

OCA#172102

First Published in the Wichita Eagle on August 26, 2016

CLEAN

8/08/16

ORDINANCE NO. 50-306

AN ORDINANCE CREATING CHAPTER 9.05 OF THE CODE OF THE CITY OF WICHITA, KANSAS, PERTAINING TO THE PROHIBITION OF ENCROACHMENTS UPON PARK PROPERTY AND THE PENALTY THEREFOR, PERMITS FOR CERTAIN ENCROACHMENTS AND THE PROCESS THEREFOR, AND REPEALING SECTION 9.03.250 OF THE CITY CODE PERTAINING TO THE PROHIBITION AGAINST STORING PERSONAL PROPERTY ON PARK PROPERTY.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:

SECTION 1. The title to Chapter 9.05 of the Code of the City of Wichita, Kansas shall read as follows:

“Chapter 9.05. Encroachments upon Park Property.”

SECTION 2. Section 9.05.010 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Definitions. – The following words and phrases, whenever used in this Chapter, shall be defined as follows:

- (a) ‘Board’ means the Board of Park Commissioners of the City of Wichita.
- (b) ‘City’ means the City of Wichita, Kansas.
- (c) ‘Council’ means the Wichita City Council.
- (d) ‘Director’ means the Director of the City of Wichita Park and Recreation Department or designee.

- (e) ‘Encroachment Permit’ means the authority to maintain an encroachment upon Park Property in the City of Wichita pursuant to and within the limitations of the provisions of this Chapter.
- (f) ‘Notice of Encroachment’ means a document filed with the Register of Deeds of Sedgwick County, Kansas to give notice that an Encroachment Permit has been issued for an encroachment upon Park Property by the City of Wichita pursuant to the terms of this Chapter.
- (g) ‘Park Property’ means any real property owned by or under the control of the City of Wichita or the Board of Park Commissioners that is designated for use as a park or recreational facility by the City Council.
- (h) ‘Person’ means any individual, corporation, partnership, association, firm, joint venture, company or other state franchised business entity such as a professional association, limited liability company, limited liability partnership or other organization of any kind.”

SECTION 3. Section 9.05.020 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Definition of Encroachment upon, below, over or across Park Property, deemed unlawful. It is unlawful for a person to commit or engage in any of the following acts, allow to occur any of following described activities, or maintain or allow to exist any of the following described structures, objects or other material thing upon, below, over or across any Park Property, and, for the purposes of this Chapter, shall be defined as an encroachment thereon:

- (a) No person shall erect, construct, install, or place any structure, building, driveway, improvement, shed, fence, wall, dog run, dog house, tree house, playhouse, play equipment, TV or radio reception device, machinery, equipment,

or apparatus of any type, whether stationary or moveable and whether permanent or temporary in character, or stockpile, store or place any organic or inorganic material used for the construction of such items.

- (b) No person shall perform, cause or authorize any mowing, trimming, cutting, or grooming of Park Property, or perform any similar grounds maintenance for any purpose, or in any like manner encroach onto Park Property from privately or publicly owned lands.
- (c) No person shall place, stockpile or store any gravel, stone, dirt, sand, wood, firewood, lumber or any other organic or inorganic material.
- (d) No person shall place any electrical wire, conduit, or pipe, or any public service or private utility, into, upon, above, across or beneath Park Property.
- (e) No person shall plant vegetation or construct or maintain any form of planting bed, vegetable garden or landscaping of any kind.
- (f) No person shall utilize Park Property for access to private or commercial property for any reason.
- (g) No person shall allow, authorize, build, construct, or place the discharge point of any sump pump, pool, water feature, or foundation drainage, or any storm water management measures, including but not limited to swales, drains and contouring, that directs or is intended to direct sump pump or foundation drainage discharge, onto Park Property. All discharge of sump pumps and foundation drainage adjacent to Park Property, shall be setback from the Park Property line, in such a manner that the water flow is discharged onto the originating property and flows in accordance with City and State of Kansas drainage law.

- (h) No person shall erect, construct, install or place any memorial such as, but not limited to, flowers, memorabilia, mementos, religious symbols or signs.”

SECTION 4. Section 9.05.030 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Exceptions. The provisions of Section 9.05.010 shall not apply to any person who has a written agreement with the City or the Board, including, but not limited to, a lease, easement or an Encroachment Permit issued pursuant to the provisions of Section 9.05.040 which allows an encroachment otherwise prohibited by Section 9.05.020, but only to the extent of the terms and conditions set forth in such written agreement, lease, easement or Encroachment Permit.”

SECTION 5. Section 9.05.040 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Permits for existing encroachments – Standards, conditions and term for issuance of same.

- (a) Any unlawful encroachment as described in Section 9.05.020, and amendments thereto, upon Park Property that is in existence upon the date of passage of this ordinance shall be subject to review by the Director, who shall compile a list thereof. The Director shall conduct a review of all existing encroachments subject to written standards developed for such purpose. These standards shall include, but not be limited to, the physical characteristics of the encroachment, the size of the encroachment, the purpose for or the use of the encroachment and whether the encroachment poses a public safety hazard. Additionally, an Encroachment Permit will not be granted allowing an encroachment to exist upon Park Property that is in violation of any land or deed restriction or is or has been

acquired and/or developed with Federal financial assistance provided by the National Park Service of the United States Department of the Interior in accordance with the Land & Water Conservation Fund Act of 1965, and amendments thereto. If a determination is made after review that an Encroachment Permit may be issued for the continued existence of the encroachment, written notice shall be served upon the owner and/or occupant of the property upon which the encroachment is located or that is associated with or adjacent to the encroachment by certified mail, return receipt requested, or by personal service. The notice shall describe the encroachment and provide options as set forth paragraphs (b), (c), (d), (e), (f) and (g) of this Section regarding the continued existence of the encroachment.

- (b) The recipient of the notice described in paragraph (a) herein shall have forty five (45) calendar days from the date of the notice to respond in writing thereto and inform the Director of such person's intentions regarding maintaining the encroachment. Should the recipient elect to apply for an Encroachment Permit to maintain the encroachment, application for the permit must be made, and all conditions set forth in subparagraph (d) must be met, within forty five (45) additional calendar days from the date of the response to the Director, provided, however, that an extension of one forty five (45) calendar day time period shall be granted if recipient demonstrates that due diligence is being exercised in making application for, and complying with the required conditions for such permit. If the recipient of the notice described in paragraph (a) herein fails to respond to the notice or fails to complete an application for and comply with the conditions for

an Encroachment Permit within the required period of time, the option to obtain an Encroachment Permit shall no longer be available to the owner and/or occupant of the property upon which the encroachment is located or that is associated with or adjacent to the encroachment. A Notice to Abate shall be sent to such person, following the process set forth in Section 9.05.060 of this Code.

- (c) An Encroachment Permit shall become null and void and subject to revocation by the Director upon the sale or any change of ownership of the property upon which the encroachment is located or that is associated with or adjacent to the encroachment.
- (d) An Encroachment Permit shall be issued to an applicant only if each of the following conditions are met:
 - (1) The encroachment must be in existence upon the effective date this ordinance to be eligible for an Encroachment Permit. No encroachment that comes into existence after the effective date this ordinance shall be eligible for such a permit.
 - (2) The encroachment must not present a public safety hazard. No Encroachment Permit will be issued if the existence thereof creates or causes a public safety hazard.
 - (3) The applicant must pay the required fee for the Encroachment Permit and must allow the Director access to the applicant's property as necessary to photograph and otherwise document the encroachment as it exists at the time the Encroachment Permit is issued.

(4) The applicant must sign an agreement to indemnify, hold harmless and defend the City, the Council, the Board, and any of its agents or employees from and against any and all loss, damage, liability, cost or expense which arises, or is alleged to have arisen due to the existence of the encroachment.

(5) The applicant must acquire, at such applicant's own expense, general liability insurance in an amount not less than the maximum liability of a governmental entity for claims arising out of a single occurrence as provided by the Kansas Tort Claims Act or other similar future law (currently \$500,000 per occurrence). The City shall be named as an additional insured under said policy and such policy shall properly protect and indemnify the City in an amount not less than aforesaid. The issuer may not cancel the insurance thereof without at least thirty (30) days advance written notice to the Director of Park and Recreation. A copy of such policy shall be furnished to City with the application for an Encroachment Permit and at the time of each annual renewal of such permit.

(6) The applicant shall not, nor permit anyone else to enlarge or expand the encroachment in any manner, nor shall such person erect, construct, install or place any encroachment in addition to that allowed by the Encroachment Permit required herein.

(7) The applicant shall sign a Notice of Encroachment which shall be in a form prepared and approved by the City Attorney, and shall be filed with the Office of the Register of Deeds for Sedgwick County, Kansas. This document is intended to serve as notice to any subsequent purchaser of the property which is

associated with the Encroachment Permit that the permit is null and void and subject to revocation and the encroachment subject to abatement upon any sale or change of ownership of said property.

(8) The encroachment for which an Encroachment Permit is issued shall be subject to any utility excavation or other work that must be done at the location of the encroachment by the City or any utility operating under a City franchise. It shall be the responsibility of the permit holder to remove any or all of the encroachment, if necessary, for such work to proceed. Additionally, should damage to the encroachment occur during such utility excavation or other work, the City or utility operating under a City franchise will not be responsible for the repair or replacement of such encroachment if the encroachment is thereafter allowed by this Chapter.

(9) The encroachment for which an Encroachment Permit is issued shall be subject to any redevelopment, change of use or to meet other needs of the Wichita Park and Recreation Department regarding the Park Property where the encroachment is located, as determined by the Council or the Board.

(10) The applicant shall be subject to any additional terms, conditions and/or limitations placed upon the existing encroachment and made a part of the Encroachment Permit by the Director, however, the applicant may, upon written request to the Director, obtain a hearing before either the Director or a designated hearing officer regarding such additional terms and conditions provided the request is received by the Director within ten (10) business days from the date of

the issuance of the Encroachment Permit. Any hearing requested shall proceed in accordance with the provisions of Section 9.05.080(a) of this Code.

- (e) An Encroachment Permit shall be valid for a term of one year from the date of issuance and must be renewed on an annual basis, with payment of the required fee and subject to all requirements set forth in paragraph (d) of this Section. Renewal must be made no later than thirty (30) calendar days following the expiration date of the permit being renewed.
- (f) The Director is authorized, with the approval of the Board, to implement an application process for the Encroachment Permit required by this Section and setting any fees therefor.
- (g) An Encroachment Permit shall be revoked by the Director, if any of the following shall occur:
 - (1) Failure of any holder of an Encroachment Permit to maintain continued compliance with any of the conditions for obtaining such permit as set forth in paragraph (d) of this Section;
 - (2) Failure of any holder of an Encroachment Permit to renew said permit within the time limits set forth in paragraph (e) of this Section;
 - (3) The sale or change of ownership of the real property associated with an Encroachment Permit; or
 - (4) A determination by the Council or the Board regarding redevelopment of or changes in the use of the Park Property where the encroachment is located, in order to meet the needs of the Department of Park and Recreation.

(h) Written notice of the revocation of an Encroachment Permit by the Director shall be provided to the permit holder along with a Notice to Abate pursuant to the procedure set forth in Section 9.05.060 of this Code. The notice shall include the reason for revocation of the Encroachment Permit and a statement that the recipient may, upon written request to the Director, obtain a hearing before either the Director or a designated hearing officer, provided the request is received by the Director within ten (10) business days from the date of the notice of revocation. Any hearing requested shall proceed in accordance with the provisions of Section 9.05.080(a) of this Code. The provisions of the Notice to Abate shall be stayed pending the hearing on the permit revocation.”

SECTION 6. Section 9.05.050 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Existing encroachments not eligible for permit. If the review of an encroachment in existence at the time of the passage of this ordinance results in a determination by the Director that an Encroachment Permit shall not be issued for the continued existence of the encroachment, a written Notice to Abate shall be sent to the owner and/or occupant of the property upon which the encroachment is located or that is associated with or adjacent to the encroachment, following the process set forth in Section 9.05.060 of this Code.”

SECTION 7. Section 9.05.060 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Notice to Abate. (a) Whenever any officer or City employee authorized to enforce the provisions of this Chapter determines that there has been a violation of any of the

provisions of Section 9.05.020 of this Code, and/or that an encroachment upon Park Property has occurred, written notice shall be given to the owner and/or occupant of the property upon which the encroachment is located or that is associated with or adjacent to the encroachment. If the violation or encroachment is not associated with any real property other than Park Property, written notice shall be given to the person committing the violation and/or responsible for maintaining the encroachment.

(b) The notice shall include the following information:

- (1) The address and/or legal description of the real property associated with the violation and/or encroachment, if any;
- (2) The nature of the violation and/or encroachment, with sufficient information that would reasonably allow the recipient to determine the nature of the violation and to allow for self-abatement;
- (3) That the violation and/or encroachment shall be abated by the recipient within a designated time period, not exceeding thirty (30) calendar days from the date of the notice, provided that an extension of one thirty (30) calendar day time period shall be granted to the recipient of the Notice to Abate provided that the recipient makes such request in writing to the Director prior to the expiration of the initial thirty (30) calendar day time period and demonstrates that due diligence is being exercised in abating the violation and/or encroachment;
- (4) That the recipient, upon written request to the Director, may obtain a hearing before either the Director or a designated hearing officer regarding the Notice to Abate, provided the request is received by the Director

within ten (10) business days from the date of the Notice to Abate, which hearing shall proceed in accordance with the provisions of Section 9.05.080(a) of this Code;

- (5) That failure to comply with the Notice to Abate may result in the City abating the violation and/or encroachment with the assessment of costs made against any real property associated with the violation and/or encroachment, or by filing an action seeking judgment against the recipient thereof;
 - (6) That failure to pay such assessments within thirty (30) calendar days of the notice of costs shall result in the filing of a lien against any real property associated with the violation and/or encroachment or the filing of an action seeking judgment against the recipient thereof, or both; and
 - (7) That such violation is subject to criminal prosecution.
- (c) Except as provided by Subsection (d), the Notice to Abate shall be served on the person or persons responsible for the violation and/or encroachment or the owner of any real property associated with the violation and/or encroachment by certified mail, return receipt requested, or by personal service, or if the any real property associated with the violation and/or encroachment is unoccupied and the owner is a nonresident, then by mailing a notice by certified mail, return receipt requested, to the last known address of the owner.
- (d) If the intended recipient has failed to accept delivery or otherwise failed to effectuate receipt of the Notice to Abate sent pursuant to this Section, the City may serve the Notice to Abate by such methods including, but not limited to, door

hangers, conspicuously posting the Notice to Abate on the property, personal notification, or first class mail.

- (e) If the Notice to Abate cannot be conveniently served as set forth in Subsections (c) and (d) of this Section, service is to be made upon the intended recipient by at least one publication in the official newspaper of the City, such publication to contain the conditions and reasons of the Notice to Abate.
- (f) If an officer or employee authorized to enforce violations of this Chapter determines that a violation exists, the officer or employee may issue a Notice to Appear in Municipal Court for such violation. No other procedures or notice are required as a prerequisite to the issuance of a Notice to Appear.”

SECTION 8. Section 9.05.070 of the Code of the City of Wichita, Kansas is hereby Created to read as follows: **“Abatement of nuisance by City; notice of costs; assessment and collection.**

- (a) If the recipient of the Notice to Abate fails to comply with the terms therein and within the period of time designated in the notice, or fails to comply with the notice after a hearing on the matter, then the City may abate the violation and/or encroachment in a reasonable manner, which may include going upon the real property associated with the violation and/or encroachment. The City shall not be responsible for damage to property due to reasonable methods of gaining entrance onto the property or for damages to property in the reasonable exercise of its duty to the public to abate the violation and/or encroachment. The City may use its own employees or contract for services for such abatement.

- (b) If the City takes action to abate the violation, it shall provide a Notice of Costs to the recipient of the Notice to Abate. The Notice of Costs shall be delivered by certified mail, return receipt requested, at the last known mailing address of the recipient; or if the property associated with the violation and/or encroachment is vacant or unoccupied, the Notice of Costs shall also be posted on the property in a reasonable manner. The recipient shall have thirty (30) calendar days from the date of the Notice to make full payment. The Notice of Cost shall state:
- (1) The address or legal description of the property, if any;
 - (2) The nature of the violation, including relevant ordinances;
 - (3) The nature of the work performed to abate the violation and/or encroachment;
 - (4) The costs incurred for the abatement of the violations and/or encroachment in either a lump sum or in itemized form;
 - (5) That the notice is a demand for payment within thirty (30) calendar days from the date of notice;
 - (6) That failure to pay the entire amount within thirty (30) calendar days shall allow the City to file a lien against the associated property or to pursue litigation for the recovery of the costs, or both;
 - (7) That such additional remedies to recover costs shall include additional amounts including additional administrative costs, attorneys' fees when applicable, and interest;
 - (8) That payment shall be made by check or money order made payable to the City of Wichita, Kansas, with no post-dating of the check, and sent to the

address as stated within the notice with a written indication of the purpose for the payment and the address of the property where the violation and/or encroachment occurred. Partial payments will not be accepted and shall be considered as non-payments.

- (c) If the payment of costs is not made within the thirty (30) calendar day period, the City may levy a special assessment for such costs against the lot or piece of land associated with the violation and/or encroachment. The City Clerk at the time of certifying other City taxes to the County Clerk shall certify the aforesaid costs, to be extended by the County Clerk on the tax roll of the county against the lot or parcel of ground, and it shall be collected by the County Treasurer and paid to the City as other City taxes are collected and paid. Provided further, the City may collect the costs in the manner provided at K.S.A. 12-1,115 and amendments thereto, by bringing an action in the appropriate court as a personal debt. The City may pursue both assessment and collection at the same time until the full cost, including applicable interest, court costs, attorneys' fees, and any other reasonable costs associated with the action have been paid in full.
- (d) Any assessment charged pursuant to this Subsection shall be in addition to and not in lieu of any other penalties or remedies provided for in this Chapter or any other applicable ordinance of the City and/or law of the State of Kansas.”

SECTION 9. Section 9.05.080 of the Code of the City of Wichita, Kansas is hereby created to read as follows: “**Hearing by the Director, Appeals.** (a) If a written request for a hearing is made within the (10) business day period as provided in Sections 9.05.040(d)(10), 9.05.040(h) and 9.05.060(b)(4) of this Chapter, then a hearing shall be

scheduled within ten (10) business days before the Director or a designated hearing officer. The Director or hearing officer shall receive evidence, review the facts relevant to the matter being heard and prepare a written order. The order shall be sent by United States mail addressed to the person requesting the hearing within ten (10) business days of the hearing, unless otherwise stated at the hearing. The order shall describe the relevant facts and provide any specific Code provision(s) or written review standard(s) being relied upon and any relevant information as deemed necessary by the Director or designated hearing officer. The Director or designated hearing officer may approve, overrule or modify the decision or determination that is the topic of the hearing request.

(b) The decision of the Director or designated hearing officer may be appealed by a party to the hearing by filing with the City Clerk a written notice of appeal within ten (10) business days of the date of the written order of the Director or designated hearing officer. The notice of appeal shall specify the name and address of the appellant, the date of the hearing from which the appeal is being taken and shall state a factual basis for the appeal. Upon receipt of a complete and filed notice of appeal, the City Clerk shall proceed as follows:

- (1) If the appeal involves an encroachment occurring upon, below, over or across Park Property to which title is held in the name of the Board of Park Commissioners pursuant to Section 5 of Charter Ordinance No. 125 of this Code and amendments thereto, the notice of appeal should be forwarded by the City Clerk to the Board President, who shall schedule a hearing before the Board at the next regularly scheduled Board meeting.

- (2) If the appeal involves an encroachment occurring upon, below, over or across Park Property to which title is held in the name of the City of Wichita pursuant to Section 5 of Charter Ordinance No. 125 of this Code and amendments thereto, the City Clerk shall schedule a hearing before the Council no later than 30 days from the date of the filing of the Notice of Appeal with the City Clerk.
- (c) Any appeal shall stay any action regarding the violation and/or encroachment or an Encroachment Permit until the matter is heard by either the Board or the Council. The Board or the Council may approve, overrule or modify the decision of the Director or designated hearing officer.
- (d) The decision of the Board or the Council may be appealed to the Eighteenth Judicial District Court of the State of Kansas pursuant to K.S.A. 60-2101 and any amendments thereto. Any such appeal to the District Court shall not stay action regarding the violation and/or encroachment or the Encroachment Permit or other determination made or imposed by the Board or the Council.”

SECTION 10. Section 9.05.090 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Enforcement – Personnel authorized. In addition to all law enforcement officers, the following personnel employed by the City shall have the power to enforce the provisions of this Chapter:

- (a) Director of Park and Recreation or designee;

- (b) All Fire Department personnel;
- (c) Director of Public Works and Utilities or designee; and
- (d) Zoning administrator or designee.”

SECTION 11. Section 9.05.100 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Penalty for Violation. Any person who is convicted of a violation of any of the provisions of this Chapter shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100.00) and not more than five hundred dollars (\$500.00). Each day that any violation of this Chapter occurs shall constitute a separate offense and shall be punishable hereinafter as a separate violation. Provided, however, that if upon trial of any person found guilty of a violation of any of the provisions of this Chapter it shall appear to the court that the violation and/or encroachment complained of as proscribed in this Chapter is continuing, the court shall enter such order as it shall deem appropriate to cause the nuisance to be abated.”

SECTION 12. Section 9.05.110 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Violations not exclusive. Violations of this Chapter are in addition to any other violation enumerated within the ordinances of the Code of the City and in no way limits the penalties, actions or abatement procedures which may be taken by the City for a violation of this title which is also a violation of any other ordinance of the City or statute of the State of Kansas. Additionally, violations of this Chapter shall not limit or impede in any manner the ability of the City to bring an action in the District Court of the Eighteenth Judicial District or any other appropriate court having jurisdiction to enjoin any violation of the provisions of this Chapter.”

SECTION 13. Section 9.05.120 of the Code of the City of Wichita, Kansas is hereby created to read as follows:

“Severability. Should any section, clause, sentence, or phrase of this ordinance be found to be unconstitutional or is otherwise held invalid by any court of competent jurisdiction, such invalidity shall not affect the validity of any remaining provisions herein.”

SECTION 14. The original of Section 9.03.250 of the Code of the City of Wichita, Kansas is hereby repealed.

SECTION 15. This ordinance shall be included in the code of the City of Wichita, Kansas, and shall be effective upon its passage and publication once in the official City paper.

PASSED PASSED by the governing body of the City of Wichita, Kansas, this 23rd day of August, 2016.

Jeff Longwell, Mayor

ATTEST:

Karen Sublett, City Clerk

Approved as to Form:

Jennifer Magaña, City Attorney and
Director of Law