**League of Women Voters of Lawrence-Douglas County**
P.O. Box 1072, Lawrence, Kansas 66044

February 24, 2009

Mayor Michael Dever
Members of the City Commission
City Hall
Lawrence, KS 66044



Dear Mayor Dever and City Commissioners:

RE: CONSENT AGENDA ITEM NO. 8, Ordinance No. 8370, Z-11-18-08.

We ask that you remove from the Consent Agenda, Item 8: Second and Final Reading of Ordinance No. 8370.

This Ordinance will rezone 11,000+ square feet of church property located on Connecticut Street to a different zoning district—RSO (Residence-Office)—from its existing RS5 single family district. This would be an ordinary rezoning if not for one fact: the RSO Zoning District Ordinance 8370 has a provision attached to it that excludes two uses, one listed as a permitted use—Financial, Insurance, and Real Estate, and a second—Homeless Shelters—the status of which must still be determined in the Land Development Code (LDC).

We apologize for bringing this to you so late, but the issue we want to address did not come up until the public hearing for this item by the Planning Commission on January 26, and was recorded for the first time in the minutes available to you when you gave it first reading last week on the Consent Agenda.

This issue tonight is similar to what occurred in the case of the Krause Restaurant, where the neighborhood did not object to the use, but rather, they objected to the rezoning to a commercial district and all of the other uses that this district permitted. Staff had originally recommended "conditioning" the Neighborhood Commercial District to exclude all uses except the restaurant. You denied this conditioning based on its not having been determined by case law as a legal option in Kansas, and instructed the staff to resolve the problem by creating a text amendment to the zoning ordinance that added the Krause's type of restaurant as a Special Use permitted in residential districts.

In this case of Ordinance No. 8370, the requested use is for a mortuary. The neighborhood has no objection to this use nor to the RSO District. The neighborhood objection was with one particular use that the RSO District normally allows—Financial. The RSO District (Single Dwelling Residence Office), allows "Financial, Insurance, and Real Estate" offices, which the neighborhood asked to be excluded from the permitted uses. They also wanted "Homeless Shelters"excluded as a use, but that is a different situation because its use status is still pending in the Land Development Code. The outcome at the Planning Commission was to recommend the rezoning to RSO for approval with two conditions attached: (1) to exclude from the RSO Zoning District the Financial, Insurance, and Real Estate uses and (2) to exclude from the RSO Zoning District the Homeless Shelters use. This rezoning appears, as mentioned above, on Second Reading tonight as Ordinance No. 8370.

Because recently the staff has almost routinely been recommending conditioning zoning to exclude uses as an approach in difficult rezoning situations, we realized that it could be because there is little public understanding of what is actually happening in these cases. We realized that the process has been mislabeled. The term "conditioning" the zoning is inappropriate because this is actually a permanent change to the zoning district on a lot or parcel. What is actually happening here is that when uses are excluded by Ordinance on a single site, the specific Ordinance (law) enabling this is actually creating a new zoning district. This new district is permanent and is different from all our other existing districts.

We discovered that this change to the district on this site is considered permanent by reading the Minutes from the January 26 Planning Commission, Agenda Item No. 3, Rezoning Z-11-18-08, page 8, last paragraph. This refers to a theoretical future buyer of this property who might want to use the excluded category of Financial, Insurance, and Real Estate use. The Minutes read: "Mr. McCullough said they are all one use category and that a future owner could submit a rezoning" [enabling him to use that category on this lot.]

In other words, this is a permanent change to the zoning district on this one lot and does not expire with a new buyer seeking the original RSO District on this lot with its original complement of permitted uses. This district with its excluded uses is permanent to the zoning district on this property until rezoned. Therefore, the zoning on this land is a new district, albeit exclusive to this lot, but nonetheless, a different zoning district unlike any other, and therefore a new district, created by law.

In contrast, why can excluding uses in a district be done in Planned Development Districts? Are they creating new districts? The answer is yes, in a sense, but this is expected because it is expressly written into the PD zoning provisions in the Land Development Code. PD districts are overlay districts and enable conventional zoning districts to be tailored to their sites, and uses are expected to be excluded where inappropriate. That is why Planned Developments exist; they enable flexible zoning provisions. PD opportunities are available to everyone who uses them. On the other hand our standard or "conventional" districts were supposed to be designed to be predictable and stable, easy to use, accessible to all, and to be administered to all citizens equally and not arbitrarily. One developer from Wichita told our City Commission many years ago that he "was prepared to play by the rules no matter what they were," but he had to know the rules first.

The basic problem that we see being created is that the proper procedure for legally making a permanent change to the City Code by creating new zoning districts is not being followed. What should be happening is that each new zoning district that has or will be excluding otherwise permitted uses, in order to legalize their status, should first be provided with a text amendment to the Land Development Code which would create a new and distinct district with its list of permitted uses tailored to the new district. Once the new district is available, a Zoning District Map designation should be adopted that will distinguish it from all other districts, and then the zoning map amendment can proceed. This would allow the new district to be legally adopted not only on the original site but the new district would be legal and available to all other citizens to use also.

We urge the City Commission to recognize that the proper procedure must be followed here and in the other previous cases. We ask that you no longer allow this type of change to our Zoning Code without first using the proper lawful process of text amendment and Zoning District Map amendment that recognize these new and different districts.

Please see the attached information which we hope will help clarify this letter. Thank you for seriously considering this issue.

Sincerely yours,

Carrie Lindsey
President

Alan Black, Chairman
Land Use Committee

*Attachments to be sent by email*

BRIEF SUMMARY OF OBSERVATIONS ON CONDITIONING ZONING.
February 24, 2009

1. Kansas state planning law requires that conventional zoning regulations shall treat everyone 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."

2. The cases where exceptions can be made are written into the regulations. This is specifically allowed in Article 13 where conditions can be applied to applications for development approval.

> **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."

3. However, the conditions are limited to those provisions in Article 13 specifically allowing exceptions and conditions (as described by the Sections in those Articles dealing with this issue).

> **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."

4. The provisions are limited in the sections of Article 13 that allow conditioning and are all different.
   a.. Those sections of the Code that allow conditioning by excluding uses as well as conditioning uses are in **20-1304, Planned Developments;** and specifically in **Article 20-701(f)(1)).**
   b. Those sections that allow specific uses not ordinarily allowed by the code and conditioning these uses beyond the specific provisions of the Code are in **Article 20-1306, Special Use Permits.** Special uses are specifically listed in the Use Table by district.
   c. Those sections that allow conditioning uses based only on specific provisions and standards of the Code come under **Article 13, Site Plans, Section 20-1305.**

> **"Article 20-1305 Site Plans**
> **(a) Purpose**
> The purpose of requiring Site Plan Review and approval is to ensure compliance with the standards of this Development Code prior to the commencement of Development Activity and ***to encourage the compatible arrangement of Buildings, off-street parking, lighting, Landscaping, pedestrian walkways and sidewalks, ingress and egress, and drainage on the site and from the site, any or all of these, in a manner that will promote safety and convenience for the public and will preserve property values of surrounding properties.*** [*Emphasis added*] Site Plans for commercial development shall comply with the Commercial Design Standards and Guidelines adopted by the City Commission on July 25, 2006 by Resolution No. 6669.**"**

5. Reducing the permitted density is allowed in Planned Developments, Planned Unit Developments and Special Use Permits. In Site Plans where density adjustments can be made in conventional districts, the land comes under **Article 20-1101(d) and (e) Sensitive Areas Site Plan** and must conform to the density adjustment table in Section 20-1101(d)(4).

6. In cases where conventional zoning has been conditioned to conform to access restrictions, this should be considered a plat condition (supported by case law) or a site plan condition that is supported by a specific article or section in the Lawrence Land Development Code.

7. It is possible that the confusion as to what and how development sites can be conditioned is because the distinction between conditioning a use and conditioning a zoning district hasn't been considered. Our understanding is that a use is one of (usually) many permitted uses within a zoning district, and our code allows placing specific conditions on a specific use on a specific site, but the potential for this type of conditioning applies to all sites in like circumstances. Conditioning a Zoning District to eliminate specific, otherwise permitted uses on a specific site is a totally different type of conditioning, treats individuals with favoritism, and would seem by the language of State law to be unlawful. It should be treated as a text amendment and remedied by adopting the change using the proper procedure as a text amendment so that this new district is available to everyone in like circumstances.

8. If the City wants to be able to condition conventional zoning in ways not specifically allowed by the Code, this should be made legal in the Kansas state planning law and then written into our Code. Before doing so it should be carefully considered, because besides allowing special privileges to individuals (contrary to our 14th Amendment in the U. S. Constitution) it renders our conventional zoning districts unpredictable and subject to arbitrary administration. One suggestion is that if the Planned Development Article is not flexible enough to allow it to be used in cases where uses should be restricted and/or eliminated, it should be changed so that it can be more easily used.

The Land Use Committee

# SOME THOUGHTS AND DEFINITIONS (CITIZEN GENERATED)

It is possible that the confusion as to what and how development sites can be conditioned is because the distinction between conditioning a use and conditioning a conventional zoning district to exclude a use from the district hasn't been understood. The comments below are an explanation of our understanding, as citizens, of the interpretation of our Zoning Ordinance as it is written. Perhaps there are other interpretations based on case law.

## ZONING DISTRICTS

Our Zoning Code is a part of our City Code, Chapter 20, Land Development Code, and has a distinct structure that facilitates the uniform access and administration of this code equally to all citizens.

It basically consists of a written text listing and describing the separate zoning districts and the regulations that go with each district. The working portion of each zoning district is a list of permitted use categories within each district. A Zoning District Map illustrates in graphic form the location and boundaries of all of the zoning districts in the city. The combination of text and map is the law that provides the mechanism for regulating land use on our urban land, compatibly, predictably, efficiently and equitably, at least in theory.

All land within the city (and county) is covered by a zoning district of some kind. When a zoning district on a parcel of city property is changed, it must be done by a lawful process, which involves adoption of this change as an Ordinance by the City Commission which is then published in an official newspaper. This change is known as a Zoning District Map Amendment because it describes and illustrates the location and boundaries of the zoning change. None of this process changes the basic Zoning District or text narrative in the City Code; nor are the basic districts themselves within the Code and their accompanying regulations changed. The Zoning District Map is what is changed by the change in location of the subject district.

Each zoning district described in the text of the City Code is a distinct, intact entity. It consists of a list or "collection" of similar and compatible uses arranged as use categories—a composite of uses. These use categories are listed in the Use Table in our zoning code under each zoning district heading with the permitted uses designated by "P" under each district heading. Each district is predictable, stable, and can't be changed unless it goes through a process called a "text amendment." The list of uses within each district is established, stable and can't be arbitrarily changed either by "interpretation" or by exception or variance. Individual uses can't be added to or subtracted from each zoning district in the text or map unless done through the process of adopting a text amendment that legally changes the Code.

## PERMITTED USES

A use is one of a list of many permitted uses within a zoning district. Individual uses are combined together within a use category and under its overall district because they are similar in terms of intensity (traffic generation, scale, character) and function, effect on neighboring property, and are generally considered compatible within their district.

When uses are allowed by the Code to be conditioned, it is to apply a type of condition that has been specifically written into the Code. It does not mean that a use can be excluded from its zoning district on a specific site. In conventional districts it means that the height, setback, buffer, parking, landscaping and other physical features normally associated with the use and its site can be modified to make the use less intensive, more compatible and functional within its intended surroundings. In conventional zoning districts; i.e., those not involving Planned Development or Special Use Permits, the potential for conditioning specific uses applies to all

sites in like circumstances and is written into the Code. (See Article 13, Section 20-1305, Site Planning).

Conditioning a Zoning District by excluding a permitted use from a zoning district is very specifically allowed in Planned Development Overlay Districts under Article 20, Section 20-701(f)(1)).

Adding an otherwise excluded use from a specific zoning district is allowed by Special Use Permit, if the use is listed as a use permitted by Special Permit in a conventional district in the Use Table.

Conditioning a use in a conventional district on a site plan for a specific site is governed by the Site Plan Section of Article 13, Section 20-1305(a) as mentioned in the "Observations on Conditioning Zoning." point 4c. (Attachment A).

STAFF INTERPRETATION

In the most recent case of "conditioning" zoning (Ordinance No. 8370) as shown in the Planning Commission January 26 Minutes, when the Director of Planning was asked how a property buyer would know how the land could be used, he said that the staff looks up the published Zoning Ordinance on each property to check on the restrictions. He also said that if the buyer or new user wanted to use this excluded use, he could get a zoning change. The meaning of that statement is profound. It means that the zoning on this land excluding the two permitted uses is a permanent change. And it will be done by a published zoning district ordinance, the law that changes the zoning on this property.. It means that this modified district is a permanent change to the district. It is a new zoning district. By State Planning Law, it should be available to everyone else to use on their land also. Therefore, it should be listed as a new district in the Land Development Code.

(Two planning commissioners were not happy with this type of "conditioning" and one suggested that the staff should look into this situation before submitting it to the City Commission.)

CONSEQUENCES OF EXCLUDING USES ON SPECIFIC SITES

Conditioning a Zoning District to eliminate specific, otherwise permitted uses on a specific site that the Land Development Code lists as permitted in that district and will be shown as the standard conventional zoning district on the Zoning District Map is a totally different type of process than anything allowed by our current Code as an exception on a specific property. When this is done with a published ordinance for a zoning district it creates a separate, new district that is different from the existing district in the Land Development Code. It doesn't matter whether this new district exists on only one property. The point is that if this district is available to the owner of one site, it should be available to all.

The problem is that this new district has not been written into the Land Development Code by a legally prescribed process. Adopting this district with the excluded uses is essentially a text amendment of the Land Development Code. However, it is not listed in the Code, nor is it shown on the Zoning District Map. If the privilege to use this specific district is available to no other person or site, then that circumstance is what makes it illegal based on state law because it allows a special privilege to the applicant that is available to no one else.

If by modifying a district it becomes less objectionable and more usable, the justification for changing the district on a property is good, but the process is wrong. The City Commission and Planning Commission either need to change the whole district to exclude a specific use category, which would make other like districts that have them non-conforming, or create an appropriate new district in the Land Development Code that excludes the objectionable uses or uses, and becomes available to everyone.

The remedies present themselves by the recognition that this practice is contrary to our LDC and state law.

We suggest that the Commissions could

1. create a general new district that does not include the objectionable uses following the legal process of a text amendment to the Zoning Text.
2. change the objectionable use or uses to require a Special Use Permit in the subject zoning districts so that all of the objectionable uses require a Special Use Permit.
4. or change the overall standards for an objectionable use that would prevent it from fitting into any lot smaller than a minimum size or otherwise modify the standards of the objectionable use so that it would rarely be applicable in standard lots. This could be added to Article 5, Use Regulations. This is an extreme measure, however.

We suggest that this issue is sufficiently serious to ask for an opinion of the State Attorney General.

Land Use Committee