

# Memorandum

## City of Lawrence

### Legal Services Department

**TO: Scott McCullough, Director of Planning And Development Services  
Toni Ramirez Wheeler, Director of Legal Services**

**From: John Jay Miller, Staff Attorney**

**Date: April 14, 2009**

**RE: Discussion on Conditioning Conventional Zoning**

At the February 24, 2009 meeting of the City Commission of Lawrence, Kansas, staff was directed to present information on conditioning conventional zoning to the Lawrence Douglas County Metropolitan Planning Commission. The League of Women Voters of Douglas-County raised the issue of conditional zoning at the City Commission meeting and their letter is attached for your review. For this discussion, conventional zoning means a rezoning request not a request for a special use permit, planned development or site plan. Provided is an overview of the authority to place conditions on conventional zoning and direction for the Planning Commission when considering conditional zoning.

#### **Development Code Provisions**

The Development Code of the City of Lawrence, Kansas is written to allow the conditioning of conventional zoning. Section 20-1301, General, of the Development Review Procedures, allows the approval of zoning map amendments with conditions or modifications. The code language in subsection (i), Action by Review Bodies, states:

(i) Action by Review Bodies

(1) Review bodies may take any action that is consistent with:

- (i) the regulations of this Article;
- (ii) the City's adopted Development Policy;
- (iii) any by-laws that may apply to the review body; and
- (iv) the notice that was given.

(2) The review body's action may include recommending approval of the application, recommending approval with modifications or conditions, or recommending disapproval of the application.

(3) The review body may recommend conditions, modifications or amendments if the effect of the condition, modification or amendment is to allow a less intensive use or Zoning District than indicated in the application, reduce the impact of the development, or reduce the amount of land area included in the application.

(4) The review body may recommend that the application be approved conditionally upon the execution of a development agreement acceptable to the Director of Legal Services and/or compliance with the Access Management

Standards and Commercial Design Policies and Standards adopted by the City Commission from time to time.

(5) Review bodies may not recommend a greater Density of development; a more intensive use or a more intensive Zoning District than was indicated in the public notice.

(6) Review bodies are not required to recommend approval of the maximum Density or intensity of use allowed.

The code language in subsection (j), Action by Decision-Making Bodies, states:

(j) Action by Decision-Making Bodies

(1) Decision-making bodies may take any action that is consistent with:

- (i) the regulations of this Article;
- (ii) the City's adopted development policy;
- (iii) any by-laws that may apply to the decision-making body; and
- (iv) the notice that was given.

(2) The decision-making body's action may include approving the application, approving the application with modifications or conditions, or denying the application. A denial of application may be accompanied with a remand to the review body, if any, for further consideration.

(3) The decision-making body may impose conditions on the application or allow modifications or amendments if the effect of the condition, modification or amendment is to allow a less intensive use or Zoning District than indicated in the application or to reduce the impact of the development or to reduce the amount of land area included in the application.

(4) The decision-making body may approve the application upon the condition that the applicant executes a development agreement acceptable to the Director of Legal Services and/or compliance with the Access Management Standards and Commercial Design Policies and Standards adopted by the City Commission from time to time.

(5) Decision-making bodies may not approve a greater Density of development; a more intensive use or a more intensive Zoning District than was specified in the public notice.

(6) Decision-making bodies are not required to approve the maximum Density or intensity of use allowed.

The code language in subsection (m), Conditions of Approval, states:

(m) Conditions of Approval

When the procedures of this Article allow review bodies to recommend or decision making bodies to approve applications with conditions, the conditions shall relate to a situation created or aggravated by the proposed use or development. When conditions are imposed, an application will not be deemed approved until the applicant has complied with all of the conditions.

In addition, Section 20-1303 on Zoning Map Amendments states:

(e) Planning Commission's Review/Recommendation

The Planning Commission shall hold a public hearing on the proposed zoning map amendment, review the proposed amendment in accordance with the review and decision-making criteria of Subsection (g) of this Section and recommend that the City Commission approve, approve with modifications, or deny the proposed amendment. The Planning Commission is also authorized to forward the proposed amendment to the City Commission with no recommendation.

(f) City Commission Decision

After receiving the Planning Commission's recommendation, the City Commission shall take one of the following actions on the proposed zoning map amendment:

- (1) approve, approve with conditions or modifications, or deny;

### **Historical Background on the Enactment of the Development Code Pertaining to Conditional Zoning**

The City Commission discussed the issue of conditional zoning when considering approval of the Development Code. Stephen P. Chinn, a land use attorney with the firm of Stinson Morrison Hecker LLP, advised the City on the code and presented to the City Commission that he had not worked with a code in the past fifteen years that did not specifically authorize governing bodies to condition the approval of rezoning with reasonable conditions. With Mr. Chinn's assistance, the code was written to allow the conditioning of conventional zoning. An excerpt of the minutes from the March 28, 2006 City Commission agenda is attached for your review.

### **Kansas Case Law on Conditional Zoning**

There does not appear to be any Kansas case law on the specific issue of conditioning conventional zoning. However, the Kansas Supreme Court took up the issue of conditional zoning in a special use permit situation in the 1994 case of *Water Dist. No. 1 of Johnson County v. City Council of City of Kansas City*, 255 Kan. 183, 871 P.2d 1256 (Kan. Apr 15, 1994). In *Water District No. 1*, the court upheld the conditions on the special use permit as reasonable.

Most recently, the Kansas Supreme Court in the case of *Manley v. City of Shawnee*, 287 Kan. 63, 75-76, 194 P.3d 1 (2008) reaffirmed their standard of review on the reasonableness of zoning body decisions and stated that "[w]hen reviewing a decision on zoning, special use permits, and conditional use permits, we are guided by principles set forth in *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 304-05, 49 P.3d 522 (2002) (quoting *Combined Investment Co. v. Board of Butler County Comm'rs*, 227 Kan. 17, 28, 605 P.2d 533 [1980] ):

- (1) The local zoning authority, and not the court, has the right to prescribe, change or refuse to change, zoning.
- (2) The district court's power is limited to determining
  - (a) the lawfulness of the action taken, and
  - (b) the reasonableness of such action.
- (3) There is a presumption that the zoning authority acted reasonably.
- (4) The landowner has the burden of proving unreasonableness by a preponderance of the evidence.
- (5) A court may not substitute its judgment for that of the administrative body, and should not declare the action unreasonable unless clearly compelled to do so by the evidence.

(6) Action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate.

(7) Whether action is reasonable or not is a question of law, to be determined upon the basis of the facts which were presented to the zoning authority.

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

### **Treatise on Conditional Zoning**

In McQuillin: The Law of Municipal Corporations, 8 McQuillin Mun. Corp. § 25.93.10 (3rd ed.) the concept of conditional zoning is discussed. An excerpt of their explanation of conditional zoning states:

"Conditional zoning is the granting of a zoning change which is subject to agreed upon specific conditions which limit permitted uses in the zoned district. Specifically, conditional zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his or her property to a particular use or to subject his or her tract to certain restrictions as a precondition to any rezoning. Because it permits a given local authority greater flexibility in balancing conflicting needs, the practice of conditional use zoning can be exceedingly valuable. Conditional zoning anticipates that when the rezoning of certain property within the general zoning framework would constitute an unacceptably drastic change, such a rezoning could still be accomplished through the addition of certain conditions or use limitations.

Although sometimes condemned as illegal spot zoning, and as involving surrender of governmental authority to determine proper land use, the court will look to the reasonableness of the conditions and of the zoning change and will sustain the ordinance if found neither arbitrary nor capricious and where a reasonable relationship to the public welfare is found to exist. An increasing number of courts have either expressly held or strongly indicated support for conditional zoning. These courts, which comprise a growing trend, have concluded, among other things, that zoning legislation provides ample authority for the practice; the use under the practice of carefully tailored restraints advanced, rather than injured, the interests of adjacent landowners, and the practice is an appropriate means of harmonizing private interests in land thus benefiting the public interest."

### **Planning Commission Considerations**

If the Planning Commission receives a request from staff, the applicant, the public, or initiates on its own placing conditions on a conventional rezoning request, then the Development Code gives the Planning Commission and then the City Commission the authority to establish reasonable land use conditions on conventional zoning requests. The Planning Commission when considering conditioning conventional zoning must apply the same review criteria they would for any rezoning application and make a recommendation to the City Commission on the rezoning request.

Ultimately, the governing body's decision on the rezoning request must be lawful and reasonable. The issue of lawfulness is whether the city followed statutory requirements and its own codes and procedures. As noted above the Development Code is written to allow conditional zoning and the Planning Commission can condition conventional zoning in conformity with the code.

For the issue of reasonableness in making the rezoning decision, the Planning Commission must at least consider the review and decision making criteria in Section 20-1303(g). The criteria are based on the eight suggested factors described in *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978). The review criteria are not exclusive of other appropriate factors. These criteria go to the reasonableness of the rezoning recommendation of the Planning Commission. Any conditions placed on a conventional rezoning request would have to be reasonable and based on the review criteria of the Development Code and the evidence and testimony presented at the hearing.

### **Conclusion**

The Development Code is written to give the Planning and City Commission the authority to place reasonable land use conditions on a conventional zoning request. If a rezoning were legally challenged, staff's opinion is that as long as the procedures are followed and the land use conditions are reasonable then we can make a strong argument to the court that the City had the legal authority to condition the zoning.

The discussion of conditioning conventional zoning only applies to City of Lawrence, Kansas rezoning requests and hearings and not rezoning requests for Douglas County.