

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION SEVEN

FRIENDS OF THE BETHANY )  
PLACE, INC., )  
 )  
 Appellant, )  
 ) Case No. 07C1195  
 vs. )  
 )  
 CITY OF TOPEKA, )  
 )  
 Appellee, )  
 )  
 and )  
 )  
 GRACE CATHEDRAL and THE )  
 EPISCOPAL DIOCESE OF )  
 KANSAS, INC., )  
 )  
 Intervenor. )  
 )  
 \_\_\_\_\_ )

**MEMORANDUM OPINION AND ENTRY OF JUDGMENT**

This matter is before the Court pursuant to an appeal perfected by the Appellant, Friends of the Bethany Place, Inc., for judicial review of the decision of the Topeka City Council granting the Grace Cathedral and the Episcopal Diocese of Kansas's request

for a permit to construct a forty to forty-three stall parking lot on the premises adjacent to the Grace Cathedral and owned by the Diocese known as "Bethany Place," which premises, including its buildings and environs, are on the State of Kansas' historic register.

Here, for the purpose of this opinion the Court need not fully repeat what has been previously discussed in its opinion of February 1, 2008, which denied a motion to dismiss this appeal and granted intervention to the Grace Cathedral and the Diocese; however, certain portions of that opinion are repeated for the ease of reference in understanding the decision on the merits of the appeal.

Three considerations arise from this appeal, not yet resolved, that will determine the result of the judicial review undertaken. First, whether the ruling made by the Topeka City Council is legally adequate to support proper judicial review, it being specific as to its mandated statutory finding, but standing unarticulated as to its underlying factual findings or

reasoning in support of its decision. Second, whether the hearing process and the record developed before the Topeka City Council supports the decision made, recognizing the clear limitations on the Court's power to overturn such character of decision. Third, and lastly, whether the Council's decision was limited or tainted in any fashion in its hearing format or evidential considerations or limitations, including any legal misperceptions as to its authority and scope of review or that might arise from the fact the permit applicants are religious entities.

**STANDARD OF REVIEW:**

Here, the appeal was perfected under K.S.A. 60-2101(d), a general statute, which provides a means of judicial review for political or taxing subdivisions when such review is not otherwise provided by another, more specific, statute.

The general standard for the review to be conducted by a court on such appeals is as follows:

"A district court may not, on appeal, substitute its judgment for that of an administrative tribunal, but is restricted to

considering whether, as a matter of law, (1) the tribunal acted fraudulently, arbitrarily or capriciously, (2) the administrative order is substantially supported by evidence, and (3) the tribunal's action was within the scope of its authority."

*Reiter v. City of Beloit*, 263 Kan. 74, 86 (1997).

This is the classic standard for the review of quasi-judicial decisions, which character of decision can be described as follows:

". . . quasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of judicial nature."

*Thompson v. Amis*, 208 Kan. 658, 693 (1972).

While standards for the conduct of quasi-judicial administrative hearings has been codified for most state agencies (K.S.A. 77-501 *et seq.*: Kansas Administrative Procedure Act), no such statewide codification of procedure exists for political or taxing subdivisions, such as the City of Topeka, and, accordingly, any existing procedure used has either been adopted specifically by the entity or is otherwise derived, *ad hoc*, from the case law and principles of

due process. The City of Topeka employs no specific procedure but, rather, from a review of the proceedings, appears to handle such matters just as a regular agenda item might be handled by the Topeka City Council for any *policy* matter.

Here, clearly, the Topeka City Council was making a quasi-judicial decision. The decision to be made by the Topeka City Council, given the determination of the State Historic Preservation Officer that granting the permit for the Cathedral's new parking lot would "encroach upon, damage or destroy [Bethany Place] . . . or the environs of such property" was to find, if the permit was to be granted, that

" . . . based on all relevant factors, that there is no feasible and prudent alternative to the [parking lot] proposal and that the [parking lot] program includes all possible planning to minimize harm to [Bethany Place and its environs]."

K.S.A. 75-2724(a) (1) .

In setting the parameters for Court review of the record, it is to be noted that had it been the approval from the State of Kansas, rather than from a local

governing entity, that had been required, such decision would have been relegated to the Governor, using the same standards; however, any appeal would have been conducted pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions pursuant to K.S.A. 77-601 *et seq.* See, K.S.A. 75-2724(b). Thus, though an appeal from such decisions made by local authorities or the Governor follow different statutory authority for the appeal, there would certainly seem to be a legislative intent that any court conducting such a review not do so under different standards of review. Hence, case law applicable to judicial review under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KAJR) may equally be seen to apply.

Accordingly, the standards for judicial review as set forth in K.S.A. 77-621 should rightfully apply and they, in turn, are but a codification of previous case law governing review of administrative decisions, particularly, those of a quasi-judicial nature. K.S.A. 77-621 states:

"(a) Except to the extent that this act or another statute provides otherwise:

(1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and

(2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines any one or more of the following:

(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

(6) the persons taking the agency action were improperly constituted as a decision-making

body or subject to disqualification;

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error."

Thus, the rules governing this Court's review can be summarized from the following case law: On a petition for review, the petitioner has the burden of proving the invalidity of the agency's order. *Siler v. Kansas Employment Security Board of Review*, 31 Kan. App. 2d 1071, 1073 (2003). On review, a court may not simply substitute its opinion for that of the agency. *Kan. State Bd. of Healing Arts v. Foote*, 200 Kan. 447, 450, (1968). "A rebuttable presumption of validity attaches to all actions of an administrative agency and the burden of proving arbitrary and capricious conduct lies with the party challenging the agency's actions."

*Kansas Racing Management, Inc. v. Kansas Racing Com.*, 244 Kan. 343, 365 (1989). An agency order is arbitrary or capricious when it is not supported by substantial evidence. *Id.*; *U.S.D. No. 461 v. Dice*, 228 Kan. 40, 50, (1980) (citing *Neeley v. Bd. of Trs., Policemen's & Firemen's Ret. Sys.*, 212 Kan. 137, Syl. para. 3 (1973)).

"Substantial competent evidence" is evidence that possesses both relevance and substance and furnishes a substantial basis of fact from which the issues can be reasonably resolved. *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 21, 687 P.2d 603 (1984).

Here, as previously noted, there may be a question of whether the judgment presented for review is presented in sufficient form such that it may be judicially reviewed in accordance with the above standards. The Topeka City Council's ultimate decision was initiated in the form of a motion. The transcript of the record reveals the following:

"MAYOR BUNTEN: Thank you, sir. That

completes our conferees. Mr. Preisner.

COUNCILMEMBER PREISNER: Thank you, Your Honor. At this time I'd like to make a motion to approve the communication to override the recommendation of the State Historic Preservation Officer and issue the parking lot permit.

I base this on the City Council's consideration of all relevant factors, that there are no feasible and prudent alternatives to the proposal, and that all possible planning has been undertaken to minimize harm to the historic property.

MAYOR BUNTEN: Is there a second?

COUNCILMEMBER ALCALA: I'll second it for the purpose of discussion.

MAYOR BUNTEN: Mr. Alcala.

COUNCILMEMBER ALCALA: I guess my question is two-fold. I heard one of the conferees come up and talk about a parking lot a block away that we didn't approve and the NIA was against that and we tried to work out some agreements and I understand that. I mean, I actually agreed with the NIA. But there's two questions that come up and I think I need to reference them to the city attorney.

One of them is the question that the attorney Pedro Irigonegaray brings up around K.S.A. 75-2724. When you look at that statute it does say that the council may sustain their decision of the State Historic Preservation Officer based off of if there's anything that's a feasible or prudent

alternative to the proposal. And I think some people have come up and suggested that. And when I look at the maps and I look at the layout you can see different items on there that maybe they could do. But the question that comes to mind is when one of the pastors or reverends came up to speak and talked about space per square footage, I guess my question goes back to the city attorney because I think there is a liability risk associated with how we vote on this and I just don't know where it is.

But Brenden my question to you is, do we infringe on the First and Fourteenth Amendment of free exercise of religion if we don't grant the permit?

MR. LONG: And there are really two things going on here. The State Historic Preservation Act does apply to this case and so the referenced statute does apply to the extent that the City Council, in order to-- to override the recommendation of the State Historic Preservation Officer must find, based on a consideration of the factors, as Mr. Preisner pointed out, that there's no feasible and prudent alternatives to the proposal. That consideration is really going to be based on all that was presented to you tonight, as well as the packets of information that you received with your agenda analyzing the needs of the applicant, the needs of the community, the attempt to maintain those-- the historic character of the site and part of it's an economic determination, part of it is a technical determination. The other issue though that you referenced, the First Amendment issue is of significant concern also. There is a recent decision in Federal District Court in

Kansas involving the City of Atchison where a church school, Mt. St. Scholastica, up in Atchison attempted to demolish a building on the campus. The City of Atchison refused the demolition permit, a lawsuit was brought and removed to federal court. And the judge in that case determined that the City of Atchison was infringing upon the First Amendment, free exercise of religious rights of the-- of the school and infringing upon their mission as a religious institution. They were not convinced that under the-- the review of law that they were-- the judge felt they needed to follow that historic preservation was a compelling enough interest to allow the city to infringe upon that First Amendment right.

So the City of Atchison did lose that case. I understand it was subsequently settled and that the demolition has occurred or is occurring as we speak. So I think the city does-- probably faces some potential legal action at least whichever way you go. I mean, again the Act still does apply, but then we would have the other possibility of an unconstitutional action against the city if the permit is denied.

COUNCILMEMBER ALCALA: And that's-- I guess that was my difference between the two parking lots. The other was privately owned and this one is owned by the Cathedral. Okay. You answered my question. Thank you, Brenden.

MAYOR BUNTEN: Mr. Blackburn.

COUNCILMEMBER BLACKBURN: Brenden, I realize it appears that there may not be-- there's probably not a feasible alternative.

Is it also proper to look at an additional mitigating circumstance that possibly the state made a mistake. I mean, in '83 they said a plan that was much more invasive-- appears to me to be more invasive and said it's in accordance with-- it would be allowable in accordance with 75-2724. I mean, is that I mean, something that we should look at as well?

MR. LONG: I think you need to examine just what's in front of you right now and not necessarily what was in front of the state back in the 1980s.

The state undertakes an environs review. They look at the impact on the environ, both the historic location landmark as well as the area within 500 feet of that determines what kind of impact that will have. Your responsibility as the governing body is to make a determination that there's a feasible and prudent alternative to the-- to what was being proposed.

So you're not really making a judgment on whether the State Historic Preservation Officer was right or wrong. It's your ultimate decision to determine whether there's a reasonable basis for that feasible and prudent alternative evaluation.

COUNCILMEMBER BLACKBURN: So ultimately it comes down to our opinion if we think there is or is not a reasonable alternative?

MR. LONG: Right. And if it goes to court that opinion will be judged accordingly.

I mean, they'll look at the reasonable

basis for it, they'll look at the evidence that was presented and determine if your decision was based on what was presented or if it was just an arbitrary decision based on other factors.

COUNCILMEMBER BLACKBURN: Thank you.

MAYOR BUNTEN: Mr. Harmon.

COUNCILMEMBER HARMON: Thank you, Your Honor. Brenden, kind of a follow-up, the Mt. St. Scholastica case that raised the First Amendment issue with respect to the denial by the City of Atchison on the demolition permit, are there any findings of fact we need to make in order to-- separate and apart from Councilman Preisner's motion with respect to the First Amendment issue if that's the basis upon which we wish to overrule the finding?

MR. LONG: No. I think your first task here is really to make your determination based on the State-- the State Act with the understanding that-- that a denial of the parking lot permit could create some legal issues.

COUNCILMEMBER BLACKBURN: All right. Thank you.

MAYOR BUNTEN: We have a motion. Is there other further discussion? The motion is to approve the communication. Those in favor will vote yes, nos will do no.

THE CLERK: We have nine, yes.

MAYOR BUNTEN: Nine having voted in favor and none against, the motion carries."

(Record: pp. 164-171.)

Thus, without a writing summarizing the reasons or some expression of the reasons on the record, the record itself is the only evidence available for deducing the reasons for the Council's vote on the permit and is, therefore, the determinant of both the Court's ability to review the record and its sufficiency to support the judgment made. Whether this record, such as it is, is sufficient is questionable, at best. See, *Board of County Comm'rs v. City of Olathe*, 263 Kan. 667, 668 (1998).

The facts here may be summarized principally as follows. Any reference to the record here is to the *Substitute Record on Appeal* filed February 8, 2008. The property contemplated as the situs for the proposed parking lot is as described in the *Council Action Form*, a part of the record on appeal. The property upon which the parking lot was sought to be placed has origins as follows:

"The property in question is known as Bethany Place. The original 20 acres of Bethany Place were donated to the Episcopal Church by

the Topeka Association in 1861, and was the original location for the Sisters of Bethany Episcopal School for Girls. Two structures still on the property, constructed in 1874 and 1875, were designed by architect John H. Haskell in the English Gothic style of architecture, and were a part of the original campus. The structures were both converted for residential uses, in association with Grace Episcopal Church, in 1928, and were later remodeled for office uses in 1959. Small additions have been made to the buildings, each of the same native limestone as the original structures.

In 1908, construction began on Grace Episcopal Cathedral, with the majority of the construction completed in 1917. The towers were completed in 1955. In 1929, the Topeka School District exercised its option to purchase the majority of the Bethany Place campus in order to construct Topeka High School. The two buildings and their environs are all that remain of the original campus of Bethany College. The college was founded by the first Bishop in Kansas at a time when educational opportunities were few, especially for women.

The grounds immediately surrounding the two remaining buildings, and particularly the frontage along SW Polk Street remain largely intact have remained relatively unchanged over the last ½ century. Several trees, which are distinctive and character-defining to the grounds of Bethany Place, are planted in this area and will be lost by the construction of the proposed parking lot."

(Record: pp. 173-174.)

In accordance with K.S.A. 75-2724(a), the State Historic Preservation Officer issued a ruling. The ruling was that the Diocese's proposed parking lot not go forward as proposed. That officer's letter of May 8, 2007, stated, in part, as follows:

"The SHPO is charged with determining whether or not projects will encroach upon, damage or destroy; historic buildings or their environs. In review projects on historic properties, the SHPO uses the Secretary of the Interior's *Standards for Rehabilitation*. The *Standards* say:

New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property.

New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

Based on the *Standards*, the SHPO has determined that the proposed project will encroach upon, damage or destroy the Bethany Place site. The construction of the proposed new parking lot appears to require the demolition of several historic trees that characterize the property at 833-835 Polk. Furthermore, construction of the parking lot drastically changes the relationship between the two historic buildings on the site with the public street of Polk.

The SHPO recommends redesigning the project to take advantage of the City's right of way by designing parking stalls directly adjacent to the street at Polk and possibly 8<sup>th</sup> Street if needed."

(Record: p. 234.)

Given the ruling, and as previously noted, the issue before the Topeka City Council was to make a:

". . . determination, based on a consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to such historic property resulting from such use."

K.S.A. 75-2724(a)(1).

The importance assigned to this duty is evidenced by the preamble to the State's Historic Preservation laws:

"The legislature hereby finds that the historical, architectural, archeological and cultural heritage of Kansas is an important asset of the state and that its preservation and maintenance should be among the highest priorities of government. It is therefore declared to be the public policy and in the public interest of the state to engage in a comprehensive program of historic preservation and to foster and promote the conservation and use of historic property for the education, inspiration, pleasure and enrichment of the citizens of Kansas taking into consideration

land used for agricultural purposes located within the environs of any historic property."

K.S.A. 75-2715.

The statutory mandate triggering the permitting process, and upon which the State Historic Preservation Officer issued the opinion disapproving the permit, was, as relevant here, activity that would:

"encroach upon, damage or destroy [Bethany Place] . . . or the environs of such property." (Emphasis added.)

K.S.A. 75-2724(a).

The Kansas Historical Society, in response to its mandates under the state historic preservation laws can promulgate regulations in aid of such statute (K.S.A. 75-2721(b)). Accordingly, that office acted to define "environs," "feasible and prudent alternative," "program includes all possible planning," and "relevant factors":

"'Environs' means the historic property's associated surroundings and the elements or conditions that serve to characterize a specific place, neighborhood, district, or area, which takes into account all relevant factors, including the following:

- (1) The use of the area;
- (2) the significance of the historical property;
- (3) the scope of the project;
- (4) surrounding buildings, structures, and foliage; and
- (5) the topography of the surrounding area.

A project need not be adjacent to a historic property for it to be in the historic property's environs."

K.A.R. 118-3-1 (d) .

"`Feasible and prudent alternative' means an alternative solution that can be reasonably accomplished and that is sensible or realistic. Factors that shall be considered when determining whether or not a feasible and prudent alternative exists include the following:

- (1) Technical issues;
- (2) design issues;
- (3) the project's relationship to the community-wide plan, if any; and
- (4) economic issues."

K.A.R. 118-3-1 (e) .

"`Program includes all possible planning' means that the written evidence and materials submitted by a governmental entity to the state historic preservation officer clearly identify all

alternative solutions that have been investigated, compare the differences among the alternative solutions and their effects, and describe mitigation measures proposed by the project proponent that address an adverse effect determination of the state historic preservation officer."

K.A.R. 118-3-1(i).

"'Relevant factors' means pertinent information submitted by project proponents or project opponents in written form, including evidence supporting their positions."

K.A.R. 118-3-1(j).

Further, by regulation, the Kansas Historic Preservation Office adopted the standards it would use to guide its judgments:

"The following standards and guidelines shall be used by the state historic preservation officer when reviewing projects.

(a) 'The secretary of the interior's standards for the treatment of historic properties with guidelines for preserving, rehabilitating, restoring & reconstructing historic buildings,' 1995 edition, is adopted by reference as a guide to determine whether or not proposed projects encroach upon, damage, or destroy listed historic properties.

(b) The 'treatment of archeological properties: a handbook,' endorsed by the advisory council on historic preservation, Washington, D.C., on November 5, 1980, is

adopted by reference as a guide for identifying and evaluating archeological sites using the criteria of eligibility for listing sites on the national register of historic places.

(c) The Kansas state historical society's 'standards and guidelines for evaluating the effect of projects on environs,' 1998 edition, is adopted by reference as a guide to determine whether or not proposed projects encroach upon, damage, or destroy the environs of listed historic properties."

K.A.R. 118-3-8.

Against this background of legal mandate and responsibility, the Topeka City Council undertook its responsibilities, heretofore noted, under the Kansas State Historical Preservation Act.

The presentations made and the documents submitted to the Topeka City Council identified alternatives to the Diocese's parking lot proposal. These alternatives involved cutback parking along Polk Street, on Eighth Street, or an adjacent alley and/or the use of vacant property belonging to the Diocese located proximately on Eighth Street for the additional parking desired. (Record: pp. 176, 271-276, 282-283.) Information was

also provided about reassigning or reconfiguring Grace Cathedral's current parking just to the west and adjacent to the church (Record: pp. 279-281) or along its current drive on the east (Record: p. 271) or reconfiguring the alleyways. (Record: p. 156.) No other alternatives were presented by any participant or commentator.

The Topeka Planning Department recommended disapproval of the Diocese's request based on the viability of the "cutback" parking alternative presented (Record: pp. 175-176); *however, whether the other alternatives suggested were investigated and compared is unknown from the record.* The Shawnee County Historical Society supported the alternatives. (Record: p. 277.) The Topeka Landmarks Commission concurred with the State Historical Preservation Office (Record: p. 173.) The Historic Old Town Neighborhood Improvement Association opposed the parking lot in favor of the alternatives presented. (Record: pp. 141-144, 173-174, 229-232, 271-276.)

The principal challenge to the alternatives

presented came from the Diocese and can be stated to rest fundamentally with the "cutback" parking in reference to its cost (Record: pp. 115-118, 257-258); the lack of ownership by the Diocese in terms of lack of ability to control parking on a public street (Record: pp. 115-118); the believed inadequacy of this alternative parking option on the character of some of the people sought to be served by the new parking lot, namely, the elderly and/or handicapped (Record: pp. 115-118, 122-125); and, as well, the safety of this alternative proposed (Record: p. 116). The Diocese argued that without an ability to control the "cutback" parking, it would be used by those in the neighborhood or by those from Topeka High School, that the angle parking suggested would create a safety issue when backing from the stalls or from children darting into the street from between cars; and that such parking on Polk or Eighth Street would require negotiating curbs or climbing steps and would not satisfy, generally, the needs of its elderly or handicapped.

The record is substantially devoid, except as to

the stated need to cross Eighth Street and the overall safety of the "neighborhood," of an explanation or proffer as to placing parking lots on the Diocese's other owned and proximate property. No comment was made as to expansion of its east drive. The Diocese argued to the Court, not the Council, that reconfiguration of its existing lot on the west of the church to create more handicap spaces would reduce the parking spaces available in that lot. In addition, the Topeka City Council was given pictures, diagrams, and the state preservation officer's opinion and those of others in writing, but principally only from opponents. Also, a video of the Grace Cathedral area in aid of the alternatives was delivered to the Council by a speaker in opposition, but not played, but, for some reason, it is not part of the record. (Record: p. 108.)

*Reiter v. City of Beloit*, 263 Kan. 74 (1997), is the most exhaustive case that aggregates the considerations that a governing body's decision should encompass. The decision to be made should be scrutinized by the Court to determine, in light of the

record, whether "the governing body took a hard look at all relevant factors and, using plain common sense, based its determination on the evidence."

*Reiter* reviewed and collated the parameters of review and further defined the scope of K.S.A. 75-2724(a)(1)'s term "relevant factors":

"In this case, the Court of Appeals reiterated the pertinent rulings of *Allen I*: '(1) The proponent of a project has the burden to prove no acceptable alternative exists; (2) a potential alternative is not a "relevant factor" unless it is supported by evidence to indicate it is both feasible and prudent; and (3) the proponent does not have to refute a potential alternative unless it is proven to be a "relevant factor." 16 Kan. App. 2d at 95.

The Court of Appeals discussed the term 'relevant factors' in both *Allen I* and *II*. The court in *Allen I* held that the term 'relevant factors' means 'something more than mere suggestions as to possible alternatives.' 14 Kan. App. 2d at 373. The court stated that '[a] proposed alternative would be a relevant factor if it included sufficient factual information to support a conclusion that such alternative was feasible and prudent. A proposed alternative unsupported by such factual information could not form the premise of such a conclusion and would not be relevant.' 14 Kan. App. 2d at 373. We agree.

However, the term 'relevant factors' is

not necessarily limited to proposed alternatives. The term 'relevant factors' authorizes the governing body to take into consideration all relevant factors relating to the project under consideration. This authorization extends to all those factors logically connected to the ultimate decision of whether there is a feasible and prudent alternative to the proposal and whether the program includes all possible planning to minimize harm to the historical property at issue, including but not limited to, those factors to be considered in any zoning change that we set out in *Golden v. City of Overland Park*, 224 Kan. 591, 598, 584 P.2d 130 (1977). These factors are:

- (1) The character of the neighborhood;
- (2) the zoning and uses of properties nearby;
- (3) the suitability of the subject property for the uses to which it has been restricted;
- (4) the extent to which removal of the restrictions will detrimentally affect nearby property;
- (5) the length of time the subject property has remained vacant as zoned;
- (6) the relative gain to the public health, safety, and welfare by the destruction of the value of plaintiff's property as compared to the hardship imposed upon the individual landowner;
- (7) the recommendations of permanent or professional staff; and

(8) the conformance of the requested change to the adopted or recognized master plan being utilized by the city.

Another relevant factor that we believe may be considered by the governing body is the report and reasoning of the SHPO."

*Id.* at 89-90.

Concluding its review, the *Reiter* court held:

"In summary it is the duty of the governing body under K.S.A. 75-2724 to examine all of the relevant factors and determine whether there is a feasible and prudent alternative to the proposed action. In making such a determination, the governing body may consider any relevant factors logically connected to the ultimate decision of whether there is a feasible and prudent alternative to the proposed project, including the information relied on by the SHPO. The decision of the governing body must necessarily be made on a case-by-case basis, and the scrutiny used by the governing body will depend in large part on the nature of each individual action and the effect such action will have on the historic property or its environs."

*Id.* at 94.

As noted earlier, clearly and unequivocally, the record before the Topeka City Council supports the existence of multiple alternatives for the Diocese to expand the parking available for the Grace Cathedral,

which, as presented, appear facially both "feasible" and "prudent," *particularly, when seen deployed in combination.* The Diocese's burden of proof in showing that *no* alternative existed that was "feasible" can clearly be said to have failed from any common sense review of the record. The only other facet of the legal test was whether the feasible alternatives proposed were, in reality, "prudent." In addition to the K.A.R. definition (K.A.R. 118-3-1(e), *supra*), the dictionary definition of "prudent" is instructive, as is the term "prudence":

"Prudent 1. Using good judgment or common sense in handling practical matters. 2. Careful with respect to one's own interests; PROVIDENT. 3. Careful about one's conduct: CIRCUMSPECT."

"Prudence 1. The state, quality, or fact of being prudent. 2. Careful management: ECONOMY."

Webster's II New College Dictionary (1995).

So viewed, really the question to be determined by the Council was whether *none* of the "feasible" *alternatives* presented were practical and economically within reason, *whether considered separately or in*

*combination*, when compared to the needs expressed by the Diocese or what may be discerned as its *true* need for additional parking, including for its elderly and handicapped.

As noted earlier, the Diocese's arguments suggest the gravamen of its objection to the alternatives rested in control of the "cutback" parking, it being on the City's easement; in the safety of this alternative; whether the full needs of the Diocese would be satisfied by this alternative; and the additional costs to be incurred. The Diocese only addressed *its use of its other owned property* on Eighth Street for alternative parking from a safety and convenience perspective, *i.e.*, its members would be forced to cross Eighth Street, entry to the church could require climbing steps, and the existing character of the neighborhood in terms of safety from crime.

Before the Court, the Diocese advanced that its current parking just west of Grace Cathedral could not be assigned to the handicapped and elderly, thus leaving the off-premises, or "cutback," parking to its

more ambulatory members because its only *level* entrance is on the east side of the Church. It did not discuss the use of expanding its current drive on the east side of the Cathedral as one of the opponents proffered. On appeal, the Diocese has suggested, through argument, that its west parking lot spaces would also be reduced by such a conversion, but how this would occur, or to what extent, was left unarticulated.

In reviewing these debates, the Court can easily note, just as could Topeka City Council members, that the method of parking facing the curb - angle parking - is rife in Downtown Topeka and its environs. It would seem that only where streets are too narrow or designed for express traffic that the practicality of angle parking is shunned. "Darting" children is a concern under any circumstance and is generally protected from by signage or speed limits. Pulling out from parallel parking is also a hazard. Thus, any safety concerns relating to an angle method of parking, if applied here to the Grace Cathedral environs as a basis for decision, seems incongruous as a matter of current City

policy and reality. "Cutback" parking, of course, can be implemented on narrow streets because parking stalls are cut into the City's easement. Here, the City's planning department endorsed such a concept. (Record: p. 175.) The Diocese's own documents show that the cutback parking available - the area from the curb to a sidewalk - is 17,450 sq. ft. versus the 12,000 sq. ft. of the proposed parking lot. (Record: pp. 257-258.) Handicap parking can be designated by signage. Further, the Diocese's arguments about Topeka High attendees occupying its on street parking spaces ignores the substantial, practical difference in the hours, even days, of operation between a public school and a church. This consideration also begs for a question about why Topeka High parking, to some degree, could not be exploited by the Cathedral in aid of its parking needs by some form of neighborly accommodation in the community's interest. Nevertheless, the record is silent as to any effort in this regard.

In reference to alternative parking lots on other Diocese owned land, any expressed concerns about its

members traversing Eighth Street, while currently an *existing* concern, must be questioned in light of what has to be the availability from the City of a pedestrian walk or a pedestrian light at the location. While a private party might not be obligated to assist in preservation of any historic site, the Kansas Historic Preservation Act's mandate would seem to place a good faith obligation on government entities to accommodate needs or concerns if they were feasible and prudent and would aid in historic preservation. The alternative parking on Diocese land on Eighth Street visually appears at least equal to that of the proposed lot on the Bethany Place grounds. (Compare, Record: p. 283 with p. 246.) The costs for the same type of surfaced lot would seem facially equal.

The inability to modify its current lot on the west to include more handicapped parking spaces or parking for the elderly because of the lack of a level entrance belies the common fact that for most businesses or governments or others open to the public, the *Americans with Disabilities Act*, 42 U.S.C.S. § 12101 *et seq.*,

requires ingress and egress be provided, such as by ramps. While the Americans with Disabilities Act does not apply in most instances to religious institutions (42 U.S.C.S. § 12187), the policy it adopts and the solutions employed to accommodate that Act are commonplace, subject to judicial notice, and belie the explanation advanced by the Diocese that parking on the Bethany Place is *the only* solution to its needs. Further, as noted, no counter argument is offered by the Diocese to development of parking along its eastern drive.

What then would be the "substantial evidence" relied upon to support a *no* feasible and prudent alternative existed finding unless one is required to treat each alternative proposed as mutually exclusive of any other alternative proposed and the common place solutions employed universally elsewhere throughout the City are ignored? Such would not seem the intent of the Kansas Historic Preservation Act or a proper implementation of it.

Notwithstanding the Diocese's emphasis on

furthering the need of its elderly and handicapped, this justification is compromised by the fact only 10 of the 40-43 proposed spaces in its proposed new lot would be designed and reserved for the handicapped and only "the closest spaces in the proposed lot would be reserved for our seniors and handicapped." (Record: p. 187, last paragraph). This admission also evidences what appears to reveal a substantial abdication and avoidance of the rest of the necessary test to overcome the State Historic Preservation Officer's ruling. While the standard of "no feasible and prudent alternative" is a substantial hurdle by itself, nevertheless, it is only part of the equation necessary to overcome the State Historic Preservation Officer's ruling. The balance of the test is "that the program [parking lot proposal] includes all possible planning to minimize harm to such historic property resulting from such use."

As noted earlier, the definition adopted by the Kansas Historic Preservation Office by K.A.R. 118-3-1(i) certainly seems to require more in the nature of

planning and analysis of the Diocese's stated needs and its plan versus alternatives available than this record reveals could be expected in this regard. This regulation, to reiterate, required:

“. . . that the written evidence and materials submitted by a governmental entity to the state historic preservation officer clearly identify all alternative solutions that have been investigated, compare the differences among the alternative solutions and their effects, and describe mitigation measures proposed by the project proponent that address an adverse effect determination of the state historic preservation officer.”

Other than the Topeka City's Planning Department's brief statement in the record in support of an alternative to the parking lot (Record: pp. 175-176), the record is devoid of any evidence that would show any comparison or planning that would measure other alternatives or assess, objectively, the Diocese's purported need. As noted, if any alternative proposal had been seen as not *entirely* feasible and prudent simply because it did not adequately address Grace Cathedral's expressed need for more handicapped or elderly parking, which certainly stands as worthy, if

needed, it, nevertheless, calls into question why Grace Cathedral would need forty to forty-three parking spaces if not all were to be used for that category of attendees and why other alternatives would not suffice to fill the balance of the expressed needs. This, itself, reflects that this second tier or phase of the statutory inquiry was never addressed from the perspective of the City, or by the Diocese as the parking lot proponent, at any point in the process. Certainly a ten slot parking lot ostensibly serves as a mitigated consideration in and of itself. However, it also opens inquiry into why ten slots could not be opened along the Cathedral's east side drive or in the western lot, with a ramp added, in satisfaction of this specific need, while yet allowing the other alternatives to serve those attendees without special needs.

As set forth in the *Reiter* case, which noted from the *Allen* cases, that as a procedural matter, it was the Diocese's duty to come forward and either evidentially or logically articulate the inadequacy of

any "feasible and prudent" alternatives *vis a vis* its own plan and demonstrate that some planning in regard to the other alternatives, in fact, was had. Here, when such a comparison is had, based just on what is in the record, the very best view could only support a lesser intrusion onto Bethany Place than the forty to forty-three parking spaces sought and this view assumes, of course, that "no feasible and prudent alternative" parking could be made available to the elderly and handicapped otherwise, which itself is facially unsupported by the record.

Accordingly, the Court is of the opinion, particularly when noting all these latter considerations, that "in light of the record," "[the Topeka City Council] [did not take] a hard look at all relevant factors, and using plain common sense, [base] its determination on the evidence."

Notwithstanding the above discussion of the merits of the permit application, some additional issues raise substantial concern which may explain, in part, paths of error in the Topeka City Council's decision. Though

admittedly neither proponents nor opponents objected, the Mayor acknowledged the receipt of *ex parte* communications by the Council. (Record: p. 2.) *Ex parte* communications in a quasi-judicial proceeding, if not fully disclosed, are an anathema to the weight and trust to be accorded to the outcome of such a proceeding. *McPherson Landfill, Inc. v. Bd. of County Comm'rs*, 274 Kan. 303, 321-322 (2002). Here, too, the proponents, both in their written communications to the Topeka City Council and in their oral presentations, argued the damage to Bethany Place involved only damage to "historic trees" that had no history (Record: pp. 113-114, 186-187) and further that the State Historic Preservation Officer's opinion was wrong in relying on federal standards. (Record: p. 124.) However, mere reference to the Kansas Historic Preservation Act in the express use of the term "environs", the K.A.R. definitions earlier referenced, and the K.A.R. adopting the federal standards for use in Kansas (K.A.R. 118-3-8) demonstrate the inaccuracy and misdirection of the arguments advanced, which, in turn, may have invited a

Council view that the State Historic Preservation Officer's opinion was, at best, of little value and, at worst, simply wrong.

Earlier in the appeal of this proceeding, the Court did not permit an August 27, 2007, supplemental letter written by the State Historic Preservation Officer to be added to the record because of the Court's belief the record was fixed and it was that record that established the parameters for Court review. However, notwithstanding the parking lot's opponents' belief to the contrary, this opinion letter had not been provided to the Council members because City staff believed it had not met a Topeka City Council rule about agendas being fixed eleven days prior to the scheduled meeting. (Topeka City Council Rule 5.1; Plaintiff's *Motion for Addition to the Record on Appeal* at Attachments 1-5.) The attorney for the City admits that had the new opinion letter been handed out at the Council meeting, it would have been received.

The importance of this letter was that it was generated after the Diocese itself requested the State

Historic Preservation Office to reconsider its opinion (*Id.* at Attachment 1, p. 1), so it, accordingly, should have been an official part of the statutory process precedent. Further, this supplemental opinion clarified its earlier opinion's poor choice of words when it used the words "historic trees." The supplemental opinion explained the importance of its reference in its initial opinion letter to its adoption of the "standards and guidelines for evaluating the effect of projects on the environs, 1998 edition," as adopted by K.A.R. 118-3-8(c), to show why the proposed parking lot, even after full reconsideration, would damage Bethany Place by damaging its historic setting. (State Historic Preservation Officer letter of August 27, 2007, at *Motion for Addition to the Record* Attachment 1; Record: p. 196). Further, not only would the trees removed be lost, but there would be some cascade effect on the health of the other remaining trees. (Record: p. 222.)

In a judicial or quasi-judicial proceeding, if a litigant referenced an item not in evidence, then an

objection would be had, or the typical hearing practice would require that the speaker and proponent be advised that the document that was referenced was not in evidence or had not been made available to the trier of fact. However, no one with knowledge of this omission spoke up at the Council meeting, thus further leaving the Council with the opinion, then on the floor, that the State Historic Preservation Officer's opinion was less than sound.

Another incidence where a speaker might have thought his materials proffered would be in the record, but do not now appear in the record, is the circumstance noted involving the video by Alex Kovalchuk of the Grace Cathedral's environs where alternative parking was thought available. Again, Mr. Kovalchuk was not advised that his video was not being received. Notwithstanding, although Mr. Kovalchuk *did* provide a copy of his video to the Council at that time, it is clear it never made the record and was never viewed before the Council's decision.

A further consideration in this regard should also

be noted. *While the information relied upon by the State Historic Preservation Officer is a "relevant factor" in determining feasible and prudent alternatives and planning duties (Reiter, 263 Kan. at 90, 94), it is clear that the Historic Preservation Officer's opinion, per se, should not be a relevant factor or, certainly, not an opinion to be de facto overruled by a governmental body in performing its K.S.A. 75-2724(a) (1) analysis. Any relief from the opinion itself, it would seem, would be pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, by K.S.A. 77-601 et seq., specifically, by K.S.A. 77-602(b) (3), since clearly it represents "agency action."*

Also, here, from review of the transcript and video of the City Council's meeting, it is obvious some Council members were dubious of their authority to challenge the Diocese's plans based on *First Amendment* religious grounds and knowledge of *Mount St. Scholastica, Inc. v. City of Atchison*, 482 F. Supp. 2d 1281 (D. Kan. 2007). The City Attorney advised the

Council that while the Historic Preservation Law is separate, nevertheless, the *Mount St. Scholastica* case might provide a basis for litigation against the City.

While litigation is always a possibility regardless of whether a decision is right or wrong, here, the Diocese and Grace Cathedral *vis a vis* the State Historical Preservation Act enjoy no special status nor is accommodation due them under it by virtue of the First Amendment on the facts advanced here. At the risk of simplicity, it is only if a law is drafted or used to discourage or frustrate a church's religious beliefs, messages, missions, practices, or conduct that the First Amendment comes into play.

Probably, the case of *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10<sup>th</sup> Cir. 1988), best exemplifies the proper application of the *First Amendment* to the facts of this case. In principle, the intended operation of the Kansas Historic Preservation Act is best likened to zoning or special use permitting situations.

In *Messiah Baptist Church*, the church wished to

build in an area zoned for agriculture. The zoning at that particular time when the application was first made denied any exceptions and the application was denied. Some four years later, and after the zoning ordinance had been changed to allow churches within the zone under a special use permit, the church reapplied to build a structure "for worship services, administrative offices, classrooms, recreation (gymnasium) purposes, parking areas for 151 vehicles, and an 'amphitheater' where worshipers could park and, without leaving their cars, listen to religious services through means of individual sound transmission devices similar to those used by 'drive-in' movie theaters." *Id.* at 822. The Jefferson County Planning Commission denied the permit on standard guideline considerations used in zoning matters, such as access problems, erosion hazards, and the inadequate availability of fire protection.

The Church challenged the ruling based on the *Due Process Clause of the Fourteenth Amendment* and the *Free Exercise Clause of the First Amendment*.

As to the former, the Court noted, in part, as follows:

"The principal test for measuring the constitutionality of a zoning ordinance under the Due Process Clause is set forth in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). In this case, the owner of a sixty-eight acre tract of vacant land sought to use his land for industrial purposes. The city zoned a portion of the sixty-eight acres for residential uses, and the owner attacked the ordinances on due process grounds. The Supreme Court upheld the zoning ordinances and stated that before a zoning ordinance can be declared unconstitutional on due process grounds, the provisions must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Id.* at 395. The Court further held that if the validity of the land classification is 'fairly debatable,' the legislative judgment must control. *Id.* at 388."

. . .

"The Church asserts the court must review the due process challenge to the A-2 zoning regulations under the strict scrutiny standard rather than the reasonable relationship standard because the zoning regulation infringes the Church's First Amendment rights to exercise a religious preference. The Church further contends that the burden, therefore, is upon the parties seeking to uphold the regulation to demonstrate that it serves a compelling state interest and is narrowly drawn to address

only the state interests at stake. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981).

In the instant case, however, the Church has not been denied the right to exercise a religious preference. Rather, the Church has been denied a building permit, and may not construct its house of worship where it pleases. That fact standing alone does not amount to a denial of the exercise of a religious preference. . . ."

*Id.* at 822-823.

The Court addressed the *Free Exercise Clause* issues as follows:

"The Church contends that the 1974 A-2 zoning regulations are invalid on their face because they preclude the Church from building a house of worship on its property located within the A-2 zoning district."

. . .

"The first question to be addressed is whether the A-2 zoning regulations regulate religious beliefs. If they regulate religious beliefs, as opposed to religious conduct, then the regulations are unconstitutional. 'The [First] Amendment embraces two concepts,--freedom to believe and freedom to act. The first is absolute. . . .' *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). Courts consistently distinguish religious beliefs from religious conduct. 'The belief/conduct distinction has survived.' *Grosz*, 721 F.2d at 733 n.5. As to what constitutes

regulation of beliefs, the Supreme Court recently quoted from *Sherbert v. Verner*, 374 U.S. 398, 412, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963), and reiterated the concept that the free exercise clause prohibits the government from *coercing* the individual to violate his beliefs, and further stated: 'The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). One of the clear points of precedent is that the government may not use its power to interfere with or regulate the individual's religious beliefs.

The A-2 zoning regulations do not in any way regulate the religious beliefs of the Church. Nothing in the record shows any friction between the religious beliefs of the Church and the zoning regulations. Consequently, we proceed to the next inquiry.

Do the regulations impermissibly regulate religious conduct? Generally speaking, the government may regulate religious conduct. 'It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers.' *Wisconsin v. Yoder*, 406 U.S. 205, 220, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). However, conduct flowing from religious beliefs merits protection when shown to be integrally related to underlying religious beliefs. In *Yoder*, the Court explained: 'We see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction,

shared by an organized group, and intimately related to daily living.' *Id.* at 216.

By contrast, the record in our case discloses no evidence that the construction of a house of worship on the property in the A-2 zoning district is integrally related to underlying religious beliefs of the Church. The Church argues that constructing its house of worship is intimately bound to its religious tenets. As an abstract argument, this proposition is true. The evidence in the record, however, fails to establish any basis for this contention. The Church makes only a vague reference to a preference for a pastoral setting, but such is of no consequence to this analysis. What is important is that the record contains no evidence that building a church or building a church on the particular site is intimately related to the religious tenets of the church. At most, the record discloses the Church's preference is to construct its house of worship upon its land. We agree with the observation of the Sixth Circuit in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 307, cert. denied, 464 U.S. 815, 78 L. Ed. 2d 85, 104 S. Ct. 72 (1983), that 'building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs.' In short, under the facts of this case, the A-2 zoning regulations do not regulate any religious conduct of the church or its members.

We must also consider whether the zoning regulations place *any burden* on the free exercise of appellant's religion."

. . .

"[W]e consider whether an alternative means exists

whereby the County may accomplish its purpose by means which do not impose an indirect burden. Without question, the zoning district plan, one of true differentiation and upheld as sound under the due process analysis, cannot be implemented effectively without the resulting financial burden on the Church. When the burden imposed by the government rests on conduct rooted only in secular philosophy or personal preference, however, the scale always reads in favor of upholding the government action. *Grosz*, 721 F.2d at 737. Since the governmental action of adopting and implementing the zoning regulations does not affect religious practice, the indirect burden does not render the zoning regulations constitutionally infirm.

We hold that the 1974 Jefferson County A-2 zoning regulations do not violate the Church's First Amendment rights. We do not hold that the act of building is *per se* that of secular conduct. We limit our holding to the record before us; a record which shows no conflict between the zoning ordinances and the religious tenets or practices of this Church. This is not a case where the church must choose between criminal penalties or foregoing government benefits and its religious benefits such as is apparent in *Yoder*, 406 U.S. at 218, or *Sherbert*, 374 U.S. at 404. This case does not involve the compromise of the Church's fundamental tenets such as was involved in *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981). In short, there is no infringement of the Church's religious freedom. A church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases. *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)."

*Id.* at 823-826.

Here, the Intervenors point to a later United States Supreme Court decision in *Employment Div. v. Smith*, 494 U.S. 872, 108 L. Ed. 2d (1990), the Kansas United States District Court for the District of Kansas' decision in *Mount St. Scholastica, Inc. v. City of Atchison*, *supra*, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.S. § 2000cc *et seq.*, and the Religious Freedom Restoration Act, 42 U.S.C.S. § 2000bb *et seq.* The simple answer to the inapplicability of these cases and the referenced statutes is that the *Free Exercise Clause of the First Amendment* has not been shown to apply to the Diocese's and Grace Cathedral's desire to build a parking lot since it is not an activity that substantially burdens the *religious* beliefs, messages, mission, conduct, or practices of either, but, rather, only a *secular preference* of the Intervenors is affected. Compare, *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661-664 (10<sup>th</sup> Cir. 2006).

Further, the *Mount St. Scholastica* case can be

distinguished from the case at hand by virtue of the fact that the Benedictines, the religious order involved in that case, claimed its religious community's *religious philosophy* required that its property and other holdings be administered justly so that the community would be able to witness the evangelical poverty each one promised and, accordingly, that mothballing or sale of its property would affront this mission. Further, whether this was true or not was never explored in *Mount St. Scholastica* because no one challenged the proposition that the sale of the building or mothballing alternatives would "burden" the Benedictines' *religious* mission. *Id.* at 1292. The result, accordingly, was to bring into play those cases noted requiring strict scrutiny of even an otherwise neutral law under principles from which the holding in *Division of Employment v. Smith* arose and to which the *Religious Land Use and Institutional Persons Act* and the *Religious Freedom Restoration Act* were directed.

Accordingly, *Mount St. Scholastica*, the cases from which it flows, and the referenced federal statutes can

be distinguished from the facts presented here, since no religious beliefs, messages, practices, or conduct of the Intervenor are impeded, either in the constitutional sense or under the federal acts, by a decision to deny its parking lot in favor of preserving some of the historical flavor of yesterday for future generations in what often seems an otherwise throw away society. Only when an impediment arises to the status of a direct or substantial burden does the First Amendment or the federal statutes cited intercede to secure protection from secular intrusions otherwise applicable to all other citizens and entities.

Here, no evidence exists before the Court that would remotely indicate that either the Kansas Historic Preservation Act, or the Act's particular implementation here by the Kansas Historical Society, was grounded other than on the sound premise of securing historic environs for the benefit of future citizens. Accordingly, any consideration of deference to the Diocese or Grace Cathedral because of their status as religious entities would have been a wholly

improper consideration and would not have been a "relevant factor" in approving or disapproving the Diocese's requested permit to build a parking lot on the Bethany Place environs.

Here, the Court has scrutinized, as carefully as it can, the record presented such as to attempt to accord a basis to sustain, and thus give deference to, the Topeka City Council's decision. The record is one that is not only difficult to follow, but one that is marginally evidential. It is a record that does not lend itself to extrapolating any cogent reason or reasons for the Topeka City Council's decision. As such, the Court has been unable to locate that necessary basis for deference to its finding for all of the reasons heretofore discussed.

Certainly, the fact that the decision was effected and accomplished in such an informal manner as a mere agenda item and the City Council members failed to articulate the reason or reasons for their decision weakens its force. Further, this absence of discussion of its reasoning and the absence of the formality of a

written decision by the Topeka City Council allows the specter that *ex parte* influence intruded into the decision making. The exclusion of a later official reconsideration of the original ruling by the State Historic Preservation Office acted to bolster the erroneous view that the opinion involved only "historic trees." And, lastly, in the absence of reasons, there lurks a substantial question whether misguided First Amendment concerns impermissibly intruded into the necessary and ultimate quasi-judicial decision called for, that is, to consider *only* whether "there is *no* feasible and prudent alternative to the [parking lot] proposal and the [parking lot proposal] includes all possible planning to minimize harm [to Bethany Place] resulting from such use." (Emphasis added.)

Notwithstanding, here, it seems clear that while each alternative proposed to the Intervenors' parking lot proposal is not required to separately satisfy the whole of the Intervenors' needs, but rather each may be considered collectively and in combination, the Topeka City Council, nevertheless, failed to do so. As a

consequence, the record evidences a lack of substantial evidence to support the statutory finding necessary that no feasible and prudent alternative existed. The record further lacks substantial evidence to support a conclusion that all possible planning was done to minimize the damage that would occur to the Bethany Place. These considerations, as noted, operate to make the Topeka City Council's decision stand as arbitrary, capricious, and unreasonable. Accordingly, the decision of the Topeka City Council is set aside.

#### **ENTRY OF JUDGMENT**

Accordingly, and based on the foregoing discussions, judgment is hereby entered for the Petitioner/Appellant, Friends of the Bethany Place, Inc., and against the City of Topeka, Respondent/Appellee, and the Intervenor, the Grace Cathedral and the Episcopal Diocese of Kansas, Inc., by setting aside the decision of the Topeka City Council to issue a parking lot permit to the Intervenor.

This entry of judgment shall be effective when filed with the Clerk of this Court and no further

journal entry is required. Costs are taxed to the City.

IT IS SO ORDERED, this \_\_\_\_\_ day of July, 2008.

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Franklin R. Theis  
Judge of the District Court  
Division Seven

cc: Pedro Irigonegaray  
Mary Beth Mudrick  
Phil Elwood  
Nathan Leadstrom