

JOINT MEETING OF THE OVERLAND PARK CITY COUNCIL  
AND PLANNING COMMISSION

August 2, 2000

Director of Planning and Development Services Roger Peterson called the joint meeting to order at 6:10 p.m. The following Councilmembers were present:

Mayor Ed Eilert; Mr. Carl R. Gerlach; Dr. Jack Halligan; Mr. David Belpedio; Mr. Michael J. Lally; and Mr. Neil S Sader.

Mr. George Kandt, Mr. Greg Musil, Mr. Thomas C. "Tim" Owens, Mr. Byron C. Loudon and Mr. Kris Kobach were absent.

The following Planning Commissioners were present:

Mrs. Terry Happer Scheier; Mr. Terry Goodman; Mr. Charles W. Hunter; Mrs. Charlene Conrad; Mr. Tom Lance; and Mrs. Anne Debus.

Mr. Robert Sanders, Mr. Curtis Bennett, Mr. Edward Reitzes, Mr. Tex New, and Mr. David White were absent.

Also present were: Mr. John Nachbar, City Manager; Mr. Bob Lindeblad, Current Planning Administrator; Mr. Skip Moon, Supervisor, Neighborhood Preservation; Ms. Mary Hunter, Senior Planner; Mr. John Rod, Administrator, Long-Range Planning; Mr. Joe Reed, Administrator, Environmental Health; Mr. Michael Odrowski, Supervisory Civil Engineer; Mr. Bart Budetti, Senior Assistant City Attorney; and Mrs. Barbara Potts, Senior Recording Secretary. There were three persons in the audience.

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ZONING AND SUBDIVISION LAW IN KANSAS

Director of Planning and Development Services Roger Peterson announced that this is the second meeting in a series of education and training; relative to planning and development topics. He noted the subject of tonight's meeting is Review of Zoning and Subdivision Law.

Mr. Peterson introduced Mr. Steve Chinn with Stinson, Mag and Fizzell, a local land use Law Firm. He explained that Mr. Chinn has been in the business for approximately 25 years and works exclusively for public entities (counties and cities) in developing ordinances and new policies for programs specifically related to land use and planning.

Mr. Chinn commented that much of the information will be in reference to specific provisions in the City Code. He began with the history of zoning and subdivision law in the state of Kansas. In 1921, Kansas enacted planning and zoning enabling legislation, prior to the Standard Zoning Enabling Act and the Planning Enabling Act adopted by the U. S. Department of Commerce. As he explained, the enabling acts adopted by the U. S. government were the models to guide communities in the adoption of comprehensive plans and zoning and enabling acts. In the 1923 case

of Ware versus City of Wichita, the state enabling legislation and the Wichita zoning ordinance were upheld by the Kansas Supreme Court, and therefore, the entire zoning concept has been well established in the state of Kansas for approximately 70 years. In 1925, zoning was extended to all first and second class cities in the state. In 1931, the authority to adopt subdivision regulations was enacted, and in 1939, the Board of Zoning Appeals statute was enacted. Mr. Chinn said the authority to establish planned unit development and extraterritorial zoning statutes to zone land within a certain distance from the boundaries of the City's jurisdiction was adopted in 1969. He noted that the floodplain zoning statute was enacted in 1970, and the Group Homes statute was enacted in 1988. In 1991, the Legislature comprehensively revised the entire planning and zoning enabling legislation, making some fairly substantial changes and adding to that authority.

Mr. Chinn stated that he would cover the following general topics: A) Zoning Text Regulations; B) Home Rule; C) Rezoning; D) Special Use Permits; E) Planned Zoning; F) Conditional Approvals; G) When Final; H) Board of Zoning Appeals; and 9) Subdivision.

In reference to Zoning Text Regulations, Mr. Chinn said the Kansas statutes [K.S.A. 12-753(a)] authorize ordinances which restrict and regulate the following: 1) Height, number of stories and size of buildings; 2) Percentage of lot that may be occupied; 3) Size of yards, courts and other open spaces; 4) Density of population; 5) Location, use and appearance of buildings, structures and land for residential, commercial, industrial and other purposes; 6) Conservation of natural resources, including agricultural land; and 7) Use of land located in floodplains and other areas, including distance of any building and structures from street or highway.

In 1991, when the Kansas legislature amended the planning and zoning enabling statute, in conjunction with the League of Municipalities, it authorized cities in the state of Kansas to use more innovative techniques, specifically authorized planning and developments. The legislature authorized the transfer of development rights, which the system basically used to conserve open space and agricultural land. As Mr. Chinn explained, the development rights to a parcel of land are severed and transferred to another parcel. He indicated that the development rights can be purchased by a bank and transferred to other properties, however, it is more common for a direct market exchange of development rights between the property owner, who sold his rights, and someone who basically wants to develop with more density. He said it allows the property owner to preserve the land by transferring density and development rights to areas where more dense development is wanted. The transfer of development rights is not as common in and around the metropolitan areas. It is used more in high growth states, such as California and Maryland, which are very active users of transfer development rights. The transfer of development rights is used to preserve open space and focus development into certain areas.

In response to Mr. Carl Gerlach's inquiry whether the City has used transfer of development rights, Mr. Peterson said the City generally uses it only within the same ownership of the property that is being sought for rezoning.

According to Mr. Chinn, the City's ordinance authorizes a transfer of density under certain conditions and planning districts within the confines of the area subject to the rezoning. He explained that the density can be moved. The density can be exceeded in certain areas by transferring it to another portion of the tract. However, the overall density for the lot cannot be exceeded.

Mr. Chinn said that other purposes of Zoning Text Regulations are as follows:

- 1) Preserve structures and districts listed on local, state, or national historic register;
- 2) Control aesthetics of redevelopment and new development;
- 3) Provide for issuance of special use permits; and
- 4) Establish overlay zones.

In reply to Dr. Jack Halligan's question whether historic designation could be imposed on the property without the consent of the owner, Senior Assistant City Attorney Bart Budetti said it would be limited in its impact. He believed it does not prevent it from occurring, however, the designation cannot be preserved indefinitely.

When asked by Mr. Lally whether the issuance of special use permits was a fairly new concept, Mr. Chinn said it was not a new concept. He explained that the issuance of special use permits is a new authorized statute. It has been used in Overland Park and in the state of Kansas for years. There has been case law ruled on special use permits, but no case specifically ever said that Kansas needs to have authority to use a special use permit technique, and never a case that specifically indicated that cities in Kansas had to have that authority. As he explained, since everyone was using it, the legislators decided to make it official, by statute, that it is an appropriate technique used in the zoning context.

If this was not statutorily allowed, Mr. Lally asked how cities received permission to do this. Mr. Chinn replied that the wording was included in the zoning ordinance, and it was an accepted concept. Therefore, case law formed the foundation for it. Because of home rule, Kansas is not necessarily bound by statutes.

Mr. Chinn said there is a distinction between a zoning text amendment and a rezoning. A zoning text amendment is obviously a change to the text of your zoning ordinance, whereas, a rezoning is when a piece of property is specifically rezoned. He indicated that there is also a substantial difference between text amendments, the zoning ordinance, and rezonings that involve specific property. He explained that no public hearing is required for a text amendment. However, there is a requirement of notices to the newspaper and to property owners, recommendation by the Planning Commission, and adoption by the Governing Body. He commented that text amendments are legislative acts, and are preferred because the courts give much more deference to the decision. If the issue results in litigation, the City would be in a much better position because of the legislative act.

Mr. Chinn indicated that there is interaction between home rule and the zoning statutes in the state of Kansas. The zoning statutes are uniformly applicable. If a statutory scheme is uniformly applicable to all cities, then there is no authority for cities to adopt charter ordinances to modify or amend the statutory scheme. If zoning statutes are not uniformly applicable, there is an exception that makes

it non-applicable to all cities statewide. He said the cities in Kansas have the authority to adopt a charter ordinance and supplement or modify that statutory scheme. He said that many statutes in Kansas are not applicable. In fact, when working with the City in regard to excise tax, one of the ways they were able to survive the challenge was because the statute that the plaintiffs were relying upon was not uniformly applicable and, thus, allowed the City to charter out from under that statute and imposed the excise tax for funding the streets. So it is very critical whether a statute is uniformly applicable. However, the zoning statutes in Kansas are uniformly applicable and therefore, the City cannot adopt ordinances that are in conflict with the statutes. With respect to Charter Ordinance provisions, Mr. Chinn said there is no impact on planning and zoning statutes, because it is not possible to charter out from the zoning statutes. The courts indicate that there is no preemption, so the City can adopt legislation relative to zoning that is not in conflict with the statutory scheme.

Mr. Chinn explained that rezoning is when the zoning classification on the official map is changed on a specifically identified piece of property. He said those kinds of rezonings can be initiated by the property owner, by the Governing Body, or by the Planning Commission. The procedures for acting on a rezoning application includes all statutory procedures for adoption of zoning regulations. He said that written notice of rezoning requests are mailed 20 days prior to the public hearing to all landowners within 200 feet of the boundaries covered by the application of the rezoning. In addition, written notice of the public hearing is posted on signs on the property proposed to be rezoned or for special use permit. By statute, rezonings and special use permits are the only two development applications that have to post signs on the property.

When a rezoning is submitted, Mr. Chinn said it could be faced with a protest petition. He explained that a protest petition is a mechanism whereby people, within the surrounding area of the property covered by the rezoning, file a petition with the city clerk, which creates the requirement for a super majority vote by the City Council in order to approve the rezoning. The protest petition needs to be filed within 14 days after the conclusion of the Planning Commission public hearing. The protest petition also has to be signed by the owners of 20 percent or more of the property to be rezoned, or by owners of 20 percent or more of "total real property required to be notified." [K.S.A. Supp. 12-757 (f)]. He noted there had been much confusion until recently about whether the area covered by the application was included, when looking at 20 percent of the total area. The legislature amended it, and as long as the applicant does not oppose the rezoning in writing, the property is excluded when calculating the protest area. Therefore, the protest petition filed has to have the appropriate number of signatures, and in order to pass the rezoning, it takes nine affirmative votes from the City Council to approve the rezoning. This protest petition is applicable after rezonings, special use permits, and preliminary development plans for nonresidential use in a residential district.

According to Mr. Chinn, the most famous case in zoning law in the state of Kansas is another case, the court another case that arose from Overland Park—Golden versus the City of Overland Park. From that case, the court totally changed the basis of

zoning in the state of Kansas. Basically, when focus shifts from the entire City to one specific tract of land, rezoning becomes more quasi-judicial than legislative and requires the following: 1) Weigh the evidence; 2) Balance the equities; 3) Apply the rules, regulations, and ordinances to specific facts of that case; and 4) Resolution of specific issues.

The court established factors that a zoning body should consider in a request for change. Mr. Chinn explained that the following "Golden Factors" are listed in the City ordinance: 1) Character of neighborhood; 2) Zoning and uses of properties nearby; 3) Suitability of subject property for uses to which restricted; 4) Extent to which removal of restrictions will detrimentally affect nearby property; 5) Length of time property remained vacant as zoned; and 6) Relative gain to public health, safety, and welfare by destruction of value of plaintiff's property as compared to hardship imposed upon the individual landowner. Other factors consist of recommendations of professional staff and conformance to Master Plan.

Mr. Goodman asked for clarification on down rezoning. He was informed that the ability of the City to initiate a down zoning is impossible to accomplish.

Mr. Chinn replied that, legally, it is not impossible. He explained that authority is necessary for the Planning Commission and the City Council to initiate a rezoning that is, in fact, a down zone. The question is whether that down zoning is constitutional or reasonable under state law. He indicated that it would be a case-by-case determination and the concern would be whether the impact of that rezoning would affect the individual property owner or property owners. In his opinion, there would be a need to look at all of the facts. If a situation is appropriate, there is no reason why the City could not down zone property through the Planning Commission or City Council to initiate rezoning.

Mr. Budetti said there is an added complication in Overland Park, because the City has a long-standing policy of land zoning. The City is not allowed by its code and by common sense to rezone to a planned district. Thus, if the intent would be to down zone the property and it is rezoning property in a planned district, the only option would be to rezone it to a non-planned district.

In response to Dr. Halligan's inquiry whether courts give priority to any of the Golden Factors, Mr. Chinn said there is no express statement by any court that any one of the Golden Factors carries more weight than any other. The Kansas statutes in the zoning ordinance indicate that the City has to set forth the criteria used to evaluate rezoning applications. He explained that the City is not bound to use every one of the criteria in every instance, because some will be relevant and others will not be relevant. Just because the developers make a point with respect to a certain factor, it does not mean the City Council is obligated to approve it.

The next topic, special use permits, is a technique to address land uses that have certain attributes that do not necessarily make them compatible within a certain zoning district. Mr. Chinn said the use may or may not have certain negative impacts,

so it is classified as a special use and special consideration is given as to whether it would be appropriate in that location. It could be a district that has permitted uses that are authorized, but there may be some uses, such as a junk yard or wireless tower, that are not wanted at that location. He said it may be acceptable in that district, but the location at which it is placed may be very critical. He explained that this is the type of use which would be subject to a special use permit.

Mr. Chinn stated that there are different ways to approach special use permits. He said that some codes say, "any use that is not specifically authorized is subject to a special use permit." Other codes indicate that each district regulation specifically lists those special uses that are authorized in that district. He noted that the City chooses a different way, which is common as well. Overland Park has a specific section on special uses and the uses are identified. Consideration is given to performance criteria on each special use. The Planning Commission makes a recommendation, and the Governing Body determines whether those special uses meet the performance criteria. He noted that the Golden Factors in the City's ordinance are applied, and a determination is made whether that is an appropriate place for that special use.

In the ordinance, a preliminary development plan or site plan is required for a special use permit. Mr. Chinn indicated that it is at the discretion of the Director of Planning and Development Services. He mentioned that a preliminary development plan is a more extensive planning process than a site plan. He asked the factors that are considered when staff makes a determination whether to require a preliminary development plan or site plan.

In response, Mr. Peterson explained that the ordinance indicates what is required on a special use permit plan, which is the same as a zoning plan. He indicated that his choice would be a preliminary development plan.

Mr. Chinn said it is common for development applications to have conditional approval. He explained that conditional approval is to approve with conditions attached. He noted that some applications have to meet specific conditions in order to get full right to the zoning improvement.

Mrs. Anne Debus referred to a previous statement that attorneys have to build their case. She asked whether it is also important for the Governing Body and Planning Commission to build their case and to verbalize their opinions.

Mr. Chinn replied that it is very important for the record to be accurate and complete. He explained that rezonings and special use permits are quasi-judicial actions, and therefore, the records need to be precise for the decision to hold up in court. He said the record needs to show that a rational decision was made. If the court cannot determine the considerations and the factors that went into the decision, it is more difficult for the court to determine the rationality of the decision.

In the provisions of the code, Mr. Budetti said the court accepts the findings adopted by the City within 45 days from the filing of a law suit. As he explained, the courts realize that it is not feasible, given the volume of applications, to find conclusions by going through all of the criteria in each case.

Mrs. Debus asked whether there is an impact in court when the Planning Commission's vote is contrary to the City Council's vote on an item.

Mr. Chinn explained that it is the deliberation of the decision maker, which would be the Governing Body. However, it is still valuable to have good records from the Planning Commission. The stipulations are critical to the record. If there is a different opinion between the Planning Commission and the City Council, and the fact that the Planning Commission's recommendation was negative, the Council has the obligation to override a failure or a negative recommendation from the Planning Commission.

In regard to facts and findings in the record, Mr. Chinn said the City's ordinance specifically indicates that the City is not required to make allowances. Also stated in the ordinance, the City can submit due findings at any time and the decision is not final until the findings are adopted. Thus, a vote could be taken on the rezoning application, with direction to the staff to prepare findings of facts and conclusions of the law. In that instance, the zoning decision would not become final until those findings, facts, and conclusions of law are adopted.

Mr. Chinn said that planned zoning, like special use permits, can work in a number of different ways. Overland Park has established a process of mapped planned districts. The purpose of planned zoning is to encourage and require quality, efficient, innovative development with deviations from traditional development techniques. He explained that planned zoning is a great technique because it allows the developer more flexibility to submit creative approaches to the development of land. The preliminary development plan and final development plan allows the City the ability to see the developer's actual proposal.

By ordinance, planned zoning gives specific authority to accomplish certain items, such as changing setbacks or changing densities, but it is all in accordance with the plan that has been submitted. Mr. Chinn indicated that no building permits can be issued until the final development plan is approved. He believed that planned zoning is a great technique to give both the development community and the City flexibility to receive more creative development and more control over what ultimately gets built in the community.

Mr. Lally did not recall seeing much planned zoning used for single family. When asked the reason, Mr. Peterson said that primarily, the planned district is the approval of the final development plan. So, theoretically, a planned district for a single-family subdivision would require a review of every single house plan.

In reference to Conditional Approvals, Mr. Chinn said there are specific provisions in the City's Ordinance, Section 18.140.400. He said approvals may be subject to permitted uses; time of performance; hours of operation; participation in transportation management programs, improvement districts, other programs for financing public utilities; and dedication of rights-of-way. He explained that this is related to planned districts, plat approvals and rezonings.

Mr. Chinn said that approval of the following constitute final decisions: 1) Zoning Text Amendment; 2) Rezoning; 3) Special Use Permit; and 4) Other application requiring ordinance. The preceding items are not considered final until the ordinance is published in an official City newspaper. Other decisions are final on the date of the authority's vote to approve or deny.

As explained by Mr. Chinn, the Board of Zoning Appeals (BZA) is a mechanism to provide relief from improper or unconstitutional enforcement of zoning regulations. He said the BZA has three basic kinds of statutory duties. One is to hear appeals from decisions of the zoning official when an applicant is grieved by the decision of the zoning official. In the City of Overland Park, the only authority of the BZA is to hear appeals and variances. He indicated that a variance is a mechanism by which the property owner is relieved of a zoning requirement when enforcement would result in an unnecessary hardship. In Kansas, the case law prevents use variances. Therefore, it means that an applicant cannot receive a variance that relates to the use of property. Area variances, such as setbacks, depth requirements, height requirements are allowed by the Board of Zoning Appeals.

In order to grant a variance in Kansas, Mr. Chinn said the BZA must find that all of the following conditions are met: 1) Condition unique to the property and not ordinarily found in the same zone; 2) No adverse effect on adjacent property owners' or residents' rights; 3) Strict application will constitute unnecessary hardship upon property owner; 4) No adverse effect on public health, safety, morals, order, convenience, prosperity, general welfare; and 5) Not in opposition to general spirit/intent of ordinance. The whole purpose of a variance is to provide a relief valve if there are concerns. He pointed out that all five criteria have to be met before a variance is granted.

Subdivision Regulations control the land development process by setting forth standards for subdivision layout, design, and construction and infrastructure requirements. He said the statutory parameters are as follows: 1) Efficient and orderly location of streets; 2) Reduction of vehicular congestion; 3) Reservation or dedication of land for open spaces; 4) Off- and on-site public improvements; 5) Recreational facilities including dedication of land area for parks; 6) Flood protection; 7) Building lines; 8) Compatibility of design; 9) Storm water runoff, including consideration of historic and anticipated 100-year rain and snowfall precipitation records and patterns; and 10) Any other services, facilities, and improvements deemed appropriate. The Subdivision Regulations authorize security for completion of required improvements in the form of cash, letters of credit, surety bonds, etc. It also permits payments of fees in lieu of land dedication requirements.

The Planning Commission has less discretion in consideration of subdivision plats. There are specific requirements and, basically, the Planning Commission has the duty to approve it if it meets the criteria. Mr. Chinn said it is important to note that if the plat is not acted upon within 60 days after the first Planning Commission meeting following plat's submission, the plat becomes "deemed approved." Staff is aware of that, and they obviously do not want any applications approved by virtue of inaction. He said this is a statutory concession to developers to ensure that they streamline the process.

Mr. Lindeblad asked whether it would be the same if the Planning Commission continued the application. Mr. Chinn said it has to be with the approval of the applicant. However, if the applicant does not, the Planning Commission cannot persist on continuing without the applicant's agreement.

When Mayor Eilert asked whether this applied to the City Council, Mr. Chinn said the Governing Body only accepts or refuses dedication of land for public purposes.

Referring to judicial review, Mr. Chinn said the courts will use specific standards to review the decision of the Governing Body or the Planning Commission. The first issue that the City needs to remember in defending these is deference of the local legislative body. He noted that there is less deference for a quasi-judicial decision and more deference for a legislative decision. However, there is always some deference to local entities in the exercise of their zoning and subdivision powers. The duty is the right to prescribe, change, or refuse to change zoning, which is vested in local zoning authority, not in the court. The court could not direct the City to disown the problem, but it could be remanded to the City for re-consideration.

Mr. Goodman believed this could be an endless cycle. As he pointed out, the zoning decision is made, and litigation occurs. The Court decides that it was not the right decision and remands it to the City. However, the court cannot direct the City to rezone the property, so the City makes the same decision, and it goes to court and is remanded to the City again. He asked when it would end.

Mr. Chinn said that a wise city would comply with the fines made by the court with respect to the reason they found the decision was not reasonable.

Mr. Goodman asked whether the court has the authority to direct the city. Mr. Chinn replied that there is some dispute in cases, but the general rule is that if the court wants to strike down a zoning, it does not have the authority to direct the Governing Body to rezone. The court can only direct the city to reconsider their original determination. It is not the court's role to rezone—that is separation of power.

When asked by Mr. Gerlach whether the Council could reject the proposal when it comes back to them, Mr. Chinn said it could be a reasonable response to a judicial decision, striking down the zoning. He recommended that the Council work very closely with the legal staff for advice. He explained that it would be ludicrous for the Governing Body to take an action that clearly and basically ignores the court's decision. He said there are options. If it would be a rezoning, and the court strikes it down, it does not mean that the Governing Body has to approve it. However, they could approve it with conditions that address some of the concerns, rather than just absolute denial.

In response to Mr. Gerlach's comment that a 100,000-foot building will impact traffic, Mr. Chinn said the Governing Body has the authority to deny an application if the belief is that it would have a negative impact on traffic. Denial could also be made if the facilities are inadequate, the City is not in a position to build a complete road, and the developer is not willing to improve it. In most instances, that would be a legitimate denial of a rezoning.

Mr. Peterson commented that the developers argue that it is the City's responsibility to improve the road. Mr. Chinn pointed out that there is a provision in the ordinance that specifically authorizes you to deny applications if facilities are not adequate or it would adversely impact the community as a whole.

Mr. Goodman requested clarification, because he continues to hear that the court has no direct way to compel a city to rezone a property. Mr. Budetti explained that the court could not advise that the City approve a specific plan and rezone it. The reality is that the court usually gives guidelines and clear indication that the City would be unwise to evade the court.

In reply to Mr. Goodman's inquiry as to the risk, Mr. Chinn said the court would issue a declaratory judgment and say that the zoning decision is invalid.

Mr. Chinn explained that zoning is not a plebiscite (where people express their opinion). Although the Governing Body likes to respond to the will of the community, there is a general principle law. He commented that the City cannot get an advisory opinion from the citizens on whether to rezone or not. In a standard review, the court reviews for lawfulness and reasonableness of the action taken. Lawfulness basically is whether they followed the statutes of the ordinance, so that is a procedural issue. It seems there is always the issue in the courts about whether a certain statutory requirement is mandatory or directory. The basic rule is if it is essential to preservation of rights, and if consequences for noncompliance are set forth in the ordinance, then it is mandatory. Otherwise, it is directory, or in other words, it does not have to be done, but it should be done.

Mr. Peterson noted that it was past time for the Community Development Committee meeting to begin. He suggested that the second session of this meeting be held next month, prior to the Community Development Committee meeting on September 6, 2000. He announced that the second session of the joint meeting would begin at 5:30 p.m.

Mr. Lally expressed appreciation to Mr. Chinn on behalf of the Planning Commission, Community Development Committee, City Council, and staff for sharing his knowledge and helping them to become more educate about these issues.

The meeting ended at 7:40 p.m. Minutes transcribed by Barbara Potts.

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Michael Lally, Chairman