


COUNTY BOARD FACTSHEET

TO : County Clerk: Attn: Kelly Lundgren

FROM : David R. Cary, Director of Planning 

RE : **County Text Amendment No. 17009**
(Amend the AG and AGR chapters of the Lancaster County Zoning Regulations by moving certain uses such as, but not limited to, dog kennels, churches, cemeteries, and group homes from permitted uses and conditional permitted uses to special permitted uses.)

DATE : May 30, 2017

1. On May 24, 2017, the Planning Commission held a public hearing on County Text Amendment No. 17009 requested by Katherine Girario and Michael Williams.
2. Attached are the Planning staff report (pp.1-7) and the minutes of the Planning Commission (pp.8-11) on **County Text Amendment No. 17009**, to amend the AG District, Article 4, Section 4.003 Permitted Uses to move certain permitted uses and place them into Section 4.007 Permitted Special Uses. Amend Section 4.005 Permitted Conditional Uses to move certain conditional uses to Section 4.007 Special Permitted Uses. Amend the AGR District, Article 5, Section 5.003 Permitted Uses to move certain permitted uses and place them into Section 5.007 Permitted Special Uses. Amend Section 5.005 Permitted Conditional Uses to move certain conditional uses into Section 5.007 Permitted Special Uses of the Lancaster County Zoning Regulation and adding them to Article 13 Special Permit requirements.
3. The staff recommendation of DENIAL is based upon the Analysis as set forth on (pp.1-6), concluding many of these uses have been in the County Zoning regulations since 1979 and a few since 1968. For close to 40 years these uses have not been an issue in the county. The newest use, wind energy conversion systems, was added in 2008. The applicant gives no reason or justification as to why the uses should be changed from permitted uses and conditional uses to special permitted uses. The uses proposed to be changed should remain as currently allowed in the County zoning regulations. The applicant presentation is found on pp.8-9.
4. There was no testimony in support of this application. Testimony in opposition can be found on p.9. Applicant rebuttal is found on p.10.
5. On May 24, 2107, the Planning Commission agreed with the staff recommendation of and voted 8-0 (Weber absent) to recommend DENIAL. The Planning staff is scheduled to brief the County Board on this item at their regular staff meeting on **Thursday, June 8, 2017, at 11:00 a.m.**, in Room 113 of the County-City Building, 555 South 10th Street, Lincoln, Nebraska. Subsequently, the public hearing before the County Board has been scheduled for **Tuesday, June 13, 2017, at 9:00 a.m.**, in Hearing Room 112 on the First Floor of the County-City Building, 555 South 10th Street, Lincoln, Nebraska.

If you need any further information, please let me know (402-441-6365).

cc: County Board
David Derbin, Deputy County Attorney
Tom Cajka, Planning
Kerry Eagan, County Commissioners

Katherine Girario and Michael Williams
Ann Ames, Deputy Admin. Officer
Pam Dingman, County Engineer

LINCOLN/LANCASTER COUNTY PLANNING STAFF REPORT

for May 24, 2017 PLANNING COMMISSION MEETING

PROJECT #: Text No.17009

PROPOSAL: Amend the AG and AGR chapters of the Lancaster County Zoning Regulations by moving certain uses such as, but not limited to, dog kennels, churches, cemeteries, and group homes from permitted uses and conditional permitted uses to special permitted uses.

CONCLUSION: Many of these uses have been in the County Zoning regulations since 1979 and a few since 1968. For close to 40 years these uses have not been an issue in the county. The newest use, wind energy conversion systems, was added in 2008. The applicant gives no reason or justification as to why the uses should be changed from permitted uses and conditional uses to special permitted uses. The uses proposed to be changed should remain as currently allowed in the County zoning regulations.

<u>RECOMMENDATION:</u>	Denial
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GENERAL INFORMATION:

HISTORY:

The current County Zoning Regulations were adopted in October 1979 and have been amended and updated several times in the past decades.

ANALYSIS:

1. The applicant (see attached letter) is requesting for changes to the Lancaster County Zoning regulations to change:
 - A. Dog breeding establishments and kennels; public uses; place of religious facilities; and wind energy conversion systems be moved from **permitted uses to special permit uses** for the AG District in the County Zoning Regulations. Text Amendment #17008 is changing the term "church" to "place of religious facilities". TX 17008 was heard by the Planning Commission on May 10th. Throughout this report the term place of religious facility will be used in place of church.
 - B. Cemeteries, public buildings, group homes, public uses, wind energy conversion system over the district height, family airfield and domestic shelter be moved from **conditional uses to special permitted uses** for the AG District in the County Zoning regulations.

- C. Public uses, religious facilities, airports and wind energy conversion systems be moved from **permitted uses to special permit uses** for the AGR District.
 - D. Cemeteries, pet cemeteries, group homes, wind energy conversion systems over the district height and domestic shelter from **conditional use to special permit use** in the AGR District.
2. The applicant's letter gives no reasons or justification as to why these uses should be by special permit. These uses have no history of significant complaints and the County zoning regulations should remain as is. The uses are compatible with agriculture and low density residential (AGR).
 3. Permitted uses and conditional uses have no review by the Lincoln-Lancaster Planning Commission or the Lancaster County Board of Commissioners. Special permits require a public hearing at Planning Commission and possibly Lancaster County Board of Commissioners. Table 1 shows each use and if it is a permitted use or conditional use. For comparison the uses are also shown for the City zoning code.
 4. The remainder of the staff report will discuss each of the uses proposed to be changed. It will look at when the use was added to the zoning regulations. And why the use should remain.
 5. **AG Permitted Uses: Dog Breeding Establishments and Kennels, and Public Uses**, have been a permitted use in the AG District since at least September 1968. In nearly fifty years these uses do not have a history of significant complaints or concerns in the agricultural area.

Dog breeding establishments and kennels are agricultural in nature. The AG District already allows large farm animals such as cows, horses and sheep by right. This use is appropriate on 20 acre parcels.

Public Uses include public parks, playgrounds, golf courses, fire stations, schools, publicly owned or operated airports and public utilities. Uses that are owned and operated by a governmental entity with the power of condemnation are exempt from zoning in the State of Nebraska. These use should remain as permitted uses.

6. **AG Permitted Uses: Place of Religious Facilities:**

Place of Religious Facilities are common throughout the County. They support the community and are a compatible land use with residential and agriculture. There are churches throughout the County with AG zoning including Country Bible Church at S. 148th and Roca Road; Slavic Christian Church at 13081 Raymond Road; and Bethlehem Covenant Church at 18841 N. 98th Street.

After consulting with the County Attorney on the rights of place of religious facilities it is important to note that Place of Religious Facilities are protected under the Religious Land Use and Institutionalized Persons Act.

The Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc et seq., is a federal law that prohibits governments, including counties like Lancaster County, from imposing or implementing land use regulations in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden:

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

See 42 USC § 2000cc(1). This test popularly is known as “strict scrutiny,” and generally is the most rigorous standard against which a law can be measured.

Pertinent to this text amendment, this prohibition applies in any case in which

the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, **individualized assessments of the proposed uses** for the property involved.

42 USC § 2000cc(2)©) (emphasis added).

For purposes of RLUIPA, “[the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” 42 USC § 2000cc-5(7)(B). A substantial burden may arise when, through an individualized assessment, government action pressures a religious institution to change its behavior. See, e.g., Riverside Church v. City of St. Michael, 205 F. Supp. 3d 1014, 1033-34 (D. Minn. 2016) (collecting cases to support the general rule).

Currently “place of religious assembly” are a permitted use in the AG and AGR districts. Requiring a special permit for place of religious assembly most likely would constitute an individualized assessment for purposes of RLUIPA. Consequently, an applicant for such a permit would be protected by RLUIPA.

Any substantial burden imposed through the permitting process would need to satisfy strict scrutiny. Although the United States Supreme Court has repeatedly stated that strict scrutiny is not “strict in theory but fatal in fact,” Johnson v.

California, 543 U.S. 499, 514, 125 S. Ct. 1141, 1151 (2005), nevertheless the fact remains that “only rarely are statutes sustained in the face of strict scrutiny.” Bernal v. Fainter, 467 U.S. 216, 219 n.6, 104 S. Ct. 2312, 2315 (1984).

Given the foregoing, any special permitting process for place of religious assembly would constitute a road fraught with peril for Lancaster County. The County Attorney is in agreement.

Cemeteries

To the extent that a cemetery is a cemetery of a religious nature, the protections of RLUIPA may apply. See, e.g., Roman Catholic Diocese of Rockville Ctr. v. Inc. Vill. of Old Westbury, 128 F. Supp. 3d 566 (E.D.N.Y. 2015). The same RLUIPA analysis applied to places of religious assembly would apply in this context.

As with places of religious assembly, any special permitting process for religious cemeteries would constitute a road fraught with peril for Lancaster County. In addition, developing different rules for religious and non-religious cemeteries could raise its own potential Constitutional issues under the Equal Protection Clause or Establishment Clause.

7. **AG Permitted Use: Wind Energy Conversion Systems (WECS)** was added as a permitted use in the AG District in October 2008. At the request of the Planning Director a text amendment was proposed to add WECS as a permitted use in the AG District. Prior to 2008 WECS were a conditional use. A special permit is required if they exceed the district height in the R, B or I districts. There was no opposition to the amendment and was approved 5-0 by the Lancaster County Board of Commissioners. Often, these WECS are no larger than a home satellite dish and should remain as a permitted use.
8. **AG Conditional Use: Wind Energy Conversion System exceeding the district height** was first added as a conditional use to the AG District in October 1982. In 2008 the zoning regulations were amended to allow WECS as a permitted use and if it exceeded the district height as a conditional use. This amendment was at the request of the Planning Director. This use should remain as a conditional use.
9. **AG Conditional Use: Cemeteries, Public Buildings not included in permitted uses, and Group Homes** have been a permitted conditional use in the AG District since October 1979. Cemeteries were a permitted use prior to October 1979. With the 1979 zoning update, cemeteries were changed to a conditional use. Cemeteries are required to be on a minimum of 20 acres. Cemeteries are allowed as accessory to place of religious facility. A cemetery will have the occasional funeral traffic, but most traffic is light. This use is unobtrusive and compatible with agriculture and residential. Many public buildings are exempt

from zoning regulations. TX17008 recommended approval by the Planning Commission on May 10th is proposing to delete public buildings as a conditional use since there are no conditions attached. These uses should remain as conditional use.

10. **AG Conditional Use: Public Uses** was added a conditional use in January 1986. TX17008 is recommending deleting public uses as a conditional use since there are no conditions attached and it is listed as a permitted use.
11. **AG Conditional Use: Domestic Shelters** was added as a conditional use to the AG District in November 1996. At the request of the Planning Director a text amendment was proposed to add domestic shelters as a conditional use to the AG and AGR districts. Group Homes were already allowed as a conditional use and domestic shelters have a similar land use impact to group homes. With the conditions, the County Board voted 5-0 for approval. This should remain as a conditional use.
12. **AG Conditional Use: Family Airfield** was added as a conditional use in the AG District in August 1996. At the request of the Planning Director a text amendment was proposed to add family airfield as a conditional use. This amendment to the zoning regulations were based on the recommendations of the Airfield Task Force. A family airfield is only for non-commercial use by the airfield owner or members of the owner's family, or to a lessee. A commercial airfield requires a special permit. The family airfield should remain as a conditional use.
13. **AGR Permitted Uses: Public Uses, Religious Facility and Airports** have been a permitted use in the AGR District since October 1979. The AGR District did not exist before October 1979. Many public uses such as public schools, public parks, fire stations and public utilities are exempt from zoning regulations. Airports are for public commercial use only. These use should remain unchanged.
14. **AGR Permitted Use: Wind energy conversion systems (WECS)** was added as a permitted use in the AGR District in October 2008. Prior to 2008 they were allowed as a conditional use. At the request of the Planning Director a text amendment was proposed to add WECS as a permitted use in the AGR District. There was no opposition to the amendment and was approved 5-0 by the Lancaster County Board of Commissioners. Often, these WECS are no larger than a home satellite dish. This use should remain as a permitted use.
15. **AGR Conditional Uses: Cemeteries, pet cemeteries and group homes** have been a permitted conditional use since October 1979 and should remain unchanged.

16. **AGR Conditional Use:** Domestic Shelter was added as a conditional use in November 1996. At the request of the Planning Director a text amendment to the County Zoning regulations was requested to add Domestic Shelter to the AGR district as a conditional use. Domestic shelters have similar land use impact as Group Homes. The text amendment was approved 5-0 by the Lancaster County Board. This should remain as a conditional use.
17. **AGR Conditional Use Wind Energy Conversion System:** was first added as a conditional use to the AG District in October 1982. In 2008 the zoning regulations were amended to allow WECS as a permitted use and if it exceeded the district height as a conditional use. This amendment was at the request of the Planning Director. This should remain as a conditional use.
18. The City of Lincoln Zoning Ordinance has many of the same uses described above. Under the City zoning ordinance Kennels, churches and wind energy conversion systems are permitted uses in the AG and AGR Districts; same as in the County Zoning Regulations.
19. Cemeteries, group homes, domestic shelters, and pet cemeteries are conditional uses in the AG and AGR Districts in the City Zoning Ordinance same as in the County Zoning Regulations.

Prepared by:

Tom Cajka
Planner

DATE: May 11, 2017

APPLICANT/CONTACT: Michael Williams
7820 NW 112th Street
Malcolm, NE 68402
402-660-7718

Table 1			
Date Use First Allowed by Right or as Conditional Use in County Zoning			
COUNTY ZONING			
Permitted by Right AG	Conditional Use AG	Permitted by Right AGR	Conditional Use AGR
Dog Breeding/Kennels 1968	Cemeteries 1979	Public Uses 1979	Cemeteries 1979
Public Use 1968	Public building not in permitted 1979	Religious Facility 1979	Pet Cemetery 1979
Religious Facility 1968	Group Home 1979	Airports 1979	Group Home 1979
WECS 2008	WECS Oct. 1982 Amended Feb 2009	WECS Oct. 2008	Domestic Shelter Nov. 1996
	Public Uses Jan. 1986		WECS Oct. 1982 Amended in Feb. 2009
	Family Airfield August 1996		
	Domestic Shelter Nov. 1996		
CITY ZONING			
Permitted by Right AG	Conditional Use AG	Permitted by Right AGR	Conditional Use AGR
Kennels	Cemeteries	Kennels	Cemeteries
Religious Facility	Group Home	Religious Facility	Group Home
WECS	Domestic Shelter	WECS	Domestic Shelter
	Pet Cemeteries		Pet Cemeteries

WECS = Wind Energy Conversion System

COUNTY TEXT AMENDMENT NO. 17009

**COUNTY TEXT AMENDMENT NO. 17009 TO AMEND AG DISTRICT, ARTICLE 4,
SECTION 4.003 PERMITTED USES TO MOVE CERTAIN USES TO PERMITTED
SPECIAL USES UNDER SECTION 4.007:**

May 24, 2017

Members present: Beckius, Corr, Edgerton, Finnegan, Harris, Hove, Scheer, Washington and Weber.

Staff recommendation: Denial.

There were no ex parte communications disclosed on this item.

Staff Presentation: Tom Cajka of the Planning Department explained that the applicant in this case requests to move certain uses that are currently allowed by right as conditionally permitted uses to only being allowed by special permit. Permitted uses in districts are allowed by right. Conditionally permitted uses are allowed, but under conditions that are tied to the use. As long as those conditions are met, there is no review by Planning Commission or County Board. Some uses have been allowed by right since 1968. In AG-R, cemeteries are listed among the conditionally permitted uses. There have been no issues with the uses allowed under current districts because they are compatible. Staff recommends denial of these proposed changes.

Harris asked for a brief explanation of how the process would change for an applicant should these be changed. Cajka said if a use needs to be approved by special permit, an application would need to be submitted to the Planning Department, including a filing fee. Staff would review the application and prepare a report and finally the application would go before Planning Commission or County Board. Harris noted it is potentially a financial burden and the time frame would be longer. Cajka said that is a fair statement.

Scheer asked what the time frame from application submittal is to approval. Cajka said it is four weeks from deadline date to Planning Commission and then an additional three weeks for County Board.

Edgerton asked if there has been any additional communication with the applicant in this case. Cajka said only a letter.

Proponents:

1. Michael Williams, 7820 112th Street, Malcolm, NE, came forward as applicant. The reason this request has been made is because there is a cemetery and temple or mosque being developed and the public should have a say over what is being developed. He understands allowing shelters and homes for children, but for things like kennels, airports, cemeteries and religious facilities the community should have a say. There are other considerations like contamination to water and soil, land value

depreciation, and increased traffic and noise. Mr Williams stated he is willing to make compromises on some of his suggested changes. He noted that in the previous text amendment at today's hearing, mausoleums were allowed by special permit which shows that the type of use is intrusive and should be reviewed more carefully. He reported that his neighbors are also upset by this.

Washington asked for clarification about the location of the cemetery to his property. Williams stated it is approximately 300 feet from the corner where the cemetery is developing.

2. Kathy Williams, 7820 112th Street, Malcolm, NE, reiterated that mausoleums were just approved as a special use in the City text amendments. What they are requesting as applicants is to have the same ability to speak about what can be allowed in their backyards. The seven weeks it would take to go through the public process is not too long for the public to have a say.

Opponents:

1. Greg Greder, 819 O Street, came forward as an attorney working with the United Yazidi organization for the past year. The applicant has concern about the cemetery going in on the 20-acre plot near them. The cemetery is a permitted use of the property that they purchased for this purpose. There will not be a structure built for a long period of time, but there will be a cemetery. To set the record straight, the Yazidi is a Christian-based organization. The Religious Land Use and Institutionalized Person Act is a federal act that prohibits unduly burdensome zoning regulations such as the one proposed by the applicant. These folks are a peaceful people who want a cemetery. They purchased the land and are more than happy to discuss concerns with neighbors. The previous use of the land was farming which most likely created more activity and dust than a cemetery where there will be activity a few times per year when someone is buried. There is misinformation about what is going on at this location. If the text changes were to go forward, there would be legal implications and strong opposition. There is not need to change regulations that have never caused problems.

Staff Questions:

Washington asked for explanation of the difference between the City text amendments adding mausoleums as a specially permitted use versus in the County.

George Wesselhoft of the Planning Department stepped forward to say that the other changes referred to by the applicant were within the corporate City limits. This project is outside of that jurisdiction. Cajka said this falls under County zoning. The owners of the property did not have to go through a public process because they have the 20 acres needed for this use and they were issued the building permit.

Harris asked what avenues anyone living in the County can pursue if they are in opposition to these types of developments. Cajka said this use is allowed by right. Even

if it were a conditional use, the only thing that could be reviewed is whether the site meets the conditions and, if it does, then it would be allowed. Harris clarified that she wondered what means the general public would have to express their opposition. Cajka said there is no opportunity for that because the use is allowed.

Applicant Rebuttal:

Mr. Williams wanted to make it clear that they are not asking anyone to stop developing. They only want the community to have a voice. Having spoken with attorneys on this matter, he understands that it would be an uphill battle to fight this particular project. The Yazidi practice Islam and their burial practices include burying the deceased wrapped in a cloth. This could cause issues with water and soil contamination. They are planning to build a temple. It is a religious facility and it is possible it could be a mosque. The point is simply that the community should have a say in what is going on.

COUNTY TEXT AMENDMENT NO. 17009
ACTION BY PLANNING COMMISSION:

May 24, 2017

Harris moved Denial; seconded by Corr.

Harris said she respects the applicant for coming forward because this was the way to bring their concerns to the public. Ordinances come into fruition through lots of research, planning and consensus. Making a change across the board like this would be traumatic and would go against the Comprehensive Plan, which encourages predictability. She appreciates the applicant's willingness to compromise; however, the particular concern in question is a land use that is already permitted.

Scheer commented that he appreciates the idea of public process and public hearings. There is a flip side to public process which is protection to property owners and their rights. Both sides must be weighed. It is never a good idea to address a specific site problem with a broad text change. He will support denial of this application.

Beckius stated he will also support the denial. In a broader context, it is important to allow community and culture to flourish in an area, including cemeteries and places of religious assembly. The bottom line is the property owners have the opportunity to use their property rights as they see fit and to build a community for themselves.

Finnegan stated she echoes many of the thoughts of her fellow commissioners. There is a danger in opening up changing ordinances for something specific to one property. Perhaps if there had been a stampede of people from the greater community things would be different, but to make a broad change for one small group is not reflective of good government.

Washington said she was interested in this proposed amendment because what she could not discern from the applicant letter was their motivation for requesting a change. She is glad this hearing brought clarity to their request. To make a broad text change

without having a wealth of information about how it could affect things is unwise. There appears to be misconception about what is allowed as a permitted use in the county. The public hearing is a good place for conversation; she thanked the applicant for bringing this to light. Communities need to allow cultures to flourish for themselves and how they honor the dead is very important and individual.

Hove stated he will support the denial. The rights of the property owner is an important aspect of this and a text change would add a layer that is unwanted. The proposal is focused on one property and not the county at large.

Motion carried, 8-0: Beckius, Corr, Edgerton, Finnegan, Harris, Scheer, Washington, and Hove voting 'yes'; Weber abstaining.

Note: This is a recommendation to the County Board.

Michael G Williams
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Ref: Change the text of the Lancaster County Building Zone regulation / District codes

I would like to have the following changes made to Article 4 “AG” Agricultural District and to Article 5 “AGR” Agricultural Residential District and place the Article 13 Special Permit requirement for both of these Districts.

The text changes for Article 4 “AG” Agricultural District are areas follows:

- 1) Move 4.003 permitted uses items and place them in section 4.007 Permitted Special Uses section, and ensure that these items have to adhere to Article 13
 - c) Dog breeding establishment and kennels
 - e) Public uses
 - g) Churches
 - l) Wind energy conversion systems (WECS)

- 2) Move 4.005 Permitted Conditional Uses items and place these items in section 4.007 Permitted Special Uses section, and ensure that these items have to adhere to Article 13 Special Permit
 - a) Cemeteries, including mausoleums subsection 1 thru 2
 - b) Any public building or premises of any depart of a governmental agency not included in Section 4.003 (e) above
 - d) Group homes:
 - e) Public Uses
 - f) Wind energy conversion system (WECS) and the subsection 1, thru 4
 - h) Family airfield and all the subsections 1 thru 10
 - i) Domestic shelter and all of the subsections 1 thru 3

The text changes for Article 5 "AGR" Agricultural Residual District are areas follows:

- 1) Move 5.003 permitted uses items and place them in section 5.007 Permitted Special Uses section, and ensure that these items have to adhere to Article 13
 - c) Public Uses
 - d) Churches
 - f) Airports
 - h) Wind energy conversion systems (WECS)

- 2) Move 5.005 Permitted Conditional Uses items and place these items in section 5.007 Permitted Special Uses section, and ensure that these items have to adhere to Article 13 Special Permit
 - a) Cemeteries, including mausoleums subsection 1 thru 2
 - b) Pet cemeteries
 - d) Group Homes and all the subsection 1 thru 3
 - e) Wind energy conversion system (WECS) and the subsection 1, thru 4
 - g) Domestic shelter and all of the subsections 1 thru 3
Group homes:

If you have any questions or concerns, would like to clarify, or get a better understanding of what this application is wanting to accomplish please feel free to contact me either by phone (402-660-7718 or email (michaelgrantwilliams@hotmail.com))

Thank you for your time in this matter

Sincerely

Michael G Williams