TO: Mayor Rob Chestnut and Lawrence City Commissioners -- 8/24/09
RE: Objections to Zoning District frontage variance
(for "5th St. Bluff" PP-04-01-08)

Mayor Chestnut and Commissioners:

The subject variance allowing frontage insufficient for the RS10 Zoning District Code requirement fails to meet the Code's specified criteria for approval. We ask that you -- as our final, elected gatekeepers -- deny and disallow this variance and related approvals, in accordance with active enforcement of the Code.

City Code states that where conflicts within it exist, the more restrictive requirement setting a higher standard MUST be enforced. This variance first tramples on that requirement in sidestepping the 40' frontage requirement it would waive. Even more egregiously, approval of the variance itself further violates additional Code requirements. The criteria for variance approval cannot be trumped by edict while remaining materially unmet.

NO specific demonstration of "unnecessary hardship" sufficient to satisfy ALL Code requirements has been provided by the applicant, by the City Staff, or by the Planning Commission's decision. Indeed, all three have struggled to assert, specify, or verify ANY condition of "unnecessary hardship" that does not conflict with some related portion of the City's Land Use Code, to wit:

"Unnecessary hardship," as stated most restrictively within the Code, can exist ONLY where conditions "... are not created by action(s) of the property Owner or applicant." Further: "Unnecessary hardship" cannot be defined by "financial loss" or "potential" loss.

This speculative developer CHOSE to block his own access to Country Club Court by building a house there. He CHOSE not to explore other options for access. He CHOSE not to discuss other options with neighbors beforehand. He CHOSE not to pursue neighbors' repeated, expressed interest in buying his "Bluff" property beforehand. He then blighted the property and physically degraded the neighborhood by massive slashing of trees and continued disregard of neighbors' values.

This same applicant now asserts "unnecessary hardship" exists because of his own bad choices. This not only defies common sense. It violates the first of the Code's criteria for granting a variance -- no matter WHICH set of variance criteria may be brought to bear.

As if that weren't contorted enough: Comments during the Planning Commission discussion suggested at least one Commissioner there judged the City Commission's previous decision to deny improper right-of-way usage as the requisite "unnecessary hardship." (Or was it the original, misguided attempt to improperly employ a right-of-way increase that was interpreted as an "unnecessary hardship" imposed upon the applicant?)

Notional and speculative hardships do not satisfy the Code. The unceasing attempts to ramrod approval for this fatally flawed plat stretch the meaning of the word "convoluted" to new dimensions.

The ONLY unnecessary hardship beyond doubt here is that imposed upon the neighboring property owners -- especially those within Grandview Heights, who have seen their neighborhood degraded, their values disregarded, and their reasonable pleas for protection trivialized. These taxpaying voters have been compelled to spend thousands of dollars and countless hours because of the City's unwillingness or refusal to enforce its own Code.

We urge you to do so now. Do not accept this deathtrap driveway variance. It would impose increased peril upon all who transit this twisty, hilly, hazardous, and vulnerable section of West 5th Street.

Please: Uphold and carry out your duty to protect the people of Lawrence, Kansas -- not to bail out a single speculator from his own bad choices.

Christopher C. Caldwell

-- Respectfully submitted by Christopher C. Caldwell,
Acting as Agent for Jacqueline Schafer, 1930 West 5th Street

Mary Miller

From: Paul Werner [paulw@paulwernerarchitects.com]
Sent: Friday, July 17, 2009 10:02 AM
To: Mary Miller
Subject: FW: 5th street..
Attachments: Scan001.pdf

Mary

Would you please include this graphic in the packet to the Commissioners. I think they have been furnished another graphic that is completely out of scale. I think it is relevant to keep in perspective what 5' looks like in the scheme of things.

Thanks for your time
Paul

Paul Werner
Paul Werner Architects
PO Box 1536
545 Columbia Drive Suite 1002
Lawrence, Kansas 66044
(785) 832-0804
(785) 832-0890 fax

5'

Jerry Wells
ATTORNEY-AT-LAW

P. O. Box 641
Lawrence, Kansas 66044

Phone: 785-856-3925
Facsimile: 785-856-1583

August 5, 2009

Scott McCullough
Director of Planning and Development
6 E. 6th St., First Floor
Lawrence, KS 66044

In re: PP-04-01-08
A Preliminary Plat for Fifth Street Bluff 0.29 Acres Subdivision
Consisting of One Lot Located at 427 Country Club Court.
Waiver Application on PP-04-01-08

Dear Scott,

On August 4, 2009, I received a telephone call from John Miller asking for further explanation of the intent of my letter of August 1, 2009, written on behalf on my clients. The intent of my clients is to appeal the decision of the Planning Commission in granting the applicant two variances from the subdivision regulations. As I understand the Planning Commission's decision, the Commission granted the applicant a variance from the requirement of a 60' right-of-way, and, a variance from the requirement of a 40' frontage to the lot. However, let me add that it is difficult to know precisely the factual justification on these variances without the minutes of the Planning Commission being available to myself, and my clients. The factual basis for the Planning Commission's finding that there was an "unnecessary hardship" beyond mere financial hardship was muddled at best, and even more difficult to understand without the minutes being available.

I hope that this letter makes clear the intentions of my clients, in so far as it is possible, without the Planning Commission's minutes.

Very truly yours,

Jerry Wells

JW:rw
Encl.

Jerry Wells
ATTORNEY-AT-LAW
P. O. Box 641
Lawrence, Kansas 66044
785-856-3925

August 1, 2009

TO: Mayor Rob Chestnut and the City Commissioners
The City of Lawrence, Douglas County, Kansas

In re: PP-04-01-08
A Preliminary Plat for Fifth Street Bluff 0.29 Acres Subdivision
Consisting of One Lot Located at 427 Country Club Court.

Waiver Application on PP-04-01-08

Mayor Chestnut:

This office represents a group of property owners adjacent to the lot in question on Application for Waiver No. PP-04-01-08.

... History ...

The waiver application on this property was first submitted as a right-of-way dedication submitted to the Planning Commission on May 18, 2009. The Planning Commission passed that application to the City Commission with a recommendation of approval, despite objections by my clients that the frontage requirement of 40 feet was not met, and, that the driveway exit on 5th Street exacerbated an already dangerous traffic situation on 5th Street. A letter outlining those concerns was provided to this Commission dated June 16, 2009. This Commission voiced concerns over the effects that a new driveway would have on an already dangerous road situation on 5th Street and over the

impact on drainage as a result of the contemplated house construction on the lot. Finally, the Commission was concerned that there was an appearance that the interested property owners were not given ample opportunity to address the Planning Commission at the meeting on May 18, 2009, regarding their several objections to the proposed right-of-way. As a result, this Commission voted not to approve the dedication as recommended by the Planning Commission, and to return the application back to the Planning Commission for further consideration. The developer then filed for a waiver of the 40' frontage requirement, and the application proceeded to be heard on July 25, 2009, in front of the Planning Commission. This office filed a letter of objection to the waiver application. That letter is attached hereto and incorporated by reference. Additionally, several of the adjoining property owners also forwarded letters of objection to the Planning Commission. A number of property owners spoke to the issues as well as this office. The Planning Commission approved the waiver application on a vote of 7-0.

... <u>The objection of the property owners</u> ...

The property owners objected to the variance application of the developer because he did not sustain his burden that he complied with all of the requirements of the applicable three criteria necessary as set forth in Sec. 20-813(g)(2). The criteria, and, the failure of the developer to meet his burden in meeting those criteria, are discussed as follows:

- (i) <u>strict construction of the regulations will create an unnecessary hardship on the developer</u>. The first point to note here is that whatever hardship created is

the fault of the developer. Even a minimal amount of planning would have determined that alternative driveway routes were available that would not have violated the 40' frontage requirement. Secondly, the developer has not met the requirement of "unnecessary hardship". Part of that definition is that, "Mere financial loss or the loss of a potential financial advantage does not constitute unnecessary hardship." The facts reveal that the developer's sole purpose for asking for a variance is to allow him to build a spec home on the property, and for no other reason. That is about money and profit from the sale of the spec home. No other construction of the terms "unnecessary hardship" is possible under the strict construction guidelines of the regulations. See Sec. 20-815(a)(b) Significantly, the Planning Commission could not articulate any other legitimate reason other than a financial hardship on the developer to get the waiver. Financial hardship does not meet the burden imposed by the regulations and, therefore, the variance application by the developer must fail as a result.

- (ii) The proposed variance is in harmony with the intended purpose of these regulations. This requirement is discussed in detail on page 5 of the letter of objection dated July 17, 2009, and attached, but suffice it to say that the variance proposed is not in harmony with the intended meaning of neither the subdivision regulations or Horizon 2020.

- (iii) The public health, safety and welfare will be protected. It is simply undisputed that an additional driveway onto 5th Street, as contemplated, will

exacerbate an already dangerous roadway. There was some discussion about referring the safety question to another advisory board, but in essence the planning staff has yet to proffer any legitimate plan to protect the adjoining property owners from the dangers inherent in adding an additional driveway entry at the point proposed. This issue was of particular concern of this Commission yet was not definitively addressed by the planning staff or the Planning Commission.

The concern voiced by this Commission regarding drainage on the lot was not even touched upon by the Planning Commission.

The only conclusion this Commission can reasonably reach is that the developer has not sustained his burden as to all three of the criteria to be granted a variance. For that reason, my clients would urge this Commission not to approve the variance application of the developer.

Beyond the detailed objections set-forth above, there is an overarching concern that my clients would like to voice. That is their heartfelt disappointment and disillusionment with the failure of the process to protect them and their interests. Here is a group of good citizens that entered into the process believing that the subdivision regulations would be enforced as written. A rule is a rule. They have expended time, money and effort believing that the rule of law would prevail. This is a situation not of their making. It was the result of a total lack of planning on the part of the developer, and a Planning Commission that seems intent on accommodating a developer that ignored the subdivision regulations at the cost of the harmony and safety of their unique

neighborhood. They do remain hopeful that this Commission will reverse the Planning Commission.

Respectfully submitted,

Jerry Wells

JW:rw
Attachment

Jerry Wells
ATTORNEY-AT-LAW
P. O. Box 641
Lawrence, Kansas 66044
785-856-3925

July 17, 2009

TO: Chairman Brad Finkeldei and Commissioners of the Lawrence Douglas County Metropolitan Planning Commission

In re: PP-04-01-08
A Preliminary Plat for Fifth Street Bluff 0.29 Acres Subdivision
Consisting of One Lot Located at 427 Country Club Court.

... Objection to Waiver of Frontage Requirements
On PP-04-01-08 ...

Mr. Chairman and Commissioners:

This office represents a group of adjacent property owners to property that is the subject of a Waiver Application on PP-04-01-08. The preliminary plant was submitted by JMC, Inc.

The preliminary plat first came to this Commission's attention on May 18, 2009. This Commission approved the plat on a 7-0 vote, and forwarded the matter to the City Commission for the dedication of a right-of-way easement. My clients objected strenuously to that approval, and the matter was returned to this Commission for further consideration, particularly in specific areas of concern expressed by the City Commission during their meeting of June 23, 2009. Those areas of concern expressed by the Commissioners in discussion during the meeting are as follows:

- The objecting property owners were not given a full opportunity to voice their concerns at the first Planning Commission Meeting on May 18, 2009.
- The topography of the lot in question raised a considerable number of questions concerning drainage off this lot onto adjacent property.
- The developer wishes to construct a driveway entry on 5th Street. That location raises a number of safety concerns.

My clients remain adamantly opposed to the proposed dedication as currently configured. There are a number of sound reasons why they oppose the dedication.

... The Frontage Requirement ...

The frontage of the proposed dedication is less than the 40' requirement of Sec. 20-815 of the Code. The planning staff first recommended that a right-of-way be dedicated that would expand the frontage to the 40' requirement by moving the frontage west of the present frontage. This is contrary to the proper use of a right-of-way according to the Attorney General. (See Opinion attached and incorporated herein and my letter of June 16, 2009, to the City Commissioners as to this issue.) Strangely, the Subdivision Regulations do not define right-of-way, but the Attorney General's opinion seems to make it clear that right-of-way dedications are not to be used for private purposes, which would be the effect of the planning staff's suggestion to allow the builder less than the 40' requirement that seems contrary to the interpretive rules of the Subdivision regulations as set forth in Sec. 20-815, particularly:

20-815(1)

(1) Where the conditions imposed by the provisions of these regulations are either more restrictive or less restrictive than comparable conditions imposed by any other provisions of any other applicable law, ordinance, resolution, rule, or regulation of any kind, the regulations which are more restrictive and impose higher standards or requirements shall govern.

20-815(b) definitions. Section one.

(1) Words used in this Article have the standard dictionary definition unless they are defined in this section. Words defined in this section shall have the specific meaning assigned, unless the context expressly indicates another meaning.

Given these rules of construction, it seems obvious that when the definition of frontage in the subdivision regulations is a boundary "abutting" a street or road, and that the frontage requirement is 40'. The legislative intent seems clear. The requirement is 40' not 37' or 38', and any attempt to cover that requirement by the use of a private right-of-way is unlawful.

... The Waiver ...

The developer now asks for a waiver from the frontage requirement of 40'. "Waiver" is defined at sec. 20-815 of the Code as follows:

> "Permission to depart from the Design Standards of the regulations when the application of a specific standard is so unreasonable that it would prevent the logical subdivision of the property."

The adjoining property owners urge this Commission to find that, if logic and planning would have been applied by the developer, the ingress and egress for this lot would have been located on the Country Club Court frontage of the lot. The safety and frontage problems would have been eliminated. Additionally, under

the strict construction interpretive rules of the Regulations, it is not unreasonable to require the 40' frontage as required.

Variances are allowed under Sec. 20-813(g) of the Subdivision regulations, but all three conditions must be met in order for a variance to be granted:

"(2)(i) Strict application of these regulations will create an unnecessary hardship upon the developer.

(2)(ii) The proposed variance is in harmony with the intended purpose of those regulations.

(2)(iii) The public health, safety and welfare will be protected."

Taking these mandatory requirements in order:

(2)(i). Strict application of these regulations will create an unnecessary hardship upon the developer. It is very clear that if there is hardship upon the developer, it is self-inflicted. The configuration of this lot would dictate that the most obvious and sensible ingress and egress for the entire lot would be the frontage on Country Club Court, not for just one residence, but for both residences planned on the lot. With good planning, the safety and, to a lesser extent, the drainage problems would have been solved. Instead, the developer chose frontage on 5th Street creating a very real safety issue for the residents on 5th Street. A variance, if it is anything, is an equitable remedy for deserving applicants for a variance. However, there is an equally important common-law equity principle; that he who seeks equity must do equity. It is this principle that the developer obviously violates. Firstly, the property owners contacted the developer early in this process to voice their concerns. The developer all but ignored them. The lack of good planning on the part of this developer is obvious. In essence, the property owners have expended

time, money and considerable energy opposing a thoughtless preliminary plat. The fault lies at the feet of the developer.

(2)(ii). The proposed variance is in harmony with the intended purpose of those regulations. The proposed variance is not only not in harmony with the intended purpose of the regulations, but to a large extent the variance directly conflicts with that stated purpose. For example, under Sec. 20-801(c). Purpose and Intent (of the regulations) (ii) states the regulations are intended to … "contribute to conditions conducive to health, safety, aesthetics, convenience, prosperity, and efficiency". As to this standard, the proposed variance fails miserably. The safety, or, lack thereof, factor cannot be underestimated, as will be discussed in detail hereafter. The developer has already destroyed a number of mature trees on the lot. Mature trees are a hallmark of this unique neighborhood. So much for aesthetics. To say that the intended placement of the driveway is an inconvenience is an understatement. It is altogether dangerous.

(2)(iii). The public health, safety and welfare will be protected. This last standard listed is particularly meaningful under the facts. The property owners along 5th Street can testify as to the dangerous condition of 5th Street at this exact location. There is a long history of accidents at this location, particularly in winter. The location of the proposed driveway only adds to this dangerous situation. Remarkably, neither the staff nor the developer have offered anything by way of solution to the added safety burden placed on the property owners. The staff relies primarily on a site-distance study to justify the safety requirement, which is only a mediocre predictor of dangerous conditions. The developer simply offers nothing. Another noteworthy potential problem incorporated into this standard, is drainage. The adjacent property owners will testify not

only as to potential drainage problems, but existing drainage issues that will only be exacerbated by the development of the lot in question. In any event, the planning staff has not offered any plan which will protect the health, safety and welfare under the facts, which they are mandated to do by the clear meaning of this regulation. Again, the City Commission expressed serious concern over the safety issues obviated by the proposed frontage exit.

„ Alternate Frontage needs to be Explored …

Apparently, neither the planning staff nor the developer has explored the options for alternate ingress-egress to this lot. There may be an alternate ingress-egress possible on County Club Court, or, onto Iowa Street. It would seem that those possibilities need to be explored and eliminated before this Commission can legitimately approve the variance as stated.

… Horizon 2020 – Points of Nonconformance …

The proposed variance conflicts with the following provisions of Horizon 2020:

> "Much of the community's overall image and appearance is related to the unique character of its neighborhoods, and these features should be preserved."
>
> GOAL 3: Neighborhood Conservation
>
> The character and appearance of existing low-density residential neighborhoods should be protected and improvements made where necessary to maintain the values of properties and enhance the quality of life.
>
> Policy 3.3: Encourage Compatible Infill Development
>
> f. Maintain the physical form and pattern of existing, established neighborhoods to the extent possible by incorporating the following principles:

1. Building orientation should reflect the predominant neighborhood pattern and existing street/roadscape.

2. Continuity of vehicular and pedestrian circulation patterns should be considered.

3. Open space patterns and front, side and rear yards characteristic of the neighborhood should be maintained.

4. Building height should be compatible with the average height of homes in the neighborhood, especially adjacent residences.

Policy 3.6: Promote Neighborhood Identity

Preserve and enhance the visual and environmental character of existing neighborhoods.

Policy 3.7: Involve Neighborhood Residents

Encourage the participation and organized involvement of neighborhoods in the planning of and development process for their neighborhoods.

GOAL 5: Create a Functional and Aesthetic Living Environment

Create and maintain neighborhoods that re aesthetically pleasing and functionally efficient and practical.

Policy 5.1: Preserve and Protect the Environment

Natural environmental features within residential areas should be preserved and protected. Natural vegetation and large mature trees in residential areas add greatly to the appearance of the community as a whole and should be maintained. Changes to the natural topography should be minimal.

... Conclusion ...

The variance application must fail because:

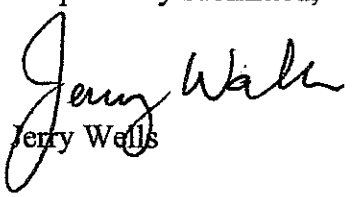
1. The strict construction of the applicable Subdivision Regulations does not allow

less than a 40' frontage;

2. The developer has wholly failed to sustain his burden to show that he met all three requirements of the variance regulation. In fact, allowing the variance may exacerbate an already dangerous situation;
3. If there is a hardship involved, it is on the adjacent property owners who are paying for the developer's obvious and singular lack of planning. If the developer has, in turn, suffered hardship then it is entirely self-inflicted, and negates any equity remedy preferred by the developer; and
4. The variance is in direct conflict with the Goals of Horizon 2020.

The property owners urge this Commission to deny the variance for the reasons stated.

Respectfully submitted,



Jerry Wells

Jerry Wells
ATTORNEY-AT-LAW
P. O. Box 641
Lawrence, Kansas 66044
785-856-3925

June 17, 2009

TO: Mayor Rob Chestnut and the City Commissioners
The City of Lawrence, Douglas County, Kansas

In re: **ADDENDUM** to Original Letter Dated June 16, 2009 re Objection to Dedication

PP-04-01-08
A Preliminary Plat for Fifth Street Bluff 0.29 Acres Subdivision
Consisting of One Lot Located at 427 Country Club Court.

Mayor Chestnut:

This is an Amendment to the original letter dated June 16th, 2009, wherein the adjoining property owners object to the proposed plat and dedication of a ROW concerning 427 Country Club Court. The property owners further object to the proposed plat and dedication of a ROW on the lot in question because it is in violation of the subdivision design standards set forth in Section 20-810 sub. (8) of the Regulations.

As a matter of clarification, the first paragraph of the June 16th letter describes the Schafer property as being north of the lot in question. It is actually more east than north of that property.

Very truly yours,

Jerry Wells

JW:rw

Jerry Wells
ATTORNEY-AT-LAW
P. O. Box 641
Lawrence, Kansas 66044
785-856-3925

June 16, 2009

TO: Mayor Rob Chestnut and the City Commissioners
The City of Lawrence, Douglas County, Kansas

In re: PP-04-01-08
A Preliminary Plat for Fifth Street Bluff 0.29 Acres Subdivision
Consisting of One Lot Located at 427 Country Club Court.

Mayor Chestnut:

This letter will serve as an objection to the dedication of easements and rights-of-way of a 0.29 acre lot located in the Fifth Street Bluff at 427 Country Club Court. The preliminary plat was submitted by JMC Construction, Inc. The objections are from all property owners in the Grandview Heights area, and are all represented by this office. Two of the objecting property owners are adjacent owners, one just north and one just to the south of the 0.29 lot in question. A list of all the objecting owners with their addresses is attached to this letter as "Exhibit A" and incorporated herein.

The objecting property owners object to the approval of the preliminary plat and any and all dedications of easements and right-of-ways appurtenant to the described 0.29 acre lot for the following reasons:

1. Firstly, and most significantly, the exact specifications of the existing right-of-way cannot be verified at this time because of unresolved physical data discrepancies. A preliminary letter from All Points Surveying, L.L.P., a licensed surveyor, confirms this and that letter is attached and incorporated herein as Exhibit "B". The implications of this are significant, including the possibility that until the exact positioning, location, and measurements of the right-of-way are verified, the right-of-way may intrude on the property of two of the property owners adjacent to the property in question. This is a threshold issue regarding the application for dedication of a right-of-way.

   The Planning Department's suggested fix for the inadequate frontage is to dedicate a right-of-way, which moves the frontage of the lot up the triangular lot

until 40' of frontage is reached. This flies in the face of the Code's definition of frontage, which is found at Sec. 20-815. "The boundary of a lot or Residential Development Parcel that abuts a street or a road." Words in the Code have the standard dictionary definition unless they are defined in Sec. 20-815, i.e., frontage. The "frontage" definition dictates that the frontage is that boundary of the property in question that "abuts" a street or road. Webster's dictionary definition of "abut" is "to touch along a border or to border on". In short, the frontage of the lot must touch 5th street. To move the frontage by using a right-of-way to meet the frontage 40' requirement is totally inconsistent with the definition of frontage in the Code. See overview attached and incorporated herein as "Exhibit C". Moreover, the use of a right-of-way to accommodate frontage requirements is simply a misuse of a right-of-way.

2. Selecting out a single property for dedication of additional right-of-way thwarts the purpose of a right-of-way, which is public travel, not as a device to save the developer from his lack of due diligence in determining the frontage specifications. Two existing plats indicate the frontage of the lot in question to be either 36 or 38 feet, far short of the required 40 feet required frontage. Rules of Construction of The Code would dictate the most restrictive 40' requirement. See RS10.20-601(a). The Developer is required to provide the Planning Director with accurate data, which he clearly has not done. 20-802(f)(g).

3. The purpose and intent of the subdivision regulations are to contribute to conditions conducive to health, safety, aesthetics, prosperity and convenience, 20-801(1)(ii), and, to provide for the conservation and protection of human and natural resources, 20-801(1)(iii), and, finally, to provide for the conservation of existing neighborhoods… 20-801(2)(ii). [Emphasis supplied.] The objecting landowners submit that the developer has generally ignored these purposes by destroying a number of mature canopy trees on the property in question. This particular area of the city is well known for its dense mature trees lending a tranquil character to the aesthetics of the area. Moreover, the Code emphasizes, if not dictates, canopy trees to abut the streets. 20-811(g). The haphazard destruction of the canopy trees may in fact cause substantial drainage problems to the down-stream neighbors.

4. The developer has inflicted substantial potential safety problems for the neighboring users of 5th street which fronts the lot in question. The developer plans a driveway at the frontage line of the lot, which would place a significant additional hazard by automobiles entering and exiting this proposed driveway. This lot lies at the base of a blind hill with a steep grade and an uncurbed street. It is an additional example of the lack of planning by this developer. The developer purchased this property with a natural north-side exit on 427 Country Club Court. With just a little vision, an aesthetically pleasing and much safer design could have been utilized by facilitating a joint-use driveway for both lots at the Country Club Court location.

5. The developer's march through the platting process underscores the apparent disregard for Grandview Heights' unique character, terrain and environment and for the stated purposes of the Code.

The objecting property owners understand the lure of in fill development as a goal of this Commission, but they do not understand why the unique character of their neighborhood should be sacrificed on that alter to accommodate a developer who systematically ignored good planning, vision and the stated purposes of the subdivision regulations.

In summary, the objecting property owners would emphasize two crucial points:

- Until the exact measurements of the property in question are verified, this process cannot move forward. It is the threshold issue.

- The use of a right-of-way to accommodate a 40' frontage is a misuse of a right-of-way. Again, the primary purpose of a road right-of-way is for public travel. A right-of-way is the land dedicated to the State, County or City for travel by the general public. *Kansas University Transportation Center Right-of-Way Guide*, 2007.

Very truly yours,

Jerry Wells

Jerry Wells

JW:rw
Attachments

Grandview Heights Homeowners Opposed to "5th St. Bluff Subdivision"
& Any Related "Dedication of Additional Right of Way"

Jacqueline Schafer,
1930 W. 5th St.

Tom Boxberger,
2002 W. 5th St.

Sheri Boxberger,
2002 W. 5th St.

Mrs. H.P. Jones,
1912 W. 5th St.

Barton Yost,
1924 W. 5th St.

Georgette Yost,
1924 W. 5th St.

Dean Radcliffe,
1921 W. 5th St.

Sue B. Radcliffe,
1921 W. 5th St.

Richard Hernandez,
2008 W. 5th St.

Nancy M. Hernandez,
2008 W. 5th St.

Deborah K. Johnston,
1918 W. 5th St.

Joett Hass,
1918 W. 5th St.

Lance Antle,
1908 W. 5th St.

EXHIBIT A

ALL POINTS SURVEYING, LLP
P.O. Box 4444 Lawrence, KS 66046 • 785-832-2121P • 785-832-2122F

June 12, 2009

To Whom It May Concern:

As of today's date, there is not sufficient physical evidence of the boundary of the proposed " Fifth Street Bluff Subdivision" plat to accurately determine the relationship of the proposed street right of way to the paved portion of Fifth Street that the proposed plat gains access from.

Steven D. Williams, PLS 1391
All Points Surveying, LLP

EXHIBIT B

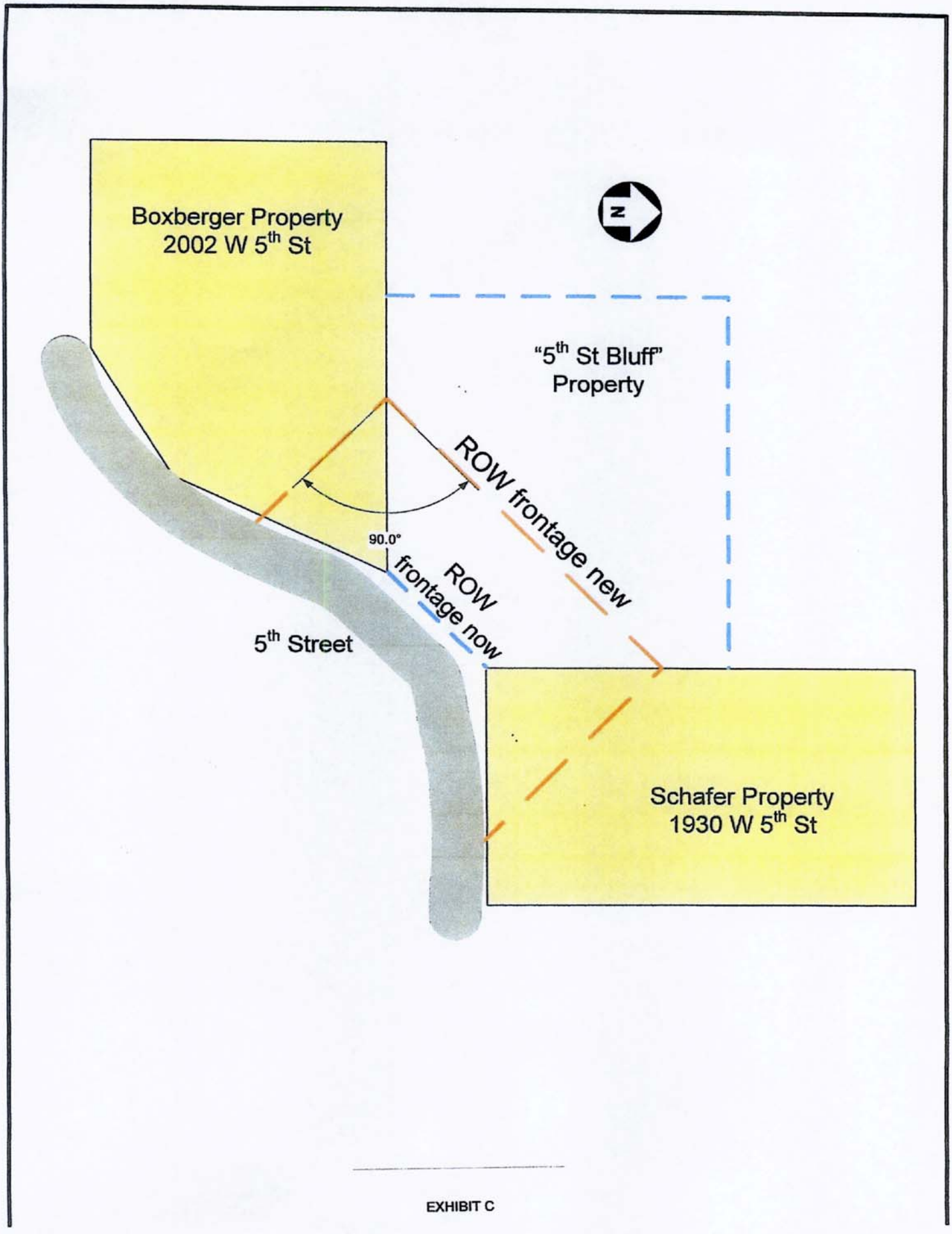

Boxberger Property
2002 W 5th St
N
"5th St Bluff"
Property
ROW frontage new
90.0°
ROW
frontage now
5th Street
Schafer Property
1930 W 5th St

EXHIBIT C

October 30, 2003

ATTORNEY GENERAL OPINION NO. **2003-28**

The Honorable Karin Brownlee
State Senator, 23rd District
1232 S. Lindenwood Drive
Olathe, Kansas 66062

Re: Corporations--Telegraph, Telephone and Transmission Lines--Rights, Powers and Liabilities of Telecommunications Service Providers; Occupation of Public Right of Way; Prohibition of Use; Definition of "Public Right-Of-Way"

Synopsis: K.S.A. 2002 Supp. 17-1902 addresses the rights and duties of cities and telecommunication service providers with respect to "public rights-of-way." A utility easement that has been dedicated to a city is not a "public right-of-way" as that term is defined by K.S.A. 2002 Supp. 17-1902. Cited herein: K.S.A. 12-406; 12-406a; 12-512a; 12-631v; 12-752; 12-3201; 13-2409a; 17-1901; K.S.A. 2002 Supp. 17-1902; K.S.A. 68-167; 47 U.S.C. § 253.

* * *

Dear Senator Brownlee:

You inquire regarding the actions of the City of Lawrence in assessing administrative fees against a telecommunication service provider for its use of "dedicated public utility easements." You inquire whether such easements fall within the definition of "public right-of-way" as defined by K.S.A. 2002 Supp. 17-1902(a)(1). If so, the City is precluded from assessing fees beyond those listed in the statute.(1)

K.S.A. 2002 Supp. 17-1902 governs the rights and responsibilities of cities and telecommunication service providers with regard to "public rights-of-way." Telecommunication service providers are guaranteed the right to place their equipment "along, across, upon and under any public right-of-way in this state."(2) Cities cannot impose "unreasonable conditions, requirements or barriers for entry into or use of the public rights-of-way"(3) but can impose certain fees enumerated in the statute for a provider's "use and occupancy" of public rights-of-way.(4) Fees, other than those listed in the statute, cannot be imposed on telecommunication service providers for their use of public rights-of-way.(5)

2002 Senate Bill No. 397 (S.B. 397), which defines "public right-of-way,"(6) was the product of a collaborative effort between municipalities and telecommunication service

providers spurred by federal telecommunications legislation.(7) 47 U.S.C. § 253 prohibits state and local governments from enacting regulations that "prohibit or have the effect of prohibiting the ability of [an] entity to provide . . . interstate or intrastate telecommunications service." Federal law does, however, allow cities to manage "the public rights-of-way" and assess fees for such use.(8) Unfortunately, this term is not defined in the federal telecommunications statutes or appellate court decisions interpreting those statutes.

Prior to the enactment of S.B. 397, telecommunication service providers in Kansas supported 2001 Substitute for Senate Bill No. 306 (S.B. 306) which, among other things, defined "public right-of-way" to include utility easements.(9) When cities objected on the basis that the bill interfered with their ability to control public rights-of-way,(10) the Legislature required cities and telecommunication service providers to work together on legislation that would accommodate the interests of both groups.

One of the objectives of the Kansas League of Municipalities (League) and the cities that participated in crafting S.B. 397 was to define "public rights-of-way." Once defined, the bill then established parameters for their use by telecommunication service providers. With the support of the League, various cities and telecommunication service providers, the Legislature enacted S.B. 397 which defines "public right-of-way" as follows:

> "'Public right-of-way' means *only* the area of real property in which the city has a *dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way.* The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts." (11)

The definition of "public right-of-way" is unfortunate because it employs the very word that is being defined: "'public right-of-way' means. . . right-of-way interest. . . ."

In property law, a right-of-way is simply a person's legal right to pass through property owned by another.(12) It has been described as an easement to pass or cross lands of another; a servitude with the fee interest remaining in the property owner.(13) However, a right-of-way can also be acquired and held by a city in fee simple through the platting/dedication process,(14) condemnation or contract. In short, how a right-of-way is held by a city (*i.e.* easement or fee simple) is not helpful in determining whether a "dedicated public utility easement" is a "public right-of-way."

The League maintains that "right-of-way" is a term of art that means a public thoroughfare.(15) This interpretation is borne out by the second sentence of the definition that refers to "streets, alleys, avenues, roads, highways, parkways, and boulevards." There are also Kansas appellate court decisions that use the term "right-of-way" to refer to property that is used for public travel.(16)

Sprint's position is that a "dedicated public utility easement" is included in the definition

of "public right-of-way" because a utility easement is a property interest that can be dedicated to a city through the platting process in the same way that a developer would dedicate streets and alleys.(17) However, while a city may accept a dedication of a utility easement, this does not mean such easement is a "right-of-way interest." Kansas statutes treat easements and rights-of-way as two distinct creatures with "public rights-of-way" allied with public thoroughfares.(18) In short, while rights-of-way can be easements, not all easements are rights-of-way.

Prior to the 2002 amendment to K.S.A. 17-1902, telecommunication service providers had the right to "set their poles, . . . wires and other fixtures along, upon and across any of the public *roads, streets, and waters of this state* in such manner as not to incommode the public in the use of such roads, streets, and waters."(19) In *City of Shawnee v. A.T.& T. Corp.,*(20) the Court interpreted K.S.A. 17-1901 and 17-1902 to allow telecommunication service providers to lay their cables only on public rights-of-way - not on publically owned land that is not a public right-of-way. Consequently, while a city may acquire property through the dedication process that is to be used only for public utilities, this acquisition does not transform the property into a right-of-way.

We are also mindful that when the telecommunication service providers, the League, and the cities finally blessed legislation(21) that addressed telecommunication franchises and cities' control of rights-of-way, the definition of "public right-of-way" did not specifically include the reference to utility easements that had appeared in the doomed S.B. 306 definition. Also, as indicated previously, the current definition elaborates on the nature of the "dedicated or acquired right-of-way interest" by indicating that this interest "include(s) the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way." Applying the doctrine of *maxim expressio unis est exclusio alterius,*(22) it is arguable that when the Legislature included those terms, it intended to exclude utility easements dedicated to a city.

In light of the legislative history of K.S.A. 2002 Supp. 17-1902 and the fact that the definition of "public right-of-way" appears to be limited to public thoroughfares, it is our opinion that the definition does not include a public utility easement that has been dedicated by a property owner to a city.

Sincerely,

Phill Kline
Attorney General

Mary Feighny
Assistant Attorney General

PK:JLM:MF:jm

FOOTNOTES

Click footnote number to return to corresponding location in the text.

1. K.S.A. 2002 Supp. 17-1902(o).

2. K.S.A. 2002 Supp. 17-1902(b).

3. K.S.A. 2002 Supp. 17-1902(m).

4. K.S.A. 2002 Supp. 17-1902(n).

5. K.S.A. 2002 Supp. 17-1902(o).

6. 2002 S.B. 397, § 2 [codified at K.S.A. 2002 Supp. 17-1902(a)(1)].

7. 47 U.S.C. § 253.

8. 47 U.S.C. § 253(c).

9. "'Public right-of-way' means the area on, below, along or above a public roadway, highway, street, public sidewalk, alley, waterway or *utility easement in which a city has an interest*. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service or easements obtained by utilities or private easements in platted subdivisions or tracts." 2001 Substitute for S.B. No. 306, § 3(g) (emphasis added).

10. *Minutes,* Senate Commerce Committee, February 16, 2001.

11. K.S.A. 2002 Supp. 17-1902(a)(1) (emphasis added).

12. Black's Law Dictionary 1326 (7th Ed. 1999).

13. *Lee v. Missouri Pacific R. Co.,* 134 Kan. 225 (1931); *Spurling v. Kansas State Park & Resources Authority*, 6 Kan.App.2d 803 (1981).

14. K.S.A. 12-406, 12-406a, 12-752.

15. July 28, 2003 letter from Kimberly Gulley, Director of Policy Development & Communications for the League of Kansas Municipalities.

16. *State v. Deines,* 268 Kan. 432 (2000) (road); *Holmes v. Sprint United Telephone of Kansas,* 29 Kan.App.2d 1019 (2001) (alley).

17. June 30, 2003 letter from Lisa Creighton Hendricks, Senior Attorney for Sprint.

18. *See* K.S.A. 12-631v ("[t]he governing body of any city shall have the power to condemn . . . lands for the construction of sewage disposal plants and . . . *any easements therein or rights-of-way* necessary for the construction . . . of sewers. . ."); K.S.A. 12-512a ("[a]ny city . . . in vacating . . . any street . . . may reserve to the city and public utilities *such rights-of-way and easements* as in the judgment of the governing body of the city are necessary. . . "); K.S.A. 12-

752(f) ("[s]uch [subdivision] regulation shall contain a procedure for issuance of building permits . . .which shall take into account the need for adequate street *rights-of-way, easements*, improvement of public facilities, and zoning regulations. . ."); K.S.A. 13-2409a ([a]ll water lines located in or on *public rights-of-way, roads, streets, lands, or easements* . . . shall be subject to regulation by the governing body of such city"); K.S.A. 68-167 (unlawful for a person to erect within 50 feet of a right-of-way on a federal or state highway a flashing red light unless the light was placed on the "*road, street, highway or public right-of-way*"); K.S.A. 12-3201 (city may regulate the planting and removal of shrubbery "upon all *streets, alleys, avenues, boulevards and public rights-of-way* within such city") (emphasis added).

19. K.S.A. 17-1901; 17-1902; *United Telephone Co. of Kansas v. City of Hill City*, 258 Kan. 208 (1995). *See Holmes v. Sprint United Telephone of Kansas*, 29 Kan.App.2d 1019 (2001).

20. 910 F.Supp. 1546 (D.Kan. 1995).

21. 2002 S.B. 397.

22. *State Dept. of Admin. v. Public Employees Relations Board Bd.*, 257 Kan. 275 (1995) (when legislative intent is in question, the Court can presume that when the Legislature expressly includes specific terms, it intends to exclude any items not expressly included in that specific list).

  | Opinion Number List | Download WordPerfect version (28161 bytes)
| Search By: Number | Date | Requestor | Topic | Synopsis | Attorney General | Author | Fulltext |

Comments to: WebMaster, ksag [at] washburnlaw.edu.
Processed: November 24, 2003.

URL: http://ksag.washburnlaw.edu/opinions/2003/2003-028.htm.

TO: Chairman and Commissioners, Lawrence DCM Planning Commission
RE: **Noncompliance of Variances** for "Fifth Street Bluff Subdivision"
DATE: July 20, 2009

In seeking to elude the City's 40' frontage requirement, these two variances represent blatant noncompliance with other explicit code requirements:

- All regulations "shall" be read "literally." This is stated clearly and without exception at the outset of the City's Land Development Code.
- The word "shall" is "mandatory" in usage. Not optional.
- "Regulations are no more or less strict than stated." (Exactly 40')
- The "more restrictive" provision (40') must be upheld where conflicts between regulations occur. (Required by the Land Development Code and the Subdivision Regulations.)
- For subdivisions, "... the regulations which are more restrictive and impose higher standards (40') or requirements (40') shall govern."

In defining the first of three "criteria" required for any variance, **the Code twice states: "Mere financial loss or the loss of a potential financial advantage does not constitute unnecessary hardship." In other words, "unnecessary hardship" is explicitly NOT to be defined by applicant's financial interests. Any "hardship" alleged by the developer here is self-inflicted, constructive, and of dubious, speculative origin at best**.

The other two criteria required for allowing a variance remain materially unmet by the developer, by his spokesman's submitted statements, and indeed by the city staff. Multiple, itemized points of nonconformance with Horizon 2020 have been totally ignored, disregarded, or dismissed by all those parties.

Finally, and as also itemized repeatedly to City planners and officials: The persistent, inherent dangers of the deathtrap driveway proposed for this project cannot be overcome by denial or design, despite the City's attempts at both. Again: The danger is **INHERENT** at this curved, hilly location -- unlike the misleading comparisons of West Hills Parkway and Morning Dove Circle.

Instead of denying these valid objections in whole or in part, the City would better deny the requested improper, noncomplying variances forthwith.

Jacqueline Schafer Chris Caldwell

Jacqueline Schafer, 1930 W. 5th St.
Chris Caldwell, agent for Jacqueline Schafer

TO: Lawrence City Planning Staff
Lawrence-Douglas County Planning Commission

FROM: **ALL PROPERTY OWNERS** of Grandview Heights Subdivision
(includes all Salllie Mae Hill W. 5th St. Residents)

SUBJECT: **Safety Tipping Point Overloaded:**
"Sight Distance Study" & Proposed Plat
for "5th Street Bluffs Subdivision"

DATE: April 20, 2009

We want to call planners' immediate attention to certain facts that may be unknown to nonresidents of the street and neighborhood directly impacted by the subject proposal. To foster understanding among those unfamiliar with this segment of West 5th Street, here is a common-sense description of what's being proposed at the outset:

ACCESS IS BEING SOUGHT ALONG A NARROW, RESTRICTING, UNLIGHTED CURVE ON A STEEP, TWISTING, OLDER STREET WITH NO SHOULDERS, OTHER SAFETY MARGINS, OR WIDTH TO PASS. Visualize a short, tight "chicane" with soft ditches, no direct street lighting, and no inviting escape path from any imminent collision.

The specific point of proposed access is inherently and especially dangerous for additional reasons including the following:

- **Young children** reside in adjacent property on 5th St. They have friends who visit. These children are unacquainted with "sight distance triangles" and may be expected to roam without regard to them. Their safety **must not be compromised.** Nor should that of other children, grandchildren, guest playmates, elderly pedestrians, or bicyclists who may visit or transit this sidewalk-free neighborhood.

- At present, no existing hillside driveway is closer than 80 feet to the next on the same side of this immediate, sloping section of West 5th St. Slashing that safe distance to under 40 feet at the location of the proposed driveway **would introduce added, near-certain collision probability over time** for drivers exiting the now two, too-close driveways. Further: Transiting traffic arriving westbound from above may not see cars with drivers hesitantly exiting either driveway in time to brake or evade collision. Darkness would increase probability of collision and the considerable likelihood of serious injury. "Sight distance triangles" do not provide nighttime illumination or quicker reaction times.

- In **severe winter conditions**, this steep hilllside street section becomes snow-packed, ice-covered, and **acutely treacherous.** Cars sliding off-road, slipping into ditches and retreating backwards downhill (particularly from the point of proposed

access) have been common occurrences in recent years. Residents' consistent experience has been that this steep street is generally one of the last in its area to be plowed and cleared. "Sight distance triangles" do not provide traction or untangle wreckage.

Further: The existing plat for Grandview Heights omits the subject unplatted parcel entirely from its intended neighborhood planning. No stated intent for access is indicated. Indeed, the block-form "PLATE" appearing lower left on that subdivision plat **EXCLUDES** any access point whatsoever to the subject parcel along 5th Street. This suggests that the **exclusion from 5th Street was quite intentional and made visibly explicit by safety-minded, thoughtful planners of the past.**

It is reasonable to conclude that common-sense considerations prevailed during earlier, historic decisions to exclude the landlocked parcel from hazardous, narrow, alley-like access intruding between broad-frontage lots on 5th Street. Departing from these recorded precedents seems unwarranted, unwise, and manifestly unsafe. **Why diminish or endanger life in Lawrence?**

Please do not allow this proposed dangerous, intrusive access or undesirable plat proposal to proceed toward approval. Thank you for your serious review, your time, and your commitment to preserve and protect.

Jacqueline Schafer
1930 W. 5th St.
Georgette Yost
1924 W. 5th Street
Barb
1924 W. 5th
Mrs. Th. P. Jones
1912 W. 5th
L O Radcliffe
1921 W 5th.
Dee K. Radcliffe
1921 W 5th St.
Nancy M Hernandez - 2008 W. 5th
M S. Henry 2008 W. 5th
Nicholas Davis
1930 W 5th St

Deborah K. Johnston
1918 W. 5th Street
Dana Hass
1918 W. 5th Street
Tom Boxberger
2002 W. 5th St.
Sheri Boxberger
2002 W. 5th St
Gretchen Boxberger
2002 W 5th St
Elyse Boxberger
2002 W. 5th St.
Lana Mutt
1908 W. 5th St

FROM ORIGINAL "GRANDVIEW HEIGHTS" SUBDIVISION PLAT OF RECORD

RE: PROPOSED "5TH STREET BLUFFS SUBDIVISION"

- 4/20/09

NO 5th St. Access

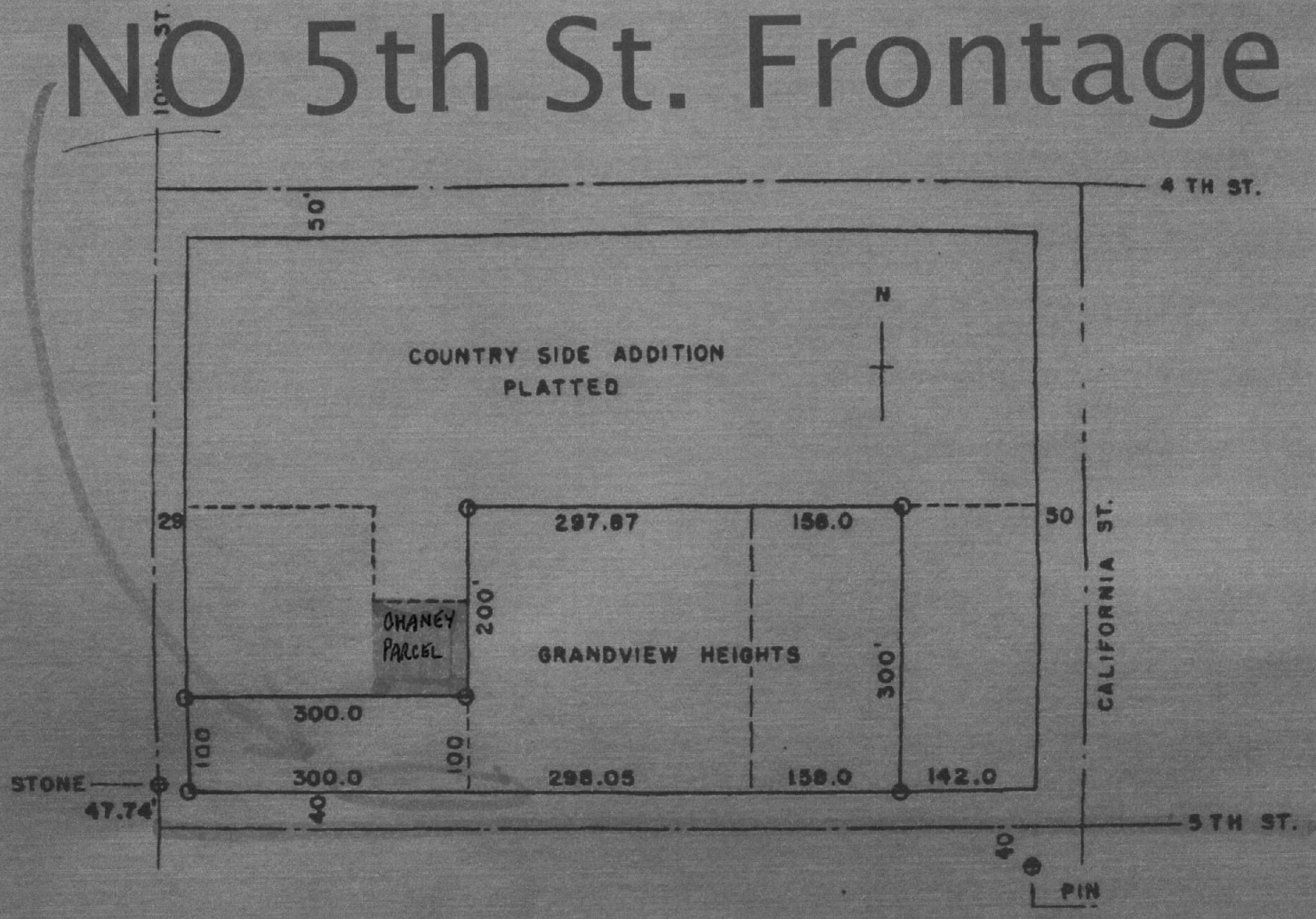
THIS PLATE REPRESENTS A TRACT OF LAND DISCRIBED AS FOLLOWS:

THE WEST 158.0 FEET OF THE SOUTH 1/2 OF THE EAST 1/3 AND THE SOUTH 1/2 OF EAST 1/2 OF THE WEST 2/3 OF BLOCK 29 WEST LAWRENCE. ALSO BEGINNING AT THE SOUTH WEST CORNER OF SAID BLOCK 29 THENCE NORTH 100 FEET THENCE EAST 300 FEET THENCE SOUTH 100 FEET THENCE WEST 300 FEET TO POINT OF BEGINNING.

FROM ORIGINAL "GRANDVIEW HEIGHTS" SUBDIVISION PLAT OF RECORD

RE: PROPOSED "5TH STREET BLUFFS SUBDIVISION"
-4/20/09

NO 5th St. Frontage



THIS PLATE REPRESENTS A TRACT OF LAND DISCRIBED AS FOLLOWS:

THE WEST 158.0 FEET OF THE SOUTH 1/2 OF THE EAST 1/3 AND THE SOUTH 1/2 OF EAST 1/2 OF THE WEST 2/3 OF BLOCK 29 WEST LAWRENCE ALSO BEGINNING AT THE SOUTH WEST CORNER OF SAID BLOCK 29 THENCE NORTH 100 FEET THENCE EAST 300 FEET THENCE SOUTH 100 FEET THENCE WEST 300 FEET TO POINT OF BEGINNING.

TO: Lawrence City Commissioners
RE: Dedication of Added Right-of-Way for ""5th Street Bluff"
DATE: June 17, 2009

We write to underscore the elevated, outright physical danger that would be created on W. 5th St. as one consequence of this proposed ROW dedication. The City's acceptance of the added right-of-way would approve the path for a deathtrap driveway on an inherently hazardous curve.

In various communications with City planners, we have detailed the physical hazards attendant to this "5th Street Bluff" project. Neighborhood concerns have been swept aside as this project has been rushed to the dedication decision point before you.

It is our earnest hope that each Commissioner will pay an advance visit to the W. 5th St. site, minutes away from City Hall. Stand in the street at the curve and imagine it under ice-covered, foggy, drenching rain, or nighttime conditions. Would you feel safe in a car, on a motorcycle, riding a bicycle, or afoot? Backing uphill out of a driveway onto the street? Approaching another vehicle?

We adamantly object to the proposed dedication of added right-of-way, to the disregard of conventional frontage standards, and to any other measures that may be employed to authorize creation of a driveway at this location.

Further: Given our repeated cautions and pleas to the City, we believe that any accident, injury, or death occurring in the vicinity of such a driveway would be a predictable, direct consequence of accepting this added right-of-way. Surely, our Commissioners do not wish to expose the City to any related allegations of gross negligence or willful disregard of human life that such an outcome could generate.

Respectfully submitted,

Chris Caldwell and
Jacqueline Schafer, 1930 West 5th St.,
on behalf of all objecting
Grandview Heights homeowners