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November 5, 2013

Via E-mail and U.S. Mail

Catherine Logan
Lathrop & Gage LLP
10851 Mastin, Suite 1000
Overland Park, Kansas 66210
clogan@lathropgage.com

Re: Mission Valley Site; MVS, LLC's 10/4/13 Site Plan & Special Use Permit Applications

Dear Ms. Logan:

As you know, we represent the Mission Valley Neighbors Association, Inc. ("Mission Valley Neighbors") who respectfully oppose the most recent special use permit application (PC 2013-11) and site plan approval (2013-123) submitted by MVS, LLC ("MVS") on or about October 4, 2013.

As explained in our October 31, 2013, letter, MVS' 10/4/13 special use permit application represents nothing more than an attempt to secure the required votes for its project by employing legal subterfuge in an effort to avoid the property right of the adjoining property owners to the south and southwest to file a protest petition against the proposed special use. While many other legal deficiencies of MVS' special use permit application are outlined in our previous letter, the purpose of the instant letter is to renew our objection to MVS' purported classification of its "Skilled Nursing/Memory Care" facility as a sufficiently "subordinate accessory" use under Zoning Ordinance 19.285.070(I) and Kansas law.

MVS' 10/4/13 special use permit application—like its previous special use permit application—proposes the construction of a "Skilled Nursing/Memory Care" as a purported "subordinate accessory use" to other "[d]wellings for senior adults" within the meaning of Zoning Ordinance 19.28.070.

As an initial matter, the Zoning Ordinance demonstrates an apparent intent to strictly construe the scope of any proposed special use, requiring that "[i]n no event shall a Special Use

Permit be granted where the Special Use contemplated ***is not specifically listed as a Special Use in the Zoning Regulations.***” Zoning Ordinance 19.28.005 (emphasis added).

Zoning Ordinance 19.28.070 allows for the following “specifically listed” use:

I. Dwellings for senior adults, as defined herein, and including handicapped adults. Dwellings may be in the form of townhomes, apartments or congregate type living quarters. Nursing care or continuous health care services *may be provided on the premises as a subordinate accessory use. . . .*

Zoning Ordinance 19.28.070(I) (emphasis added).

Simply put, MVS cannot demonstrate that its 97,550 SF Skilled Nursing/Memory Care facility constitutes a mere “subordinate accessory use.” As an initial matter, the Zoning Ordinance demonstrates an intent to only permit nursing care as a “subordinate accessory use” “on the premises” of the principal building and not as the primary use in a wholly separate building. Zoning Ordinance 19.28.070(I). Stated another way, the Zoning Ordinance does not “specifically” grant the right to operate a separate and distinct skilled nursing facility on a “campus” which includes several buildings, one of which facilitates a “use” not specifically listed. Section 19.28.070(I) does not expressly provide MVS any authority to construct a separate building or “premises” independent of the principal senior adult “dwelling” building. To the contrary, Section 19.28.070 demonstrates that the Zoning Ordinance was never intended to be used as a statutory authority to construct a separate 97,550 SF building under the guise of a mere “subordinate accessory use.” Indeed, the Zoning Ordinance itself only contemplates an “accessory use” to be a secondary use in the primary building. “Accessory uses” to motels include, for example:

restaurants, banquet rooms, liquor, notions and magazine counters, vending machines, beauty and barbershops, flower and gift shops; ***provided all are within the main building*** and designed to serve primarily the occupants and patrons of the motel or hotel;

Zoning Ordinance 19.28.070(P). Further, “accessory uses to hospitals” are similarly limited in definition to uses contained in the primary building or clearly secondary thereto:

Accessory uses to hospitals including, but not limited to, residential quarters for staff and employees, nursing or convalescent quarters, storage and utility buildings, food service and vending machines, laundry and other similar services for hospital personnel, visitors and patients;

Zoning Ordinance 19.28.070(Q).

Further, Zoning Ordinance 19.02.300 defines “Lot” as “a parcel of land occupied or to be occupied by one main building or unit group of buildings and the accessory buildings or uses customarily incidental thereto” “Accessory Building” is defined under the Zoning

Ordinance as “a subordinate building or structure having a use customarily incidental to and located on the lot occupied by the principal use or building. **A building housing an accessory use is considered an integral part of the principal building, when it has any part of a wall in common with the main building, or is under an extension of the main roof and is designed as an integral part of the principal building.** Zoning Ordinance 19.02.010. MVS’ proposed 97,550 SF Skilled Nursing/Memory Care Facility, however, will share no “wall in common with the main building” and will not be “under an extension of the main roof” of the Assisted Living/Independent Living building.

The proposed special use permit seeks to construct a major, 97,550 SF facility that would alone constitute one of the largest buildings in the area. Under any statutory construction and any cursory review of the proposed 97,550 SF Nursing Facility, such a structure cannot be considered a mere “subordinate accessory use” within the meaning of the Zoning Ordinance. As such, MVS has failed to apply for an allowable special use “specifically listed” by statute and, thus, the application now before the Planning Commission fails to meet the minimum standards of the Zoning Ordinance.

Moreover, MVS’ contention that the 97,550 SF Nursing Facility is somehow a “subordinate accessory use” attempts to distort the plain meaning of those terms. In using the plain and unambiguous words “subordinate” and “accessory,” any fair reading of Section 19.28.070 should also give such terms their plain and unambiguous meaning. *See, e.g., Weeks v. City of Bonner Springs*, 518 P.2d 427, 433 (Kan. 1974) (“This court has many times stated the primary rule for the construction of a [municipal ordinance] is to determine the legislative intent from the language used therein. If the language used is plain and unambiguous the court should follow the intent expressed by the words within the statute . . .”) (quoting *Phillips v. Vieux*, 504 P.2d 196, 201 (Kan. 1972)). Indeed, and in accordance with the generally accepted definition of such terms¹ as connoting a secondary or inferior position, the Zoning Ordinance specifically proscribes the construction of a building as an “accessory use” if it imposes any sort of burden in excess of that associated with the primary building or use. Specifically, Section 19.34.005 states that:

accessory buildings and uses shall be so constructed, *maintained and conducted as to not produce* noise, vibration, concussion, dust, dirt, fly ash, odor, noxious gases, heat or glare which is injurious, damaging, unhealthful or disturbing to adjacent property or the users thereof *or generate vehicular traffic which exceeds*

¹ “Accessory Use” is defined under the Zoning Ordinance as “a use of building or land which is customarily incidental to and located on the same lot or premises as the principal building or use of the premises.” Zoning Ordinance 19.02.015. Black’s Law Dictionary (9th ed. 2009) defines “incidental” as “[s]ubordinate to something of greater importance; having a minor role.” The Merriam-Webster Dictionary defines “subordinate,” in relevant part, as: “(1) placed in or occupying a lower class, rank, or position : inferior . . .” “Accessory” is similarly defined as: “(1) assisting as a subordinate . . .;” (2) “aiding or contributing in a secondary way;” or (3) “present in a minor amount and not essential as a constituent.” Kansas courts have defined the term “incidental” as “[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose.” *See Trent v. City of Pittsburgh*, 5 Kan. App. 2d 543, 545, 619 P.2d 1171, 1173 (1980).

the normal traffic in the neighborhood and shall be on the premises of the principal building or use.

Zoning Ordinance 19.34.005 (emphasis added). MVS' proposed "subordinate accessory" 97,550 SF Skilled Nursing/Memory Care facility, however, would produce a significant traffic burden on the surrounding area. To the extent that Section 19.34.005 expressly prohibits a purported "accessory use" from producing *any* additional vehicular traffic burden, the significant traffic burden produced by the 97,550 SF Nursing Facility demonstrates that MVS' proposed special use is not merely a "subordinate accessory" use. For such additional reason, MVS' special use application should be denied.

In addition, MVS' contention that its proposed 97,550 SF Skilled Nursing/Memory Care facility would somehow constitute a "subordinate accessory use," under the plain meanings of those terms, clearly misses the mark when one assesses the sheer size of the nursing facility in relative terms. Under the proposal presented by MVS, the 97,550 SF Skilled Nursing/Memory Care facility would be a separate, stand-alone structure. In comparison to other notable nearby structures, the 97,550 SF Nursing Facility would be larger (in terms of square feet) than any of the following: (a) the Corinth South property (i.e. Panera, First Watch, and Mission Antique Mall buildings); (b) the Corinth Office Building; and (c) the Corinth Executive Building. *See Corinth Area Office and Retail* data, attached hereto as **Exhibit A**. In addition, the 97,550 Skilled Nursing/Memory Care facility would constitute over half of the square-foot area of *all* the buildings in the Corinth Square retail center. In light of such numbers, any argument by MVS that the nursing facility should be considered anything other than one of the largest buildings in Prairie Village should not be countenanced by the City.

MVS' proposed 97,550 SF Skilled Nursing/Memory Care facility does not constitute a "subordinate accessory use" to another, primary senior adult dwelling for the additional reason that the Skilled Nursing/Memory Care facility itself would constitute an independent and self-contained senior adult dwelling designed for residential occupancy, both short and long term. According to MVS, the Skilled Nursing/Memory Care facility would offer its citizens a number of amenities exclusive to that facility, including its own dining spaces, theater, library, coffee and sundry shop, and gym, among others. While the City's Zoning Ordinance only permits approval of "nursing care or continuous health care" as "accessory" "services" offered to the residents of the primary senior adult dwelling, *i.e.* the "Assistant Living/Independent Living" facility, MVS' proposed special use permit proposes that such "nursing care or continuous health care" would be offered to residents of the "Skilled Nursing/Memory Care" itself.

In sum, MVS' reliance on the Zoning Ordinance's for approval of its 97,550 SF Skilled Nursing/Memory Care facility as a "subordinate accessory use" should not be accepted by the City. The City's Zoning Ordinance demonstrates a clear intent to limit the mass and density of the proposed "nursing care or continuous health care services" by only permitting such use as a "subordinate accessory use." At 97,550 SF, however, the Skilled Nursing/Memory Care facility would constitute one of the largest residential buildings in the area on a "campus" already proposed to contain a 228,340 SF Assisted Living/Independent Living building and a number of residential homes. The City's Zoning Ordinance does not permit—expressly or otherwise—the

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construction of a separate building for “nursing care or continuous health care services” of the size and density of the proposed 97,550 SF Skilled Nursing/Memory Care facility under the guise of a mere “subordinate accessory use.”

As such, the Mission Valley Neighbors request that the City refuse to consider or deny MVS’ proposed special use permit.

Very truly yours,

DUGGAN SHADWICK DOERR & KURLBAUM LLC

A handwritten signature in blue ink, appearing to read "John M. Duggan", with a long horizontal flourish extending to the right.

John M. Duggan

CORINTH AREA OFFICE AND RETAIL

<u>Property</u>	<u>Acres</u>	<u>Square Footage</u>
1. Corinth South (Panera, First Watch, and Mission Antique Mall buildings)	6.92	89,076
2. Corinth Square (All buildings)	17.76	167,351
3. Corinth Office Building	2.01	51,818
4. Corinth Executive Building	<u>3.64</u>	<u>52,752</u>
TOTAL	30.33	360,997

Square footage/ acre of existing mixed use (properties 1-4 above) = $360,997/30.33= 11,902$

	<u>Acres</u>	<u>Square Footage</u>
Development Proposal	12.8	325,890

Square footage/acre proposed= 25,460

The proposed development is over two times more intense a development than the mixed use development to its north.

Square footage/acre proposed 25,460

Square footage/acre existing mixed use **11,902**

EXHIBIT A