

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

## MEMO

**To:** Members of the Governing Body  
City of Prairie Village, Kansas

**From:** Catherine P. Logan, City Attorney

**Date:** August 19, 2013

**Subject:** **Zoning Matters**

In anticipation of the application for a Special Use Permit ("SUP") for Adult Senior Dwellings at the former Mission Valley school site which will come before the Governing Body on September 3, 2013, this Memo is to advise and remind you of certain matters relating to zoning matters generally.

SUP applications are first considered by the Planning Commission. The Planning Commission holds a public hearing, which, as in the case of the pending application for a SUP for Adult Senior Dwellings at the former Mission Valley school site, may require several meetings to conclude. After the public hearing is closed, the Planning Commission makes a recommendation to the Governing Body.

The Planning Commission concluded the public hearing and recommended approval of the Mission Valley SUP on August 6.

Both the Planning Commission and the Governing Body are required to consider the so-called "Golden Factors" as well as the factors set forth in Chapter 19.28 of the City's zoning regulations. Those are summarized in a separate handout.

The public hearing before the Planning Commission is the forum in which the applicant, supporters and opponents are given the opportunity to present evidence in support of and in opposition to the application.

Due process to both the applicant and opponents requires that the proceedings at both the Planning Commission and Governing Body level be fair, open, and impartial.

All interested parties must be informed of the evidence submitted for consideration and must be provided an opportunity to respond and rebut the evidence.

Courts recognize that members of the Governing Body may receive information outside of the public hearing process, since persons in the community, as well as the applicant, may contact them, either directly or through communications to the City Clerk or otherwise. These communications are not legally prohibited. The Kansas courts recognize that "a local legislator may confer *ex parte* with persons interested in a proposed zoning amendment." *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 321 (2002) (quoting 83 Am. Jur. 2d, Zoning and Planning § 602).

However, in zoning matters, members of the Governing Body are acting in a quasi-judicial capacity, and must remain impartial and not prejudge the application. They also must not consider evidence outside of the public record, either in support or in opposition, since that could give an unfair advantage to one side, and prevent the other side from having an opportunity to respond.

Both the Planning Commission and Governing Body may consider the opinions of neighboring property owners so long as the consideration of such opinions is relevant to establishing the existence or absence of one of the regulatory factors governing the zoning decision and the benefit or harm involved to the community at large. Consideration of public opinion becomes improper when the zoning determination is based entirely upon public sentiment.

Some Procedural Notes Relating to Mission Valley SUP:

Since a SUP application must be approved by Ordinance, staff will prepare a form of Ordinance approving the Mission Valley SUP with the conditions recommended by the Planning Commission. This Ordinance will be considered by the Governing Body at its September 3, 2013 meeting.

A valid protest petition against the Mission Valley SUP has been filed with the City Clerk. Under both state law and the City's zoning regulations, an Ordinance approving the application must receive at least 10 affirmative votes from the Governing Body (3/4 of the Governing Body) if a protest petition is filed.

The Governing Body may consider and decide upon the planning commission recommendation based solely on the record before the Planning Commission.

If the Governing Body allows the applicant and others to comment, it should not receive or consider any information that is not part of the public record which was considered by the Planning Commission.

Because it is necessary to establish a record of the basis for the action of the Governing Body (in case its action is appealed to the District Court), when the vote is taken on the Ordinance approving the Mission Valley SUP, I will ask each member of the Governing Body to state the basis for his or her vote, so that the basis may be recorded in the minutes and confirmed by a Resolution to be adopted at a subsequent meeting.

If a member of the Governing Body votes "aye" on the Ordinance, then a simple statement of agreement with the recommendation of the Planning Commission is sufficient, although additional reasons may be given if desired.

If a member of the Governing Body votes “nay” on the Ordinance, he or she should state the reasons for the vote against. Since your deliberations are required to be based upon the regulatory factors and the benefit or harm involved to the community at large, if you vote against the application you should state your determination concerning one or more of those factors and the effect on the community at large.

Regardless of the outcome, it is advisable to have a Resolution prepared confirming the stated basis for the vote of each member of the Governing Body. If there is an appeal of the Governing Body’s decision to the District Court, the Resolution forms an important part of the record of the basis for the Governing Body’s decision.