

# LATHROP & GAGE<sub>LLP</sub>

## MEMO

To: Prairie Village Planning Commission

From: Katie Logan, Lathrop & Gage LLP

Dated: May 6, 2013

Re: Application PC 2013-05  
Special Use Permit for Adult Senior Dwellings (Mission Valley SUP)

### Issues:

We have been asked to review two legal issues regarding the interpretation of the provision of the Prairie Village Zoning Regulations governing the Mission Valley SUP, Section 19.28.070(I), a copy of which is attached to this Memo.

### Conclusion:

Section 19.28.070(I) does not require an adult senior dwelling project which includes nursing care or continuous health care services as a subordinate accessory use to provide those services in the same building as the senior adult dwelling facilities. A separate care facility may be approved for completion prior to the completion of the primary dwelling facility, as long as the SUP is conditioned upon the completion of the primary dwelling facility.

### Facts:

Applicant is seeking a SUP for a three phase project. City staff is treating the application as a single SUP under Section 19.28.070(I) of the Zoning Regulations. The project consists of a 271,140 sq. ft. Independent Living/Assisted Living building (Phase II), six separate Villa buildings for independent living (Phase III), and a separate 92,565 sq. ft. skilled nursing or memory care facility (Phase I).

Section 19.28.070(I) lists as a permitted special use:

Dwellings for senior adults, as defined herein, and including handicapped adults.  
Dwellings may be in the form of townhouses, apartments or congregate type living quarters. Nursing care or continuous health care services may be provided on the premises as a subordinate accessory use....

We understand that the City's Planning Consultant, Lochner, and City staff have concluded that the Phase I facility is a subordinate accessory use based in part upon the square footage of the Phase I facility compared to the total square footage of the project and based on the number of

units in Phase I compared to the total number of units in the project.

We also understand that that they will recommend to the planning commission that, at a minimum, the SUP be conditioned upon the start of construction and completion of all three phases within some specified time period, and that the SUP will terminate if the conditions are not satisfied.

We have been advised that John Duggan, counsel for the Mission Valley Neighbors Association, Inc., contends that under Section 19.28.070(I), the phrase “may be provided *on the premises* as a subordinate accessory use” means that nursing or health care services may only be provided in same building as primary senior adult dwelling facility.

We have also considered the separate question of whether a separate facility for nursing or health care services is subordinate if completed prior to the primary senior adult dwelling facility.

#### General Discussion:

We have considered the above separately as Legal Issue #1 and Legal Issue #2 in the discussion that follows.

#### Legal Issue #1:

To qualify as a “subordinate accessory use” under Section 19.28.070(I) of the Zoning Regulations, must “nursing care or continuous health care services” be provided in the same building or buildings as “dwellings for senior adults?”

Answer: It is a reasonable interpretation of Section 19.28.070(I) of the Zoning Regulations that the subordinate accessory use of a nursing or health care facility may be provided in a separate building.

#### Discussion:

Section 19.28.070(I) authorizes as a special use “dwellings for senior adults” and further provides “Nursing care or continuous health care services may be provided on the premises as a subordinate accessory use.”

The following are just some sections of the Zoning Regulations which clearly distinguish the term “premises” and “building” and indicate that the term “premises” is broader than the term building, and includes the surrounding parcel on which a building is located.

19.28.070(I) uses the term “premises” a second time, in connection with parking: “Not less than three off-street parking spaces shall be provided on the premises for every four apartments or congregate living units, one space shall be provided for every five beds in any nursing facility, and not less than one space shall be provided for each employee on the premises...” Clearly the term “premises” as used a second time in that section does not mean that parking must be provided in the dwelling buildings.

Other sections of the Zoning Regulations distinguishing the terms “building” and “premises” are:

19.02.120 defines “private club” as a building or premises used for ....

19.06.010 “In District R-1a, no building, structure, land or premises shall be used.....

19.22.050 – Parking Regulations in District C-3: Off-street parking shall be provided on the premises...

19.26.070 Nonconforming Uses. A structure or the use of a structure or premises which was lawful before....

19.28.070(G) lists as a permitted special use: Buildings, structures, towers and premises for public utility services....

The following sections of the Zoning Regulations also distinguish the terms “building” and “premises,” and clearly indicate that accessory uses may be in a different building than the principal use building:

19.02.015 defines “Accessory Use” as a use of building or land which is customarily incidental to and located on the same lot or premises as the principal building or use of the premises.

19.02.300 defines “Lot” as a parcel of land occupied or to be occupied by one main building or unit group of buildings, and the accessory buildings or uses customarily incidental, thereto....

19.34.005 Accessory Uses – General. Buildings and structures may be erected and land may be used for purposes which are clearly incidental to, and customarily and commonly associated with the main permitted use of the premises. Such accessory buildings and uses shall ... be on the premises of the principal building or use. [Clearly in this context, “premises” means parcel of land on which the principal building is located].

Based upon the clear context in which the term “premises” is used in the Zoning Regulations, and upon the clear intent that accessory uses may be in buildings separate from a principal building, it is a reasonable interpretation of Section 19.28.070(I) of the Zoning Regulations that the subordinate accessory use of nursing or health care services may be provided in a building which is separate from the senior adult dwelling.

If the Governing Body so interprets its Zoning Regulations, it is likely, based on case law, that a court would defer to the Governing Body’s interpretation.

“Under the doctrine of ‘operative construction,’ the interpretation placed upon legislation by the administrative agency whose duties are to carry the legislative policy into effect is entitled to great weight. *State v. Helgerson*, 212 Kan. 412, 413, 511 P.2d 221 (1973); *Cities Service Gas Co. v. State Corporation Commission*, 192 Kan. 707, 714, 391 P.2d 74 (1964). Judicial deference to the interpretation is especially appropriate in this case where it is the legislative body itself and not an administrative agency, that is giving effect to the interpretation.” *Robert L. Rieke Building Co., Inc. v. City of Overland Park*, 232 Kan. 634 (1983).

Legal Issue #2:

Under Section 19.28.070(I) of the Zoning Regulations, may a SUP be issued for a project which includes a separate nursing or health care facility which will be completed prior to the completion of the primary dwelling for senior adults?

Answer:

A reasonable interpretation of the Zoning Regulations is that a SUP may be issued under Section 19.28.070(I) for a project in which a separate nursing or health care facility will be built prior to the completion of the primary senior adult dwelling facility if the Governing Body determines that there is a reasonable likelihood that the primary dwelling facility will be built within a reasonable period of time after completion of the subordinate facility, and if the SUP is conditioned upon the completion of the primary dwelling facility.

Discussion:

Section 19.28.070(I) establishes that nursing care or continuous health care services are a subordinate accessory use to senior adult dwelling facilities. As noted above, a reasonable interpretation of that section is that those services may be provided in a separate facility.

Section 19.28.070(I) does not require that the subordinate facility must be constructed simultaneously with or after the construction of the primary senior adult dwelling facilities.

Section 19.02.005(A) of the Zoning Regulations provides "Words used in the present tense include the future tense," referred to in this Memo as "present tense includes future tense" construction clause.

In a Michigan case, the court applied the same "present tense includes future tense" construction clause in a local zoning ordinance to a separate section of a residential zoning code requiring that boats could not be stored "within the front yard," but could be stored in "a garage, enclosed building, or in the rear yard, or located behind the front building line of the main structure." The lower court found that the section governing boat storage prohibited the storage of a boat on a vacant lot. The court of appeals held that, "By using the ordinance's rule of construction, the present tense form of this definition includes the future, which means that the structure on the property need not exist at the present moment, but may exist in the future. Accordingly, the circuit court erred in concluding that the ordinance prohibits the storage of a boat on a vacant lot." *Thomas v New Baltimore*, 254 Mich. App. 196; 657 NW2d 530 (2002).

In a later case, involving whether riding off road vehicles is an accessory use of residentially zoned property where there is no dwelling, the court of appeals indicated that future "primary" use could be relevant to the inquiry of whether an existing use is an accessory use. "To the extent that it is pertinent in any respect here, *Thomas* merely instructs that, to determine whether a use violates an ordinance, a court must undertake the same analysis of that use regardless of

whether the primary structure is then present or whether it may be present at some point in the future. *Milton Township v Kaminsky*, 2012 Mich. App. LEXIS 2261[unpublished opinion].

These cases support the argument that since the Prairie Village Zoning Regulations include “present tense includes future tense” construction clause, it is reasonable to consider a future primary use in connection with a determination of whether a current use qualifies as an accessory use.

Based upon the foregoing, we believe that reasonable interpretation of the Zoning Regulations is that a SUP may be issued under Section 19.28.070(I) for a project in which a separate nursing or health care facility will be built prior to the completion of the primary senior adult dwelling facility if the Governing Body determines that there a reasonable likelihood that the primary dwelling facility will be built within a reasonable period of time after completion of the subordinate facility, and if the SUP is conditioned upon the completion of the primary dwelling facility.

If the Governing Body so interprets its Zoning Regulations, it is likely, based on case law, that a court would defer to the Governing Body’s interpretation. See Rieke case, above.

Attachments: Section 19.28.070 City of Prairie Village Zoning Regulations

cc: Dennis Enslinger  
Ron Williamson

**Chapter 19.28 – Special Use Permits**

- A. A violation of the ordinances of this City including, but not limited to, the zoning regulations;
  - B. A violation of the district regulations; and
  - C. A violation of non-compliance with the conditions, limitations or requirements contained in the special use permit or these regulations.
- (Ord. 2199, Sec. V, 2009)

**19.28.070 Specifically Listed Special Use Permits**

Any of the following uses may be located in any district by special use permit in accordance with Section 19.28.005: unless otherwise noted:

- A. Country clubs, or private clubs or clubs which serve food and alcoholic, wine and cereal malt beverages;
- B. Cemeteries;
- C. Columbariums;
- D. Hospitals;
- E. Nursery sales office, building, greenhouse, or area (wholesale or retail);
- F. Nursing and convalescent homes as defined by state statutes; but not including group homes;
- G. Buildings, structures, towers and premises for public utility services or public service corporations whether located in public right-of-way or on easements on private property except that the following shall be specifically excluded from the Special Use Permit requirements: utility poles; utility boxes; and underground utility lines. (Ord. 2029, Sec. II, 2002)
- H. Assembly halls;
- I. Dwellings for senior adults, as defined herein, and including handicapped adults. Dwellings may be in the form of townhouses, apartments or congregate type living quarters. Nursing care or continuous health care services may be provided on the premises as a subordinate accessory use. Not less than seven hundred square feet of land shall be provided for each occupant in an apartment or congregate dwelling unit and not less than five hundred square feet of land shall be provided for each bed in a nursing or continuous care facility. Not less than three off-street parking spaces shall be provided on the premises for every four apartments or congregate living units, one space shall be provided for every five beds in any nursing facility, and not less than one space shall be provided for each employee on the premises on the maximum shift, provided, however, that this section shall not apply to group homes; Standards for height and setback of buildings applicable to such dwellings shall be those permitted in residential zoning districts R-1 through R-4;
- J. Service stations in C-1, C-2 & C-3 Districts only; not including automatic car wash; provided that all gasoline storage tanks shall be located below the surface of the ground. Display and service racks for new stock normally carried by filling stations, including oils and tires, may be placed outside the building during business hours;
- K. Automatic and semiautomatic car washes, continuous line car washes, self-service car washes, manual car washes and all other car washing facilities located separately or in relation to the operation of a service station in C-1, C-2 & C-3 Districts only;
- L. Skating rinks, arcades and similar commercial recreation facilities in C-1, C-2 & C-3 Districts only provided such use shall be not less than two hundred feet from any existing clinic, hospital, school, church or district R-1 to R-4 inclusive, unless approved by the

Governing Body under such restrictions as seem appropriate after consideration of noise and other detrimental factors incidental to such use;

- M. Mortuaries and funeral homes - in C-0, C-1, C-2 & C-3 Districts only;
- N. Day Care Centers in residential districts;
- O. Drinking Establishments - Bar or Night Club - C-1, C-2, & C-3 Districts only:
  - a. The initial approval shall be for a period of three years;
  - b. Subsequent renewals may be for periods up to ten years but shall not be in excess of the lease term or options thereof;
- P. Accessory uses to motels includes but not limited to restaurants, banquet rooms, liquor, notions and magazine counters, vending machines, beauty and barbershops, flower and gift shops; provided all are within the main building and designed to serve primarily the occupants and patrons of the motel or hotel;
- Q. Accessory uses to hospitals including, but not limited to, residential quarters for staff and employees, nursing or convalescent quarters, storage and utility buildings, food service and vending machines, laundry and other similar services for hospital personnel, visitors and patients;
- R. Utility or Storage Buildings: Detached storage or utility buildings for nonresidential uses.
- S. DELETED. (Ord. 1909, Sec. II, 1997; Ord. 2190, Sec. III, 2009)
- T. Private Schools, Colleges and University Education Centers (Ord. 1919, Sec. 1, 1997)