IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

GARY W. MARSH, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Case No. 13CV-08544**
v.	)	**Division 3**
	)	
CITY OF PRAIRIE VILLAGE, KANSAS, AND MVS LLC	)	
	)	
	)	
Defendants.	)	

MEMORANDUM DECISION AND JOURNAL ENTRY OF JUDGMENT

This matter is before the Court on motions for summary judgment filed by all the parties to this action. Plaintiffs have filed their Motion for Summary Judgment and Memorandum in Support[1]; as have separate defendants, City of Prairie Village, Kansas (hereinafter "the City") and MVS, LLC.[2] The City and MVS filed separate Memorandums in Opposition to Plaintiffs' Motion[3]; and the City filed a Memorandum in Opposition to MVS's Motion for Summary Judgment.[4] Finally, Plaintiffs filed separate Memorandums in Opposition to the motions for summary judgment filed by the City and MVS.[5] On September 2, 2014, counsel, and several of the individual plaintiffs, appeared for oral argument.

Highly summarized, this case involves a special use permit (SUP) obtained by MVS to build a senior living and skilled nursing complex on land it acquired from the Shawnee Mission School District, on which Mission Valley Middle School was located. Neighboring landowners oppose this development, and opposed the SUP sought by MVS. The duly elected Prairie

[1] Docs. 72 & 80, respectively.
[2] Docs. 71, 68, & 69, respectively.
[3] Docs. 86 & 89, respectively.
[4] Doc. 87.
[5] Docs. 92 and 90, respectively.

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

Village City Council and Mayor voted 7-6 in favor of granting the SUP. The Plaintiffs now challenge the lawfulness of Ordinance 2301, which granted the SUP. The issue is whether or not the City adhered to the applicable law in considering the issue and passing Ordinance 2301.

After reviewing the parties' extensive briefs and voluminous exhibits, and after considering oral arguments, the Court finds that Marsh's Motion for Summary Judgment should be, and hereby is, DENIED in its entirety. For the same reasons, the Court finds that MVS's Cross-Motion for Summary Judgment should be, and hereby is, GRANTED in its entirety. Lastly, and again for the same reasons, the Court finds that the City's Cross-Motion for Summary Judgment should be, and hereby is, GRANTED as to Counts II, III, IV, V, VII, VIII, IX, XI, XII, and XIII and DENIED as to Count VI. The effect of the rulings below, is that the City did in fact, adhere to the applicable law; and thus, plaintiffs' appeal of the City's decision is dismissed.

I. FACTS

In support of their respective motions, the parties have provided to the Court approximately 200 paragraphs of what they contend are uncontroverted facts. Some of these facts are controverted, and some purport to be controverted, but are not properly controverted and/or are not material to the issues to be decided by this Court. After examining all of the facts presented by the parties, viewed in light of the issues presented, this Court finds that the following facts are uncontroverted and material to the issues this Court must decide:

MVS owns the property at issue which is located at 8500 Mission Road, Prairie Village, Johnson County, Kansas. Mission Valley Middle School had previously occupied the property. The property is an 18.4 acre tract that has at all relevant times been zoned R-1a. Because the property is zoned R-1a, permitted uses of the property (uses for which no SUP is required)

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

include: **s**ingle family dwellings; golf courses except for miniature golf and commercial driving ranges; publicly owned parks and recreation areas; churches and synagogues; City Hall, police and fire stations; publicly owned libraries, museums, art galleries; public schools, college and university educational centers operated by a local district or state agency; Group Homes; residential design manufactured homes; accessory uses as provided and regulated in Chapter 19.34; Conditional Use Permits as provided for and regulated in Chapter 19.30; and Special Use Permits as provided for and regulated in Chapter 19.28. Dwellings for senior adults and accessory nursing care or continuous health care services are permitted in residential zoning districts R-1 through R-4 by SUP**.**

In April 2013, MVS submitted a SUP application, designated Special Use Permit 2013-05 ("First SUP Application") to the City concerning the 18.4-acre tract. The First SUP Application requested a SUP for development of a residential project including skilled nursing, assisted living and independent living components on the entire 18.4-acre tract. Specifically, it proposed construction of a "senior living community" approximately 358,040 square feet in size consisting of (1) a 228,340 square foot "Assisted Living/Independent Living" building containing 190 "units" standing two to three stories in height; (2) a 91,200 square foot "Skilled Nursing/Memory Care" facility containing 120 "units" (136 beds) standing one to two stories in height; and (3) nine separate "Villas" comprising a total of 38,500 square feet. On August 14, 2013, a protest petition was filed in opposition to the First SUP Application, which included the signatures of some of the Plaintiffs herein. The City recognized as valid the protest petition filed in opposition to the First SUP Application. On September 3, 2013, the City Council and Mayor voted 7-6 to approve the First SUP Application, but it was determined by the governing body that a supermajority was required for approval, so the First SUP Application was deemed denied. The

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

six (6) City Councilmembers voting against the project generally expressed concerns that the proposed development proposal was too massive, too dense, and inconsistent with the surrounding neighborhood.

On October 4, 2013, MVS submitted a SUP application, designated Special Use Permit 2013-11 ("Second SUP Application"), to the City to build adult senior dwellings including independent, assisted, memory care and skilled nursing on a 12.8-acre tract of MVS's property. Under the Second SUP Application, the legal description was reduced in size from 18.4 acres to 12.8 acres. The Second SUP Application proposed the construction of a "senior living community" approximately 325, 890 square feet in size consisting of (1) a 228,340 square foot "Assisted Living/Independent Living" building containing 190 "units" standing two to three stories in height; and (2) a 97,550 square foot "Skilled Nursing/Memory Care" facility (the "SNF") containing 120 "units" and standing three stories in height.

Under the Second SUP Application, MVS proposed to alter the 12.8-acre tract of land from its then-present status of R-1a single-family residential general permitted uses, to the special use of dwellings for senior adults and accessory skilled nursing, which are specifically permitted by Sections 19.06.010 and 19.28.070(I) of the Zoning Ordinance. Under the Second SUP Application, MVS made no application to change the 5.6-acre tract of MVS's property (that was omitted and reduced from the First SUP Application) from its present status of R-1a single-family residential general permitted uses, thus leaving the zoning of the smaller 5.6-acre tract unaltered. As a result, the footprint for the Skilled Nursing Facility ("SNF") got smaller from the First SUP Application to the Second SUP Application; and the Skilled Nursing Facility ("SNF") got taller from the First SUP Application to the Second SUP Application. The Plaintiffs contend

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

that the Second SUP proposes a larger (in terms of square feet and height) and denser (in terms of units per acre and square feet per acre) development.[6]

On or about October 15, 2013, MVS sent a "Notice to Property Owners of Affected Property," providing notice of a public hearing to be held by the Planning Commission on November 5, 2013. On October 22, 2013, MVS held a neighborhood meeting; and on October 31, 2013, counsel for Plaintiffs wrote to the City Attorney expressing concerns related to the Second SUP Application. The City received public comment and materials in connection with its November 5, 2013 meeting of the Planning Commission, including input from some Plaintiffs and MVS.

At the November 5, 2013 meeting of the Planning Commission, the City Attorney determined that the notice of public hearing was defective, and the Planning Commission continued the matter to its December 3, 2013 meeting.

On November 12, 2013, MVS sent a "Notice to Property Owners" providing notice of a public hearing to be held by the Planning Commission on December 3, 2013. The City continued to receive public comment and materials, as well as provide certain notices and receive input from some Plaintiffs and MVS through the Planning Commission meeting on December 3, 2013.

On December 3, 2013, the City's Planning Commission held a public hearing on the Second SUP Application and voted 4-1 in favor of recommending approval to the Governing Body of the Second SUP Application. On December 17, 2013, at 1:25 P.M., a protest petition was filed in opposition to the Second SUP Application, which included the signatures of many or all of the Plaintiffs.

On December 16, 2013, at 11:16 A.M, counsel for MVS' sole member, Mr. Joseph Tutera, filed a Notification to Withdraw from Protest Petition with the City Clerk on behalf of Edson

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[6] Doc. 25, at ¶67.

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

Ludwig and Leonice Ludwig. On December 16, 2013 at 4:34 P.M., a Notification to Withdraw from Protest Petition was filed with the City Clerk on behalf of Marc L. Baratta. On December 17, 2013, a Notification to Withdraw from Protest Petition was filed with the City Clerk on behalf of William Wilt, Trustee. On December 20, 2013, at 4:30 P.M., Mr. Wilt revoked his Notification to Withdraw from Protest Petition. On December 20, 2013, at 10:50 A.M., a Notification to Withdraw from Protest Petition was filed with the City Clerk on behalf of Deogracias D. Diego and Cecilia Diego who own real property at 8514 Mission Road (the "Diego Property"). The City did not include the Diego Property in the Protest Petition.

"South Adjoining Landowners" include the following ten Plaintiffs who own land in the City as follows: Gary W. Marsh and Deanna L. Marsh, 3900 W. 86th Street; Brian D. Doerr and Cynthia E. Doerr, 4000 W. 86th Street; Whitney E. Kerr, Jr. and Deborah R. Kerr, 4020 W. 86th Street; Steven F. Carman and Alice B. Carman, 8521 Delmar Lane; and Benjamin J. Frisch and Stacey L. Frisch, 8511 Delmar Lane. "Mission/Somerset Adjoining Landowners" include the following seven Plaintiffs who own land as follows: Ann D. Egan, 8428 Somerset Drive, Prairie Village; Thomas M. Johnston and Rhetta Johnston, 8412 Somerset Drive, Prairie Village, Kansas; William Carolan, 3809 W. 84th Street, Prairie Village, Kansas; Cameron B. Jones and Deborah L. Jones, co-trustees of the Cameron B. Jones Trust dated May 3, 2003, 3605 W. 85th Street, Leawood, Kansas; and Martha A. Mick, 3807 W. 84th Terrace, Prairie Village, Kansas. The City did not count the signatures (or corresponding property or land area) of the "Mission/Somerset Adjoining Landowners" or the "South Adjoining Landowners" (or others allegedly similarly situated) in its calculation of the valid Protest Petition area and signatures. Neither the "South Adjoining Landowners" nor the "Mission/Somerset Adjoining Landowners"

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

own property within 200 feet of the 12.8-acre tract of land proposed to be altered by the Second SUP Application.

Less than 100% of the joint owners of the common area of the Chateau Condominium Owners signed the Protest Petition. On January 2, 2014, the City Attorney issued a Letter Ruling stating the City's position that the Protest Petition did not contain sufficient valid signatures to satisfy the 20% threshold required by K.S.A. 12-758(f)(1) and Section 19.28.041 of the Zoning Ordinance. There, the City Attorney found and concluded that the common area of the Chateau Condominiums could not be included in the calculation of the 20% threshold for the Protest Petition because the Protest Petition lacked the requisite signatures to commit the common area:

> The petition does not show that one or more co-tenants who signed were authorized to sign for the co-tenants who did not sign. The petition does not include any power of attorney or other delegation of authority by unit owners who did not sign. The signatures by the Chateau Home Owners Association, itself the owner of a single unit, apparently purport to trigger inclusion of the common area within the 20% area required for a valid protest petition. However, there is nothing in the condominium declaration, or the Kansas apartment ownership act, which delegates to the Association, either by vote of a requisite majority of the unit owners, or otherwise, the right to sign a zoning petition on behalf of 100% of the unit owners in their capacities as co-tenants or joint owners of the common areas.

The City continued to receive public comment and materials through the January 6, 2014 meeting of the Governing Body, specifically including input from Plaintiffs and MVS. On January 6, 2014, the City's Governing Body met and voted 7-6 in favor of approving the Second SUP Application, as set forth in part in Ordinance 2301. The same seven Governing Body members who voted to approve the First SUP Application again voted to approve the Second SUP Application. The six City Councilmembers voting against the project generally expressed concerns that the development proposal was too massive, too dense, and inconsistent with the

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

surrounding neighborhood. This vote was sufficient to pass Ordinance 2301 approving the Second SUP Application.

Under the City's interpretation of Section 19.28.070(I), it found and concluded that the section authorizes as a special use "dwellings for senior adults," and further provides that "[n]ursing care or continuous health care services may be provided on the premises as a subordinate accessory use," which were consistent were other sections in the Zoning Ordinance which clearly distinguish the term "premises" from "building," and indicate that the term "premises" is broader than the term "building," such that it reasonably concluded that "premises" includes the surrounding parcel on which a building is located.

II. STANDARD OF REVIEW

a. Summary Judgment.

All of the parties to this action have filed a motion for summary judgment. Thus, all parties must believe that the facts ***material to this case*** are uncontroverted, and that a final judgment can be entered without a trial.

> Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[7]

"A party opposing a motion for summary judgment may not rest merely on allegations, but must provide some affirmative evidence to support its position."[8] "[W]hen a plaintiff presents no evidence of an essential element of his or her claim, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[9]

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[7] *O'Brien v. Leegin Creative Leather Products, Inc.* 294 Kan. 318, 330, 277 P.3d 1062, 1072 (2012).
[8] *Donnell v. HCA Health Servs. of Kan., Inc.,* 29 Kan. App. 2d 426, 431, 28 P.3d 420, 424 (2001).
[9] *Mortg. Electronic Registration Sys., Inc. v. Graham,* 44 Kan. App. 2d 547, 247 P.3d 223, 229 (2010).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

b. Legal Presumption of Validity.

In addition to the above-referenced standard of review that applies to all motions for summary judgment in all civil cases; there is an additional legal standard of review this Court ***must*** apply when reviewing legislative actions of city governmental bodies. This legal standard imposes a heavy burden on citizens of that city who seek to challenge the decisions of their duly elected city officials, such as here, where a group seeks to have a Court declare unlawful an ordinance that has been presented to, debated by, voted on and passed by the Mayor and City Council.

"Where a city has authority to act…, it is governed by its own discretion, and not that of the courts[.]"[10] "[T]he governing body has the right to prescribe zoning, the right to change zoning and the right to refuse to change zoning."[11] "The power of the court is limited to determining (1) the lawfulness of the action taken, that is, whether the procedures in conformity with law were employed, and (2) the reasonableness of such action."[12] Because Plaintiffs have voluntarily dropped all "reasonableness claims", this court must focus solely on the issue of whether the action by the City was lawful.

Kansas law is clear that in reviewing the legality and constitutionality of an ordinance, Kansas courts ***must***:

> (1) presume the ordinance is constitutional; (2) resolve all doubts in favor of validating the ordinance; (3) uphold the ordinance if there is any reasonable way to do so; and (4) strike down the ordinance only if it clearly appears to be unconstitutional.[13]

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[10] *Mader v. City of Topeka*, 106 Kan. 867, 867, 189 P. 969, 969 (1920).
[11] *Hukle v. City of Kansas City,* 212 Kan. 627, 635, 512 P.2d 457, 464 (1973).
[12] *Id.*
[13] *City of Lincoln Center v. Farmway Co-Op, Inc.,* 298 Kan. 540, 544, 316 P.3d 707, 711 (2013).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

Thus, this Court has "a duty to preserve the validity of the ordinance and to search for ways to uphold its constitutionality"[14], and must review the action by the city with "a presumption that a city government has complied with the law in passing an ordinance" which can only be overcome by clear and convincing evidence.[15] This Court absolutely cannot substitute its judgment for that of the Mayor or members of the City Council; and it absolutely cannot invalidate the ordinance in question simply because it may have voted differently than the majority.

As will be discussed more fully below, this Court finds that the Plaintiffs have failed to introduce clear and convincing evidence that the City acted unlawfully in passing the Ordinance granting the Second SUP. Consequently, this Court is required by law to find that the City did act lawfully; and as a result, this Court must dismiss the challenge of the Plaintiffs.

III. ANALYSIS

a. Count II – Successive Application Doctrine

The Plaintiffs assert that the City was legally barred from even considering the Second SUP Application because of its earlier rejection of the First SUP Application. In support, Plaintiffs argue that the "successive application" doctrine bars a second zoning application unless it is "substantially changed so as to respond to objections raised in the original application."[16] Plaintiffs assert that because the First SUP Application was denied due to its massive size, density, and inconsistency with the surrounding neighborhood, the Second SUP Application is barred because it requests approval of an even *larger* and *denser* development over a smaller acreage of land; and thus, failed to address the objections that prevented approval of the First SUP. Plaintiffs' argument must be rejected for two reasons.

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[14] *Id.*
[15] *City of Haven v. Gregg,* 244 Kan. 117, 118, 766 P.2d 143, 144 (1988).
[16] *In re Dunkin Donuts,* 185 Vt. 583, 585, 969 A.2d 683, 685-86 (2008).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

First, the "successive application" doctrine is not recognized in Kansas. Although this doctrine may be recognized in other jurisdictions, the Plaintiffs (who have the burden) have failed to cite to this Court any Kansas case law that recognizes, supports or applies this doctrine. Further, the Plaintiffs have failed to cite to this Court any Kansas statute, rule or regulation that recognizes this doctrine by name, or otherwise mandates that a City may not consider a second zoning application unless it is substantially different from, and addresses objections raised in, a prior application.[17] Lastly, Plaintiffs have failed to cite to this Court any Kansas case law applying the "res judicata" or "finality" principles under which Plaintiffs attempt to characterize this successive application argument. Thus, Plaintiffs' argument is based on law that does not exist in Kansas. For this reason alone, this argument is rejected.

But further, it appears that even if the doctrine does apply, Plaintiffs have mischaracterized it as having a stricter standard that it actually does. Specifically, Plaintiffs have suggested that ***all*** concerns regarding the previous application that prevented its approval must be addressed in the second application. It appears that at least the majority of states that have addressed this issue have determined that the doctrine is not as strict and absolute as suggested by Plaintiffs. "[a] review of out-of-state cases shows that the majority view is that a second application for a similar proposal can be considered if there is a 'substantial change in circumstances' or a 'material change' in the application or in conditions relevant to the application."[18] Thus, it

[17] While some cities in Kansas require waiting periods before subsequent applications may be submitted, Prairie Village does not. *E.g.,* City of Overland Park, Kansas Municipal Code, at §18.140.460(A) ("No application for rezoning by a landowner or a landowner's agent shall be accepted if any application for substantially the same property has been filed and advertised for public hearing within the preceding 6 months.") Even then, "[t]he Governing Body may waive the limitation in this section for good cause shown." §18.140.460(D). Similarly, under City of Olathe, Kansas Unified Development Code, Chapter 18.01, and Unified Development Ordinance, §18.12.015: "When a proposed application for rezoning, special use permit, or plat has been withdrawn by the applicant or denied by the Planning Commission or the Governing Body, the same application for the same property shall not be resubmitted for a period of one (1) year from the date of withdrawal or denial. However, an application for a different zoning classification or special use permit request can be submitted at any time."

[17] Kan. Stat. Ann. §12-757(b) (2014).

[18] *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash. 2d 22, 32, 891 P.2d 29, 35-36 (1995).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

appears that "a" material change in the application or conditions relevant to the application is sufficient to satisfy the doctrine. In the present case, it is undisputed that there were material changes in the Second SUP.

Furthermore, even if this argument did fall under "res judicata" or "finality" principles as argued by Plaintiffs, the City's Governing Body's determinations and actions here cannot reasonably be found to be an abuse of discretion, the requisite standard to overturn their decision[19] (as indicated in Section IIb above).

Summarized, the successive application doctrine does not exist in Kansas, and thus, it cannot serve as a basis to assert that the City was precluded from considering the Second SUP Application. Although this Court need not address the argument further, it appears that even if Kansas were to recognize the successive application doctrine, it would not serve to bar the consideration of the Second SUP under the facts of this case.

The Court denies Plaintiffs' Motion for Summary Judgment on Count II; and for the same reasons, the Court grants Defendant's Cross-Motion for Summary Judgment on Count II.

b. Count III – Proper Procedure under K.S.A. 12-757(b)

Plaintiffs assert that the City failed to follow the procedure set forth in K.S.A. 12-757(b), because the City failed to "provide written notice or the opportunity to file a protest petition" to a group of the Plaintiffs known herein as the "South Adjoining Landowners". The City admits that notice was not sent to these landowners, but argues that these landowners were not legally

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[19] 4 Rathkopf's The Law of Zoning & Planning §68:10 (4th ed) ("It is up to the board to determine in the first instance whether res judicata requires the rejection of the subsequent application. The New Jersey Supreme Court has stated: Whether an application is to be rejected on the grounds of res judicata is in the first instance for the board to determine. Even if the application is closely similar to a previous one, or identical with it. [*sic*]. But if it is alleged that the surrounding circumstances have changed or that experience has shown prior denial was error it is within the discretion of the board whether to reject the application on the ground of res judicata, and the exercise of that discretion may not be overturned on appeal in the absence of a showing of unreasonableness.") (internal citation omitted).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

entitled to notice.[20] It should be noted that it is undisputed that Plaintiffs participated heavily in the public hearings regarding the Second SUP Application, both in person and by and through their counsel. Thus, there is no basis for Plaintiffs to claim that the hearings were inadequate or that the Plaintiffs were denied the opportunity or right to participate in the public hearings. The only real issue is whether these Plaintiffs were unlawfully denied the right to join the Protest Petition. This is an important issue in that if the South Adjoining Landowners were entitled to join the Protest Petition, then a supermajority vote of the Governing Body, rather than a simple majority vote, would have been required to pass the Second SUP Application.

The relevant portion of K.S.A. 12-757(b) provides that written notice "shall be mailed … to all owners of record of real property located within at least 200 feet of the area proposed to be altered."[21] The issue that must be decided by this Court is where on the property at issue does that 200-foot measurement begin? If the Plaintiffs at issue were outside the 200 feet, then there was nothing unlawful about the City failing to send them notice and prohibiting them from joining the Protest Petition.[22]

Plaintiffs argue that the City should have measured this 200-foot distance from the boundary of the entire 18.4 acre tract of land owned by MVS. The Plaintiffs, sometimes using altered and affected interchangeably in their briefs, argue that the entire 18.4 acre tract is being altered by MVS with their development; and thus, the 200-foot measurement should begin at the boundary of the 18.4 acre tract. At first glance, this argument has some appeal in that there will be changes to the entire 18.4 acre tract, with 12.8 acres being "altered" and 5.6 acres being "affected" if that term means changed or transformed by the development as a whole.

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[20] In fact, the City argues that if it had provided notice to these landowners, MVS would have had a valid argument that the City unlawfully failed to follow K.S.A. 12-757(b).
[21] Kan. Stat. Ann. §12-757(b) (2014).
[22] One could certainly argue that choosing to include only those owners within 200 feet is arbitrary. However, it would not be proper for this Court to question the wisdom of the legislature in choosing this distance, and thus, this is the distance that must be recognized by this Court.

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

The City argues that under the Second SUP, MVS only seeks to alter the 12.8 acre tract within the larger 18.4 acre tract. Thus, argues the City, the Plaintiffs that did not receive notice were not entitled to notice, in that it is undisputed they were more than 200 feet from the 12.8 acre tract. This Court finds that the City must prevail on this argument.

There is no question that the 5.6 acre tract between the Plaintiffs and the 12.8 acre tract subject to the Second SUP Application will be changed. But that tract will change from an existing public school site to single family dwellings, a public road, and other uses ***specifically allowed in R-1a zoning districts***. All of the changes that will or may occur on the 5.6 acre tract under the development proposed, are changes MVS could make to that tract under its existing zoning, without any need for a SUP, and without providing anyone with notice, or opportunity to be heard or right to object by the adjoining landowners. There is no request in the Second SUP Application to change the zoning of this 5.6 acre tract,[23] or to build something on that tract that would require an SUP. This type of change to the property is not governed by K.S.A. 12-757, which only applies when a city or a property owner proposes to "supplement, change or generally revise the boundaries or regulations contained in zoning regulations by amendment."[24]

The Second SUP Application does apply to the 12.8 acre tract, and unquestionably alters the real property to allow development not authorized in an area zoned R-1a. It would be nonsensical to assert that anytime a property owner wished to make a change in his property that

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[23] The 5.6-acre tract does not fall within the "area proposed to be altered" (*i.e.* the area in which a special use permit is required for the proposed use as dwellings for senior adults).

[24] Kan. Stat. Ann. §12-757(a) (2014) ("The governing body, from time to time, may supplement, change or generally revise the boundaries or regulations contained in zoning regulations by amendment. A proposal for such amendment may be initiated by the governing body or the planning commission. If such proposed amendment is not a general revision of the existing regulations and affects specific property, the amendment may be initiated by application of the owner of property affected. Any such amendment, if in accordance with the land use plan or the land use element of a comprehensive plan, shall be presumed to be reasonable. The governing body shall establish in its zoning regulations the matters to be considered when approving or disapproving a rezoning request. The governing body may establish reasonable fees to be paid in advance by the owner of any property at the time of making application for a zoning amendment.").

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

is already allowed under R-1a zoning, he must seek an SUP, and the City must provide notice to adjoining landowners under K.S.A. 12-757(b). But it makes perfect sense that the procedure must be followed in the event a landowner seeks permission to change the land in a way contrary to the current zoning.

This conclusion, in addition to being supported by application of common sense, is also supported by Attorney General Opinion 2007-16 which states that the notice distance requirement of K.S.A. 12-757 "should be calculated from the property that is the subject of an owner-initiated rezoning application [here, the small 12.8-acre tract that was *altered*], not from the larger tract [here, the 18.4-acres that may have been *affected*, but not *altered*] of property owned by the applicant within which the subject property is located."

Interestingly, Plaintiffs cite a case from Oklahoma, *Walkingstick v. Board of Adjustment of City of Tulsa*, 1985 OK 70, 706 P.2d 899 (1985), in support of their position. Obviously, a State Court decision from Oklahoma is not binding on this Court. Regardless, rather than support Plaintiffs' argument, *Walkingstick* demonstrates how our legislature could have written the applicable statute in such a way that Plaintiffs' argument might have merit (but didn't). In *Walkingstick*, the applicable Oklahoma statute required notice be mailed "to all owners of property within a three hundred (300) foot radius of the ***exterior boundary of the subject property***."[25] In *Walkingstick*[26], the court found the subject property per notice requirements to be the entire 60-acre tract, rather than the 24-inch drilling hole included in the amended application description. Accordingly, its application varies greatly from the requirement that notice be given "to all owners of record of real property located within at least 200 feet of the area proposed to

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[25] *Walkingstick v. Board of Adjustment of City of Tulsa,* 1985 OK 70, 706 P.2d 899, 902, 903 (1985).
[26] *Id.* at 902.

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

be altered"[27] found in the Kansas statute. As such, the rationale in *Walkingstick* is inapplicable here.

This Court concludes that K.S.A. 12-757(b) only applies when there is a proposal to "supplement, change or generally revise the boundaries or regulations contained in zoning regulations by amendment."[28] The City properly complied with the statutory requirements of K.S.A. 12-757(b) by providing notice to all owners of record of real property within 200 feet of the 12.8 acre tract of land sought to be altered. Changes occurring on the 5.6 acre tract are not governed by the statute as they are permitted within the current R-1a zoning and require no public notice, public hearing, or approval by the City. As such, the South Adjoining Landowners had no entitlement or right to receive written notice or to join the Protest Petition. Accordingly, only a simple majority[29] and not a supermajority[30] vote was required for the Second SUP Application to pass. Because the Governing Body passed the Second SUP Application by a simple majority vote, 7-6, the Second SUP Application was properly approved.

The Court denies Plaintiffs Motion for Summary Judgment on Count III; and for the same reasons, the Court grants Defendants Cross-Motion for Summary Judgment on Count III.

c. Counts IV and V - Excepting Public Streets and Ways From the 200 Foot Distance.

Plaintiffs claim that the City failed to exclude the public streets and ways in calculating the 200 feet required by the Zoning Ordinance discussed above. In other words, according to the

[27] Kan. Stat. Ann. §12-757(b) (2014).

[28] Kan. Stat. Ann. §12-757(a) (2014) ("The governing body, from time to time, may supplement change or generally revise the boundaries or regulations contained in zoning regulations by amendment. A proposal for such amendment may be initiated by the governing body or the planning commission. If such proposed amendment is not a general revision of the existing regulations and affects specific property, the amendment may be initiated by application of the owner of property affected. Any such amendment, if in accordance with the land use plan or the land use element of a comprehensive plan, shall be presumed to be reasonable. The governing body shall establish in its zoning regulations the matters to be considered when approving or disapproving a rezoning request. The governing body may establish reasonable fees to be paid in advance by the owner of any property at the time of making application for a zoning amendment.")

[29] *See* Kan. Stat. Ann. §12-757(d) (2014); Zoning Ordinance, at §19.28.045 (2014).

[30] *See* Kan. Stat. Ann. §12-757(f)(1) (2014); Zoning Ordinance, at §19.28.041 (2014).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

Plaintiffs, the 200 foot measurement from the 12.8 acre tract should not include any public street that falls within that distance. As such, Plaintiffs claim that the South Adjoining Landowners and Mission/Somerset Adjoining Landowners were improperly denied notice and the right to join the protest petition.

Zoning Ordinance §19.28.020 provides as follows:

> The applicant shall be responsible for mailing notice of such proposed special use permit to all the owners of lands located within two hundred feet, ***except public streets and ways***, of the application area at least twenty (20) days prior to the hearing, thus providing an opportunity to all interested parties to be heard. (Emphasis added)

The City argues that Zoning Ordinance §19.28.020 merely excludes the owners of public streets and ways from the notice requirement, so that owners of public streets and ways, such as the City, County, or State, do not have to be provided notice of a proposed SUP. In other words, pursuant to this Ordinance, MVS would not be required to give the City notice of its proposed SUP, even if the City owned a public street within 200 feet of the 12.8 acre tract proposed to be altered by the Second SUP.

This Court agrees with the City. The Ordinance at issue does not expand the 200 foot notice area contemplated by K.S.A. 12-757 or §19.28.020 in situations where a public street falls within that 200 foot distance. It should be noted that Plaintiffs' proposed construction would invariably lead to inconsistencies in its application where a public street does not run parallel to the outer boundary of the subject property.

Further, "Under the doctrine of 'operative construction,' the interpretation placed upon legislation by the administrative agency whose duties are to carry the legislative policy into effect is entitled to great weight."[31] While it is true "that the doctrine of operative construction has lost favor with [the] court" thereby giving no significant deference on judicial review to

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[31] *Cities Serv. Gas Co. v. State Corp. Comm'n*, 192 Kan. 707, 714, 391 P.2d 74, 79 (1964).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

agencies or boards engaged in statutory interpretation;[32] here we are dealing with an ordinance interpreted by the City. "Judicial deference to the interpretation is especially appropriate … where it is the legislative body itself and not an administrative agency that is giving effect to the interpretation."[33] Therefore, as noted in Section IIb above, this Court should give great deference to the City in interpreting its own Ordinances.

Lastly, even under Plaintiffs reading of the Ordinance, they would not be entitled to notice. At the time notice was required to be given, there was no public street or way to except out of the 200 foot measurement. Plaintiffs' argument is based on a *proposed* construction and not on an existing public road.

The Court denies Plaintiffs Motion for Summary Judgment on Counts IV and V; and for the same reasons, the Court grants Defendants Cross-Motion for Summary Judgment on Counts IV and V.

d. Count VI – Common Area Calculation.

Plaintiffs contend that the City's refusal to recognize the common area of the Chateau Condominium complex in calculating the 20% threshold for the Protest Petition violated K.S.A. 12-757. Both Defendants argue that the City was correct in refusing to recognize the common area. Here, the City and MVS are in disagreement as to how to address the issue of the condominium common area; but under either of their arguments, the Protest Petition fails.

Kansas law provides that a protest petition is not valid under K.S.A. 12-757(f)(1) unless it has been signed by "the owners of record of 20% or more of the total real property within the area required to be notified by this act of the proposed rezoning."[34] Thus, if more than one entity

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[32] *143rd St. Investors, L.L.C. v. Bd. of Cnty. Comm'rs of Johnson Cnty.,* 292 Kan. 690, 698-99, 259 P.3d 644, 650 (2011).
[33] *Robert L. Rieke Building Co., Inc. v. City of Overland Park*, 232 Kan. 634, 641, 657 P.2d 1121, 1127 (1983).
[34] Kan. Stat. Ann. §12-757(f)(1) (2014).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

or person are the "owners of record" of real property to be protested, ***all*** "owners" must sign the protest petition for the petition to be valid.[35] Zoning Regulations of Prairie Village specifically provide that:

> Valid Protest Petitions must be signed and acknowledged by each and every owner(s) of property protesting a given action. The word "owner(s)" for purposes of protest petitions shall include ***all those individuals that may have ownership in subject real property or property within the notification area. If the property is owned by joint tenancy, all such owners must sign the petition by their own hand to be valid***, unless the petition itself clearly indicates that one tenant has the legal authority to sign for and on behalf of the other. [36] (Emphasis added)

Plaintiffs allege that 89.0% of the joint owners of the condominium common area signed the Protest Petition, and that this majority vote bound all other "unit owners." However, this argument that the participation of a majority of the owners can serve to bind all of the owners conflicts with the applicable statute and regulation that, as a result of their plain language, clearly require participation of all of the owners. It appears clear that any number less than 100% of the joint owners is insufficient to meet the requirements of zoning ordinance §19.28.041 as indicated above.

Plaintiffs argue that the signature of the President of the Board of Managers of the Chateau Home Owners Association had the effect of protesting all "common areas." However, the Protest Petition here did not "clearly indicate" that one tenant had the legal authority to sign for and on behalf of others. This finding is consistent with Kansas Attorney General Opinion No. 78-184 which states the following:

> The signature of one joint tenant, standing alone, is not sufficient to commit the property in support of a zoning protest petition. If the names of both joint tenants are affixed to the petition by only one joint tenant, without any indication that the signing joint tenant is authorized to act for the other joint tenants, the signatures are insufficient to commit the property in support of the protest.[37]

[35] *Id.*
[36] Zoning Ordinance, at §19.28.041
[37] Kan. Atty. Gen. Op. No. 78-184, at p. 1.

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

In addition, the Kansas Uniform Common Interest Owners Bill of Rights Act[38] (which applies retroactively – such that non-conforming declarations and bylaws enacted prior to January 1, 2011 are invalidated) requires that the powers of a board of directors or managers be specified in the Bylaws.[39] Because this act does not allow a board of directors or managers to exercise powers not specifically enumerated in the Bylaws, "catch all" provisions like that found in Article II, Section 2 of the Chateau Home Owners Association Bylaws (provided in part below) do not empower a Board of Managers to execute a protest petition for the condominium owners.[40]

> Section 2. Powers and Duties. The Board of Managers shall have all of the powers and duties necessary for the administration of the affairs of the Association and as stated herein, and may do all such acts to exercise and carry out such powers and duties subject to the provisions of the Declaration and these Bylaws, except such powers as by law, the Declaration or these Bylaws may not be delegated to the Board of Managers by the Unit Owners. The powers and duties of the Board of Managers shall include, but shall not be limited to the following: (a) operation, care, upkeep and maintenance of the common areas and facilities and limited common areas and facilities; (b) determination and payment of the common expenses required for the affairs of the Association, including without limitation, the operation, care, upkeep and maintenance of the common areas and facilities; (c) assessment and collection from the Unit Owners of common expenses to meet the common expenses; (d) entering into contracts and agreements on behalf of the Association…for the maintenance and operation of the common areas and facilities and conduct of the affairs of the Association; (e) adoption and amendment of rules and regulations, including the Rules and Regulations attached hereto, applicable to the operation and use of the Property;…(g) purchasing, leasing or otherwise acquiring in the name of the Board of Managers or its designee, corporate or otherwise, on behalf of all Unit Owners, Units offered for sale or lease, or surrendered by their ownrs [sic] to the Board of Managers; (h) selling, leasing, mortgaging or otherwise dealing with Units acquired by, and subleasing Units leased by, the Board of Managers, or its designee, corporate or otherwise, on behalf of all Unit Owners; (i) organizing corporations to act as designees of the Board of Managers in acquiring title to Units on behalf of all Unit Owners;…[41]

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[38] Kan. Stat. Ann. §58-4601 *et seq.* (2014).
[39] Kan. Stat. Ann. §58-4610(a)(3) (2014).
[40] Kan. Stat. ann. §58-4609(c)(5) (2014).
[41] Chateau Home Owners Association Bylaws, Article III, Section 2.

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

Because the right to bind all owners in a protest petition is not specifically found in the Chateau Home Owners Association Bylaws, the City could not, as a matter of law, include the common area in connection with the Protest Petition. Ownership of condominiums is governed by the Kansas Apartment Ownership Act (the "Act").[42] Under the Act, "apartment" and "condominium unit" are synonymous and are limited to the interior "furnished surfaces" of the unit "while all other portions of such walls, floor and ceilings shall be deemed a part of the common areas and facilities."[43] While "[e]ach apartment owner [or condominium owner] shall be entitled to the exclusive ownership and possession of his or her apartment"[44] as indicated above, such area includes only the "studs in" (the airspace inside the unit and the inside surface of the walls). In addition, "[e]ach apartment owner [or condominium owner] shall be entitled to an undivided interest in the common areas and facilities as expressed in the declaration" and as measured by "either the size or par value of each apartment or condominium unit."[45] The "unit owner" does not however have exclusive ownership or possession of any land as indicated under the following Act provision:

> "Common areas and facilities," unless otherwise provided in the declaration or lawful amendments thereto means and includes (1) ***The land on which the building is located***; (2) the foundations, columns, girders, beams supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building; (3) the basements, yards, gardens, parking areas and storage spaces; … (8) all other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use.[46]

The Condominium Property Declaration for the Chateau Condominiums is consistent with the Act. Thus, while each of the "unit owners" can separately convey (1) their interest in their

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[42] Kan. Stat. Ann. §58-3101 *et seq*. (2014).
[43] Kan. Stat. Ann. §58-3102(a) (2014).
[44] Kan. Stat. Ann. §58-3105 (2014).
[45] Kan. Stat. Ann. §58-3106(a) (2014).
[46] Kan. Stat. Ann. §58-3102(g) (2014). (Emphasis added)

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

units – “studs in”; and (2) their undivided, tenants in common interest in the common areas and facilities on the 2.332 acres of land (which includes the land under the units); a unit owner has no power to affect any particular portion of the land other than with “all owners.” As stated in a real property treatise:

> When two or more persons hold as tenants in common, each has an “undivided interest” in the entire property to the extent of his or her ownership share… All decisions with respect to the co-owned property must be unanimous.[47]

Thus, in order for a Kansas protest petition to be effective as to any land in the Chateau Condominium Subdivision (whether under a unit or not), 100% of the “owners of record” of units in the Subdivision must sign, regardless of whether any particular unit is inside or outside the “notice area.”

Again, under either the City’s theory or that of MVS, the City properly concluded that the condominium common area should not be included in the 20% calculation. However, while the City properly excluded the common area in connection with the Protest Petition, the City failed to properly conclude that there is no land under any condominium unit that is not “common area”, and thus owned in tenancy in common by all unit owners. When all of the “common area” is correctly excluded, only 110,778.61 sq. ft. was protested. Therefore, the Protest Petition failed by 25,412.99 sq. ft.

For the foregoing reasons, the Court denies Plaintiffs Motion for Summary Judgment on Count VI; and for the same reasons, the Court grants MVS’s Cross-Motion for Summary Judgment and denies the City’s Cross-Motion for Summary Judgment as to Count VI.

e. Count VII – Withdrawal of Protest Petition Signatures

It is undisputed that there were a few withdrawals of signatures from the Protest Petition, and even a withdrawal of a withdrawal. However, Plaintiffs focus on one withdrawal as untimely,

[47] Real Estate Investor’s Deskbook, §3:8 (3d ed).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

that of Deogracias D. Diego and Cecilia Diego. Because of its rulings above, this Court need not address Count VII, based on the denial of Plaintiffs Motion for Summary Judgment on Count III – proper procedure under K.S.A. 12-757(b), and Count VI – common area calculation. However, this Court will address the issue.

Plaintiffs claim there is no legal authority permitting persons to withdraw signatures from a protest petition. Defendants cite to K.S.A. 25-3602 and Attorney General Opinion 2003-18 for such authority. Defendants argue that the City followed the plain language of K.S.A. 25-3601 and K.S.A. 25-3602 in concluding that K.S.A. 25-3602 governed the legality and timeliness of the withdrawals. K.S.A. 25-3601(a) and K.S.A. 25-3601(d) respectively provide as follows:

> Subject to the provisions of subjection (d), if a petition is required or authorized as part of the procedure applicable to the state as a whole or any legislative election district or to any county, city, school district or other municipality, or part thereof, the provisions of K.S.A. 25-3601 *et seq.* and amendments thereto, shall apply.[48]
>
> When any other statute imposes specific requirements which are different from the requirements imposed by K.S.A. 25-3601 *et seq*., and amendments thereto, the provisions of the specific statute shall control.[49]

Plaintiffs and Defendants agree that the provisions imposing specific requirements different from K.S.A. 25-3601 are K.S.A. 17-741 *et seq*. However, Defendants argue that because these provisions do not cover withdrawal of signatures from a protest petition, withdrawals are plainly governed by K.S.A. 22-3602(c) which states the following:

> Any person who has signed a petition who desires to withdraw such person's name may do so by giving written notice to the county election officer or other designated official not later than the third day following the date upon which the petition is filed.[50]

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[48] Kan. Stat. Ann. §25-3601(a) (2014).
[49] Kan. Stat. Ann. §25-3601(d) (2014).
[50] Kan. Stat. Ann. §22-3602(c) (2014).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

Plaintiffs counter that the statute only applies to elections (not to zoning petitions) and that the Attorney General Opinion failed to adequately examine the statute's language in making his determination on this matter. Plaintiffs point to an earlier opinion of the Attorney General analyzing K.S.A. 25-3601 which found that the election statute had no application to non-election law where the non-election law specifically addressed the issue.[51] The issue with Attorney General Opinion 90-37 however, is that the Opinion referred to whether a valid petition was created and the statute it noted (K.S.A. 19-27a03) covered withdrawals. Thus, it was unnecessary in that situation to also follow K.S.A. 25-3602. The same cannot be said of K.S.A. 12-741 *et seq*. which does not cover withdrawals. Therefore, Attorney General Opinion 90-37 is not directly applicable here.

Attorney General Opinion 2003-18 (provided in part below) and the Kansas Court of Appeals in *Deffenbaugh*[52] agree with the Defendants approach of following the plain language of K.S.A. 25-3601 and K.S.A. 25-3602 in concluding that K.S.A. 25-3602 governed the legality and timeliness of the withdrawals.

> Attorney General Opinion 2003
> A protest petition regarding the amendment of zoning boundaries or regulations is authorized in 7(f)(1). "[I]f a petition is required or authorized as a part of the procedure applicable . . . to any county, city, school district or other municipality, or part thereof, the provisions of K.S.A. 25-3601 *et seq.*, and amendments thereto, shall apply." "When any other statute imposes specific requirements which are different from the requirements imposed by K.S.A. 25-3601 *et seq.*, and amendments thereto, the provisions of the specific statute shall control." Therefore, the requirements in K.S.A. 12-757 ***and*** 25-3601 *et seq*. are considered in determining whether signatures on a protest petition authorized by K.S.A. 12-757(f) must be notarized….There is no requirement in K.S.A. 12-757 that signatures on a protest petition be notarized. The plain language in K.S.A. 2002 Supp. 25-3602 shows that the signature of a circulator who has completed the recital is to be verified upon oath or affirmation before a notarial officer, but there is no requirement that other signatures contained on the petition be notarized. Following the rules of statutory

[51] *See* Kan. Atty. Gen. Op. No. 90-37, 1990 WL 547057.
[52] *Deffenbaugh Disposal Servs., Inc. v. City of Kan. City, Kan.* 776 P.2d 835, 1989 Kan. App. LEXIS 447, at *3 (unreported) (applying K.S.A. 25-3602(c) in the context of the validity of signatures on a zoning protest petition and the denial of a special use permit).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

> construction, it is determined that signatures on a protest petition submitted pursuant to K.S.A. 12-757, other than the circulator's signature on the recital, do not need to be verified upon oath or affirmation before a notarial officer or otherwise notarized. (Emphasis added)

Because neither K.S.A. 12-741 *et seq*. nor the zoning ordinances outline withdrawal of protest petition signatures, K.S.A. 25-3602 should control. The original protest petition submission deadline was December 17, 2013 at 5:00 P.M. The Diego's withdrawals were received at 10:50 A.M. on December 20, 2013 which is within the three day window available for withdrawals under K.S.A. 25-3602(c).

As such, were the Court required to address Count VII, it would deny the Plaintiffs' Motion for Summary Judgment and the decision of the City would stand. For the same reasons, the Court would grant Defendants' Cross-Motion for Summary Judgment on Count VII.

f. Count VIII – Subordinate Accessory Use

Zoning Regulations of the City specifically authorize "dwellings for senior adults" as a special use and provide that "[n]ursing care or continuous health services may be provided on the premises as a subordinate accessory use."[53]

Plaintiffs claim that the Second SUP Application fails to comply with the City's Zoning Ordinance because the Skilled Nursing Facility (SNF) is not a "subordinate accessory use" as it provides no "condition of servitude"[54] to the primary assisted living building. Specifically, they note that the SNF will offer its services to SNF patients only, and not to all residents of the assisted living building. Thus, they claim that SNF will be open to anyone in the general public who requires skilled nursing care and cannot be considered "subordinate" or an "accessory" to the primary assisted living building

[53] Zoning Ordinance, at §19.28.070(I) (2014).
[54] *Trent v. City of Pittsburg*, 5 Kan. App. 2d 543, 546, 619 P.2d 1171, 1174 (1980).

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

Defendants claim that the City previously considered the argument presented by Plaintiffs and ultimately concluded that the City's Zoning Ordinance allowed for subordinate accessory uses in separate buildings because the term "premises" should be broadly construed. As such, the City found that the plans set forth in the Second SUP Application were reasonable and consistent with regulations. Defendants argue that this finding should be upheld.

This issue is purely a matter of local law under the Zoning Ordinance. Because Kansas law entitles the City to great deference as noted in Section IIb above, the City's interpretation of its own zoning Ordinance will be upheld unless the Court determines the actions taken to be unlawful or unreasonable.[55] Plaintiffs have presented no Kansas authority indicating that the City's actions were unlawful or unreasonable, and their argument that no deference can be afforded to the City under the doctrine of operative construction because interpretation of ordinances is subject to unlimited review, is unavailing.[56]

The Court denies Plaintiffs Motion for Summary Judgment on Count VIII; and for the same reasons, grants Defendants' Cross-Motion for Summary Judgment on Count VIII.

g. Count IX – Due Process Rights

Based on the Court's denial of Plaintiffs Motion for Summary Judgment on Count III – proper procedure under K.S.A. 12-757(b), the only remaining question under Count IX – due process rights, is whether proceedings were "fair, open, and impartial."[57]

Here, the Court pauses to acknowledge Plaintiffs' argument that certain members of the City Council objected to the Second SUP as a "very calculated and deliberate intent to circumvent due process".[58] This Court is not blind to, and does not ignore, the suggestion that Defendants

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[55] *Hukle,* 212 Kan. at 635, 512 P.2d at 464.
[56] *Sharp v. City of Leawood*, 188 P.3d 977, *2 (Kan. Ct. App. 2008).
[57] *Manly v. City of Shawnee*, 287 Kan. 63, 78, 194 P.3d 1, 12 (2008)
[58] Doc. #72, p. 12, ¶43.

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

intentionally circumvented due process through strategic placement of buildings. However, it is apparent that the majority of the City governing body did not see it that way. More importantly, this Court has found none of the actions by the City were unlawful. In other words, calculated and deliberate do not equate (at least in this case) to unlawful.

Plaintiffs contend, without supporting legal authority, that the U.S. Constitution and the Kansas Constitution afford them "vested rights from interference without due process law of law."[59] However, the Court must address such claims in the context of the specific case before it. The Kansas Supreme Court recently concluded, under facts similar to the present case, that in the context of a special use permit application, "the only question before us [the Court] is whether the proceedings that led to the granting of the special use permit were fair, open, and impartial":

> We first note that the record does not disclose a ruling by the district court that the Manlys did not have a protected property interest as affected property owners. Moreover, we are unconvinced by Manlys' suggestion that they have some sort of property interest in the procedures employed by the City. We perceive the only question before us is whether the proceedings that led to the granting of the special use permit were fair, open, and impartial. We believe that they were.[60]

The Supreme Court continued: "The Manlys received the appropriate notice under K.S.A. 12-757(b)."[61] "They appeared and had an opportunity to be heard at the public hearing before the planning commission on November 21, 2005."[62] "The Manlys and their attorney had an opportunity to be heard at the December 12, 2005, City Council meeting."[63] "Again, at the January 9, 2006, meeting, the Manlys and their attorney took advantage of their opportunity to address the City."[64] "In short, the notice and hearing requirements of K.S.A. 12-741 *et seq*. were

[59] Doc. 66, Pretrial Order, at pp. 23–24.
[60] *Manly*, 287 Kan. at 78, 194 P.3d at 12 (citing *McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County*, 274 Kan. 303, 317, 49 P.3d 522, 531 (2002) ("Thus, due process attached to the proceedings and those proceedings must have been fair, open, and impartial.")).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

followed."[65] "The record confirms that the hearings before both the planning commission and the City Council were unquestionably fair, open, and impartial."[66] "The Manlys fail to establish any due process violation which would invalidate the City's action."[67]

An obvious difference between Manly and the present case, is that the Manlys received notice, and in the present case, certain Plaintiffs did not. However, as this Court has concluded above, those Plaintiffs were not entitled to notice under K.S.A. 12-757(b). Thus, in both cases, the City complied with K.S.A. 12-757(b). Further, as in Manly, the record herein is clear that Plaintiffs and their attorneys had their opportunity to address their concerns to the City. As a result, the proceedings before the City here, as in Manly, were fair, open, and impartial, as evidenced not only by the record, but also by Plaintiffs' decision to drop their reasonableness challenges.

The South Adjoining Landowners, the Mission/Somerset Landowners, and the condominium owners had no vested rights with respect to notice or protest petitions. Because the Plaintiffs have provided no evidence (let alone clear and convincing evidence) that the underlying proceedings and hearings held before the City were not fair, open, and impartial, and Plaintiffs had no vested right to a protest petition, Count IX must fail. The Court denies Plaintiffs' Motion for Summary Judgment on Count IX; and for the same reasons, the Court grants Defendants Cross-Motion for Summary Judgment on Count IX.

h. Count XI - Mandamus

The Plaintiffs seek a writ of mandamus. Under Kansas law, "before an order of mandamus may be issued it must be found that a clear legal right has been violated…Mandamus lies only to

[65] *Id.*
[66] *Id.*
[67] *Id.*

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

enforce a right in a clear-cut case."[68] When the issue is in substantial dispute or not clear, "mandamus is not an appropriate means to resolve the issue."[69]

Although Plaintiffs claim that the City has "clearly defined duties" imposed by law, not involving discretion; this Court has found otherwise in denying Counts III, IV, V, and VI. In fact, this Court has not only denied Plaintiffs motion on these Counts, but it has also granted Defendants motion on those Counts. As such, mandamus is clearly inappropriate. The Court denies Plaintiffs' Motion for Summary Judgment on Count XI; and for the same reasons, the Court grants Defendants' Cross-Motion for Summary Judgment on Count XI.

i. Counts XII and XIII – Injunctive Relief

The Plaintiffs seek injunctive relief. This Court has previously denied Plaintiffs' request for a temporary injunction. In order to obtain a permanent injunction, "plaintiff must first establish a substantial likelihood of success on the merits."[70] In addition, plaintiff must meet the following four requirements:

> (1) There is a reasonable probability of irreparable future injury to the movant; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest.[71]

Based upon this Court's rulings above on all other Counts, Plaintiffs clearly cannot establish the four requirements necessary to obtain a permanent injunction. The Court denies Plaintiffs' Motion for Summary Judgment on Counts XII and XIII; and for the same reasons, the Court grants Defendants' Cross-Motion for Summary Judgment on Counts XII and XIII.

IV. <u>CONCLUSION</u>

[68] *Bd. of Cnty. Comm'rs v. Whiteman*, 23 Kan. App. 2d 634, 638, 933 P.2d 771, 774 (1997).
[69] *Id.* at 639.
[70] *Steffles v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843, 854 (2007).
[71] *Id.*

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL

For the reasons set forth above, the Court finds that Plaintiffs' Motion for Summary Judgment should be, and hereby is, **DENIED in its entirety.** For the same reasons, MVS's Cross-Motion for Summary Judgment should be, and hereby is, **GRANTED in its entirety.** The City's Cross-Motion for Summary Judgment should be, and hereby is, **GRANTED as to Counts II, III, IV, V, VII, VIII, IX, XI, XII, and XIII and DENIED as to Count VI.**

IT IS SO ORDERED.

This Memorandum Decision and Journal Entry of Judgment shall constitute the Court's final entry of judgment in this case pursuant to K.S.A. 60-258.

Dated this 12th day of September, 2014.

/s/ THOMAS SUTHERLAND
District Judge, Division 3
Johnson County District Court

Clerk of the District Court, Johnson County Kansas
09/12/14 11:57am DL