

Memorandum

City of Lawrence

Planning & Development Services

TO: David L. Corliss, City Manager

FROM: Scott McCullough, Director
John Miller, Staff Attorney

CC: Cynthia Boecker, Assistant City Manager
Diane Stoddard, Assistant City Manager
Toni Wheeler, Legal Services Director

Date: February 18, 2009

RE: Homeless Facilities Text Amendment Update

On October 14, 2008 the Lawrence City Commission gave initial support to a text amendment related to homeless facilities that more comprehensively addressed their location and use standards. The text amendment was requested by the Lawrence Community Shelter to provide flexibility in their objective to relocate within the city and permit shelters in industrial districts with a special use permit. The amendment was broadened in scope by staff to more comprehensively address homeless facilities from the Development Codes' perspective and also to facilitate a program initiated in Lawrence in 2008 known as Family Promise. This memo addresses concerns submitted to staff after the City Commission's initial approval for the religious institution portion of the text amendment but does not address the portion related to permitting shelters in industrial districts. Staff plans on separating the two issues and submitting the portion related to permitting shelters in industrial districts to the commission within a few weeks.

Currently, the Development Code permits Homeless or Transient Shelters (shelters) with a special use permit in the RSO, RMO, CO, CD, CC, CR, CS, GPI, and H districts. The code also permits shelters as an accessory use to a Campus or Community Religious Institution with approval of a special use permit. Campus religious institutions are permitted in the RM12, RM12D, RM15, RM24, RM32, RMG, and RMO. They are not permitted in any RS district. The code does not permit shelters in Neighborhood Religious Institutions. Neighborhood institutions are permitted in every RS and RM district. Staff understands that several of the religious institutions participating in the Family Promise program may qualify for either type of institution and exist in RS and RM districts, meaning that certain institutions would not be permitted to participate, even with a special use permit, under the current code.

Adoption of the new regulations requires approval of two readings of the adopting ordinance. After the commission's initial approval, the city received a letter concerning

the legality of the language from a member church participating in the Family Promise program and also several concerns from Family Promise representatives. As staff understands them, Family Promises' main concerns with the proposed amendments are related to other city code requirements in the fire code and also processing issues to implement the proposed amendment. Staff has interpreted the current fire code to require that religious institutions fully comply with the code if overnight sheltering occurs. Several institutions in the city are code compliant and several that desire to participate in Family Promise, as staff understands it, are not.

It should be noted that Family Promise implemented the program in several religious institutions and opened a "day center" use without site plan approval. Family Promise representatives did actively seek information regarding the site plan process in November 2008 and have stated to staff that they are working on the site plan application.

The city's efforts have focused on researching the concerns noted above and seeking ways to balance the interests of neighborhoods, social service providers, and legal concerns. The city's Legal Department has reviewed the ordinance language in order to provide the City Commission with an opinion on whether the ordinance will meet legal scrutiny if challenged in court. The first and second reading of the adopting ordinance of the text amendment has been delayed, while this review is completed, in order to provide the commission this information and options to move forward with this important policy matter. Legal issues include:

- Compliance with the Religious Land Use and Institutionalized Persons Act (RLUIPA).
- Freedom of religion and religious practice protections of the United States and Kansas Constitutions.
- International Fire Code issues related to occupancy use changes for overnight sheltering in religious institutions.
- The City's police powers to regulate religious institutions as a land use.

The Legal Department has completed a thorough review of the associated legal issues and has concluded that, in an attempt to reduce the risk that a court would find the City in Violation of RLUIPA or the Kansas and United States Constitutions, the proposed code amendments should include the following:

- Provide a definition of homeless.
- Standardize the permitting requirements for shelters to be more consistent with how other land uses are regulated in the Development Code. Options include permitting shelters in religious institutions as an accessory use either by right with no limitations, by right with certain limitations, or by special use permit.
- If permits are required, make clear that there are neutral, measurable and objective standards for considering and approving or denying permits.
- Provide a distinction between social services traditionally provided by religious institutions compared with services provided by secular institutions.
- Remove the limitation of sheltering only families or families with children to avoid potential constitutional or RLUIPA claims.
- Remove the term "or to persons at risk of being homeless" from the code to avoid vagueness or claims of being overly broad.

A review of issues associated with other stated concerns includes:

- Whether the city's fire code should be modified to remove certain requirements for shelter use in a religious institution that would require costly retrofitting to comply, while maintaining other requirements that would serve the purpose of protecting life and property.
 - Discussion – The major issue with permitting overnight sheltering in religious institutions is the requirement for structures to comply with the fire code, which may include a requirement to have sprinklers installed and operational, and/or maintain a fire alarm system with manual pull station, and/or provide other forms of compliance measures so that minimum fire protection standards are established for the use. The Fire Department notes that several religious institutions do have sprinklers, but some that desire to participate in Family Promise do not. It is a policy debate on whether the fire code should maintain all of the current standards for the overnight shelter use and require Family Promise and similar programs to operate within the framework of the code or whether the code standards should be reduced to accommodate programs desiring to operate in the city in this manner.
 - Options - The options available include (1) maintaining the fire code as it currently stands, which may require religious institutions to provide sprinklers and fire alarms and which could limit the number of religious institutions available for the Family Promise program, or (2) modify the code to some agreed upon minimum life-safety standards and permit Family Promise, and programs like it, to operate in institutions that do not currently meet all standards of the fire code.
 - Fire Code Board of Appeals – On February 5, 2009, the Fire Code Board of Appeals discussed the two options noted above. The board recommended option one (1) above. Their minutes are attached.

As mentioned, the current code does not permit sheltering associated with religious institutions in RS districts. The City Commission, as staff interpreted it through the commission's support for the text amendment, took action to support shelters in RS districts when they are limited in occupancy and calendar days and when associated with religious institutions. Staff believes an appropriate code would permit limited shelters in any type of religious institution and in any zoning category up to a certain threshold, as limited shelters are, in staff's opinion, a compatible land use in the context of other types of recreational and educational accessory uses that the code currently recognizes for religious institutions. After that threshold is exceeded, a special use permit would be required and analyzed per code standards for land use compatibility.

Recommendations to Resolve

Given the conclusions of the legal review, staff recommends that the following two options should be discussed and considered in order to resolve the matter relative to permitting shelters in religious institutions.

Option 1

1. Permit by right, as an accessory use, a shelter for Neighborhood Religious Institutions and Campus or Community Religious Institutions up to a certain threshold (based on occupancy and/or calendar days) regardless of the zoning district in which it is located. If the threshold is exceeded, then a special use permit would be required.

Option 2

1. Permit by special use permit only any shelter in a religious institution, regardless of its limitations on size or number of guests and regardless of the zoning district in which it is located.

Recommendations relevant to both options

1. Maintain the Fire Code and require that any program that includes overnight sheltering be required to meet all of the standards of the code, which could include sprinklers, fire alarm systems, or other forms of compliance measures.
 - a. Alternative - Modify the fire code to permit overnight sheltering up to some reasonable limitation in occupancy and/or calendar days while establishing alternative minimum requirements that may not require fire alarm systems and sprinklers for the sleeping or other areas. (See attached list of minimum requirements that the Fire Department has stated would be minimum protection standards for the use.)
2. Provide a distinction between social services traditionally provided in religious institutions compared with services typically provided in secular institutions.

Staff also recommends that the City Commission return this amendment to the Planning Commission for a hearing by which the public can comment on the proposed revisions and direction of the City Commission. The recommended options should simplify the amendment language; however, staff will need time to revise the language for the Commission's review.

Summary

Staff seeks direction on the following policy issues so that specific language can be drafted to meet the commission's intent.

1. Permitting process – which process balances the interests of the service providers, religious institutions, legal issues, and neighborhoods to the greatest extent – permitting overnight sheltering by right, by right with occupancy and/or calendar day limitations, or only with a special use permit?
2. Location of overnight shelters in religious institutions – should overnight sheltering, either in limited or unlimited fashion, be permitted in all zoning districts?
3. Fire code standards – should the city maintain the current standards or modify the standards to require a lesser framework by which overnight sheltering in religious institutions must meet?

Action Requested

Staff recommends that the City Commission consider these options, direct staff appropriately, and return TA 04-03-08 to the Planning Commission for a hearing on specific elements of the proposed language that the City Commission desires to be changed.

Attach: Memo from Legal Department
Letter from Caleb Stegall
Fire Code alternative compliance standards
Fire Code Board of Appeals Minutes of February 5, 2009

Memorandum

City of Lawrence

Legal Services

TO: Toni Ramirez Wheeler, Director of Legal Services

FROM: John Jay Miller, Staff Attorney

Date: February, 4, 2009

RE: Overview of RLUIPA and Constitutional Challenge Information To Include In Planning Memorandum

You have requested information to include with material from the planning department to advise the City Commission on the Religious Land Use and Institutionalized Person Act and Constitutional challenges to proposed homeless text amendments.

Zoning decisions that affect religious institutions (*e.g.* synagogues, temples, mosques, churches, home-worship centers) implicate the United States Constitution, most notably the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, the Kansas Constitution, Bill of Rights Section 7, and the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*

RLUIPA is a federal act that protects two types of religious freedom claims: those by religious institutions and those by institutionalized persons claiming that the government infringes on the rights to freely exercise their religion.

RLUIPA was enacted by Congress to protect religious institutions from unduly burdensome and discriminatory land use regulations. The land use provisions of RLUIPA protect individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws.

RLUIPA prevents the City from infringing on the free exercise of religion, bars the City from discriminating among religions, requires that religious institutions are treated as well as comparable secular institutions and prevents the City from imposing a land use regulation that excludes a religious assembly from the City or prevents the City from unreasonably limiting religious institutions within the City.

Whenever the City adopts a zoning regulation that could affect a religious institution the City must be cognizant of RLUIPA and the potential effects that the act may have on the regulation. The existing Development Code is also subject to RLUIPA claims.

RLUIPA (42 U.S.C. § 2000cc (a)) prohibits the City from imposing a “substantial burden” on the “religious exercise” of a person (religious institution) through a land use regulation unless the City can demonstrate that the substantial burden is in “furtherance of a compelling state interest” and is the “least restrictive means of furthering that compelling governmental interest.” The compelling governmental interest test is the most stringent standard of judicial review of a government’s action and means that the action of the city is recognized as a necessary government function such as protecting the public health, safety and welfare compared to something preferred by the government. The “least restrictive means” test requires the government to show that its interests could not be achieved by a more narrow regulatory action that burdens the plaintiff to a lesser degree.

For comparison, the rational basis test is the standard test for municipal zoning decisions and if a city’s action does not constitute a substantial burden, then the rational basis standard of review is applied by the courts.

RLUIPA (42 U.S.C. § 2000cc (b)) also prohibits the City from imposing a land use regulation that “treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution” or “discriminates against any assembly or institution on the basis of religion or religious denomination.” Unlike the substantial burden provision, these provisions may not be overcome by a showing of compelling state interest. The proposed code and the issues raised about the code do not implicate this section of RLUIPA.

Before a court would consider whether the city was imposing a “land use regulation in a manner that imposes a substantial burden on the religious exercise of a person” the person claiming a violation of RLUIPA bears the burden of persuasion and must produce prima facie evidence to support the claim they are alleging. If the Court determines that the plaintiff met their prima facie burden, then the burden shifts to the City to prove that the land use regulation is the least restrictive means of furthering a compelling state interest.

Whether an accessory use at a religious institution (school, day care, homeless or overnight shelter) constitutes a religious exercise under RLUIPA is still an unresolved issue. In *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006) the court upheld the jury’s findings that the Church failed to prove it was engaged in a sincere exercise of religion in the Church’s operation of a day care center.

Requiring a permitting process, whether administratively or legislatively, for homeless shelters at religious institutions is not generally considered a substantial burden on a religious institution. Having neutral, measurable and objective standards for considering and approving or denying the permits is the important element to the permitting process. The proposed code includes a variety of permits both administrative and legislative with some differing requirements depending upon the permit. Having a consistent permitting process with standard requirements is a safer approach for the City.

Compliance with 2006 International Fire Code is a concern that has been raised. It has been asserted that requiring religious institutions to comply with the building and fire codes imposes a substantial burden on their free exercise of religion. The concern of the proponents for homeless shelters at religious institutions is that existing religious institutions will need to comply with the current fire codes because providing an overnight shelter is a change of use or

occupancy pursuant to section 102.3 of the International Fire Code. The Fire Code would then require a sprinkler system or other form of compliance to meet the new use. Many of the neighborhood religious institutions would have to retrofit their facilities to comply with fire code requirements.

Generally, courts have determined that RLUIPA does not apply to measures like health and safety codes that protect the people using the facilities. They are not considered zoning or landmarking laws. Any claim would have to be made under constitutional grounds instead of RLUIPA although the substantial burden analysis is similar. Courts have held that that complying with health and safety codes does not substantially burden the free exercise of religion. In instances when the courts have held that the health and safety codes were a substantial burden, they also conclude that the codes are the least restrictive means of furthering a compelling state interest.

Neither RLUIPA nor the Free Exercise Clause of the First Amendment grants religious institutions an unfettered ability to do whatever they want on their property. While the First Amendment provides absolute protection to religious thoughts and beliefs, the free exercise clause and RLUIPA do not prohibit Congress and local governments from regulating religious conduct. Numerous courts have determined that RLUIPA does not prevent municipalities from imposing reasonable land use regulations on properties owned by religious institutions. The City can adopt zoning regulations that do not substantially burden the free exercise of religion or if the regulations do substantially burden the free exercise of religion the City can do so as long as it is the least restrictive means of furthering a compelling state interest. Nonetheless, modifications to the proposed code as discussed in the Planning Department memorandum may be appropriate to and reduce the risk of facing a legal challenge to the homeless text amendments.



the
STEGALL LAW FIRM

RECEIVED

OCT 24 2008

CITY MANAGERS OFFICE
LAWRENCE, KS

October 23, 2008

Lawrence City Commission
City Hall
P.O. Box 708
Lawrence, KS 66044

*Re: Text Amendment TA-04-03-08 to Chapter 20 of Lawrence City Code to
define and permit various homeless facilities*

Dear Commissioners:

By this letter please be put on notice that Grace Evangelical Presbyterian Church has retained this firm to represent it in connection with the new code language referenced above and given preliminary approval by the Commission at its October 14, 2008, meeting. The amendments to Chapter 20 of the Lawrence City Code restrict in a variety of ways the religious liberties and practices of my client. This letter will serve to briefly state my client's concerns and objections. A fuller legal briefing can be provided upon request.

The new code language dramatically restricts the religious liberty and the free exercise thereof of all churches in Lawrence. The language places a substantial burden on all religious institutions and their ability to minister to other persons according to the dictates of their conscience and the calling of their particular religious beliefs and convictions. **Moreover, these restrictions are not narrowly tailored to further a compelling government interest and do not employ the least restrictive means necessary.**

As such, it is my client's position that the amendments to Chapter 20 of the Lawrence City Code violate the multiple legal protections afforded the free exercise of religion including Constitutional protections, federal statutory protections, and protections in state law. Therefore, it is my client's further position that as these amendments are not authorized by law, they do not have the authority to bind or otherwise restrict my client's ability to freely exercise its religion as it deems fitting and proper.

Certain specific restrictions contained in the text amendments are particularly egregious and offensive to the free practice of religion in Lawrence:

Caleb Stegall
PRINCIPAL

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504 Plaza Drive • Perry, KS 66073
cs@steglaw.com • www.steglaw.com

- 1) The restriction prohibiting the very broadly defined activities of "Homeless Day Centers" from occurring in residentially zoned areas (most churches including Grace EPC);
- 2) The restriction limiting the operation of a "Type A Homeless Shelter" to only 15 nights per quarter;
- 3) The restriction limiting the operation of a "Type A Homeless Shelter" to only family units and to a maximum of four such units; and
- 4) The permitting process whereby churches would be required to execute an affidavit pledging compliance with all use specific standards.

Grace EPC is one of the churches participating with the Family Promise Network. Please be advised that should my client determine that the text amendments in any way impinge or otherwise restrict the free exercise of Grace EPC's religion, my client stands ready to fully and firmly assert all of its legal prerogatives in an appropriate court of law.

Should the Commission desire to modify the text amendments to ameliorate the legal deficiencies identified above, my client stands ready to act as a positive partner with the City to achieve such narrowly tailored regulations which further the City's compelling interests by the least restrictive means.

Thank you for your attention to this vitally important matter.

Very Truly Yours,

THE STEGALL LAW FIRM

Caleb Stegall

✓ Cc: David Corliss

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Overnight Sheltering in Religious Institutions Residential Use Code Requirements

Fire Sprinkler system in residential area (Secs. 912, IEBC and 903.2.7, IFC).

Evacuation plan developed, posted and drilled (Secs. 404.2 and 405, IFC).

Fire alarm system with manual pull station (Sec. 907.2.8, IFC).

Smoke alarms in sleeping areas (Sec. 907.2.10.1.1, IFC).

Emergency egress windows or exterior doors in sleeping area (Sec. 1026.1, City Ord. 8055).

Emergency exit lighting present and operational (Sec. 1006.1, IFC).

Illuminated exit signs present and operational (Sec. 1011.2, IFC).

Portable fire extinguishers present and maintained (Sec. 906.1, IFC).

Class K or CO2 portable extinguisher in kitchen area (Sec. 906.4, IFC).

Unapproved extension cords and adapters removed from Residential area (Secs. 605.4 & 5, IFC).

Overnight Sheltering in Religious Institutions Revised Requirements

~~Fire Sprinkler system in residential area (Secs. 912, IEBC and 903.2.7, IFC).~~ **WAIVE IF APPROPRIATE**

Evacuation plan developed, posted and drilled (Secs. 404.2 and 405, IFC).

~~Fire alarm system with manual pull station (Sec. 907.2.8, IFC).~~ **WAIVE IF APPROPRIATE**

Smoke alarms in sleeping areas (Sec. 907.2.10.1.1, IFC).

Emergency egress windows or exterior doors in sleeping area (Sec. 1026.1, City Ord. 8055).

Emergency exit lighting present and operational (Sec. 1006.1, IFC).

Illuminated exit signs present and operational (Sec. 1011.2, IFC).

Portable fire extinguishers present and maintained (Sec. 906.1, IFC).

Class K or CO2 portable extinguisher in kitchen area (Sec. 906.4, IFC).

Unapproved extension cords and adapters removed from Residential area (Secs. 605.4 & 5, IFC).

Required telephone in area of use. **ADD STANDARD IF APPROPRIATE**

Trained Staff, awake and available in the area of use at all times. **ADD STANDARD IF APPROPRIATE**

Prohibition of Cooking, Candles, or any other open flame device. **ADD STANDARD IF APPROPRIATE**

**City of Lawrence
Fire Code Board of Appeals
February 5, 2009 - Minutes**

MEMBERS PRESENT: Stephen Blanchard, Lt. Peter Easterwood, Tracy Green, Dan Wilkus and Jay Zimmerschied

MEMBERS ABSENT:

STAFF PRESENT: Division Chief Rich Barr, Lt. Russell Brickell, and Rachel Palmer

GUEST PRESENT: Scott McCullough - Planning and Development Director, John Miller - Staff Attorney, and Toni Wheeler - Legal Services Director

Division Chief Rich Barr called meeting to order at 4:10 p.m. and introductions were made. Chief Barr asked the committee to elect their new chairman for the Fire Code Board of Appeals.

Stephen Blanchard volunteered himself as chairman for the board. Tracy Green seconded Mr. Blanchard as chairman and nominated Jay Zimmerschied as second chair. The motion was approved unanimously.

Family Promise Homeless Shelter

Chief Barr distributed information from Family Promise of Lawrence, which is a faith-based non-profit program that transforms the lives of homeless children and their families by providing them safe shelter, food, transportation, training, counseling, medical care and other assistance. Their program will accommodate up to four families (14 persons maximum) at a time through the efforts of faith congregations in the community. Family Promise wishes to use thirteen (13) host congregations to house and feed these families.

Chief Barr explained to the Board that the Fire Department has concerns for the safety of these families in using these churches as residential properties. By allowing this the department believes it (the property) is a "change of use" and should comply with the IFC. In the Board's packet is a check list of present code requirements the churches would need to comply with, one being fire sprinkler system in residential areas (Secs. 912, IEBC and 903.2.7, IFC). Family Promise disagrees.

{Mr. Zimmerschied joined the meeting at 4:45 pm.}

Mrs. Toni Wheeler explained to the Board that Family Promise believes using the churches in this manner is not a "change of use" because churches have provided to the poor for centuries. Housing these families in churches is temporary until they can find permanent housing, doing this is part of their ministry.

Mr. Scott McCullough told the Board that the Building Code would be effective as well. Mr. McCullough stated that some of those churches already meet the code, but for those that do not, he would like to find minimum requirements that can help Family Promise house these families. What Mr. McCullough would like the Board to do is consider two options; one, require the churches to comply with the IFC or two, recommend minimum requirements that must be met by the churches before families can be housed in those churches that do not already comply.

Mr. John Miller added that what we want to do is change the code for all A3 (places of worship) properties, not just for the organization, Family Promise.

Chief Barr stated that he does not think the code should be change until Family Promise has utilized all their resources. Chief Barr again stated that his concerns are for the safety of these families. What would happen if a fire breaks out while they are sleeping and we did not require the churches to comply with code?

Mr. McCullough stated that he believes it is valuable to give Family Promise options.

{Lt. Easterwood joined the meeting at 5:50 pm.}

The Board had question for both the fire department staff and city staff present at the meeting.

1. How many churches comply with code?

Response: There are a total of eighteen (18) churches on the Family Promise list of churches in the area. Of those eighteen (18), six (6) are sprinkled, three (3) are outside of city limits.

2. Has the Fire Department evaluated any of the churches?

Response: The fire department has not evaluated any of the churches.

3. Will the churches be staffed during sleeping hours?

Response: One male and one female volunteer will spend the night in the building in which the families sleep, it is unknown if they will be required to stay awake.

4. Will the Fire Department be notified when there are families being housed at the churches?

Response: The department would maintain a list of the churches approved for this use and then should an alarm come in, the department would respond assuming that it was occupied with families. The department would require a floor plan to help responders prioritize the correct location of occupants.

5. Can city staff or this board make changes to the IFC?

Response: The IFC is designed to be modified to fit the community and its concerns. The City Commission makes the decision to accept those changes. In this case the City Commission will receive two options one, to comply with code or two, adopt the proposed ordinance (handed out to the board) that amends A3 properties for overnight shelters in an religious assembly. It will also be known to the City Commission what this Board supports.

After much decision the board members all agreed that the churches should comply with the IFC as written in the City's ordinance.

Chairman Blanchard moved that any building or structure intended for sleeping purposes, shall meet the provisions of the appropriate R occupancy and other requirements of the currently adopted IFC and amendments. Mr. Wilkus seconded the motion, the motion passed unanimously.

Chairman Blanchard moved to defer the discussion on Door Swing on Existing Outdoor Assemblies to the next meeting. Mr. Wilkus seconded the motion, the motion passed unanimously.

Next meeting will be March 26, 2009, 4:00 pm, Administration Offices McSwain Conference Room, 1911 Stewart Ave.

The meeting was adjourned at 6:15 p.m.