
8. In *Hudson v. City of Shawnee*, 246 Kan. 395 (1990), the Kansas Supreme Court found that government imposed regulations are not unconstitutional merely because they operate as a restraint upon private rights of persons or property or will result in a diminution of the property value of individual properties. The infliction of such loss is not automatically a deprivation of property without due process of law. The exertion of the police power upon objects lying within its scope in a proper and lawful manner is due process of law. Hence, the police power may be exerted to restrain land uses by private persons, and where appropriate or necessary, may even be used to prohibit certain uses of property in aid of the public safety and general welfare.

Nevertheless, some governmental restrictions upon land use have been found to result in inverse condemnation. The Kansas Supreme Court has discussed the potential for inverse condemnation recovery in situations involving commercial development property based upon prior governmental approval:

Had plaintiffs developed their property for commercial uses or even taken any substantial steps toward such development we would have an entirely different

lawsuit. It might then be akin to the second Kansas case we find persuasive, *Spurgeon v. Board of Commissioners*, 181 Kan. 1008, 317 P.2d 798. In that case this court upheld a Shawnee county zoning resolution which required the removal within two years of auto wrecking yards located in residential zones, even though they were lawful prior nonconforming uses. The two year period was held reasonable in view of the owner's capital investments, and the resolution was held to be a valid exercise of the police power as against the landowners' claim that they were being deprived of their property without due process of law. It appears to us that if a governing body can constitutionally zone an existing business out of existence, it can surely zone against a use which is merely contemplated at some indefinite time in the future. We conclude that plaintiffs had no constitutional right to the continuation of the zoning existing at the time they purchased their land.

Colonial Inv. Co., Inc. v. City of Leawood,
7 Kan. App.2d 660 (1981).

9. In its 2002 decision in *McPherson Landfill v. Board of County Commissioners of Shawnee County*, 274 Kan. 303, 49 P.3d 522, the Supreme Court favorably cited its holding in *Jack v. City of Olathe*, 245 Kan. 458, 781 P.2d 1069 (1989) that the failure to rezone is not a Fifth Amendment Taking. In *Jack* the Court contrasted rezoning denials – where the local government refuses to allow the expansion of an existing right to use property, and zoning actions where takings had been found – cases where local governments had taken away a right to use the property which already existed.
10. **Recent Kansas Regulatory Takings Decision: *Mount St. Scholastica v. City of Atchison*, 2007 WL 782196 (D.Kan.) (Mar. 12, 2007).**

Plaintiff alleged, among a number of other challenges, that the City's denial of a demolition permit was a 5th/14th Amendment regulatory taking because that denial restricted plaintiff's use of its property.

Applying the U.S. Supreme Court's newest test for regulatory takings (*Lingle v. Chevron USA, Inc.*) as well as 10th Circuit takings caselaw, the Court found no regulatory taking. This decision is noteworthy not just for its application of *Lingle*, but also for its analysis of 1st Amendment Free Exercise Clause and the Kansas Historic Preservation Act.

C. TAKINGS OF PRIVATE PROPERTY FOR PUBLIC USE

1. The Fifth Amendment to the U.S. Constitution, as incorporated by the 14th Amendment, forbids state and local governments from taking private property for public use without payment of just compensation. *Chicago, B&Q.R.R. v. Chicago*, 166 U.S. 226 (1897).
2. Regulation of the use of land in a manner consistent with the "police power" is not a taking for which compensation must be paid:
 - Even if the regulation substantially diminishes the use or value of the land, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); provided that the regulation does not deny a landowner all economically beneficial use of

his or her land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992).

- However, compensation must be paid if the regulation involves a permanent, physical occupation authorized by the government without regard to the public interest it may serve. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

3. Forms of Takings Cases

a. Regulations requiring actual dedication of land or an easement over the land as a condition for development.

- *Nollan v. California Coastal Commission* (483 U.S. 825, 107 S.Ct. 3144, 97 L.Ed.2d 677) (1987): The Nollans owned a small beachfront cottage they wanted to demolish and replace with a larger house. The California Coastal Commission found that the Nollans' new house would interfere with the public's view of the beach from a public road. The Commission granted a permit conditioned on the Nollans' granting a public easement across their beach.

U.S. Supreme Court holding: when a dedication of land is required as a condition for the issuance of a permit, that requirement is valid only if there is an "essential nexus" between the condition and the governmental end advanced

as the justification for the condition. Public access over the Nollans' beach did not advance the objective of increased public view of the beach from the road. The question left unanswered by the Court in *Nollan* -- how close the connection (nexus) must be between the conditions imposed by the government upon property owners and the impacts created by their development -- was addressed in *Dolan v. City of Tigard*, where a standard of "rough proportionality" was adopted.

- *Dolan v. City of Tigard, Oregon* (512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304) (1994). Dolan owns a plumbing and electrical supply store. She sought a building permit to double the size of her store and pave a gravel parking lot. The city planning commission required Dolan, as a condition of a building permit, to dedicate property for a stormwater drainage system and for a pedestrian/bicycle pathway. The Oregon courts denied Dolan's challenge of the dedications, finding they were reasonably related to the legitimate public purposes of flood prevention and reduction of traffic congestion. The U.S. Supreme Court reversed, finding an uncompensated taking. The Court held that while there was a valid public purpose behind the

dedications, and that the dedications met the Nollan test of "essential nexus", there must be additional scrutiny as to whether the dedication requirements meet the brand-new *Dolan*-created standard of "rough proportionality" between the condition imposed by the government and the impact created by the development. The problem with requiring land to be given up for use as a public greenway along the floodway is that Dolan lost her ability to exclude others from using her land. According to the Court, Dolan's proposed development's impact on the floodplain was not to the extent that she should be required to lose her right to keep others off her property -- a right that was one of the "most essential sticks in her bundle of property rights." The problem with requiring Dolan to dedicate land for a pedestrian/bicycle path was that such a path might reduce some of the new traffic demand created by the enlarged store, however the city had not attempted to quantify that reduction.

b. Regulations so restrictive that they are confiscatory in their application.

- (1) Other decisions of the U.S. Supreme Court regarding takings deal with so-called regulatory takings. In

regulatory takings there is no actual dedication of a property interest exacted from the landowner, instead regulations are applied in such a manner as to severely limit the uses that can be made of the property. A regulatory taking occurs when a governmental regulation so restricts a landowner's use of property that, for all intents and purposes, the government has taken that property.

- (2) **General Rule:** Regulations that go "too far" are confiscatory takings of property requiring the payment of just compensation. *Pennsylvania Coal v. Mahon*, 260 U.S. 383 (1922). Pennsylvania Coal Company sold the surface rights to a tract of land but reserved the right to mine below the surface. The state later adopted a statute that prohibited the mining of coal in such a way that would cause the subsidence of any dwelling unit. The owners of the surface rights sued to prohibit the mining of coal in such a fashion that would cause their residence to subside. The Court held that the statute was a taking of Penn's mining rights.
- (3) Factors considered by courts in evaluating an alleged regulatory taking:
 - (a) Economic impact of the regulation;

(b) Interference with reasonable investment backed expectations;

(c) Character of governmental action. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

(In *Penn Central* the city applied its historic landmark designation law to prevent construction of a multi-story office tower within the air space over Grand Central Station. The Supreme Court upheld the regulation citing the three factors listed above.)

(4) In *Agins v. Tiburon*, 477 U.S. 255 (1980) the U.S. Supreme Court set forth a two-part test for finding a regulatory taking:

(a) Does the regulation substantially advance a legitimate state interest?

(b) Does the regulation deny an owner the entire economically viable use of the land?

In *Agins* the city placed a tract of undeveloped land in a residential planned development and open space zone to implement the comprehensive plan. The Court upheld the zoning and adopted a two part "taking" test: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state

interests,... or denies the owner economically viable use of his land,... The question necessarily requires a weighing of public and private interests." This two-part test had life for 25 years, until *Lingle v. Chevron USA, Inc.*, 125 S.Ct. 2074 (2005) when the Court eliminated the "substantially advances" inquiry as a test in its own right. In *Lingle* the Supreme Court held that Agins' "substantially advances" formula is not an appropriate test for a regulatory taking, *i.e.*, whether a regulation "substantially advances" a legitimate state interest is not a constitutional test for purposes of the Takings Clause.

- (5) Damages: Regulatory takings, even if temporary, are compensable. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). In *First English* the church owned property that it used as a campground for disabled children. The property was improved with lodging and dining facilities, and an outdoor chapel. A forest fire in the area created a flood hazard, and a flood subsequently destroyed the camp buildings. Because of the flooding Los Angeles County adopted an interim ordinance setting out a flood protection area and prohibiting building

construction within that area. The church brought a takings action claiming that the ordinance denied it all use of the camp. The Court in *First English* did not decide whether the interim ordinance was a "taking", but held that when a government's action does constitute a taking, it must compensate the landowner for the value of the use of the land during the period of the regulation, even if the regulation is later rescinded by the government.

- (6) Categorical Rule: A regulation that denies a landowner all economically beneficial use of the property will constitute a taking unless the regulation prohibits a use already impermissible under state property and nuisance law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992). Lucas had paid \$975,000 for two residential lots in an existing single family subdivision along the coast in an area that was notoriously unstable and subject to erosion. Subsequently, the South Carolina legislature enacted the Beachfront Management Act which prohibited the construction of habitable structures seaward of a certain "erosion line". The act was justified by factors including wildlife resources conservation and

protection of mainland life and property from storm damage by preserving the beach/dune system on barrier reefs. The entirety of the two lots purchased by Lucas was seaward of the erosion line. Lucas sued claiming that the act caused a total devaluation of his property. The Court held that "where the government has deprived a property owner of all economically beneficial uses" by applying regulations, compensation may be awarded under the takings clause "without case-specific inquiry into the public interest advanced in support of the restraint."

4. In 2001, the Court applied the *Lucas* total takings test. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, plaintiff Palazzolo owned waterfront property purchased in 1959. He submitted development proposals in 1962, 1963 and 1966, all of which were denied. In 1971 the State created the Rhode Island Coastal Resources Management Council ("Council") to protect the State's coastal wetlands, and generated regulations classifying the Palazzolo property as such wetlands. A single portion of Palazzolo's upland property valued at \$200,000 was not wetlands, and he could have developed the same. While the claim was ripe, the Court did not believe that it was a *Lucas* per se total taking because the \$200,000 value left in the upland parcel meant that the property was not rendered economically idle.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465 (2002), found that

a moratorium on development did not amount to a *First English* temporary taking requiring compensation because no taking occurred. Additionally the moratorium did not effect a *Lucas* per se total taking because it did not render the property at issue “valueless”, despite the evidence that the moratorium was a complete bar to development. The *Tahoe* Court refused to recognize the taking of limited moratorium period in part because the *Penn Central* Court had stated that one could not take only a portion of the fee and the moratorium lasted only a portion of the property’s perpetual life.

D. THREE-PART REGULATORY TAKINGS INQUIRY

1. Does the governmental body have the legal authority to regulate the use of land and in the exercise of that authority did it comply with procedural requirements?
2. Does the regulation have a legitimate end-means relationship (rational relationship)? (*Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3144, 97 L.Ed. 2d 677 (1982))
3. Is the degree of the exaction demanded by the public in “rough proportionality” to the projected impact of the proposed development? (*Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed. 2d 304 (1994))

TYPES OF REGULATORY TAKINGS

Since the 2005 *Lingle* decision it appears takings claims can be grouped into three categories:

1. Physical Invasions. A physical invasion taking occurs when a regulation requires a physical occupation of land. In the 1982 *Loretto* case the Supreme Court held a regulation that required a television cable to be placed on all apartment buildings to be a physical invasion taking. A regulation that prevents a property owner from excluding members of the public, or government facilities, from his/her property is likely to be a taking.
4. Economic Devaluations. In these cases the property owner seeks compensation because a regulation allegedly causes property to lose value. Courts however have not held that mere loss of potential market value is not enough to trigger a 5th/14th Amendment taking. Instead courts apply one of several tests to find the degree to which the regulation affects property value. In those rare cases where a regulation eliminates all of the land's value the *Lucas* decision will hold that there has been a taking (unless one of the exceptions set out in *Lucas* apply). In all other instances courts will apply the three factors from *Penn Central*: (1) the economic impact of the regulation; (2) the owner's reasonable investment-backed expectations; and (3) the character of the government action.
3. Conditions on Development. Project specific dedications of land that are individually bargained-for between a governmental body and the property owner or developer may become a taking when the purpose of the dedication is not sufficiently related to the project

being developed (the *Nollan* “essential nexus” requirement) and the total cost or amount of the condition is not proportional to the impact of the project (the *Dolan* “rough proportionality” requirement).

SESSION VI:

EMINENT DOMAIN

LAW IN KANSAS FOLLOWING

KELO V. CITY OF NEW LONDON

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TAKINGS LAW; EMINENT DOMAIN AND *KELO V. CITY OF NEW LONDON*

A. EMINENT DOMAIN: A COMPENSATED-FOR TAKING OF PRIVATE PROPERTY

1. Most of the drama, and anxiety, over takings of private property involve narrow questions of when governmental regulations and regulatory action become noncompensated takings violative of the 5th and 14th amendments. However, the 2005 eminent domain decision of the U.S. Supreme Court in *Kelo v. City of New London* let loose a firestorm from private property rights advocates who rejected the use of eminent domain for economic development purposes.
2. Basics of Eminent Domain
 - Reduced to its fundamentals, eminent domain is the inherent power of a governmental entity to take private property and convert it to public use. The entity is empowered to take private property, over the objections of the owner, upon meeting the conditions of public use and payment of just compensation.
 - The power of eminent domain is a necessary power held by a sovereign body, as it is a power essential to the existence of government. It is necessary to the function of government, and so exists even in the absence of a specific grant of authority via a constitution or statute.

- The exercise of eminent domain is subject to constitutional limits, including payment of just compensation and due process for the property owner (e.g., notice and an opportunity for a hearing). The Kansas Constitution does not expressly require compensation for takings. However, the 5th Amendment's guarantee of just compensation is made applicable to the state's exercise of eminent domain through the Due Process clause of the 14th Amendment. *Lone Star Industries v. KDOT*, 234 Kan. 121, 671 P.2d 511 (1983)
- The power of eminent domain is held by the sovereign state, which may delegate the exercise of the power to subordinate units of government and/or other entities, e.g., K.S.A. 26-501 *et seq.*, the Eminent Domain Procedure Act.
- Specific delegations of eminent domain power to local units of government are the subject of over 300 Kansas statutes. Many of these empower a particular unit to use eminent domain for a specific purpose (e.g., K.S.A. 12-1736, city power to acquire land for public building purposes). Other statutes delegate general authority to exercise eminent domain powers.
- The State of Kansas has granted not only cities and counties the power of eminent domain to advance economic development, but also airport authorities (K.S.A. 3-129), port

authorities (K.S.A. 12-3406), industrial districts (K.S.A. 19-3808), and public building commissions (K.S.A. 12-1757).

The Kansas courts have for many years taken a broad view of what is a public use to which the eminent domain power can be lawfully applied. The following excerpt from a 2003 Kansas Supreme Court decision shows why the holding of the U.S. Supreme Court in *Kelo* (discussed below) was consistent with the law of eminent domain and takings in Kansas at that time.

“It is elementary that the legislature possesses no power to authorize the appropriation of one’s property for a private use or purpose, but it is equally well-settled that the right to take private property for a public use is inherent in the state, and that the legislature may authorize the acquisition and appropriation of private property for a public use provided the owner is compensated therefore. [Citation omitted.] The difficulty often encountered lies in the inability of courts comprehensively to define the concept of a public use or purpose, due, no doubt, to the exigencies shown by the facts and the diversity of local conditions and circumstances in an ever-changing world.

“In our opinion the concept of the terms public purpose, public use, and public welfare, as applied to matters of this kind, must be broad and inclusive... The mere fact that through the ultimate operation of the law the possibility exists that some individual or private

corporation might make a profit does not, in and of itself, divest the act of its public use and purpose.” *State ex rel. Tomasic*, 265 Kan. 779, 789-90, 962 P.2d 543 (quoting *State, ex rel., Fatzer v. Urban Renewal Agency of Kansas City*, 179 Kan. 435, 438, 296 P.2d 656 [1956]).

B. THE 2005 DECISION IN *KELO ET. AL V. CITY OF NEW LONDON ET. AL*, 545 U.S. 469, 125 S. CT. 2655, 73 USLW 4552 (2005)

The U.S. Supreme Court held in *Kelo v. City of New London* that the “public use” provision of the takings clause of the 5th Amendment to the U.S. Constitution permits the use of eminent domain for economic development purposes.

The case involved an economic development plan for the City of New London, Connecticut. The city has been in economic decline for many decades. In 1998, Pfizer, Inc. announced plans to build a large research facility in New London on a site adjacent to the Fort Trumbull neighborhood. This neighborhood had a high vacancy rate for nonresidential buildings, old buildings in poor shape, and fewer than half of the residential properties were in average or better condition.

The nonprofit New London Development Corporation (NLDC) was formed to help the city plan for economic development. After the Pfizer announcement, the city authorized NLDC to put together an economic development plan for 90 acres in Fort Trumbull. The plan’s goals were to

create a development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually to build momentum for the revitalization of the rest of the city, including its downtown area.

Voluntary sales were achieved for 100 of the 115 properties in the neighborhood. The owners of the remaining 15 lots filed suit claiming that the use of eminent domain as contemplated by the plan violated the state and federal constitutions.

The Supreme Court, in a 5-4 decision, recognized that the U.S. Constitution prohibits a "taking" whose "sole purpose" is to transfer one person's private property to another private person, even if just compensation is paid. However, the Court explained, this was not the issue before the Court. Rather, "The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose...Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field...To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development."

The Court found that New London’s economic development plan served a “public purpose” under the “public use” provision of the U.S. Constitution. “Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including – but by no means limited to – new jobs and increased tax revenue.”

The Court acknowledged that “...nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.”

C. KANSAS APPELLATE COURT DECISIONS ON ECONOMIC DEVELOPMENT AS A “PUBLIC PURPOSE” FOR WHICH EMINENT DOMAIN POWER CAN BE EXERCISED

Years prior to *Kelo*, the Kansas Supreme Court had upheld local government’s exercise of eminent domain to take private property for economic development purposes, as lawful under state law.

In *State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City*, 265 Kan. 779 (1998), the Court upheld provisions of the tax increment financing (TIF) law which authorized special obligation (STAR) bonds, and the use of eminent domain to build the Kansas Speedway in Wyandotte County. The Court held that the development of the race track facility and related projects were valid public purposes for which TIF and STAR bonds could be issued and eminent domain authority could be exercised.

In a 2003 decision, the Kansas Supreme Court not only approved of economic development as a public purpose, but also recognized Home Rule as a source of eminent domain authority for Kansas county governments. In *General Building Contractors, LLC v. Board of Shawnee County Commissioners*, 275 Kan. 525 (2003) the Court held that Shawnee County's condemnation of a private business owner's property, for use as a national merchandiser's distribution facility was a valid public purpose, and that its power of eminent domain is to found within the county Home Rule Statute, K.S.A. 1-101a *et seq.* and related statutes authorizing industrial and economic development activities by local governments.

D. POST-KELO

In the aftermath of *Kelo* property rights advocates have promoted various new restrictions upon eminent domain in statehouses across the country. Some of the ideas advanced included: prohibiting the transfer of property from one private use to another private use; limiting "public use" to only

those identified by the state legislature; and requiring “blight” to be a condition upon any private property taken for economic or industrial development purposes.

KANSAS LEGISLATION IN RESPONSE TO THE *KELO* DECISION

The 2006 session of the Kansas Legislature considered several bills affecting the power of eminent domain, several of which would effectively end all local government authority to exercise the power, and passed Senate Substitute for SB 323 (L.2006, ch. 192).

As was the case in state legislatures around the country, Kansas legislators in 2006 rushed to “defend” property owners against the threat of an economic development-based exercise of eminent domain.

The whereas clauses introducing Sub. for SB 323 well state the mindset, *i.e.*, the intent, of the Kansas legislature as it responded to *Kelo*:

WHEREAS, The Kansas and United States Supreme Courts have ruled that the taking and transferring of private property from one private party to another is a valid use of the power of eminent domain; and

WHEREAS, the people of Kansas support the protection of private property rights and seek to heighten the protection of private property rights from the level expressed by recent court rulings; and

WHEREAS, the people of Kansas agree that the use of eminent domain for the taking and transferring of private property from one private party to an other should only be allowed in extraordinary and limited situations and with explicit procedural safeguards: Now therefore,

L. 2006, ch. 192 imposed significant new limitations upon state and local governments’ power of eminent domain.

The 2006 law generally prohibits using eminent domain to promote economic development without the express approval of the Kansas Legislature. It also generally affects the requirements for use of eminent domain. Among the specifics of the new law:

1. On and after July 1, 2007, the taking of private property by eminent domain for the purpose of selling, leasing or transferring it to another private entity is not permitted unless the taking meets any one of the following:
 - The property is deemed excess real property that was taken lawfully and incidentally to the acquisition of right-of-way for a public road, bridge or public improvement project of the Kansas Department of Transportation or a municipality;
 - The taking is by any public utility;
 - The taking is by any gas gathering service, pipeline company or railroad;
 - The private property owner has acquiesced in writing to the taking;
 - The property has defective or unusual conditions of title or unknown ownership interests in the property; or
 - The property was unsafe for occupation by humans under the municipality's building codes.
2. Any taking of private property for the purpose of transferring it to any private entity, except as authorized above, must be expressly authorized by the Legislature on or after July 1, 2007, by enactment of a law that

identifies the specific tract or tracts to be taken. The Legislature is required to consider providing extra compensation to the person whose land will be taken of at least 200% of the fair market value.

3. The tax increment financing law is amended to provide that on or after July 1, 2007, the power of eminent domain could be exercised only with state legislative approval by passage of a bill approving eminent domain for a specific project.
4. Another restriction is made to county home rule (K.S.A. 19-101a) to provide that a county may not exempt itself from or effect changes in this new set of restrictions upon eminent domain.

L. 2006, ch. 192 was, to be kind, an ill-conceived, haphazard set of solutions in search of a problem. In the rush to prove to the public that it was the guardian of private property rights, the Legislature bestowed upon itself the authority to decide what historically has been the decision of locally-elected, locally-accountable governing bodies – when is economic development a public purpose which can justify the exercise of eminent domain?

SESSION IX:

- **EXTRATERRITORIAL REGULATION OF LAND USE**
 - **ANNEXATION**

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EXTRATERRITORIAL REGULATION OF LAND USE

A. DEFINING THE “URBAN FRINGE” PROBLEM FOR CITIES AND COUNTIES

1. Recipe for Conflicts Between Cities and Counties, at the Urban Fringe:
 - City has given no thought to when or how the urban fringe should develop, made no provision for urban fringe growth as part of its capital improvement plan, is reluctant to annex unless the landowner requests annexation, and has not attempted to influence county land use regulations within the urban fringe; and
 - Either county does not regulate of use of land (i.e. no zoning or subdivision regulations or building codes); or
 - County does regulate land, but city and county have conflicting land use policies and objectives with respect to how and when development occurs in the urban fringe area.
2. Some of the Problems Which Result From Lack of City and County Cooperation.

Adverse consequences for the city and the county, as well as for the public they serve:

- Long range planning for, and development of, the fringe area, and possibly additional territory, is compromised.

- Immediate conflicts can also arise from inconsistent land uses on nearby parcels of land – *e.g.*, one parcel inside the city's limits, the other outside.
 - Developers and landowners will easily pick up on signs of confusion or conflict between a city and county with respect to land use regulation in the urban fringe. They will respond either by seeing the situation as an opportunity to exploit, or by moving on to some other community where a more rational, predictable (*i.e.* safer) environment exists in which to invest their money.
3. Outcomes Resulting from Lack of City-County Cooperation.
- Desired development does not occur because developers are leery of what the land development "rules" are, and are concerned about undesirable uses locating near their property.
 - Development occurs, but at an intensity not efficient for urban-scale growth. City gets hemmed in by sprawl development that makes extension of municipal services and infrastructure inefficient or impossible.
 - Development occurs without proper thought (*i.e.* planning) as to future extension of city's infrastructure. Streets, sewers, water lines etc., do not line up or are otherwise incompatible. Parks and open spaces are not provided for, neither are schools or other public uses.

- Development occurs, but too much, too fast. Could even take the form of relocation of homes and businesses from locations within the “more regulated” city to the “less regulated” urban fringe area.
 - Development occurs, but is the wrong type of development at the wrong location (cement plant, salvage yard, landfills, shopping malls).
 - Loss of natural resources, environmentally-sensitive land, prime agricultural land, open space, etc., chewed up by unplanned, sprawl development.
4. Summary: Bad News and More Bad News.
- Growth that is wanted does not materialize, and
 - The growth that does occur, but it is of a character that creates adverse consequences for the community.

B. STATUTORY, AND OTHER, TOOLS THAT MAY PROVIDE SOLUTIONS

1. Political Process.
 - Elections. Election of decision makers sensitive to the significance of urban fringe development.
 - Joint meetings of city and county governing bodies and planning commissions to discuss common issues and possible solutions.
2. Annexation – Bringing Land That is Urban in Character Into the City’s Corporate Boundaries.
 - a. What is the city’s attitude toward annexation?

- Never annexes unless such is requested by the property owner.
 - Annexes only when such is not politically damaging to the city, *i.e.*, no controversy.
 - Annexes as part of an overall growth/economic development strategy, whether landowner wants to be annexed or not.
- b. What do the city's zoning regulations provide for with respect to classification of newly annexed land? See *Crumbaker, et al v. Hunt Midwest Mining, Inc., et al.*, 275 Kan. 872, 69 P.3d 601 (Kan. 2003) (annexed property retains its county zoning classification until rezoned by annexing city).
- c. Some cities will still extend municipal services to property outside their corporate limits without getting a consent to annexation for property receiving those services.
- d. Pros and cons of annexing: Clearly the best way for a city to achieve influence over an area, but nonconsented-to annexations are difficult politically (especially if need county commission approval per K.S.A. 12-521) and can be expensive (service extension plan, etc.).
3. Kansas statutes providing extraterritorial land use authority for cities.
- a. For planning - K.S.A. 12-744.
 - b. For zoning - K.S.A. 12-754(a).

- c. For subdivision regulations - K.S.A. 12-749(a); K.S.A. 12-750.
- d. For building codes - K.S.A. 12-751 and 12-751a.

C. EXTRATERRITORIAL JURISDICTION

1. **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 and within three miles of the city. K.S.A. 12-744(a).
2. **Zoning Regulations.** A city may apply its zoning regulations to land located outside the city which is not currently 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.
3. **Subdivision Regulations.**

- a. 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 up to three miles beyond its corporate limits. A city and county could also provide for such extraterritorial regulation by the city, or even "shared" city-county regulation, by means of an interlocal agreement.
- b. In situations where a county has subdivision regulations in effect, a city may acquire subdivision regulatory authority by one of two means, 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, the city must adopt a resolution stating its intent and the area sought to be controlled and certify a copy to the county board.

Within 60 days after the date of certification a joint committee for subdivision regulation is to be established by joint resolution of the city and the county. This committee is composed of three members of the county planning board, three members of the city planning commission and one member selected by those six.

The joint subdivision regulation committee is to recommend a single set of subdivision regulations for the area designated within six months after its appointment. Any regulations previously adopted for the area remain in effect for six months or until the joint committee recommends regulations.

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.

4. **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 this area for at least four years.

D. 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 more effective, efficient regulation of development at the urban fringe. While the Act is broad, and allows for creative arrangements, there are a couple of 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, or city imposing building codes without opportunity for a protest petition and election.
3. Any procedures or requirements created by an interlocal agreement must meet recognized legal standards, most notably procedural and substantive due process of law, *e.g.*, a provision giving a BOCC “veto” power over rezonings in a growth area raises Due Process issues for property owners unless care has been given to how, when and why the BOCC uses its “veto”.

The table following this text illustrates differences between Kansas statutes which authorize joint city and county land use regulation. The table also illustrates the joint land use regulation approaches of several existing interlocal (city-county) cooperation agreements. Specifically, the following statutes and agreements are shown:

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

- b. K.S.A. 12-2901 - Interlocal agreements; authorizing interlocal agreements among and between public agencies, including cities and counties.
- c. K.S.A. 12-750 - Planning and zoning statutes; authorizing creation of joint (city - county) committees for subdivision regulation.
- d. K.S.A. 12-754(a) - Planning and zoning statutes; authorizing cities to regulate zoning within a three mile extraterritorial area.
- e. K.S.A. 12-2908 - Interlocal contracts; authorizing any two municipalities (municipality defined as both counties and cities) to contract for services.
- f. Miami County - Paola, *et al.* Interlocal Agreement.
- g. Hamilton County - Syracuse Interlocal Agreement.
- h. Dickinson County - Abilene *et al.* Interlocal Agreement.
- i. Ford County - Dodge City, *et al.* Interlocal Agreement.

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	<p>Joint Planning Commission</p> <p>Statute does not address how Board of Zoning Appeals (BZA) or governing body authority will be divided or administered.</p>	<p>"as... shall be designated by the joint ordinances and resolutions." K.S.A. 12-744(c)</p>	<p>Pursuant to K.S.A. 12-2901 <i>et seq.</i> "... by ordinance of each city and by resolutions of the board of county commissioners." K.S.A. 12-744(c)</p>	<p>"... 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 recommendations)</p>
K.S.A. 12-2901; Interlocal Agreement (Interlocal Cooperation Act)	<p>"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).</p>	<p>No geographical limitations expressly stated under this statute.</p>	<p>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.</p>	<p>"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).</p>

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.

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. 12-2908; 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).
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 an 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 <u>et seq.</u>	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 areas of county maintains county planning commission.	By interlocal agreement authorized and executed per K.S.A. 12-2901 <u>et seq.</u>	Applies Dickinson County zoning and subdivision regulations within areas of influence.

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 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 <u>et seq.</u>	Applies city - adopted zoning, subdivision and building code regulations to land within designated "Community Growth Areas".
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 <u>et seq.</u>	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 <u>et seq.</u> and the Home Rule authority of the City (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.

E. HOME RULE AND INTERLOCAL AGREEMENTS

1. While cities and counties understand (sometimes) that their power of Home Rule is very significant, and understand (sometimes) that the Kansas planning and zoning enabling law (K.S.A. 12-741 *et seq.*) recognizes that Home Rule can be used in the regulation of land and development – the fact is that few cities and counties have tapped into the potential Home Rule has for serving their communities in the context of land use regulation.
2. While both cities and counties can use Home Rule to pass requirements and procedures to complement or supplement what is set out by statute, counties (but not cities) can also use Home Rule to exempt from and substitute for what the state has set out in K.S.A. 12-741 *et seq.*
3. In 2004 the Kansas Supreme Court, in *Topeka v. Shawnee County*, 277 Kan. 874, 89 P.3d 924, held that a county could exempt itself from any or all of K.S.A. 12-741 *et seq.*
4. Regarding city-county interlocal agreements to regulate the urban fringe, two important questions arise from this ability of a county to exempt via Home Rule:
 - If a county does exempt itself entirely from K.S.A. 12-741 *et seq.*, under what authority does it then plan and zone? Is it pursuant to Home Rule, or some inherent Police Power?
 - If a county does exempt itself from some or all of K.S.A. 12-741 *et seq.*, how does that affect its subsequent delegation

of power to a city via interlocal agreement? e.g., if a county exempts itself from the provisions of K.S.A. 12-758 regarding regulation of agricultural lands, and thereafter regulates agriculture via zoning, can it then pass that power to regulate agricultural use in the unincorporated area to the city, notwithstanding K.S.A. 12-758's limitation upon cities?

F. AN OVERVIEW OF THE ANNEXATION PROCESS

1. A 2007 decision invalidating an attempted annexation by the City of Topeka provides the most recent statement of the Kansas Supreme Court that a city's authority to annex comes solely through state enabling legislation:

For a city to alter its boundaries by annexation, it must follow Kansas statutes. *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 884, 69 P.3d 601 (2003) (“[T]he power of a municipality to alter its boundaries by annexation is vested absolutely and exclusively in the legislature, and this power is therefore completely controlled by statute, *i.e.*, K.S.A. 12-519 *et seq.*”). As a result, the “failure of a city to comply with requirements of the legislative enactment which gave it power and authority to annex territory nullifies the attempted annexation ordinance.” *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 12-13, 687 P.2d 603 (1984).

--*Dillon Real Estate Co. v. City of Topeka*, 284 Kan. 662 at 665-666 (2007).

2. Three types of annexations may be undertaken by any city pursuant to Kansas statutes, set out at K.S.A. 12-519 et seq.
 - a. Unilateral annexation without landowner consent pursuant to K.S.A. 12-510(a)(1)-(6);

- b. County approved annexations without landowner consent pursuant to K.S.A. 12-521; and
- c. Landowner consent annexations pursuant to K.S.A. 12-520(a)(7) (for land adjoining the city) and K.S.A. 12-520c (for land not adjoining the city).

G. UNILATERAL ANNEXATION WITHOUT LANDOWNER CONSENT

This process allows the city to annex land by means of its own unilateral action; that is, without the landowner's consent and without obtaining approval for the annexation from the board of county commissioners or any other governmental body.

1. **Substantive Requirements.** Land that meets any one or more of the six conditions set out in K.S.A. 2007 Supp. 12-520 may be unilaterally annexed by the city. These six conditions, each of which indicates some urban or urbanizing character to the land proposed to be annexed, are:
 - a. The land is platted and some part of the land adjoins the city;
 - b. The land is owned by or held in trust for the city or any agency thereof;
 - c. The land adjoins the city and is owned by or held in trust for any governmental unit other than the city. Exception: A city is not permitted to annex land owned by a county without the express permission of the board of county commissioners, other than certain highway rights-of-way adjoining the city.

- d. The land lies within or mainly within the city and has a common perimeter with a city boundary line of more than 50%;
- e. The land, if annexed, will make the city boundary straight or harmonious and some part adjoins the city. [Exception: No land in excess of 21 acres may be annexed under this section];
- f. The tract is situated so two-thirds of any boundary line adjoins the city. [Exception: No tract in excess of 21 acres may be annexed under this section.]

Once establishing that the land sought to be annexed meets any one or more of these conditions, the city may proceed to unilaterally annex, regardless of the desire of the property owner to be annexed.

- 2. **Procedural Requirements.** The procedure a city must follow when annexing land unilaterally can be divided into three general requirements: A report on the proposed annexation, a resolution of intent to annex, and a public hearing.

- a. **Report.** The first step in a unilateral annexation is the preparation of a report on the proposed annexation. This report must include a sketch of the land proposed to be annexed and a plan for the extension of municipal services in sufficient detail to provide a reasonable person with an understanding of the services to be provided.

- b. **Resolution of Intent to Annex.** The second step is for the city to adopt the resolution required under K.S.A. 12-520a(a), stating that it is considering the annexation of land.

The resolution must:

- (1) Give notice that a public hearing will be held to consider the annexation;
- (2) Describe the boundaries of the land proposed to be annexed; and
- (3) State that the plan for the extension of services is available for public inspection.

The resolution must be published in the official newspaper of the city and a copy mailed by certified mail to each owner of land located in the proposed annexation area.

- c. **Public Hearing.** The third step is for the city to hold a public hearing within 60 to 70 days following adoption of the resolution. At the hearing, the city must present its proposal for annexation, including its plan for the extension of services. The city also must provide all interested persons the opportunity to be heard. After the hearing, if the city decides to annex the land, it may do so by ordinance.

H. COUNTY APPROVED ANNEXATIONS WITHOUT LANDOWNER CONSENT

Under this procedure a city may annex land with the approval of the board of county commissioners even when the landowners have not consented to the annexation.

1. **Substantive Requirements.** Under K.S.A. 12-521 a city may annex land under either of two circumstances:

a. When a city is not permitted to annex land through either the unilateral or any consent annexation procedures, or

b. When a city could so annex, but deems it advisable not to annex the land through the unilateral or consent procedures.

There are no geographic preconditions for annexing land under the approval of the county board as there are under K.S.A. 12-520. While a city may utilize this procedure whenever it chooses to annex land, its procedural requirements are much stricter than the requirements for either unilateral or consent annexations. It is uncertain at this time whether this procedure could also be used for the annexation of nonadjoining land that could be annexed by a city pursuant to K.S.A. 12-520c.

2. **Procedural Requirements.** The procedure set out by statute for county approved annexations is very detailed and is generally intended to provide certain protections to the interests of affected landowners. The city must prepare a report on the proposed annexation and present a petition to the board of county

commissioners. The board of county commissioners then is required to hold a hearing to determine the advisability of the annexation.

- a. **Report.** K.S.A. 12-521(a) requires that the city file a report with the county board. The report must include a sketch of the area and a plan for the extension of municipal services. This report must be filed with the board of county commissioners at the same time that the city files its petition for annexation.
- b. **Petition.** K.S.A. 12-521(a) also requires the city to file a petition with the board of county commissioners giving the legal description of the land to be annexed and requesting a hearing on the proposed annexation. The petition must be presented with the above-noted report.
- c. **Public Hearing.** The county board must hold a public hearing to determine the advisability of the annexation. The hearing must be held between 60 to 70 days from the date of the presentation of the petition. Notice of the hearing must be given to all landowners in the proposed annexation area, and it must be published in a newspaper of general circulation in the city prior to the hearing. At the hearing the board hears evidence on the advisability of the annexation and determines if the annexation, if approved, will cause manifest injury to the affected property owners, or manifest

injury to the city if disapproved. Fourteen criteria are set out by statute to assist the county board in its determination of whether the annexation will cause manifest injury. If the board renders a judgment that the annexation should be allowed, it issues an order to that effect and the city may annex the land by ordinance.

I. CONSENT ANNEXATIONS

There are two different statutory procedures for consent annexations. The appropriate procedure depends upon whether the land proposed to be annexed adjoins the city.

1. Consent to Annexation of Adjoining Land.

- a. Substantive Requirements.** There are two conditions a city must meet before annexing land under K.S.A. 12-520(a)(7): The owner must file a written petition for annexation or consent to the annexation, and the land must adjoin the city. The statute does not provide any specific requirements regarding the form of the consent or petition.
- b. Procedural Requirements.** No resolution, notice, or public hearing is required for the annexation of adjoining land when the landowner consents to or petitions for the annexation. Once the petition or consent is filed with the city, the city only has to pass an ordinance to accomplish annexation of the land.

2. Consent to Annexation of Nonadjoining Land.

- a. **Substantive Requirements.** A city may annex nonadjoining land under K.S.A. 12-520c if all three of the following requirements are met:
 - (1) The land is located within the same county as the city;
 - (2) The owner of the land petitions for or consents in writing to the annexation of such land; and
 - (3) The board of county commissioners determines that the annexation is advisable.
- b. **Procedural Requirements.** Under the K.S.A. 12-520c annexation procedure the city requests by resolution that the county board determine that the annexation is advisable. If the board so deems, the city may annex the land by ordinance.

J. **PROHIBITED ANNEXATIONS**

The annexation statutes contain several specific limitations or prohibitions applicable to the annexation of certain governmental or quasi-governmental entities. The following briefly describes those limitations and prohibitions.

1. **Improvement Districts.** K.S.A. 12-520(c) prohibits a city from unilaterally annexing certain improvement districts or any land within certain improvement districts. This section applies only to improvement districts incorporated and organized under K.S.A. 19-2753 et seq., where the petition for incorporation and organization of the improvement district was presented to the county board on or

before January 1, 1987. The constitutionality of K.S.A. 12-520(c) was unsuccessfully challenged by the City of Topeka. *Dillon Real Estate Co. v. City of Topeka*, 284 Kan. 662 (2007).

2. **Incorporated Territory.** K.S.A. 12-524 prohibits any city from annexing, by any method, any other incorporated city or any part of another incorporated city. K.S.A. 12-520a(g) prohibits a city from unilaterally annexing any territory subsequently incorporated under K.S.A. 15-115 et seq. Once steps have been taken to incorporate territory, another city cannot annex that territory. The incorporation proceedings take priority over any subsequent attempt to annex the territory.
3. **Military Reservations.** In response to an attempted annexation of Fort Riley the Kansas legislature in 1982 enacted K.S.A. 12-529 which prohibits any city from annexing any territory of a United States military reservation.

K. GENERAL REQUIREMENTS FOR ANNEXATIONS

1. **Referral to Planning Commission.** Before the city annexes any land under K.S.A. 12-520 or 12-521, the governing body of a city must submit its resolution or petition to any city, county, township, or joint planning commission having jurisdiction over any portion of the area to be annexed. However, this provision does not apply to annexations pursuant to K.S.A. 12-520 which do not require a resolution, nor does this provision apply to "island" annexations pursuant to 12-520c. The planning commission must make a

determination of whether the annexation is compatible with land use patterns and report back to the city or the board of county commissioners.

2. **Filing, Recording and Publication.** The annexation ordinance becomes effective upon publication. The legal description in the publication must correctly describe the land, otherwise the annexation is invalid. Upon passage and publication, the city clerk files a certified copy of the ordinance with the county clerk, the register of deeds, and the county election commissioner of the county in which the city is located (K.S.A. 12-532).

L. RURAL WATER DISTRICTS

If a city annexes land located within a rural water district organized pursuant to K.S.A. 82a-612 et seq., it must purchase all of the facilities within the area annexed that are owned by the water district and used for the transportation or utilization of water distributed to the water district benefit units within the area annexed. This appears to be required whether or not the city actually utilizes the facilities of the district for the delivery of water to property within the city. The city must pay the district the reasonable value of all of the facilities located within the land to be annexed within 120 days of the determination of reasonable value. Except for the case of discontinuance of water service for a customer's nonpayment of user charges, during the period of time of negotiations for compensation between the city and the district the district is prohibited from diminishing service to benefit units which were supplied water by the

district at the time of annexation. The city is authorized to issue general obligation bonds, revenue bonds, or water utility funds to finance the purchase of the water district. The annexing city is not limited in its adoption and enforcement of regulations applicable to the operations of a water service supplier. As part of its plan for the extension of municipal services, the city must notify each affected rural water district of its future plans for the delivery of water in the areas proposed for annexation that are currently served by the district. (See K.S.A. 12-527:528.)