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Rural Land Use Regulation in Iowa: An Empirical Analysis of County Board of Adjustment Practices

by

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Part 1 of 3

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Contemporary Studies Project*

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I. INTRODUCTION

Zoning is the most widely used land use planning technique in America.[1] Indeed, all fifty states have authorized municipal governments to adopt zoning regulations,[2] and by 1967 more than ninety-seven percent of American cities with a population over 5000 had exercised the power to zone.[3] Iowa Legislature delegated the power to zone to counties in 1947;[4] since that time, sixty-six counties have exercised that option.[5] In an era when suburban residential growth and vacation home development are competing with agriculture for Iowa's finest land, a study of the means available to the state for regulating development in the public interest is particularly important.

The constitutionality of zoning depends on whether the zoning restrictions are applied in a manner rationally related to legitimate government interests in the advancement of public health and welfare.[6] This means that the burdens and benefits of zoning must be apportioned in response to the goals of regulating development rather than in response to the whims of zoning officials or the desires of particular persons. Attempts to alter the terms of the original zoning plan in individual cases, by amendment or variance, present the greatest potential for uneven and discriminatory application of zoning regulations.[7] Consequently, the delegation of power to make amendments and grant variances is accompanied by standards that must be observed by the local zoning bodies.

A. Scope

This Contemporary Studies Project[8] is an empirical analysis of the implementation and administration of land use legislation by county governments in Iowa. The purpose of the Project is to examine Iowa law on the zoning of unincorporated areas and to provide a comprehensive description of current county zoning practices in Iowa. Relevant statutory provisions, case law, and empirical findings will be synthesized to illustrate the strengths and weaknesses of county zoning, and specific recommendations for improvement will be made.

The primary focus of this Project is on the role of county boards of

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1. C. HAAR, LAND-USE PLANNING—A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 185 (3d ed. 1976).

2. National Commission on Urban Problems, *Land-Use Controls: Zoning and Subdivision Regulations*, in LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM 19, 19 (D. Listokin ed. 1974).

3. C. HAAR, LAND-USE PLANNING—A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 185 (3d ed. 1976).

4. Act of April 1, 1947, ch. 184, 1947 Iowa Acts 229.

5. *See* Appendix III *infra* (Table 1).

6. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

7. *See* Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 60-61.

8. Hereinafter referred to as Project. The empirical information collected for the Project is on file with the *Iowa Law Review*.

adjustment[9] in the zoning scheme. Petitioners and their attorneys seeking relief before county boards of adjustment should benefit from information provided on the functioning of these boards. State legislators and county zoning administrators will be provided with the data needed to improve county zoning and, in particular, the way in which boards of adjustment perform. Special attention will be given to the power of boards of adjustment to grant variances from the terms of county zoning ordinances. Variances are the form of relief most frequently sought from county boards of adjustment.[10] Because of the broad discretion entrusted to the boards to determine variance requests[11] and the courts' willingness to defer to board decisions,[12] the power to grant variances enables boards of adjustment to have a substantial impact on the effectiveness of county zoning ordinances. Thus, the authority to determine variances is potentially the most destructive and, therefore, controversial board power.[13]

Information used to prepare the Project was gathered from all Iowa counties that have adopted zoning pursuant to the county zoning enabling act, Iowa Code chapter 358A.[14] Although the Project focuses solely on Iowa county board of adjustment practices, the information presented should prove useful to practitioners, administrators, and legislators in other states as well. Most states that have enacted zoning enabling acts have included board of adjustment provisions similar to those in the Iowa Code.[15] Moreover, courts in other states have delimited the authority of boards of adjustment in rulings very similar to decisions of the Iowa Supreme Court.[16] Thus, it is likely that the practices of the Iowa county boards

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9. The duties of boards of adjustment are prescribed in IOWA CODE § 358A.10 (1983). Boards of adjustment also are referred to as boards of review and boards of appeals. 3 R. ANDERSON, AMERICAN LAW OF ZONING § 17.07 (2d ed. 1976).

10. During the period under study, county boards of adjustment considered 521 variance requests, compared to 404 special exception applications and only 8 administrative appeals. *See* Appendix VII *infra* (Table 1).

11. *E.g.*, State *ex rel.* Smart v. City of Big Timber, 165 Mont. 328, 333, 528 P.2d 688, 691 (1974); Glankler v. City of Memphis, 481 S.W.2d 376, 378 (Tenn. 1972).

12. *See* Kunz v. Waterman, 258 Ind. 573, 577-78, 283 N.E.2d 371, 374 (1972) (court must resolve all doubts concerning variance denial in favor of board of adjustment); Kramer v. Board of Adjustment, 45 N.J. 268, 285, 212 A.2d 153, 162 (1965) (presumptive validity attends variance decisions).

13. Justice Cardozo, while serving as Chief Justice of the New York Court of Appeals, observed that "[t]here has been confided to the Board a delicate jurisdiction and one easily abused." People *ex rel.* Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 290, 155 N.E. 575, 578 (1927).

14. IOWA CODE ch. 358A (1983).

15. *See, e.g.*, ALA. CODE § 11-19-19 (1975); DEL. CODE ANN. tit. 9, §§ 1350-1352 (1974); MONT. CODE ANN. § 76-2-223 (1981); OKLA. STAT. tit. 19, § 865.62 (1981).

16. This has been the case in California, *compare* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 513-14, 522 P.2d 12, 16, 113 Cal. Rptr. 836, 840 (1974) (board of adjustment must make specific findings that support its position) *with* Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921, 925 (Iowa 1979) (board of adjustment must

of adjustment are typical of boards in other jurisdictions. Many of the Project recommendations, therefore, will be applicable outside Iowa. This Project also should prove useful to municipal zoning authorities. The terminology of the municipal zoning statute in Iowa, Iowa Code chapter 414,[17] is virtually identical to the county zoning enabling act, chapter 358A.[18] Similarly, chapter 358A resembles municipal enabling statutes that have been enacted in other jurisdictions.[19]

The significance of this Project may be underestimated to the extent that problems associated with county zoning are underestimated. County zoning administration is inherently subject to less political scrutiny than municipal zoning because of the lower residential density of rural areas. Fewer citizens seek to influence actions taken by county zoning agencies because relatively few citizens are affected directly by each administrative decision.[20] Moreover, the problem of relatively little public scrutiny of county zoning practices is compounded by a nationwide decline in the building industry in recent years.[21] Because new construction generates a large share of the variance petitions submitted to boards of adjustment, the construction recession has reduced the number of variances sought and, as a result, the number of board decisions made during the period studied.[22]

Despite the relatively minor political controversy surrounding county zoning and the inactivity of some county boards of adjustment, the potential for abuse is a realistic threat to effective land use planning. In many

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make findings that allow court to determine basis for its action), and New York, *compare* Otto v. Steinhilber, 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939) (definition of unnecessary hardship) *with* Deardorf v. Board of Adjustment, 254 Iowa 380, 386, 118 N.W.2d 78, 81 (1962) (citing *Otto* for definition of unnecessary hardship).

17. IOWA CODE ch. 414 (1983).

18. *Compare id. with id.* ch. 358A. In Gannett v. Cook, 245 Iowa 750, 61 N.W.2d 703 (1953), the Iowa Supreme Court was faced for the first time with a case involving Iowa Code chapter 358A. The central issue in *Gannett* was whether a filed subdivision plot qualified as a lot of record as defined in Scott County's new zoning ordinance. *Id.* at 752-57, 61 N.W.2d at 705-07. As a preliminary matter, however, the court held that, for purposes of defining zoning authority, a county should be treated in the same manner as a municipal corporation. *Id.* at 756, 61 N.W.2d at 707. In light of the *Gannett* ruling and the similarities in wording between Iowa Code chapters 358A and 414, *compare* IOWA CODE ch. 358A (1983) *with id.* ch. 414, rules developed in the case law under one chapter should be treated by the courts as applicable to both chapters.

19. *See, e.g.*, MO. REV. STAT. ch. 89 (1978); NEB. REV. STAT. §§ 19-901 to -922 (1977).

20. *See* text accompanying notes 85-89 *infra*.

21. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 758 (102d ed. 1981) (36% decline in private housing starts between 1978 and 1980).

22. *See* Appendix III *infra* (Table 6). Over two-thirds of the county boards of adjustment in Iowa considered less than an average of three variance applications per year for the period studied. *Id.* Nearly one-fourth of the boards have not considered any variance requests in the same period. *Id.*

instances abuse of discretion by county boards already has affected county land planning significantly. Information gathered from county zoning records indicates that a majority of these boards exceed their delegated authority by granting variances without finding the requisite legal criteria.[23] Such abuses of authority and their subsequent effect on county land use planning will be evaluated in this Project.

B. Methodology

The Project began with comprehensive legal research on the topic of land use regulation. The preliminary research effort included a thorough study of relevant case law and statutory provisions from nearly every jurisdiction, as well as legal periodicals, treatises, and other secondary sources. A preliminary land use survey[24] was sent to all chairpersons of county boards of supervisors in Iowa to determine the extent to which county governments have exercised their option to zone unincorporated land.[25] The survey revealed that sixty-six of the ninety-nine counties in Iowa have enacted some type of county land use regulation.[26]

Next, uniform comprehensive record searches were conducted in the county courthouses of all sixty-six counties that have enacted county land use regulations. Information gathered from those record searches included county zoning ordinances and comprehensive plans; minutes of board of adjustment, zoning commission, and board of supervisors meetings; rules of procedure of boards of adjustment; variance and special use permit applications; and district court cases in which board of adjustment determinations had been challenged.[27] The records from each county were then analyzed and filed. Personal interviews with zoning officials and board of adjustment petitioners were conducted in one-third of the counties that have enacted county land use regulations.[28] The purpose of conducting interviews was to gather subjective opinions concerning county zoning to supplement the more objective data from the county zoning records and subsequent questionnaires.

After compiling and analyzing the data from the survey, county record searches, and personal interviews, final questionnaires were developed and

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23. *See* text accompanying notes 774-878 *infra*.

24. *See* Appendix I *infra*.

25. County zoning in Iowa is optional. IOWA CODE § 358A.1 (1983).

26. *See* Appendix III *infra* (Table 1).

27. Records from 1980 through the summer of 1982 were the primary object of the record searches. In some instances, however, older records were evaluated to derive a more accurate picture of a county's zoning practices when recent zoning activity was sparse. Conversely, the records were so voluminous in several counties that only the most recent records—but at least those for a full year—were studied. Only in a few counties were the Project writers unable to examine zoning records because of inadequate records. *See* notes 662-64 *infra*.

28. *See* Appendix II *infra*. The 21 counties in which interviews were conducted were selected on the basis of their urban or rural nature and their population growth rate.

sent to zoning administrators and board of adjustment members in every Iowa county that regulates land use. All 325 county board of adjustment members[29] in Iowa were sent one type of questionnaire.[30] The sixty-six county zoning administrators were mailed a slightly different questionnaire.[31] Several of the questions on the two questionnaires were identical to facilitate comparisons of particular responses given by the two groups. Data from both questionnaires were then tabulated and computerized for statistical analysis.[32]

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29. The Greene County Board of Supervisors has enacted zoning regulations but has not appointed a board of adjustment. Thus, there are 325 board members on 65 boards of adjustment, or 5 members per board.

30. *See* Appendix I *infra*. Seventy-five percent of the board members returned the questionnaire. At least one board member from all of the 65 boards of adjustment responded.

31. *See* Appendix I *infra*. Ninety-seven percent of the zoning administrators responded to the questionnaire.

32. The statistical analysis of the Project data was performed on the Statistical Package for the Social Sciences (SPSS) at the University of Iowa Weeg Computer Center. All the statistics used assume that the data is gathered by random sampling from a larger population. The Project's analysis diverges from that assumption in two respects. First, the Project surveyed 100% of the known board of adjustment members and zoning administrators. Thus, in one respect, the results need no statistical analysis whatsoever. Statistical testing measures the utility of a sample of data as a predictor of the characteristics of the entire population. The Project data directly measures the characteristics of the entire population. However, because the membership of county zoning offices turns over in time, the Project sample is considered part of the larger population of county zoning officials who have served or will serve. The second problem with the statistical assumption is that 78 board members and 2 zoning administrators failed to return the Project survey. There is no feasible choice but to assume that the failure to return a survey was a random occurrence and proceed with the analysis.

The Project questionnaires, Appendix I *infra*, were intended to elicit information on the personal characteristics of county board of adjustment members and zoning administrators, and also to test county zoning officials' understanding of county zoning law. The statistical analysis was designed to test two propositions. The first proposition studied was limited to board of adjustment members. That proposition is whether there are any relationships between personal characteristics, such as level of education achieved or length of service on the board, and a board member's knowledge of some aspect of the law, such as the difference between a variance and a special use permit. The second proposition tested was whether the average weight given to a particular factor that may bear on the question of unnecessary hardship in a variance case differed to a statistically significant degree from the hypothesis that that particular factor receives no weight in the deliberation on a variance petition.

The first proposition, whether possession of a personal characteristic is predicative of a person's knowledge of some aspect of the law, is tested by two statistics. The first statistic—labeled "F" throughout the appendices—is used to measure the difference in mean numbers in groups possessing different characteristics. For example, the Project tests the effect of five educational levels on the number of correct responses in the variance criteria section. *See* Appendix V *infra* (Table 1). For each educational level, a mean number of correct answers is calculated for the class of people who achieved that educational level. The F statistic tests whether the mean numbers computed from the Project's sample differ beyond a chance level. The larger the F, the less likely the differences are due to sampling error. The probability that sampling error is the reason why the mean numbers computed from the Project's sample are distributed as they are is labelled "*p*." In other words,

C. Organization of Discussion

This Project consists of seven parts. Following this introduction, part II provides a historical overview of zoning law in the United States.[33] Against this historical backdrop, the special problems presented by the zoning of unincorporated areas are discussed in detail. Part III examines the implementation of zoning in Iowa with special emphasis on past and present land use schemes.[34] In particular, part III discusses the provisions of Iowa Code chapter 358A, the county zoning enabling statute.

A close examination of county boards of adjustment is made in part IV.[35] Part IV focuses on the role of county boards of adjustment in county land use control, their statutory authority, and the qualifications and characteristics of board members. Part IV also considers at length the procedural practices of county boards of adjustment in Iowa and addresses the need for procedural safeguards.

The power of boards of adjustment to permit variances is analyzed in part V.[36] Due to the board's broad discretion to determine variance requests,[37] the authority to grant variances presents a significant potential for abuse. Part V concentrates on the legal criteria that must be met

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a p value of .05 indicates that the distribution of mean numbers computed from the Project's sample would occur in fewer than 5 out of 100 random samples; a p value of .02 means that less than 2 similar cases out of 100 random samples would be caused by sampling error.

A p value of .05 is a generally accepted benchmark of statistical significance. Thus, for example, when the distribution of mean numbers generated from the Project sample shows that persons with more education correctly weight more of the variance criteria, and p is less than .05, the contention that more education results in more correct answers is a statistically significant representation of the behavior of Iowa county board of adjustment members. See W. HAYS, STATISTICS FOR THE SOCIAL SCIENCES §§ 12.1, 12.9 (1973), for an explanation of the derivation of the F statistic.

The second proposition that the Project tests relates to the variance criteria section of both questionnaires. Appendix I, *B* (questions (E)(1)-(26)) and *C* (questions (G)(1)-(26)) *infra*. After calculating the mean weight given to each variance criterion by the class of board members or zoning administrators, the Project tested whether that mean differs significantly from 3.0, the response which indicates that a particular factor has no effect on a variance decision. If the mean weight given to a particular factor does not differ from 3.0, then that factor has no significant bearing on the variance decision in the mind of the average board member or zoning administrator. The statistic referred to in Appendices IV (Table 35) and VI (Table 33) *infra*, is derived from application of a "t" test, explained more fully in W. HAYS, STATISTICS FOR THE SOCIAL SCIENCES § 10.11 (1973). Essentially, the statistic is similar to the F statistic discussed above in that a p value smaller than .05 indicates that the mean number derived from the Project data will differ from 3.0 as a result of sampling error in fewer than 5 out of 100 random samples. In fact, due to sampling error alone, the mean number derived from the Project data for a criterion will differ from 3.0 in less than 100 times the p value given for that criterion ($100 \times p$) out of 100 random samples.

33. *See* text accompanying notes 41-185 *infra*.
34. *See* text accompanying notes 186-353 *infra*.
35. *See* text accompanying notes 354-688 *infra*.
36. *See* text accompanying notes 689-884 *infra*.
37. *See* note 11 and accompanying text *supra*.

before a variance can be issued.[38] Special attention is given to the factors that have influenced variance decisions by Iowa county boards of adjustment in recent years and the impact of improperly granted variances on county land use plans.

Part VI examines the role of the judiciary in the zoning process.[39] In particular, the appeals from board of adjustment decisions filed in Iowa district courts in the past five years and the effect of those appeals on county boards of adjustment are discussed. Conclusions are drawn and recommendations are made in part VII.[40] The recommendations, which are discussed fully in the body of the Project, involve county land use regulation issues, many of which demand legislative resolution.

II. PERSPECTIVES ON RURAL ZONING

The basis of state governments' power to zone is found in its implied authority to promote the public health, safety, morals, and general welfare.[41] By segregating incompatible uses of property, zoning is thought to preserve the character of existing neighborhoods and encourage the orderly development of others in a manner consistent with a community's best interests.[42] The benefits achieved by zoning are in this way shared by each member of the community, and the burdens of regulation are imposed equally on all property owners.[43]

Zoning is but one of several alternative means of land use control. Private nuisance suits, restrictive covenants, and the state's power of eminent domain also have been used with varying degrees of success to accomplish the objectives sought through zoning.[44] Zoning, however, has become the predominant land use regulation tool of this century.[45] To comprehend the importance of the social and economic issues raised by rural zoning and the controversy that surrounds it, it is essential to understand the origin and development of zoning law in the United States.

A. Historical Development of Land Use Control in the United States

The first comprehensive municipal zoning ordinance was adopted in New York City in 1916.[46] Prior to that time, land use control had been accomplished primarily by private covenants and equitable servitudes.[47]

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38. *See* text accompanying notes 697-773 *infra*.
39. *See* text accompanying notes 885-935 *infra*.
40. *See* text accompanying notes 936-68 *infra*.
41. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
42. *See* 1 E. YOKLEY, ZONING LAW AND PRACTICE §§ 2-1,-3 (4th ed. 1978).
43. *See* 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 16.05 (1974).
44. For a discussion of alternatives to zoning as a land use control device, see 1 R. ANDERSON, *supra* note 9, §§ 3.03-.05.
45. C. HAAR, LAND-USE PLANNING—A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 185 (3d ed. 1976); 1 N. WILLIAMS, *supra* note 43, § 16.01.
46. 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 1.01[2] (1975).
47. *Id.* § 1.01[1].

Zoning, on a limited scale, also existed prior to the New York City ordinance. California sustained the validity of use restrictions in 1886,[48] and Washington, D.C., promulgated height restrictions for buildings, which were upheld in 1889.[49] The enactment of the New York City ordinance, however, signalled a rapid expansion in the exercise of the zoning power by American cities.[50] One commentator found that within a year of the enactment of the New York ordinance, twenty cities had enacted zoning regulations.[51] By 1922 more than twenty state zoning enabling acts and nearly fifty zoning ordinances had been passed and approximately one hundred other zoning plans were in progress.[52]

The power to zone originally was sustained on a statutory nuisance theory as an extension of the states' police power.[53] The authority to zone was questioned, however, until the Supreme Court removed all doubts about its validity. In *Village of Euclid v. Ambler Realty Co.*[54] the Supreme Court upheld a comprehensive municipal zoning ordinance that divided property into districts according to use, area, and height.[55] Although the Court in *Euclid* held that zoning was a valid exercise of the states' police power, it soon became clear that the power was not without limitations. Shortly after *Euclid*, the Court held in *Nectow v. City of Cambridge*[56] that a zoning ordinance was invalid with respect to a particular parcel of land.[57] In *Nectow* the plaintiff alleged that the zoning ordinance, as specifically applied to him, constituted a deprivation of property without due process.[58] Before passage of the ordinance, the plaintiff had entered into a contract for the sale of his land. The purchaser refused to comply with the contract when the zoning ordinance, similar to the one in *Euclid*, left unrestricted the use of the entire parcel except a strip 100 feet in width. The Court ruled in favor of the plaintiff, finding that the restriction did not promote the public "health, safety, convenience and general welfare."[59]

Notwithstanding the validation of zoning in *Euclid* as an exercise of the states' police power, local governments possessed no inherent power to zone.[60] State legislatures, however, soon delegated the state's police

48. *In re* Hang Kie, 69 Cal. 149, 152, 10 P. 327, 329 (1886).

49. Welch v. Swasey, 214 U.S. 91, 108 (1909).

50. *See* 1 A. RATHKOPF, *supra* note 46, § 1.01[2], at 1-6, -12.

51. Ford, *What Has Been Accomplished in City Planning During the Past Year*, 6 NAT'L MUN. REV. 346, 348 (1917).

52. Kimball, *A Review of Planning in the United States, 1920-21*, 11 NAT'L MUN. REV. 27, 32 (1922).

53. Hadacheck v. Sebastian, 239 U.S. 394, 410-11 (1915).

54. 272 U.S. 365 (1926).

55. *See id.* at 379-80.

56. 277 U.S. 183 (1928).

57. *Id.* at 188.

58. *Id.* at 185.

59. *Id.* at 188.

60. *E.g.*, Allen v. Coffel, 488 S.W.2d 671, 678 (Mo. 1972); Dresner v. Carrara, 69 N.J. 237, 241, 353 A.2d 505, 507 (1976); Heaton v. City of Charlotte, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971).

power to local governmental units through enabling statutes. The promulgation of the Standard State Zoning Enabling Act (SZEA),[61] first published in 1922 by an advisory committee on zoning within the United States Department of Commerce, was a significant event in the early history of zoning. The SZEA, issued as a final draft in 1926, closely resembled the New York City Zoning Resolution of 1916 and eventually was adopted in all fifty states.[62]

Following the acceptance of zoning as a valid land use device, rigid "Euclidean" zoning enjoyed a period of substantial judicial deference.[63] Commerce and land development languished during the Great Depression, and consequently, very few pressures affected the regulation of land use.[64] The revived and magnified economic growth following World War II, however, presented new hurdles for "Euclidean" zoning. Rigid districting proved to be ineffective in dealing with the economic and social challenges of rapid land development, and techniques designed to introduce flexibility into the zoning scheme emerged.[65] Still, courts generally accepted the local autonomy of zoning regulation and awarded it a presumptive validity that rarely was overcome.[66] In 1973 the Supreme Court issued its first zoning decision in nearly half a century. In the opinion of some observers, the Court's decision in *Village of Belle Terre v. Boraas*[67] signified the beginning of a new stage of increased judicial scrutiny of zoning practices.[68] The new judicial attitude arguably represents a more realistic view of local government: skepticism with an eye toward protecting basic constitutional values.[69]

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61. STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) [hereinafter cited as SZEA], *reprinted in* 5 A. RATHKOPF, *supra* note 46, at 765.

62. 1 N. WILLIAMS, *supra* note 43, § 18.01, at 355.

63. *Id.* § 5.04.

64. *See* 1 A. RATHKOPF, *supra* note 46, § 1.02, at 1-13.

65. Among the devices designed to introduce flexibility into traditional zoning schemes is the concept of "cluster zoning." Cluster zoning is a method of permitting development without strict compliance with area restrictions in zoning ordinances. 2 R. ANDERSON, *supra* note 9, § 11.02, at 342. With certain limitations, developers are free to arrange residential dwellings as they please, as long as they leave open spaces for recreational uses. *Id.*

Another flexibility device is the "floating zone," which is characterized by its undefined boundaries. 1 A. RATHKOPF, *supra* note 46, § 12.06[2]. Floating zones are specific use districts provided by ordinance that "float" until established within another district, usually at the request of a petitioning landowner. *Id.*

A third modern flexibility device is the "planned unit development" (PUD). A PUD is a special district involving a planned combination of residential, commercial, and, sometimes, industrial uses. 2 R. ANDERSON, *supra* note 9, § 11.12. This technique is designed to achieve compatible and efficient use of land. PUD provisions are common in developing towns and suburban communities. *Id.*

66. *See* Hermann v. City of Des Moines, 250 Iowa 1281, 1284-85, 97 N.W.2d 893, 895 (1959); Brackett v. City of Des Moines, 246 Iowa 249, 260, 67 N.W.2d 542, 547-48 (1954); Anderson v. Jester, 206 Iowa 452, 457, 221 N.W. 354, 357 (1928).

67. 416 U.S. 1 (1973).

68. 1 N. WILLIAMS, *supra* note 43, § 5.05.

69. *Id.*

The increase in judicial scrutiny of local land use regulation was accompanied by a trend toward state reclamation of the zoning powers previously delegated to local governments.[70] The movement toward centralization of land use regulation is reflected in the American Law Institute's *Model Land Development Code (Model Code)*.[71] For example, article 7 of the *Model Code* addresses methods for state and regional involvement in land development regulation. A "State Land Planning Agency" would be created to define categories of "Development of Regional Impact."[72] Within an area designated as an "Area of Critical State Concern," the local government could then promulgate regulations subject to approval by the State Land Planning Agency.[73] Local "Land Development Agencies" would be responsible for local zoning implementation and administration,[74] but appeals from those local agencies would be made to a "State Land Adjudicatory Board."[75]

The *Model Code* was expected to provide a new impetus for state land use programs, most of which were still based on the SZEA.[76] Despite the increasing complexity of modern land use issues, however, the form and substance of traditional zoning persists.[77] The SZEA remains in effect with various modifications in most states,[78] and at least one commentator has suggested that the trend toward centralization has slowed considerably.[79]

To summarize, zoning is essentially a product of this century and has been almost universally enacted in major American cities.[80] On the other hand, zoning has been relatively slow to gain acceptance in unincorporated areas. In 1929 Wisconsin became the first state to authorize county zoning,[81] but most county zoning enabling legislation has been promulgated since World War II.[82] Attending the extension of zoning—traditionally an instrument of municipal land use control—into the rural context have been a host of issues unique to that context.

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70. One commentator notes that by 1975, 48 states had enacted legislation or were seriously considering proposals that would increase the state's role in land use decisionmaking. 1 P. ROHAN, ZONING AND LAND USE CONTROLS § 1.04[4], at 1-67 n.46 (1982).

71. MODEL LAND DEV. CODE (1975).

72. *Id.* § 7-301(1).

73. *Id.* § 7-203.

74. *Id.* §§ 2-301, -302.

75. *Id.* § 7-501(1).

76. *See* Address by Richard F. Babcock to the 1971 *Urban Law Annual* staff, (Apr. 23, 1971), *reprinted in* LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM 321, 328 (D. Listokin ed. 1974).

77. National Commission on Urban Problems, *Land-Use Controls: Zoning and Subdivision Regulations,* in LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM 19, 21 (D. Listokin ed. 1974).

78. Professor Williams states that the SZEA still comprises the foundation for enabling legislation in 47 states. 1 N. WILLIAMS, *supra* note 43, § 18.01, at 355.

79. D. ALLENSWORTH, LAND PLANNING LAW 8 (1981).

80. *See* text accompanying notes 1-3 *supra*.

81. Note, *County Zoning in Iowa*, 45 IOWA L. REV. 743, 750 (1960).

82. *See id.* at 746. One commentator noted that 37 states allow at least limited county zoning. 1 N. WILLIAMS, *supra* note 43, § 18.08, at 361.

B. Unique Issues Presented by Rural Zoning

The problems presented by land use regulation in rural areas differ from those in urban areas in two respects. First, the physical problems that arise in the rural and urban contexts are not identical, and imposition of techniques useful in one context are not necessarily a panacea for the other.[83] Second, constitutional and political constraints on the exercise of the zoning power impact differently in rural areas due to the unique physical problems characteristic of rural areas, as well as the different perspectives shared by rural people concerning formal land use planning techniques.[84]

1. Physical Problems Presented by Rural Zoning

In both rural and urban areas, zoning finds its roots in a desire to prevent one person's use of land from interfering with the enjoyment of another's.[85] The specific patterns and pressures of development, however, differ between rural and urban areas.[86] Urban zoning often is imposed on areas that are already developed. Preservation of existing or evolving neighborhoods and prevention of further deterioration of urban living conditions often are the main purposes of urban zoning. Thus, municipal zoning often results in the approval of an established neighborhood character and is frequently termed "negative zoning."[87]

Unlike negative zoning in municipalities, zoning in unincorporated areas permits county government to predict future development patterns. Moreover, county government may attempt to channel development toward the best future use of undeveloped land.[88] Fewer preexisting structures exist in rural areas to limit planning for the future.[89]

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83. *See* text accompanying notes 85-117 *infra*.

84. *See* text accompanying notes 118-85 *infra*.

85. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926); Comment, *Variance Law in New York: An Examination and Proposal*, 44 ALB. L. REV. 781, 788 n.42 (1980); Note, *Protection of Environmental Quality in Nonmetropolitan Regions by Limiting Development*, 57 IOWA L. REV. 126, 133 (1971).

86. The first municipal land use controls appeared in the late 19th century, coinciding with rapid population growth rates in urban areas. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926); Tomain, *Land Use Controls in Iowa*, 27 DRAKE L. REV. 254, 255 (1977-78). Zoning of rural areas is a more recent and less pervasive phenomenon, but it has gained momentum in the last 20 to 30 years because of the movement of people to suburban and rural areas in increasing numbers. *See* Note, *supra* note 85, at 127; Note, *supra* note 81, at 744.

While zoning in both rural and urban areas appears to be a response to population growth, the manner in which growth occurs differs between the two areas. *See* text accompanying notes 113-17 *infra*. Regardless of the differing problems, zoning as a land use regulation technique has followed the population to the suburbs.

87. *See, e.g.*, Reps, *The Zoning of Undeveloped Areas*, 3 SYRACUSE L. REV. 292, 292 1952); Note, *supra* note 81, at 747.

88. Reps, *The Zoning of Undeveloped Areas*, 3 SYRACUSE L. REV. 292, 292 (1952).

89. Note, *supra* note 81, at 751.

a. Effects of Uncontrolled Development on Agricultural Uses

Iowa's single most important natural resource is its land.[90] The legislative debates preceding adoption of Iowa Code chapter 358A suggest that that Act primarily was aimed at providing a means for county governments to protect agricultural uses from encroachment of incompatible developments.[91] The need for such protection is demonstrated by the effects of uncontrolled development on agricultural activities. Agricultural uses fare poorly in competition with other, more concentrated land use developments. Suburban residential and industrial growth commonly occurs first on land that is also prime agricultural land. Flat ground, due to its low susceptibility to erosion, is preferred by developers as well as farmers.[92] Because the value of a subdivided acre far exceeds its value when planted in crops,[93] sellout can become an economic imperative.

Economic pressure to sell in the face of oncoming development increases over time. The approach of residential and business uses results in higher tax costs for farmers for two reasons. First, the proximity of intensive uses will raise the land's assessed valuation. Second, expansion of public services to meet the needs of the growing population will cause increases in the tax rate.[94] Farmers rarely reap a benefit that is comensurate with this dual cost increase because farmers have little need for the newly provided services. Nevertheless, large farms foot a major portion of the service bill generated by urban immigration.[95] Thus, the rate of conversion of agricultural land only tends to accelerate as costs continue to increase for farmers who choose to retain their land while their neighbors sell out.[96]

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90. The importance of Iowa's land is reflected in Iowa's national reputation for agricultural productivity. In 1980 Iowa ranked second only to Illinois in percent of the value of U.S. farm exports. IOWA DEV. COMM'N, IOWA 1982 STATISTICAL PROFILE 24 (1982). Furthermore, Iowa ranked first in number of corn and soybean acres in 1980. *Id.* at 3.

91. Note. *supra* note 81, at 754.

92. Comment, *Rural Zoning in Nebraska,* 44 NEB. L. REV. 151, 165 (1965) [hereinafter cited as Comment, *Rural Zoning in Nebraska*]; Comment, *Agricultural Land Preservation by Local Government,* 84 W. VA. L. REV. 961, 961 (1982). All of the competition is not caused by intensive development of suburban communities. Farmland, with its open spaces, woodlots, lakes, and ponds is particularly attractive to outdoor recreationists. Comment, *Rural Zoning in Nebraska, supra,* at 165 n.71. The demand for recreation in America is growing faster than the population. *See* Swan, *Psychological Response to the Environment,* in ENVIRONMENTAL QUALITY AND WATER DEVELOPMENT 105 (1973).

93. *See* W. BLOCK, RURAL ZONING: PEOPLE, PROPERTY AND PUBLIC POLICY 19 (USDA Extension Serv. 1967); Comment, *Rural Zoning in Nebraska, supra* note 92, at 167.

94. *See* Note, *supra* note 85, at 143; Comment, *Rural Zoning in Nebraska, supra* note 92, at 166-68.

95. *See* E. SOLBERG, THE WHY AND HOW OF RURAL ZONING, 19 (USDA Bull. 1958); W. BLOCK, *supra* note 93, at 19.

96. The problem of conversion of farmland to more intensive uses is most acute in Iowa's fastest growing areas—suburban areas surrounding large, established cities. *See*

In addition to the economic predicament created for farmers by rural land development, the intrusion of high value uses commonly imposes detrimental effects on the physical productivity of land that is still farmed. One adverse effect resulting from rural development is the creation of conditions that increase the potential for flooding. The replacement of vegetation by hardened surfaces such as roads and building rooftops increases runoff at the expense of infiltration.[97] Additionally, rural developments lower the water table.[98] Accelerated runoff, coupled with direct drawing of ground water to supply rural developments, makes access to ground water for agricultural uses more difficult and more expensive.[99] Finally, air and water pollution are certain to accompany rural development.[100] Such changes in the environment make farming more difficult and more expensive.

The economic and physical effects of rural land development on agricultural uses in Iowa's rural areas have never been quantified. The studies required by the recently enacted Land Use Bill[101] may provide some information. At the very least, however, knowledge of the general effects of rural development is sufficient to warrant legislative notice thereof when considering rural land use regulation.

b. Effects of Uncontrolled Development on Uses Other than Agriculture

Protection of agriculture is not the only goal pursued by county zoning. Residential, business, and industrial uses are by no means unique to municipalities, and their appearance in rural areas can create land use conflicts more commonly found in urban areas. The very nature of rural areas also poses problems that urban planners do not face. The open spaces

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id. Between 1970 and 1980, the five largest cities in Iowa—Davenport, Des Moines, Cedar Rapids, Sioux City, and Waterloo—declined in aggregate population by 1.6%. IOWA DEV. COMM'N, IOWA 1982 STATISTICAL PROFILE 115 (1982). During the same period, the counties in which those cities are situated grew in population by 5%. *Id.* at 109-10.

97. T. DUNNE & L. LEOPOLD, WATER IN ENVIRONMENTAL PLANNING 259-60, 272, 275 (1978); E. SOLBERG, THE WHY AND HOW OF RURAL ZONING 19 (USDA Bull. 1958).

98. Note, *supra* note 85, at 143.

99. W. BLOCK, *supra* note 93, at 19; T. DUNNE & L. LEOPOLD, WATER IN ENVIRONMENTAL PLANNING 224 (1978).

100. Note, *supra* note 85, at 143. Although wind-borne air pollution already may be present, and although soil and chemical runoff from farms themselves cause significant water pollution, *see* Contemporary Studies Project, *Impact of Local Government Units on Water Quality Control,* 56 IOWA LAW REV. 804, 847-60 (1971) (describing various common sources of rural water pollution), population increases in rural areas are sure to exacerbate pollution problems. *See* E. SOLBERG, THE WHY AND HOW OF RURAL ZONING 19 (USDA Bull. 1958); Swan, *Psychological Response to the Environment,* in ENVIRONMENTAL QUALITY AND WATER DEVELOPMENT 107-08 (1973).

101. The Land Use Bill, IOWA CODE ch. 93A (1983), is discussed at text accompanying notes 265-83 *supra*.

found in rural areas are affected by the intrusion of urban uses and cause unique planning problems.

Many of the same conditions that led to the implementation of negative zoning in municipalities also may occur in rural areas if land use is not regulated.[102] The advantages of a particular locale that lead one person to construct a house often attract other people to build in that area, even if there was no initial plan to develop a multi-unit subdivision. Immigration to these locales adversely affects the open space amenities that initially attracted suburbanites.[103]

The intermingling of incompatible uses is another problem attending uncontrolled development that is common to both urban and rural areas.[104] Large businesses moving to the country to avoid municipal regulation and to take advantage of lower taxes often are followed by their employees. Other businesses subsequently are attracted by the new markets and available workforce created by the communities that develop around the first business.[105] Rural governments that act too late to regulate land use will be limited, in the same manner as are municipal planners, in their ability to direct future developments because of existing structures.[106] The effects of such uncontrolled development can be mitigated by zoning.

The effects of construction on spacious, often pristine, rural areas present many unique county land development problems. Although a municipality generally need not consider environmental preservation in implementing zoning, it can be assumed that most counties have an interest in preserving animal life and water quality in undeveloped areas. The most attractive sites for new rural subdivisions often are the most ecologically sensitive areas.[107] Sudden stripping of wooded hillsides leads to severe erosion, especially during construction.[108] Road cuts and exposed foot paths continue to erode even after revegetation.[109] Development around streams and lakeshores that precedes the construction of modern sewage systems

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102. *See* Note, *supra* note 81, at 747.

103. Note, *supra* note 85, at 126-31.

104. *See* W. BLOCK, *supra* note 93, at 19-21; Note, *supra* note 81, at 744.

105. Comment, *Rural Zoning in Nebraska*, *supra* note 92, at 164-65.

106. *See* Note, *supra* note 81, at 747.

107. Stream and lakeside areas and wooded hillsides are particularly attractive sites both for recreation, Swan, *Psychological Response to the Environment*, in ENVIRONMENTAL QUALITY AND WATER DEVELOPMENT 106-07 (1973), and for permanent habitation, *see* T. DUNNE & L. LEOPOLD, WATER IN ENVIRONMENTAL PLANNING 394 (1978). However, development of such sites can lead to severe erosion. McHarg & Clark, *Skippack Watershed and the Evansburg Project: A Case Study for Water Resources Planning*, in ENVIRONMENTAL QUALITY AND WATER DEVELOPMENT 310 (1973).

108. T. DUNNE & L. LEOPOLD, WATER IN ENVIRONMENTAL PLANNING 684 (1978); Comment, *Rural Zoning in Nebraska, supra* note 92, at 174.

109. *See* T. DUNNE & L. LEOPOLD, WATER IN ENVIRONMENTAL PLANNING 259-60 (1978).

can have detrimental effects on both the health of nearby residents and the amenities of shoreline lots.[110]

Lakeside land development presents an important land use problem for some counties in Iowa. For example, the only zoned land in Appanoose County is that adjoining Lake Rathbun,[111] where a rapid influx of vacation homes and recreational business developments has occurred. Similarly, a major concern of Cerro Gordo County zoning officials is the accommodation of current development plans with the poorly planned growth that occurred in the Clear Lake area before county zoning was implemented.[112]

Other unique problems for rural planners stem from the difficulties caused by construction in large, open areas. Rural land development tends to differ from urban development in the manner in which it progresses. Instead of a general spiral growth pattern around an urban core, rural developments tend to grow in a loose ribbon-like pattern along established roadways.[113] This type of growth leaves unused land scattered between subdivisions. Thus, a rural area population will occupy more land than a comparable population in a municipality.[114]

The "spread" pattern in which rural growth progresses is partly responsible for delay in the development of county services such as water and sewer sytems. Long distances between rural subdivisions make improvements relatively more expensive than the same quality services provided in denser, urban areas.[115] Low assessments for rural land and low population densities combine to limit the ability of many counties to develop service systems until after large portions of county land are developed.[116] By the time service development catches up with suburban construction, substantial environmental damages already may have occurred.[117]

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110. Note, *supra* note 85, at 128 n.22. Vacation home development around East Lake Okoboji in northwest Iowa reportedly turned the lake into a " 'virtual cesspool.' " *Id.* (quoting Spencer Daily Reporter, June 11, 1970, at 1, col. 6).

111. *See* Appanoose County, Iowa, Zoning Ordinance art. III, at 1 (1980).

112. Interview with Larry Phearman, Cerro Gordo County, Iowa, Zoning Administrator, in Mason City, Iowa (June 8, 1982).

113. W. BLOCK, *supra* note 93, at 19; Comment, *Rural Zoning in Nebraska, supra* note 92, at 165.

114. W. BLOCK, *supra* note 93, at 19; Comment, *Rural Zoning in Nebraska, supra* note 92, at 165.

115. *See* Note, *supra* note 85, at 143.

116. W. BLOCK, *supra* note 93, at 19; *see* Note, *supra* note 85, at 143 (advocating the implementation of zoning to avoid the "abnormally costly extension of municipal services" to rural residential developments); Comment, *Rural Zoning in Nebraska, supra* note 92, at 165, 168, 173 (recommending zoning as means of avoiding high public service costs generated by uneconomical land use).

117. See note 110 *supra*.

The aforementioned problems indicate the special need for long-range land use planning and regulation in rural areas. Conservation of prime agricultural land and other county resources can best be achieved through land development that is planned to reserve space efficiently for each proposed use. Uses that are sensitive to neighboring uses, such as agriculture, can thus be protected. Compatible uses can be arranged to achieve an optimal balance between land waste and maintenance of open-space amenities. The limited funds that are available for county projects can be concentrated to provide higher quality services for smaller areas.

2. *Legal and Political Problems Caused by Rural Zoning*

Rural zoning is both a prediction of future development and a method of channeling development toward that prediction. Constitutional and political constraints, however, limit the regulatory powers of county governments.

a. Constitutional Limitations

Although the constitutionality of a state's power to permit local government bodies to zone is not disputable,[118] the application of zoning restrictions to particular pieces of property may be unconstitutional. First, government must show a rational basis for the initial passage of the zoning ordinance and for any subsequent amendment thereto in order to satisfy due process.[119] Second, a zoning regulation must leave the landowner with some reasonably profitable land use option or that regulation may be challenged successfully as a taking of private property without just compensation.[120]

Iowa Code section 358A.5 requires that county zoning ordinances be adopted "in accordance with a comprehensive plan."[121] The statutory

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118. *See* Gorieb v. Fox, 274 U.S. 603, 607 (1927) (restricted-residence-district setback requirements "unassailable on constitutional grounds"); *see also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926); Keller v. City of Council Bluffs, 246 Iowa 202, 207, 66 N.W.2d 113, 116 (1954); Anderson v. Jester, 206 Iowa 452, 456, 221 N.W. 354, 356 (1928).

119. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-89 (1926); F.H. Uelner Precision Tools & Dies, Inc. v. City of Dubuque, 190 N.W.2d 465, 469 (Iowa 1971).

120. *See* Keller v. City of Council Bluffs, 246 Iowa 202, 206, 66 N.E.2d 113, 116 (1954) (zoning ordinance may be constitutional in general and unconstitutional in a specific instance); Petersen v. City of Decorah, 259 N.W.2d 553, 554-55 (Iowa Ct. App. 1977) (zoning restriction held to be unconstitutional taking because of its operation on a particular piece of property); Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 226-27, 15 N.E.2d 587, 592 (1938).

121. Section 358A.5 provides:

> Objectives.
>
> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street or highway; to secure safety from fire, flood, panic, and other dangers; to provide adequate light and air; to prevent

comprehensive plan requirement, taken from the Standard State Zoning Enabling Act,[122] is intended to ensure that county governments act rationally rather than arbitrarily in exercising their delegated zoning authority.[123] Most courts agree that to satisfy the comprehensive plan requirement the county legislative body must show that the plan, whether inherent in the zoning ordinance or a separate written document, is designed to reflect current and future expected land uses.[124] Courts are split, however, on what documentary evidence must be produced by the legislative body to prove that it carried out the requisite deliberations.

Many courts have concluded that the final zoning ordinance, without any other evidence of planning, provides a sufficient basis to test the rationality of the regulation. If the zoning map is not arbitrary or capricious, both the rational basis test and the comprehensive plan requirements are simultaneously satisfied.[125] The Iowa Supreme Court recently reaffirmed its acceptance of that "minimal showing" standard in *Montgomery v. Bremer County Board of Supervisors*.[126] In *Montgomery* a group of neighbors challenged two amendments that the board of supervisors had made to the county zoning map. The adjacent properties in question, which were previously

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> the 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 regulations shall be made with reasonable consideration, among other things, as to the character of the area of the district and the particular suitability of such area for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such county.

IOWA CODE § 358A.5 (1983).

122. SZEA, *supra* note 61.

123. *See, e.g.*, Summ v. Zoning Comm'n, 150 Conn. 79, 87-88, 186 A.2d 160, 164 (1962); Mraz v. County Comm'rs, 291 Md. 81, 88-89, 433 A.2d 771, 776 (1981); Kozesnik v. Montgomery Township, 24 N.J. 154, 166, 131 A.2d 1, 7 (1953); Garden State Farms, Inc. v. Bay II, 136 N.J. Super. 1, 23-24, 343 A.2d 832, 844 (Law Div. 1975); Udell v. Haas, 21 N.Y.2d 463, 468-72, 235 N.E.2d 897, 900-01, 288 N.Y.S.2d 888, 893-94 (1968); *In re* Key Realty Co., 408 Pa. 98, 101-02, 182 A.2d 187, 189 (1962); Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1155-56 (1955); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 902 (1976).

124. Morningside Ass'n v. Planning & Zoning Bd., 162 Conn. 154, 161, 292 A.2d 893, 898 (1972); Connor v. Township of Chanhassen, 249 Minn. 205, 213, 81 N.W.2d 789, 796 (1957); Township of Sparta v. Spillane, 125 N.J. Super. 519, 525, 312 A.2d 154, 157 (App. Div. 1973); Fasano v. Board of County Comm'rs, 264 Or. 574, 583, 507 P.2d 23, 27-28 (1973); A. VESTAL, IOWA LAND USE AND ZONING LAW § 3.01(d) (1979); *see also* Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1155 (1955).

125. Dawson Enters., Inc. v. Blaine County, 98 Idaho 506, 509-10, 567 P.2d 1257, 1260-61 (1977); Mraz v. County Comm'rs, 291 Md. 81, 88-89, 433 A.2d 771, 776 (1981); Sabo v. Monroe Township, 394 Mich. 531, 538-41, 232 N.W.2d 584, 586-88 (1975); Kozesnik v. Township of Montgomery, 24 N.J. 154, 166, 131 A.2d 1, 7-8 (1957); Tulsa Rock Co. v. Board of County Comm'rs, 531 P.2d 351, 357 (Okla. Ct. App. 1975).

126. 299 N.W.2d 687 (Iowa 1980).

farmed, had been rezoned from an agricultural district to an industrial district to allow for the construction of a hog slaughtering plant.[127] The petitioning neighbors raised several grounds for reversal, including the contention that the rezoning amendments did not conform to the comprehensive plan. The court rejected the comprehensive plan contention, holding that the board's consideration of public needs, changing conditions, and the similarity of the subject tract to other land in the vicinity satisfied the statutory planning requirement.[128]

Application of the minimal showing standard should result in the affirmation of many zoning ordinances.[129] In Iowa, for example, twenty-five county boards of supervisors adopted zoning ordinances without having previously developed or adopted a comprehensive plan.[130] Although convenience and flexibility are well served by the application of the minimal showing standard, the standard will not serve the public's interest in the development of well-reasoned zoning regulations. Moreover, acceptance of the minimal showing requirement derogates the zoning enabling legislation's comprehensive plan requirement.[131] A zoning map cannot serve as a substitute for a separate planning process because the map merely reflects current uses; maps ignore the prospects for future developments.[132] By failing to account for future expectations, the zoning map is not a "plan." Moreover, a zoning map is not "comprehensive" because the post hoc rationalization offered to justify each individual amendment to the map is based only on the needs of the person who is seeking rezoning rather than the needs of the entire community.[133] Therefore, approval of such a system encourages arbitrary amendment of the map.[134]

Both the statutory comprehensive plan requirement and concepts of fairness suggest that a planning requirement more stringent than the minimal showing standard should be imposed by Iowa courts. If the Iowa Supreme Court accepts the proposition that an ordinance adopted in accord-

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127. *Id.* at 691.

128. *Id.* at 695.

129. *See* Comment, *Land Use Planning—A Prerequisite to Effective Zoning*, 11 ST. MARY'S L.J. 161, 164-65 (1979).

130. *See* Appendix III *infra* (Table 1).

131. Comment, *Land Use Planning—A Prerequisite to Effective Zoning*, 11 ST. MARY'S L.J. 161, 164-65 (1979).

132. The zoning map may be a rational reflection of *current* land use. To call the map a plan, however, strains logic. The concept of a plan implies consideration of *future* desires and expectations. If the zoning map can be called a plan, the drafters of the map must not expect any change in the use of land in the future. *Id.* at 171.

133. The findings of the Project indicate that county boards of supervisors rarely consider amendment requests in terms of the needs of the community as a whole. Rather, only the needs of the petitioner are considered. *See* note 140 *infra*.

134. *Cf.* Sullivan & Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33, 44 (1975) (value of separate plan derives from forcing local decisionmakers to account for general welfare by considering future overall development needs as well as individual case at hand).

ance with itself satisfies the comprehensive plan requirement, the statutory requirement in Iowa Code section 358A.5 will be rendered meaningless. Rules of statutory construction counsel against such a result.[135]

The circumstances under which zoning is implemented in rural areas provide special reason to reject the minimal showing standard. Although established neighborhoods and recognizable development patterns make a separate-plan requirement less important in urban areas, a more complex question is presented in dealing with wide open rural lands.[136] Zoning is intended to be a prediction and plan for future orderly development.[137] Common practices indicate, however, that zoning often is used as a tool to freeze current land uses and then to allow developments on a case-by-case basis through occasional administrative relaxation of the old map.[138]

Evidence of those practices appears both in county zoning maps and analysis of amendment and variance procedures currently employed by county zoning officials in Iowa. As enacted, most of the maps studied show isolated areas of residential, commercial, and industrial zones accommodating current uses, with the balance of land devoted to the more

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135. Comment, *Land Use Planning—A Prerequisite to Effective Zoning*, 11 ST. MARY'S L.J. 161, 164-65 (1979).

136. Courts often state that the plan must account for current and expected land uses. Morningside Ass'n v. Planning & Zoning Bd., 162 Conn. 154, 161 n.3, 292 A.2d 893, 898 n.3 (1972); Plaza Recreational Center v. Sioux City, 253 Iowa 246, 257-58, 111 N.W.2d 758, 765 (1961); Mraz v. County Comm'rs, 291 Md. 81, 88, 433 A.2d 771, 776 (1981); Shelton v. City of Bellevue, 73 Wash. 2d 28, 35, 435 P.2d 949, 953 (1968). Cities embrace both established neighborhoods and areas undergoing development. A zoning map that mirrors the existing situation satisfies the requirement that the plan account for current and expected land uses, at least to an extent.

A zoning map that mirrors existing land uses in a rural area frequently shows nothing more than a few scattered houses and much farmland. The map accounts for current uses, but prediction of expected uses is virtually impossible. Note, *Non-Euclidean "Zoning"—Its Theoretical Validity and Practical Desirability in Undeveloped Areas*, 30 U. CIN. L. REV. 297, 303-05 (1961).

Moreover, district lines in rural areas must be somewhat arbitrary. Reps, *The Zoning of Undeveloped Areas*, 3 SYRACUSE L. REV. 292, 293 (1952). In a relatively homogeneous undeveloped area, almost any use, if it is the first to appear, is compatible with the area. Because county governments have less opportunity to plan for compatibility based on the current uses of an area, they should be required to justify zoning district lines on legitimate land use planning goals. *Id.*

The Iowa Supreme Court recognized the special problems of rural zoning in Keppy v. Ehlers, 253 Iowa 1021, 115 N.W.2d 198 (1962). In *Keppy* the court struck down an amendment to a zoning ordinance in a rural area on the ground that, because the property rezoned was indistinguishable form its surroundings, the board of supervisors' classification was not in accordance with a comprehensive plan. *Id.* at 1023-24, 115 N.W.2d at 200. The court 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." *Id.* at 1023, 115 N.W.2d at 200. However, the court did not propose any lasting solutions; the individual amendment was struck down, but counties were left without guidance with respect to a better process for rezoning rural land.

137. *See* note 136 *supra*.

138. *See* Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 719 (1980).

restrictive agricultural zones.[139] Subsequently, higher density uses are accommodated by amendment or variance—one tract at a time.[140] That

139. *See, e.g.*, Butler County, Iowa, Zoning Ordinance (1978) (newspaper supplement; map at centerfold); Franklin County, Iowa, Zoning Ordinance (1976) (map attached); Guthrie County, Iowa, Zoning Ordinance (1972) (map at unnumbered p. 3); Henry County, Iowa, Zoning Ordinance (1961) (map at centerfold); Madison County, Iowa, Zoning & Subdivision Ordinances (1966) (map attached); Montgomery County, Iowa, Zoning Ordinance (1977) (map attached).

140. An in-depth analysis of zoning commission dispositions of rezoning requests was carried out in a randomly selected sample of 10 counties. Those counties are Butler, Cass, Fayette, Floyd, Greene, Guthrie, Henry, Ida, Madison and Polk. Minutes of boards of supervisors' final action on rezoning petitions are useless to this analysis because all the supervisors' minutes collected contained nothing more than a legal description of the property involved, a statement of the zoning commission's recommendation, a list of persons in attendance, and a record of the vote. *See, e.g.*, Floyd County Board of Supervisors Minutes, Rezoning Petition of Weatherwax, book 22, p. 10 (Jan. 26, 1982); Polk County Board of Supervisors Minutes, Petition of Bartholomew (Nov. 24, 1981). Thus, if there are any reasons for the granting of rezoning requests, those reasons must be found in the zoning commission minutes.

The zoning commissions' minutes reviewed, however, resemble those of the boards of adjustment, *see* note 626 *infra*, in their failure to display the reasons for change in the zoning scheme. *See, e.g.*, Greene County Zoning Commission Minutes, Petition of Franey (July 6, 1981); Henry County Zoning Commission Minutes, Petition of Cornell (March 28, 1980); Ida County Zoning Commission Minutes, Petition of Godberson (Oct. 5, 1981). Moreover, the rezoning practices of only 10 counties were surveyed. Thus, the conclusion drawn—that county zoning commissions frequently approve zoning amendments for, at best, undisclosed reasons, and at worst, for no reasons at all—is based on circumstantial proof. However, as Richard Babcock stated, "[h]unch and gut reaction . . . are appropriate benchmarks in a field where scrutiny of entrails for propitious omens frequently is more effective than the most careful search in the academic publications." R. BABCOCK, THE ZONING GAME xiii (1966). Considerable circumstantial evidence of arbitrary action exists in the sample counties.

Rezoning deliberations rarely include an analysis of the area-wide impact contemplated by Iowa Code § 358A.5. Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 695 (Iowa 1980). In interviews many county supervisors indicated that proposed zoning amendments were brought before county zoning commissions only at the request of specific individuals. *See, e.g.*, Board of Supervisors Member Interview No. 319 (July 30, 1982) (by telephone); Board of Supervisors Member Interview No. 315 (July 20, 1982) (by telephone); Board of Supervisors Member Interview No. 305 (July 8, 1982); Board of Supervisors Member Interview No. 312 (June 24, 1982); Board of Supervisors Member Interview No. 314 (June 24, 1982); Board of Supervisors Member Interview No. 307 (June 21, 1982); Board of Supervisors Member Interview No. 308 (June 14, 1982); Board of Supervisors Member Interview No. 311 (June 8, 1982). Thus, self-interested, individual requests, rather than perceived community needs, are a frequent starting point for amendment petitions. Amendments passed to accommodate the needs of individual property owners without regard to the rights of neighboring landowners constitute illegal "spot zoning." 2 E. YOKLEY, *supra* note 42, § 13-3.

The analysis of 10 counties' zoning commission minutes lends further support to the contention that only the petitioner's land and proposed use is normally considered. Exceptions appear in Polk and Butler Counties. In Polk County eight rezoning applications disposed of between November 1981 and March 1982 were reviewed. In each case considerable analysis of the area involved was provided by the planning staff. *See, e.g.*, Polk County Zoning Commission Minutes, Petition of Enterprise Farmers Elevator Co. (May 24, 1982); *id.* Petition of Thomas (Feb. 22, 1982); *id.* Petition of Easley (Aug. 24, 1981)

method of zoning has the potential of unfairly favoring applicants with political connections and popular proposals at the expense of those persons who have relied on the current zoning map.[141] The burden that would

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(request by several adjacent landowners). Only two rezoning applications were found in Butler County. The zoning commission's consideration of the primary goal of the county's land use plan, preservation of agricultural land, resulted in denial of one of the applications. Butler County Zoning Commission Minutes, Petition of Brandt (June 19, 1981).

In the other eight counties sampled, a pattern of original imposition of a strict map, *see* note 139 *supra* and accompanying text, followed by routine accommodation of proposed construction was observed. Sixty-nine rezoning petitions were studied; only three of those petitions were denied, all in Henry County. Henry County Zoning Commission Minutes, Petition of Sandersfeld (June 30, 1978); *id.* Petition of Welcher (Nov. 12, 1976); *id.* Petition of Watson (Apr. 27, 1976).

In 26 of the 69 petitions reviewed, the acreage involved is not disclosed in the minutes. Twenty-four cases out of the remaining 43 resulted in rezoning of smaller than five acres, and twelve involved less than two acres. *See, e.g.*, Fayette County Zoning Commission Minutes, Petition of C.M.H., Inc. (Apr. 8, 1982) (fractional one acre); Henry County Zoning Commission Minutes, Petition of Sutton (June 29, 1979) (one acre); Ida County Zoning Commission Minutes, Petition of Kielhorn (Mar. 9, 1981) (one acre). Sixty-two of the 69 petitions raised the classification of previously agriculturally zoned land to a higher classification. *See, e.g.*, Cass County Zoning Commission Minutes, Petition of G.A. Finley, Inc. (Mar. 26, 1981) (agricultural to heavy industrial zone); Greene County Zoning Commission, Petition of Finch (Feb. 4, 1980) (agricultural to commercial zone); Guthrie County Zoning Commission Minutes, Petition of Northwestern Bell (Sept. 16, 1981) (agricultural to commercial zone). Small size of a rezoned lot, while not conclusive, is another indicium of spot zoning. *See, e.g.*, 1 P. ROHAN, *supra* note 70, § 5.02[2]; 2 E. YOKLEY, *supra* note 42, § 13-2.

The resolution adopted by the zoning commission differed from the request in only one instance out of 69. Madison County Zoning Commission Minutes, Petition of Farmer's Co-op (May 21, 1981). In that case the petitioner requested rezoning of a 20-acre tract from agricultural to industrial restrictions to operate a fertilizer plant. The zoning commission recommended rezoning of five acres because of objections from neighbors. *Id.*

Other circumstantial evidence indicating that comprehensive planning is ignored abounds in many counties. The high rate of variance approval, *see* text accompanying notes 691-93 *infra*, further suggests that administrative relaxation of the original zoning scheme is routine rather than exceptional. Moreover, county officials' inability to distinguish zoning amendments, variances, and special exceptions, *see* Appendix IV (Tables 9-12); notes 328-29 *infra* and accompanying text, implies that county officials find legal criteria to be of little importance. Finally, the evidence of absentee voting methods employed in several counties, *see* notes 614-16 *infra* and accompanying text, indicates that the process by which administrative restructuring of a county zoning ordinance is carried out is a mere formality.

Thus, the Project found several specific instances and much circumstantial evidence to support the conclusion that, in many Iowa counties, the zoning scheme fails to limit development in any rational fashion. Instead, the original zoning map, accepted by many courts as the last word in land use planning, is nothing more than a picture of uses existing at the time of the map's adoption. Subsequent legislative and administrative changes render the map meaningless as a guide to future land development. Professor Krasnowiecki calls that conclusion "self-evident" without even conducting a systematic evaluation. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 719 (1980). The empirical results of this Project offer compelling evidence that little real planning occurs at the county level in Iowa. A more formalized planning process is needed to ensure rational application of zoning restrictions.

141. *See* Roberts, *The New Frontier*, 31 SYRACUSE L. REV. 685, 687-88, 692-93 (1980).

be placed on county governments by a more stringent planning requirement is not overwhelming. An elaborated-plan requirement would not be an imposition on the counties that already zone in accordance with a recognizable plan. Even though a more stringent planning requirement may constitute an additional burden on those counties that have not formulated a definite land use plan, the requirement that boards of supervisors plan in advance and consult the plan when drawing the zoning map or considering future land development is essential to equal treatment of all county residents.[142]

Once a legislative body has proven the reasonableness of its zoning classifications, another constitutional burden must be met: the zoning regulation must not so greatly restrict the use of the land that it constitutes a taking of property without just compensation. In determining the validity of the zoning regulation,[143] the benefits to the public,[144] the reciprocal benefits to the landowners affected by a zoning regulation,[145] and the uses that may still be made of the restricted land,[146] are significant considerations.

The many public benefits that result from zoning in rural areas arguably should persuade courts to uphold the regulations. First, concentration of higher density developments to defined areas mitigates the high

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142. *Cf.* Keppy v. Ehlers, 253 Iowa 1021, 1023-24, 115 N.W.2d 198, 200 (1962) (when "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 industrial use; and similar in value, . . . the amendment in question is discriminatory between citizens owning similar tracts of land and is illegal").

143. *See, e.g.*, Schlueter v. County of St. Clair, 19 Ill. App. 3d 470, 471, 311 N.E.2d 735, 737 (1974); Mongtomery County Council v. Kacur, 253 Md. 220, 229, 252 A.2d 832, 837 (1969); Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 226, 275 N.E.2d 585, 588, 325 N.Y.S.2d 933, 938 (1971); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 591-92 (1938); *cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (historic landmark preservation ordinance is not a taking); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (due to substantial degree of resulting devaluation, state coal mine safety regulations constitute taking).

144. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Miller v. Schoene, 276 U.S. 272, 279-80 (1928); Hadacheck v. Sebastian, 239 U.S. 394, 409-10 (1915); Rochhi v. Zoning Bd. of Appeals, 157 Conn. 106, 113, 248 A.2d 922, 926 (1968); Cohen v. City of Des Plaines, 30 Ill. App. 3d 918, 924-26, 333 N.E.2d 513, 518-20 (1975); Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969); Just v. Marinette County, 56 Wis. 2d 7, 15-16, 201 N.W.2d 761, 767 (1972).

145. *See* Agins v. City of Tiburon, 447 U.S. 255, 262 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 134-35 (1978); Blades v. City of Raleigh, 280 N.C. 531, 549-50, 187 S.E.2d 35, 45-46 (1972); Norman Hall, Inc. v. Gurda, 234 Wis. 290, 295-96, 291 N.W. 350, 353 (1940); *see also* Note, *supra* note 85, at 136, 143.

146. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978); Ford Leasing Dev. Co. v. Board of County Comm'rs, 186 Colo. 418, 426-27, 528 P.2d 237, 241 (1974); LaSalle Nat'l Bank v. Lake County, 69 Ill. App. 2d 179, 184, 215 N.E.2d 849, 852 (1966).

cost of extending services to haphazardly located developments.[147] Second, agricultural land can be preserved in the interest of maximizing the world food supply.[148] Third, scenic and ecologically sensitive areas can be protected from the hazards of poorly planned development.[149] This list of public benefits is not by definition all-inclusive.

The reciprocal benefits that accrue to all landowners in a restricted zoning district are particularly important in justifying the diminution of some owners' land values.[150] Freedom from imposition of other incompatible uses was the justification cited in *Village of Euclid v. Ambler Realty Co.*,[151] and it remains valid for modern zoning ordinances.[152] In this manner the open-space amenities that contribute to a rural home's desirability are protected. Low density districts, such as agricultural areas, are shielded from higher taxes and assessments.[153] Again, this is only a partial list of reasons that can be advanced to justify a county's exercise of its zoning authority.

Notwithstanding the benefits that accrue to the public and the class of affected landowners, to be immune from a "takings" challenge, a zoning restriction also must leave each landowner with a reasonably profitable use of the restricted land. The leading case expounding this requirement is *Arverne Bay Construction Co. v. Thatcher*.[154] In *Arverne Bay* the plaintiff wished to construct a gas station on a parcel of land in a largely undeveloped area on the outskirts of New York City. After the zoning board of standards and appeals denied an application for a variance, the plaintiff challenged the residential classification as a taking of property without just compensation.[155] Although denial of the variance was affirmed,[156] the New York Court of Appeals sustained the takings challenge.[157]

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147. *See* Note, *supra* note 85, at 143.

148. *Cf.* Just v. Marinette County, 56 Wis. 2d 7, 18, 201 N.W.2d 761, 768 (1972) (preservation of existing environmental character for enjoyment of the general public is a valid exercise of police power).

149. Note, *supra* note 85, at 143; *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978) (land use regulations may be used to preserve aesthetically desirable features such as historic landmarks). *But see* Comment, *Filling in the* Pennsylvania Coal *Mine:* Agins v. City of Tiburon *and Supreme Court Approval of Open Space Zoning,* 1981 WIS. L. REV. 790, 796 n.53 (open-space zoning is not universally accepted).

150. *See, e.g.,* Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 134-35 (1978); Note, *supra* note 85, at 137.

151. 272 U.S. 365, 394-95 (1926).

152. Agins v. City of Tiburon, 447 U.S. 255, 261-62 (1980).

153. Note, *supra* note 85, at 144; Comment, *Rural Zoning in Nebraska, supra* note 92, at 173.

154. 278 N.Y. 222, 15 N.E.2d 587 (1938). *Accord* Petersen v. City of Decorah, 259 N.W.2d 553, 555 (Iowa Ct. App. 1977).

155. 278 N.Y. at 225, 15 N.E.2d at 589.

156. *Id.*, 15 N.E.2d at 589.

157. *Id.* at 230, 15 N.E.2d at 591.

The lower court found that the district designated for residential use was wholly unfit for residences because of the proximity of a city incinerator and open sewer. Both the incinerator and sewer discharged offensive fumes and odors that permeated the plaintiff's property.[158] The New York Court of Appeals ruled that conditions which would make development of a conforming use possible on restricted land must be reasonably foreseeable. Because the residential district had been in basically the same state for over ten years and the city could not show any plans for future improvement, the ordinance was held invalid with respect to all similarly situated surrounding property.[159]

The rule presented in *Arverne Bay* does not make it impermissible for a governing body to zone to protect an undeveloped area for certain planned uses. As the United States Supreme Court ruled in *Zahn v. Board of Public Works*,[160] local government may place reasonable restrictions on the improvements that may be made on undeveloped land.[161] *Zahn* also involved a challenge to the residential classification of the landowner's property.[162] The state court initially stated that the potential suitability of the area for a nonresidential use was irrelevant. Rather, the only issue for the court was whether the area was reasonably suitable for its current classification.[163] The state court held that the city was justified in keeping the area clear for residences in the interest of the welfare of the entire city,[164] and the United States Supreme Court affirmed.[165]

The significant factual distinction between *Zahn* and *Arverne Bay* is that the property in *Zahn* was located on a busy street in a rapidly developing part of town and that there was, therefore, an immediate prospect of profitable residential development in the district.[166] Under those circumstances the law permits a governmental body to save an undeveloped area for a use that would be incompatible with another, albeit reasonable, use. The *Arverne Bay* and *Zahn* cases also illustrate the significance of a fact that is particularly important in the county zoning context: future development patterns in undeveloped areas are often difficult to predict.[167] To

158. *Id.*, 15 N.E.2d at 591.

159. *Id.* at 232, 15 N.E.2d at 591-92.

160. 274 U.S. 325 (1927).

161. *Id.* at 327-28.

162. *Id.* at 327. The neighborhood under consideration was sparsely occupied but was undergoing rapid development. *Id.* at 327-28.

163. *See* Zahn v. Board of Pub. Works, 195 Cal. 497, 510-12, 234 P. 388, 395-96 (1925), *aff'd*, 274 U.S. 325, 328 (1927).

164. *Id.* at 514-15, 234 P. at 395-96.

165. 274 U.S. at 328.

166. *See id.* at 327-28.

167. Note, *Non-Euclidean "Zoning": Its Theoretical Validity and Practical Desirability in Undeveloped Areas*, 30 U. CIN. L. REV. 297, 300 (1961); *see also* note 136 *supra*.

assure fairness and avoid potential takings of property without just compensation, county governments must therefore plan carefully to ensure that some reasonably profitable use is, or will be made, available to each landowner.[168]

b. Sociological and Political Barriers to Effective Land Use Regulation

After satisfying statutory and constitutional prerequisites to zoning, county boards of supervisors must overcome institutional barriers to effective zoning. County zoning in Iowa is optional; it is within the discretion of each county board of supervisors to implement a zoning scheme.[169] Public apathy toward, or resistance to, county zoning not only prevents the adoption of county zoning ordinances, but also impedes the administration of zoning schemes after they are adopted.

(i) Barriers to Initial Adoption of Land Use Regulations

Formal land use regulation of any type is historically an urban institution.[170] Urban residents of today accept zoning as a fact of life. Zoning of rural areas, however, is a more recent phenomenon.[171] Thus, rural people have not had the same time to become acquainted with zoning. What some planners contend is conservatism inherent in rural people may simply be unfamiliarity.[172] Additionally, rural problem solving is historically more of a voluntary, ad hoc process than the institutionalization common in more densely populated areas.[173] Many rural people think that the government which restricts them least is the best form of government.[174] That attitude may explain the decision of thirty-two Iowa counties not to adopt a zoning ordinance.

Another factor contributing to the unpopularity of zoning is that it may be perceived that the benefits of land use are reaped by many strangers at the expense of local land owners.[175] Protection of agricultural resources and recreational amenities requires that some individuals be restricted in

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168. *See* text accompanying notes 122-42 *supra*.

169. *See* IOWA CODE § 358A.1 (1983).

170. *See* note 86 *supra*.

171. *Id.*.

172. W. BLOCK, *supra* note 93, at 4; Lapping, *Rural Development and Land Use Planning: A Forestry Perspective*, 80 J. FORESTRY 583, 584 (1982).

173. W. BLOCK, *supra* note 93, at 4; Lapping, *Rural Development and Land Use Planning: A Forestry Perspective*, 80 J. FORESTRY 583, 584 (1982).

174. Community sentiments about government intrusion into the right of free use of property were reflected in comments by county officials when asked about the major problems faced by zoning authorities. *See, e.g.*, Board of Supervisors Member Interview No. 308 (June 14, 1982); Zoning Administrator Interview No. 205 (June 21, 1982); Zoning Administrator Interview No. 207 (June 14, 1982); *see also* W. BLOCK, *supra* note 93, at 18 (explaining that some people oppose zoning by government as "a matter of ethics").

175. Lapping, *Rural Development and Land Use Planning: A Forestry Perspective*, 80 J. FORESTRY 583, 602 (1982).

the manner in which they develop their property. In many ways the general populace of Iowa, both present and future, is the beneficiary of county zoning. Even if the board of supervisors decides that those burdened receive reciprocal benefits, it is impossible to convince every landowner that zoning regulations are worthwhile.

Opposition to land use regulation was encountered before zoning was implemented in several counties.[176] In interviews, several board of supervisors members recalled their memories of vocal opposition to the imposition of zoning restrictions.[177] At least one incident has been reported in which violent threats were made against county officials who were considering the enactment of a zoning ordinance.[178] A system that places restrictions on the free use of property obviously is not universally accepted.

(ii) Barriers to Effective Enforcement of Zoning Regulations

Even after a county government overcomes public resistance and enacts zoning regulations, effective administration is hindered by institutional factors.[179] Many zoning administrators and board of adjustment members remain unfamiliar with state zoning enabling legislation, Iowa Supreme Court opinions clarifying the law, and even the county zoning ordinances.[180] Unfamiliarity with the law makes its enforcement impossible. Enforcement is also a problem in some counties regardless of the administrator's knowledge of the zoning restrictions. For example, many board of adjustment members contend that "good common sense" is all that is needed to apprise a variance request.[181] The survey of county board of adjustment cases conducted by this Project suggests that "good common

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176. All of the Project information was gathered in counties that have zoned. Thus, evidence of the political factors that hinder adoption of zoning comes entirely from counties where such opposition was overcome.

177. One zoning administrator recalled a board of supervisors meeting in which two of the supervisors came to fisticuffs while discussing zoning. Zoning Administrator Interview No. 209 (June 3, 1982). In most counties, however, county officials contended that consideration of zoning ordinances evoked little interest at all from county residents. *See* Board of Supervisors Interview No. 316 (July 22, 1982); Board of Supervisors Interview No. 314 (June 24, 1982); Board of Supervisors Interview No. 312 (June 24, 1982); Board of Supervisors Interview No. 307 (June 21, 1982); *see also* note 789 *supra* and accompanying text..

178. Zoning Administrator Interview No. 202 (June 15, 1982).

179. Note, *supra* note 85, at 163.

180. Several county zoning officials stated that they had never heard of the term "unnecessary hardship" or of the enabling legislation, IOWA CODE ch. 358A (1983). *See, e.g.*, Board of Adjustment Interview No. 101 (June 22, 1982); Board of Adjustment Interview No. 103 (June 14, 1982); Zoning Administrator Interview No. 210 (June 8, 1982); Zoning Administrator Interview No. 207 (June 14, 1982); *see also* Appendix IV *infra* (Tables 9 & 10).

181. *See, e.g.*, Board of Adjustment Questionnaire Nos. 081, 312, 421, 603.

sense'' must mean no more than that board members make every effort to accommodate the wishes of parties who appear at the hearing.[182]

Although such a ''neighborliness doctrine'' may be desirable in some contexts, it is illegal when its implementation in the zoning context diverges from the established requirements for defining districts and permissible variations.[183] The ''neighborliness doctrine,'' which also is espoused by many zoning administrators, results in administrative relaxation of zoning ordinance requirements. Enforcement of the zoning ordinance, while difficult in most circumstances, is entirely neglected in some counties.[184] This leads to popular contempt for the restrictions, and construction is carried out as though no zoning ordinance was in effect. Similar enforcement problems often result from a lack of publicity of the requirements of the county ordinance.[185]

The institutional factors listed above often lead to problems in the enactment and administration of county zoning ordinances in Iowa. These factors manifested themselves both in conversations that the Project writers had with zoning officials and in the results of the cases studied. What these institutional factors suggest is the need to consider more than merely the content of enabling legislation or what makes a zoning ordinance constitutional. The Iowa Legislature also must consider such things as the need to provide more detailed definitions of terms contained in the enabling legislation. The enabling act should be designed for the results that are foreseeable when individuals are in charge. With that caveat, the land

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182. The presence of objectors or supporters was one of the factors this Project found to have a substantial bearing on the outcome of a petition. *See* text accompanying notes 789-800 *infra*. Many board members said in interviews that presence of objectors was a very significant, if not crucial, factor in the variance decision-making process. *See, e.g.*, Board of Adjustment Member Interview No. 104 (June 21, 1982); Board of Adjustment Member Interview No. 105 (June 21, 1982); Board of Adjustment Member Interview No. 109 (June 10, 1982); Board of Adjustment Member Interview No. 113 (June 24, 1982); *see also* Appendix IV *infra* (Table 35(8)).

183. Professor Wilcoxen refers to ''the 'good business' philosophy, which argues that the expansion or development of any business activity will be of great economic benefit to a community.'' Wilcoxen, *Procedures Before Zoning Boards of Adjustment*, 19 OKLA. L. REV. 29, 35 (1966). Persons who espouse the good-business philosophy, however, often fail to consider that the cost of services required by new developments is greater than the additional tax revenue derived. *See* Note, *supra* note 85, at 164-65. In Iowa the concept is expanded to accommodate *any* use, business or otherwise, which does not elicit opposition. *See* text accompanying notes 791-98 *infra*.

184. *See* Appendix VI *infra* (Table 35).

185. One board of adjustment member called zoning in his county a ''joke,'' largely because of the apathy with which the zoning administrator approached his enforcement duties Board of Adjustment Questionnaire No. 014. The administrator in that county stated that he thought the best zoning reform his county could pursue was repeal because lack of publicity of the regulations and outright defiance of the restrictions made enforcement of the regulations impossible. Zoning Administrator Interview No. 222 (June 14, 1982).

use regulation system that has been devised by the Iowa Legislature will be examined.

III. IMPLEMENTATION OF ZONING IN IOWA

This part will focus on Iowa's statutory zoning scheme. First, the history of state zoning legislation in Iowa, including recent legislative enactments with potential future impact, will be discussed.[186] Then, the important features of Iowa Code chapter 358A, which defines the legislative scheme for county land use regulation, will be examined.[187]

A. History of Iowa Zoning Enabling Legislation

The history of Iowa zoning law parallels nationwide trends.[188] The state legislature experimented with municipal land use regulation by enacting restricted-residence-district enabling legislation in 1917.[189] Delegation of general zoning powers to municipalities followed in 1923 with passage of the predecessor of Iowa Code chapter 414.[190] Patterned after the SZEA, chapter 414 remains in force in amended form today.[191]

The concept of zoning unincorporated areas was not as readily accepted by the state legislature because of political resistance.[192] As a result of opposition to comprehensive zoning of unincorporated areas, the original Iowa Code chapter 358A, enacted in 1947, contained three significant compromise provisions.[193] First, all agricultural uses were exempted entirely from zoning regulation.[194] Second, only counties with a population greater than 60,000 were given the authority to zone unincorporated land.[195] Last, counties with the requisite minimum population could adopt a zoning ordinance only if a majority of owners of unincorporated property approved the ordinance.[196]

Only nine counties in Iowa had enacted a zoning ordinance by 1959.[197]

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186. *See* text accompanying notes 188-283 *infra*.

187. *See* text accompanying notes 284-353 *infra*.

188. *See* text accompanying notes 46-82 *supra*.

189. Act of April 5, 1917, ch. 138, 1917 Iowa Acts 160; *see* City of Des Moines v. Manhattan Oil Co., 193 Iow 1096, 1098, 184 N.W. 823, 824 (1922); *see also* Note, *supra* note 81, at 753.

190. Act of Apr. 24, 1923, ch. 134, 1923 Iowa Acts 124 (current version at IOWA CODE ch. 414 (1983)).

191. *See* IOWA CODE ch. 414 (1983).

192. Note, *supra* note 81, at 753-54.

193. *Id.*

194. Act of Apr. 1, 1947, ch. 184, § 2, 1947 Iowa Acts 229, 229.

195. *Id.* § 1, 1947 Iowa Acts at 229.

196. *Id.* § 3, 1947 Iowa Acts at 229-30. A majority, both in number of real property taxpayers and in assessed property valuation, was required. Note, *supra* note 81, at 754.

197. Note, *supra* note 81, at 754.

Amendments to chapter 358A in 1955[198] and 1959[199] contributed to the enactment of at least twenty-three county zoning ordinances in the 1960's and thirty more during the 1970's.[200] Several other amendments have been made to chapter 358A since 1960. In 1963 section 358A.2, which exempts farms from county zoning ordinances and regulations, was broadened. Instead of requiring that land be "adapted . . . for agricultural purposes as a primary means of livelihood"[201] in order to be eligible for the exemption, the 1963 amendment provided that land need only be "primarily adapted . . . for agricultural purposes" to be exempt.[202] Twice, the permitted objectives of zoning legislation were expanded. In 1965 flood prevention[203] and in 1981 energy conservation and solar access[204] were added as legitimate objectives for county zoning.

Qualifications for membership on county zoning commissions or boards of adjustment were formally enacted in 1974. These amendments required a majority of each commission and board to reside within the county but outside of any incorporated areas.[205] Finally, the 1982 Land Use Bill[206] amended the objectives and agricultural exemption sections and added a new section authorizing the creation of agricultural districts.[207] The Land Use Bill, including amendments to chapter 358A, is discussed in detail below.[208]

Because only nine counties had exercised their option to zone by 1960, there was very little reported case law that explained Iowa Code chapter 358A. In fact, only two cases involving the chapter came before the Iowa Supreme Court between 1947 and 1960.[209] Notwithstanding the dearth

198. Act of Apr. 6, 1955, ch. 180, § 1, 1955 Iowa Acts 210, 210 (removing requirement that county population exceed 60,000 before county has authority to zone unincorporated land); *id.* § 2, 1955 Iowa Acts at 210 (majority consent requirement changed from majority both in number of real property taxpayers and in assessed property valuation to simple majority of property taxpayers).

199. Act of May 4, 1959, ch. 266, § 1, 1959 Iowa Acts 293, 293 (current version at IOWA CODE § 358A.3 (1983)) (removing all majority consent requirements).

200. *See* Appendix III *infra* (Table 2).

201. Act of Apr. 1, 1947, ch. 184, § 2, 1947 Iowa Acts 229, 229 (current version at IOWA CODE § 358A.2 (1983)).

202. Act of Apr. 22, 1963, ch. 218, § 2, 1963 Iowa Acts 301, 301 (current version at IOWA CODE § 358A.2 (1983)).

203. Act of July 1, 1965, ch. 374, § 4, 1965 Iowa Acts 538, 539 (current version at IOWA CODE § 358A.5 (1983)).

204. Act of May 4, 1981, ch. 125, § 1, 1981 Iowa Acts 463, 463 (codified at IOWA CODE § 358A.5 (1983)).

205. Act of June 3, 1974, ch. 1210, §§ 1-2, 1974 Iowa Acts 719, 719 (current version at IOWA CODE §§ 358A.8, .11 (1983)).

206. Act of May 14, 1982, ch. 1245, 1982 Iowa Acts 437, 437-42 (codified at IOWA CODE ch. 93A (1983)).

207. *Id.* § 15, 1982 Iowa Acts at 441-42 (codified at IOWA CODE §§ 358A.2, 358A.5, 358A.27 (1983)).

208. *See* text accompanying notes 265-83 *infra*.

209. Board of Supervisors v. Paaske, 250 Iowa 1293, 98 N.W.2d 827 (1959); Gannett v. Cook, 245 Iowa 750, 61 N.W.2d 703 (1953).

of case law concerning county zoning, a body of applicable law developed in the municipal zoning context.[210]

Since 1960, the Iowa Supreme Court's interpretation of county zoning law has been especially significant in four areas. First, the court took steps to define the criteria that boards of supervisors and boards of adjustment must consider in changing the terms of an ordinance by amendment or variance.[211] Second, the procedural rights of parties appearing before those boards have been defined and clarified.[212] Third, the court has required boards of adjustment to make written findings of fact to justify any action taken in an adjudicatory proceeding.[213] Last, the scope of jurisdiction of each of the four agencies mentioned in Iowa's zoning enabling legislation—boards of supervisors, zoning administrators, zoning commissions, and boards of adjustment—has been clearly defined by the court.[214]

Three recent enactments—the 1978 county home rule amendment to the Iowa Constitution, the 1981 county home rule implementation act, and the 1982 Land Use Bill—indicate the potential for significant changes in Iowa zoning law in the near future. The county home rule amendment of 1978[215] empowers counties to enact any ordinance "not inconsistent with the laws of the general assembly, to determine their local affairs and government."[216] Home rule reverses the historical presumption that

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210. *See* note 18 *supra*.

211. Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 695-96 (Iowa 1980) (board of supervisors, when amending zoning ordinances, needs to consider general welfare of public); Deardorf v. Board of Adjustment, 254 Iowa 380, 384 118 N.W.2d 78, 80 (1962) (board of adjustment must find unnecessary hardship in the particular case to grant variance). For a discussion of unnecessary hardship, see text accompanying notes 697-736 *supra*.

212. Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 693 (Iowa 1980) (board of supervisors need only conduct notice and comment type hearings with fair opportunity for all present to voice their views); Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921, 923-25 (Iowa 1979) (board of adjustment conducts adjudicatory hearing when considering variance application and, therefore, must publish rules of procedure and produce written findings of fact).

The Iowa Administrative Procedure Act, IOWA CODE ch. 17A (1983), is not applicable to local agencies such as boards of adjustment. *Id.* § 17A.2. However, the Iowa Supreme Court has looked to that Act as a persuasive guide to procedural safeguards that local agencies should implement. Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921, 924 (Iowa 1979).

213. Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921, 925 (Iowa 1979).

214. *See* Buchholz v. Board of Adjustment, 199 N.W.2d 73, 75 (Iowa 1972) (board of adjustment jurisdiction to grant special use permits is exclusive); Boomhower v. Cerro Gordo County Bd. of Adjustment, 163 N.W.2d 75, 77 (Iowa 1968) (board of adjustment lacks jurisdiction to hear appeal regarding board of supervisors' legislative zoning functions); Depue v. City of Clinton, 160 N.W.2d 860, 862-64 (Iowa 1968) (statute fixes exclusive jurisdiction to grant special use permits in board of adjustment).

215. IOWA CONST. amend. 37.

216. *Id.*

local government authority is restricted to powers specifically delegated by the state government.[217] Under the grant of home rule authority, local governments possess power to govern their local affairs without statutory delegation, subject only to limitations prescribed by the constitution or laws of the state.

Zoning in general should qualify as within the scope of power delegated by the county home rule amendment. The optional nature of county zoning[218] suggests that the Iowa Legislature considers zoning to be a local affair. Moreover, the United States Supreme Court considered zoning a local affair in *Village of Euclid v. Ambler Realty Co.*[219] In *Euclid* the Court held that the city of Euclid was free, within the bounds of its organic act and the state and federal constitutions, to zone in the interests of its own residents, without regard to development patterns encroaching from outside areas.[220]

County zoning authority, however, is not without bounds. The first limitation on local zoning authority is based on the fact that, even under home rule, local governments are creatures of the state. Home rule itself is a delegation of power, albeit a broader one than any other.[221] Local governments, in exercising delegated police powers, remain subject to limits imposed by state law and policy.[222] Thus, when legislating in the interest of the public health, safety, morals, or general welfare, there are circumstances in which local governments must consider the welfare of the entire state and not just the welfare of local residents.[223]

New Jersey pioneered the requirement that local governments take into account the needs of the surrounding region when making zoning decisions. In *Southern Burlington County NAACP v. Township of Mt. Laurel*[224] the Supreme Court of New Jersey struck down a zoning ordinance on the ground that the subject zoning regulations made it physically and economically impossible for persons of low or moderate income to move

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217. City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (1868); Scheidler, *Implementation of Constitutional Home Rule in Iowa*, 22 DRAKE L. REV. 294, 295-96 (1973).

218. IOWA CODE § 358A.1 (1983).

219. 272 U.S. 365 (1926).

220. *Id.* at 389-90.

221. *See* IOWA CONST. amend. 37.

222. The validity of delegation of power to legislate on matters of local concern, including matters relating to the general health, safety, and welfare of local residents, is well established. *See* Richards v. City of Muscatine, 237 N.W.2d 48, 57 (Iowa 1975); Green v. City of Cascade, 231 N.W.2d 882, 888-90 (Iowa 1975). However, local exercise of the police power must be consistent with the law and policy of the state. J. M. Mills, Inc. v. Murphy, 116 R.I. 54, 66, 352 A.2d 661, 667 (1976); 6 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.46 (3d ed. rev. 1980).

223. Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?*, 3 CONN. L. REV. 244, 251 (1970-71).

224. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

into town.[225] The *Mt. Laurel* court imposed on each locality the state's interest in providing adequate housing for all classes of people.

In Iowa the Land Use Bill[226] states that the goal of preservation of prime agricultural land is now a statewide policy.[227] Amendments to chapter 358A contained in the Land Use Bill suggest that the legislature considers county zoning to be one tool for implementing that policy.[228] Because one of the main purposes of the county zoning enabling act was to protect agricultural land use from succumbing to other uses[229] and the Land Use Bill articulates a policy supporting agricultural preservation, county zoning should be administered with more than local purposes in mind. County zoning must also advance Iowa's interest in protecting prime agricultural land.

As a second limitation on local power, the county home rule amendment provides that a local ordinance is invalid if it is "inconsistent" with a state statute.[230] In implementing this amendment, the Iowa Legislature provided that a local ordinance is not "inconsistent" with state law unless the two are "irreconcilable."[231] Identical language appears in the municipal home rule amendment[232] and the municipal home rule implementation act.[233] In *Green v. City of Cascade*[234] the Iowa Supreme Court interpreted the term "irreconcilable" in the municipal home rule implementation act.[235] The *Green* court deferred to the legislature's authority to prescribe rules of construction for its own statutes and—having assumed that the term "irreconcilable" is stronger than the term "inconsistent"—concluded that the legislature's use of the former term indicates that state laws should be construed to be harmonious with local ordinances unless the laws cannot be reconciled.[236] The Iowa court is likely to analogize to the limitation on municipal powers in interpreting the limitation on county powers.[237]

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225. *Id.* at 174, 336 A.2d at 724.

226. Act of May 14, 1982, ch. 1245, 1982 Iowa Acts 437 (codified at IOWA CODE ch. 93A and scattered sections of chs. 358A, 414, 472 (1983)).

227. IOWA CODE § 93A.1 (1983); *see also* text accompanying notes 265-83 *supra*.

228. *See* Act of May 14, 1982, ch. 1245, §§ 15-17, 1982 Iowa Acts 437, 441-42 (codified at IOWA CODE §§ 358A.2-.5 (1983)).

229. *See* Note, *supra* note 81, 754, 756.

230. IOWA CONST. amend. 37.

231. Act of May 19, 1981, ch. 117, § 300.4, 1981 Iowa Acts 305, 311 (codified at IOWA CODE § 331.301(4) (1983)).

232. IOWA CONST. amend. 25.

233. IOWA CODE § 364.2(3) (1983).

234. 231 N.W.2d 882 (Iowa 1975).

235. *Id.* at 890.

236. *Id.*

237. *Compare* IOWA CONST. amend. 25 (municipal home rule amendment) *with id.* amend. 37 (county home rule amendment); *compare* IOWA CODE § 364.2(3) (1983) (municipal home rule act, interpreting "inconsistent") *with id.* § 331.304(4) (county home rule act, interpreting "inconsistent"). *Cf.* Gannett v. Cook, 245 Iowa 750, 756, 61 N.W.2d 703, 707 (1953) (for purposes of defining zoning authority, county is treated like municipal corporation).

Generally, when a statute and an ordinance address the same subject, the ordinance may be found inconsistent by either direct conflict with, or preemptive force of, state law. A direct conflict exists when an ordinance so conflicts with the intent and purpose of the statute that the two are irreconcilable or when both laws cannot be obeyed at the same time.[238] Preemption can be either express or implied. Express preemption arises when a statute provides that state law precludes all local initiative in a particular area. Absent such a statute, preemption nonetheless may be implied by the circumstances of a statute.[239] Circumstances to consider in evaluating implied preemption include the legislative history of the statute challenged as inconsistent with an ordinance, the desirability of state-wide uniformity given the nature of the subject matter, and the pervasiveness of the state's regulatory scheme.[240] These factors are considered in an effort to determine whether the legislature intended to limit local power.[241]

The statutes that may restrict local zoning authority are chapter 358A and sections of the county home rule implementation act that directly address zoning. After defining the term "inconsistent," the act provides other guidance in the analysis of zoning power. First, under section 303.6 of the act, county boards of supervisors are required to exercise their powers to adopt county zoning regulations in accordance with chapter 358A.[242] Second, section 320.1(t) requires boards of supervisors to appoint "[a] zoning commission, an administrative officer, and a board of adjustment in accordance with sections 358A.8 through 358A.11, if the board adopts county zoning under chapter 358A."[243]

No express restriction of county zoning authority solely to the contents of chapter 358A can be found within the language of that chapter or the county home rule implementation act. Section 303.6 of the act can be interpreted as either a broad or a narrow statement of the continued force of chapter 358A as a limitation on a county government's power to zone. The broadest reading of that section would limit county zoning authority to only the powers granted in chapter 358A. Section 303.6 thus

238. Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1975); *see also* Lewis *ex rel.* Quinn v. Ford Motor Co., 282 N.W.2d 874, 877 (Minn. 1979); Village of Struthers v. Sokol, 108 Ohio St. 263, 268, 140 N.E. 519, 521 (1923).

239. *See* People v. Llewellyn, 401 Mich. 314, 322-24, 257 N.W.2d 902, 904-05, *cert. denied sub nom.* City of East Detroit v. Llewellyn, 435 U.S. 1008 (1977).

Michigan's home rule amendment, like Iowa's, is of the limited self-executing type. *See* MICH. CONST. art. VII, § 22. For definitions of the various types of home rule, see Scheidler, *Implementation of Constitutional Home Rule in Iowa*, 22 DRAKE L. REV. 294, 302 (1973).

240. *See* People v. Llewellyn, 401 Mich. 314, 322-24, 257 N.W.2d 902, 905-06, *cert. denied sub. nom.* City of East Detroit v. Llewellyn, 435 U.S. 1008 (1977).

241. Scheidler, *Implementation of Constitutional Home Rule in Iowa*, 22 DRAKE L. REV. 294, 306 (1973).

242. Act of May 19, 1981, ch. 117, § 303.6, 1981 Iowa Acts 305, 315 (codified at IOWA CODE § 331.304(b) (1983)).

243. *Id.* § 320.1(t), 1981 Iowa Acts at 316 (codified at IOWA CODE § 331.321(t) (1983)).

would constitute an express preemption of local freedom in designing zoning regulations. However, such a broad reading would make the mandate of section 320.1(t), which requires compliance even under home rule with certain personnel requirements of chapter 358A, superfluous. Canons of statutory construction counsel against such a result.[244] Thus, the inclusion of section 320.1(t) in the implementation act indicates that it would be improper to interpret section 303.6 as an express preemption.

Nor can an implied preemption be derived from chapter 358A. Although that chapter was interpreted as a pervasive *grant* of power prior to home rule,[245] it should not be construed as establishing the limits of county zoning authority after home rule. Iowa Code section 358A.1, which vests county government with the power to decide whether to zone,[246] suggests that local zoning autonomy should be acknowledged. Uniformity in manner of regulation could hardly be necessary in a system that does not expect uniformity in fact of regulation.

The Washington Supreme Court addressed a similar situation—in which both home rule power and an optional zoning enabling statute were available to local governments—in *Nelson v. City of Seattle*.[247] The *Nelson* court held that, if a city chose to adopt zoning regulations under the authority of the enabling statute, that city would be bound by all the provisions of the statute. If the city instead chose to zone under its home rule authority, the city was free to devise its own zoning scheme.[248]

In light of the primary purpose of the county home rule amendment, section 303.6 of the county home rule implementation act should be read narrowly and the *Nelson* court's interpretation should be applied to section 358A.1 of the Iowa Code. Home rule's purpose is to expand local power to legislate on matters of local concern;[249] restricting zoning authority to that provided in chapter 358A defeats this purpose.[250] At best, it is unclear whether either section 303.6 of the implementation act or chapter 358A of the Iowa Code restricts counties' zoning authority. However, the presumption in favor of local initiative enunciated in *Green*[251] tips the balance in favor of county autonomy.

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244. Courts endeavor to avoid rendering any part of a statute superfluous. Robinson v. Department of Transp., 296 N.W.2d 809, 811 (Iowa 1980); Rohret v. State Farm Mut. Auto Ins. Co., 276 N.W.2d 418, 420 (Iowa 1979).

245. *Cf.* State v. Bates, 305 N.W.2d 426, 427 (Iowa 1981) (prior to home rule, only powers specifically granted by or necessarily implied from chapter 358A could be exercised by local authorities).

246. *See* IOWA CODE § 358A.1 (1983).

247. 64 Wash. 2d 862, 395 P.2d 82 (1964).

248. *Id.* at 866-67, 935 P.2d at 84-85.

249. *See* text accompanying note 217 *supra*.

250. *Cf.* State v. Schlemme, 301 N.W.2d 721, 723 (Iowa 1981) (court must examine language and purpose of statute, without giving undue weight to an isolated section, in resolving statutory ambiguities).

251. *See* text accompanying notes 234-36 *supra*.

Specific sections of the act and of chapter 358A may still conflict directly with certain local initiatives. The finding of a direct conflict, however, does not preclude all local regulation in the subject matter. Instead, such conflict requires that any local ordinance enacted be consistent with the statute on the same subject. Under a narrower interpretation of section 303.6 of the Act, the words "power to adopt" suggest a legislative intent to require only the procedural prerequisites to adoption of zoning ordinances that are contained in Iowa Code sections 358A.6 and 358A.7.

The mandate of section 320.1(t) of the implementation act is reasonably clear: counties that zone must appoint a zoning commission, a zoning administrator, and a board of adjustment.[252] The specific sections of chapter 358A that define the powers of the board of adjustment[253] may also impliedly limit county zoning power. One reason supporting this implied limitation is that the grant of jurisdiction to the board in section 358A.10 to "make special exceptions to the terms of the ordinances"[254] is defined by the specific language of sections 358A.12 through 358A.17.[255] Second, without the definition of powers set forth in sections 358A.12 through 358A.16, counties would be free to appoint a board and grant it *no* powers. It is unlikely that the legislature meant to sanction the creation of a powerless board.[256] Finally, the empirical evidence gathered by this Project of past disregard of procedural rights of parties appearing before boards of adjustment suggests that a strong state interest in fairness should be enforced by retaining this minimal procedural code. At the very least, the provisions of sections 358A.12 through 358A.17, which are expressed as mandatory requirements, should apply even if counties can supplement those sections with additional regulations.[257]

Chapter 358A contains some potential limits on county zoning power that are independent of those contained in the county home rule imple-

252. Act of May 19, 1981, ch. 117, § 320.1(t), 1981 Iowa Acts 305, 316 (codified at IOWA CODE § 331.321(t) (1983)).

253. IOWA CODE § 358A.12 (1983) (rules required, powers of chairman, open meetings and open records compelled); *id.* § 358A.13 (appeal procedure); *id.* § 358A.14 (stay of proceedings); *id.* § 358A.15 (jurisdiction of board of adjustment); *id.* § 358A.16 (decision-making power); *id.* § 358A.17 (three votes required).

254. IOWA CODE § 358A.10 (1983).

255. Boomhower v. Cerro Gordo County Bd. of Adjustment, 163 N.W.2d 75, 76-77 (Iowa 1968).

256. Rules of statutory construction counsel against allowing administrative agencies to avoid exercising a duty when delegation suggests a legislative intent to require the exercise of that duty. *See* Natural Resources Defense Council, Inc. v. Train, 545 F.2d 320, 327 (2d Cir. 1976).

257. *See* Brock v. Dickinson County Bd. of Adjustment, 287 N.W.2d 566, 569 (Iowa 1980) (without a rule defining a reasonable time within which to appeal a decision of the board of adjustment, board possesses undesirable discretion in defining a reasonable time on an ad hoc basis); Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Bd. of Adjustment, 277 N.W.2d 921, 923-24 (Iowa 1979) (statutory procedural rule-making requirement is an important aid in advising potential parties to agency action of their rights and duties).

mentation act. Section 358A.2, the agricultural exemption provision,[258] should continue to operate with the same force it had before home rule. If a county attempts to regulate uses or structures adapted for agricultural purposes in a manner that is not in accordance with the County Land Use Preservation Ordinance,[259] a situation of direct conflict would necessarily arise and the local ordinance would be invalid.

The objectives listed in section 358A.5 also operate to structure the exercise of zoning power under home rule. The Land Use Bill offers a clear statement of legislative intent to use zoning as a tool to achieve a uniform, statewide goal of agricultural preservation.[260] Other objectives may be added by home rule zoning authorities, but the recent amendment indicates that the legislature still considers section 358A.5 to survive home rule.

The sections of chapter 358A that define the procedures for, and the scope of, judicial review ought to limit county freedom to legislate on the subject of judicial review. The functioning of the state court system is not solely a matter of local concern. The district court system was created by the state, and the state has an interest in the efficiency of its operation.[261] Also, the right of appeal has been held to be a creature of statute—a right that only the legislature has the power to grant or deny.[262]

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258. IOWA CODE § 358A.2 (1983).

259. Under the Iowa Land Use Bill, IOWA CODE ch. 93A (1983), county governments are empowered to enact county land use preservation ordinances. *Id.* § 93A.5. For a discussion of such ordinances, see note 275 *infra*.

260. *See* text accompanying notes 222-29 *supra*.

261. IOWA CODE § 602.1 (1983).

262. *See* Kenkel v. Iowa State Highway Comm'n, 162 N.W.2d 762, 765 (Iowa 1968); Bales v. Iowa State Highway Comm'n, 249 Iowa 57, 60, 86 N.W.2d 244, 246 (1957) ("[T]here is no inherent or constitutional right of appeal. It is purely a creature of statute. The legislature has the power to grant or deny it.").

The Iowa Supreme Court has addressed the power of local authorities to define procedures for judicial review in the context of municipal human rights commissions. *See generally* Dietz v. Dubuque Human Rights Comm'n, 316 N.W.2d 859 (Iowa 1982); City of Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771 (Iowa 1978); Cedar Rapids Human Rights Comm'n v. Cedar Rapids Community School Dist., 222 N.W.2d 391 (Iowa 1974). The statute creating the state human rights commission, IOWA CODE ch. 601A (1983), speaks specifically of local authority to create human rights commissions under home rule authority and defines the functions of such a commission. *Id.* § 601A.19. The same section requires judicial review of a local agency "in the same manner and to the same extent as a final decision of the [state] commission." *Id.*

Some leeway may be left to the local authority, but none has yet been found. *Westinghouse Learning Corp.* and *Cedar Rapids Human Rights Comm'n* struck down ordinances providing substantial deviations from the state scheme, 264 N.W.2d at 773; 222 N.W.2d at 402-03, but the *Cedar Rapids Human Rights Comm'n* court left some room for doubt, 222 N.W.2d at 402-03 ("failure to provide for judicial review *similar* to that afforded by [the Iowa Code section defining review of the state commission] invalidates the ordinance" (emphasis added)). The *Westinghouse Learning Corp.* court stated that the legislature surely intended state uniformity of judicial review procedures in the human rights commission context. 264 N.W.2d at 773.

Sections 358A.3 and 358A.4 presumably do not impose any binding constraints on counties operating under home rule. For example, the Euclidean districting method of zoning that is codified in section 358A.4 may be replaced with other methods, such as performance zoning or floating zones. Section 358A.4 states that boards of supervisors "may" divide their county into districts.[263] Prior to home rule, districting was the only method by which counties could regulate land use.[264] With home rule powers, however, counties should now possess the authority to experiment with other techniques of land use regulation.

In sum, home rule gives counties the option to zone either within the confines of chapter 358A or within their home rule authority, which is subject to the agricultural exemption, the board of adjustment procedural framework, and the judicial review sections of chapter 358A. Under home rule, counties should be free to experiment with land use regulation techniques other than Euclidean district zoning and to supplement the procedural framework with additional requirements applicable to a particular need. Such an approach accommodates both the primary local interest in choosing the desired ends of a land use regulation system and the primary state interest in fairness to all the citizens of the state.

The third recent enactment indicating that it is appropriate to reevaluate Iowa zoning law is the Land Use Bill.[265] The Land Use Bill creates a Land Preservation and Use Commission in each county[266] which is responsible for compiling an inventory that documents current land uses and the number of acres converted from agricultural uses since 1960.[267] By analyzing the information compiled, the Commission is directed to assess the effect that land development has had on agricultural acreage and production. After the assessment is completed, each County Land Preservation and Use Commission may either propose a land use plan primarily adapted to agricultural preservation or forward its inventories to its board of supervisors with findings on how to achieve the goals of the Land Use Bill.[268]

If the Commission decides to forward the inventory and findings to the board of supervisors, the board may direct the Commission to prepare a formal plan.[269] Upon receipt of that plan, the board may send the plan back to the Commission for modification or approve the plan as submitted

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263. IOWA CODE § 358A.4 (1983).

264. State v. Bates, 305 N.W.2d 426, 427 (Iowa 1981) (only powers specifically delegated or necessarily implied may be exercised by local authorities). *But see* Gannett v. Cook, 245 Iowa 750, 755, 61 N.W.2d 703, 706 (1953) (local authorities may add additional requirements consistent with state regulations).

265. Act of May 14, 1982, ch. 1245, 1982 Iowa Acts 437 (codified at IOWA CODE ch. 93A and scattered sections of chs. 358A, 414, 472 (1983)).

266. IOWA CODE § 93A.3 (1983).

267. *Id.* § 93A.4.

268. *Id.* § 93A.5.

269. *Id.* § 93A.5(2).

or amended.[270] After adoption, the plan becomes the land use policy of the county and must be administered and enforced in the county's unincorporated areas.[271]

The Land Use Bill made three explicit amendments to the county zoning enabling act. First, a new section provides for the creation of "agricultural areas."[272] Upon creation, each agricultural area is subject to the use restrictions defined in the Land Use Bill rather than the former district regulations of the county zoning ordinance.[273] The agricultural areas also qualify for special tax exemptions, water diversion priorities, and other benefits.[274]

Second, the Land Use Bill amended chapter 358A by removing from the scope of the agricultural exemption any regulation necessary to implement the provisions of a County Agricultural Land Preservation Ordinance.[275] For example, a county may now regulate the placement of buildings—even buildings primarily adapted for agricultural use—if such regulation reasonably advances the goals of the county agricultural land preservation ordinance.

Last, the objectives of preservation of agricultural land, protection of soil from wind and water erosion, and encouragement of efficient urban development patterns are now listed prior to all other county land use regulation objectives in Iowa Code section 358A.5.[276] That amendment, read *in pari materia*, establishes a clear state policy favoring the preservation of Iowa's agricultural land. This should have a persuasive effect on boards of supervisors considering the enactment of, or amendments to, zoning ordinances.

Whether Iowa courts will enforce the agricultural land preservation policy to any degree remains unclear. Decisions made by county governments concerning zoning policy and administration are allowed a high

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270. *Id.* § 93A.5(3).

271. *Id.*

272. *Id.* § 93A.6.

273. *See id.*

274. *Id.* §§ 93A.10, .11.

275. *See id.* § 358A.2. The county agricultural land preservation ordinance is not clearly defined in the Land Use Bill. Section 15 contains one reference to such an ordinance, stating that "*[i]f* a county adopts an agricultural land preservation ordinance . . . which subjects farmland to the same use restrictions provided in section 7 of [the] Act for agricultural areas," the tax, water, and other benefits, *discussed at* text accompanying note 274 *supra*, shall apply to farms covered by the ordinance. Act of May 14, 1982, ch. 1245, § 15, 1982 Iowa Acts 437, 441 (codified at IOWA CODE § 358A.27 (1983)) (emphasis added). Section 7 allows owners of farmland to initiate requests for creation of "agricultural areas," and mentions the county agricultural land preservation ordinance only by referring back to section 15. *Id.* § 7, 1982 Iowa Acts at 440 (codified at IOWA CODE § 93A.6 (1983)). Thus, whether owners of farmland may unilaterally invoke the protections of the Land Use Bill, or whether a county must first pass an agricultural land preservation ordinance, is not clear.

276. *Id.* § 358A.5.

degree of deference.[277] However, the Iowa Supreme Court has recognized that public policy strongly favors the preservation of agricultural land.[278] That public policy, when supplemented by the Land Use Bill's agricultural preservation principle, establishes a significant legislative priority that should not be ignored by Iowa courts.

Another significant effect that the Land Use Bill should have on county zoning derives from the requirement that each county design a land use plan.[279] The development of that plan will involve the expenditure of considerable time and effort—work that each county can use to update and improve existing zoning ordinances. One of the reasons that many courts did not impose a separate planning requirement was that no statute expressly required the design of, or defined the elements of, a land use plan.[280] That deficiency no longer exists in Iowa.

Unfortunately, however, the Iowa Legislature failed to require utilization of the planning process that the Land Use Bill puts into motion. Although the plan formulation requirement is written in mandatory terms, adoption of the land use plan, once developed, is optional.[281] Also, the Bill dictates that county governments enforce the land use plan but does not define an enforcement mechanism.[282] Presumably, counties may devise their own methods of enforcement; however, counties left to their own devices may avoid enforcing the plans.[283] Thus, though the Land Use Bill carries hope for effective agricultural land preservation in Iowa, that effectiveness is blunted by a lack of mandatory enforcement provisions.

B. The Regulatory Scheme of Iowa Code Chapter 358A

This subpart will examine the county land use regulation system provided in Iowa Code sections 358A.1 through 358A.9.[284] Interpretations

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277. *See* Devaney v. Board of Zoning Appeals, 143 Conn. 332, 325-26, 122 A.2d 303, 305 (1956). Local authorities live "close to the circumstances and conditions which create the problem and shape the solution." Byington v. Zoning Comm'n, 162 Conn. 611, 613, 295 A.2d 553, 554 (1971). Only in cases of arbitrariness or illegality can a court overturn such action. *Id.*, 295 A.2d at 554.

278. *See* Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 696 (Iowa 1980).

279. IOWA CODE § 93A.5 (1983).

280. Note, *Comprehensive Plan Requirement in Zoning*, 12 SYRACUSE L. REV. 342, 346 (1961).

281. *See* IOWA CODE § 93A.5(3) (1983).

282. *See id.*

283. The evidence gathered by this Project indicates that current zoning ordinances are not zealously enforced in several counties. Some zoning administrators suggest that noncompliance with the zoning ordinance is a frequent occurrence, yet active enforcement is often neglected. *See* Appendix VI *infra* (Table 35).

284. For purposes of analysis, the home rule authority of Iowa counties will be disregarded in this part. *See* text accompanying notes 215-64 *supra* for analysis of home rule authority.

of the statute—both judicial and nonjudicial—and data collected by the Project writers will be used to supplement the statutory analysis.

Iowa Code section 358A.1 provides that the decision to zone is committed to the discretion of each county board of supervisors.[285] To date, sixty-six counties in Iowa have exercised their option to implement land use regulations.[286] Most counties in Iowa that have adopted zoning adopted it primarily to preserve prime agricultural land. Other common reasons given for the implementation of zoning regulations included county governments' desire to control mobile home placement and to plan orderly expansion of municipalities.[287]

Iowa Code section 358A.2 exempts from county government's zoning authority any "land, farm houses, farm barns, farm outbuildings or other buildings, structures, or erections which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used."[288] The only exception to this broad exemption was added by the Land Use Bill.[289] Under the Bill, county governments may regulate agricultural uses to the extent required to implement a County Agricultural Land Preservation Ordinance.[290]

Only one Iowa Supreme Court decision to date defines what structures or uses are primarily adapted to agricultural purposes. In *Farmegg Products, Inc. v. Humboldt County*[291] the Iowa Supreme Court held that a confinement chicken-feeding operation was not so adapted.[292] The plain-

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285. Section 358A.1 provides: "The provisions of this chapter shall be applicable to any county of the state at the option of the board of supervisors of any such county." IOWA CODE § 358A.1 (1983).

286. *See* Appendix III *infra* (Table 1).

287. *See* Appendix VI *infra* (Table 8).

288. IOWA CODE § 358A.2 (1983).

289. Act of May 14, 1982, ch. 1245, § 16, 1982 Iowa Acts 437, 442 (codified at IOWA CODE § 358A.2 (1983)).

290. *Id.; see also* text accompanying note 275 *supra*.

291. 190 N.W.2d 454 (Iowa 1971).

292. *Id.* at 459-60.

Professor Hamilton suggests that Patz v. Farmegg Prods., Inc., 196 N.W.2d 557 (Iowa 1972), indicates that uses " 'not incident to rural life' " are not within the meaning of "agriculture," as that term is used in § 358A.2. Hamilton, *Freedom to Farm! Understanding the Agricultural Exemption to County Zoning in Iowa*, 31 DRAKE L. REV. 565, 572 (1982) (quoting *Patz*, 196 N.W.2d at 562). While the *Humboldt County* opinion alludes to the examination of traditional farming methods for assistance in defining "agriculture" within the scope of § 358A.2, 190 N.W.2d at 459, Hamilton's reliance on *Patz* is misplaced. *Patz* is a nuisance case. The *Patz* court referred to "incident[s] of rural life" to define the character of the neighborhood in question, 196 N.W.2d at 562, an important factor in classifying a land use as a nuisance. Classification as an "incident of rural life" is important in finding a nuisance but is not so important in defining "agriculture." The character of the neighborhood was involved indirectly in *Humboldt County* when the court looked with favor on the board of supervisors' classification of the area on the zoning map as a residential neighborhood. 190 N.W.2d at 459-60. If "incident[s] of rural life" is a determinative test, all confinement operations should be excluded from the agricultural exemption of § 358A.2. However, the *Humboldt County* court seemed to consider some confinement feeding operations to be "agricultural." *See id.* at 459; note 302 *infra*.

tiff in *Humboldt County* sought a building permit to allow construction of buildings that would house up to 40,000 chickens without having to comply with the setback requirements of the county zoning ordinance. The *Humboldt County* court considered it decisive that no feed was to be raised and no farm implements were to be stored on the land in question.[293] Also, the court gave weight to the county supervisors' opinion, expressed by a classification of the plaintiff's lands as "suburban residential" on the county zoning map, that the tract was not primarily adapted to agriculture.[294]

The *Humboldt County* opinion finds little support in either semantics or policy.[295] Semantically, the court had to strain the common definitions of "agriculture" to reach its conclusion. All the definitions cited by the court included the raising and production of livestock, but the court astonishingly found that no livestock were to be kept on the land in question.[296] Instead, the court classified confinement feeding as an "independent productive activity,"[297] borrowing a term from *Farmers Reservoir Irrigation Co. v. McComb*.[298] In *McComb* the United States Supreme Court used the dichotomy between agricultural functions and independent activities to assess whether functions that are not literally agricultural, such as tool making, power generation, or water distribution, could qualify as agricultural within the terms of a statute because of an actual interrelationship with functions that are literally agricultural.[299] The *Humboldt County* court, however, used the dichotomy to determine that activities which *are* agricultural in nature are outside the statutory exemption.[300]

The *Humboldt County* opinion also is not defensible on policy grounds. The legislature's purposes underlying the agricultural exemption were not well served. The legislature intended a broad exemption to allow the agricultural sector to be unfettered by zoning regulations.[301] The general

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293. 190 N.W.2d at 459. The court cited with approval an Iowa Attorney General's opinion that distinguished confinement feedlots that are operated in conjunction with the raising of feed crops from feedlots operated without conjunctive crop raising. *Id.* The purpose of such a distinction seems unclear—a feedlot is a feedlot.

294. *Id.*

295. *See id.* at 460-63 (Uhlenhopp, J., dissenting).

296. *Id.* at 459. "Livestock" includes *all* domestic animals. *See* 6 THE OXFORD ENGLISH DICTIONARY 364 (corrected reissue 1961); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1324 (1976). The proposition that chickens can be excluded from the scope of the term "livestock" seems untenable.

297. 190 N.W.2d at 459.

298. 337 U.S. 755, 761 (1949).

299. *Id.* at 760-63.

300. 190 N.W.2d at 459.

301. *See* Hamilton, *Freedom to Farm! Understanding the Agricultural Exemption to County Zoning in Iowa*, 31 DRAKE L. REV. 565, 574 (1982). Professor Hamilton persuasively contends that the agricultural exemption had to be intended as very broad at the time of the passage of chapter 358A to enhance the chapter's political palatability. *Id.* at 573-74. Also, a later legislature broadened the scope of the exemption by removing the requirement that farm-

purpose of zoning—the protection of one person's use and enjoyment of property from interference by another's use—also is not substantially advanced. Circumvention of the *Humboldt County* construction of the agricultural exemption is relatively easy because the decision itself recognized that feedlots maintained in conjunction with feed crop production will qualify as agricultural uses.[302] A clear legislative definition of "uses primarily adapted to agricultural purposes," within the meaning of section 358A.2, would be helpful.

Sections 358A.3 through 358A.5 of the Iowa Code delegate general Euclidean zoning powers to each county board of supervisors.[303] Before the ratification of the county home rule amendment, section 358A.3 defined the extent of the supervisors' zoning authority.[304] Section 358A.4 defined the only method by which that authority could be carried out: establishment of districts with uniform regulations throughout.[305] The objectives and factors to be considered by the board in developing the county zoning scheme were defined in section 358A.5.[306] With the ratification of the county home rule amendment, the selection of powers and methods of county zoning may now be left to county policymakers, except when state law expressly limits county authority.[307]

Iowa Code sections 358A.6 and 358A.7 set forth the procedure that a board of supervisors must follow in enacting a zoning ordinance.[308] The board acts in a quasi-legislative rule-making capacity when adopting a zoning ordinance.[309] It is mandatory that the board of supervisors provide notice of hearing and an opportunity for citizens to appear and offer

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ing be the primary means of livelihood on the land in question. *Id.* at 565; *see* Act of Apr. 22, 1963, ch. 218, § 2, 1963 Iowa Acts 301, 301 (current version at IOWA CODE § 358A.2 (1983)).

302. 190 N.W.2d at 459. Professor Hamilton suggests that the *Humboldt County* opinion was result oriented: the court wanted to allow counties to regulate confinement feeding operations. Hamilton, *Freedom to Farm! Understanding the Agricultural Exemption to County Zoning in Iowa*, 31 DRAKE L. REV. 565, 571 (1982). Admittedly, confinement feedlots can be the most obnoxious of land uses. However, distaste for feedlots does not justify regulation by zoning. As Professor Hamilton points out, counties have other means of regulating feedlots. *Id.* at 576-78. The legislative intent to exempt *all* agricultural uses from zoning regulations should not be abrogated by judicial desire to expand the authority of county governments.

303. IOWA CODE § 358A.3 (1983) (power of supervisors to regulate uses and size and placement of structures); *id.* § 358A.4 (power of supervisors to divide county into districts with internally uniform regulations); *id.* § 358A.5 (permissible objectives of exercise of zoning power).

304. State v. Bates, 305 N.W.2d 426, 427 (Iowa 1981) (county authority before home rule restricted to powers expressly conferred or necessarily implied from powers conferred).

305. IOWA CODE § 358A.4 (1983).

306. *Id.* § 358A.5.

307. *See* text accompanying notes 215-64 *supra*.

308. IOWA CODE §§ 358A.6, .7 (1983).

309. Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 694 (Iowa 1980).

opinions.[310] No other specific procedures are required. Practices followed by boards of supervisors when considering the original adoption of an ordinance should accord with the assumptions that underlie classification as a quasi-legislative function. Such action is based on policy issues and affects large classes of people. Boards of supervisors presumably request and consider input from diverse public groups before adopting ordinances.

On the other hand, the Project's data indicate that, when considering amendments to zoning ordinances, boards of supervisors deal only with facts concerning one piece or very few pieces of property.[311] To those limited facts the supervisors apply both the policy analysis applied in the initial adoption of the ordinance and a specific standard. This standard requires boards of supervisors to find that the amendment serves the needs of the public and to determine whether the land considered for amendment differs from its surroundings in a way that makes different classification a rational result.[312] Due to the different character of the proceedings, courts' procedural due process analysis of amendments to zoning ordinances should differ from that of the original adoption of the ordinances themselves.[313]

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310. *Id.* at 693; Bowen v. Story County Bd. of Supervisors, 209 N.W.2d 569, 572 (Iowa 1973).

311. Although the lack of findings makes analysis difficult, zoning commission minutes, interviews with county supervisors, and procedures utilized by boards to hear zoning amendment requests belie the assumption that supervisors consider more than the tract that is the subject of the request. The Project writers examined county zoning commission minutes from January 1980 to July 1982 and found that most petitions for rezoning were initiated by a single landowner's request to change the zoning classification of only that landowner's property. Also, during the same period, few zoning amendments affected the zoning classification of land other than that specified in the petition. *See* note 140 *supra*.

312. Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 695-96 (Iowa 1980); Jaffe v. City of Davenport, 179 N.W.2d 554, 556 (Iowa 1970); Keppy v. Ehlers, 253 Iowa 1021, 1023, 115 N.W.2d 198, 200 (1962). Amendments concerning land that is indistinguishable from the surrounding area are known as "spot zoning." 1 R. ANDERSON, *supra* note 9, § 5.08. Spot zoning is invalid because it is not in accordance with a comprehensive plan. *Id.* A finding of spot zoning does not render a county powerless to rezone the area in question. To ensure fair treatment of all surrounding citizens, however, the proposed zoning amendment must be shown to be an appropriate way of meeting a public need. Fasano v. Board of County Comm'rs, 264 Or. 574, 583-84, 507 P.2d 23, 28 (1973) (en banc); *see also* South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 14, 569 P.2d 1063, 1073 (1977) (comprehensive plan amendment may be made only on showing of general public need).

313. Quasi-legislative agency action (rulemaking) must be distinguished from quasi-judicial agency action (adjudication). Although a clear dichotomy does not exist, some descriptions have met with more acceptance than others. Professor Kenneth Culp Davis posits three elements to be considered in distinguishing rulemaking from adjudication. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:2, at 5-6 (2d ed. 1978). First, the more specifically the individuals affected may be named, the more likely an adjudication is at hand. Second, if the legal status of an individual is immediately defined, the proceeding is adjudicative in nature; a legislative rule-making decision must be applied in another proceeding to affect the legal status of an individual. Third, if the facts at issue

Ideally, zoning amendment hearings should be treated as quasi-legislative in character. The substantive standards accompanying the legislative delegation of county zoning authority require boards of supervisors to consider "the character of the *area* of the district and the peculiar suitability of such *area* for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land *throughout such county*."[314] This standard evinces a legislative intent that county zoning regulations—including amendments to existing land use regulations—be enacted only after consideration of the public interests that would be affected. However, under the guise of a deferential standard of review, Iowa courts rarely analyze what actually occurs at zoning hearings.[315]

Viewed in the light least favorable to administrative authority, the assumption that zoning amendment proceedings before Iowa county boards of supervisors are quasi-legislative in nature is plainly wrong.[316] An amendment that results from a proceeding in which only the tract described in

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in the proceeding occurred in the past, the proceeding is likely to be adjudicative; in a legislative rule-making proceeding, the operative facts that bring an individual within the ambit of the rule must occur after the rule is promulgated and effective. *Id.* The important consideration is not the identity of the body conducting the proceeding, but the character of the function performed. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 85-86; *see also* 2 K. DAVIS, *supra*, § 7:2, at 7; *id.* § 10.5.

314. IOWA CODE § 358A.5 (1983) (emphasis added).

315. *See* Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687 (Iowa 1980). The *Montgomery* court simply applied the quasi-legislative label and concluded that only minimal notice and comment procedures were required. *Id.* at 693.

316. Professor Bonfield defines legislative facts as "generalized propositions of fact or policy guiding the exercise of legislative judgment." Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 IOWA L. REV. 285, 288 (1977), *quoted in*, Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 693 (Iowa 1980). If legislative facts are at issue in a case, due process requires only that rule-making procedures be followed by the agency. Bonfield, *supra*, at 324. Professor Bonfield defines adjudicative facts as "individualized facts concerning the circumstances of the specific party—the facts of the particular case." *Id.* at 323. Actions of particular applicability based on such individualized facts are more properly considered adjudication. *Id.* at 324.

The *Montgomery* court apparently based its classification of zoning amendments as quasi-legislative on the identity of the body performing the function. 299 N.W.2d at 693 (citing Boomhower v. Cerro Gordo County Bd. of Adjustment, 163 N.W.2d 75, 77 (Iowa 1968)). A more searching analysis was performed by the Iowa Supreme Court in Board of Supervisors v. Department of Revenue, 263 N.W.2d 227 (Iowa 1978). In classifying administrative implementation of a property tax equalization order, the court found persuasive the fact that the decision was of such a nature that one individual could not make a significant contribution to the facts sought by the agency. *Id.* at 239-40. A rezoning decision presents the opposite situation in practice, if not in theory. A single individual *must* make a significant contribution to the facts because only one individual—the petitioner—shows up for most rezoning hearings. *See* note 140 *supra*. The supervisors necessarily base their decision on individualized facts presented by the petitioner and occasionally by a few neighbors. In practice, rezoning decisions resemble hearings on adjudicative facts more closely than hearings on legislative facts.

the petition is considered is one in which the party affected is specifically named, the legal status of the petitioner is immediately defined, and the facts on which the decision is based occurred in the past. These factors suggest that a more judicial, adjudicatory proceeding is involved.[317]

Some jurisdictions have adopted the position that zoning amendment proceedings involving individual tracts of land are adjudicative in nature.[318] For example, the Oregon Supreme Court recognizes that an amendment proceeding requires the application of general policy to a specific piece of property.[319] Such a specific action, taken in response to an individual request, is an adjudicative action regardless of the name of the body performing the function.[320] Although many state courts retain the posture

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317. For definitions of adjudication and rulemaking, see note 313 *supra*.

318. *See, e.g.*, Golden v. City of Overland Park, 224 Kan. 591, 597, 584 P.2d 130, 135 (1978); West v. City of Portage, 392 Mich. 458, 472, 221 N.W.2d 303, 307, 310 (1974); Fasano v. Board of County Comm'rs, 264 Or. 574, 579-81, 507 P.2d 23, 25-27 (1973) (en banc); Fleming v. Tacoma, 81 Wash. 2d 292, 298, 502 P.2d 327, 331 (1972). The Colorado Supreme Court considers classification of rezoning decisions as quasi-judicial to be the modern trend in zoning law. Snyder v. City of Lakewood, 189 Colo. 421, 426, 542 P.2d 371, 375 (1975). Even though the Colorado court recognizes that rezoning is an action of particularized applicability performed under a delegated standard, Colorado law does not require that adjudicatory procedures be followed by a body enacting a rezoning ordinance. *See* Margolis v. District Court, ___ Colo. ___, ___, 638 P.2d 297, 305 (1981). The results of this Project, which indicate potential for usurpation of board of adjustment authority by supervisors, *see* text accompanying notes 326-30 *infra*, suggest that the Iowa Supreme Court should take that extra step. In the interest of fairness, Iowa should not only recognize the adjudicatory nature of rezoning proceedings, but also should require that some adjudicatory procedures be followed when exercising the rezoning power.

319. Fasano v. Board of County Comm'rs, 264 Or. 574, 581-82, 507 P.2d 23, 26-27 (1973) (en banc).

320. *Id.* at 581-84, 507 P.2d at 26-28; *see also* South of Sunnyside Neighborhood League v. Board of Comm'rs, 280 Or. 3, 11, 569 P.2d 1063, 1071 (1977) (amendment of comprehensive plan).

The *Fasano* court referred to Roseta v. County of Washington, 254 Or. 161, 458 P.2d 405 (1969), as support for the abandonment of its previous classification of zoning amendment decisions as quasi-legislative. 264 Or. at 584-87, 507 P.2d at 28-30. The *Roseta* court in turn relied on

> recurring recognition in the vast literature on zoning that many of the evils in zoning practice can be ameliorated by a judicial insistence upon the zoning board's compliance with the statutory requirement that any changes in the zoning ordinance be made "in accordance with a comprehensive plan."

Id. at 168, 458 P.2d at 409 (footnote omitted). The specific evils referred to by the *Roseta* court included " ' "easy and erratic" variance practices,' " *id.* at 167 n.6, 458 P.2d 408 n.6 (quoting Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3, 9 (1969) (quoting Woodruff, A Zoning Primer 66 (proceedings of the Annual Planning Conference 1935))), and ad hoc amendment decisions that constitute responses to individual requests and provide special privileges rather than respond to the needs of the community. *Id.* at 167-68, 458 P.2d at 408.

This Project suggests that the same evils identified by the *Roseta* court lurk behind zoning practices in Iowa. The Oregon Supreme Court responded by imposing additional procedural requirements on local zoning authorities, including a requirement that local authorities justify rezoning with findings of fact. The findings must adequately show that

that zoning amendment proceedings are legislative, very few offer persuasive reasoning to support their position. Those states, including Iowa, trace the legislative classification to the statement in *Village of Euclid v. Ambler Realty Co.*[321] that decisions—such as the decision to adopt a zoning ordinance—which require an assessment of the health, welfare, and safety needs of the community are decisions best left to the legislature.[322]

The *Euclid* Court appropriately determined that a deferential standard of review is required in cases involving the enactment of social or economic legislation by politically responsible bodies.[323] However, the subject of procedural rights guaranteed to parties appearing before administrative bodies has undergone a revolution in the years since the decision in *Euclid*. As courts acknowledge the importance of the rights at stake in administrative adjudications, procedural rights have been granted to the interested parties to ensure fairness.[324] Those sorts of procedural rights were not at issue in *Euclid*, and too much has happened in the field of procedural due process since *Euclid* to allow a general statement therein to continue to foreclose a searching analysis of what actually occurs in zoning amendment proceedings.

Even viewed in a light most favorable to administrative authority, the Iowa Supreme Court should determine that some procedural protections beyond the minimum accorded participants in quasi-legislative proceedings should be granted to parties in zoning amendment cases. As Professor Kenneth Culp Davis suggests, there are cases on the borderline between quasi-legislative rulemaking and quasi-judicial adjudication in which the best approach in analyzing procedural due process requirements is "to skip the labeling and to proceed directly to the problem at hand."[325]

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any change in zoning is consistent with the local comprehensive plan. Fasano v. Board of County Comm'rs, 264 Or. 574, 588-89, 507 P.2d 23, 30 (1973) (en banc). The Iowa Supreme Court would do much to ensure fairness to all the citizens of a county by adopting a similar approach.

321. 272 U.S. 365 (1926).

322. *Id.* at 387-90. The Iowa court cited *Euclid* for the proposition that zoning is a valid exercise of the police power in Anderson v. Jester, 206 Iowa 452, 456, 221 N.W. 354, 356 (1928). That generalization evolved into the statement in Boomhower v. Cerro Gordo County Bd. of Adjustment, 163 N.W.2d 75 (Iowa 1968), that power to amend zoning ordinances rests exclusively with boards of supervisors in their legislative capacity. *Id.* at 77. Finally, in Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687 (Iowa 1980), the legislative classification was held to vitiate the need for any procedural protections beyond the most simple notice-and-comment type hearing. *Id.* at 693. For a similar evolution, see State *ex rel.* Rochester Ass'n of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 888-89 (1978) (deference to legislative discretion results in classification of amendment proceedings as quasi-legislative); Sun Oil Co. v. Village of New Hope, 300 Minn. 326, 333, 220 N.W.2d 256, 261 (1974).

323. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

324. *See* Wolff v. McDonnell, 418 U.S. 539, 555-58 (1974); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268, 1273 (1975).

325. 2 K. DAVIS, *supra* note 313, § 7:2, at 7; *see also id.* § 10:5, at 324-25.

One significant problem is the failure of county zoning officials to distinguish the legal grounds necessary for a zoning amendment from those necessary for a variance. When proposing a use not permitted within current zoning district regulations, a petitioner may seek relief in the form of either a use variance or an amendment. However, a variance is a remedy suited for a unique condition of the land in question, while an amendment is not a remedy but a change in regulation in response to the needs of a larger area.[326]

The zoning administrator is the first source of information for a petitioner seeking relief appropriate to the petitioner's condition. Petitioners should be routed through the county land use system based on the characteristics of their land and proposed use.[327] This Project, however, found that zoning administrators often direct a petitioner to seek a certain remedy without considering the relevant legal criteria.[328] Some zoning administrators view the distinction between amendments and variances in terms of the anticipated public reaction. If, for example, the zoning administrators expect that an amendment might cause neighbors to object to the opening of the land to a new class of uses, it is recommended that the administrators grant a variance allowing only the requested use.[329]

If any of the recommendations made by this Project for increasing the procedural requirements of a variance are adopted, it is crucial that similar requirements be imposed on the rezoning process to prevent usurpation of the board of adjustment's function by the board of supervisors. Since county zoning officials frequently treat amendments and variances as though they are legally indistinguishable, if it becomes more difficult to obtain a variance, current arbitrariness in the relaxation of the zoning plan may be perpetuated by means of the amendment process.[330]

A second significant problem in the zoning amendment context is that county boards of supervisors' factual investigations of rezoning petitions focus exclusively on the land and proposed uses named in those petitions. Few area-wide assessments are made, and questions of policy are

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326. *Compare* Deardorf v. Board of Adjustment, 254 Iowa 380, 386-89, 118 N.W.2d 78, 81-83 (1962) (must show unnecessary hardship to prove entitlement to variance) *with* Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 692, 696 (Iowa 1980) (must show relation to general health, safety, and welfare and rational basis for distinguishing subject property from its surroundings to prove entitlement to rezoning).

327. *See* note 326 *supra.*

328. For example, the Clayton County zoning administrator recommended pursuing a variance in one case because the county attorney said that it would take less time than pursuing an amendment, which requires public hearings before the zoning commission and the board of supervisors. Clayton County Board of Adjustment Minutes, Petition of Howe (Apr. 15, 1982).

329. *See, e.g.*, Board of Supervisors Interview No. 307 (June 21, 1982).

330. *See* Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 60-61, 85-86 (amendment and variance processes both present potential for arbitrariness).

rarely addressed.[331] The purpose of imposing procedural requirements on boards of adjustment is to ensure that the statutorily required investigation is made and that all county residents are treated equally and fairly.[332] The same purposes should be pursued in the rezoning context to ensure that all county residents' expectations of nonarbitrary application of zoning regulations are fulfilled.

To ensure fairness to all county residents, boards of supervisors should at least be compelled to adopt a comprehensive land use plan[333] and to make findings of fact. These findings should indicate that a rezoning decision fairly considered the nature of land surrounding the land named in the petition for possible inclusion in the area rezoned, the future land use needs of the county, and the effect of rezoning on the comprehensive plan.

The purpose and effect of a findings requirement were recently elucidated by Justice LeGrand, speaking for a unanimous Iowa Supreme Court, in *Citizens Against the Lewis & Clark (Mowery) Landfill v. Pottawattamie County Board of Adjustment*.[334] In *Pottawattamie County* the court reversed a series of cases that held that findings were not required for board of adjustment actions. According to the court, findings

> would provide a ready basis for determining the reasons for the board's action and would help immeasurably in determining whether the result was reasonable or was, as is frequently claimed, arbitrary and capricious. It would also serve the additional purpose of sharpening the issues the parties should raise on appeal.[335]

The Iowa Supreme Court's holding in *Pottawattamie County* supports the conclusion that administrative inconvenience is not an adequate reason for refusing to impose a findings requirement on boards of adjustment.[336] Empirically, both variance proceedings before boards of adjustment and amendment proceedings before boards of supervisors involve orders of particular applicability based on legislatively created standards. At the very least, requiring boards of supervisors to make express fact findings would increase public confidence in the zoning process by avoiding the appearance of arbitrary action.[337]

Furthermore, establishing a findings requirement for zoning amendment proceedings would assist courts in an area deemed particularly

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331. *See* note 140 *supra*.

332. *See* text accompanying notes 463-75 *infra* (explaining need for procedural protection for parties seeking relief from boards of adjustment).

333. The purposes of adopting a comprehensive plan are discussed in text accompanying notes 121-42 *supra*.

334. 277 N.W.2d 921 (Iowa 1979).

335. *Id.* at 925.

336. *E.g.*, Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1140 (D.N.H. 1976) (local agency's interest in informality does not outweigh private interest in avoiding arbitrary and capricious agency action).

337. Citizens not only have an interest in being treated fairly, but they also have an interest in believing that they have been treated fairly. *Id.*

troublesome: spot zoning. Spot zoning involves an amendment made for the purpose of benefiting the applicant in a fashion out of line with the goals of the comprehensive plan.[338] Surely, the absence of a record only makes more troublesome the application of a standard that requires a balancing of all the factors involved in the request.[339] The concerns articulated in *Pottawattamie County*, which led to a board of adjustment findings requirement, support the enforcement of record-keeping requirements for zoning amendment proceedings before boards of supervisors.

Iowa Code section 358A.8 requires the creation of a seven-member zoning commission.[340] The commission acts as an advisory body to the board of supervisors preceding enactment of ordinances or amendments. The commission must prepare a report detailing the effects of the proposed zoning scheme on the general welfare.[341] Before finally submitting its recommendations to the board of supervisors, the commission must hold public hearings on the proposal.[342]

Most county zoning ordinances in Iowa were not actually prepared by a zoning commission but were created by consultants or regional planning commissions.[343] Thus, the zoning commission's most significant impact on the intitial zoning process is to reduce the work load of the board of supervisors by holding preliminary public hearings. Sometimes more than one hearing is held before the commission, particularly in cases eliciting a great deal of public input. The supervisors generally hold only one hearing, and attendance at supervisors' hearings usually is sparse.[344]

Section 358A.9 requires that a zoning administrator be appointed to enforce the zoning regulations.[345] Every zoned county has a zoning

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338. *See, e.g.*, Jaffe v. City of Davenport, 179 N.W.2d 554, 556 (Iowa 1970); Keppy v. Ehlers, 253 Iowa 1021, 1023, 115 N.W.2d 198, 200 (1962).

339. Resolution of a claim requires analysis of factors including the size of the property rezoned, prior use of the property, the character of the surrounding area, and the suitability of the subject property for various uses. Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 696 (1980).

340. IOWA CODE § 358A.8 (1983).

341. Buchholz v. Board of Adjustment, 199 N.W.2d 73, 75 (Iowa 1972).

342. *Id.* The board of supervisors and the zoning commission must each hold a hearing before adoption or amendment of a zoning ordinance. *Id.* at 76-77.

343. For examples of ordinances prepared by consulting engineering firms, see Floyd County, Iowa, Zoning Regulations (1967); Greene County, Iowa, Zoning and Subdivision Regulations (1969); Plymouth County, Iowa, Zoning Regulations (1978). For examples of ordinances prepared by Regional Councils of Governments, see Allamakee County, Iowa, Zoning Ordinance (1979); Dickinson County, Iowa, Zoning Ordinance (1982); Muscatine County, Iowa, Revised Zoning Ordinance (1981). One ordinance was prepared by a law firm. *See* Franklin County, Iowa, Zoning Ordinance (1976).

344. *See, e.g.*, Board of Supervisors Interview No. 316 (July 22, 1982); Board of Supervisors Interview No. 315 (July 22, 1982); Board of Supervisors Interview No. 319 (June 28, 1982); Board of Supervisors Interview No. 307 (June 21, 1982); Board of Supervisors Interview No. 301 (June 9, 1982).

345. IOWA CODE § 358A.9 (1983).

administrator.[346] In the small counties, administrators usually hold another office, and some devote as little as two hours per week to zoning duties. Three counties in Iowa employ nearly full-time zoning administrators, and Polk County, the most populous county in Iowa, employs a staff of five persons who work an aggregate of approximately ninety-four hours per week.[347]

The main duty of zoning administrators is taking applications for new buildings, assessing those applications' specifications for compliance with zoning ordinances, and then issuing or denying building permits based on those assessments.[348] As a consequence, the zoning administrator is the first interpreter of the meaning of an ordinance. The administrator's decision is vested with a presumption of validity and will be reversed only if unreasonable.[349]

All zoning administrators are responsible for enforcement of zoning regulations pertaining to construction commenced or completed, regardless of whether a permit has been issued.[350] The need for, and the actual practice of, enforcement vary considerably from county to county. In four Iowa counties over fifty percent of all construction commences before the owner has sought a building permit—a per se violation of all county ordinances.[351] Many zoning administrators blamed the high rates of noncompliance on the absence of publicity regarding the existence of ordinances, the stringent requirements of zoning ordinances, and the outright defiance of building restrictions.[352]

One county zoning administrator has a unique practice of questionable legality. The administrator offers business permits, available in any district, which have the effect of legalizing home occupations and small businesses. Issuance of the permits is based on the administrator's "judgment and understanding of the zoning ordinance," and the permits are revocable for violation of any imposed conditions or in the event of neighbors' complaints.[353] Such blatant usurpation of the board of supervisors'

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346. The Project writers were able to contact zoning administrators in every county that has enacted a zoning ordinance.

347. *See* Appendix V *infra* (Table 12).

348. *See, e.g.*, Zoning Administrator Interview No. 203 (July 9, 1982); Zoning Administrator Interview No. 201 (June 22, 1982); Zoning Administrator Interview No. 202 (June 15, 1982).

349. Crow v. Board of Adjustment, 227 Iowa 324, 328, 288 N.W. 145, 146-47 (1939).

350. County enforcement methods range from nonenforcement to ongoing supervision of construction sites. Most administrators rely on neighbors' complaints to discover violations. *See* Appendix VI *infra* (Table 35).

351. *See, e.g.*, Black Hawk County, Iowa, Zoning Ordinance § VII (1980); Cherokee County, Iowa, Zoning Ordinance § 17(B) (1976); Page County, Iowa, Zoning Ordinance § 13-2.1 (1973).

352. *E.g.*, Zoning Administrator Interview No. 204 (June 21, 1982); Board of Adjustment Interview No. 104 (June 21, 1982); Interview with Eldon Rike, Adams County, Iowa, Zoning Administrator, in Corning, Iowa (June 14, 1982); Interview with David Hulse, Dubuque County, Iowa, Zoning Administrator, in Dubuque, Iowa (June 3, 1982).

353. *See* Zoning Administrator Interview No. 223 (June 21, 1982).

legislative function of defining permissible uses for a district is, to say the least, surprising.

Chapter 358A also establishes the board of adjustment and spells out in detail the procedures for administrative change in the county zoning scheme. The next two parts of this Project will focus on the creation, composition, and operation of county boards of adjustment in Iowa.

IV. COUNTY BOARDS OF ADJUSTMENT

In many respects each parcel of land is unique.[354] Thus, drafting an ordinance that benefits and burdens all property equally is a difficult, if not futile, task. Consequently, nearly every zoning ordinance creates at least the potential for significant inequities. Early zoning advocates were acutely aware of the imperfections of zoning legislation;[355] thus, all zoning ordinances provide for administrative relief from the onerous burdens imposed on particular landowners.[356] The most common provision for such relief is the establishment of a zoning board of adjustment.[357]

Despite virtually universal acceptance, however, the board of adjustment concept has been subjected to considerable debate on its effectiveness as a land use tool.[358] As early as 1927, one commentator noted the divergent views on the popularity of the board of adjustment.[359] Thirty years later, another zoning authority suggested that, based on observation alone, more than fifty percent of board determinations constituted illegal usurpations of power.[360]

A. The Role of the County Board of Adjustment

The board of adjustment originally was intended to serve as a "safety valve," allowing relief in extraordinary circumstances in which strict enforcement of the zoning ordinance would result in the imposition of a burden on one property owner that was not imposed on other owners of similarly situated property.[361] In such extraordinary circumstances the

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354. *See* text accompanying note 528 *infra*.

355. 3 R. ANDERSON, *supra* note 9, §§ 17.07-.08; *see* N. BAKER, THE LEGAL ASPECTS OF ZONING 76-77 (1927).

356. *See* 3 R. ANDERSON, *supra* note 9, § 17.07, at 100.

357. *Id.* § 17.07. The establishment of a local board of adjustment constituted a significant provision in the SZEA, which had adopted the concept from the New York City Zoning Resolution of 1916. SZEA, *supra* note 61, § 7.

358. *See, e.g.*, Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353, 354-55 (1962); Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 273-75 (1962); Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROBS. 280, 281-82 (1955).

359. *See* N. BAKER, THE LEGAL ASPECTS OF ZONING 100 (1927).

360. Blucher, *Planning and Zoning Principles Validated*, 13 ARK. L. REV. 1, 7 (1958).

361. *See* Rubin v. Board of Directors, 16 Cal. 2d 119, 124, 104 P.2d 1041, 1043 (1940); Zimmerman v. O'Meara, 215 Iowa 1140, 1144, 245 N.W. 715, 717 (1932).

One court has described the board's function in this way:

> In the early days of zoning, a Board of Appeals was considered a device merely

zoning ordinance often left the landowner with no reasonable use of the restricted property. Therefore, the board of adjustment was designed to circumvent potential constitutional challenges[362] when zoning restrictions prevented any beneficial use of property without a substantial relation to the public welfare.[363]

Many members of county boards of adjustment in Iowa, however, see their role quite differently from that originally intended for them. Only twenty percent of the board members who responded to the Project questionnaire thought that their duty was limited primarily to granting variances from the zoning ordinance in extraordinary circumstances.[364] Rather, roughly one-third of the responding board members thought that their responsibility was to permit deviation from the zoning restrictions when the deviation was perceived as insignificant or harmless.[365] Over one-half of the board members who responded to the questionnaire thought their role to be that of granting relief in situations in which the burdens imposed exceeded the benefits derived from a specific regulation, the proposed illegal use constituted the "best" use of the land, or the prohibitive regulation was considered a "poor" provision.[366] In essence, many county board of adjustment members in Iowa view their role as that of policymaker.

In comparison with the board members' views, thirty percent of the county zoning administrators responding to the Project questionnaire thought that the primary role of the board of adjustment in variance cases is to provide relief in extraordinary circumstances.[367] Also, twelve and one-half percent of the zoning administrators thought that the board's role in variance decisions is to promote the most beneficial use of the subject property,[368] but nevertheless, over fifty-six percent of the zoning admini-

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> for rounding off the sharp corners of the zoning requirements. Such a board is now considered absolutely necessary to the safe operation of a zoning ordinance. It is the safety valve of the zoning plan. A zoning ordinance, like a steam boiler, will sooner or later blow up if there is no safety valve. Where there is a functioning board of appeals to which every aggrieved applicant for a permit may resort, litigation automatically assumes the form of a court review of the discretion of the board, instead of out and out attacks on the constitutionality of specific instances of regulation. . . . Where there is no board of appeals, instances are sure to arise which the courts must, under the law, declare unreasonable and arbitrary, and therefore void.

Van Auken v. Kimmey, 141 Misc. 105, 115-16, 252 N.Y.S. 329, 341 (Sup. Ct. 1930), *quoted in* 3 A. RATHKOPF, *supra* note 46, § 37.01[1], at 37-5.

362. *See* 3 R. ANDERSON, *supra* note 9, § 17.08.

363. *See, e.g.*, Anderson v. Jester, 206 Iowa 452, 458, 221 N.W. 354, 357 (1928); Rhode Island Hosp. Trust Nat'l Bank v. East Providence Zoning Bd. of Review, ____ R.I. ____, ____, 444 A.2d 862, 864 (1982); N. BAKER, THE LEGAL ASPECTS OF ZONING 79-81 (1927).

364. *See* Appendix IV *infra* (Table 12).

365. *Id.*

366. *Id.*

367. *See* Appendix VI *infra* (Table 34).

368. *Id.*

strators still think that the board of adjustment's role is to balance the burdens and benefits of the zoning ordinance or to allow deviations that will not harm neighboring residents.[369] The implication of both the board members' and zoning administrators' misperception of the boards' primary purpose has been that county boards of adjustment in Iowa often exceed the limits of their delegated authority.[370]

B. Jurisdiction and Powers of the County Board of Adjustment in Iowa

The county board of adjustment is a creature of statute. As such, the board is limited to those powers expressly granted by the legislature. Iowa Code section 358A.15 gives the board of adjustment the following powers:

> 1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant thereto.
>
> 2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such 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.[371]

The distinction between each of these powers is significant because different criteria must be found, and different standards of proof applied, for each.[372] Many county board of adjustment members, however, do not understand the distinction between special exceptions and variances—the two types of relief constituting virtually all board of adjustment action.[373] Almost one-third of the board members who responded to the Project questionnaire were unaware of or could not explain the difference between a special exception and a variance, and over one-half chose not to answer the question pertaining to the distinction.[374] Only nineteen percent of the board members were able to make the distinction accurately.[375] As a result

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369. *Id.*

370. *See* text accompanying notes 774-884 *infra*.

371. IOWA CODE § 358A.15 (1983). This section of chapter 358A, in the same manner as the delineation of board of adjustment powers in most jurisdictions, was taken almost verbatim from § 7 of the SZEA. *See* 1 N. WILLIAMS, *supra* note 43, § 18.08.

372. *See* text accompanying notes 380-85, 397-400 *infra*.

373. *See* note 10 *supra*.

374. *See* Appendix IV *infra* (Table 11).

375. *Id.* Many county board of adjustment members responded that the distinguishing characteristic between special exceptions and variances is that special exceptions are limited

of this confusion, some board members may apply the lesser standard of proof required for special exceptions to variance requests, thereby increasing the likelihood that a variance will be granted on inadequate grounds.[376] Because the board's authority is derived wholly from section 358A.15, and the distinction between the individual powers contained therein is of special significance, a more detailed discussion of each power is merited.

1. Administrative Appeals

In Iowa very few appeals to the board of adjustment take the form of an administrative appeal.[377] More often, the unsuccessful applicant for a building, zoning, or occupancy permit resorts to an application for variance or special exception.[378] Administrative appeals commonly involve an interpretation of a vague term, such as "home occupation," or an ambiguous boundary line. When it encounters such an appeal, the board of adjustment merely steps into the shoes of the administrative official whose decision is being appealed.[379] The board may then reach any reasonable conclusion that it thinks the administrative authority should have reached.

2. Special Exceptions

Special exceptions[380] are uses permitted by the zoning ordinance, provided the board of adjustment finds certain factual conditions relating to the public welfare to be present.[381] If the petitioner proves that the requisite conditions have been met, the board then bears the burden of demonstrating

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to a certain time period while variances, once granted, are permanent. *E.g.*, Board of Adjustment Questionnaire Nos. 261, 371, 381, 403, 642. While special exceptions often involve a time restriction, at the expiration of which the petitioner must reapply for an extension of the permit, the distinction is much more sophisticated than the mere presence or absence of time limits. *See* text accompanying notes 380-422 *infra*.

376. Board members who were able to distinguish accurately between variances and special exceptions on the Project's board of adjustment questionnaire were more likely to identify proper variance factors. *See* Appendix V *infra* (Table 3).

377. *See* note 10 *supra*.

378. *Id.*

379. SZEA, *supra* note 61, § 7. Section 7 provides that the board has the authority to "make such an order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken." *Id. Accord* IOWA CODE § 358A.16 (1983).

380. Special exceptions also are referred to as special uses, special permits, and conditional uses. P. ROHAN, *supra* note 70, § 44.01[1]. For purposes of this Project, the term special exception as provided in IOWA CODE § 358A.15(2) (1983) will be used to describe this type of relief.

381. *E.g.*, Gregorio v. Zoning Bd. of Appeals, 155 Conn. 422, 429-30, 232 A.2d 330, 334-35 (1967); Buchholz v. Board of Adjustment, 199 N.W.2d 73, 75 (Iowa 1972); Vogelaar v. Polk County Zoning Bd., 188 N.W.2d 860, 862-63 (Iowa 1971); Reilly v. Marion Township, 113 Mich. App. 584, 587, 317 N.W.2d 693, 695 (1982); Urban Farms, Inc. v. Borough of Franklin Lakes, 179 N.J. Super. 203, 210, 431 A.2d 163, 166 (App. Div. 1981); *In re* Ellis, 277 N.C. 419, 425, 178 S.E.2d 77, 79 (1970).

that the petitioner is not entitled to the relief sought.[382] This burden-shifting analysis illustrates a fundamental characteristic of special exceptions: although special exceptions are not permitted in all circumstances, they possess a certain degree of legislative approval.[383] The board of adjustment merely serves as a factfinder to assure that the requisite conditions are met.[384] The initial decision that, under certain circumstances, the particular use is compatible with the zoning classification is retained by the politically sensitive board of supervisors.[385]

The board of adjustment's power to determine requests for special exceptions is not devoid of discretion, however. The following conditions are typical of those required prior to the approval of a special exception:

> 1. That the proposed location, design, construction, and operation of the particular use adequately safeguard the health, safety, and general welfare of persons residing or working in adjoining or surrounding property.
>
> 2. That such use shall not impair an adequate supply of light and air to surrounding property.
>
> 3. That such use shall not unduly increase congestion in the streets, or public danger of fire and safety.
>
> 4. That such use shall not diminish or impair established property values in adjoining or surrounding property.
>
> 5. That such use shall be in accord with the intent, purpose, and spirit of this ordinance and the land use policies of [the] County.[386]

Thus, the board of adjustment is entrusted with limited discretion to construe somewhat broad conditions.

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382. *E.g.*, Sheridan v. Planning Bd., 159 Conn. 1, 16, 266 A.2d 396, 404 (1969); Stewart v. District of Columbia Bd. of Zoning Adjustment, 305 A.2d 516, 518 (D.C. 1973); Boffo v. Boone County Bd. of Zoning Appeals, ____ Ind. App. ____, ____, 421 N.E.2d 1119, 1125 (1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 885 (Iowa 1976); Luger v. City of Burnsville, 295 N.W.2d 609, 612 (Minn. 1980); Kern v. Zoning Hearing Bd., 68 Pa. Commw. 396, 400, 449 A.2d 781, 783 (1982).

383. *See, e.g.*, Cornell v. County of DuPage, 58 Ill. App. 3d 230, 235, 374 N.E.2d 1, 4-5 (1977); Buchholz v. Board of Adjustment, 199 N.W.2d 73, 76 (Iowa 1972); Vogelaar v. Polk County Zoning Bd., 188 N.W.2d 860, 862 (Iowa 1971); City of Des Moines v. Lohner, 168 N.W.2d 779, 782-83 (Iowa 1969); Martin Marietta Aggregates v. Citizens for Preservation of S. Mountain-Antietam Env't, 41 Md. App. 26, 35, 395 A.2d 179, 184 (1978); Verona, Inc. v. Mayor of West Caldwell, 49 N.J. 274, 282, 229 A.2d 651, 655 (1967).

384. *See, e.g.*, Buchholz v. Board of Adjustment, 199 N.W.2d 73, 75 (Iowa 1972); 3 R. ANDERSON, *supra* note 9, § 19.17.

385. *See* 3 R. ANDERSON, *supra* note 9, § 19.09, at 371.

386. Black Hawk County, Iowa, Zoning Ordinance §§ XIX(B) 1-3, 5 (1980); *see also* Crawford County, Iowa, Zoning Ordinance § 2.15(2)(d) (1976); Fayette County, Iowa, Zoning Ordinance § 9B (1973); Humboldt County, Iowa, Zoning Regulations § 19D (1976); Sioux County, Iowa, Zoning Ordinance and Subdivision Regulations art. 19, § 5 (1979); Webster County, Iowa, Zoning Regulations § XVI G(3) (1972).

Nonetheless, the board cannot exercise its discretion arbitrarily. It is clear that the special exception power must be accompanied by adequate legislative guidelines so that the board of adjustment is not empowered with unbridled discretion. In *Chicago, Rock Island & Pacific Railroad v. Liddle*[387] a zoning ordinance that conferred virtually unlimited power upon a board of adjustment to issue special exception permits was held invalid.[388] The court held that by merely providing that the board of adjustment could issue permits after, but not dependant on the outcome of, fire and health department reports, the ordinance constituted a delegation of authority without adequate guidelines.[389]

Even though the local legislative body normally determines what uses constitute special exceptions and the nature of their requisite conditions,[390] the power to grant special exceptions is vested exclusively in the board of adjustment when so delegated by statute.[391] However, several outdated county zoning ordinances in Iowa still provide that the board of supervisors may grant special exceptions.[392] In *Depue v. City of Clinton*[393] an ordinance provision empowering the city council to grant special exceptions was ruled invalid.[394] The court held that under the municipal zoning enabling statute, Iowa Code chapter 414, the legislature had delegated exclusive jurisdiction of special exceptions to the board of adjustment.[395] Therefore, by comparison, similar provisions in county ordinances are likewise invalid.[396]

3. Variances

In contrast to a special exception, a variance is an extraordinary remedy, justified only in situations of "unnecessary hardship."[397] Unneces-

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387. 253 Iowa 402, 112 N.W.2d 852 (1962).

388. *Id.* at 408, 112 N.W.2d at 855.

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

390. *See* text accompanying note 385 *supra*.

391. Depue v. City of Clinton, 160 N.W.2d 860, 863 (Iowa 1968); *see also* City of Des Moines v. Lohner, 168 N.W.2d 779, 784 (Iowa 1969) (holding that the power to grant special exceptions is exclusively within the powers of the board of adjustment when delegated by ordinance).

392. Audubon County, Iowa, Zoning Ordinance and Subdivision Regulations § VI(C)(1) (1969); Buena Vista County, Iowa, Zoning Ordinance § 15 (1966); Greene County, Iowa, Zoning and Subdivision Regulations § XV (1968); Marshall County, Iowa, Zoning Ordinance No. 2 art. XII, § 1 (1962); Plymouth County, Iowa, Zoning Regulations and Land Subdivision Regulations art. 5, § 2 (1978).

393. 160 N.W.2d 860 (Iowa 1968).

394. *Id.* at 862.

395. *Id.*

396. That judicial interpretations of chapter 414 are applicable to chapter 358A, see note 18 *supra*.

397. *E.g.*, Buchholz v. Board of Adjustment, 199 N.W.2d 73, 75 (Iowa 1972); Board of Adjustment v. Ruble, 193 N.W.2d 497, 503 (Iowa 1972); Holasek v. Village of Medina, 303 Minn. 240, 244, 226 N.W.2d 900, 903 (Minn. 1975); Rosedale-Skinker Improvement Ass'n v. Board of Adjustment, 425 S.W.2d 929, 933 (Mo. 1968); New London

sary hardship represents a more stringent standard than the showing required for a special exception.[398] Additionally, the burden of establishing unnecessary hardship lies entirely with the petitioner,[399] unlike special exceptions, in which the burden to justify denial shifts to the board of adjustment once the petitioner shows that the requisite conditions have been met.[400]

There are two basic types of variances: "use" variances, which permit uses that are otherwise illegal according to the zoning ordinance, and "area" variances—sometimes referred to as "bulk" or "nonuse" variances—which customarily involve departures from the physical restrictions imposed by the ordinance, such as lot size, height, or setback requirements.[401] The distinction between use and area variances is not always as clearly defined as it may seem, however, and in certain situations the two categories tend to overlap.[402]

a. Use Variances

Although requested less frequently,[403] use variances have a more destructive impact on the county's land use plan; by their very nature, they allow uses that have been judged by the zoning commission to be incompatible with the established district.[404] Area variances, on the other hand, do not usually alter the character of the district as drastically as, for instance, a variance for a commercial use in a residential neighborhood.[405]

Due to the conceivably greater detriment to land use plans, a number of states, in their enabling statutes, have withheld the authority to permit

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v. Leskiewicz, 110 N.H. 462, 464, 272 A.2d 856, 858 (1970); Harding v. Board of Zoning Appeals, 219 S.E.2d 324, 328 (W. Va. 1975).

398. *See, e.g.*, Vogelaar v. Polk County Zoning Bd., 188 N.W.2d 860, 862 (Iowa 1971); Martin Marietta Aggregates v. Board of County Comm'rs, 5 Kan. App. 2d 774, 781, 625 P.2d 516, 522-23 (1981); Anesse v. Board of Appeal, 361 Mass. 893, 893, 282 N.E.2d 677, 678 (1972); Luger v. City of Burnsville, 295 N.W.2d 609, 612 (Minn. 1980).

399. *E.g.*, Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 521, 522 P.2d 12, 22, 113 Cal. Rptr. 836, 846 (1974); Graziano v. Board of Adjustment, 323 N.W.2d 233, 237 (Iowa 1982); Lovely v. Zoning Bd. of Appeals, 259 A.2d 666, 669 (Me. 1969).

400. *See* text accompanying note 382 *supra*.

401. 3 R. ANDERSON, *supra* note 9, §§ 18.06-.07.

402. *Id.* § 18.06.

403. County boards of adjustment in Iowa consider more than seven times as many area variances as use variances. *See* Appendix VI *infra* (Table 1). During the period covered by this Project, 64 use variances were considered by the county boards of adjustment, as compared to the consideration of 457 area variances for the same period. *Id.*

404. Anderson v. Board of Appeals, 22 Md. App. 28, 38, 322 A.2d 220, 226 (1973); 3 R. ANDERSON, *supra* note 9, § 18.46, at 267-68; Dukeminier & Stapleton, *supra* note 358, at 281.

405. *See, e.g.*, Anderson v. Board of Appeals, 22 Md. App. 28, 38, 322 A.2d 220, 226 (1973); Snyder v. Waukesha County Zoning Bd. of Adjustment, 74 Wis. 2d 468, 473, 247 N.W.2d 98, 101-02 (1976).

use variances from the board of adjustment.[406] Similarly, twenty-nine county boards of adjustment in Iowa are expressly prohibited by ordinance from granting use variances,[407] even though the state's enabling statute imposes no such limitation on the board's powers. Despite the clear language of these zoning ordinances, nearly forty percent of the boards so limited disregard the prohibition and grant use variances.[408] Whether these violations of the county's legislated opposition to use variances occur with or without the board's knowledge could not be determined. However, the result is uniform: uses forbidden by elected representatives are permitted by an appointive body without the authority to do so.

Further evidence that use variances are considered to be more detrimental than area variances is that county boards of adjustment deny use variance applications at twice the rejection rate for area variances.[409] Never-

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406. *E.g.*, ALA. CODE § 11-19-19(3) (1975); ARK. STAT. ANN. 17-1113.7.7(3) (1947); CAL. GOV'T CODE § 65906 (Deering Supp. 1983); FLA. STAT. § 163.225(3)(d) (1981).

407. Adams County, Iowa, Zoning Ordinance § 15.2224 (1979); Allamakee County, Iowa, Zoning Ordinance § 1.68 (1979); Calhoun County, Iowa, Zoning Ordinance § 1920.3(e) (1980); Carroll County, Iowa, Zoning Regulations § 16.2224 (1980); Clay County, Iowa, Zoning Ordinance and Subdivision Regulations art. XXIV, § 3 (1979); Clayton County, Iowa, Zoning Ordinance and Subdivision Regulations § 1.7(72) (1980); Clinton County, Iowa, Zoning and Subdivision Ordinances § 3.15(3) (1976); Crawford County, Iowa, Zoning Ordinance § 3.1(51) (1976); Dallas County, Iowa, Zoning Ordinance § 25B (1974); Dickinson County, Iowa, Zoning Ordinance art. 3, § 1.94 (1982); Emmet County, Iowa, Zoning Ordinance and Subdivision Regulations art. III, § 1 (1975); Fayette County, Iowa, Zoning and Subdivision Ordinances § 23(B) (1973); Franklin County, Iowa, Zoning Ordinance § 348 (1976); Guthrie County, Iowa, Zoning Ordinance § 2.14(3) (1977); Harrison County, Iowa, Regional Zoning Ordinance § 16.2224 (1972); Ida County, Iowa, Zoning Ordinance § 20(B) (1979); Jackson County, Iowa, Zoning Ordinance § 2.15(3) (1976); Jasper County, Iowa, Zoning Ordinance § 19.3(C)(4) (1981); Kossuth County, Iowa, Zoning Ordinance § 23.2224 (1973); Linn County, Iowa, Zoning Regulations § 2.29(9.1) (1981); Mitchell County, Iowa, Zoning Ordinance art. XXIII, § E(2) (1980); Monona County, Iowa, Zoning and Subdivision Ordinances § 22(B) (1978); Osceola County, Iowa, Zoning Ordinance and Subdivision Regulations art. 3, § 1.88 (1979); Pocahontas County, Iowa, Zoning Ordinance § 1620.3(G) (1979); Pottawattamie County, Iowa, Zoning Ordinance § 2.940 (1981); Shelby County, Iowa, Zoning Ordinance § 23.2224 (1973); Sioux County, Iowa, Zoning Ordinance and Subdivision Regulations art. 3, § 1.85 (1979); Story County, Iowa, Land Use Policies, Zoning Ordinance and Subdivision Regulations art. XXIII, § E(2) (1977); Woodbury County, Iowa, Zoning and Subdivision Ordinances § 23(B) (1981).

408. *E.g.*, Allamakee County Board of Adjustment Minutes, Petition of Mount (May 27, 1982); Calhoun County Board of Adjustment Minutes, Petition of Irwin (Dec. 3, 1980); Clayton County Board of Adjustment Minutes, Petition of Edgerton (Oct. 15, 1981); Clinton County Board of Adjustment Minutes, Petition of Nelson (June 10, 1981); Fayette County Board of Adjustment Minutes, Petition of Albrecht (June 2, 1982); Jackson County Board of Adjustment Minutes, Petition of Aggrecon (June 11, 1981); Jasper County Board of Adjustment Minutes, Petition of First Miss, Inc. (Sept. 3, 1981); Kossuth County Board of Adjustment Minutes, Petition of Viking Oil (Mar. 4, 1981); Linn County Board of Adjustment Minutes, Petition of Smith (Apr. 26, 1982); Osceola County Board of Adjustment Minutes, Petition of Reed (Mar. 11, 1982); Sioux County Board of Adjustment Minutes, Petition No. 80-19 (Aug. 6, 1980).

409. *See* Appendix VI *infra* (Table 1).