

# LAND USE CONTROLS IN IOWA

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## I. INTRODUCTION

### A. An Overview

Land use controls in Iowa, as in other states, exist in a variety of forms. Both the substance and structure of these controls continually change to meet the needs of a developing society. Recent and rapid technological growth, together with the spread of population, indicate that there is a growing interdependence between land use and land users. As a result of this interdependence and the complex nature of our technological and economic environment, the number of governmental regulations is increasing rapidly.<sup>1</sup>

In a less complex society, private land use controls evolved to resolve land use issues between private parties. The use of covenants and easements proved to be a simple means of providing for private land use arrangements.<sup>2</sup> To this day, private controls, particularly covenants, still play an important role in modern land development.<sup>3</sup>

In addition to the private arrangements, the common law developed various judicial doctrines directly related to land use. The maxim *sic utere tuo ut alienum non laedas* (use your property in such a manner as not to injure that of another) states the guiding principle of land use controls as generally recognized at common law and summarizes the heart of the law of nuisance.<sup>4</sup> Other common law judicial doctrines governing one's

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1. C. HAAR, LAND-USE PLANNING 3 (3d ed. 1977) [hereinafter cited as HAAR ON PLANNING].

2. C. BERGER, LAND OWNERSHIP AND USE 445-575 (2d ed. 1975); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 333-61 (2d ed. 1975) [hereinafter cited as CRIBBET]; J. CASNER & B. LEACH, CASES AND TEXT ON PROPERTY 983-1190 (2d ed. 1969); R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY 527-89, 703-46 (abr. ed. 1968) [hereinafter cited as POWELL].

3. HAAR ON PLANNING, *supra* note 1, at 781-860. The use of covenants to protect the nature and character of large scale residential or commercial developments is particularly extensive.

4. BLACK'S LAW DICTIONARY 1551 (rev. 4th ed. 1968). See CRIBBET, *supra* note 2, at 362-64; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 571-612 (4th ed. 1971). The law of

In the interests of fairness and the implementation of the objective of punitive damages, evidence of civil fines and of punitive damage awards in other cases growing out of the same event should be admissible on the issue of the appropriate size of an award, just as evidence of financial condition is now relevant. Since such evidence could also influence the liability question, it should not come in over a defendant's objection. But if offered by the defendant himself on the issue of damages, to show he has been properly or partly chastised, it should be admitted.<sup>375</sup>

### XIII. CONCLUSION

Although some compensatory damage verdicts will be sizeable enough to have a punitive effect, most compensatory damage verdicts cannot come to terms with the wrongdoer whose conduct was outrageous. In those cases, punitive damages can be an effective tool in restraining outrageous behavior by the imposition of punishment for the misconduct.<sup>376</sup> Because the jury system provides more prompt punishment and more salutary deterrents of socio-economically undesirable conduct than the lobby-infested legislative halls of our state and nation, reliance on imposition of punitive damages under the common law rather than statutory enactments should continue. But some reforms are necessary, including the exercise of the power of remittitur by the Iowa courts, the abandonment of the actual damage and reasonable relationship rules, and the implementation of procedures to deal with multiple plaintiff claims, if the twin undesirable effects of under-kill or over-kill are to be avoided in punitive damage awards.

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misconduct for which punitive damages may lie, but this is largely impractical. While the potential harm to innocent employees, small investors and pension plans should not preclude punitive damages, it must be recognized that annihilation of business firms by multiple or unreasonable punitive damage awards usually goes beyond punishing the actual perpetrators of wrongdoing. The United States Supreme Court recently recognized an aspect of the problem in its decision in *Illinois Brick Co. v. State of Illinois*, 97 S. Ct. 2061 (1977), a price-fixing case under § 4 of the Clayton Act, 15 U.S.C. § 15 (1970). In denying benefits of the Act to those who did not buy directly from those alleged to have engaged in price-fixing, but bought from middlemen, the majority opinion by Justice White noted that the defendants faced with antitrust suits by indirect as well as direct purchases would risk paying excessive damages in a multiplicity of complex and lengthy lawsuits.

375. Criminal punishment will not bar punitive damages but evidence of it is admissible in some jurisdictions in mitigation of punitive damages. *E.g.*, *Wirsing v. Smith*, 222 Pa. 8, 70 A. 906 (1908); *Smithwick v. Ward*, 52 N.C. 64 (1859). An early Iowa case, which has not been overruled, holds that such evidence is not competent. *Reddin v. Gates*, 52 Iowa 210, 2 N.W. 1079 (1879).

376. See *Funk v. Kerbaugh*, 222 Pa. 18, 19, 70 A. 953, 954 (1908), where the defendant willfully carried out blasting in such a way as to shatter plaintiff's buildings because, in the court's opinion, "apparently . . . it was cheaper to pay damages . . . than to do the work in a different way."

use of land include the law of equitable servitudes,<sup>5</sup> the doctrine of waste<sup>6</sup> and the law of support.<sup>7</sup>

However, the growth of population and the expansion of industry and commerce which resulted in the complex socio-economic-political phenomenon known as the industrial revolution exposed the inadequacy of the common law as a means of solving land use problems.<sup>8</sup> Consequently, a need for governmental regulation of land use became apparent.<sup>9</sup> This Article will focus on the two predominant governmental controls utilized in Iowa—zoning and planning. Next, the Article will examine the existing body of land use law in Iowa. Finally, current legislative land use proposals will be examined.

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nuisance remains a valuable land use device and has two distinct applications. First, nuisance theory can be utilized as an independent basis attacking one's use of property, regardless of zoning. In a 1951 case, a landowner brought an injunctive action against his neighbor's use of property as a nursery school in a residential district. The suit was based on nuisance and additionally, on the alleged violation of the zoning ordinance. The Iowa Supreme Court held that the school was a permitted use and that the plaintiff failed to show either noncompliance with local safety and health standards or improper vehicular use of private drives so as to give rise to an action to enjoin the operation of the school. *Livingston v. Davis*, 243 Iowa 21, 50 N.W.2d 592 (1951).

Secondly, nuisance theory can be applied to a land user who violates a particular zoning restriction. This latter situation is illustrated in *Town of Grundy Center v. Marion*, 231 Iowa 425, 1 N.W.2d 677 (1942), where a landowner was sued by the municipality for violation of a municipal ordinance which proscribed the use of property as a junkyard within 300 feet of a business or residential zone. The injunction issued and was sustained by the Iowa Supreme Court. The court held that the violation of the ordinance constituted a nuisance and that the city had the right to bring such actions to restrain and abate that particular use of property. *Id.* See also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) wherein the constitutional justification for zoning was based in part on nuisance theory. *Accord*, *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 184 N.W. 823 (1921), *sup. op.*, 193 Iowa 1096, 188 N.W. 921 (1922).

5. See generally *AMERICAN LAW OF PROPERTY* §§ 9.24-40 (A.J. Casner ed. 1952); Paulus, *Use of Equitable Servitudes in Land Planning*, 2 WILLAMETTE L.J. 399 (1963); Reno, *The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 951 (1942).

6. POWELL, *supra* note 2, at 679-91.

7. CRIBBET, *supra* note 2, at 364-67; POWELL, *supra* note 2, at 759-73.

8. Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367 (1965) [hereinafter cited as Cunningham].

9. It is beyond the scope of this Article to discuss the relative merits of governmental regulation versus private or judicial controls. Some commentators suggest that governmental controls are economically inefficient with the consequent effect of creating adverse or incompatible and counterproductive land uses. See B. SIEGAN, *PLANNING WITHOUT PRICES* (1977); Siegan, *No Zoning is the Best Zoning*, in *NO LAND IS AN ISLAND* 157 (1975); Gramm & Ekelund, *Land Use Planning: The Market Alternative*, in *NO LAND IS AN ISLAND* 127 (1975); *ECONOMIC FOUNDATIONS OF PROPERTY LAW* (B. Ackerman ed. 1975); *THE ECONOMICS OF LEGAL RELATIONSHIPS* (H. Manne ed. 1975); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

### B. Governmental Controls

In order to emphasize the variety of land use controls and regulations utilized by the government, a brief discussion of the available control mechanisms is necessary. In Iowa, there exists a number of interrelated but not necessarily interdependent statutes dealing with land controls. Basically, land use is institutionalized on the local<sup>10</sup> and county<sup>11</sup> level.

#### 1. Eminent Domain

One of the most dramatic exercises of the government's power over one's private use of land is that of eminent domain.<sup>12</sup> The use of this inherent power of sovereignty can be exercised by a number of state and governmental subdivisions as well as delegated to private units affected with public purpose. The effect of eminent domain is to remove the use of land from a private sector for the benefit of the public.<sup>13</sup>

While the major concern of the landowner is what land will be taken, the value of that land and damage to remaining lands,<sup>14</sup> this is only of incidental importance to the public. The critical public issue is what are the consequences of a particular taking. While economic efficiency is an important public goal, other considerations which should be taken into account include the preservation of natural resources, stimulation of economic growth, maximum efficiency and compatibility of land users and public welfare issues such as relocation assistance.<sup>15</sup> Thus, the exercise of the power of eminent domain has far reaching consequences for the landowner and the public alike; it is a governmental land use control the impact of which cannot be overlooked.

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10. See IOWA CODE §§ 409, 414, 473A (1977).

11. See *id.* §§ 358A.3, 359.1. This includes unincorporated townships.

12. IOWA CONST. art. I, § 18 (1857, amended 1908).

13. A compilation of those entities authorized to exercise the power of eminent domain can be found in Note, *Contemporary Studies Project: New Perspectives on Iowa Eminent Domain*, 54 IOWA L. REV. 737-39 (1969) [hereinafter cited as *Contemporary Studies Note*].

14. The law of damages and the valuation process constitutes the bulk of eminent domain law. The literature in this area is rich as well as technical. See, e.g., P. NICOLS, *THE LAW OF EMINENT DOMAIN* (1976); L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* (1953); Berger, *Current Problems Affecting Costs of Condemnation*, 26 LAW & CONTEMP. PROB. 85 (1961); Cromwell, *Some Elements of Damage in Condemnation*, 43 IOWA L. REV. 191 (1958); Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437 (1962); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L. J. 61 (1957).

15. *Contemporary Studies Note*, *supra* note 13. This comment is a detailed study of Iowa eminent domain law and should serve as a basic guide in the area. However, the decision of how to utilize land does not occur in a vacuum. Various factors, including the effects on people, their jobs, the ecology and the economy are directly affected. Any land use system must take into consideration all integral parts. A vivid account of the elimination of a neighborhood by eminent domain with a disregard of the human factors is given in R. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 849-50 (First Vintage ed. 1975).

## 2. Municipal Finance—Urban Renewal

On a more local level is the municipality's ability to tax, borrow and spend for the purposes of funding municipal organizations and providing municipal services and improvements. The exercise of these powers have a direct impact on land use by affecting land value and the development of the municipality.<sup>16</sup>

The most noticeable way the powers of municipal finance are used to alter the character of land use is through urban renewal.<sup>17</sup> Pursuant to the Iowa Urban Renewal Law,<sup>18</sup> a municipality has wide ranging authority to eliminate the blight created by slum conditions.<sup>19</sup> Using a vast array of powers to deal with this complex problem, including taxing, financing, borrowing, condemnation and planning,<sup>20</sup> the basic technique is to develop a general municipal plan, adopted after public hearings.<sup>21</sup> The municipality then acquires private property by purchase or condemnation and resells the land to a private developer.<sup>22</sup>

What makes urban renewal distinctive among land planning devices is its breadth. The local municipality is given controlling authority to make substantial physical changes which have equally substantial economic and societal impact.<sup>23</sup>

The determination as to what area is to be the target of an urban renewal project is a legislative one, political in nature, and involves questions of public policy. It is a determination for the city to make and cannot be overturned unless it is arbitrary, capricious or unreasonable.<sup>24</sup> As a result, a large amount of planning is required in terms of capital expenditures, availability of funds and other financing considerations. Tax base issues and land uses additionally must be taken into account as well as the more people-oriented issues such as relocation and neighborhood restructuring. The issue raised but unanswered is whether the local municipality can perform this function efficiently.

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16. IOWA CODE ch. 384 (1977). See Hayes, *Survey of Iowa Law: Iowa Tax Law and Procedure*—1972, 22 DRAKE L. REV. 550 (1972).

17. IOWA CODE ch. 403 (1977).

18. *Id.*

19. HAAR on PLANNING, *supra* note 1, at 604-780; D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 368-428 (1971) [hereinafter cited as HAGMAN].

20. IOWA CODE §§ 403.2, 403.6 (1977).

21. *Id.* § 403.5. Courts have gone so far as to hold that an urban renewal plan will be valid even if its purpose is to make an area more aesthetically pleasing. *Berman v. Parker*, 348 U.S. 26 (1954).

22. Cunningham, *supra* note 8. See also *Webster Realty Co. v. City of Fort Dodge*, 174 N.W.2d 413 (Iowa 1970); *Wilson v. Iowa City*, 165 N.W.2d 813 (Iowa 1969); *R. & R. Welding Supply Co. v. City of Des Moines*, 256 Iowa 973, 129 N.W.2d 666 (1964). Each discusses and upholds the constitutionality of the Urban Renewal Law. IOWA CODE ch. 403 (1977).

23. *Id.* § 403.5.

24. *Dilley v. City of Des Moines*, 247 N.W.2d 187 (Iowa 1976).



Federal, state, and local levels of government also play significant roles in the urban renewal system.<sup>25</sup> Experience has demonstrated the existence of substantial problems at these various levels, including:

1. Lack of enabling legislation mandating adequate planning;
2. Lack of coordination of urban renewal with other urban assistance programs provided by the federal government;
3. Urban renewal procedures, involving a minimum of two and generally four federal agencies, as well as local public and other government agencies, have become too complex and time consuming;
4. Attempts to comply with the "workable program" requirement has demonstrated the difficulty of enforcing regulatory codes and ordinances;
5. Urban renewal is expensive;
6. The urban renewal concept from its inception has suffered from fundamental disagreements at federal, state and local levels as to where major emphasis should be placed.<sup>26</sup>

These complex problems demand planning, as well as federal, state and local coordination. Without such planning and coordination, the land-

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25. The changing character of urban areas has brought with it unforeseen problems. Relief from these problems was to come from state and federal assistance but was to be administered locally. As industry and commerce move into and out of different urban neighborhoods, different sections of a city are either adversely or beneficially affected. The problems engendered by urban slums proved to be one of the major incentives for the urban planning movement. First, housing and building codes were employed to promote safe and attractive structures. Then public health and multiple-dwelling regulations were designed to eliminate unsanitary conditions. During the Depression, provisions for public housing were initiated for the purpose of making available homes for those unable to afford housing in the private market. It was the federal government that provided the initial impetus through such landmark legislation as the Emergency Relief and Construction Act, 12 U.S.C. § 343 (1932), the National Industrial Recovery Act of 1934, ch. 90, 48 Stat. 195 (1933), and the Housing Act of 1937, 42 U.S.C. §§ 1401-30 (1970).

The goal throughout this period was to cause a shift in the housing market from private to public housing so as to provide an incentive for owners of substandard buildings to renovate their properties for decent residential use or to convert them to other purposes. Additional pressures were supplied by the many housing acts which provided for the elimination of one substandard unit for each public housing unit built. However, it was clear by the beginning of World War II that this approach was inadequate. These economic factors proved to be too costly and too slow-moving, and the demand for housing in many areas made slum properties too valuable to preclude their elimination from the housing market. Thus, it was within this setting that the concept of urban development began in New York in 1941. It was the need to provide adequate housing that gradually caused the development of the land use tool now known as urban renewal. Essentially, urban renewal calls for the governmental acquisition of property by purchase or condemnation of designated slum or blighted areas. These areas are then cleared or redeveloped; facilities, such as streets and utilities, are installed; and the area is resold or leased to private developers for redevelopment in accordance with a plan designed to produce and maintain a decent and attractive urban area. Cunningham, *supra* note 8, at 437-39.

26. *Id.* at 454-57. See Vestal, *Planning For Urban Areas: The Fight for Coherency*, 56 IOWA L. REV. 19 (1970).

owner can be adversely affected by the fragmentation of federal, state and local regulations. The emergence of the federal government into the land use area, together with the seeming inability of local municipalities to adequately coordinate disparate and fragmented units of authority, lead to the issue of the feasibility of regional planning.<sup>27</sup>

### 3. Subdivision Regulation

One, if not the most, localized land use control is subdivision regulation governing the manner in which a parcel of land can be divided into smaller units. Subdivision regulation is one of the key tools utilized effectively and extensively at the local level. In Iowa, the key subdivision regulation is established through the auspices of a recording statute.<sup>28</sup> Land use controls are also found in the housing and building codes of a given municipality.<sup>29</sup>

### 4. Environmental Controls

The final governmental land use control regulates environmental quality.<sup>30</sup> Although such controls exist more predominantly on the state and federal levels than the local level, they nevertheless directly affect land utilization.<sup>31</sup>

In Iowa, the Department of Environmental Quality is charged with the responsibility of overseeing commissions on air quality, water quality, solid waste disposal and chemical technology.<sup>32</sup> There is also established

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27. D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 11-14 (1976) [hereinafter cited as MANDELKER].

The Iowa Supreme Court in *Webster Realty Co. v. City of Fort Dodge*, 174 N.W.2d 413 (Iowa 1970), while discussing the constitutionality of the Urban Renewal Law, IOWA CODE ch. 403 (1966), underscored the seriousness of the problem created by urban blight and noted that the Urban Renewal Law is extraordinary in policy and purpose, and is aimed to relieve pressing and urgent municipal evils.

28. IOWA CODE ch. 409 (1977). See also Note, *Subdivision Regulation in Iowa*, 54 IOWA L. REV. 1121 (1969) [hereinafter cited as *Subdivision Note*].

29. IOWA CODE chs. 403A, 413 (1977). For an economic analysis of housing codes, see Markovits, *The Distributive Impact, Allocative Efficiency And Overall Desirability Of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976).

30. In the near future a corpus of law relative to the competing demands for energy usage will develop and will also contain land use ramifications—for example, the location of energy facilities. See T. STOEL, *ENERGY IN FEDERAL ENVIRONMENTAL LAW* (E. Dolgin & T. Gilbert eds. 1974); Note, *Power Plant Siting—A Regulatory Crisis*, 22 DRAKE L. REV. 645 (1973). Also, if categorized as sui generis, agriculture law can be viewed as land use control. See Symposium, *Agricultural Law*, 21 S.D.L. REV. 479 (1976); Symposium, *Agricultural Law*, 54 NEV. L. REV. 21 (1975); Symposium, *Agricultural Law*, N.D.L. REV. 249 (1974); Symposium, *Agriculture and the Law*, 44 N.D.L. REV. 447 (1968).

31. See generally MANDELKER, *supra* note 27, at 1-15.

32. IOWA CODE ch. 455B (1977). See also Woodruff, *Pollution Control: Why Not Cost Allocation?*, 21 DRAKE L. REV. 133 (1971); Hines & Schantz, *Water Quality Regulation Improvement In Iowa*, 57 IOWA L. REV. 231 (1971).

in Iowa the Iowa Natural Resources Council<sup>33</sup> for the conservation and preservation of the surface and ground-water resources of the state.

On the federal level, principal statutes include: the National Environmental Policy Act,<sup>34</sup> Clean Air Act of 1970,<sup>35</sup> Federal Water Pollution Control Act Amendments of 1972,<sup>36</sup> National Flood Insurance Program,<sup>37</sup> the Wild and Scenic Rivers Act<sup>38</sup> and the Coastal Zone Management Act.<sup>39</sup> Legislation has been introduced in Congress which would encourage and support land use and management programs through a grant system administered by the Secretary of the Interior.<sup>40</sup>

The above list of land use controls is to emphasize that the area of land use is heavily regulated by all levels of government. With so many regulations on so many levels, it is important to recognize that efficient

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33. IOWA CODE ch. 455A (1977).

34. 42 U.S.C. § 4321-61 (1970). The heart of NEPA is the environmental impact statement required of developers. This Act has been viewed as a revolutionary development and as a federalization of land use. See HAGMAN, *supra* note 19, at 527-54 (1971 & supp. 1975) and F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1972). See also *Iowa Citizens in Environmental Quality, Inc. v. Volpe*, 487 F.2d 849 (8th Cir. 1973).

35. 42 U.S.C. §§ 1857-58a (Supp. VI 1976). See Bleicher, *Economic And Technical Feasibility In Clean Air Act Enforcement Against Stationary Sources*, 89 HARV. L. REV. 316 (1975).

36. 33 U.S.C. §§ 1251-1376 (Supp. V 1975). See Goldfare, *Water Quality Management Planning: The Fate of 208*, 8 U. TOL. L. REV. 105 (1976); Note, *The EPA's Power To Establish National Effluent Limitations for Existing Water Pollution Sources*, 125 U. PA. L. REV. 120 (1976).

37. 42 U.S.C. §§ 4001-4128 (Supp. V 1975).

38. 16 U.S.C. § 1271 (1970).

39. 16 U.S.C. §§ 1451-64 (Supp. V 1975). See generally NATURAL RESOURCES DEFENSE - COUNCIL, INC., *LAND USE CONTROLS IN THE UNITED STATES* (1977) for a guide to the various federal, state and local controls.

40. Since 1970 at least nine major comprehensive land use proposals have appeared in one or both houses of Congress. In 1970, Senator Henry Jackson introduced S. 3354, 91st Cong., 2d Sess. (1970). A corresponding bill, H.R. 16,670 and 16,989, 91st Cong., 2d Sess. (1970) was introduced in the House but never reached the floor.

Senator Jackson reintroduced the bill as S. 632, 92d Cong., 1st Sess. (1971) and it, together with an administration bill, S. 992, 92d Cong., 1st Sess. (1971) passed the Senate. The House took no action on S. 632 nor on its own H.R. 7211, 92d Cong., 1st Sess. (1971).

S. 268, 93d Cong., 1st Sess. (1973) was introduced by Senator Jackson and the administration again offered a land use bill, S. 924, 93d Cong., 1st Sess. (1973). S. 268 passed the Senate but died in the House while a bill introduced by Representative Udall was also being considered, H.R. 10294, 93d Cong., 1st Sess. (1973); it too died in the House.

Finally, in the opening days of the 94th Congress, Senator Henry Jackson and Representative Morris Udall again introduced S. 984, 94th Cong., 1st Sess. (1975) and H.R. 3510, 94th Cong., 1st Sess. (1975) respectively. Again, these measures failed. A brief bibliography of congressional efforts in this area is given in AMERICAN ENTERPRISE INSTITUTE, *LAND USE PROPOSALS* (1975). See *Land Resource Planning Assistance Act and The Energy Facilities Planning and Development Act: Hearings on S. 984 and S. 619 before the Subcommittee on the Environment and Land Resources Comm. of the Sen. Comm. on Interior and Insular Affairs*, Parts 1 & 2, 94th Cong., 1st Sess. (1975).



land use decisions will suffer unless an orderly and complementary system of controls can be implemented as inexpensively as possible.

One alternative that has been widely discussed to cope with the challenge of urban growth and increased governmental regulation is the concept of regional planning.<sup>41</sup> Under this system, regional needs beyond the border of a given municipality would not be ignored. Yet the issue becomes whether the body politic is able and willing to create such a system of regional planning, as the possibility exists that it could strip the municipalities of their control over land use decisions. There does exist a middle ground, however, that regional planning need not destroy all local authority; it is possible to implement regional planning and still parcel out the responsibilities between the local and regional authorities.<sup>42</sup> This is a less drastic solution than either keeping the present system intact or removing all authority from the local governments. The middle ground permits the preservation of each unit's integrity. Once there is a realization that the concept of regional planning will not destroy local autonomy, then perhaps progress can be made in that direction. Regional planning theorists, ideally, seek efficiency—not the establishment of a new bureaucracy. It is not a necessary corollary that because a variety of controls exist at various regulatory levels that efficiency cannot be achieved. Flexibility and efficiency in land use are two goals that are realizable through any well thought-out system. This Article will explore possible means of achieving these goals, and discuss reasons why these theories can and should be pursued.

## II. ZONING

### A. Statutory Scheme

At the first city planning conference held in 1909, zoning received only passing attention. New York City is generally credited with having

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41. See Haar, *Regionalism And Realism In Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Note, *The Regional Approach to Planning*, 50 IOWA L. REV. 582 (1965). Regionalism, as used here, means regulation of land use beyond the local level: county, state or federal control. See Johnson, *Land Use Planning and Control by the Federal Government*, in NO LAND IS AN ISLAND 75 (1975); McClaughry, *The New Federalism—State Land Use Controls*, in NO LAND IS AN ISLAND 37 (1975); Udall, *Land Use: Why We Need Federal Legislation*, in NO LAND IS AN ISLAND 59 (1975). In terms of human interactions, urban areas are most directly affected by poor planning. However, non-metropolitan areas cannot be ignored, particularly in a state where farming is of primary significance. The wide range of controls and the diverse types of land users require some system that will allow for uniformity, efficiency and flexibility. A fragmented administrative structure is unable to efficiently and effectively meet the demands created by the aforementioned regulations. This failure is due in part, if not substantially, to either political inability or unwillingness to create a unified system of administration that provides the needed uniformity and flexibility. The old system of land use controls worked to create municipal fiefdoms not unlike the city states of ancient Greece or Renaissance Italy. The result: balkanization of control and diseconomies in land use.

42. This is essentially the approach taken by the ALI MODEL LAND DEVELOPMENT CODE (Prop. Off. Draft 1975) [hereinafter cited as MLDC].

enacted the first comprehensive zoning ordinance in 1916, although certain restrictions pertaining to height and use had been enacted in various cities prior to this time. Following 1916, planners across the country began organizing and developing zoning ordinances. In 1922, the first treatise on zoning, "The Law of City Planning and Zoning" by Frank B. Williams, was published.<sup>43</sup> However, the most significant event in this early history of zoning was the development of the Standard State Zoning Enabling Act (SZEa) drafted by the Department of Commerce under Herbert Hoover.<sup>44</sup> The SZEa was the foundation upon which rests most state enabling acts of today, including Iowa's.<sup>45</sup>

A review of the SZEa illustrates how the laws of zoning and planning developed in this country. Sections 1 and 2 of the SZEa set out the powers of a municipality.

For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and the size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes.

For any or all said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulation in one district may differ from those in other districts.<sup>46</sup>

Utilizing hindsight, these two sections indicate the rigid districting scheme which was to be the basic focus of municipal zoning. This created a rigid grid system of zoning, the problems of which will be discussed at a later point.<sup>47</sup>

Similarities between the SZEa and the Iowa State Enabling Legislation can readily be seen as both the municipality and the county have

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43. Cited in HAAR on PLANNING, *supra* note 1. Haar also includes a short bibliography on the history of zoning. *Id.* at 185-87.

44. U.S. DEPT. OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) [hereinafter cited as SZEa], reprinted in 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 100-1 to 100-6 (4th ed. 1975).

45. IOWA CODE ch. 414 (1977).

A more elaborate history of zoning in general may be found in 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 1.14, 3.07-11 (2d ed. 1976) [hereinafter cited as ANDERSON]; 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING §§ 1.01-04 (4th ed. 1975) [hereinafter cited as RATHKOPF]; Cunningham, *supra* note 18, at 368-80.

46. SZEa §§ 1 and 2, *supra* note 44.

47. See Part IV *infra*.

identical powers in terms of districting and rest their powers on policies identical to those enumerated in the SZEА.<sup>48</sup>

After setting out the powers and general policy, the SZEА established the procedural mechanism for the implementation of these objectives. Prior to the establishment of a zoning scheme<sup>49</sup> or amendments to that scheme,<sup>50</sup> there must be a study and report by a body authorized to examine the zoning plan, after which the legislative body must hold public hearings.<sup>51</sup> Once this is completed and a zoning plan has been adopted, the heart of the SZEА—the Board of Adjustment—comes into play. This board was created to act upon the inequities which result from the imposition of government regulations on landowners.

The board has jurisdiction to hear appeals by any person aggrieved by any municipal officer.<sup>52</sup> Expressly included are the powers:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by administrative official . . . .
2. To hear and decide special exceptions to the terms of the ordinance . . . .
3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.<sup>53</sup>

48. IOWA CODE ch. 414 and ch. 358A (1977) (§ 414 contains the enabling legislation for municipalities and § 358A pertains to counties). See also Note, *County Zoning in Iowa*, 45 IOWA L. REV. 743 (1960). The corresponding sections for municipalities are Iowa Code §§ 414.1, .2 and .3, and for counties, Iowa Code §§ 358A.3, .4 and .5 (1977). The county enabling statute describes an additional power not set out in § 2 of the SZEА nor in its municipal counterpart. The court may "regulate, restrict, and prohibit the use for residential purposes of tents, trailers and portable . . . structures; provided that such powers shall be exercised only with reference to land and structures located within the county but lying outside the corporate limits of any city. . . ." IOWA CODE § 358A.3 (1977). This restriction could be utilized to preclude the establishment of mobile home parks if the exclusion survives constitutional attack. See *Vickers v. Township Committee of Gloucester Township*, 37 N.J. 232, \_\_\_, 181 A.2d 129, 140-50 (1962) (Hall, J., dissenting) (ordinance excluding mobile homes declared valid). But see *Dequindre Development Co. v. Charger Township*, 359 Mich. 634, 103 N.W.2d 600 (1960) (ordinance excluding mobile homes held unreasonable); *contra*, *Kirk v. Township of Tyrone*, 398 Mich. 429, 247 N.W.2d 848 (1976) (ordinance excluding mobile homes held valid). See also Annot. 42 A.L.R.3d 598 (1972); Bartke & Gage, *Mobile Homes: Zoning and Taxation*, 55 CORNELL L. REV. 491 (1970).

49. SZEА § 4, *supra* note 44.

50. *Id.* § 5.

51. *Id.* § 6 (establishes zoning commission). Chapter 414 of the Iowa Code has adopted almost verbatim the SZEА. IOWA CODE §§ 414.4-6 (1977). Similarly, the counties have authority to establish an identical mechanism. *Id.* §§ 358A.6-8.

52. SZEА § 7, *supra* note 44.

53. *Id.* The board of adjustment created under the Iowa enabling legislation is substantially the same in regard to powers and duties as that created under § 7 of the SZEА. See IOWA CODE §§ 358A.15, 414.12 (1977).

Finally, the SZEА sets out means of enforcement, including imprisonment, fines and other civil remedies.<sup>54</sup> One additional means of enforcement consists of granting to the city council or county board of adjustment the authority to initiate legal actions to prevent the unlawful construction, alteration, use or occupancy of any building, structure or land.<sup>55</sup>

### B. Constitutional Basis

Historically, the constitutionality of zoning regulations was upheld on a nuisance theory. However, use of the police power as the constitutional authorization for zoning laws under the SZEА enables municipalities to regulate on a broader scale without being confined to the nuisance concept—that a landowner could do anything to his land as long as his neighbors were not adversely affected. As long as a municipal decision is in accordance with certain general guidelines, i.e., promotive of health, safety, morals or general welfare, a landowner's use of his land can

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54. SZEА § 8, *supra* note 44. Compare IOWA CODE § 358A.26 (1977).

55. SZEА § 8, *supra* note 44. Compare IOWA CODE §§ 358A.23, 414.20 (1977). Unlike the SZEА, the local boards of adjustment in Iowa are mandatory and are created by the council, the local legislative body. IOWA CODE § 414.7 (1977). The county follows suit. *Id.* § 358A.10. In addition, Iowa's enabling legislation for both municipalities and counties follows the SZEА in establishing procedures whereby persons aggrieved by board of adjustment action may seek review in the district court. *Id.* §§ 358A.18, 414.15. Courts are also given the discretion to allow the board of adjustment to review its own initial decision within a time period prescribed by the court. *Id.* §§ 358A.19, 414.16. And courts can grant a restraining order during this review, if necessary. *Id.* If the court decides a hearing is necessary, the matter is to be tried de novo. *Id.* §§ 358A.21, 414.18. The court may take evidence or appoint a referee to make findings of fact and conclusions of law. A report will then be made by the referee to the court, which will form the basis of the judge's decision. *Id.* Remedial provisions are also included:

In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained; or any building, structure, or land is used in violation of this chapter or of any ordinance or other regulation made under authority conferred thereby, the council [board of supervisors for county], in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land or to prevent any illegal act, conduct, business, or use in or about such premises.

*Id.* §§ 358A.23, 414.20. The enabling legislation also provides that in cases of conflict with other rules, ordinances or statutes, the more restrictive land use control will govern. *Id.* §§ 358A.24, 414.21.

Insofar as municipal and county zoning does exist, the enabling legislation has given the municipality the authority to zone the unincorporated areas up to two miles beyond the limits of each city except for those areas within a county where a county zoning ordinance exists. *Id.* § 414.23. See also *Louie Balk Lime & Ready-Mix Concrete, Inc. v. Board of Adjustment*, 215 N.W.2d 284 (Iowa 1974). If a city chooses to exercise its authority it must then increase the size of its planning and zoning commission and its board of adjustment to include members residing in the area outside the city limits over which this jurisdiction is extended. IOWA CODE § 414.23 (1977).

be tightly circumscribed. Under the police power, these land uses have been segregated into classes such as residential and commercial, by means of comprehensive zoning.<sup>56</sup>

In 1917, prior to an enabling act, Iowa enacted its first land use regulation—a procedure by which cities on petition of sixty per cent of the owners of real estate in a district, could establish within its limits a district restricted to residential use.<sup>57</sup> The constitutionality of this act was upheld in *City of Des Moines v. Manhattan Oil Co.*<sup>58</sup>

In the *Manhattan Oil Co.* case, the city brought suit to enjoin the defendants from erecting and maintaining a gasoline station on property owned by the defendant in a district restricted to residential use. The ordinance for this restriction was adopted pursuant to statute and any use in violation thereof was declared a nuisance. The city contended that the statute was a valid exercise of the police power, and the court upheld the statute on this ground.<sup>59</sup>

The ordinance was also challenged as taking private property for public use without just compensation, a constitutional imperative.<sup>60</sup> The court rejected the taking argument on the grounds that the regulation did not deny the defendants the use of their property and that it did not take the defendants' property for the private use of the residents.<sup>61</sup>

Finally, the Iowa court considered whether the restriction of the ordinance upon the use of the property was so clearly unreasonable that it would be held void. There were several challenges to the reasonableness of the statute, including absence of notice, absence of a compensation pro-

56. See *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915); ANDERSON, *supra* note 45, at § 3.06; RATHKOPF, *supra* note 45, at § 2.2. Whether or not this was the intent and purpose of the act can be the subject of speculation; however, one must note that the purpose and intentions of the SZEA are broadly established.

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulation shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of the buildings and encouraging the most appropriate use of land throughout such municipality.

SZEA § 3, *supra* note 44.

57. 1917 IOWA ACTS ch. 138 (current version at IOWA CODE § 414.24 (1977)).

58. 193 Iowa 1096, 184 N.W. 823 (1921), *sup. op.*, 193 Iowa 1096, 188 N.W. 921 (1922).

59. *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 1103-09, 184 N.W. 823, 826-29 (1921), *sup. op.*, 193 Iowa 1096, 188 N.W. 921 (1922).

60. *Id.* at 1106, 184 N.W. at 828. See IOWA CONST. art. 1, § 18 (1857, amended 1908). Plaintiffs also argued that the construction of a gas station constituted a nuisance. *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 1098, 184 N.W. 823, 824 (1921), *sup. op.*, 193 Iowa 1096, 188 N.W. 921 (1922).

61. *Id.* at 1108-09, 184 N.W. at 829.



vision and making a nuisance of an act that is otherwise lawful. The court ruled against all challenges and held the ordinance to be reasonable:

[I]t is essential to peace, good order, and general welfare that the individual shall submit to reasonable restrictions upon his natural rights for the public good; and it is not at all strange or unusual that he often finds himself forbidden under penalty, to do things which, but for some police regulation, would be his unquestionable right. Nor is it of itself a valid objection to a police regulation that it is made applicable to a segregated area or district. . . .

That the state may directly, or through delegation of authority to municipalities, adopt and enforce reasonable regulations concerning the use and occupation of real estate in cities and towns is too well established to admit of serious dispute.<sup>62</sup>

Thus, the *Manhattan Oil Co.* case set the stage for the exercise of the police power in the area of land use regulations prior to the enactment of zoning enabling legislation.

This decision reflects the pattern of law that still exists today. A municipality can regulate land use, including segregation of land uses according to use and type of structure, pursuant to the police power delegated by the state. This restricted residential district law is a microcosm of the law of zoning and planning in the United States.<sup>63</sup> By far, most litigation and case law have developed over the issue of residential districting. In fact, housing and the preservation of single family residential areas, whether it be from "apartment blight" or to preserve the "small town" character of a given area, has been and continues to be the history and development of land use planning.<sup>64</sup>

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62. *Id.* at 1110-11, 184 N.W. at 829. Prophetically, the court envisioned a day when expansion of the city's commercial area would crowd out the residents; the court said the validity of the restrictions could then be questioned. *Id.* at 1115, 184 N.W. at 831-32.

63. Many cases have dealt with controversies involving restricted residential districts. See *Funnell v. City of Clear Lake*, 239 Iowa 135, 30 N.W.2d 722 (1948); *Hirsch v. City of Muscatine*, 233 Iowa 590, 10 N.W.2d 71 (1943); *Scott v. City of Waterloo*, 223 Iowa 1169, 274 N.W. 897 (1937); *Wolle v. Sioux City*, 229 N.W. 214 (Iowa 1930) (not reported in Iowa Reports); *Marquis v. City of Waterloo*, 210 Iowa 439, 228 N.W. 870 (1930); *Downey v. Sioux City*, 208 Iowa 1273, 227 N.W. 125 (1929). See also 7 IOWA L. BULL. 260 (1921).

64. The current debate is the extent to which a city can go to preserve residential character without being illegally exclusionary. R. BABCOCK, *THE ZONING GAME* (1966) [hereinafter cited as BABCOCK].

The celebrated case of *Southern Burlington Co. NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975), has entrenched into land use literature the term exclusionary zoning. The constitutionality and validity of a government regulation that has the effect of excluding certain classes of persons is perhaps the hottest issue in zoning today. See *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970) (ordinance held invalid as exclusionary); *National Land & Investment Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965) (ordinance held to be invalid as exclusionary); *accord*, *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977); *Appeal of Girsch*, 437 Pa. 237, 263 A.2d 395 (1970). But see *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 97 S. Ct. 555 (1977); *Golden v. Planning Bd.*, 30 N.Y.2d 359,

Thus, such exercise of power will be upheld unless it is so onerous as to constitute a taking.<sup>65</sup> Furthermore, the exercise of power must be reasonable.<sup>66</sup>

The next stage in the development of zoning authority in Iowa was the enactment of the State Enabling Act in 1923. The constitutionality of this enabling legislation was unsuccessfully challenged in *Anderson v. Jester*.<sup>67</sup>

In *Anderson*, a landowner applied to the building commissioner for a permit to open a coal company within a residential zone. When the building inspector refused to issue the permit, the coal company successfully sought a variance from the Board of Adjustment. Neighboring owners demanded a trial de novo to present evidence showing that the granting of the variance would not be in harmony with the general purpose of the zoning ordinance but would be contrary to its spirit and the public interest, that substantial justice would not be served, and that denial of the permit would not result in an unnecessary hardship.<sup>68</sup>

The court first discussed the constitutionality of Chapter 414, the enabling statute, and upheld the ordinance on established authority. Specifically, the court stated that it was a valid exercise of the police power in the interest of the public peace, order, morals, health, safety, comfort, convenience and general welfare.<sup>69</sup>

Discussing the reasonableness of the zoning ordinance, the court stated:

Classification or regulation will not be held arbitrary or unreasonable or discriminatory unless clearly so . . . . All regulation imposes limitation upon the full use and enjoyment of property, and in a sense takes away property rights . . . . That full use and enjoyment of a plot of ground are prohibited, that the excluded use is the most profitable to which the land can be put, or that the prohibition deprives the owner of profit that would otherwise be derived from such use, or that esthetic considerations incidentally enter into the determinations does not invalidate the regulation

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285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). See also Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) [hereinafter cited as Ellickson].

65. For a discussion of when a governmental regulation becomes a taking, see, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

66. The concept of reasonableness raises the issue of substantive due process. See *Moore v. City of East Cleveland*, 97 S. Ct. 1932 (1977); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

67. *Anderson v. Jester*, 206 Iowa 452, 221 N.W. 354 (1928).

68. *Id.* at 455, 221 N.W. at 356.

69. *Id.* at 456, 221 N.W. at 356.

.... A district may be zoned as residential, and industrial enterprises excluded from it, though it is sparsely settled, and adopted for industrial uses.<sup>70</sup>

Thus, *Anderson* merely built upon the existing precedent of *Manhattan Oil Co.* in laying the ground rules for the exercise of zoning power by a municipality.<sup>71</sup>

If forced to characterize the battle between a land user and governmental regulation, one could quickly point to the fact that the land user seeks to make a more profitable use of his property than is allowed by the restriction imposed by a governmental entity. The ultimate concern of the developer is that the value of his property will be lessened by restricting the use which can be made of it. However, devaluation alone is insufficient to overturn a land use restriction.<sup>72</sup>

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70. *Id.* at 457-58, 221 N.W. at 357 (citations omitted). The court further discussed the powers of a board of adjustment as set forth in Iowa Code ch. 6463 (1927). The court stated, "The power [of the board of adjustment] may not be arbitrarily exercised, and its exercise must be confined strictly within the limitations of the statute. . . . The reservation of this power of variance and adjustment and the delegation thereof to a special board are not unconstitutional." *Anderson v. Jester*, 206 Iowa 452, 459, 221 N.W. 354, 358 (1928).

71. The constitutionality of Iowa Code ch. 414 has been affirmed in *McMahon v. City of Dubuque*, 255 F.2d 154 (8th Cir. 1958); *Plaza Recreational Center v. Sioux City*, 253 Iowa 246, 111 N.W.2d 758 (1961); *Keller v. City of Council Bluffs*, 246 Iowa 202, 66 N.W.2d 113 (1954); *Brackett v. City of Des Moines*, 246 Iowa 249, 67 N.W.2d 542 (1954); *Boardman v. Davis*, 231 Iowa 1227, 3 N.W.2d 608 (1942).

A paradigm zoning case which examined in detail the various types of attacks which can be levied at a zoning ordinance is *Plaza Recreational Center v. Sioux City*, 253 Iowa 246, 111 N.W.2d 758 (1961). In *Plaza Recreational*, a landowner operated a bowling alley as a permitted use. However, zoning regulations applicable to the D-1 district in which the bowling alley was located prohibited the consumption of beer on the premises. Thus, the landowner attacked the ordinance on a number of grounds, including: it was unconstitutional (*id.* at 251, 111 N.W.2d at 762); it was a violation of the due process and equal protection laws of the state and federal constitutions (*id.* at 252, 111 N.W.2d at 762); it was a violation of substantive due process (*id.* at 253, 111 N.W.2d at 763); it was a taking (*id.* at 254, 111 N.W.2d at 763-64); it was discriminatory (*id.* at 255, 111 N.W.2d at 764); and it violated the comprehensive plan (*id.* at 257-58, 111 N.W.2d at 765). The court rejected these contentions and held that the plaintiff failed to meet his burden in proving the unreasonableness of the ordinance. Basically, *Plaza Recreational* dealt with a restriction upon the use of one's property; however, the same and similar arguments occur when bulk restrictions are imposed. See, e.g., *Boardman v. Davis*, 231 Iowa 1227, 3 N.W.2d 608 (1942). The consequences of failing to follow a bulk restriction can be serious. In *Boardman*, the defendant was required to tear down a partially constructed building. *Id.*

72. Numerous cases exist whereby a land use regulation precluded all use of an owner's land. Some cases grant the landowner no relief. See *Sibson v. State of New Hampshire*, 115 N.H. 124, 336 A.2d 239 (1975); *Just v. Marinette Co.*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). But see *State v. Johnson*, 265 A.2d 711 (Me. 1970); *Petersen v. City of Decorah*, 259 N.W.2d 553 (Iowa Ct. App. 1977) (failure of city to rezone property from agricultural zone to allow for shopping center held confiscatory).

A popular term for such maneuvering is called "down zoning" and it was this down zoning that was the basis of the complaint in *Business Ventures, Inc. v. Iowa City*, 234 N.W.2d

This brief review of the underlying analysis and constitutional challenges is to establish the basis for land use regulations, i.e., zoning. The ensuing section will interrelate zoning with planning theories and develop the case law of various zoning techniques and problems.

### III. PLANNING

#### A. Definition

Logically, planning should have preceded zoning, as the latter is properly characterized as a planning tool. But historically the opposite is true as planning legislation was enacted subsequent to zoning legislation. In 1928, only two years after the SZEA, the Department of Commerce promulgated the Standard City Planning Enabling Act.<sup>73</sup>

Planning encompasses more than the location of physical structures and establishment of segregated use districts, although these are deemed to be the central goals of land use controls. In fact, to accomplish the purposes of zoning, a plan necessarily depends upon environmental, economic, sociological and political factors, in addition to the physical nature of land. As the plan is carried out through land use controls, the pace, sequence, timing and manner of land development is affected. However, earlier zoning ordinances were developed merely by an examination of what uses were existing and by then mapping out districts to fit the existing land uses. Thus, planning input was generally nonexistent, and at most, negligible.

Today, planning may be characterized as the establishing of socioeconomic goals, examining available resources and devising a means through which the goals can be achieved. The expectations and aspirations of municipal officials and the citizenry play a significant, if not controlling, part in this development. By selective allocation of municipal services and facilities, a town can significantly control its character.<sup>74</sup> The ur-

376 (Iowa 1975). *Business Ventures* is an example of a rather sophisticated attempt by a municipality to down zone property which was to be taken by the city under its eminent domain power, thereby reducing considerably the cost of condemnation. Although *Business Ventures* is essentially an eminent domain case, it illustrates well the crux of the zoning issue—whether or not a governmental regulation unreasonably restricts the value of one's property. If so, that regulation must fail. See Linowes & Delaney, *Down Zoning—And How the Landowner May Fight It*, 5 REAL EST. L.J. 311 (1977). Implicit in this discussion is the concept that landowners have a legally protected right to develop their property. Whether there exists an a priori right to maximize the profit potential of one's land is an open question. For discussion of a limited right to develop, see, e.g., Ellickson, *supra* note 64, at 416-18.

73. ANDERSON, *supra* note 45, at §§ 1.03-11. See N. WILLIAMS, AMERICAN LAND PLANNING LAW § 18.1 (1975). The term planning is not used at this point as a term of art, but rather, it has a generic meaning which transcends a given definition unless it is defined in a statute or ordinance. ANDERSON, *supra* note 45, at § 1.03.

74. RATHKOPF, *supra* note 45, at 1-17 to 1-18. The wisdom of suburban growth controls from an economic efficiency standpoint as well as from a legal standpoint is questioned in Ellickson, *supra* note 64.

ban planner must consider not only the physical and economic factors but also human and sociological elements.<sup>75</sup>

To the land use lawyer, however, a more narrow definition of planning is generally employed, i.e., does a particular land use regulation fit an overall scheme or plan?<sup>76</sup>

### B. Statutory Scheme

In Iowa, the role of planning is manifest in the enabling legislation. The planning process can take place in at least three municipal bodies. First, the legislation provides a procedure for the establishment of metropolitan or regional planning commissions.<sup>77</sup> Second, the zoning commission of a particular municipality is required to engage in the planning process.<sup>78</sup> Finally, planning is mandated of the urban renewal agency.

The metropolitan regional commission is a vehicle for regional planning of two or more cities or counties. This commission is empowered to perform regional planning of a comprehensive nature.<sup>79</sup> However, due to the permissive nature of the regional planning commission, there has been a tendency to keep this power hidden and unused. With the present need for regional planning, however, this is a potentially beneficial provision.

Prior to 1975, the legislature additionally provided for a city planning commission.<sup>80</sup> The commission was also permissive and was formed "[f]or the purpose of making a comprehensive plan for the physical develop-

75. The courts have recognized an expansive interpretation of the planning function:

Planning is comprehended in this inherent right of sovereignty so to order the affairs of the people as to serve the common essential need; and zoning is an implementation of planning, concerned as it is with common social and economic interests and needs encompassed by the basic power of government to "make, ordain and establish all manner of wholesome and of reasonable laws, not repugnant to the constitution," as may be deemed to be "for the good and welfare of the commonwealth and all subjects of the same."

Roselle v. Wright, 21 N.J. 400, \_\_\_, 122 A.2d 506, 510 (1956). The planner as an advocate involves the professional in these socio-economic issues. See, e.g., HAGMAN, *supra* note 19, at § 4; D. MAZZIOTTI, *ADVOCACY PLANNING: A SELECTED BIBLIOGRAPHY* (1972); Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AM. INST. PLANNERS 331 (1965); Davidoff & Davidoff, *Suburban Action: Advocate Planning for an Open Society*, 36 J. AM. INST. PLANNERS 12 (1970).

76. Lawyers are increasingly being called upon to assimilate principles from other disciplines. In this instance, the lawyer as planner creates an interdisciplinary atmosphere within which the lawyer must operate. The ability to synthesize a client's land use problems from other than a purely legal standpoint should serve the attorney well. See generally D. HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* 346-80 (1973).

77. IOWA CODE §§ 473A.1-.8 (1977).

78. *Id.* §§ 414.6, 358A.8.

79. *Id.* § 473A.4.

80. IOWA CODE ch. 373 (1971) (repealed 64th G.A., ch. 1088, § 199, effective July 1, 1975). The repeal of this section may have serious consequences. The municipality can still create such an agency, but the impetus to do so has been taken away.



ment of the municipality."<sup>81</sup> With the present increased reliance on the planning function, it is anomalous that the city planning commission statute has been repealed with no assurance that the planning function will be undertaken by another agency. While existing planning agencies may continue to function,<sup>82</sup> in those municipalities that never established such a commission, there is no direct authorization now to do so.<sup>83</sup>

Municipal and county enabling legislation requires that zoning be in "accordance with a comprehensive plan."<sup>84</sup> Failure to meet this mandatory provision will result in an overturning of the zoning ordinance. Additionally, before an urban renewal project is undertaken, a municipality must approve a "general plan for the municipality."<sup>85</sup> However, the Urban Renewal Law is not confined to specific urban renewal projects and gives to a municipality a more general planning authority.

For [urban renewal purposes] and *other municipal purposes*, authority is hereby vested in every municipality to prepare, to adopt and to revise from time to time, a general plan for the physical development of the municipality as a whole, giving due regard to the environs and metropolitan surroundings.<sup>86</sup>

### C. Case Law

While the enabling legislation states that a comprehensive plan is mandatory, the exact perimeters of what constitutes a comprehensive plan are not easily definable.<sup>87</sup> A general definition was set out in a New Jersey case:

Without venturing an exact definition it may be said for the present purposes that "plan" connotes an integrated product of a rational process and "comprehensive" requires something beyond a piece-meal approach, both to be revealed by the ordinance considered in relation to the physical facts and the purposes authorized by [the statute].<sup>88</sup>

The New Jersey court concluded that a zoning ordinance itself would con-

81. *Id.* § 373.18.

82. IOWA CODE § 392.1 (1977).

83. Although the grant of home rule powers enables a city to create, almost without limitation, administrative agencies, *id.* § 392.1, there is no guarantee, or even encouragement, for the creation of a planning agency. This is an especially curious situation when the idea of mandatory planning is considered. See generally, Mandelker, *The Role of the Local Comprehensive Plan in Land use Regulation*, 74 MICH. L. REV. 900 (1976) [hereinafter cited as Mandelker on *Comprehensive Plan*].

84. IOWA CODE §§ 414.3, 358A.5 (1977).

85. *Id.* § 403.5(1).

86. *Id.* (emphasis added).

87. See ANDERSON, *supra* note 45, at §§ 5.01-.07; RATHKOPF, *supra* note 45, at 12-1 to 12-6; HAAR, "In Accordance With a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955).

88. *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 166, 131 A.2d 1, 7 (1957).

stitute the comprehensive plan as long as it was the end product of a rational process, i.e., a study.<sup>89</sup>

Because of increased urbanization and growth, public concern with issues such as growth management, environmental protection and the need for the provision of low-income housing have added new dimensions to the planning process and have imparted an urgency on local comprehensive planning that was not felt earlier.

As a result of the increased need for planning and the statutory requirement of a comprehensive plan, courts<sup>90</sup> and legislatures<sup>91</sup> have imposed even greater planning requirements on municipalities. One of the responses to this urgency for a comprehensive plan is the concept of a "master plan"—the requirement of a general plan for a given area. Yet, while the master plan concept may satisfy the comprehensive plan requirement, it is not necessary or as of yet feasible that the master plan be adopted by all municipalities. However, there is a general trend in some states towards requiring a master plan—which by its nature is comprehensive. More frequently the judiciary is looking to the comprehensive and master plan requirements in order to test a zoning ordinance against a reasonable set of studies and assumptions.<sup>92</sup> There is no master plan requirement in Iowa. Here, reference to the master plan concept is made only to highlight how a municipality may satisfy the comprehensive plan requirement.

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89. *Id.* at 167-68, 131 A.2d at 7-8. Hence, the requirement of a comprehensive plan is a standard against which a zoning ordinance must be measured; if the ordinance does not satisfy this requirement then it is invalid.

Such being the requirements of a comprehensive plan, no reason is perceived why we should infer the Legislature intended by necessary implication that the comprehensive plan be portrayed in some physical form outside the ordinance itself. A plan may readily be revealed in an end-product—the zoning ordinance—and no more is required by the statute.

The comprehensive plan embraced by an original zoning ordinance is of course mutable. If events should prove that the plan did not fully or correctly meet or anticipate the needs of the total community, amendments may be made . . . and if the ordinance as thus amended reveals a comprehensive plan, it is of no moment that the new plan so revealed differs from the original one.

*Id.* at 166-67, 131 A.2d at 7-8 (citations omitted).

Insofar as zoning preceded planning, this historical fact has led to this type of judicial justification in order to preserve the well accepted tradition of Euclidian zoning. The plan has also been equated with the zoning map. *Albright v. Town of Manlius*, 34 App. Div. 2d 419, 422-23, 312 N.Y.S.2d 13, 18-19 (1970).

90. *Baker v. City of Milwaukee*, \_\_\_ Ore. \_\_\_, 533 P.2d 772 (Ore. 1975); *Fasano v. Board of Co. Comm'rs*, 264 Ore. 547, 507 P.2d 23 (1973).

91. *MANDELKER*, *supra* note 27, at 31-32, 404-06.

92. *See generally*, *MLDC*, *supra* note 42, art. 3; *ANDERSON*, *supra* note 45, at §§ 21.03-15; *HAAR ON PLANNING* 996-1018, *supra* note 1; *Haar, The Master Plan: An Impermanent Constitution*, 20 *LAW & CONTEMP. PROB.* 353 (1955); *Mandelker on Comprehensive Plan*, *supra* note 83.

Iowa case law dealing with comprehensive plans is in agreement with the general law that the comprehensive planning requirement is designed to avoid piecemeal zoning. In *Brackett v. City of Des Moines*,<sup>93</sup> the plaintiff landowner was granted a building permit for a commercial establishment on his property. A subsequent zoning ordinance was passed rezoning plaintiff's property from commercial to residential use and the building permit was revoked. Plaintiff brought an action seeking a declaration that the zoning ordinance was invalid and sought to enjoin its enforcement. The court held that the ordinance was valid and that it was promulgated in accordance with the "comprehensive plan."

[T]he record shows the City Planning and Zoning Commission, over a period of years had done much work on a comprehensive city plan. In 1938 . . . city planners, engineers and landscape architects [made] . . . a comprehensive survey of the city and in 1940 [they made] a detailed report in book form with many maps and plats. . . . Subsequently general studies and studies on various sections and neighborhoods, including the property, and neighborhood here involved, were made. These formed the basis for changes in and additions to the comprehensive plan which brought it up to date. Ordinance 54533 was based upon this new comprehensive plan. Public hearings were held for consideration of the proposed ordinance. . . .

[T]here was full compliance with the requirement the regulations be made in accordance with a comprehensive plan.<sup>94</sup>

Similarly, in *Plaza Recreational Center v. Sioux City*,<sup>95</sup> when a landowner attacked the use restriction on its property, the court sustained the validity of the amended ordinance and noted: "If trends and economic changes of the times appear, the council's discretion to change its plan is quite broad and it may amend the general ordinance any time it deems circumstances and conditions warrant such action."<sup>96</sup>

Finally, in *Anderson v. City of Cedar Rapids*,<sup>97</sup> the Supreme Court of Iowa, in sustaining a challenge to an amendment to a zoning ordinance authorizing construction of a shopping center, discussed the need for flexibility in a comprehensive plan: "It is not only proper but highly essential that our municipality officials periodically review and update zoning regulations. Welfare of the people, present and future, will not permit adoption of a passive attitude in these matters."<sup>98</sup>

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93. 246 Iowa 249, 67 N.W.2d 542 (1954).

94. *Brackett v. City of Des Moines*, 246 Iowa 249, 257, 67 N.W.2d 542, 546 (1954).

95. 253 Iowa 246, 111 N.W.2d 758 (1961).

96. *Plaza Recreational Center v. Sioux City*, 253 Iowa 246, 258, 111 N.W.2d 758, 766 (1961).

97. 168 N.W.2d 739 (Iowa 1969).

98. *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739, 743 (Iowa 1969).

In these cases there exists, in capsule form, the law of the comprehensive plan with its varying facets. First, the comprehensive plan is not much more than what it was in the *Brackett* case, i.e., the existing zoning ordinance. Then, in *Anderson*, the comprehensive plan is shown to require flexibility so that development may be facilitated. *Anderson* is also notable for its link between the past and present, particularly in light of the far-reaching implications of *City of Des Moines v. Manhattan Oil Co.*,<sup>99</sup> in that physical and social need must be taken into account when land use controls are implemented.

Although the case law does not present overly stringent planning requirements and a flexible statutory scheme does exist, the Iowa law of planning has its short-comings. First, there may not be sufficient enabling legislation to encourage, if not force, new municipalities to establish planning commissions. Secondly, Iowa may fall victim to that which at least one author feels all planning suffers—lack of mandatory planning requirements:

Time has revealed that the decision of the model planning act draftsman to make the planning function optional was as serious a shortcoming as their more widely recognized failure to call explicitly for a comprehensive plan in zoning administration. Whatever reason for the absence of a planning requirement there may have been, it is now apparent that changes in land use control techniques, expansion in the scope of comprehensive planning, and an increasing emphasis on mandatory planning in federal aid programs all underscore the need for mandating a comprehensive planning process at the local government level.

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Since adoption of the comprehensive or master plan in 1955, noticeable changes have taken place in the south-easterly part of Cedar Rapids. As a result of relatively recent migrations, territory located within existing boundaries, once denominated agricultural, has become residential. Concurrently the residential population in that area south and east of the subject rezoned tract has increased substantially.

.....  
Moreover, common experience discloses highly concentrated stores and shops, catering to public needs, are often a convenience, if not a necessity, in or near populous residential areas. Municipal planning in that direction cannot ordinarily be held incompatible with any previously enacted comprehensive plan.

.....  
But that situation is not present in the case at bar. Here the rezoned property is adjacent to an existing commercial district. A uniform development plan to improve the property by permitting establishment of a shopping center, with controlled traffic access and off-street parking, was duly approved by the city authorities. As previously indicated the now constructed center provides, among other things, a drive-in banking office. It is contemplated use of this and other available facilities by those living in the vicinity will lessen traffic congestion in the central business district. Other benefits to the people may reasonably be expected to flow from establishment of the subject shopping district.

*Id.* at 743, 744 (citations omitted).

99. 193 Iowa 1096, 184 N.W. 823 (1921), *sup. op.*, 193 Iowa 1096, 188 N.W. 921 (1922).

....  
Mandatory comprehensive planning is sorely needed to rationalize public decisions to restrict or intensify development, so that a proper balance can be struck between the needs of the public and the desires of landowners as affected by these decisions.

....  
State legislators must settle at least three major issues if they decide to mandate comprehensive planning: the form and content of the planning process to be required at different governmental levels within the state, the extent to which consistency should be required between local land use controls and locally adopted comprehensive plans, and the extent to which local planning programs should be subject to review and modification by other governmental units.<sup>100</sup>

There are multifarious land use controls at numerous governmental levels. If the system is to act efficiently, planning should be mandatory. This additional expenditure of time and dollars should result in planned growth for efficient future development.

#### IV. THE DEVELOPMENT OF EUCLIDIAN ZONING IN IOWA

##### A. The Parameters of Euclidian Zoning

Euclidian zoning derives its name from *Village of Euclid v. Amber Realty Co.*,<sup>101</sup> which upheld in principle the theory of zoning—districting through the establishment of use and area districts, and height requirements. This rigid districting system is the main characteristic of Euclidian zoning.

The early champions of zoning acted on the assumption that owners and occupiers of urban land should be protected from the injurious effects of discordant land uses by segregating different types of use in separate zones or districts. They also aimed to prevent the worst effects of uncontrolled urban growth by establishing reasonable standards of population density, light, air, and open-space. The ideal city was viewed as a great patchwork of contrasting zones rigidly segregating incompatible land uses, each zone furnished the appropriate density, light, and air, and open-space regulations, all "in accordance with a comprehensive plan."

The "Euclidian" zoning ideal just described rested upon the assumptions "that similar uses naturally tend to congregate in homogenous [sic] areas, that development takes place lot-by-lot on small parcels, that shifts of social groups and land values come about slowly, and that where and when and how development takes place can be predicted and regulated in advance." With the benefit of hindsight it is easy to see that many of these assumptions were either questionable or clearly erroneous.<sup>102</sup>

Further, Euclidian zoning is not done in a comprehensive fashion but merely by examining the existing land uses. Existing differences in

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100. Mandelker on *Comprehensive Plan*, *supra* note 83, at 909-51 (footnotes omitted).

101. 272 U.S. 365 (1926).

102. Cunningham, *supra* note 8, at 382-83 (footnotes omitted).



land uses are thus emphasized and segregated rather than there being a focus on interrelationships between different land users. This method illustrates a lack of planning and instead facilitates rezoning planning. However, the Euclidian ideal and the basic zoning authority in general, i.e., that police power, are not compatible. The police power is used by the state to promote the general welfare while *Euclid* and its progeny<sup>103</sup> stress the goal of segregated districts, particularly segregated residential districts of single-family detached dwellings.

Tension occurs as a result of the municipality's desire for self-preservation and the state's larger desire to provide for the general welfare. Many communities preserve their existing character by zoning out users of non-single-family detached dwellings. It is difficult to justify the segregation of single-family detached units let alone the exclusion of two-family detached dwellings, townhouses and garden apartments. It is difficult for a municipality to justify the creation of different minimum standards designed to secure adequate light, air, and open space in different residential zones, as opposed to a single maximum standard for the whole city. It is even more problematic for a municipality to try to justify minimum lot-size requirements of e.g., more than one-half acre under any circumstance. It appears that justification on health, safety or morals grounds is untenable, and justification on the basis of the general welfare is equally spurious.<sup>104</sup>

By analyzing growth patterns and avoiding overzoning, it is possible to lessen this tension. For example, if a municipality attracts large scale commercial and industrial development but only provides districts of single-family detached dwellings, it is only accommodating housing for middle and upper levels of management. Without complementary housing for all employees, the municipality is overzoned for commercial and industrial uses.<sup>105</sup>

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103. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The fundamental premises of *Euclid* and *Nectow* are as valid today, perhaps unfortunately so, as when they were decided. In *Euclid*, zoning was upheld as a valid exercise of the police power. The United States Supreme Court held the ordinance constitutional on its face and procedurally did not require the challenger to exhaust its administrative remedies. However, the Court reserved the issue of whether or not the ordinance as applied was valid. The latter issue, which requires that administrative remedies be exhausted, was reached in *Nectow*. In *Nectow*, the Court adopted the findings in part of a Special Master who noted that as applied to the land in question, the ordinance did not promote the general welfare. *But see Southern Burlington City NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

104. See *Cunningham*, *supra* note 8, at 385.

105. *Id.* at 385-86. One rationale for overzoning is undoubtedly economic: a municipality can broaden its tax base by bringing in business and industry. The countervailing desire to preserve its residential character, however, may cause diseconomies. Because each broad category of uses places a different strain on municipal facilities and services the above may not be found to be compatible without provision for intermediate density uses. Municipalities

The rigid districting of Euclidian zoning does not solve new problems, however, such as competing land uses, the interrelatedness of land use controls and the growth of industry and technology. One of the more recent responses to this criticism of Euclidian zoning is judicial approval of a planned unit development (P.U.D.).

P.U.D. is the antithesis of the exclusive districting principle which is the mainstay of "Euclidian" zoning. The latter approach divided a community into districts, and explicitly mandated segregated uses. P.U.D., on the other hand, is an instrument of land use control which augments and supplements existing master plans and zoning ordinances, and permits a mixture of land uses on the same tract (i.e. residential, commercial and industrial). It also enables municipalities to negotiate with developers concerning proposed uses, bulk, density and set back zoning provisions, which may be contrary to existing ordinances if the planned project is determined to be in the public and individual homeowner's interest. It also recognizes the importance of encouraging and making it financially worthwhile for developers and investors to undertake P.U.D. projects by permitting a more intensified utilization of vacant land which is scarce and skyrocketing in price.<sup>106</sup>

The by-products of Euclidian zoning such as abuse of the variance process, over-zoning and the failure to promote planning flexibility will be explored in the remainder of this section.

### B. Spot Zoning

Spot zoning is a term which generally describes the practice whereby a single lot owner is granted privileges which are not granted to other landowners. It can result in piecemeal zoning or a zoning decision which is arbitrary, capricious or discriminatory with respect to a particular parcel of property.<sup>107</sup> The fact that a particular zoning decision, be it an amendment, a re-zoning or variance, favors a particular parcel or owner and is contrary to a comprehensive plan could arguably occur in any system of zoning. This practice, where a zoning administrator will grant a privilege to a parcel of land or an owner, is a by-product of Euclidian zoning.

The fact that a particular parcel of land is treated differently is insufficient to establish spot zoning. It must also be shown that the resulting pattern is not in accordance with the comprehensive plan.

*Keller v. City of Council Bluffs*<sup>108</sup> is a perfect example of the analysis

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with antiquated zoning laws now find themselves in need of new techniques, e.g., tax incentive zoning, upzoning, growth management, etc., to remedy the consequences of these disparities.

106. *Rudderow v. Township Committee*, 121 N.J. Super. 409, \_\_\_, 297 A.2d 583, 585 (1972). See also Elliott & Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls*, 1 HOFSTRA L. REV. 56 (1973).

107. ANDERSON, *supra* note 45, at §§ 5.08-19; RATHKOPF, *supra* note 45, at 26-1 to 26-2.

108. 246 Iowa 202, 66 N.W.2d 113 (1954).

used by a landowner who claims that a zoning decision constitutes spot zoning. The landowners in *Keller* sought to test the validity of an amendment to a comprehensive zoning ordinance which changed the use classification of three lots from an "A" residential to a "B" residential district. The "A" district allowed for single-family detached dwellings; the "B" district allowed for the operation of a nursing home. The owners of the lots in issue had, prior to the zoning ordinance, operated the premises as a convalescent home. Consequently, it was a nonconforming use. As a result of plaintiffs' complaints, the owners of the nursing home sought rezoning which would make the nursing home a conforming use. The rezoning was granted.<sup>109</sup> The plaintiffs appealed the decision claiming it constituted illegal spot zoning, and this contention was upheld by the district court. The Iowa Supreme Court reversed. The plaintiffs contended that this amendment was arbitrary, capricious and unreasonable, and amounted to spot zoning and thus not in accordance with the comprehensive plan. The defendants contended that the structure as located had little or no value as a single-family dwelling and the only beneficial use to be made was as a nursing home, an apartment house, fraternity or other multi-dwelling all of which were prohibited in a class "A" district. This contention was supported by facts. The court first noted that the rezoned premises were never used as a single-family residence prior to the zoning ordinance and that plaintiffs purchased and improved their property knowing the use defendants made of their property. The record also disclosed that there had been fifty amendments to the comprehensive zoning ordinance, ten of which were from "A" to "B" and that this was the only convalescent home in a class "A" district of the twelve throughout the city.

The court further concluded that to deny relief would be against the general welfare by rendering the property virtually valueless, unmarketable and thus subject to decay.<sup>110</sup> The court then addressed the plaintiffs' argument that an amendment to an ordinance which zones a property class "B" when it is entirely surrounded by class "A" is invalid as spot zoning.

Action of imposing restrictions that do not bear alike on all persons living in the *same territory under similar conditions and circumstances* is discriminatory and will not be upheld. . . . That a zoning statute must be impartially applied as to all properties *similarly situated* is beyond dispute. Here, as we have pointed out, the property is not similarly

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109. Rezoning to make a nonconforming use conforming is against the theory behind a comprehensive plan.

110. *Keller v. City of Council Bluffs*, 246 Iowa 202, 209, 66 N.W.2d 113, 117 (1954). If this were the court's only concern there would appear to be no reason why the law of nonconforming uses should not pertain, i.e., allow reasonable repairs without allowing expansion at least until the landowner makes a reasonable return on his investment.

situated and is distinguishable by its past use and character from other surrounding property. . . .

"Spot zoning" when construed to mean reclassification of one or more *like tracts* or *similar lots* for a use prohibited by the original zoning ordinance and out of harmony therewith is illegal. When done under certain other conditions and circumstances in accordance with a comprehensive zoning plan, such action will not be declared void. It depends upon the circumstances of each case. . . .

[T]here must be substantial and reasonable grounds or basis for the discrimination, when one lot or tract is singled out in an amendatory ordinance removing therefrom restrictions imposed upon the remaining portions . . . of the same zoning district. When the tract has been shown to be clearly different in character or use from those around it, discrimination may be legally justified.<sup>111</sup>

A contrary result was reached in *Hermann v. City of Des Moines*<sup>122</sup> where plaintiffs attacked an amendment to a zoning ordinance on the theory that the amendment constituted spot zoning in that it rezoned a portion of property from R-2 (one and two-family dwellings) to R-3 (multi-residence district). The facts, which were stipulated, indicated that the premises in question would be an "R-3 island entirely surrounded by R-2."<sup>123</sup> The *Hermann* court noted that in *Keller* the property could not be utilized in accordance with its zoning, unlike the present case. The property here was similar in use, character and adaptability to the surrounding property. It was used as a one-family dwelling at the time the ordinance was enacted. Finally, the court stated that there was no change in the surrounding properties since the enactment of the general ordinance.<sup>124</sup>

The property was intended to be used as a sorority house in the vicinity of Drake University. However, the majority opinion held that these facts were not stipulated and it would not take judicial notice of them. It was on this ground the dissent held that the Des Moines City

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111. *Id.* at 213-14, 66 N.W.2d at 120.

112. 250 Iowa 1281, 97 N.W.2d 893 (1959).

113. *Hermann v. City of Des Moines*, 250 Iowa 1281, 1284, 97 N.W.2d 893, 895 (1959).

We are unable to find anything in the rezoning of a part of Lot 10 which will in any way promote the public health, morals, safety or general welfare. It must be kept in mind the comprehensive zoning ordinance, enacted in 1953, placed this lot in R-2, together with all territory immediately surrounding it. No reason appears, none is suggested, why this tract should now be singled out for removal of many of the restrictions originally placed upon it and which still affect the remainder of the property in the block. It is spot zoning; and while not all spot zoning is illegal *per se*, the courts look upon it with some disfavor. This, of course, arises from the nature of things. Properly, it is held that one property owner should not be favored over his neighbors in the absence of a good reason therefore.

*Id.* at 1285, 97 N.W.2d at 895 (1959).

114. *Id.* at 1287, 97 N.W.2d at 897.

Council had not acted in an arbitrary, unreasonable or capricious matter in adopting the amendment.<sup>115</sup>

The *Keller* and *Hermann* cases indicate the courts' difficulties in resolving zoning problems. It is clear that the legislative body has great discretion in designing the zoning ordinance and amendments. Additionally, one who challenges a zoning ordinance has an onerous burden in overcoming its presumption of validity. Given this presumption of validity coupled with the municipality's wide discretion, a court can sustain a zoning ordinance with little showing on behalf of the municipality as was the result in *Keller*. Thus, it is notable that in *Hermann* the court did overturn the zoning ordinance on the basis that it constituted spot zoning.<sup>116</sup>

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115. A reading of the case indicated a paucity of evidence introduced on behalf of the parties. Clearly a different result could be obtained given a better factual development:

There are several decisive elements in the instant case which show the basis of the council action to be logical and reasonable, and which negative the action of the city to be arbitrary, etc.: (1) The ordinance amendment creates no damage as to general conditions in the neighborhood. (2) There is no prejudice nor damage to property of plaintiffs, who are neighbors in the community. (3) The general welfare in this area and the community is enhanced.

*Id.* at 1290, 97 N.W.2d at 899 (Peterson, J., dissenting).

The rule that amendments must not constitute spot zoning applies to counties as well. See *Keppy v. Ehlers*, 253 Iowa 1021, 115 N.W.2d 198 (1962).

116. *Hermann v. City of Des Moines*, 250 Iowa 1281, 97 N.W.2d 893 (1959). See also *Keppy v. Ehlers*, 253 Iowa 1021, 115 N.W.2d 198 (1962) wherein the rezoning of a 20 acre tract from rural to light industrial in the area of a highway interchange was declared to be illegal spot zoning:

In *Hermann v. City of Des Moines*, 250 Iowa 1281, 97 N.W.2d 893, we had a somewhat similar situation except it dealt with city zoning. We there held that a city council does not have authority to amend a comprehensive zoning law so as to remove or impose less onerous restrictions upon a small tract or lot similar in character and use to the surrounding property. That restrictions not bearing alike on all persons living in the same territory and under similar conditions and circumstances is discriminatory and will not be upheld. The better rule is that there must be substantial and reasonable grounds or basis for the discrimination, when one lot or tract is singled out in an amendatory ordinance removing therefrom restrictions imposed upon the remaining portions of the same zoning district. See *Keller v. City of Council Bluffs*, 246 Iowa 202, 66 N.W.2d 113, 51 A.L.R.2d 251.

We feel it must be recognized that in county zoning a more complex question is presented in dealing with agricultural lands, with the wide open spaces, than in the more congested urban communities. We realize the change in conditions in the vicinity of the new interchange creates a reason for a reclassification in this area. But where it appears, as it does here, that such reclassification is largely dependent upon an application being made as to a certain tract, without regard to other tracts in the same area, similar in location to interchange; similar in adaptability to either rural or light industry use; and similar in value, it must be said that the plan is evident of a lack of a comprehensive plan within the purview of the statute. While the size of the tract involved is not too material it is of primary importance whether such tract has a peculiar adaptability or is merely carved out of a similar tract or area equally suited to the requested reclassification. Such is the situation here and results in illegal "spot zoning". . . .



In *Jaffe v. City of Davenport*,<sup>117</sup> an action in equity was brought attacking the validity of an amendatory ordinance which changed a portion of a tract zoned R-5 (single family) to C-1 (neighborhood shopping district). The district court declared the amendment void, but the Iowa Supreme Court held that the amendment was not unreasonable, arbitrary or capricious, even though it did constitute spot zoning. In support of its decision, the court noted that the tract was such that it could only be used for truck farming, that it was located at a busy intersection controlled by traffic lights in a fast growing, undeveloped and old residential area, and that it was difficult to sell the land for residences at this location.

The fact that the rezoning may create an isolated area of particular land use is not of itself necessarily illegal:

If the ordinance constitutes piece-meal or haphazard zoning of a small tract of land similar in character and use to the surrounding property for the benefit of the owner and not pursuant to a comprehensive plan for the general welfare of the community, it is arbitrary, unreasonable and invalid.

....

Spot zoning is valid if it is germane to an object within the police power and there is a reasonable basis for making this distinction between the spot zoned and the surrounding property. The determination of this question is primarily a legislative matter and is largely within the zoning authority's discretion.

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The size of the spot zoned, the uses of the surrounding property, the changing conditions of the area, the use to which the subject party has been put and its suitability and adaptability for various uses are all matters to be considered in determining whether there is a reasonable basis for singling out certain property from the neighboring property. . . .

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Zoning is not static and any existing restrictions are subject to reasonable revision as the need appears and the ordinances may be amended any time circumstances and conditions warrant such action.<sup>118</sup>

The court went on to declare the ordinance valid insofar as the rezoned property was a tract of over two acres, located at the intersection of two heavily travelled thoroughfares. The court noted that the population in the area had increased and the development trend was expected to continue. In light of these facts, it found that the area was underzoned.

Additionally, the court found that witnesses for both sides agreed that the tract was most suitable for commercial development. The court said that the amendment constituted spot zoning, but since it was a reasonable basis for the differentiation, that it would be upheld since the

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We hold the amendment in question is discriminatory between citizens owning similar tracts of land and is illegal.

*Id.* at 1023-24, 115 N.W.2d at 200 (citations omitted).

117. 179 N.W.2d 554 (Iowa 1970).

118. *Jaffe v. City of Davenport*, 179 N.W.2d 554, 556 (Iowa 1970) (citations omitted).

designation was not contrary to the spirit of the comprehensive plan.<sup>119</sup>

The dissent held that on such facts, the amendment constituted illegal spot zoning.<sup>120</sup> However, the dissent's view of the zoning process ignored the fact that the city council is the designated body with expertise in planning and zoning. Instead, it focused on the fact that the rezoning from R-5 to C-1 created an island of land use. The creation of an island or spot is only one indicia of spot zoning which may, in fact, be overcome. Other indicia include land use at the time of the original zoning ordinance, current use, uses of surrounding area, burden imposed upon the land, adaptability of premises for rezoned use, adaptability of surrounding premises and pattern of development. These factors are relevant to the purposes of a comprehensive plan.

### C. Nonconforming Uses

A nonconforming use is a use which exists prior to the implementation of a zoning ordinance or prior to the implementation of an amendment.<sup>121</sup> It is a preexisting use which is allowed to continue under certain prescribed conditions. The situation is created by Euclidian zoning in that the initial establishing of districts designates areas for particular uses. There may already exist in the area other uses not allowable in the new district; thus results the nonconforming use. Even if an ordinance was designed where all districts had only legitimate uses, it would be difficult to put these districts into the total plan of the city without incompatible districts adjacent to each other.

With increasing urbanization, the problem of nonconforming uses occurs more frequently, particularly when residents from an expanding metropolitan area have encircled business or industry that had previously been in a commercial zone. This is also true when existing residential areas become commercialized. When cities incorporate and initially pass zoning ordinances, invariably nonconforming uses will be created.

Nonconforming uses are inimical to the objectives of Euclidian zoning, i.e., maintaining compatible uses within the same district and continuity in community planning. Such uses are a financial burden because they demand municipal services not necessitated by adjoining land uses. Further, they tend to adversely affect the early development of the community as a whole by reducing the value of surrounding property. Depending on the use, they often result in increased traffic, unpleasant odors, polluted air and water, increased noise and a less pleasing appearance.<sup>122</sup>

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119. *Id.* at 559.

120. *Id.*

121. ANDERSON, *supra* note 45, at 6.01-.73; RATHKOPF, *supra* note 45, at 58-1.

122. See Graham, *Legislative Techniques for the Amortization of the Nonconforming Use*, 12 WAYNE L. REV. 435 (1966).

Historically, property used for a purpose which was later declared unlawful acquired a vested right to continue as a nonconformity. This applied to structures as well as uses. This right developed because courts were reluctant to give zoning ordinances a retroactive effect which would substantially destroy existing property rights. However, the existence of nonconforming uses or structures comes into conflict with the goal of adopting an overall workable comprehensive plan; and for this reason, the elimination of nonconforming uses, or measures to discourage their continuation have resulted. It was not advisable to allow a nonconformity to merely live out its life by not allowing reasonable repairs to existing structures and uses because the consequent effect would be devaluing property, thus affecting surrounding properties adversely.

One means of discouraging the prolongation of nonconforming uses is to prohibit substantial structural alterations. However, in *Granger v. Board of Adjustment*,<sup>123</sup> the court allowed the manufacturer of burial vaults to replace the frame walls of his nonconforming building with concrete and steel which substantially prolonged the use of this nonconformity. Courts often allow changes which allow nonconforming uses to continue without encouraging their expansion.

The premise of nonconforming uses assumed that they disappear at the end of their own natural life. However, preexisting uses were shown to have no tendency to disappear. Rather they became monopolies within a given area and insofar as businesses were concerned they tended to thrive and prosper. Thus, techniques were sought to eliminate these uses.

One available technique was that of eminent domain. However, due to the great capital expenditure called for, it was not financially feasible to use this to any great extent. Secondly, the uses could be terminated under a theory of nuisance, i.e., in the context of the neighborhood in which the use is situated it presented a nuisance. But it was thought that the nuisance theory would be of only limited benefit and would be effective only as a supplement to some other form of termination.<sup>124</sup> Elimination of nonconforming uses may also come about through abandonment, legitimization, restrictions on alterations or expansion, and amortization. Zoning ordinances also often put certain restrictions on continuation of nonconforming uses.<sup>125</sup> Finally, enabling legislation has certain restraints on the existence of nonconforming uses.<sup>126</sup> But due to the lack of proscrip-

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123. 241 Iowa 1356, 44 N.W.2d 399 (1950).

124. Note, *Nonconforming Uses in Iowa: The Amortization Answer*, 55 IOWA L. REV. 998, 1004-06 (1970) [hereinafter cited as *Nonconforming Uses*].

125. See, e.g., CLIVE, IOWA, ZONING ORD. § 9 (March, 1972).

126. See, e.g., N.J. STAT. ANN. § 40:55D-68 (Supp. 1977), which merely allows a nonconforming use to continue and repairs to be made in the event of partial destruction. But note, the Iowa enabling legislation contains no guidelines limiting nonconforming uses.

tions in enabling legislation, the control of nonconforming uses rests with the judiciary.<sup>127</sup>

The legitimization method of elimination is to make a nonconforming use a conformity as was done in *Keller*. This type of rezoning naturally runs the risk of resulting in spot zoning and becoming invalid for those reasons. Moreover, to establish a rule that nonconforming uses can be legitimized by amendment will make the ultimate goal of an efficient comprehensive plan more difficult to obtain and the nonconformity may be used as the basis on which to seek an amendment to the zoning ordinance.<sup>128</sup>

Amortization is attractive as it gives the nonconforming use a reasonable period in which to recoup its investment and in fact make a reasonable return on that investment before it is eliminated.<sup>129</sup> Professor Daniel Mandelker wrote in 1958:

Unfortunately, the Iowa Supreme Court has now made the elimination of the nonconforming use almost an impossibility. In a series of recent decisions it has permitted the indefinite prolongation of nonconforming uses and has sanctioned the exercise of the amending power to validate nonconformity. . . . [I]n *Stoner McCray System v. City of Des Moines*, [247 Iowa 1313, 78 N.W.2d 843 (1956)] the court struck down an amortization ordinance which directed the removal of nonconforming bill boards after two years. Not only has one of the cardinal aims of zoning now been frustrated, but the *Stoner* decision has limited the usefulness of the zoning power as a technique to deal with the newer problems of land use control.

As a consequence, the Iowa municipality is helpless under the zoning power to do anything more than freeze the existing land use pattern. Nonconforming uses cannot be extirpated and may be entitled to be substantially rebuilt if not validated by amendment to the zoning ordinance. Of even greater significance is the conceptual basis for the *Stoner* opinion. While the decision is ambiguous, it can be read as holding

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127. Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction on the Power to Zone in Iowa*, 8 DRAKE L. REV. 23 (1958) [hereinafter cited as Mandelker on *Nonconforming Use*]; *Nonconforming Uses*, *supra* note 124.

128. See Mandelker on *Nonconforming Use*, *supra* note 127.

129. See generally Anderson, *The Non-conforming Use—a Product of Euclidian Zoning*, 10 SYRACUSE L. REV. 214 (1959); Norton, *Elimination of Incompatible Uses & Structures*, 20 LAW & CONTEMP. PROB. 305 (1955). The central concern of opponents to amortization ordinances is that such an ordinance is confiscatory. However, those jurisdictions that uphold the validity of the ordinances do so on the basis that one who recovers a reasonable return on investment has not been deprived of property without just compensation. See, e.g., *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); *Town of Hempstead v. Romano*, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (Sup. Ct. 1963). Although the theory of a reasonable return may be upheld, application of the principle may be difficult and costly. See Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325 (1975).

that a zoning ordinance may not operate retroactively except to eliminate a use which would constitute a nuisance under the common law.<sup>130</sup>

However, the *Stoner* decision did not expressly terminate the possibility that an amortization ordinance could be held valid:

We do not wish to infer herein that under certain circumstances a municipality could not provide for the termination of nonconforming uses, especially if the period of amortization of the investment was just and reasonable, and the present use was a source of danger to the public health, morals, safety or general welfare of those who have come to be occupants of the surrounding territory.<sup>131</sup>

The case of *Board of Supervisors v. Miller*<sup>132</sup> suggested that if a reasonable amount of time has been given, an amortization scheme will be constitutionally valid. The *Miller* court was equally divided in its opinion, and thus cannot be cited as authoritative;<sup>133</sup> it does, however, show a substantial diminution of the restrictiveness of *Stoner*. Given the assumption that nonconforming uses are contra to good zoning, it would seem desirable for the legislature to pass a statute establishing mandatory standards for their elimination.

The MLDC presents an alternative method of discontinuing land uses incompatible with a comprehensive plan.<sup>134</sup> Existing uses cannot be eliminated in the absence of a state or local plan which has established a policy of maintaining a neighborhood and unless the use is found to be inconsistent with the character of that neighborhood.<sup>135</sup> The affected area is

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130. Mandelker on *Nonconforming Use*, *supra* note 127, at 23, 31-32.

It must be noted that the *Stoner* court invalidated the ordinance because there was no authority for it in the enabling legislation. *Stoner McCray System v. City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 843 (1956). While the statute has not changed, it is arguable that in light of the current trend of the law and the favorable treatment of amortization ordinances throughout other parts of the country this result may not be obtained today. A less pessimistic view of nonconforming uses and amortization in Iowa does exist, however. See *Nonconforming Uses*, *supra* note 124.

131. *Stoner McCray System v. City of Des Moines*, 247 Iowa 1313, 1320, 78 N.W.2d 843, 848 (1956).

132. 170 N.W.2d 358 (Iowa 1969), noted in 19 DRAKE L. REV. 508 (1970).

133. Because the court in *Miller* was equally divided, the opinion below stands but the decision is of no further force or authority. See IOWA CODE § 684.10 (1977).

134. MLDC art. 4 (Prop. Off. Draft 1975). The drafters of the Code reject the existing law of nonconforming uses as being too rigid. Basically, the existing law seeks to have nonconforming uses eliminated merely because they do not conform to those uses found in a specific rigid district. The MLDC art. 4, at 177 (Prop. Off. Draft 1975) starts from a new premise: "[T]hat existing use of land should be encouraged to conform to new land development regulations only if those regulations embody a policy that a specifically defined neighborhood character should be maintained over a substantial period of time." *Id.* Therefore, the Code suggests that there must be a policy other than thoughtless conformity before existing uses are eliminated.

135. *Id.* § 4-102(1)(a). This is the basic premise for reducing nonconforming uses; other methods are enunciated in §§ 4-102(b) to (e).



given a definite time period (one month is suggested) to comply with an order to discontinue.<sup>136</sup> The enforcement agency, however, is empowered to grant exemptions<sup>137</sup> or extensions of time to allow the landowner a reasonable period of amortization<sup>138</sup> based on economic usefulness, urgency of public purpose and cost of discontinuance. The proposal has at least two immediately recognizable advantages. First, assuming Iowa does not authorize amortization, this proposal will rectify that. Secondly, it forces the municipality to plan for the elimination and have a purpose other than blind conformity to the law of nonconforming uses.

There has not been unanimity in the Iowa courts for allowing the expansion of nonconforming uses. Indeed, they have been somewhat restrictive about the expansion of nonconforming uses. In *Zimmerman v. O'Meara*,<sup>139</sup> landowners were denied a variance to convert a nonconforming single-family residence to a duplex because of area requirements. The court overturned the previously granted variance because of insufficient evidence to allow the change. However, in *Granger v. Board of Adjustment*, substantial structural alteration was permitted.<sup>140</sup>

In *Stan Moore Motors, Inc. v. Polk County Board of Adjustment*,<sup>141</sup> the landowner sought to erect a canopy on a nonconforming building. The building permit was denied, the district court upheld the denial, and the Iowa Supreme Court affirmed. The nonconformity was that the building was too close to adjoining streets and the construction of the canopy involved the extension of the rafters. The court upheld the denial of the permit on the ground that it was an enlargement or extension of a nonconforming use which was expressly prohibited by the zoning ordinance of Polk County. This case seems to be in accord with *McJimsey v. City of Des Moines*<sup>142</sup> and insofar as it cites *Granger*, it shows a willingness of the Iowa courts to restrict the extension of nonconforming uses.

The court was again faced with the issue of a nonconforming use in *Trailer City, Inc. v. Board of Adjustment*.<sup>143</sup> This case represents a curious addition to the law of nonconforming uses in Iowa. Since 1948, the plaintiff operated a trailer park in Pottawattamie County. The park was outside the city limits until June 4, 1969, on which date all property involved was annexed to the City of Council Bluffs. Beginning July 1, 1961,

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136. *Id.* § 4-202(1).

137. *Id.* § 4-202(2).

138. *Id.* § 4-202(3).

139. 215 Iowa 1140, 245 N.W. 715 (1932). See *Weldon v. Zoning Bd.*, 250 N.W.2d 396 (Iowa 1977); *McJimsey v. City of Des Moines*, 231 Iowa 693, 2 N.W.2d 65 (1942).

140. 241 Iowa 1356, 44 N.W.2d 399 (1950).

141. 209 N.W.2d 50 (Iowa 1973).

142. 231 Iowa 693, 2 N.W.2d 65 (1942). See *Weldon v. Zoning Bd.*, 250 N.W.2d 396 (Iowa 1977).

143. 218 N.W.2d 645 (Iowa 1974).

the property was governed by the county zoning ordinance, and under both the county and city ordinances, the area was zoned for residential purposes with the trailer park continuing as a nonconforming use. In 1961, the plaintiff developed a comprehensive plan of development for the park and its future expansion. The development of the park from 1961 had been continuous. In 1961, the plaintiff, with permission from the proper state authorities, undertook development of his land and invested approximately \$75,000 to convert a swamp into a lagoon adjacent to the park. Additional work was done on a sewer plant at the cost of between \$45-47,000.

On March 23, 1971, plaintiff applied to the Board of Adjustment for modification of its nonconforming use and advised the Board of its intention to develop various additional lots as sites for mobile homes. The Board denied approval and the district court overturned the Board on the grounds that the Board acted in excess of its jurisdiction in denying the application.

The Iowa Supreme Court upheld the trial court's finding of illegality and its finding that the application was "not an enlargement or extension of a nonconforming use."<sup>144</sup> The court noted that "substantial construction on the entire tract had been commenced and substantial liability incurred and that the entire tract owned by [Trailer City was] a nonconforming use as a mobile home park at that time the tract become subject to city zoning regulations."<sup>145</sup> The court based its decision on the equities of the case rather than on any existing law.

It seems clear that in *Trailer City* the court abdicated its role of reviewing and applying the law of nonconforming uses in that this was clearly an expansion of the existing use in face of the fact that various additional lots were to be developed. This case may be an anomaly and hopefully it will be one which may have limited application due to its procedural nature.

In *Conley v. Warne*,<sup>146</sup> an adjoining landowner brought an equity action against his neighbor and a building contractor to enjoin the reconstruction of a dwelling, claiming it was a zoning violation. The trial court held that the plaintiff was estopped from complaining and denied injunctive relief. The Iowa Supreme Court affirmed on estoppel grounds but reversed insofar as the structure constituted a nonconforming use. The side yard requirements were not met and the length of the sundeck exceeded area requirements. The court held that such a nonconforming structure could not be expanded or enlarged.

Thus, it seems that the law of nonconforming uses in Iowa is in somewhat of a state of flux. On one hand it gives vent to the traditional

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144. *Trailer City, Inc. v. Board of Adjustment*, 218 N.W.2d 645, 648 (Iowa 1974).

145. *Id.*

146. 236 N.W.2d 682 (Iowa 1976).

view that such uses shall not be expanded, but in the case law various devices do allow for such expansion. Furthermore, there exists inconclusive but persuasive authority for the elimination of nonconforming uses through the amortization scheme.

#### D. Rezoning and Zoning Amendments

Zoning ordinances began in 1916 and became increasingly popular with the passage of the revised SZA in 1926. Changing trends in urbanization and suburban development as well as towards large scale land development have necessitated numerous amendments to existing zoning ordinances. The issue of rezoning or amendments to ordinances has two perspectives—the municipality may rezone or the landowner may seek to have his land rezoned.

Amendments and rezonings initiated by a municipality fall principally into the following categories:

- (a) The previously existing ordinance having been found inadequate in the face of conditions which have developed since its enactment and it is replaced in its entirety;
- (b) Where changing conditions affecting or with a tendency to affect a previously undeveloped area of the community but having little or no impact upon the settled portion thereof, it is necessary to amend the ordinance with respect to the previously undeveloped area;
- (c) Where a previously existing ordinance is amended only with respect to the uses of a particular area, comparatively small in size, or with respect to a particular piece of property—and an amendment of this type usually involving a claim of spot zoning.<sup>147</sup>

To these might also be added the situation where a developer has amassed an area of land (e.g., for use as a shopping center or industrial park) that may be too large for a variance, but where the city finds a zoning amendment or rezoning would be advantageous.

The second perspective of rezoning or amendment is where a particular landowner may, instead of seeking a variance, choose to seek rezoning of his land. In light of the developing trend towards large scale development, this presents a viable alternative for a landowner with a large tract of land.

In addition to this dual nature of the rezoning issue there are procedural and substantive aspects. Procedurally, an amendment or a rezoning is promulgated by the city council and must proceed as if the original zoning ordinance was being implemented, i.e., after notice and a public hearing.<sup>148</sup> Furthermore, after the adoption of a new zoning ordinance, the zoning commission may, from time to time, recommend zone changes to

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147. RATHKOPF, *supra* note 45, at 27-1 to 27-2.

148. IOWA CODE §§ 358A.6-7, 414.4-.5 (1977).

the council.<sup>149</sup> Changes to a zoning ordinance can be thwarted by a protest of twenty per cent of the owners of the area, in which case the change is not effective except by the favorable vote of at least three-fourths of the council members.<sup>150</sup>

The amendment to an ordinance must naturally be drawn within the limits of the zoning power delegated by the enabling legislation and must conform to a comprehensive plan already in existence or it must constitute a new plan. It must also be reasonable and avoid the danger of being classified as spot or piecemeal zoning.<sup>151</sup> However, the Iowa courts have set up a distinction between the original ordinance and a substantial amendment as opposed to minor rezoning or minor amendments.<sup>152</sup> It should be noted that the board of adjustment is not the appellate body for challenging rezoning classifications but rather the district court is the

149. *Id.* §§ 358A.8, 414.6. See C.C. Bowen v. Story County Bd. of Supervisors, 209 N.W.2d 569, 571 (Iowa 1973).

150. IOWA CODE §§ 358A.7, 414.5 (1977). The protest mechanism may serve to quell dissident landowners but it does not necessarily promote the most efficient and equitable utilization of land when popular sentiment can garner enough votes to disregard good planning. Naturally, this is stating the obvious to anyone who has appeared before a municipal body with an unpopular cause. *E.g.*, neighborhood reaction against low-income housing or a fast-food restaurant in a single family detached dwelling district will often defeat a rezoning proposal regardless of planning ramifications. The primary inquiry here is with whom does zoning and planning expertise allegedly reside? To carry this one step further—is zoning by referendum (popular opinion if you will) desirable from a planning standpoint? See *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); Freilich, *Editor's Comment, The Diminishing Role of the Federal Judiciary in Metropolitan Land Use Disputes*, 8 URBAN LAW. vii (1976); Comment, *Referendum Zoning: The State and Federal Issues and a Suggested Approach*, 60 MARQ. L. REV. 907 (1977). See also RATHKOFF *supra* note 45, at 28-1 to 28-16 (chapter on neighborhood protests).

151. See, *e.g.*, Comment, 30 IOWA L. REV. 135 (1944).

152. *Smith v. City of Fort Dodge*, 160 N.W.2d 492 (Iowa 1968). Landowners challenged the city's rezoning of a property from single family to multifamily for the purpose of erecting a nursing home. The challengers contended that the city did not comply with the notice and hearing requirement of Iowa Code §§ 373.16 (repealed 1975), 414.16 (1977). The supreme court rejected this challenge on the basis that Iowa Code §§ 373.19 (repealed 1975), 414.6 (1977), was restricted to the original comprehensive zoning ordinance and to "substantial" amendments. The latter were defined as a "general modification of the zoning districts or regulations in that law, not isolated, minor, or individual changes such as appear herein." *Smith v. City of Fort Dodge*, 160 N.W.2d 492, 497 (Iowa 1968).

Even accepting the court's dichotomy, for which there is no expressed support in Iowa Code §§ 414.4, 414.5, 414.6 (1977), which when read together require a notice and hearing prior to a zone change, the relief granted in *Smith* is arguably a variance for which a public hearing before the board of adjustment is required in Iowa Code § 414.9 (1977).

The seemingly erroneous belief espoused in *Smith* is supported in dictum in *Velie Outdoor Advertising of Sioux City, Inc. v. City of Sioux City*, 252 N.W.2d 408, 410 (Iowa 1977) (the ultimate decision was that a sign ordinance was not subject to comprehensive plan amendment requirements).

In fact, the failure of a city to provide notice or hold hearings prior to the adoption of a zoning ordinance amendment makes the amendment void. *B & H Investments, Inc. v. City of Coralville*, 209 N.W.2d 115 (Iowa 1973).

proper body.<sup>153</sup> These procedural requirements are mandatory and jurisdictional without which the rezoning is invalid.

Substantively, courts will examine surrounding circumstances in ascertaining the reasonableness of any ordinance. Case law provides the criteria which influence court decisions in this area. An Illinois case is instructive in this regard.<sup>154</sup> In *LaSalle*, the courts succinctly set forth the factors to be considered in reviewing the reasonableness of an ordinance. These apply to the validity of a ordinance when initially enacted as well as to the validity of a rezoning or an amendment to an ordinance:

- (1) The existing uses and zoning of nearby property;
- (2) The reduction in property value resulting from the particular zoning restriction;
- (3) The extent to which the destruction of property values of the site promotes the general health, safety and welfare of the public;
- (4) The relative gain to the public as compared to the hardship imposed upon the individual property owner;
- (5) The suitability of the particular property for the zone purposes;
- (6) The length of time the property has been vacant, as zoned, considered in the context of land development in the area where the property is located.<sup>155</sup>

This type of showing is necessary before a landowner can attempt to rezone his land successfully. Naturally, the procedural requirements must be followed and the landowner must appear before the council and ask the council to initiate the procedure or to have the zoning commission or planning authority study and recommend that the area be rezoned.

In *F. H. Uelner Precision T. & D., Inc. v. City of Dubuque*,<sup>156</sup> the plaintiff sought to have the rezoning of its land from business or light industry to multi-family declared invalid. Previously the premises had been zoned for business or light industrial use, but the city in 1965 decided to formulate a general development plan and pursuant to that plan the area

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153. The court in *Boomhower v. Cerro Gordo Co. Bd. of Adjustment*, 163 N.W.2d 75, 77 (Iowa 1968), a case which dealt with the county ordinance, stated:

Amendment of a zoning ordinance is a legislative function placed in the board of supervisors. The board of adjustment which is granted quasi-judicial and administrative functions was not given and should not have veto power over the legislative body. The board of adjustment is established to prevent injustice being done to those persons not fitting within the zoning ordinances as adopted by the board of supervisors. It is to help make workable the ordinances and not to sit as a judicial body to determine the propriety of their adoption. Parties who claim such ordinance or amendment thereto is arbitrary or capricious should seek relief in the courts by petition for a writ of certiorari.

*Id.* See also *Anderson v. Jester*, 206 Iowa 452, 221 N.W. 354 (1928).

154. *LaSalle Nat'l Bank v. Village of Harwood Heights*, 2 Ill. App. 3d 1040, 278 N.E.2d 114 (1971).

155. *Id.* at 1045-46, 278 N.E.2d at 117-18.

156. 190 N.W.2d 465 (Iowa 1971).



was designated as multi-family. The residents in that area then petitioned for a rezoning to multi-family which was passed by the city council. The plaintiff alleged that property values decreased and that nonconforming uses were created which prevented any substantial repairs or expansions. The district court held the ordinance invalid.

The case involves the role of zoning and the fulfillment of long-range city planning. Traditionally, zoning has been employed as a holding action to prevent deterioration of districts, and amendments have usually rezoned districts "down" rather than "up". In the present instance the rezoning was up, not down. It was a holding action as to the largely residential 12 blocks, recommended for inclusion by the Commission to prevent further incursion of commerce and industry. But the rezoning cannot be expected to stabilize six and one-half blocks already having businesses and industries. More likely those structures will decline. Unquestionably the rezoning was a proper use of zoning power to stabilize portions largely residential. That portion did not develop industrially because of changes and transportation methods. . . . Our problem relates to the portion which did in fact develop commercially and industrially as originally hoped.<sup>157</sup>

The court went on to note that while residential zoning may have a beneficial effect for a portion of the tract, it did not facilitate good planning in terms of the commercial tract.

But the northern portion of the area involving several businesses and light industries in proximity to each other presents a different case. Some of these firms have been there many years. A number of the properties represent very substantial investments. None of the activities of the firms is shown to be offensive—other than the fact itself of being commercial or industrial. The founders established those firms when the area was unzoned or in reliance on then existing zoning. Rezoning will work hardship. Moreover, rezoning will not likely stabilize that portion of the area but, if anything, will have a deteriorating influence. We do not have here a relatively few or isolated nonconforming uses compared to the area as a whole. . . . Rather, the north part of this area is quite substantially commercial and industrial. On the balancing the possible public good against the harm to plaintiffs, we arrive at the conclusion reached by the commission and the trial court. We hold the rezoning unreasonable as applied to plaintiffs' property.<sup>158</sup>

Relative to the implementation of the master plan the court said that zoning may not be used to achieve this end. A technique suggested was condemnation.

This case presents a classic example of the interrelatedness of zoning and planning and is an example of the limited use of certain zoning tools, particularly rezoning. The city's desire to see this tract changed from business or light industry to multi-family could not be accomplished if the

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157. *F.H. Uelner Precision T. & D., Inc. v. City of Dubuque*, 190 N.W.2d 465, 468 (Iowa 1971) (citations omitted).

158. *Id.* at 469.

surrounding circumstances did not warrant it, especially if the landowner is adversely affected economically.

One substantive argument often used to invalidate a zoning amendment is that the ordinance constitutes piecemeal or spot zoning and therefore, is not in accordance with a comprehensive plan. For example, in *Keller v. City of Council Bluffs*,<sup>159</sup> the property was rezoned to permit a nursing home in an island of single-family residences. The contention was that this was spot zoning and illegal insofar as a small tract of land was involved.<sup>160</sup>

The *Keller* court concluded that because of changed circumstances the amendment was necessary.

So if the only reasonable use of the property is seriously affected by the zoning ordinance, the owner should be entitled to relief, and, in addition, if the legislative body under any reasonable interpretation of the facts could say there was such an interference with that use, its action could not be held arbitrary, unreasonable and discriminatory.<sup>161</sup>

However, this reading of the *Keller* case seems to mistake the true purpose of having a comprehensive and workable plan. Here the municipality took a small tract of land and rezoned it so as to validate what was an inconsistent use of property. If in fact this is a nonconforming use, then so be it. But to legitimize it presents a possible inconsistency in that neighborhood.

The court can be criticized for allowing the owner of the property to make the argument that since the land was an inconsistent use that it should be given relief. The only relief which the landowner is entitled to under good zoning and planning theory is to be able to continue the nonconformity at least long enough to recoup or make an adequate return on his investment before property is further restricted. Rezoning should not be used to legitimize an incompatible use. Rather, rezoning should be utilized to foster good planning in a developing community.

The types of conditions that will almost assuredly sustain a rezoning were exemplified in *Jaffe v. City of Davenport*<sup>162</sup> where the property was rezoned from residential to commercial in light of: rapid and intense development along heavily traveled thoroughfares; an inability to sell the properties as residential; the need for commercial users in that area;

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159. 246 Iowa 202, 66 N.W.2d 113 (1954).

160. See notes 108 to 111 and accompanying text *supra* where the case is more fully described relative to spot zoning.

161. *Keller v. City of Council Bluffs*, 246 Iowa 202, 210, 66 N.W.2d 113, 118 (1954); see *Hermann v. City of Des Moines*, 250 Iowa 1281, 1284-85, 97 N.W.2d 893, 895 (1959) wherein the court discussed one criteria to be utilized to validate a zone change: "Zoning ordinances may be amended at any time conditions warrant, and the action of the zoning authorities will not be interfered with if the question is fairly debatable." *Id.* See *Hanna v. Rathje*, 171 N.W.2d 876 (Iowa 1969) (conditions warranted rezoning to permit mobile home park).

162. 179 N.W.2d 554 (Iowa 1970).

declining opposition to the zoning change; the development of the rest of the area to commercial; and testimony that this was the highest and best use of the property.<sup>163</sup>

Land use litigation, like any trial determination, depends upon an effective marshalling of facts. However, the case law is often devoid of a delineation of those factors that a court will examine in granting or denying requested relief. In the area of rezoning as well as other land use areas, it is necessary to examine the case law to determine what was persuasive to a particular court. Rezoning and amendments to the ordinance are useful tools but it is imperative that they are utilized with proper forethought and a formulated plan.

### E. Special Exceptions

Another power given to the board of adjustment by both the SZEA and the enabling legislation is the power to hear and decide special exceptions to the terms of the ordinance upon which the board is required to pass.<sup>164</sup> Under this authority, the board may issue a special exception or special use permit for those uses specified in the ordinance as special or conditional if the conditions are satisfied. Thus, a special exception is in fact a permitted use with certain additional conditions attached.<sup>165</sup> The special exception is a device designed to facilitate the creation of particular uses which have characteristics making it necessary to set particular conditions. For example, churches, schools and hospitals may have special needs that must be satisfied before they can comfortably fit into another district. These are distinct from variances in that once you can show that the conditions have been satisfied, you are entitled as a matter of right to the special exception and there is no required showing of unnecessary hardship. This likewise differs from a rezoning in that the

163. *Jaffe v. City of Davenport*, 179 N.W.2d 554, 557 (Iowa 1970). See *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739 (Iowa 1969) (rezoning from residential to neighborhood shopping district valid). But see *Keppy v. Ehlers*, 253 Iowa 1021, 115 N.W.2d 198 (1962) (rezoning from rural to light industry invalid).

164. SZEA, *supra* note 44, at § 7; IOWA CODE §§ 414.12(2) and 358A.15(2) (1977).

165. 3 ANDERSON, *supra* note 45, §§ 15.01-32. Professor Anderson distinguishes special exceptions from special permits. Basically, he characterizes the special exception as a permit that the board of adjustment must grant as a matter of right if it finds the facts to so warrant. The board in the special exception category utilizes no discretion. The special permit, however, requires the board of adjustment to exercise administrative judgment guided by rather broad standards. *Id.* at § 15.03. Neither Professor Rathkopf nor Professor Hagman make this distinction. 2 RATHKOPF, *supra* note 45, at §§ 54.1-52; HAGMAN, *supra* note 19, at §§ 113-15.

For the most part special exceptions, special use permits and conditional use permits have a similar function: they each allow a landowner to make a use of his property as a matter of right without the need for showing unnecessary hardship as is required in the variance situation. These terms will be used interchangeably here.

underlying zoning is established and there is no need for a zone change. Flexibility is one of the attractive aspects of special use permits.<sup>166</sup>

Procedurally, it is the board of adjustment who must hear and decide the special use permit case. In *Depue v. City of Clinton*,<sup>167</sup> the Iowa Supreme Court held invalid the city council's grant of a special use permit, finding this act to be in derogation of the statute granting this authority to the board of adjustment. For relief, the appropriate action from the city council is a rezoning which in fact had been attempted in the *Depue* case and was denied. The city, however, allocated jurisdiction over special use permits to the council and special exceptions to the board. The court disregarded this distinction and held that it is the board of adjustment who has original jurisdiction:

The foregoing cases all indicate an interpretive history for Chapter 414 which would require the city to place what we have called the quasi judicial function of granting special exceptions in the board of adjustments. This interpretation is buttressed by legislative provisions for review of the board's action by the courts not by the council.<sup>168</sup>

Additionally, in *City of Des Moines v. Lohner*,<sup>169</sup> the city, through its ordinance, gave the city council the authority to make determinations on special uses. The court again held that such was impermissible. Nor can the power to grant a special use permit be delegated to the zoning commission.<sup>170</sup>

In order to have a valid special use ordinance, it is necessary that certain standards are set to guide administrative actions, although the standards need not be so specific as to preclude all discretion.<sup>171</sup> In Iowa, the courts have generally permitted the board of adjustment to exercise broad discretion in making those decisions.<sup>172</sup> However, in *Chicago, R.I. &*

166. HAGMAN, *supra* note 19, at § 113. This type of zoning is successfully used in connection with planned unit developments and cluster developments.

167. 160 N.W.2d 860 (Iowa 1968).

168. *Depue v. City of Clinton*, 160 N.W.2d 860, 863 (Iowa 1968).

169. 168 N.W.2d 779 (Iowa 1969).

170. See *Buchholz v. Board of Adjustment*, 199 N.W.2d 73 (Iowa 1972).

171. See, e.g., *Kotrich v. County of Du Page*, 19 Ill. 2d 181, 166 N.E.2d 601, *appeal dismissed*, 364 U.S. 475 (1960); Comment, *Zoning—Changes in Zoning Restrictions—Validity of the "Special Use" Technique*, 46 IOWA L. REV. 479 (1960). See also Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60.

172. In *Scott v. City of Waterloo*, 223 Iowa 1169, 274 N.W. 897 (1937), plaintiffs challenged the issuance of a building permit for a filling station in a restricted residential zone. The ordinance establishing the zone simply provided that "no buildings . . . except residences, schoolhouses, churches and other similar structures" could be erected in that area "without first procuring from the city council a permit." This is a prototype special exception case, but for granting unfettered authority to the city council rather than the board of adjustment.

Although there were no standards to guide the council, the court held the issuance of the permit to be valid. "The statute and ordinance expressly authorized the granting of such permits upon such reasonable rules and regulations as may be provided. The fact that no

*P. R. Co. v. Liddle*,<sup>173</sup> the Iowa Supreme Court invalidated an unlimited grant of power to the Board of Adjustment pursuant to the zoning statute.

The plaintiff in the *Liddle* case owned property classified as M-2, heavy industrial, on which it sought to erect stockyards with twenty pens for the care and feeding of livestock which was to be loaded and transported on its trains. The ordinance specifically stated that the premises within that district could be used for any purposes including stockyards but that no permit should be issued for stockyards "until and unless the location of such use shall have been authorized by the Board after report by the Fire Prevention Bureau of the fire department and the health department."<sup>174</sup> The plaintiffs alleged that the denial of the permit for the stockyard was arbitrary, capricious and unreasonable insofar as the ordinance delegated to the board the power to determine whether a stockyard permit should issue without fixing any standards to guide or limit the board in making that determination. The court agreed with the plaintiff's contentions and in interpreting Chapter 414, noted that the board of adjustment may very well be delegated power to issue these exceptions, however:

We can find in the state statute no guides or standards by which the board is to act in *exercising such power as is delegated to it by Part XIV of the zoning ordinance*. The ordinance itself, insofar as it is contained in the record (presumably all that is here pertinent), provides that authorization by the board of a permit to occupy stockyards shall come after report by the Fire Prevention Bureau of the fire department and the health department. No duty is placed on the board to abide by any recommendations contained in these reports. This provision can hardly be said to provide adequate standards to the board's exercise of power *under Part XIV*. And we find in the ordinance no other guides or standards for the board's exercise of this particular power.

We must conclude the ordinance confers upon the board virtually unlimited power, conditioned only upon receiving a report from the Fire Prevention Bureau and the health department unaccompanied by adequate guides or standards, to authorize or not authorize a permit for stockyards in an M-2 district. So far as the statutes or the ordinance provides, the board may arbitrarily deny such a permit for a good reason, a bad reason, or no reason at all. Such a grant of virtually unlimited power is invalid and offends against the Constitutional provisions plaintiff has invoked relating to due process and equal protection of the law.<sup>175</sup>

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rules and regulations are contained in this particular ordinance does not invalidate it." *Scott v. City of Waterloo*, 223 Iowa 1169, 1173, 274 N.W. 897, 900 (1937).

*Accord*, *Marquis v. City of Waterloo*, 210 Iowa 439, 228 N.W. 870 (1930). Note that the *Scott* and *Marquis* cases deal with the restricted residential district law, formerly Iowa Code ch. 415 (repealed 1972), rather than the zoning law, IOWA CODE ch. 414 (1977).

173. 253 Iowa 402, 112 N.W.2d 852 (1962).

174. *Chicago, R.I. & P.R. Co. v. Liddle*, 253 Iowa 402, 404 and 405; 112 N.W.2d 852, 853 (1962).

175. *Id.* at 407-08, 112 N.W.2d at 855.



Thus, the lack of standards or guidelines resulted in a finding of an unconstitutional delegation to the board of adjustment of a legislative function.

It seems clear that the objective of a special use permit is to specifically delineate those situations in which particular uses can be placed within a given district so that they will not be incompatible with surrounding uses and will fit into the overall plan. However, when standards grant a great amount of discretion to the board, the special use permit can be easily abused as illustrated by *Liddle*. This device can also be used as an exclusionary weapon; e.g., no apartment buildings unless the board of adjustment finds the granting of a special permit for such will promote the general welfare. The question is fairly raised—what then constitutes adequate standards.

In *Schultz v. Board of Adjustment*,<sup>176</sup> these standards were held to be sufficient and the conditions were held to be permissible:

The Board of Adjustment in reviewing an application for a conditional use may consider the most appropriate use of the land; the conservation and stabilization of the value of property; adequate open space for light and air; concentration of population; congestion of public streets; the promotion of the public safety, morale, health, convenience, and comfort; and the general welfare of the persons residing or working in the neighborhood of such use. In addition to the general requirements of this ordinance, in granting a conditional use, the Board of Adjustment may recommend conditions be attached which it finds are necessary to carry out the purpose of this ordinance. These conditions may increase the required lot or yard, control the location and number of vehicular access points to the property, limit the number of signs, limit coverage or height of buildings because of obstruction to view and reduction of light and air to adjacent property, and require screening and landscaping where necessary to reduce noise and glare and maintain the property in a character in keeping with the surrounding area.<sup>177</sup>

This merely reiterates the general objectives of zoning. If these requirements were imposed on the apartment example, a municipality could easily exclude such use altogether either because the proposal does not satisfy the standards or by setting conditions that are financially impractical to meet. Herein lies the danger of inadequate standards. Thus, the grant of discretion argument cuts two ways. On the one hand, the stan-

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176. 258 Iowa 804, 139 N.W.2d 448 (1966). In *Schultz* the plaintiff attacked the county board's grant of a conditional use permit for a sanitary land fill in a general manufacturing district on the ground that it was an unconstitutional delegation of authority. The court nevertheless upheld the standards.

177. *Schultz v. Board of Adjustment*, 258 Iowa 804, 809, 139 N.W.2d 448, 451 (1966) (note the similarities between this standard and Iowa Code § 358A.5 (1977)). See *Town of Grimes v. Board of Adjustment*, 243 N.W.2d 625 (Iowa 1976) (grant of special use permit for sanitary landfill valid); *Vogelaar v. Polk Co. Zoning Bd. of Adjustment*, 188 N.W.2d 860 (Iowa 1971) (landfill satisfied special use requirements).

dards must be sufficient enough that the developer can meet them; on the other, they must be flexible enough to give to the municipality some leeway in prescribing uses and conditions before the grant of a special permit. However, the grant of authority must not be so open-ended as to give the Board the power to completely exclude. Another example of the exclusionary ramifications of the conditional use or special exception is the setting of conditions that are impossible to met, e.g., no adult bookstore within 1000 yards of any school—in a town with no such dimension.

*Johnson v. Board of Adjustment*<sup>178</sup> is a novel case in that it attacks the device of the special exception permit as constituting spot zoning. In *Johnson*, owners of property near a proposed mortuary sought to invalidate the board of adjustment's issuance of a special use permit for the mortuary's construction. The plaintiffs argued, *inter alia*, inadequacy of the record below; inadequacy of trial judge's finding; that the zoning map and the zoning ordinance were inconsistent; that the landowner failed to satisfy the conditions of the ordinance; that the mortuary was a nuisance; and that the special exception constituted spot zoning. The court, in rejecting the spot zoning argument, noted that the classification of a use as a special exception is a legislative determination that it is a part of the comprehensive plan<sup>179</sup> and thus a permitted use.

In discussing special exceptions, it must again be emphasized that they are permitted uses (presumably in accordance with a comprehensive plan) and that they must be administered by reasonable standards. That special exceptions are permitted uses is a conclusion that is reached in the *Johnson* case. However, these exceptions could be invalidated by successfully challenging the ordinance as a whole.

#### F. Variances

It can be safely said that the heart of the local land use control system is the variance mechanism. Basically, variances are granted for relief from use restrictions and relief from bulk or structural restrictions.<sup>180</sup> The enabling legislation sets out the standard to be applied: that property owners should not be restricted to the point that an undue hardship is created by making it difficult or impossible to utilize their property.<sup>181</sup> A variance is granted in those cases where the results are not contrary to the public interest, or where literal enforcement of zoning provisions would result in an unnecessary hardship. A variance should be

178. 239 N.W.2d 873 (Iowa 1976).

179. *Johnson v. Board of Adjustment*, 239 N.W.2d 873, 891 (Iowa 1976).

180. See ANDERSON, *supra* note 45, at §§ 18.01-.84; HAGMAN, *supra* note 19, at § 106; 2 RATHKOFF, *supra* note 45, at 45-1 to 45-29.

181. IOWA CODE §§ 414.12(3), 358A.15(3) (1977).

granted in the spirit of the ordinance and should result in substantial justice being done.

From a planning perspective, the variance procedure is designed to promote equity. It should be employed sparingly since once the plan is set, no matter how flexible, alterations of that plan are inimical to it. However desirable it is to minimize the number of variances granted, it is apparent from board of adjustment meetings how loosely the board adheres to provisions for the grant or denial of such.

The board of adjustment for various reasons (e.g., the nature of the board, the nature of the proceedings, lack of expertise, a lack of planning input) has not been judged to be a useful mechanism.<sup>183</sup> These boards, either due to their lack of expertise, pressure of the case load or political pressure, tend to ignore universal standards. Consequently, the procedure is misused and abused at the local level.

However, once a board determination on a variance request is challenged in a trial court, the board's action is usually sustained due to its wide discretion. This illustrates even more of a reason for re-evaluating board procedures in order to further land use objectives. Arguably, the standard of judicial review could be expanded, having the court closely scrutinize the board's findings, in order to achieve these objectives. Alternatively, criteria to guide the board could be defined by legislation.

In Iowa, the constitutionality of municipal zoning was upheld in *Anderson v. Jester*.<sup>184</sup> This issue arose in the context of a variance application. In *Deardorf v. Board of Adjustment*,<sup>185</sup> the board of adjustment granted a variance to the landowner for the construction of an apartment building in an R-3 multi-family district in violation of certain bulk requirements. The neighboring landowners challenged the board's action as illegal.

The court noted that the burden was on the applicant to show that the enforcement of the zoning ordinance would result in an unnecessary hardship and that a variance should be granted. The plaintiff in the court action, however, must show the board's granting of the variance to be illegal. The court on de novo review found no evidence to support the showing of unnecessary hardship by the applicant and took occasion to define this requirement:

[B]efore a variance may be granted on the ground of unnecessary hardship it must be shown: (1) the land in question cannot yield a reasonable return

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182. A popular book on zoning declares that this is really a game. BABCOCK, *supra* note 64.

183. Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101 (1962).

184. 206 Iowa 452, 221 N.W. 354 (1928).

185. 254 Iowa 380, 118 N.W.2d 78 (1962).

if used only for a purpose allowed in that zone; (2) the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) the use to be authorized by the variance will not alter the essential character of the locality.<sup>186</sup>

The court emphasized that power to grant a variance should be exercised sparingly, with great caution and only in exceptional circumstances.

Other cases in Iowa do not further develop the law of granting or denying variances. While *Deardorf* sets out three standards to be met, there is no indication of the actual showings that must be made to obtain a variance. In fact, all the cases deal with an inability to make a showing of unnecessary hardship; thus, the case law is lacking in delineating those factors which will satisfy the unnecessary hardship requirement.

An extreme and rigorous test for undue hardship applied by the courts would facilitate the function of variances, i.e., to provide relief only in the most exceptional circumstances. Courts generally have rigorously enforced statutory criteria of hardship. However, empirical work in this field indicates that only a small percentage of cases where variances are granted come before courts. Additionally, many boards of adjustment ignore the statutory criterion of hardship because its members do not find it to be wise or justifiable.<sup>187</sup>

The Model Land Development Code (MLDC) proposes different standards for bulk variances and use variances. For bulk variances, relief will be granted if compliance with the ordinance would cause practical difficulties due to the physical characteristics or if it would significantly

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186. *Deardorf v. Board of Adjustment*, 254 Iowa 380, 386, 118 N.W.2d 78, 81 (1962). The court rejected the argument that the land with the variance would be more profitable. *Id.* at 389, 118 N.W.2d at 83. See *Board of Adjustment v. Ruble*, 193 N.W.2d 497 (Iowa 1972); *Zimmerman v. O'Meara*, 215 Iowa 1140, 245 N.W. 715 (1932).

187. See, D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 106 (1971); Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969); Comment, *The General Welfare, Welfare Economics, and Zoning Variance*, 38 S. CAL. L. REV. 548 (1965). One author suggests a rationale for the misuse of variances.

The very fact that boards grant variances so liberally notwithstanding thirty years of scholarly handwriting about it may suggest that there is a felt need in the practical world for parcel land-use decision making. See, e.g., Sussna, "Zoning Boards in Theory and Practice," 37 Land Econ. 82 (1961). The fault may lie in the notion that land-use decisions can be made in sweeping terms on a map with the conventional district lines and categories. The need may be for an agency capable of making individual decisions when the owner of a parcel of land proposes to develop it, either from scratch or by way of converting an existent use to a new one. In a crude way, therefore, the boards may be injecting a necessary increment of contemporariness and flexibility into an otherwise static system. The real question is how to preserve this parcel by parcel flexible approach but channel its potential arbitrariness into a matrix of norms by which the individual decisions can be measured in a rational and constructive way.

E. ROBERTS, LAND USE PLANNING 3-116 (2d ed. 1975).

lessen the profit available to the landowner without causing substantial harm to neighbors.<sup>188</sup> The MLDC, however, treats use variances more stringently. Use variances will only be granted for land which is not reasonably capable of economic use. Further, the variance must not interfere with the enjoyment of other land and not differ from the general development more than is reasonably necessary to permit some economic use of the land. A use variance will not be granted if it is found that the hardship was created by the owner. The intended effect is to have the appropriate agency apply a general standard of what is reasonably capable of economic use in light of all circumstances—including the value at which the seller acquired the land and at which he sold it to the applicant. The intended result is to avoid situations where imposition of regulations would be confiscatory or arbitrary.<sup>189</sup>

The purpose of a variance procedure is to protect the landowner from confiscatory actions by a governing body. If properly utilized, the problems engendered by Euclidian zoning should not arise; however, past experience has indicated the contrary. Therefore, a mechanism must be created to insure that recognizable standards are developed and followed when granting or denying a variance.

#### G. Subdivision Controls

Land subdivision controls, instead of looking at large scale or regional planning problems, concentrate on local development.<sup>190</sup> It is through this mechanism that a municipality can evaluate a project and determine how that project or similar projects will develop. With effective subdivision regulation and the trend towards private development of large areas, a municipality is given an opportunity to fashion the manner in which facilities will be utilized at the lowest possible cost. The municipality is also given the chance to prescribe regulations as to the design and layout of subdivisions. Additionally, the municipality is allowed to more efficiently allocate facilities and services and make determinations as to the timing and sequence of growth. Growth control is subject to the caveat that growth can neither be unreasonably hampered nor can certain uses or users be completely excluded.<sup>191</sup>

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188. MLDC, *supra* note 42, at § 2-202.

189. The emphasis on economic analysis has at least one meritorious characteristic: relative ease of ascertainment as compared to standards of "reasonableness" or "general welfare."

190. One method of regulating subdivisions is through recording statutes, which is the method which exists in Iowa. See IOWA CODE ch. 409 (1971). See also Cunningham, *supra* note 8, at 415-437; Note, *Subdivision Regulations in Iowa*, 54 IOWA L. REV. 1121 (1969).

191. See, e.g., *Construction Industry Assoc. v. City of Petaluma*, 375 F. Supp. 574, 586 (N.D. Cal. 1974), *rev'd*, 552 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, *appeal dismissed*, 409 U.S. 1003 (1972).



Due to the trend in the private sector to develop large areas, it is necessary that a municipality become involved in the subdivision process in order to make the most efficient economic use of its resources, facilities and services. Poor subdivision development can easily result in a depreciation of property values as well as increased service costs which ultimately result in higher property taxes. Ideally, a municipality and the private developer will cooperate so their mutual interest can be effectively satisfied.<sup>192</sup> The municipality's interests are in keeping an attractive community and taxes reasonable, *i.e.*, high enough for municipal purposes but palatable to the citizenry. If taxes become prohibitive for the landowner, certain land uses fall into disrepair resulting in a blighted area. A municipality is additionally interested in providing services and facilities as efficiently as possible. The developer is interested in a low development cost in order to keep his property at a marketable price. Once subdivision requirements are installed, due to their permanent nature, any change is costly if not prohibitive.

Thus, planning, zoning and subdivision functions should interrelate in order that the most efficient land use mechanism can be developed.

Participation of the planning commission in the formulation of both the zoning and subdivision regulation is calculated to insure considerable degree of conformity between them and with the master plan (if any). . . .

"The standards in the subdivision ordinance with respect to minimal lot sizes and lot area requirements shall be identical with the provisions of the zoning ordinance. Where a zoning ordinance contains no such provisions or where there is not such ordinance, the standards including minimum lot sizes and lot area requirements shall be specified in the subdivision ordinance." N.J. Stat. Ann. § 40.55-1.15 (Supp. 1963). Thus, the agency which has the power to regulate land subdivision becomes, in effect, the initial enforcement agency with respect to minimum lot size and area zoning regulations or in the unusual case where there is no zoning ordinance or the zoning ordinance contains no such regulations—the zoning agency.<sup>193</sup>

Subdivision regulation need not rigidly fix area and bulk requirements. In fact, subdivision ordinances can be given great flexibility by vesting the planning authority or zoning commission with the power to vary bulk and density restrictions within the zoning regulations for subdivisions. The average residential density must be maintained, taking the entire area of the subdivided tract into account. Such divisions are referred to as

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192. One recurring theme in dealing with land use controls is that without proper planning, administrative costs can become excessive to the point where the developer can no longer effectively pass through these costs to the purchaser. When this occurs everyone loses: the consumer acquires an unsatisfactory product; the developer's profit is reduced (or he incurs losses); and the municipality does not maximize its tax base due to a poor quality development. The immediate ripple effect is that the rest of the residences must make up the deficit.

193. Cunningham, *supra* note 8, at 435-36.

cluster zones or P.U.D.'s and are designed to permit development at a somewhat higher density than otherwise allowed per single-lot development. Such schemes will provide sizeable areas of common open space.<sup>194</sup>

Normally, it is the planning agency that drafts and implements the subdivision ordinances. Although such procedure existed in Iowa under Chapter 373, since its repeal, a serious gap in administration may currently exist.<sup>195</sup> Nevertheless, basic statutory authority for the regulation of subdivision is found in the state platting act<sup>196</sup> which is directed to the subdivider and requires subdivision when the land is divided into three or more parts.

A municipality is given the authority to require the subdivider to conform streets with existing streets and blocks, and to install sidewalks, paving, sewers, water, gas and electric utilities before a plat is approved.<sup>197</sup> The developer may also be required, in lieu of immediate installation, to post a surety bond to secure the construction or installation of improvements within a fixed time.<sup>198</sup> Thus, a municipality has extensive authority over the subdivider and may, in fact, control the design and layout of a particular plat for the purpose of insuring orderly growth and development.<sup>199</sup>

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194. See Henke, *Planned Unit Developments and Land Use Intensity*, 114 U. PA. L. REV. 65 (1960); Goldston & Scherer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959); see also *Chrinko v. South Brunswick Township Planning Bd.*, 77 N.J. Super. 594, 187 A.2d 221 (1963).

195. IOWA CODE ch. 373 (1974) (repealed effective July 1, 1975). The repeal of chapter 373 does not mean that a city may not adopt a planning commission. However, there is less incentive for a city to do so.

196. IOWA CODE ch. 409 (1977).

197. IOWA CODE §§ 409.4-5 (1977).

198. *Id.* § 409.14.

199. See generally Freilich & Levi, *Model Regulations for the Control of Land Subdivision*, 36 MO. L. REV. 1 (1971). The authors view subdivision controls as a flexible tool:

The traditional method for controlling urban development has been "Euclidean" zoning. But zoning is based upon the supposition that it is possible, by careful intellectual effort, to determine optimum land use long before actual development. The use of subdivision regulations allows consideration of an application for development by an administrative body which exercises *ad hoc* judgments and based on standards in pre-stated regulations. Each application is handled as a unique development. The procedure for subdivision approval is comparable to modern techniques of flexible zoning-floating zones, planned unit developments, special permits, incentive zoning and cluster developments—in that an administrative agency (the Planning Commission) renders determinations when each application is filled.

The use of subdivision regulations is more relevant to today's problems than is zoning. The fast-moving shift of population to sprawling suburban environments threatens the utilization of every existing acre of land without adequate provisions for community facilities and no consideration for preservation of woodlands, streams and fresh air. Development has become so rapid in many areas that there is on longer time to adopt fixed and permanent master plans which will regulate in predetermined fashion every step of a community's development. The rapid pace of

While subdivision controls are held to be within the police power of the state,<sup>200</sup> the extent to which a municipality may require a subdivider to develop his land raises the issue of whether the requirements are unconstitutionally burdensome and thus constituting a taking.<sup>201</sup>

The simple requirement of having the streets graded in a certain fashion or certain design layouts have been accepted generally. Municipalities, through their subdivision ordinances, have also required the developer to make monetary contributions to the school system, or for parks, or other facilities in excess of the needs of the subdivision. Such compulsory dedications for off-site controls run a greater risk of being ruled unconstitutional.

The law of subdivision controls in Iowa could benefit by structuring it to be more than a recording device. This could be accomplished by encouraging or requiring the establishment of a planning board to develop and administer subdivision controls. Such a law might also allow the board to exercise authority over site plans, thus fostering flexibility in municipal planning.

#### H. Judicial Review

Appeals from the board of adjustment are explicitly regulated by statute and are taken to the district court by writ of certiorari.<sup>202</sup> Administrative remedies must be exhausted if the appeal concerns the application of a zoning ordinance to the complainant's property.<sup>203</sup> An or-

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modern urbanization requires flexible decision-making tied to rational planning policies.

The technique of subdivision regulations gives the governing unit one of its most potent means to coordinate the demands for new development with the demands for essential facilities. Full use of subdivision regulations also provides a means to put into operation the environmental and aesthetic considerations which are today so much a part of the American man's concept of "the good life."

*Id.* at 3-4 (footnotes omitted). Included in the article are detailed regulations. *Id.* at 31-76. See also Landau, *Urban Concentration and Land Exactions For Recreational Use: Some Constitutional Problems in Mandatory Dedication Ordinances in Iowa*, 22 *DRAKE L. REV.* 71 (1972); R. FREILICH & P. LEVI, *MODEL SUBDIVISION REGULATIONS* (1975).

200. See Repts, *Control of Land Subdivision by Municipal Planning Boards*, 40 *CORNELL L. REV.* 258, 280 (1955); Note, *Platting, Planning & Protection—A Summary of Subdivision Statutes*, 36 *N.Y.U.L. REV.* 1205 (1961). See also *STANDARD ENABLING PLANNING ACT* §§ 2, 12, 13 (1928). See *Mansfield & Swett, Inc. v. Town of West Orange*, 120 *N.J.L.* 145, \_\_\_, 198 *A.* 225, 229 (1938) (this case is also notable for its discussion of the different functions of the planning board and the board of adjustment).

201. See Johnston, *The Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 *CORNELL L. REV.* 871, 873 (1967); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 *YALE L.J.* 119 (1964). See also *Divan Builders Inc. v. Planning Bd.*, 66 *N.J.* 582, 334 *A.2d* 30 (1975); *Jenad, Inc. v. Village of Scarsdale*, 18 *N.Y.2d* 78, 218 *N.E.2d* 673, 271 *N.Y.S.2d* 955 (1966); *Subdivision Note*, *supra* note 28, 1126-27.

202. *IOWA CODE* §§ 414.15, 358A.18 (1977).

203. See, e.g., *Nectow v. City of Cambridge*, 277 *U.S.* 183 (1928).

dinance may be attacked on its face as being unconstitutional directly in district court without exhausting administrative remedies.<sup>204</sup>

Once jurisdiction of the district court is invoked, the burden is on the challenger to prove that the ordinance, which is presumptively valid, is unconstitutional—either as applied or on its face.<sup>205</sup> There exists an increasing body of authority that the burden of proof is shifting to the municipality in that it must justify and substantiate the reasons why an owner of land has been denied the use to which he seeks to put his property.<sup>206</sup> In Iowa, one who challenges a zoning ordinance has the burden of asserting its invalidity and must prove that it is unreasonable, arbitrary, capricious or discriminatory.<sup>207</sup> This generally occurs when the ordinance is attacked as being unconstitutional and in conflict with the due process or equal protection clauses.<sup>208</sup> The test of arbitrariness or unreasonableness is whether the means used have any substantial relationship to public health, safety or general welfare,<sup>209</sup> e.g., does a height limitation or a prohibition of fast food restaurants further the objectives of the zoning ordinance? If so, the challenge becomes whether the ordinance is consistent with the enabling legislation.

Ordinances are strictly construed.<sup>210</sup> The presumption of validity is strong and the courts have interpreted the presumption to mean that if the ordinance is facially valid and the reasonableness of the ordinance is "fairly debatable," it must stand.<sup>211</sup> The courts have stated that they will not substitute their judgment for an action by a city or town acting

204. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

205. RATHKOFF, *supra* note 45, at 21-1 to 21-41.

206. In *Bristow v. City of Woodhaven*, 35 Mich. App. 205, 192 N.W.2d 322 (1971), the court, in discussing an attempt by a municipality to exclude a mobile home park said: "Therefore, in such limited situations, the proponent of a preferred or protected but prohibited use may establish a *prima facie* case thereby casting upon the municipality the burden of going forward to justify its prohibition of a use heretofore recognized as beneficial to the public welfare." *Id.* at \_\_\_, 192 N.W.2d at 325. See *Kropf v. Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974) (the longevity of Kropf was short; see *Kirk v. Township of Tyrone*, 398 Mich. 429, 247 N.W.2d 848 (1976); *Sabo v. Township of Monroe*, 394 Mich. 531, 232 N.W.2d 584 (1975); *Michigan Nat'l Bank v. Windsor Charter Twp.*, \_\_\_ Mich. \_\_\_, 256 N.W.2d 791 (Ct. App. 1977)); *Southern Burlington Co. NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); *Baker v. City of Milwaukee*, 533 P.2d 772 (Ore. 1975); *Fasano v. Board of Co. Comm'rs*, 507 P.2d 23 (Ore. 1973); *Lawley v. Town of Golfview*, 174 So. 2d 767 (Fla. Ct. App. 1965).

207. See *Hermann v. City of Des Moines*, 250 Iowa 1281, 1284, 97 N.W.2d 893, 895 (1959).

208. See, e.g., *Plaza Recreational Center v. Sioux City*, 253 Iowa 246, 251, 111 N.W.2d 758, 762 (1961).

209. *Keller v. City of Council Bluffs*, 246 Iowa 202, 66 N.W.2d 113 (1954).

210. *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739, 742 (Iowa 1969); *Livingston v. Davis*, 243 Iowa 21, 26, 50 N.W.2d 592, 596 (1951).

211. *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739, 742 (Iowa 1969); *Smith v. City of Fort Dodge*, 160 N.W.2d 492, 495 (Iowa 1968); *Stoner McCray System v. City of Des Moines*, 247 Iowa 1313, 1318, 78 N.W.2d 843, 847 (1956).

reasonably within the scope of the police power.<sup>212</sup> A zoning ordinance will be sustained as a valid exercise of the police power once the courts finds that is in the interest of the public peace, morals, health, safety, convenience and the general welfare.<sup>213</sup>

A developer who applies for a rezoning, an amendment, or even a variance must show that the proposed use comports with the municipality's plan. Under the developing shifting burden of proof doctrine, the township, must do more than merely deny relief in the belief that the proposal is not in the municipality's interest; it must identify the reasons why relief is denied.

What is or is not reasonable is often difficult to ascertain. In *Jaffe v. City of Davenport*,<sup>214</sup> the Iowa Supreme Court upheld the rezoning of a tract from residential single family to commercial because of the circumstances and the suitability of the land for commercial rather than residential use. The court stated that this conclusion was fairly debatable and did not violate the comprehensive plan; therefore, the rezoning was held to be a valid exercise of police power. Note how easy it would have been for the municipality to have denied the rezoning request, saying that the land was suitable for residential development. In this situation, because of the scope of the court's review, the result is the same, i.e., either a decision to allow commercial or residential use could have been upheld. This suggests a wide latitude for the exercise of decision making on behalf of a municipal body.

Judicial review by the district court and the supreme court is de novo.<sup>215</sup> This is a de novo review of the record, however, and issues must have been presented below in order to be preserved.<sup>216</sup> Again, it must be noted that one who attacks such legislation on constitutional grounds has the burden of pleading its invalidity and unreasonableness and assumes the burden to negate every reasonable basis upon which the ordinance may be sustained.<sup>217</sup>

In appeals from decisions of administrative tribunals, plaintiffs generally have the heavy burden of showing that such tribunal exceeded its proper jurisdiction or otherwise acted illegally.<sup>218</sup>

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212. *Anderson v. City of Cedar Rapids*, 168 N.W.2d 739, 742 (Iowa 1969); *Brackett v. City of Des Moines*, 246 Iowa 249, 67 N.W.2d 542, 548 (1954).

213. *Jersild v. Sarcone*, 260 Iowa 288, 292, 149 N.W.2d 179, 183 (1967).

214. 179 N.W.2d 554 (Iowa 1970).

215. *Weldon v. Zoning Bd.*, 250 N.W.2d 396 (Iowa 1977); *Cole v. City of Osceola*, 179 N.W.2d 524 (Iowa 1970).

216. *Cole v. City of Osceola*, 179 N.W.2d 524, 527 (Iowa 1970). See *Johnson v. Board of Adjustment*, 239 N.W.2d 873 (Iowa 1976).

217. *Cole v. City of Osceola*, 179 N.W.2d 524, 528 (Iowa 1970).

218. *Trailer City, Inc. v. Board of Adjustment*, 218 N.W.2d 645, 646-47 (Iowa 1974).



Cases presented with the issue of the scope of the state supreme court's review are not in accord.<sup>219</sup> The Iowa Supreme Court has attempted to define the scope of its review.

The term "de novo" as used in either section [358A.21 and 414.18] does not bear its equitable connotation. It authorizes the taking of additional testimony, but only for the submission and consideration of those questions of illegality raised by the statutory petition for writ of certiorari. Upon the hearing to determine such questions the trial court, as both sections 414.18 and 358A.21 provide, "... may reverse or affirm, wholly or partly, or may modify the decision brought up for review." The action of the trial court has the effect of a jury verdict and is appealable to us on assigned errors only.<sup>220</sup>

The lesson to be learned for the developer should be clear. The case must be made at the municipal level. For the municipality, although its role is minimal now, its decisions must also be supportable.

#### V. LEGISLATIVE PROPOSALS

Iowa, unlike the more densely populated states, is fortunate in that the effects of poor land use planning are not yet critical. This does not mean that Iowa does not need improved planning methods. Iowa's traditional role of being a leading supplier of the nation's agricultural products is dependent upon the wide expanses of grade "A" land reserved solely for agricultural purposes.<sup>221</sup> However, this interest has come into direct conflict with Iowa's growing population and other factors which are competing for the use of this limited amount of land.<sup>222</sup> Iowa, at this point, is faced with two alternatives: Iowa can follow the unfortunate examples of those states which discovered, too late, the irreversible effects, both environmentally and socially, that accompany rapid and haphazard land development; or Iowa can choose to designate priorities in the form of a land use policy and implement a plan to coordinate competing land uses.

Iowa's evaluation of a statewide land use policy began in 1971 with a resolution which requested that the Iowa Legislative Council establish a study of land use policies and related planning procedures for the state

219. Compare *Vogelaar v. Polk Co. Zoning Bd. of Adjustment*, 188 N.W.2d 860 (Iowa 1971) with *Buchholz v. Board of Adjustment*, 199 N.W.2d 73 (Iowa 1972). See *Weldon v. Zoning Bd.*, 250 N.W.2d 396 (Iowa 1977).

220. *Trailer City, Inc. v. Board of Adjustment*, 218 N.W.2d 645, 647-48 (Iowa 1974).

221. In 1971, the Legislative Council of the Sixty-fourth General Assembly of Iowa created the Land Use Policies Study Committee (LUPSC) for the purpose of taking testimony from representatives of private industry and governmental agencies concerning land use problems and practices and the need for a statewide land use policy. See Minutes: LUPSC at 1 (Oct. 20-21, 1971) (statement of Robert Mickle); Minutes: LUPSC at 3 (Nov. 9-10, 1971) (statement of William H. Greiner).

222. According to 1970 census figures Iowa has a state population of 2,824,376, over a third of which is centered in the state's five largest cities (Des Moines-286,101; Cedar Rapids-163,213; Davenport-142,687; Waterloo-132,916; and Sioux City-103,052).

223. H. Con. Res. 25, 64th G.A., 1st Sess. (1971).

and make recommendations to the Sixty-fifth General Assembly.<sup>223</sup> In compliance with this resolution, the Legislative Council created the Land Use Policies Study Committee.

The primary focus of the initial Land Use Policies Study Committee was to determine the desirability of a statewide land use plan for Iowa; and if desirable, what should constitute the basic element of such a plan. A general consensus of the Committee favored the development of such a plan and gave the following reasons for this decision:<sup>224</sup>

1) To provide for the use of land for the purpose for which it is best suited. . . . [225]

2) To protect those land areas that have special geologic, aesthetic, scenic, scientific, and historic value.<sup>[226]</sup>

3) To protect landowners from having their property taken for purposes other than for which it is best suited.<sup>[227]</sup>

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224. Final Report: LUPSC at 2 (1972).

225. Primarily, a land use policy would assist the state in realizing the maximum benefits from its land by designating uses of land according to the land's highest potential. Agricultural production, industrial, recreational, residential and other forms of land use which all compete for limited surface area do not require the same physical characteristics. Proper planning would reduce the occasions of senseless overlap, e.g., the zoning for industrial development on mineral-rich soil when agricultural use is more efficient. At the same time, proper planning could allow for a temporary overlap of land uses which would not be irreversible thereby providing a degree of flexibility. For example, if a highly productive piece of land is not presently needed for agricultural purposes, it may be converted temporarily for recreational purposes in the form of a park or nature trails. Such convertibility is desirable in view of the fact that the amount of land used for agricultural production has become less critical in recent years due to modern agricultural production methods. See Minutes: LUPSC at 3-4 and 6-7 (Oct. 20-21, 1971) (see statements of Lauren Soth and Frank E. Horton); Minutes: LUPSC at 1-3 (Nov. 9-10, 1971) (statement of David L. Trauger). See also Gordon, "Recreational Carrying Capacity—Estimation and Use," LAND USE PLANNING SEMINAR: FOCUS ON IOWA (1973); [hereinafter cited as FOCUS ON IOWA]; Thompson "Land Production and Land Use Planning and Control," FOCUS ON IOWA, *supra*.

226. It is also the purpose of any land use plan to take into consideration the many needs and elements which cannot be classified under the economic headings of production and development. See also IOWA CODE §§ 303.20-33 (1977) which established a mechanism for the preservation of historical districts.

227. Instead of taking away certain freedoms, a land use policy is more likely to preserve certain rights and freedoms by guaranteeing the individual that the best use of his land will not be severely devalued by incompatible uses of surrounding lands. By eliminating notions of "rugged individualism" in regard to land use, and by making clear that legal ownership does not entitle one to an inalienable right to use or misuse the land in any way he chooses, a land use policy is in fact protecting us from an infringement on our freedom as a result of one's misuse of land. See Minutes: LUPSC at 3 (Nov. 9-10, 1971) (statements of William Greiner).

4) To coordinate the manner in which public agencies make decisions concerning land use.<sup>[228]</sup>

5) To provide for adequate study of the short-term and long-term effects (ecologic, economic, and social) of land conversions from present use to another use, especially any nonreversible use, before such conversions are made.<sup>[229]</sup>

The Committee concluded that in order to assure orderly growth and development in the state consistent with a desirable environment, immediate efforts were needed to acquire a more complete understanding of land use needs in Iowa. In the absence of any specific legislative proposal, the Committee made its final recommendation that a land use policy should be formulated by:

- 1) Development of a statement setting forth the need for a land use policy.
- 2) Development of guidelines setting forth the different kinds of land and how land should be used in the best interests of the landowners and the public.
- 3) [Suggestion of] methods to be used in carrying out the land use guidelines.<sup>230</sup>

A 1972 Committee continued and broadened the inquiries of its predecessor as to the desirability of a state land policy. From the regional public hearings conducted by the 1972 Committee, it became apparent that most who attended wanted a land use policy as soon as possible, but not statewide zoning. In other words, while the majority would

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228. The impact of individual, autonomous land use decisions go far beyond the immediate parties involved. Even the smallest decisions to maintain or change a particular land use may have present or future effects on the region or the state. Therefore, a land use policy is needed to reduce the chance that the benefits derived from a particular decision of one community will not later act to the detriment of another community. This process of coordination is one of the primary concerns of these legislative attempts to implement a land use policy.

229. Iowa is the state with the least amount of land topographically mapped for geological and hydrological purposes. With less than 46% of the land mapped, a top priority in the implementation of a land use policy should be to identify all potential natural resources within the state. See Minutes: LUPSC at 9 (Oct. 20-21, 1971) (statement of Samuel J. Tuthill).

Once a better understanding of the geographical make-up of the state is acquired, then Iowa will be better equipped to obviate the concerns of many who fear that the conversion of one land use into another will be irreversible in the future. Minutes: LUPSC at 6 (Oct. 20-21, 1971) (statement of Frank E. Horton). An expanding population will require that land not presently being used be converted for urban or transportation purposes, but proper planning can help to insure that lands rich in natural resources or agricultural potential will be maintained for such purposes while land less valuable in those terms may be converted for other uses. Minutes: LUPSC at 3 (Oct. 20-21, 1971) (statement of Lauren Soth). Specifically, in regard to transportation, a land use policy may encourage efforts to improve present primary and secondary highways in the state rather than irreversibly converting other land into new highway systems. Minutes: LUPSC at 1 (Nov. 9-10, 1971) (statement of David Trauger).

230. Minutes: LUPSC (Dec. 22, 1971).

support land use guidelines implemented under local supervision or control, they did not support any specific statutory controls.

Repeatedly, there were attempts to distinguish the feasibility and need of a statewide land use policy from the concept of zoning. This distinction was necessary due to the overwhelming dissatisfaction with the results of state, county and local zoning measures. The criticism of zoning is that it lacks specific guidelines and it does not touch upon the natural resource concerns, even though it does serve a political, economic or social purpose on a local or regional basis.<sup>231</sup>

Another major concern was the role that a land use policy plays in regard to urbanization. Those who strongly advocate the preservation of Iowa's agricultural land state that this could only be accomplished by a policy that directs itself to the problems of industrial development and urbanization.<sup>232</sup> For example, urban development on the fringe of our larger cities is already a crucial problem. In this respect, a land use policy would be instrumental in preserving Iowa's agricultural land while controlling urban sprawl. However, the purpose of a land use policy would not be to limit or diminish urbanization, but rather, to plan for a healthy coexistence of urban and rural need. A land use policy would help to identify the land areas best suited for rural purposes and the area where urban development should continue.

In concluding its work, the 1972 Committee recommended the enactment of a bill creating a state land use policy commission.<sup>233</sup> The bill was to be process-oriented in that a state commission was to be formed for the purpose of developing a state land use policy and then making legislative recommendations to the General Assembly.<sup>234</sup> The proposed commission had no substantive authority.

There was not the necessary support of the Legislature for creation of this commission. However, the first step toward the creation of a modern statewide land use policy had been taken and significant concepts were developed. First, the state commission proposal established the goal of formulating state wide land use controls to be used at least as guides

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231. Minutes: LUPSC at 1-3 (Nov. 17, 1972).

232. Minutes: LUPSC (May 8, 1972) (statement of Dr. Burl Al Parks). For example, land which is highly suitable for agricultural purposes is also highly suited for industrial development—the land is reasonably level, requiring very little grading, and its structure would easily support the buildings and structures needed for industrialization. With the urban population expanding while the rural population decreases in Iowa, it is obvious that urbanization will increase at the expense of increased consumption of agricultural land. The land in rural communities within commuting distance of urban areas is a likely candidate for use by a developer. It is in the interest of these communities to adopt a comprehensive land use policy in order to effectuate an orderly growth plan before inefficient and perhaps irreversible development occurs.

233. H.F. 65, 65th G.A., 1st Sess. (1972).

234. *Id.* at § 3.

for local controls. Secondly, the proposed commission was to be given wide latitude to identify and evaluate land use problems in Iowa,<sup>235</sup> and to prepare legislative proposals in a number of substantive and procedural areas such as state review of local plans and state regulation of large scale development.<sup>236</sup>

Building primarily upon the information received from the previous committees, the 1973 Committee<sup>237</sup> stated that its primary objective would be to draft legislation which would prepare and implement a state land use policy in order to guide state agencies, counties, cities and special districts in making land use decisions. In this attempt, the 1973 Committee operated on the premise that most decisions affecting the use of land are only of local concern; therefore, the administration and enforcement of land use decisions should be left to local government, except in the case of large scale developments, key public facilities and areas of critical concern which, because of their size or impact, affect several political subdivisions or the state as a whole.<sup>238</sup>

The Committee gave special attention to Senate Bill 268, "The Land Use Policy and Planning Assistance Act of 1973," which had been passed by the United States Senate.<sup>239</sup> This proposed bill, if passed, would have provided more than \$100 million each year for eight years in grants to assist states in developing and carrying out land use programs. As the 1973 Committee realized, not only is it in Iowa's best interest to formulate a land use policy, but also, the cost of implementation might be alleviated through federal funding. Although Senate Bill 268 was not enacted by Congress, there was recognized a need to shift power from virtually total local control to state control with possible federal influence.

The 1973 Committee moved in the direction of substantive rather than procedural change. In expanding upon the previous Committees' work, it essentially retained the concept of a state land use agency but sought to vest that agency with more substantive authority.

In order to facilitate its preparation of legislative proposals, the Committee divided into three subcommittees. The first was the Subcommittee on State Organization and Guidelines.<sup>240</sup> This subcommittee was charged with the duty of determining what kind of state agency should administer the state's land use policy. The subcommittee formulated four alternatives for the organization of the state land use agency:

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235. *Id.* at § 8.

236. *Id.* at § 9.

237. H. Con. Res. 66, 65th G.A., 1st Sess. (1973).

238. Final Report of LUPSC (Jan. 1974).

239. Minutes: LUPSC at 2 (Aug. 23, 1973).

240. Minutes: LUPSC at 4 (Sept. 17, 1973).



- 1) A temporary agency similar to that recommended by the 1972 Land Use Study Committee;
- 2) A combination of several existing departments that relate to land use;
- 3) A new department created to administer the land use policy; and
- 4) An expansion of the existing Department of Soil Conservation.<sup>241</sup>

In its final recommendation to the Committee, the Subcommittee was unable to come to a decision on whether an entirely new agency should be created or whether the Department of Soil Conservation should be expanded to include the administration of a land use policy. The members appeared to favor the latter.<sup>242</sup> According to the Subcommittee, whatever form of agency was ultimately used, it would be responsible for establishing guidelines and policies for a department of land use. It would also be responsible for developing statewide land use goals, land use planning guidelines for local governments, issuing permits for critical areas and activities, preparing inventories and land use tax studies and reviewing and approving the land use plans of state agencies and local governments.<sup>243</sup>

The second subcommittee was the Subcommittee on Critical Areas.<sup>244</sup> The stated purpose of this Subcommittee was to formulate specific legislative recommendations relating to the protection of critical areas such as strip mines, prime agricultural land, historical sites and fragile lands including wetlands and woodlands.<sup>245</sup> For example, in regard to strip mining, it was recommended that the General Assembly insure that mined land is restored for agricultural or recreational purposes. The need for this protection is great in view of the energy crisis and Iowa's abundant supply of coal.<sup>246</sup>

The final subcommittee was the Subcommittee on Local Implementation.<sup>247</sup> In accordance with the 1973 Committee's basic tenet that the local nature and impact of land use decisions calls for a local agency to implement policies, the primary objective of this Subcommittee was to determine the composition and structure of that local agency.<sup>248</sup>

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241. Minutes: LUPSC at 2 (Oct. 4-5, 1973).

242. Minutes: Subcommittee on State Organization and Guidelines, LUPSC (Oct. 4, 1973).

243. *Id.* It should be noted how this is different from what was proposed by the 1971 and 1972 Study Committees. Basically, it differs from the previous proposals in that it is asking the land use committee for more than just recommendations. In H.F. 65 the land use commission was temporary and was to be used to recommend legislative proposals whereas in this 1973 proposal it would be given certain decision making and policy making authority. H.F. 65, 65th G.A., 1st Sess. (1972).

244. Minutes: LUPSC at 4 (Sept. 17, 1973).

245. Minutes: Subcommittee on Critical Areas 1, LUPSC (Sept. 18, 1973).

246. *Id.*

247. Minutes: Subcommittee on State Organization 4, LUPSC (Sept. 17, 1973).

248. Minutes: Subcommittee on Local Implementation 1, LUPSC (Sept. 18, 1973).

It was the general consensus of this Subcommittee that local land use decisions usually had at least a regional impact and that the nuclear unit for local implementation of a state land use policy should be the county.<sup>249</sup> Each county would have a county-wide land use policy agency. The principal duties of which, subject to state guidelines, would be to study the resources of the county and develop a comprehensive plan which included such matters as solid waste disposal; sewage treatment; water supply; flood plain controls; designation of industrial, recreational, residential, commercial development and feedlot areas; designation of woodland, scenic, historic and other natural areas of local significance; provision for a transportation system; and annexation controls.<sup>250</sup>

Having received the final recommendations from the three subcommittees, the 1973 Committee continued to work on its legislative proposal which was the final product of the year's study. The final draft of the proposed bill was completed and recommended for enactment. The proposed bill was introduced as House File 1422.<sup>251</sup> The bill was amended and passed by the House of Representatives during the 1974 Session of the Sixty-fifth General Assembly. House File 1422 is the basic document for a comprehensive land use bill in Iowa.<sup>252</sup> Wide ranging guidelines and policy objectives were enunciated within which the State Commission was to act.<sup>253</sup>

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249. Minutes: Subcommittee on Local Implementation 2, LUPSC (Oct. 4, 1973).

250. Minutes: Subcommittee on Local Implementation 3, LUPSC (Oct. 31, 1973).

251. H.F. 1422, 65th G.A., 2d Sess. (1974).

252. The following summarizes the recommendations of the 1973 Land Use Policies Study Committee as introduced in H.F. 1422:

1. To create a state land use agency for the purpose of the creation, implementation and administration of a state land use filing;
2. To provide for the creation of county commissions to assist the state commission in its functions;
3. To provide for the preparation and revision of a state inventory of land and natural resources and of data related to population trends, economic characteristics, environmental trends and the directions and extent of urban and rural growth;
4. To provide assistance to counties and municipalities for development of comprehensive plans;
5. Designation of state "areas of critical concern" which include fragile or historic lands; natural hazard lands; designation of "key facilities" such as airports, major highways and public utilities; and designation of "large scale development" or renewable resource lands of more than local concern;
6. To establish procedural rules for the review of county and local land use decisions.
7. Creation of, for areas of critical concern, key facilities and large scale development;
8. Comprehensive plans for land use must be prepared, adopted and promulgated by state agencies, counties, cities and special districts;
9. Appeal procedures for persons aggrieved by state, county and local decisions.

H.F. 1422, 65th G.A., 2d Sess. (1974).

253. *Id.* at § 9.

Thus, the efforts of the 1973 Committee were productive from the standpoint that the extensive legislation it had drafted was passed by the House of Representatives. The bill created a state agency and a statewide land use planning organization to implement policy according to guidelines provided by the state agency for local units. House File 1422 was a formidable bill in that it established a feasible system for the implementation of a state land use policy while remaining compatible with the national bill (S. 268) in order to qualify for federal grants-in-aid should they become available.<sup>254</sup>

The focus of House File 1422 and subsequent legislation is not incompatible with local control of land use policy. In the first instance, the state commission seeks to undertake an omnibus study of land use needs and develop a statewide plan. However, implementation of the plan is localized at the county level. More importantly, the development permits authorized by the state are limited to certain designated areas of "critical concern," "key facilities," or "large scale development." Local municipalities retain their planning, zoning and subdivision powers with the added responsibility of adoption of a comprehensive plan. Theoretically, this division of authority is convenient. On the one hand the municipalities still possess significant controls over local issues. On the other hand, the state, through the counties, tackles the more sensitive and sophisticated planning issues that are likely to have a regional impact.

The 1974 Committee reviewed amendments to House File 1422 and began plans to prepare a revised bill to be introduced during the 1975 Session of the Sixty-sixth General Assembly.<sup>255</sup> In analyzing House File 1422, minor criticisms were made. First, it was suggested that state land use coordination responsibility should be placed somewhere other than in the Department of Soil Conservation. Secondly, it was argued that a number of sections of House File 1422 did not adequately protect the interest of cities.<sup>256</sup> Finally, criticism was made of any legislative proposal, such as House File 1422, which was developed without regard for such factors as current air and water pollution control guidelines from the federal Environmental Protection Agency.<sup>257</sup>

House File 1422 was applauded for its method of implementation which allowed for "bottom-up" planning similar to the federal land use bill and the MLDC; it stresses the grass roots approach: state guidelines, state control of critical areas, but with the majority of planning and enforcement at the local levels of government. The combination of statewide land use policies with as much local control as possible was

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254. Minutes: LUPSC at 1 (Aug. 23, 1973).

255. Final Report: LUPSC (Dec. 1974).

256. Minutes: LUPSC at 1 (Sept. 19, 1974) (statement of Robert E. Josten).

257. *Id.*

overwhelmingly favored over the creation of an autonomous "top-down" planning authority.<sup>258</sup>

After reviewing its findings, the 1974 Committee recommended a bill which was introduced as House File 58.<sup>259</sup> After review and study by the House Committee on Natural Resources, a new draft, House File 505, was introduced and subsequently amended and passed by the House.<sup>260</sup>

House File 505 was substantially similar to House File 1422, with only minor changes. As amended and passed by the House, it provided, as did House File 1422, for a standard land use policy and also creates a department of soil conservation and land use, a state land use policy commission and county land use policy commissions. Additionally, it specified the powers and duties of such agencies.

During the 1975 Session of the Sixty-sixth General Assembly, a 1975 Land Use Study Committee was established, primarily to draw together and review land use legislative proposals that had been brought before both the House of Representatives and the Senate.<sup>261</sup> The 1975 Committee determined the major issues and differences in four land use proposals introduced or filed during the 1975 Session of the Sixty-sixth General Assembly. The four proposals selected for comparison included House File 505 as amended, Senate Amendment S-3988, Senate Amendment S-4147, and House Amendment H-3465. The 1975 Committee also considered House Amendment H-3506 which specifically amended provisions of House File 505 relating to an intermediate land use policy commission.<sup>262</sup> Finally, the 1975 Committee approved House File 505 as amended.

During 1976, the House of Representatives did not offer new land use legislation, but the Senate, through its Committee on Natural Resources, introduced Senate File 1313.<sup>263</sup> The substance of this bill was similar to those previously before the House and Senate. Also, the bill called for implementation of a state land preservation commission, which was similar to the commissions which were established under House File 505 except for some minor changes in the numbers and qualifications of members. The bill incorporated a definite time schedule and method of procedure for the development of a state land "preservation" policy.<sup>264</sup>

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258. Minutes: LUPSC at 1 (Sept. 19, 1974) (statement of William H. Greiner).

259. Final Report: LUPSC (Nov., 1975).

260. *Id.*

261. Minutes: LUPSC at 2 (Oct. 1, 1975).

262. Final Report: LUPSC (Nov. 7, 1975). The major differences discussed by the Study Committee were primarily organizational. For example, three of the proposals (H-3465, S-4147, and S-3988) provided for the creation of an independent state agency, while H.F. 505 provided for the reorganization of the Department of Soil Conservation. See H-3465 (House Amendment to H.F. 505) and S-4147, S-3988 (Senate Amendment to H.F. 505), 66th G.A., 2d Sess. (1976); H.F. 505, 66th G.A., 2d Sess. (1976). There were also differences concerning membership and qualifications on the state commission.

263. S. 1313, 66th G.A., 2d Sess. (1976).

264. *Id.* at § 8.

The House of Representatives, evidently satisfied with the ideas expressed in the amended House File 505 which had failed to receive the requisite approval of the entire General Assembly, passed House File 210 in early 1977.<sup>265</sup> House File 210 was identical to House File 505 as to the agencies created and their specified powers and duties. House File 210 was passed by the House but virtually amended out of existence by the Senate.<sup>266</sup>

Basically, the State Land Preservation Policy Act is a holding action which establishes two temporary commissions to study and recommend a land preservation policy.<sup>267</sup> First, it creates a Temporary County Land

265. H.R. 210, 67th G.A., 1st Sess. (1977).

266. H-3931 (Senate Amendment to H.R. 210), 67th G.A., 1st Sess. (House Clip Sheet May 4, 1977). On June 30, 1977, Governor Ray signed the amended version of H.R. 210 into law, see Land Preservation, H.F. 210, 1977 Iowa Leg. Serv. 227 (West) (to be codified in the IOWA CODE) [hereinafter cited as State Land Preservation Policy Act].

267. It is the intent of the general assembly of the state of Iowa to provide for the development of land preservation policy recommendations for the consideration of the general assembly through a process that emphasizes the participation and recommendations of citizens and local governments. The general assembly intends to provide for the development of recommendations which will provide for the orderly use and development of land and related natural resources in Iowa, preserve private property rights, preserve the use of prime agricultural land for agricultural production, preserve, guide the development of critical areas, key facilities and large-scale development, and provide for the future housing, commercial, industrial and recreational needs of the state.

State Land Preservation Policy Act, *supra* note 266 at § 1. Compare the Act's legislative intent with that of H.R. 210, 67th G.A., 1st Sess. § 1 (1977).

[T]o provide for the orderly use and development of land and related natural resources in Iowa, to preserve the use of prime agricultural land for agricultural production, to preserve natural, cultural and historical areas, to provide for future housing, commercial, industrial and recreational needs and for such other uses as needed, to provide for the coordination of comprehensive plans for land use, and to control urban sprawl and to preserve and renew the urban core, and thereby provide for the protection and preservation of the private and public interest in the land, water, and related resources of this state for the public health, safety and general welfare, and for the benefit of present and future generations.

Land use decisions should rest primarily at the local government level. It is the intent of the general assembly that a state land use policy provide maximum emphasis on the local development of land use goals and objectives, local development of comprehensive land use plans, and local regulation and enforcement of land use decisions. It is further the policy of the general assembly that the State Land Use Commission provide maximum emphasis on developing a statewide land inventory and compiling land use data and projections to aid local governments in land use decisions.

*Id.*

Clearly, House File 210 has a broader scope and yet it does not ignore the intent of the enacted legislation. One might note a rural bias in the Senate and a more beneficent eye in the House toward urban development. There is no reason why urban and rural development cannot co-exist; in fact, a workable statewide plan makes such cooperation a necessity.



Preservation Policy Commission<sup>268</sup> to submit a recommendation, after holding public hearings, to the state commission within one year after the effective date of the Act.<sup>269</sup> The recommendation is to construct both a state and county land preservation policy. Once its work is completed the Commission is to be dissolved effective January 1, 1979.<sup>270</sup> Secondly, the Act creates a Temporary State Land Preservation Policy Commission<sup>271</sup> whose function it is to receive recommendations of the county commis-

268. State Land Preservation Policy Act, *supra* note 266, at § 3.

269. *Id.* at § 3 (2). The county commission is charged to work within certain guidelines. *Id.* at §§ 3 (5) and (6).

- [5].a. The preservation of agricultural land for the production of food and fiber.
- b. A review of the available resources, growth trends and land use issues of the county.
- c. A review of the present comprehensive plans, ordinances, regulations and policies of the local units of government that have an impact on the use of land.
- d. The development of a local land preservation policy for:
  - (1) Solid waste disposal, sewage treatment and an adequate water supply.
  - (2) Siting of industrial, commercial, educational, cultural, residential and recreational facilities.
  - (3) Designation and appropriate use of critical areas.
  - (4) Coordination of a countywide transportation system with the state transportation system.
- e. State land preservation guidelines for state agencies.
- f. Suggestions for the content of a state land preservation policy and methods for implementation.
- g. The implementation of a county land preservation policy.
- h. The preservation of private property rights.
- 6. The chairperson of the temporary county land preservation policy commission of each county shall file with the executive secretary of the temporary state land preservation policy commission a written report by July 1, 1978 containing the following:
  - a. The extent to which the county and the cities in the county have adopted zoning ordinances and have prepared comprehensive plans to be implemented by the zoning ordinances.
  - b. Whether the county has established a county conservation board and the extent to which it has adopted a plan for the conservation and recreation needs of the county.
  - c. The extent to which the county and the cities and private agencies of the county have implemented or pending plans for the disposal of solid waste.
  - d. The extent to which a survey of the soil of the county has been conducted.
  - e. The extent to which a comprehensive plan for the conservation of soil resources and the control and preservation of soil erosion has been prepared and implemented.

*Id.*

The requirement of holding public hearings, while laudable, is duplicative of the procedure used by the Land Use Policies Study Committee, whose work was previously discussed.

270. *Id.* at § 3(4).

271. *Id.* at § 4.

sions and within thirty months from the effective date of the Act, report to the General Assembly.<sup>272</sup> The report is to include a state land preservation policy and recommendations concerning methods of implementation. In developing its policy, the Commission is to consider:

- a. The preservation of agricultural land for food and fiber production.
- b. The effect of current laws on land use decisions.
- c. The recommendation of a state policy for the guidance and direction of state agencies in the use of land.
- d. The criteria for the designation and preservation of critical areas.
- e. The designation of key facilities.
- f. The designation of large-scale development which will have impact beyond county boundaries.
- g. The control of urban sprawl and the orderly and efficient transition of land from rural to urban use.
- h. The balance of anticipated energy resources and consumption.
- i. The protection of private property rights.<sup>273</sup>

Finally, the Commission is to dissolve upon final action by the General Assembly.<sup>274</sup> This apparent holding action reveals a rift between the House and the Senate concerning the adoption of a comprehensive state land use policy.

The fact remains that Iowa does have a need for a comprehensive land use policy. The House proposals are significant steps toward the formulation of a unified plan with the creation of state and county agencies which do not intend to severely hamper local administration. The state seeks to administer only certain designated areas that are likely to have a regional impact, thus providing some semblance of statewide uniformity.<sup>275</sup> Further, the state, counties and municipalities must adopt comprehensive plans.<sup>276</sup>

This type of land use legislation is a departure from the antiquated SZEAs which form the basis of Iowa's current land use control system. Further, the House proposals attempt coordination at the state and county levels with provisions that seek to attain statewide uniformity with a degree of flexibility not allowed in the traditional Euclidian context.

Thus, the State Land Preservation Policy Act, while not as expansive nor as progressive as the previous House proposals, does give Iowa a certain minimal direction. The Act provides Iowa with the opportunity to formulate a comprehensive policy. Given the work performed by the Land Use Policies Study Committees, together with the guidance of the Model Land Development Code and state legislation in states such as Hawaii and Vermont, Iowa is in the advantageous position of developing

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272. *Id.* at § 4(3).

273. *Id.* at § 4(4).

274. *Id.* at § 8.

275. See D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION ch. II (1977); Note, *State Land Use Statutes: A Comparative Analysis*, 45 *FORDHAM L. REV.* 1154 (1977).

276. See H.F. 210, 67th G.A., 1st Sess. (1977) at §§ 5(3), 18(3), and 20(1), respectively.

meaningful legislation to correct the deficiencies of land use policies that have accumulated over the past fifty years.<sup>277</sup>

## VI. CONCLUSION

As Iowa case law reveals, the development of land use controls in Iowa has been along traditional lines. In fact, the SZEAL was adopted almost in toto and therefore, a limited range of mechanisms are available to handle land use problems. Iowa has developed a rigid grid system of zoning as a result of residential development on a lot by lot basis. The development controls that have been enforced have proved inefficient. Land use issues have been complicated by the influx of diverse governmental regulations, particularly environmental controls. State and federal governments are now intruding into an area which traditionally has been considered a local preserve. Consequently, new techniques and new methods of administration are needed.

The response of the Iowa legislature has been to promote the creation of a state agency to develop a comprehensive plan and administer control over certain designated areas. The statewide plan would be adapted to federal legislation and would expressly preserve local control. Thus, from an administrative standpoint, intergovernmental coordination is possible. Uniformity is likewise fostered by provision for mandatory comprehensive plans at all levels with a mechanism to review those plans. Although the House proposals focus on administration rather than substance, there is an impetus provided for moving away from Euclidian zoning. This results from a state land use policy that focuses on impact rather than simply area, height or use restrictions. The state is concerned with those users that are likely to have a regional impact. Statewide land use should also be more adaptable to those types of social, political and economic issues that are not considered at the local level. The House proposal will not eliminate Euclidian developments such as the variance procedure or the inequities inherent in the static law of non-conforming uses, but it is a step away from a system that places undue emphasis on segregated use districts. The House proposals can significantly alter the future development of Iowa land use for the better. Should a bill similar to the original House File 210 be adopted, it would make Iowa one of the progressive states that have adopted state policies for the control and development of their land resources.

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277. See Miller, *The New Jersey Land Use Law Revision: A Lesson For Other States*, 5 REAL EST. L.J. 138 (1976). Compare H.F. 210, 67th G.A., 1st Sess. (1977) with N.J. STAT. ANN. 40:55D-1 to -91 (Supp. 1971) (the New Jersey law has been called a "disappointment" by Miller because of its failure to deal with minor procedural matters rather than to cope with the emerging social, political and economic problems that face us all). Compare H.F. 210, 67th G.A., 1st Sess. (1977) with HAWAII REV. STAT. § 205-1 to -37 (1976) (statewide land use controls) and VT. STAT. ANN. tit. 10, §§ 6001-91 (1973) (regionally administered land use controls).