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November 14, 2014

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BY HAND DELIVERY AND E-MAIL TO jhmundy@pvkansas.com

Joyce Hagen Mundy
City Clerk
City of Prairie Village, Kansas
7700 Mission Road
Prairie Village, KS 66208

**Re: MVS LLC Special Use Permit/Prairie Village Ordinance 2301
Request to City Planning Commission for Extension of Special Use Permit**

Dear Madam Clerk:

As you are aware, on January 6, 2014, a Special Use Permit was approved by enactment of Prairie Village Ordinance 2301, pursuant to which MVS LLC (“MVS”) intends to build an approximate \$55 million senior living facility to be known as Mission Chateau in compliance with the Special Use Permit.

However, within 30 days of enactment of Ordinance 2301, a group of Plaintiffs filed suit in the District Court of Johnson County, Kansas challenging the legality of the grant of the Special Use Permit (Marsh, et al v. City of Prairie Village, Kansas and MVS LLC, Case No. 13CV-08544). Although the District Court on October 30, 2014 affirmed the legality of the grant of the Special Use Permit, the Plaintiffs have appealed that decision to the Kansas Court of Appeals.

Ordinance 2301 states, in part:

4. That the Special Use Permit not have a termination or expiration time established for it; however, if construction has not begun within twenty-four (24) months from the approval of the Special Use Permit by the Governing Body, the permit shall expire unless the applicant shall reappear to the Planning Commission and Governing Body to receive an extension of time prior to the expiration.

There is no reasonable likelihood that the appeal of the District Court judgment will be fully and finally resolved (i.e. a ruling by the Kansas Court of Appeals, which will likely be followed by the filing of a Petition for Transfer to Kansas Supreme Court) prior to January 6, 2016, which is the twenty-four (24) month anniversary of the approval of the Special Use Permit.

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When faced with similar circumstances, numerous state courts have unanimously held that where the validity of a permit for construction was the subject of pending litigation, the local ordinance providing for the expiration of such permit was stayed or tolled by operation of law until the pending litigation had been fully and finally resolved.

For example, in *Belfer v. Building Commissioner of Boston*, 294 N.E.2d 857, 363 Mass. 439 (1973), there was an appeal from the grant of zoning variances to allow the building of a 33-story building. The ordinance required construction to begin within two years or the variances would expire. The Massachusetts Supreme Court stayed the expiration of the variances pending the conclusion of the appeal, stating: **“We conclude that the relief from time limitations... where a legal impediment exists to the use of a benefit, should also be given where an appeal from the granting of the variance creates equally real practical impediments to the use of a benefit. Otherwise a variance which was lawfully awarded can be frustrated by the delay inherent in an appeal. Unless an appeal tolls the time period, many variances would be meaningless.”** 294 N.E.2d at 859 (emphasis added).

In *Tantimonaco v. Zoning Board of Review of Town of Johnston*, 232 A.2d 385, 102 R.I. 594 (R.I. 1967), there was an appeal challenging the legality of the grant of a building permit for a gasoline service station. The ordinance required that construction start within six months or the permit would expire. The Supreme Court of Rhode Island stayed the expiration of the permit pending the conclusion of the appeal, stating: **“As heretofore noted, petitioners challenged the validity of that permit by seeking a review of the board’s decision . . . Although the filing of such a petition does not act as a stay . . . common prudence understandably acts as a brake against incurring obligations, the benefits of which would be cancelled by an adverse decision of this court. Apart from the question as it may be affected by a change in the zoning regulations, we think it clear that the requirement of activating a permit set forth in an ordinance does not apply during such time as the legality of a permit is open to question by reason of litigation amounting to an appeal from the issuance thereof.”** 232 A.2d at 388 (emphasis added).

In *Gala Homes v. Board of Adjustment of City of Killeen*, 405 S.W.2d 165 (Tex.Civ.App. 1966), there was an appeal challenging the legality of building permits to construct apartments. The ordinance required construction to start within 90 days or the permits would expire. The Texas Court of Civil Appeals stayed the expiration of the permits pending the conclusion of the appeal, stating: **“Further, we hold that the two year period within which the city ordinance requires that construction be completed should be tolled, commencing with the filing of intervenor’s appeal with the Board and continuing until final judgment herein.”** 405 S.W.2d at 167.

In *Homeowners Organized to Protect the Environment v. First National Bank of Barrington*, 521 N.E.2d 1202 (Ill.App. 2 Dist. 1988) there was an appeal challenging the validity of the grant of a special use permit. The ordinance required commencement of substantial

construction within one year or the permit would lapse. The Illinois Court of Appeals stayed the expiration of the permit pending the conclusion of the appeal, stating: **“However, to allow plaintiffs here or in any other case to exhaust an ordinance’s time limitation by simply litigating the ordinance would be, as the trial court observed, inequitable. We believe judicial review should be afforded parties to resolve legitimate legal questions and not as a bar to the full enjoyment of the zoning relief granted.”** 521 N.E.2d at 1207.

In *National Waste Managers, Inc. v. Anne Arundel County*, 763 A.2d 264 (Ct. Special Appeals Md. 2000) there was a claim that the special exception and variance to operate a rubble landfill had expired while various legal challenges to the landfill proceeded. The ordinance required that action to implement the use must begin within two years of the grant of the special exception. The Maryland Court of Special Appeals rejected a claim that the special exception and variance had expired, stating: **“To be sure, we do not fault the parties for exercising their legal rights. At the same time, we cannot disregard that delay is an inherent consequence of litigation, and the County’s repeated attempt to litigate National’s right to proceed with the Landfill ultimately made it impossible for National to comply with [the regulation]. If the County were correct in its analysis as to tolling, it would mean that a developer facing a time-related condition could almost always be thwarted in its efforts by the inevitable delay resulting from litigation, regardless of the merits; the right to proceed would necessarily expire before a court could rule otherwise. We cannot accept that logic, which elevates legal gamesmanship to new heights. Here, National did not comply with [the regulation] because the County’s exercise of its rights made it impossible for National to do so. We have not uncovered any Maryland cases discussing the concept of tolling in the context of this case. Nor have we been referred to any applicable Maryland cases. Nevertheless, other authorities suggest, by analogy, that the tolling principle ought to apply to the circumstances of this case.”** 763 A.2d at 276-277 (emphasis added).

In *Fromer v. Two Hundred Post Associates*, 631 A.2d 347 (Conn.App. 1993), there was a claim that a wetlands permit expired when the developer did not commence significant activity within one year of issuance of the permit. Litigation challenging the permit went on for six years. The Appellate Court of Connecticut rejected claims that the permit expired, stating: **“The regulatory process is not designed to be a spider’s web, snaring one who follows all the regulations and statutes, obtains all the necessary permits, and successfully defends a series of appeals, but then loses his right to proceed because the passage of time has caused the permits to expire.”** 631 A.2d at 353.

Because we find no reported court decisions that are in conflict with this line of cases, we are confident that Kansas courts would follow this line of cases and determine that the twenty-four (24) month time period in which MVS was given to commence construction in accordance with Ordinance 2301 is currently stayed or tolled by operation of law pending the full and final resolution of the pending appeal consistent with the cases discussed above.

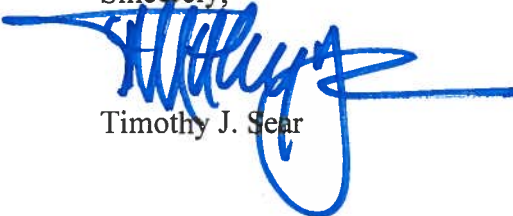
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However, in lieu of filing yet another lawsuit dealing with Mission Chateau which would request the District Court to enter a judgment confirming that the twenty-four (24) month time period in which MVS was given to commence construction in accordance with Ordinance 2301 is currently stayed or tolled by operation of law pending the full and final resolution of the pending appeal, MVS respectfully requests the City extend the current expiration date of January 6, 2016 contained in Ordinance 2301 to provide that MVS shall have twenty-four (24) months to commence construction beginning from the date upon which a final non-appealable judgment is entered in connection with the Marsh litigation.

Granting such an extension is not only warranted under the circumstances, but also supported by applicable case law, and will put to rest any issues with respect to the date by which MVS has or must commence construction on the project while affording all of the interested parties the opportunity for a judicial review to resolve the legal questions surrounding the issuance of the Special Use Permit.

MVS asks that this Application for Extension of Special Use Permit be placed on the December 2, 2014 Planning Commission Agenda.

Sincerely,



Timothy J. Sear

TJS:mgs
Enclosure

cc: Joseph Tutera
Michael F. Flanagan, Esq.
John D. Petersen, Esq.
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