

SUBJECT: SPECIAL ZONING PRIVILEGES
September 27, 2006

This is a discussion of what I believe is a serious misinterpretation of the new zoning code. It is not written for the purpose of supporting or opposing the rezoning of a site that has been characterized as “spot zoning” by the planning staff, but rather as describing my understanding of the Code and its misinterpretation.

BACKGROUND.

Conventional zoning district texts include lists of uses permitted for each district (our Use Table). If a parcel qualifies, once rezoned to a certain district (a map amendment), any of the permitted uses allowed in that district are available to the parcel to develop, and none of the uses from that district for which the parcel qualifies may be excluded. This interpretation is based on State law, quoted below, that requires that within each zoning district properties shall be treated uniformly (equally).

K.S.A. 12-756(a) states: “...Except as provided in the zoning regulations, all such regulations shall be uniform for each class or kind of building or land uses throughout each district, but the regulations in one district may differ from those in other districts and special uses may be designated within each district with conditions attached.”

In our new code, **20-1301(i)(3)** is the citation reportedly quoted below by legal staff on the subject of conditioning rezoning applications. This citation applies to the “review body” which may be the Planning Commission. The same wording is repeated in **20-1301(j)(3)** and applies to the “decision-making body” which may be the City Commission or County Commission.

In contrast to the above convention and State Law, according to one Planning Commissioner, the staff legal interpretation of the Code is that the two citations below (**20-1301(i)(3)** and **20-1301(j)(3)**) allow “cherry picking” permitted uses (choosing some uses and excluding others) from the conventional zoning districts “Use Table” to apply to a specific site in a way that would permanently exclude from that site any other uses permitted by that district. Not only that, but this current interpretation also says that specific chosen uses can be conditioned to abide by specific restrictions that are exclusive to the specific use and site and not available to use as conditions on other sites in that district. In the Code this approach is permitted by the Planned Development (Article 7, and Article 13, Section 20-1304) and the Article 13 section on Special Use Permits (20-1306). Outside of these specific regulatory exceptions, our conventional zoning ordinance, up to now, has never been interpreted to allow the exclusion of permitted uses from a specific site in a conventional district, regardless of conditions. To do so has been considered contrary to State Law.

I believe that this issue really needs to be investigated further, and is the purpose of this discussion. I believe that this interpretation without including the entire Article 1301 will radically distort the administration of our ordinance to a point of making it unconstitutional.

Following is the citation “A” in the new code that legal staff interprets as allowing the ^{inclusion}~~exclusion~~ of certain uses from a conventional zoning district permitted uses list and excluding others, as well as exceptional conditioning. An additional, critical citation, “B,” on page 2 in this discussion is missing from the staff legal interpretation.

A. “20-1301(j)(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** [emphasis added] 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.”

The critically important provision in Article 13 (quoted below) that limits *when* and *what type* of conditions can be applied is **Section 20-1301(m)**. This section considerably limits the allowable conditioning but is not being included in the staff legal interpretation. The effect of ignoring this critical section is not being considered by the legal staff.

B. “20-1301(m) Conditions of Approval
When the procedures of this Article allow review bodies to recommend or decision-making bodies to approve **applications with conditions** [emphases added], 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.”

DISCUSSION OF THE CODE CITATIONS, “B” AND HOW IT MODIFIES “A”

Conditioning: When Allowed and What Type of Conditions Are Allowed as Specified by 20-1301(m):

“When procedures of this Article allow review bodies to recommend [conditions]...”

Explanation: The wording is providing clarification on when conditions can be applied. The phrase “procedures of this Article” limits when conditions can be applied to *(1) only when the Code Article 13 allows conditions to be placed on an application.* The sections that allow this in Article 13 are 20-1304 (Planned Developments), 20-1305 (Site Plan Review), and 20-1306 (Special Uses).

“...the conditions shall relate to a situation created or aggravated by the proposed use or development.”

Explanation: The wording describes (2) *what type of conditions are allowed.* Beyond Article 13, the Code in Article 11 further limits the nature of conditions that can be applied, and these conditions control damaging environmental effects.

Controlling intensity of a use through actions by the Planning Commission allowed by 20-1301(i)(3), and 20-1301(j)(3). Choices that the PC or CC have to limit an application in a conventional district to “allow a less intensive use” are (1) to reduce the amount of land area included in the application, (2) to require smaller lots in the same district through platting (case law), or (3) to apply the Lesser Change Table and change the rezoning to a district that has a less intensive use.

Controlling intensity of a use through modifying conditions on a site.

Article 20-1101 (Protection Standards for Residential Districts) allows conditioning permitted uses by applying the special provisions available in this section, but only those conditions specified in Article 11, and allowed in Article 13, such as reducing building height, providing screening, etc.

Creating a less intensive use by eliminating some permitted uses.

Nowhere do sections from Article 1301 indicate that any of the permitted uses from any conventional district can be excluded, but rather, Sections 20-1301(i)(3) and 20-1301(j)(3) deal with reducing or controlling the “intensity” of the various uses permitted by the district. The only provisions in the Code that allow eliminating permitted uses from a district are not provided by any of our existing conventional zoning districts. Below are special districts or provisions in Article 13 that would allow both eliminating uses to fewer than permitted in a district and conditioning these uses.

A. PD Overlay District. One method for permanently eliminating permitted uses from a site would be by a Planned Development Overlay District (which would allow eliminating all uses but one and would be binding). However, the PD approach can’t be used on a small area unless the Code is changed to eliminate the minimum size requirement of five acres.

B. Special Use Permit. A second method for designating a single use would be through applying a Special Use Permit. This could be done without rezoning a site, but only for allowing a use not currently listed by the Use Table in a conventional district. However, the use would have to be defined and added to specific districts as a special use. A special use description would have to be adopted. Applying a Special Use Permit would allow almost unlimited conditioning as long as it conforms to Article 13. The use or uses, the hours, the environmental restrictions, and the duration of the use are among a wide range of other possible conditions that could be specified. However, *applying the SUP would require creating a special definition of the use other than what currently is listed in the Code and listing the districts in which it would be allowed.*

C. A text amendment. Another consideration raised by staff would be to change the Code by a text amendment that would create a new district having only one or a few specific uses and conditions. In a book that was published many years ago by a planner whose name was Bear, titled *Bear Facts*, he made the point that cities can create single use zoning districts, such as districts that permit only detached single-family houses on one-acre lots—no more, no less. He used this as an example for where specific uses are needed rather than inclusive districts, his

point being that a conventional district can be very narrow as long as it treats all land in that district the same and is available for others to use in like conditions.

CONSEQUENCES OF SPECIAL TREATMENT.

All of this discussion is directed to the methods of “conditioning” uses on a site. The important issues of spot zoning, allowing a special exception to the Zoning Ordinance not available to anyone else, and allowing a special privilege and its consequences are not considered here.

SUMMARY THOUGHTS.

I do not know the source of the interpretation of Sections 20-1301(i)(3) and 20-1301(j)(3) as meaning that the PC can permanently restrict the uses permitted for a specific site to one or a few in any conventional district even though there may be 35 other permitted uses in that district, but the consequences of this interpretation are very serious. This approach has been absolutely prohibited in conventional districts for as long as I can remember. Even site planning does not allow eliminating permitted uses from a district as applied to a specific site or applying conditions not allowed by the Code. For example, **Site Planning (Article 1305(a)(Purpose))** makes clear that this Section deals only with the physical design of the site.

SUMMARY

1. Conventional zoning by State Law requires that every class of use be treated uniformly, which means that special exceptions cannot be made for only one person that is not allowed to everyone else under the same circumstances in the regulations. Only if there are regulations in the zoning code that allow exception is this permitted, and then it applies to everyone. K.S.A. 12-756(a).
2. The regulations that govern allowing special exceptions in our zoning Code are the Special Use Permit and the Planned Development Article. These are not conventional zoning districts and are governed by their own regulations in special sections. However, everyone using these regulations is subject to the same rules.
3. Our State Planning Law has no provision for “contract zoning” —the agreement to use land in an exceptional or specific way bound by contract with the City or County. Contract zoning gives the developer a special privilege not uniformly available to other developers, but binds both the developer and the city to the specific development agreement. This is similar to the manner in which our PUDs have functioned when the PUD zoning districts are conditioned, and now the PUD districts have been revised as PD Overlay Districts. However, our PD and Special Use (SUP) regulations are uniformly available to everyone and everyone is governed the same under these regulations. It is important to repeat that “Contract Zoning” is not supported either by State law or by our local zoning Code.
4. Outside of PDs and SUPs we have no provision for granting special but binding privileges in conventional zoning districts, disguised as “conditions,” to individual property owners under our zoning code. To attempt to do this without a change in State planning law would appear to be outside of State law and of our zoning code.
5. Our code allows applying special conditions to permitted uses under 20-1301(i)(3) and 20-1301(j)(3). However, the type of conditions and the circumstances under which they can be applied is modified and controlled by 20-1301(m).

This section—20-1301(m) of Article 13—limits the conditions that can be applied to (a) those that reduce the negative impact of the use as allowed and designated in our code (20-1101 and other specific sections), and (b) applies to regulations in sections listed under Article 13—Special Uses and Planned Developments. Site Planning is included in Article 13, but the Site Plan regulations are very limiting in what can be controlled on the site—buildings and other physical features of the site. Site Planning does not allow delimiting uses from a permitted use list or controlling nonphysical site characteristics such as hours of operation.

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