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Via E-mail and U.S. Mail

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Re: Mission Valley Site; MVS, LLC's 10/4/13 Site Plan & Special Use Permit Applications

Dear Ms. Logan:

MVS, LLC's ("MVS") October 4, 2013, site plan/special use permit application obstinately refuses to recognize the overriding concern repeated time and again by adjoining property owners, concerned citizens, and even members of the Prairie Village City Council: MVS' senior living "campus"-style development proposal is too massive, too dense, and entirely inconsistent with the residential character of the surrounding neighborhood. Such concerns were a central theme in the remarks of a number of City Councilmembers in denying MVS' previous special use permit application:

- "I've been on the council for 16 years, I went through the Village Vision; and I don't recall us ever discussing this as a transition property. We decided to keep this property residential because we felt it should be residential. So in the discussions of this being transition and what's appropriate for transition, . . . in my mind, it's . . . always been whatever fits residential. So . . . for me, for this project to work, it needs to feel residential. . . .

  I vote no. I do not believe that the density and intensity of the use fits the character of the neighborhood." Council Member Laura Wassmer, Transcript of September 3, 2013, City Council Proceedings, at 224:23–225:11; 237:15–18.

- "My concern is when I look at R-1a, and the property was purchased as an R-1a property, the purpose and intent of the residential district is . . . to protect and sustain the property values, prevent the decline of physical conditions of private property, prevent conversions of noise and uses that are not in harmony with the neighborhood and . . . generally ensure the quality of life at the highest practicable order. So . . . I'm with Laura on that, on the R-1a. I think it's got to fit into that property." Council Member Ted Odell, Transcript of September 3, 2013, City Council Proceedings, at 227:13–25.

- "I do have an issue with the scale and mass and size of what has been presented. And I really do believe it's out of context with the neighborhood. . . .

  No [on the motion to approve MVS' special use permit application]. And it's based on density, size and proposed materials selection for this project does not . . . match the existing neighborhood." Council Member Ted Odell, Transcript of September 3, 2013, City Council Proceedings, at 228:24–229:1–2; 239:23–240:1.

- "To me, the character of the neighborhood, . . . the size of this . . . proposed project will overwhelm the neighborhood. The size, the magnitude, the height, the intensity of the proposed project will overwhelm the neighborhood. . . . [T]his project would be like Lebron James and Larry Bird moving into Munchkin Land. It just doesn't fit." Council Member David Morrison, Transcript of September 3, 2013, City Council Proceedings, at 232:1–13.

- "No [on the motion to approve MVS' special use permit application]. And I'm going to go with Number 1, the character of the neighborhood. I feel like the project is too dense for that property, and I feel like it is not compatible with the neighborhood." Council Member Ashley Weaver, Transcript of September 3, 2013, City Council Proceedings, at 235:15–19.

- "[I] vote no. . . . I believe the project is out of context with the surrounding neighborhood." Council Member Michael Kelly, Transcript of September 3, 2013, City Council Proceedings, at 236:25–237:3.

- "I vote no. Density, the number of units, yes, but you're accounting for a maximum of 412 people at one time with 80 employees. That takes it . . . almost up to 500 people there, so a lot of units, a lot of people and not enough space." Council Member Brooke Morehead, Transcript of September 3, 2013, City Council Proceedings, at 238:2–7.

Despite such clear objections from the City Council, MVS' most recent proposal actually asks that this City *increase* the size and intensity of its proposed senior campus development. Indeed, a statistical comparison of MVS' most recent 10/4/13 application with the proposal that was rejected by the City Council as too massive and too dense is truly astonishing:

Skilled Nursing/Memory Care Building

	Plans dated July 30, 2013	Plans dated October 4, 2013	Change
Gross Building Square Feet	91,200 sf	97,550 sf	+ 6,350 sf
Units	120 Units (136 Beds)	120 Units (136 Beds)	NO CHANGE
Building Height	One to Two Story Peak: 22'0'' (One story peak); 29'6'' (two story peak).	Three-Story Peak: 38'-0'' to 40'-0''	+ one to two stories (+ 8'6'' – 18')
Lot Coverage	7.3%	5.7%	-1.6%
Total Area	18.4 acres/801,504 sf	12.8 acres/557,632 sf	N/A[1]

Assisted Living/Independent Living Building

	Plans dated July 30, 2013	Plans dated October 4, 2013	Change
Gross Building Square Feet	228,340 sf (+3,000 sf Storm Shelter (basement))	228,340 sf (+3,000 sf Storm Shelter (basement))	NO CHANGE
Units	190 Units	190 Units	NO CHANGE
Building Height	Two to Three Story Peak: 26'-0'' (two story peak); 36'-0''(three story peak)	Two to Three Story Peak: 26'-0'' (two story peak); 36'-0'' – 40'0'' (three	+ 4'0'' ("at interior common area screen walls")

[1] MVS' 10/4/13 special use permit application suddenly takes the position that only a certain area surrounding its Skilled Nursing/Memory Care and Assisted Living/Independent Living buildings, rather than the entire 18.4 acre tract, should be considered for purposes of avoiding the adjoining landowners' protest petition rights. As discussed at length herein, such an arbitrary line is not permitted under Kansas law or this City's land use regulations and should not be countenanced by this City. These statistics are being provided only to explain MVS' purported "lot coverage" calculations, and do not constitute any recognition of the legal subterfuge employed by MVS.

		story peak)	
Lot Coverage	10.1%	14.6%	+4.5%
Total Area	18.4 acres/801,504 sf	12.8 acres/557,632 sf	N/A

Villas

	Plans dated July 30, 2013	Plans[2] dated October 4, 2013	Change
Gross Building Square Feet	38,500 sf	Undisclosed by Applicant	Undisclosed by Applicant
Units	17 Units (2 Bedroom Units)	Undisclosed by Applicant	Undisclosed by Applicant
Building Height	21'4''	Undisclosed by Applicant	Undisclosed by Applicant

In sum, MVS' current development proposal is *larger* (in terms of gross square feet and height) and *more intense* than the proposal that was rejected by the City Council on those very grounds.

Rather than acknowledge the concerns of several City Councilmembers and the substantial grassroots opposition of neighbors, citizens, and a wide array of other interested parties, MVS has instead decided that it should be entitled to the City's approval of its development proposal by simply ignoring and, as discussed below, attempting to squelch the voices of the frustrated opposition through legal artifice. Indeed, after the City denied its previous application, MVS responded by (1) chaining the gates of its property to the community; (2) filing suit against the City in the District Court of Johnson County, Kansas, for allegedly acting illegally and in bad faith in properly recognizing the statutory right of the adjoining landowners to file a protest petition against their previous development proposal; and (3) submitting a new development proposal that is larger (in terms of square feet), taller, and more intense than the plan previously rejected on those very grounds.

Most alarming, however, is MVS' apparent belief that it can now secure the required votes from the City for the same failed plan simply by employing a thinly-veiled scheme of legal subterfuge designed to sidestep the property right of the adjoining landowners to file a protest petition under Kansas law. Specifically, MVS has taken the position[3] that its most recent

[2] At present, no proposed plan, plat, or application has been submitted for the south and southwestern portions of the lot. Instead, the architectural site plan submitted in support of its 10/4/13 site plan/special use permit application merely purport to reflect certain street and lot boundary lines that have not been approved by the City or filed of record with the Register of Deeds.

[3] Despite that its 10/4/13 site plan/special use permit application proposes a change in land use for the lot formerly home to Mission Valley Middle School (hereafter the "Property"), MVS has failed or refused to mail the

development plan need not observe the rights of its adjoining neighbors to the south and southwest to file a protest petition pursuant to K.S.A. 12-757 and Zoning Ordinance 19.28.041 based on the flawed and unconscionable premise that it can now simply draw an artificial line around its Assisted Living/Independent Living and Skilled Nursing/Memory Care ("SNF") facilities for purposes of calculating the notice area of K.S.A. 12-757 and Zoning Ordinance 19.28.020. Thus, rather than yielding an inch to the sensible concerns of the grass-roots opposition, MVS has instead decided to draw the proverbial, and in this case literal, line in the sand in an effort to make an end-run around the neighbors' notice and protest petition rights.

As an initial matter, MVS' intractable position is in direct contravention of this City's directive[4] to MVS that "[a]ny proposed plans for new uses or the expansion of existing uses needs the input of the surrounding neighborhood. . . . [T]he City and residents expect ample opportunity to provide input into future redevelopment plans for the site." *See Strategic Investment Plan, City of Prairie Village, Kansas, Volume 1: Report* at 8.8, Recommendation 1. However, because MVS would apparently much rather attempt to silence, invalidate, and ignore the voices of neighbors and concerned citizens than attempt to cooperate, any hope for the sort of collaboration envisioned by the City has seemingly all but been abandoned.

In any event, MVS' 10/4/13 development proposal should be denied by this City as it represents nothing more than a brazen and unconscionable attempt to evade the strictures of the State vesting statute, K.S.A. 12-741, *et seq.* and Zoning Ordinance 19.28.041. Additionally, for the many reasons set forth below, MVS' failure or refusal to afford notice to all owners within

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written notice required by K.S.A. 12-757 to all owners of real property within 200 feet that filed a protest petition against MVS' previous development proposal.

[4] The City's recommendations provided in full:

> **1. Encourage developers to obtain community input.** Residents, the City, and the property owner all have a vested interest in the future development of the site. As such, Redevelopment Plans should address the needs of the community as a whole and consider a variety of potential reuses for the site. Any proposed plans for new uses or the expansion of existing uses needs the input of the surrounding neighborhood. Due to the former school's prominent role in the City and surrounding neighborhood, the City and residents expect ample opportunity to provide input into future redevelopment plans for the site. To address these expectations, developers will need to make significant efforts to solicit community input in redevelopment planning. An assessment of the existing building and site should take place to determine whether or not they can accommodate the proposal. If not, then a new development plan could be considered, which may give more flexibility to incorporating other uses (e.g. residential) on the site. The site may be large enough to allow for a compatible senior housing development. A mixed residential use concept on this site could serve to further reinforce and reconnect the neighborhood to public uses. The issues of open space, drainage, access, traffic and parking all need to be addressed in detail as a part of any proposed development or expansion of existing uses on this site. The developer needs to conduct an adequate public involvement process to obtain input from the neighborhood.

Strategic Investment Plan, City of Prairie Village, Kansas, Volume 1: Report at 8.8, Recommendation 1, available at http://pvkansas.com/Modules/ShowDocument.aspx?documentid=3277 (accessed October 17, 2013).

200 feet of the entire boundary of the Property renders the City and its Planning Commission without jurisdiction to consider MVS' 10/4/13 application. Any eventual deprivation of the adjoining landowners' right to file a protest petition pursuant to K.S.A. 12-757 and Zoning Ordinance 19.28.041—and thereby compel a minimum 3/4 vote of the City Council for approval of the proposed change in land use—would invalidate any decision of this City related to MVS' recent development application.

A. Kansas Law and This City's Planning Regulations Do Not Permit MVS to Draw an Artificial Boundary Solely for Purposes of Circumventing the Adjoining Landowners' Property Right to File a Protest Petition.

The right to file a protest petition pursuant to K.S.A. 12-757 extends to all owners of record of real property located "within at least 200 feet *of the area proposed to be altered* . . . ." *See* K.S.A. 12-757(b) (emphasis added). Under its previous 7/30/13 development proposal, MVS agreed that the "villa"-style residences to the south were within the "area proposed to be altered" and thus afforded the adjoining property owners their property right to file a protest petition. Yet, in the instant application, MVS takes the inconsistent and disingenuous position that only the Assisted Living/Independent Living and SNF facilities should be considered "the area proposed to be altered" under K.S.A. 12-757. Put another way, MVS' refusal to recognize the south and southwest adjoining landowners' property right to file a protest petition is premised on the hope that this City will find that that "the area to be altered", *i.e.* the area subject to a change in "land use," should be measured from only the area containing its Assisted Living/Independent Living and SNF facilities and not the outer boundaries of the entire proposed Mission Chateau development.

Such cunning attempts to avoid the procedures of the State vesting statute, K.S.A. 12-741, *et seq.*, however, must fail as a matter of law.

1. The Kansas Supreme Court Has Specifically Recognized the Validity of a Protest Petition Which Measured the Requisite Distance Requirement From the Outer Boundary of the Lot, Despite that Only a Limited Portion of Such Lot Was Subject to a Special Use Permit.

In *Crumbaker v. Hunt Midwest Mining, Inc.*, the Kansas Supreme Court considered a landowner's efforts to avoid following the notice and protest petition procedures of K.S.A. 12-741, *et seq.* 275 Kan. 872, 877, 69 P.3d 601, 606 (2003). Specifically, Hunt Midwest contended that, by entering into an annexation agreement with the City of De Soto which authorized the expansion of rock quarrying operations onto land not allowed to be quarried previously, the City did not need to afford the adjoining landowners' notice or the right to file a protest petition under K.S.A. 12-757. *Id.* at 875. The adjoining landowners filed suit against the City of De Soto and Hunt Midwest and argued that the legal effect of the annexation agreement was to issue a conditional use permit without observing the due process rights of the neighbors to file a protest petition under K.S.A. 12-757 against the proposed expansion of mining operations. *See id.* at

875 & 877. The Kansas Supreme Court agreed, finding that the City's actions effectively changed the "land use" without properly observing the notice and protest petition procedures of K.S.A. 12-757. *Id.* at 886–87. Accordingly, the Court found, the denial of the adjoining property owners' right to file a protest petition against Hunt Midwest's special use permit rendered the City's actions invalid. *Id.* at 887.

Importantly, the "area proposed to be altered" by the special use permit application in *Crumbaker* was limited to an area "within 750 feet from the north property line, and . . . to within 3,390 feet from the quarry's east property line." *Id.* at 877. Nevertheless, the Court found that the failure to provide those property owners within 1,000 feet of the *outer boundaries* of the quarry land[5] proper notice or the opportunity to file a protest petition as required by K.S.A. 12-757 rendered the City's actions invalid. *Id.* at 886. In addition, the Court noted that some of the property owners were within the city limits and within 200 feet of the outer boundary of the quarry land and, thus, were also entitled to file a protest petition. *Id.* at 873 & 887. Put another way, the Court held that the "area proposed to be altered" by Hunt Midwest's special use permit was the entire 770-acre property, despite that only a portion therein was actually subject to the special use permit.

MVS' claim that the neighbors on its south and southwest property lines need not be afforded the right to file a protest petition is directly contrary to *Crumbaker*'s recognition of a protest petition filed by those owning property within 1,000 feet of the outer boundaries of the subject lot. The *Crumbaker* Court did not afford any credence to the claim made by MVS here that the distance requirement of K.S.A. 12-757 should somehow be measured from an arbitrary line surrounding the special use permit. Indeed, Kansas courts refused to countenance the idea that boundaries, such as the boundary of a municipality, is any bar to the right to file a protest petition. *See Koppel v. City of Fairway*, 189 Kan. 710, 714–15, 371 P.2d 113, 117 (1962) (finding owners of residential property in the City of Roeland Park, which adjoined the property in the City of Fairway that was being rezoned from residential to retail business, were entitled to file statutorily-authorized protest petition). As such, the City should refuse to entertain MVS' site plan/special use permit application for failure to send notices to all owners within 200 feet of the "area proposed to be altered" which, under *Crumbaker*, includes the entire Mission Valley tract.

2. The Right to File a Protest Petition, Which "Appear[s] to Be Applicable to Virtually Every Situation" Where a Change in "Land Use" is Sought, Is Broad Enough to Encompass an Application to Change the Use of the

[5] Specifically, *Crumbaker* measured the distance requirement of K.S.A. 12-757 from the "annexed land." *See Crumbaker*, 275 Kan. at 886. Elsewhere in the opinion, the Court specified that the City's annexation agreement applied to the entire "quarry land." *Id.* at 877; *see also id.* at 873–74 (defining "quarry land" as entire 770-acre property, of which only 377 acres was subject to the conditional use permit for quarrying operations).

Mission Valley Property From a School to a Multi-Building Senior Living "Campus."

The power of a municipality to enact "planning and zoning" regulations is derived solely from the grant contained in K.S.A. 12-741. *et seq.* *Crumbaker v. Hunt Midwest Min., Inc.*, 275 Kan. 872, 884, 69 P.3d 601, 610 (2003). The Act acknowledges an emphasis on "land use" regulation since it defines zoning as "the regulation or restriction of the location and uses of buildings and uses of land." K.S.A. 12-742(a)(10); *see also Crumbaker*, 275 Kan. at 883. As such, a city has no authority to change the zoning or "land use" of property—which includes issuing special use permits—without conforming to the statute which authorizes the zoning. *Crumbaker*, 275 Kan. at 886 (citing *Ford v. City of Hutchinson*, 140 Kan. 307, 311, 37 P.2d 39 (1934)). In rejecting the argument that a City may bypass the notice and protest procedures of K.S.A. 12-757 by entering into an annexation agreement, the *Crumbaker* court held that the procedures of K.S.A. 12-741. *et seq.* "appear to be applicable to virtually every situation" where a change in zoning or "land use" is sought. *Crumbaker*, 275 Kan. at 885.

In its 10/4/13 site plan/special use permit application, MVS requests that this City elevate form over substance and find that only the land containing its Assisted Living/Independent Living and SNF facilities should constitute a change in "land use" for purposes of determining whether the adjoining landowners' property right to file a protest petition applies.

It is undeniable, however, that the area subject to the proposed single-family lots are necessarily a part of and related to its overall senior living "campus" development. For example, MVS' architectural plans indicate that the development's access road is located within the area in which MVS claims does not constitute a part of the area subject to its special use permit application. It defies reason to suggest that an access road to a skilled nursing facility—which would be necessary to provide access in the case of emergency—should somehow not be considered a part of that skilled nursing facility.

Moreover, the Kansas Supreme Court's decision in *Crumbaker* supports the conclusion that the area purported to be platted as single-family residential lots would still represent a change in "land use" to which the procedures of K.S.A. 12-741, *et seq.* should apply. Indeed, despite that the area subject to the special use permit application for expanded mining operations was limited to a specific, central area of the lot, the *Crumbaker* court nevertheless measured the 1,000 foot notice area from the outer boundaries of the entire tract. *Crumbaker*, 275 Kan. at 886. Here, as in *Crumbaker*, this City should refuse to elevate artificial and arbitrary lines over the substance of MVS' application. To allow MVS to unilaterally decide that the area to the south and southwest should now be considered separate from its overall development proposal would frustrate the purpose of the Act, which is intended to apply in "virtually every situation" where a change in "land use" is sought. *Id.* at 885.

Further, the *Crumbaker* court did not find that a city must only comply with K.S.A. 12-741, *et seq.* where an applicant sought a zoning classification change, *e.g.* R-1A to a C-2 General Business District. Instead, the Court broadly held that the procedural requirements of K.S.A. 12-741, *et seq.* attach where any change in "land use" is sought. As such, *Crumbaker* stands for the

proposition that MVS must observe the adjoining landowners' right to file a protest petition even when considering the proposed land use change as one only changing what was previously a public school to now include a subdivision of single-family residential lots containing structures of unknown size, setbacks, appearance, etc. Indeed, had MVS attempted to construct a subdivision of "manufactured homes" or a fire station on its south property line, one would be hard pressed to argue that such construction would not constitute a change in "land use" under *Crumbaker*, despite that such uses are permitted in R-1A Districts as provided in Zoning Ordinance 19.06.010.

The City's conclusion that MVS' proposed single-family subdivision in substance constitutes a change in "land use" under *Crumbaker* and K.S.A. 12-741, *et seq.* is further urged when one properly considers that such subdivision represents an integral, and indeed required, component of its overall senior living "campus" development. Similar to its previously-denied "villa" concept, MVS will undoubtedly market the subdivision as yet another residential option in its "continuum of care campus." Subdivision residents would presumably avail themselves of the "lifestyle amenities" offered in the other proposed structures. Moreover, the *sole* access road of the proposed "campus" would be located in the proposed single-family subdivision. Without such road, access to the development's skilled nursing facility would be virtually impossible in the event of an emergency.

For all the foregoing reasons, the City should refuse to countenance MVS' tenuous argument that only the area containing its special use permit application constitutes a change in "land use" when such area is undeniably dependent upon and inextricably linked with the area that will purportedly be subject to an application for plat approval.

3. <u>The City's Subdivision Regulations do not contemplate the ability to subdivide Property for the purpose of defeating a special use permit.</u>

MVS' refusal to recognize the south and southwest adjoining landowners' property right to both the receipt of the statutorily-required notice and to file a protest petition must fail for the additional reason that the Subdivision Regulations make clear that purported lot lines not approved by the Planning Commission and City Council, or reflected in the public records, are legally invalid. Accordingly, such invalid lot lines should not be considered for purposes of considering the extent of the "area to be altered" by a land use change.

The City's Subdivision Regulations specifically proscribe MVS from (1) obtaining a building permit; and (2) conveying or selling any lot unless and until a subdivision plan or plat has first been submitted to and approved by the Planning Commission and the City Council and recorded in the Office of the Johnson County Register of Deeds. *See* Subdivision Regulation 18.01.110, 18.01.140 & 18.01.160. The Prairie Village Subdivision Regulation were specifically enacted to ensure the "proper location and width of streets, building lines, open spaces, . . . ," among other aims. *See* Subdivision Regulation 18.01.050. The City, and not the developer, is vested with exclusive authority to approve a proposed lot subdivision and street system. Yet, in

its 10/4/13 site plan/special use permit application, MVS quietly invites the City to deny the adjoining landowners' right to file a protest petition based on street widths and building lines that have not been approved by the City Council or recorded with the Register of Deeds.

MVS' position begs the obvious question of how it would attempt to avoid the adjoining property owners' ability to invalidate an approval of its proposed site plan/special use permit for failure to observe their protest petition rights in the event that the Planning Commission and City Council eventually approve a plan or plat calling for different boundary lines less wide than those arbitrarily suggested by MVS. *See* Subdivision Regulation 18.04.090 (requiring the Planning Commission to specifically review size and width of lots). Or, as discussed in a separate context below, how would MVS argue that the adjoining landowners possess no right to file a protest petition should the Planning Commission or the City determine that MVS' proposed street[6] should be widened? The questions themselves indict MVS' suspect position.

Because the City's Subdivision Regulations expressly proscribe the ability to unilaterally subdivide land, this City should refuse to deny the adjoining landowners' property right to file a protest petition based on artificial lot subdivision lines that have not been approved by the Planning Commission or City Council or filed of record with the Register of Deeds. At present, the only legally-recognized boundary line is the perimeter of the existing lot containing the former Mission Valley Middle school. As such, the City's calculation of the protest petition area pursuant to K.S.A. 12-757(f)(1) should be measured only from boundaries of that tract. In addition, MVS should be required to provide the statutorily-required notice to those property owners within 200 feet of the boundaries of the tract.

B. MVS' Proposed Development Cannot Be Approved in Piecemeal Fashion; At Base, The Entire "Mission Chateau Senior Living Community" Constitutes a Planned Mixed Use Development Which Must Be Considered As One Application Under Zoning Regulation 19.23, *et seq.*

Here, MVS is seeking the City's approval for an application to change the land use on the subject property from what was exclusively a public school to what would contain several uses: (1) single-family dwellings; and (2) a special use permit for senior adult dwellings; and (3) "[n]ursing care or continuous health care services . . . on the premises as a subordinate accessory use." According to MVS, the Mission Chateau development will provide a "continuum" of retirement care to include independent living, assisted living, memory care, and skilled nursing. *See* MVS 10/4/13 "Narrative Overview" at 5. MVS will also apparently market the single-family residential lots to the south and southwest as part of its "continuum" care offering. MVS is also marketing many "lifestyle amenities," including: (1) a host of various dining venues and options; (2) entertainment options and spaces that include a theater, coffee and sundry shop; (3) a library; (4) housekeeping and laundry services; (5) an enclosed indoor pool and spa; (6) a fitness

[6] As discussed in Part C, *supra*, Zoning Ordinance 19.28.020 expressly excludes "public streets and ways" from the notice and protest petition area calculation set forth in that Section.

and wellness center; (7) scheduled activities; (8) transportation, valet services, covered parking, concierge services, 24-hour security; and (9) access to the health care services provided within the community. MVS 10/4/13 "Narrative Overview" at 5–6. MVS' narrative at various times describes its development as a "continuum of care campus," a "community," or "neighborhood." *See generally* MVS 10/4/13 "Narrative Overview."

Despite assuring its potential residents a variety of uses in its senior living "campus," MVS is claiming—solely for purposes of avoiding the adjoining landowners' right to file a protest petition—that the City must consider its special use permit application separate from its eventual plat approval for the single-family dwellings to the south and southwest. Any such piecemeal review of the Mission Chateau development simply ignores the true substance of the proposed development. Because MVS' application proposes a variety of uses on one common lot, the intent of the City's Zoning Ordinance demands that it be reviewed as a single application for rezoning as a "MXD" Planned Mixed Use District. Because it proposes a variety of uses, the Mission Chateau development is clearly the sort of development envisioned by the MXD regulations. Indeed, the MXD District were enacted to encourage:

- "a variety of land uses," including "a mixture of residential, . . . and retail uses in a single structure or multiple structures"
- "public spaces, entertainment uses, and other specialty facilities that are compatible both in character and function and incorporate a coordinated consistent theme throughout the development"
- "shared parking facilities linked to multiple buildings and uses"

See Zoning Regulation 19.23.005.

Unlike MVS' piecemeal application proposal, the MXD procedures expressly provide the City with the ability to review the *entire* development plan in unison to ensure that it, as well as each of the proposed uses therein, complies with the City's Zoning Regulations and those special considerations especially applicable to mixed use developments such as MVS' proposed senior care "campus." *See* Zoning Regulation 19.23.035 (requiring preliminary development plan to include, among other things, "proposed public and private ways, driveways, sidewalks," etc., location of parking areas, outdoor lighting plan, landscape plan, detailed traffic impact study, list of uses proposed for MXD District, and a "phasing plan" if project not constructed at one time). Under the current piecemeal zoning application, however, the City would be required to review and approve the proposed site plan/special use permit application in isolation of the proposed residential subdivision, and vice versa. The City could not, for example, consider whether the *entire* Mission Chateau development proposal contained adequate access roads in the case of emergency; sufficient parking; acceptable traffic flow patterns for the entire development; or other common considerations necessarily required by virtue of the mixed-use, campus nature of the proposed development.

For a striking demonstration of the absurdity of MVS' piecemeal application proposal, one need look no further than the failure of MVS' site plan/special use permit application to provide any access road to its SNF facility located in the rear of its campus. Indeed, solely by

virtue of its brazen attempt to invalidate the adjoining property owners' right to file a protest petition while still maintaining the size of its massive development, MVS must make the tenuous argument that the proposed access road is not part of the "area to be altered" by the special use permit. Without such access road, however, it is unlikely that any fire marshal would find that the SNF would be adequately accessible in the case of emergency through the tangle of parking spaces to the north. Perhaps more significantly, the City's Zoning Ordinance requires, as a condition for approval of MVS' 10/4/13 site plan application, the demonstration that the plan "provides for safe and easy ingress, egress and internal traffic circulation." *See* Zoning Ordinance 19.32.030(D); Zoning Ordinance 19.08.045 (requiring site plan approval). Similarly, MVS must demonstrate that the area it has artificially drawn around its special use permit independently meets the requirement that "[t]he site is capable of accommodating the building(s), parking areas and drives with appropriate open space and landscape." *See* Zoning Ordinance 19.32.030(A). In sum, MVS' flimsy legal argument that the area containing its single-family subdivision should not be considered a part of its special use permit area fails because such special use permit would not be receive approval as a matter of law but for the existence of the subdivision area.

Only the procedures applicable to MXD District are equipped to handle the application presented by MVS. *See, e.g.* Zoning Ordinance 19.23.035 (requiring MXD District preliminary development plan to include information for "[t]raffic flow patterns within the site including, entrances and exits, emergency access, ... "). As such, this City should refuse to consider any application which fails to recognize the true substance of the Mission Chateau proposal as a single-lot senior-living "campus" development.

C. Any Consideration by the City of MVS' Piecemeal Application Scheme Would Constitute Invalid Haphazard Zoning Enacted Without Any Reasonable Basis But For the Advancement of MVS' Private Interest in Evading the Adjoining Property Owners' Right to File a Protest Petition.

The City has no authority to enact arbitrary and unreasonable "spot zoning" that singles out of a small parcel of land for use classified differently from the surrounding area, "primarily for the benefit of the owner of the property so zoned and to the detriment of the area and other owners therein." *See Coughlin v. City of Topeka*, 206 Kan. 552, 558, 480 P.2d 91, 96 (1971). A zoning ordinance or an amendment of a zoning ordinance to permit piecemeal or haphazard zoning is void, and so-called "spot zoning," where it is without a reasonable basis, is invalid. *Id.* (quoting 18 McQuillin Mun. Cop. (3rd Ed.), Zoning, § 25.83). "Thus, singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment, is invalid 'spot' zoning." *Id.* Invalid "spot zoning" has appeared "in many cities in America as the result of pressure put upon councilmen to pass amendments to zoning ordinances solely for the benefit of private interests." *Id.* While the City has wide discretion in enacting zoning ordinances, "it has no authority" to zone by "mere favor" unless there exists "reasonable ground" for its actions. *Id.* (citing *Cassel v. Mayor & City Council of Baltimore*, 195 Md. 348, 355, 73 A.2d 486, 489 (1950)).

Given the direct application of the MXD District Regulations and the undeniably singular nature of MVS' "campus" or "community" mixed use development proposal, there exists no rational basis by which the City could consider MVS' application in piecemeal fashion. In fact, MVS only now seeks to employ its artificial piecemeal application scheme in support of its efforts to invalidate the property owners' right to file a protest petition. The City should refuse to be complicit in MVS' unconscionable scheme.

Any action by the City to countenance MVS' efforts to obtain approval of its development in two separate applications, for the sole purpose of advancing its efforts to invalidate the adjoining property owners' right to file a protest petition, would constitute invalid piecemeal or haphazard zoning enacted without any reasonable basis for the sole economic benefit of the owner. For such additional reason, this City should reject and/or refuse to entertain MVS' 10/4/13 site plan/special use permit application.

D. MVS Has Not Complied with City's Zoning Ordinance With Respect to Notice, and Therefore, Approval of MVS' Application Would be Invalid.

Under the City of Prairie Village Zoning Ordinance, twenty (20) days prior to the public hearing in front of the Planning Commission, an applicant for a special use permit must provide notice by mail to all "owners of lands located within two hundred feet, ***except public streets and ways***." Zoning Ordinance 19.28.020 (emphasis added).

Here, MVS has failed or refused to provide notice to the owners of land along the south and southwest borders of the property. MVS apparently takes the position that because it has not requested a land use change for the 200 feet along the south and southwest border of its property, MVS need not provide notice to the landowners adjacent to this border. But MVS' plan specifically includes a semi-divided road to be dedicated to the public upon completion. *See* AS1 – Architectural Site Plan submitted October 11, 2013, available at http://pvkansas.com/Modules/ShowDocument.aspx?documentid=3312 (accessed October 29, 2013). This road runs most of the length of the south and southwest borders and is a necessary component of the overall plan, as the tract described in the special use permit application has only one other access point. Yet MVS apparently did not exclude the width of this road in determining the owners of land who were legally entitled notice of the public hearing.

Instead, MVS included the width of the road in determining the notice requirements under Zoning Ordinance 19.28.020, and, finding that MVS owned all the land within the 200 feet adjacent to the proposed land use change area, provided no notice to landowners adjacent to MVS' property.

As stated previously, the notice requirements should have been calculated from the boundary of the entire tract owned by MVS, but even if you disregard that legal conclusion, this City's Zoning Ordinance still would have required MVS to exclude from its notice determination the width of the road. Because the road abuts the area deemed by MVS to be subject to its most recent special use permit application, MVS was required to provide notice to owners of land within 200 feet of the artificial boundary but excluding the width of the proposed road right-of-way. MVS did not provide such notice, and therefore, even if the City were to grant the

application, the application would be void for its failure to comply with the City's regulations. *See, e.g.*, *Crumbaker v. Hunt Midwest Min., Inc.*, 275 Kan. 872, 886 (2003) ("Proper notice is mandatory and must be complied with to give the planning commission authority to recommend actions, and the city commission jurisdiction to act."); *see also Carson v. McDowell*, 203 Kan. 40, 44 (1969).

E. The City Should Abstain From Acting on MVS' Renewed Application for a Special Use Permit Because MVS Has Removed the Case From the Jurisdiction of the City to the Jurisdiction of the District Court Through its Appeal, and Any Action From the City on the Matter Would Interfere with the District Court Proceeding.

1. By appealing the City's decision, MVS has terminated the City's power to reconsider MVS' application for a Special Use Permit.

After a city governing body, acting in a quasi-judicial capacity, renders a final order, the body no longer has jurisdiction to reconsider or change such order once an appeal has been perfected. *See Petition of City of Shawnee*, 236 Kan. 1 (1984); *see also Scenic Riverway Community Ass'n v. City of Lawrence*, No. 105,096, 260 P.3d 1248 (Table) (Kan. App. Sept. 30, 2011).

In *Scenic Riverway*, Lawrence passed a rezoning ordinance impacting certain property after its annexation of such property was nullified on appeal. *Id.* at *1. The city then realized that because the land was not annexed, this rezoning ordinance was not effective. The city therefore repealed and then re-enacted the rezoning ordinance after the effective date of a second, valid annexation. But the rezoning ordinance had been properly appealed before the city attempted to repeal and re-enact it, leaving the city without jurisdiction to reconsider or change the ordinance. *Id.* at *1–2.

The *Scenic Riverway* court based its decision on *Petition of City of Shawnee*. The *Shawnee* court came to its decision based on the definition and rationale of appeals from quasi-judicial administrative bodies. That court found that once a party has appealed a decision, the case moves vertically, and the appealing party has left the jurisdiction of the tribunal that rendered the aggrieved decision. *Shawnee*, 236 Kan. at 14–15. Thus, the appealing party cannot request, and the appealed-from tribunal cannot grant, reconsideration or amendment of the initial decision during the pendency of the appeal. *Id.*

Here, MVS filed an appeal of the City Council's decision to deny its April 2013 application for issuance of special use permit in the District Court of Johnson County, Kansas (Case No. 13CV06998). MVS left the jurisdiction of the City tribunal and seeks redress from a court with appellate jurisdiction. Thus, just as in *Shawnee*, the City Council's power and authority to consider MVS' special use permit application is terminated during the pendency of

the appeal. Indeed, MVS' 10/4/13 site plan/special use permit application requests that the City now approve substantially the same development proposal as that currently the subject of its appeal. As such, this City should stay any action on MVS' attempt to re-examine its application until the conclusion of the appeal.

2. Because the District Court now possesses jurisdiction over the matter, the City should avoid potentially-conflicting parallel litigation and abstain from acting on MVS' application for a Special Use Permit.

"It has long been the rule in this state, and is the general rule elsewhere, that the court of competent jurisdiction which first acquires jurisdiction retains it to the exclusion of any other court of concurrent jurisdiction." *Nixon v. Nixon*, 226 Kan. 218, 221–22 (1979).[7] In other words, where proceedings are already ongoing in another court, a court—even one with subject matter jurisdiction—should not interfere by adjudicating the matter. *Id.* This rule exists to avoid conflict between tribunals and to avoid seemingly enforceable inconsistent judgments. *See, e.g., Kelly v. Kelly*, 245 S.W.3d 308 (Mo. Ct. App. 2008); *see also* 20 AM. JUR. 2D COURTS § 88 ("The rule is based on the public policies of avoiding conflicts between courts, and preventing vexatious litigation and a multiplicity of suits . . . .").[8]

Here, by virtue of MVS' appeal, the Johnson County District Court has jurisdiction over the matter of MVS' application for a special use permit. This appeal was perfected prior to MVS' filing of a second application for a special use permit. Because this later application covers the same property and reflects substantially the same plan, resolution of the later application will necessarily interfere with the adjudication of the original application. The City Council and Planning Commission, acting as a quasi-judicial body, should respect the District Court's jurisdiction over this matter and stay any consideration of MVS' renewed application. To do otherwise would risk inconsistent judgments.

Indeed, if the City grants the application, such a finding could be in direct conflict with an Order from the District Court. Conflict could arise not only from the general dispositions of the dueling applications, but also from the District Court's resolution of the cross-claim that certain adjoining landowners intend to file against the City in MVS' appeal of the denial of its special use permit application. In general terms, this cross-claim challenges the validity of the MVS' special use permit application, including without limitation the validity of the

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[7] The City Commission, when acting on the special use permit, is a quasi-judicial body subject to procedural due process requirements similar to those required of courts of law. *See, e.g., McPherson Landfill, Inc. v. Bd. of Cnty. Commissioners of Shawnee Cnty.*, 274 Kan. 303 (2002); *Golden v. City of Overland Park*, 224 Kan. 591 (1978).

[8] Courts also express similar rationales when declining to hear a matter where another court has already exercised jurisdiction. *See, e.g., Perrenoud v. Perrenoud*, 206 Kan. 559, 573 (1971) ("The general rule is that courts should exercise comity between themselves in order to avoid expense and harassment and inconvenience to the litigants.")

characterization of the SNF as a subordinate accessory use. Thus, even if MVS is successful on its appeal with respect to the protest petition procedure or its substantive appeal of the City Council's decision, the resolution of the cross-claim could still directly conflict with any action taken by the City on the later application.

Not only is this situation inherently problematic, but because the appeal was perfected prior to submission of the later application, the District Court's order would almost surely take precedence. *See, e.g.*, *Nixon*, 226 Kan. at 221–22 ("[T]he court of competent jurisdiction which first acquires jurisdiction retains it to the exclusion of any other court of concurrent jurisdiction."). Moreover, the City would be complicit in MVS' attempt to abuse city and state governments through parallel litigation for the apparent purpose of coercing a settlement agreement with the City.

As a result of the foregoing, the City needs to act accordingly:

1) Stay the MVS Applications for a Special Use Permit and Site Plan until the conclusion or resolution of the MVS lawsuit against the City.

2) Require MVS to re-submit the Special Use Permit Application having addressed the following:

    a. Require MVS to provide notice in compliance with the Zoning Ordinances, namely giving notice to all adjoining property owners within 200 feet of the boundary of the entire Mission Valley School tract and not an artificially determined portion of the tract;

    b. Confirm that the applicable neighbors entitled to the receipt of the foregoing notice may avail themselves of the filing of a Protest Petition if the requirements of the Zoning Ordinances are satisfied;

    c. If MVS wants to plat the Mission Valley School tract then require compliance with the Zoning Ordinances applicable to mixed use development so the entire tract receives a uniform review thus avoiding piecemeal treatment;

    d. Require in any event that the to-be-publically dedicated road is included in the portion of the Mission Valley School tract that may be subject to senior dwelling units so that the senior dwelling units have adequate and safe access;

    e. Require the skilled nursing facility to be treated as a subordinate accessory use in size and location to the independent living housing (see prior correspondence submitted to the City).

Very truly yours,

DUGGAN SHADWICK DOERR & KURLBAUM LLC

John M. Duggan