APA Institute
Legal Issues: Legislation, Case Law & a Smorgasbord of Topics
APA/Nebraska Planning & Zoning Association
February 24, 2010
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Welcome to
Dave’s Deli
101st LEGISLATURE – 2009 First Session

LB’s from 2009 worth noting

- **LB33 – Carryover Bill.** LB33 would allow the transfer of development rights as a useful, market-based approach for directing new residential development away from scattered rural sites to areas desirable for relatively dense housing, such as being near incorporated communities or next to rural subdivisions that already have the needed infrastructure. The purpose of LB33 is to permit Lancaster County to use the transfer of development rights, or TDR, as part of the county’s zoning authority. Under LB33, Lancaster County would have the authority to regulate density on noncontiguous property if the transfer is voluntary between landowners and applied to residential uses.

- **LB104 – Indefinitely postponed.** LB104 would have amended section 16-117 to change the procedure for annexation by cities of the first class. The bill removes the steps in the annexation process that cities of the first class have to follow but other classes of municipality do not have to follow. LB 104 would have made the annexation process for cities of the first class the same as for cities of the second class and villages and similar to the process for cities of the metropolitan and primary class. LB 104 would not have changed the requirement that a city of the first class adopt an annexation proposal by ordinance at a public meeting after notice. The planning commission would have had to review the annexation proposal and make a recommendation to the city council before the council could take action on the proposal as per Section 19-929. Remember - The requirement that the ordinance be read at three meetings on three different days prior to adoption cannot be waived for annexation ordinances (Section 16-404).

- **LB278 – passed 5/28/09.** Previous state law prohibited the use of roadways for volunteer fundraising activity. LB 278 allows municipalities, through the adoption of a city ordinance, to allow pedestrians, except for persons under the age of 18, to solicit contributions on roadways within their corporate boundaries, at specified times and locations, if the contributions are to be devoted to charitable or community betterment purposes. The bill would prohibits such solicitation from occurring on roadways that are part of the state highway system. The bill provides that any ordinance enacted shall not exclude or give preference to any individual or members of any organization, association, or group.
- **LB338** – **Indefinitely postponed.** This bill proposed to amend current state law regarding first and second class cities and villages to reduce the height at which grasses and weeds may be permitted to grow before they can be legally considered to be a nuisance. Sections 16-230 and 17-563 currently provide that these municipalities may require that a property owner keep the property free of any weeds, grasses or worthless vegetation that are twelve inches or more in height. Each city or village may (by ordinance) declare it to be a nuisance to permit or maintain the growth of such vegetation to a height of more than twelve inches. LB 338 would amend these sections to lower the maximum height of such weeds or vegetation from twelve inches to six inches.

- **LB350** – **Carryover Bill.** LB350 proposes to amend the law regarding industrial areas to clarify and tighten eligibility for designing real estate as an industrial area, to expand the procedure to review an industrial area designation, and to provide for the termination of an industrial area designation after a term of years.

- **LB 467** – **Indefinitely postponed.** LB 467 seeks to amend sections 14-117, 15-104, 15-111, 16-117, 16-122, and 17-402, Reissue Revised Statutes of Nebraska; to require voter approval for actions related to annexation of cities or villages. Annexation of any adjoining city, town or village in the State of Nebraska would require the majority of the registered voters of the adjoining city, town or village voting on the issue during a statewide primary or general election. LB 467 would prohibit municipalities of a larger class, based solely on population, from forcefully annexing smaller municipalities without the consent of the majority of voters in the municipality being annexed.

- **LB495** – **Passed 5/13/09.** LB 495 amends Section 19-916 which governs the approval of additions to a city of the first or second class or a village. An amendment to this section enacted in 2001 (LB 210) raised questions of interpretation relating to the ownership of dedicated streets in approved subdivisions. The new language makes it clear that the municipality becomes the owner of the dedicated streets and public areas upon annexation and not upon mere approval of the plat, since formal annexation must follow the approval of the plat in the process set out in this statute. LB 495 also restructures Section 19-916 to clarify provide that approval of subdivisions of property in a city’s or village’s extraterritorial zoning jurisdiction are to be done as provided in Sections 16-901 to 16-905 and Sections 17-1001 to 17-1004.
- **LB503** - Passed 5/26/09. LB503 provides shooting range operations with guidelines and protections that would allow these ranges to continue operating when faced with urbanization. The key elements of this bill addressed that shooting ranges shall operate safely and shall not be subject to local ordinances that would prohibit the normal operation of the range. This means that cities, counties, villages and other political subdivisions cannot pass zoning, noise, or discharge restrictions that might be unreasonable for the purpose of forcing ranges to close. It also established that ranges that are currently in operation shall be allowed to operate without regard to any future ordinances that are passed in regard to zoning, noise or the discharge of firearms.

- **LB512** - Select file. LB512 amends the law regarding airport zoning. The law provides for airport zoning to prevent hazards that endanger lives and property of the users of the airport and the occupants of land in the vicinity of the airport. The creation of a joint airport zoning board is a cumbersome process and adds a level of bureaucracy. LB 512 eliminates the need for a joint board in most cases by returning that the political subdivision where the airport is located will do the zoning for the airport. A joint airport zoning board would only be used if the political subdivision where the airport is located is not enforcing zoning regulations.

- **LB526** - General file. LB526 recognizes the special development pressures and needs of cities and villages located in close proximity to metropolitan class cities. LB526 was introduced to provide enhanced annexation authority for such municipalities to enable them to more quickly and effectively being developed areas within municipal boundaries. LB526 provides 3 significant changes in annexation law which would broadly widen the authority for the specified cities and villages to annex property.
  1. The new authority may only be exercised by cities and villages located in counties that border on a county within which is located a city of the metropolitan class and which area is (a) located within the area over which the city or village exercised extraterritorial zoning jurisdiction on January 1, 2009 and (b) would not add more than 25 new residents to the city or village in consequence of the annexation.
  2. Authorizes the annexation by such cities or villages of noncontiguous territory with a population in excess of 25 persons could be accomplished with the approval of a majority of the property owners located in the area proposed for annexation. The approval would be obtained in an election conducted in the same manner as an election for members of the board of trustees of a sanitary and improvement district. (mail vote) If the property owners approve of the election, the annexation may be accomplished by means of a "strip" annexation.

- **LB615** - Carryover Bill. LB615 has 3 distinct parts. (1) LB615 would revise, rename, and extend the Municipal Infrastructure Redevelopment Fund Act to become the County and Municipal Infrastructure Redevelopment Fund Act which expired on July 1, 2009. The "MIRF" Act was adopted in 1989 to assist cities with funding infrastructure projects with an allocation from the state cigarette tax. §77-2602 would be amended to provide for an allocation from the cigarette tax of $3.5 million per year to be distributed in accordance with the revised Act. (2) LB 615 would expand the authority of counties to create "community building districts" in order to finance the construction of county facilities for "community, social and athletic" purposes. (3) LB 615 would adopt the Family Entertainment and Sports Attraction Act, which would permit the formation of Family Entertainment and Sports Attraction Districts in the State (FED Districts). To qualify as FED district:
the FED District must encompass facilities that will either (1) "attract or retain a spectator sports franchise or event" that is reasonably expected to draw over 100,000 spectators per year, or (2) "permit substantial facilities upgrades" for an intercollegiate athletic team that is reasonably expected to draw over 100,000 spectators per year. In each case, the facilities must result in a "long-term occupancy agreement" of 20 years or more. In the event that the area is designated as an FED District, then, if the area is not already within an area in which a local option sales tax is imposed, the local political subdivision may impose such a local option sales tax up to 1.5 percent, and the state would agree to "turn back" the local political subdivision up to 75 percent of the state sales tax collected within the District. Bonds would be authorized, which could be repaid with the sales tax revenues resulting from status as an FED District, as well as other sources.

- **LB647 – Indefinitely postponed.** LB 647 would have required cities of the first or second class, or villages to provide written notice of a proposed annexation by regular mail to all property owners (of record in the Register of Deeds Office as of the end of the last business day 25 days prior to the hearing before the Planning Commission) within the area proposed for annexation. The bill would require notice be sent at least ten working days prior to the planning commission public hearing, and at least ten working days prior to the city council or village board public hearing. The notices would include (1) a description of the area proposed for annexation, (2) information about the meeting, and (3) how to obtain more information. No other notice would be necessary beyond these two notices, if either meeting is adjourned, continued, or postponed to a later date. Except for willful or deliberate failure to cause notice to be given, LB 647 would not allow an annexation decision to be affected solely for an irregularity, defect, error, or failure on the part of the city to cause notice if a reasonable attempt was made to comply with this bill.

- **LB736 – Final Reading.** The provisions of § 76-374 grant a condominium homeowners association a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due and a notice containing the dollar amount of such lien is recorded in the office where mortgages are recorded. LB 736 would establish provisions relating to the establishment and priority of liens that are identical to the provisions of § 76-374 for all types of homeowners associations, other than condominium homeowners associations.

- **LB863 – Hearing 1/26/10.** LB 863 changes the restrictions on Sanitary Improvement Districts (SID) to enter into or extend contracts once they have been notified that the city is proposing the annex the SID. After such notification the SID will need to seek the approval of the City Council before entering into any contracts.

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101st LEGISLATURE – 2010 Second Session

**LB’s from 2010 worth noting**

- **LB736 – Final Reading.** The provisions of § 76-374 grant a condominium homeowners association a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due and a notice containing the dollar amount of such lien is recorded in the office where mortgages are recorded. LB 736 would establish provisions relating to the establishment and priority of liens that are identical to the provisions of § 76-374 for all types of homeowners associations, other than condominium homeowners associations.

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- **LB906** – Hearing 2/1/10. LB 906 amends section 53-177(1) of the Liquor Control Act by eliminating the prohibition of liquor licenses for the sale at retail of any alcoholic liquor within 150 feet of any church, hospital, or home for aged or indigent persons or for veterans, their wives or children. LB 906 leaves in the prohibition of liquor licenses for the sale at retail of any alcoholic liquor within 150 feet of any school.

- **LB997** – Hearing 2/9/10. LB 997 would require counties and municipalities to include an energy element as part of the already required comprehensive plan. LB 997 would become effective when a new comprehensive plan is developed, a full update to the comprehensive plan is undertaken, or by January 1, 2015. The energy element would: assess energy infrastructure and energy use by sector, including residential, commercial, and industrial sectors; evaluate utilization of renewable energy sources; and promote energy conservation measures that benefit the community.

- **LB1035** – Indefinitely postponed on 2/9/10. LB1035 would have granted authority to any Nebraska county, city, or village to declare public health nuisances that may result in the spread of infectious disease and to outline, but not limit, specific public health nuisances that may result in the spread of infectious disease. LB1035 would have given the power to any Nebraska county, city, or village to direct the owner or user of the property where the declared nuisance exists to abate the public health threat. LB1035 would have also given Nebraska counties, cities, and villages the authority to abate the declared nuisance and acquire a lien for the cost of abating the declared nuisance if the owner or user of the property refuses, failed, or neglected to abate the public health threat.

- **LB1098** – Hearing 2/8/10. LB 1098 provides enabling legislation to municipalities to create by ordinance a special district known as a sustainable energy financing district. The purpose of the district is to encourage, accommodate, and provide a source of revenue and means for financing capital improvements for energy efficiency improvements, such as retrofitting and the installation of renewable energy improvements in residential and commercial properties. LB 1098 would allow a municipality that creates a sustainable energy financing district to provide loans to residential and commercial property owners within the district to make certain energy efficiency improvements. The loan, including interest rates and administrative fees, would be collected through the residential or commercial property owner’s property tax bill, over a length of time not to exceed twenty years.

Background: Billboard company brought action against landowners, city, and others after landowners discontinued billboard leases pursuant to amended city ordinances which allowed replacement of nonconforming signs. The Dodge County District Court entered judgment for defendants. The Company appealed and certain defendants cross-appealed.

FACTS: In 2003, the Fremont city ordinances were amended to allow replacement of nonconforming signs, and the landowners leasing to Lamar discontinued their leases with Lamar and leased the space to a different sign company. Lamar challenged the constitutionality of the ordinance and alleged that, although it was a mere lessee, it had a vested property right in the nonconforming structures and that this vested property right was not the landowners' to transfer.

NUGGETS:
- The right to maintain a legal nonconforming use runs with the land, meaning it is an incident of ownership of the land, and is not a personal right; therefore, a change in the ownership or tenancy of a nonconforming business or structure which takes advantage of the nonconforming rights does not affect the current landowner's right to continue the nonconforming use.
- Any rights Billboard Company had with respect to nonconforming use were extinguished when leases were terminated, and thus company lacked any property rights to take and amended ordinances which allowed replacement of nonconforming signs did not constitute a regulatory taking of company's property rights.
- A claim that a regulation "goes too far" and deprives an individual or entity of a vested property right should be analyzed under the Takings Clause of the Fifth Amendment and the Nebraska Constitution.
- To establish a takings claim under either the U.S. or Nebraska Constitution, the claimant must have been deprived of some property right.
- City ordinance which allowed replacement of nonconforming signs did not unconstitutionally impair billboard company's contracts with landowners; leases permitting company to place its billboards on landowners' lands were terminated under the terms of the periodic lease agreements, which were entered into prior to the enactment of the ordinance, and once company's leaseholds were terminated, all rights company had in the nonconforming use of its billboards were extinguished.
Lawful termination of billboard company’s leases extinguished any right it had with respect to company’s nonconforming use of the land, and thus company lacked any rights of which to be deprived for purposes of § 1983 claim against city which enacted amended ordinances that allowed replacement of nonconforming signs.

**NOTE:** §19-904.01 deals with non-conforming uses and reads as follows:
The use of a building, structure, or land, existing and lawful at the time of the adoption of a zoning regulation, or at the time of an amendment of a regulation, may, except as provided in this section, be continued, although such use does not conform with provisions of such regulation or amendment; and such use may be extended throughout the same building if no structural alteration of such building is proposed or made for the purpose of such extension. If such nonconforming use is in fact discontinued for a period of twelve months, such right to the nonconforming use shall be forfeited and any future use of the building and premises shall conform to the regulation.

The municipal legislative body may provide in any zoning regulation for the restoration, reconstruction, extension, or substitution of nonconforming uses upon such terms and conditions as may be set forth in the zoning regulations. The municipal legislative body may, in any zoning regulation, provide for the termination of nonconforming uses, either by (1) specifying the period or periods in which nonconforming uses shall be required to cease, or (2) by providing a formula whereby the compulsory termination of a nonconforming use may be so fixed as to allow for the recovery of amortization of the investment in the nonconformance, except that in the case of a legally erected outdoor advertising sign, display, or device, no amortization schedule shall be used.

2) **Conley v. Brazer**, 278 Neb. 508, 772 N.W.2d 545 (2009)

Decided on September 4, 2009

**Background:** Neighbors brought action to enjoin landowners’ proposed construction of kennel on their property, alleging that landowners’ building permit was invalid. The Douglas County District Court granted landowners’ motion to dismiss, and neighbors appealed.

**Facts:** Appellants, Nancy Conley and Todd Conley, own and reside on property consisting of approximately 9.21 acres located in Douglas County immediately south of appellants’ Thomas Brazer and Kathy Brazer, property. The Brazers applied for and received a building permit from Douglas County to construct a kennel on their
property. The Conleys brought an action in the Douglas County District Court to enjoin the Brazers’ proposed construction. The Conleys alleged that the building permit was invalid due to deficiencies in the Brazers’ application and that the county’s extensions of the expiration date of the permit were not valid and effective.

Nuggets:
- Neighbors who sought to contest county building instructor’s issuance of permit to landowners to construct kennel were not required to appeal to the county board of adjustment, but rather, as affected owners of real estate, they could directly petition the district court for injunctive relief (not required to exhaust administrative remedies).
- The word “may,” when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
- Genuine issue of material fact as to whether building permit for kennel was valid when issued by county to landowners, including issues surrounding site plan presented and the existence of well, sewer, and septic permits precluded summary judgment on neighbors’ claim for injunctive relief.
- Genuine issues of material fact as to whether landowners, who obtained building permit for kennel, were in violation of zoning regulations at the time of the issuance of the building permit precluded summary judgment for landowners on neighbors’ claim for injunctive relief.

3) Sarpy County v. City of Papillion, 277 Neb. 829, 765 N.W.2d 456 (2009)
Decided on May 22, 2009 (“cut off the tail” case)

Background: County brought action for declaratory and injunctive relief to challenge to city annexation ordinances. The Sarpy County District Court entered a permanent injunction but did not specifically provide that ordinance was null and void.

Facts: Sarpy County (Sarpy), challenged two ordinances passed by the City of Papillion (Papillion), that purported to annex land and portions of several streets, including Highway 370. Sarpy alleged that the annexations were null and void and that an injunction should be issued against the ordinances, because the properties were not contiguous to the municipality, as required by Neb.Rev.Stat. § 16-117. Two ordinances (1526 and 1527) described
the property by what was referred to as "arms" and "tails". The "arms" description was part on one entire legal description of the area to be annexed (Ordinance 1527), while the "tails" were described in a way that they could be severed from the legal description of the area to be annexed (Ordinance 1526). The District Court found all parts of the annexations to be adequately contiguous, with the exception of two "tails" running the approximate width of two roads traveling away from the farthest ends of larger annexation areas. The District also found that the entire ordinance (1527) to be ineffective. Because first ordinance (1526) involved more complex descriptions of four separate areas, one being simply the "tail", the court found that tail to be severable from the remainder of the ordinance and found that ordinances enforceable with the exception of the paragraph describing the tail. The District Court granted a permanent injunction consistent with these conclusions, but did not specifically state in its conclusion that any ordinance was null and void.

Nuggets:
- County had standing to bring action for temporary and permanent injunctions regarding city annexation ordinances, as county had illustrated that its governmental functions were infringed upon by the annexations, both fiscally and in other ways. If a county alleges that a city, through an unlawful annexation plan, has encroached upon its governmental function, it has alleged an injury sufficient to give it standing to challenge the annexation plan.
- A municipal corporation has no power to extend or change its boundaries otherwise than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do. Cities of the first class have statutory authority to extend their city limits, subject to certain limitations. Neb.Rev.Stat. § 16-117.
- The burden is on one who attacks an annexation ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
- The terms "contiguous" and "adjacent" in annexation statutes are synonymous; they mean "adjoining," "touching," and "sharing a common border."
- The terms "contiguous" and "adjacent" in annexation statutes are synonymous; they mean "adjoining," "touching," and "sharing a common border."
- In order to satisfy the statutory requirements for annexation by a first class city, the entirety of the connecting boundary need not be touching; instead, the boundaries must be sufficiently or substantially joined together. Neb.Rev.Stat. § 16-117. Substantial adjacency between a municipality and annexed territory exists when a substantial part of the connecting boundary of the annexed land is adjacent to a segment of the boundary of the city or village.
- So-called "strip" or "corridor" annexations do not comport with either adjacency requirements or the idea of a unified municipal entity. The annexation of a portion of a highway extending beyond the border of a municipality, connected only by the width of that highway, is an invalid strip or corridor annexation.
- "Arms" of annexed areas, which radiated out from either side of a larger area touching city almost the entirety of two sides of its roughly rectangular shape, and then ran flush alongside the city with certain non-touching "bridges" running parallel to some part of the city, were sufficiently contiguous with city such that arms did...
Lot owners brought action seeking injunction

Improper "Tails" of annexed areas were inconsistent with statutory contiguity and adjacency requirements and thus were invalid annexations, although tails were not merely strips of road corridors, where tails were attached perpendicularly to newly annexed larger boundaries merely by their width, and tails stretched away from the city. Neb.Rev.St. § 16-117.

If a city ordinance contains valid and invalid provisions, the valid portion will be upheld if it is a complete law, capable of enforcement, and is not dependent upon that which is invalid; in other words, the valid part may be carried into effect if what remains after the invalid part is eliminated contains the essential elements of a complete ordinance.

Improper four-mile-long "tail" was described in a separate paragraph in annexation ordinance containing its own metes and bounds description, which in no way affected the descriptions of the other areas sought to be annexed, and thus the offending tail portion could be severed from the rest of the ordinance and the ordinance was not invalid in its entirety. Neb.Rev.St. § 16-117(2).


Background: Lot owners brought action seeking injunction against developer to prevent construction of apartment building, and developer brought cross-claim alleging breach of a restrictive covenant. The Douglas County District Court found in favor of developer with regard to injunction, and all parties appealed.

Facts: Restrictive covenants against Lots 92 through 103 of the High Point subdivision in Elkhorn had been filed in November 1987. The Stollers own Lot 99 and part of Lots 98 and 100. In 2005, Mic-Car, whose president, board of directors chairman, and majority stockholder is Buttner, purchased Lots 93 through 95. In 2007, Buttner obtained a

Decided on May 5, 2009
building permit issued by the city of Elkhorn for construction of the Elkhorn Apartments, which would cover all three lots owned by Mic-Car. In February 2007, Elkhorn Ridge and the Stollers filed suit against Mic-Car and Buttner, seeking an injunction and alleging that the plans and specifications for the new apartment building they were planning to build did not meet the requirements set forth in the applicable two restrictive covenants. The issue in this case is the enforcement of two restrictive covenants in the same instrument that are in irreconcilable conflict. Covenant #1 stated in part: “all lots within the Properties shall be used only for detached single family residences, and not more than one single family dwelling with garage attached”; and Covenant #2 stated in part: “Lots 92 thru 103, inclusive, as shown on the plat, are zoned R3; but no building or structure may be erected thereon exceeding two and one-half stories in addition to basement or garden type apartments.”

Note – In the R3 zoning designation, the City of Elkhorn allowed apartments.

Nuggets:
- A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.
- When the language of the two articles of a restrictive covenant are clear and unambiguous when read separately, the Court of Appeals must read the instrument containing the covenants as a whole.
- When considering restrictive covenants, courts should keep in mind that covenants which restrict the use of land are not favored by the law, and, if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property.
- Under no circumstances shall covenants restricting the use of land be extended by mere implication.

- A restrictive covenant is not ambiguous unless there are at least two reasonable but conflicting interpretations or meanings thereof.
- When provisions within an instrument imposing restrictive covenants irreconcilably conflict, the provision that allows the broadest use of the land will apply.
- Article of restrictive covenant that required single family residences be built on lots did not prohibit construction of proposed apartment building; article irreconcilably conflicted with article that allowed multi-family dwellings, and as such, article allowing the broadest use of the land applied.

Decided on March 24, 2009

Background: Landowner filed complaint seeking reversal of zoning board of appeals' decision granting zoning variances to adjoining landowner. The Douglas County District Court upheld the board's decision, and landowner appealed.

Facts: In 2005, Kerwin purchased a lot located in a portion of Omaha, Nebraska, known as Dundee. Dundee is a residential area originally developed at the end of the 19th century. At the time Kerwin purchased the lot, it was vacant. A fire had destroyed the structure previously standing on the property. After initially making plans to build 11 total condominiums on the property, Kerwin decided to build a four-story, four-unit condominium that included an elevator. Kerwin wanted to design a building in the old "federal" style with an interior that would look like a condominium found "in Chicago or New York." Kerwin designed this particular building to fit the needs of professionals coming from other parts of the country, who she believed did not generally like the housing in Omaha that was currently available. Kerwin had the project redesigned 11 times in an attempt to get it to comply with zoning regulations before deciding to seek a waiver. Kerwin decided that it would be impossible to accomplish her architectural goals and comply with the existing zoning ordinances and filed an appeal with the Zoning Board of Appeals to seek variances. Her application stated that her grounds for seeking the variances were as follows: (1) Waiver of variance to front yard setback from 35 feet to 20 feet to bring proposed structure into alignment with adjacent buildings which average 19.33 feet on the north side of Davenport Street. (2) Waiver of off-street parking requirement from 1.5 to 1.0 parking stall per unit (6 to 4 stalls total) due to inner-city location with good access to existing bus routes and availability of traditional on-street parking locations. In May 2007, the Board heard Kerwin's application for the two variances. In addition to the two variances which Kerwin had initially requested on her application, the Board considered a third variance that would allow Kerwin to decrease her side yard setback from 12 feet to 10 feet. Although the application did not specifically request this variance, the notice provided to the interested parties stated this and Kerwin's building plans as submitted to the Board indicated that this variance would be necessary. At the conclusion of the hearing, the Board granted all three proposed variances. Rousseau then filed a complaint in district court to seek a reversal of the Board's decision as to all three variances. In March 2008, the parties tried this matter before the Douglas County

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District Court. At trial, Kerwin admitted that it was possible to build a multiple-family residential building on the lot and still comply with zoning regulations. Nevertheless, Kerwin contended that the zoning regulations prohibited her from building the particular style of building that she desired to build. Kerwin adduced evidence that the zoning regulations from which she sought a variance were designed to control growth in more suburban areas. The district court upheld the Board's decision. The court found that the zoning regulations permitted Kerwin's proposed front yard setback without a variance. The court also found that the density of the neighborhood was a hardship that justified the side yard setback and parking space variances.

Nuggets:

- On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.

- In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.

- In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error of law.

- Evidence was sufficient to support District Court's decision that no variance was necessary for landowner's request for her proposed building's front yard setback to be 20 feet, even though municipal code called for 35 foot setback; code allowing setback exception for building to be built within 100 feet of an existing building on both sides provided the minimum setback for proposed building was to be the mean setback of the adjacent buildings, and the proposed setback either complied with the mean setback or was within 1.8 inches of the code requirement, depending on which exhibit was used by the court. Neb.Rev.St.§ 14-411.

- A proper result will not be reversed merely because it was reached for the wrong reason.

- A variance from a zoning ordinance is not appropriate where the person seeking the variance has created the condition necessitating the variance.

- Standing alone, neither the desire to build a larger building, nor the desire to generate increased profits, constitutes a sufficient hardship to justify a zoning variance. Neb.Rev.St. § 14-411.

- Evidence was sufficient to support zoning board of appeals' decision to grant landowner a side yard variance from 12 feet to ten feet and a parking variance from six spaces to four; current zoning regulations would have prevented landowner from building style of building she wanted, area was originally developed into small lots for high-density worker housing, and area was developed on assumption that only one off-street parking stall per unit would be available due to extensive availability of public transportation when area was originally developed. Neb.Rev.St. § 14-411.

- Generally, it is the zoning board of appeals' duty, and not the function of a court, to make a decision as to whether or not a sufficient hardship exists to justify a variance. Neb.Rev.St. § 14-411.

Are you happy with this result?
NOTE: §14-411 reads as follows:

The board of appeals shall fix a reasonable time for the hearing of the appeal or other matter referred to it and give due notice thereof to the parties and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and shall make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of appeals shall have the power, in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

Contrast this statute to 19-910 or 23-168.03 which provides:

. . . (c) when by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the zoning regulations, or by reason of exceptional topographic conditions on other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation under this section and sections 19-901, 19-903 to 19-904.01, and 19-908 (section 23-114 to 23-114.05, 23-168.01 to 23-168.04, 23-172 to 23-173, 23-174.02, 23-373 and 23-376) would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship, if such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any ordinance or resolution.

And continuing on with the criteria necessary to grant a variance, the same sections provide:

(2) No such variance shall be authorized by the board unless it finds that:

(a) The strict application of the zoning regulation would produce undue hardship;
(b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity;
(c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and
(d) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or exercise.

No variance shall be authorized unless the board (also) finds that the condition or situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations.
Moosman v. Cherry County Bd. of Adjustment, Neb.App., 2009 – not designated for publication
Decided on February 24, 2009

Background: Nola Moosman appeals from an order of the Cherry County District Court which affirmed the decision of the Cherry County Board of Adjustment which upheld the approval of a zoning permit issued by the Cherry County zoning administrator.

Facts: Nola owns certain rural property in Cherry County and opposes a zoning permit issued to her brother, Dan Moosman, for construction on neighboring rural property owned by Dan. Nola’s and Dan’s respective properties were once part of a larger Moosman ranch property divided between Nola and her siblings after their mother’s death.

Nola’s property includes a number of original buildings, all located in somewhat close proximity to the boundary between Dan’s and Nola’s properties. Nola lives on her property and also rents out a portion of her property. Dan lives in a cabin on his property. In addition, he uses the property for harvesting timber, planting fruit trees, pasturing cattle and horses, and baling hay. Dan’s property is shaped such that a “toe” of the land owned by Dan juts into and is surrounded on three sides by Nola’s property. On this “toe” of land is a building which is described in the record as a hangar/honey house. The “toe” of land between Nola’s and Dan’s property has been a point of contention between the two siblings for many years. Dan’s development of the land surrounding the hangar/honey house has resulted in multiple lawsuits and growing tensions.

Following a public hearing on September 2006, the board denied Nola’s appeal and upheld the Zoning Administrator’s decision to grant Dan’s permit application. The board found, “The property in question is agricultural in nature. The use of the property in question is compatible with the Cherry County Cattle Country Agricultural Zoning District and it is not in opposition to the Cherry County Comprehensive Plan.” Nola alleged that the board acted illegally and contrary to the law. Nola’s specific allegations, as they relate to this appeal, include that the board:

1. was deficient in various respects in publishing notice of the public hearing;
2. did not conduct the hearing pursuant to its bylaws; and
3. rendered an erroneous decision in that the property in question is not agricultural in nature, the requested use of the property is incompatible with a neighboring use, and the requested use of the property generally violates the Cherry County Comprehensive Plan.
Nola further alleged that she was aggrieved by the board's "erroneous decision" because the decision had resulted in an interference with her quiet use and enjoyment of real estate and would result in a reduction in her property's value. The Court of Appeals detailed the court's pertinent findings and conclusions as follows:

1) The district court determined that there was sufficient evidence to show that the board properly published notice of the public hearing in the local newspaper at least 10 days prior to the September 2006 hearing.
2) The district court also determined that Nola waived any right to object to the alleged deficiencies in the notice of the September 26 public hearing by attending the meeting, making a presentation to the board, and making no objections to the published notice.
3) The district court found that the board did not strictly adhere to its bylaws in conducting the meeting.
4) The court found that the board did not comply with the order of the agenda for such hearings as delineated in the bylaws. 
5) However, the district court also found, "The procedure employed was not of such a nature to render the decision to the board illegal."

6) The court determined that Nola failed to meet her burden of showing prejudice from this procedural error.

Nuggets:
- A district court may disturb a decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. Ranchero v. Board of Adjustment, 269 Neb. 623, 694 N.W.2d 641 (2005).
- Any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or that person will be held to have waived the right to object on that ground at a later time. Kaszowski v. Nebraska Quality Jobs Bd., 264 Neb. 403, 648 N.W.2d 756 (2002). A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given.
- Nola attended the public hearing and made no specific objections to any deficiencies in the published notice. Accordingly, Nola has waived any right to object to the deficiencies in the notice and cannot now raise the insufficiency of the public notice.
- Nola argues that the board did not conduct the hearing according to its bylaws due to the order in which evidence was received. The net effect of the procedure employed at the September 2006 hearing was to allow the public to comment on two occasions, rather than on only one occasion. Nola argues that this procedure was prejudicial because the members of the public who spoke during the first opportunity could not and did not address the Zoning Administrator's comments as would have been accomplished if the proper order was followed. There was no evidence presented to suggest how the public's comments would have differed if they had been given after the Zoning Administrator's comments, nor was there evidence on precisely how such comments would have been more beneficial to Nola's appeal.
- The District Court made the following factual findings:
  1) The Zoning Administrator recited Dan Moosman has alfalfa on his land baled for hay.
  2) Nola admits that Dan Moosman has rented his land out to other livestock owners and he puts up hay.
  3) The Zoning Administrator determined that the property is a farm.
  4) Dan Moosman has confined the current building in question to the place of existing buildings.
6) The County Assessor assesses Dan Moosman's property as agricultural.

- Nola argues that the board did not conduct the hearing according to its bylaws due to the order in which evidence was received. The net effect of the procedure employed at the September 2006 hearing was to allow the public to comment on two occasions, rather than on only one occasion. Nola argues that this procedure was prejudicial because the members of the public who spoke during the first opportunity could not and did not address the Zoning Administrator's comments as would have been accomplished if the proper order was followed. There was no evidence presented to suggest how the public's comments would have differed if they had been given after the Zoning Administrator's comments, nor was there evidence on precisely how such comments would have been more beneficial to Nola's appeal.

- Upon our review of the record, the Court of Appeals found competent evidence to support the district court's factual findings. Accordingly, the Court of Appeals concluded that:
  1. Dan's property is agricultural in nature; and
  2. Dan's use of the building in question for storage and farm-related machinery and hobby-related items is so generally compatible with other properties in the Cattle Country Agricultural District.

- The Cherry County zoning regulations state that outright allowable principal land uses and structures which require no zoning permit or certificate of zoning compliance include agricultural uses.

- Dan's use of the building in question as a shop and as a storage facility, for both personal use and as an agricultural accessory building, are uses normally and commonly appurtenant to the permitted principal uses and structures.

- The Court of Appeals concluded after reviewing the record, including the relevant zoning regulations, that the district court did not abuse its discretion or make an error of law in affirming the board's decision to uphold the issuance of the June 2006 permit application.

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**Thieman v. Cedar Valley Feeding Company**

Decided February 23, 2010
Nebraska Court of Appeals
Any other Questions?

Thank you for attending.

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