

FACTSHEET

TITLE: CHANGE OF ZONE NO. 3280, a text amendment to Title 27 of the Lincoln Municipal Code, requested by the Director of Planning, to define and allow sexually oriented live entertainment establishments as a permitted special use in the H-1, H-2, H-3, H-4, I-1, I-2 and I-3 zoning districts by adding sections 27.03.545, 27.03.564, 27.03.566 and 27.63.730; and by amending sections 27.39.030, 27.41.040, 27.43.040, 27.45.030, 27.47.030, 27.49.040 and 27.51.050.

SPONSOR: Planning Department

BOARD/COMMITTEE: Planning Commission
Public Hearing: 9/6/00
Administrative Action: 9/6/00

RECOMMENDATION: Approval (7-1: Krieser, Newman, Duvall, Taylor, Schwinn, Carlson and Bayer voting 'yes'; Hunter voting 'no'; Steward absent).

STAFF RECOMMENDATION: Approval

FINDINGS OF FACT:

1. This text amendment and the associated text amendment to the County Zoning Resolution were heard at the same time before the Planning Commission.
2. The Planning staff recommendation to approve this text amendment is based upon the "Analysis" as set forth on p.2-4, concluding that land use regulations may benefit Lincoln's goal of preventing urban blight and resulting economic investment.
3. The presentation by the Director of Planning is found on p.5-6.
4. Testimony in support is found on p.6.
5. There was no testimony in opposition.
6. The Planning Commission discussion and debate is found on p.7-9.
7. A motion to restrict the sexually oriented live entertainment establishments to only the H-4 district and to not allow such establishments to locate facing a main arterial street failed 4-4 (Krieser, Hunter, Taylor and Bayer voting 'yes'; Newman, Duvall, Schwinn and Carlson voting 'no'; Steward absent).
8. On September 6, 2000, the Planning Commission voted 7-1 to agree with the staff recommendation, as set forth in the staff report dated August 23, 2000 (Hunter dissenting).

FACTSHEET PREPARED BY: Jean L. Walker

DATE: September 11, 2000

REVIEWED BY: _____

DATE: September 11, 2000

REFERENCE NUMBER: FS\CC\FSCZ3280

4. Lincoln-Lancaster County Planning Department used the *Adult Use Study* Parts 1 through 4 as well as its Appendices A, B1b, B2, B3, B4, B5, B6, B7 and B8, performed for Kansas City, Missouri, Final Version, March 1998, prepared by Eric Damien Kelly, AICP, in association with Connie B. Cooper, AICP.
5. The Kelly/Cooper Kansas City study incorporated ordinances from Atlanta GA, Austin TX, Charlotte NC, Cincinnati OH, Denver CO, Fort Worth TX, Indianapolis (Marion County) IN, Louisville KY, Manatee County FL, Minneapolis MN, Newport News VA, Oklahoma City OK, Phoenix AZ, Portland OR, St. Paul MN, San Diego CA, Seattle WA, Tucson AZ, and Whittier CA.
6. The Kelly/Cooper Kansas City study incorporated so-called Adult Use Studies from Fort Worth TX, Indianapolis IN, Newport News VA, St. Paul MN, Phoenix AZ, Tucson AZ, Seattle WA, Whittier CA, Austin TX, and Denver CO as well as the “Adult Use Study and Adult Use Manual” of Massachusetts Chapter, APA & City Solicitors & Town Counsel Assoc.
7. The experience and studies of other areas may be generalized as applicable to Lincoln and its three-mile zoned area.
8. Regulating the location of sexually oriented live entertainment establishments through zoning will serve the public interest.
9. Mapping of zone districts potentially available to sexually oriented live entertainment establishments generally indicates that ample properties with development potential exist under this proposal.
10. This amendment adds three definitions: *sexually oriented live entertainment establishment*, *specific anatomical areas*, and *specific sexual activities* to Title 27.
11. The H districts generally are Highway Commercial in nature.
12. The I districts generally are industrial in nature.
13. This amendment proposes sexually oriented live entertainment as a permitted special use in H-1, H-2, H-3, H-4, I-1, I-2, and I-3 zoning districts.
14. The proposed Sec. 27.63.730 establishes “Permitted Special Use” standards for locating sexually oriented live entertainment establishments, including a minimum separation distance (1500 feet) between two such uses; a minimum separation distance (1000 feet) between such use and from property zoned AGR, R-1, R-2, R-3, R-4, R-5, R-6, R-7, and R-8 as well as distance from specific uses: church; public elementary and high schools or private schools having a curriculum equivalent to public elementary or high schools; early childhood care facility; public park; hospital; public library; public museum; amusement park, recreation area or playground that primarily serves persons younger

than 18; correctional facility; or a residential treatment facility licensed by the State of Nebraska in which people reside while receiving therapy, counseling, or rehabilitation for physical, emotional or mental disease or disability.

15. The amendment would specify the method for measuring the required separation distance.
16. The amendment would specify provision for City Council to modify or waive separation.
17. Before issuance of a Special Permit for any use Planning Commission holds a public hearing to consider the effect of the proposed use on the surrounding neighborhood, the Comprehensive Plan, the community as a whole, and other matters relating to the public health, safety, and general welfare.
18. Planning Commission's action may be appealed to City Council for public hearing and decision.

STAFF CONCLUSION: Land use regulations may benefit Lincoln's goal of preventing urban blight and resulting economic investment.

STAFF RECOMMENDATION: **Approval**

Prepared by:

Kathleen A. Sellman, AICP
Planning Director

**COUNTY CHANGE OF ZONE NO. 202
and
CHANGE OF ZONE NO. 3280**

PUBLIC HEARING BEFORE PLANNING COMMISSION:

September 6, 2000

Members present: Krieser, Newman, Hunter, Duvall, Taylor, Schwinn, Carlson and Bayer; Steward absent.

Planning staff recommendation: Approval

Proponents

1. Kathleen Sellman, Director of Planning, presented the application. The City Council and County Board have requested zoning amendments to regulate the location of sexually oriented live entertainment establishments for the purpose of preventing secondary and negative effects. The proposed amendments are separate for the city and county.

The County Zoning Resolution regulates those areas which are unincorporated and located outside of the three-mile zoned area. Those changes which would affect the City of Lincoln land use regulations would apply within the incorporated limits and within the three-mile zoned area.

There is a three-pronged approach for each amendment that would cover categories of definitions to assist in clarifying what is to be regulated; a proposal to list the specific use within zone district categories; and then standards under a special permit process to govern sexually oriented live entertainment establishments. This is a land use issue. The goal of the City Council and County Board is to bring the land use regulations up to the standard of current practice with regard to regulating sexually oriented live entertainment establishments.

The definitions which are before the Commission are that of sexually oriented live entertainment establishments, specific anatomical areas and specific sexual activities. The goal of the City Council and County Board is to have regulations which are as similar as they can be so that as future annexation may occur, the regulatory process is as consistent in that change-over of jurisdiction as it can be.

The special permit process has been selected as the method for evaluating the proposed uses and that brings before the Planning Commission a proposal for this type of business. For the county permits, the Lancaster Board makes the final decision. With special permits in the city or three-mile area, the Planning Commission will make the final decision with an appeal process to the City Council.

Bayer wondered why we have to allow this at all. Sellman advised that the most recent Supreme Court decisions on these businesses have indicated that a complete prohibition on such businesses may be an unreasonable regulation and that alternative means of expression must be

available within a jurisdiction. If a business can meet the requirements of the special permit, they would be allowed in the industrial zoned districts of the unincorporated county and in the city and in the three-mile zoned area in the H-1, H-2, H-3 and H-4 Highway Commercial districts, and in the I-1, I-2 and I-3 Industrial districts. There is a proposed requirement that there would be a separation of 1500 feet of any two such businesses. In the county there would be a separation requirement from such a business and specified uses which have been identified as sensitive, i.e. residential, schools, playgrounds. Within the city, there is an additional separation requirement proposed from residential zoned districts and from agricultural and AGR zoning.

Hunter stated that she is opposed to any of these types of things because whoever's business they are next to will suffer just from the environment that is created. What prohibits us from limiting the number of permits that can be issued? Why can't we limit them because there are a lot of industrial areas in Lincoln and we could end up having one in every industrial area in the city? Sellman explained that to be a question that might more appropriately be answered by the City or County Attorney, but from the planning practice side of things, our interpretation of the court decisions has been that the courts, while they have said you cannot prohibit, you have to provide some opportunity. The courts have been less than specific about that number and it has been left to the marketplace to see how that develops.

2. Rick Peo, City Law Department, stated that he has not done a lot of research on the number limitation. New York City did actually limit the number but it would take a different type of regulation, including zoning and licensure. The zoning regulations is not the appropriate place to allow "x" number of uses. It's a land use issue. The licensure procedure to limit the numbers would have to go under the police power of the city and be under a different type of ordinance. The staff has not had direction from the City Council to come forward with that type of situation. The proposal is to allow the uses in certain districts with separation requirements. The separation requirements were a deliberate decision as opposed to clustering.

3. Cindy Williams, representing **West A Neighborhood Association** and mother of four girls, testified in support. A vote for this change would prohibit these adult establishments from locating near our sports complexes, ball fields, churches, sand volleyball courts, hospitals, mental institutions, schools and our homes which are three blocks or less from Cheetahs. She urged the Planning Commission to act promptly on this ordinance and to change the zoning, not just for the West "A" neighborhood but for the entire Lincoln community.

3. Deb Vocasek, 21 year resident in the West A neighborhood, testified in support. Why do we have to allow these establishments in the City? Why doesn't Omaha have any? She urged that this text amendment be approved. These uses are not appropriate in residential areas with our children, schools and daycares.

4. Joyce Champoux, President of Yankee Hill Neighborhood Association, testified in support. They are opposed to any of these type of establishments in any neighborhood.

There was no testimony in opposition.

Bayer inquired as to what is allowed today. Sellman advised that the existing businesses, if lawfully established, would continue to exist. The opportunity now exists for such businesses to locate in the B-4 zoned district. Bayer noted that this discussion is about land use. Is there any limitation on where someone could come in and start this entertainment? Sellman advised that part of the difficulty in regulating these at this time is that they are not defined so they are coming in under an umbrella which is much more broad. By failing to keep up with current practice and land use by providing a definition we are providing in many ways an open door. Once we define them as set forth, and require that those businesses meeting the definitions must have the special permit, then we are limiting greatly the ability of such a business to be established in the future.

Peo advised that under the existing ordinance, in the commercial districts we do not have a definition to control their location. It is clear that they can be located in the B-4 and I-3. If they fall within the existing definitions they might be allowed in some of the other districts. They are not allowed in the residential districts. This text would provide more definition and be more restrictive than the existing code.

Bayer referred to H-4--isn't that like 27th & the Interstate? He thought H-4 was only in certain places like entries to the city. Kathleen clarified that to be H-3. Bayer wondered about eliminating the H districts from this legislation. Sellman advised that the Commission does have that opportunity.

Hunter inquired as to why we aren't creating a specific zone rather than using any of our existing zones for this type of use, such as outside the three-mile limit, etc. Sellman agreed that there are a variety of ways to do it. In bringing this legislation forward, she has tried to use guidance from other communities and Supreme Court decisions. This is in terms of simplicity of administration--it is easy to explain to someone as to what is allowed and the requirements. If you create a zone district that is so complicated that no one can meet the requirements, then it is our interpretation that that does not meet the intent of rezoning a district. We can't be so restrictive that no one can do it and we can't be unreasonably restrictive.

Peo added that there are limitations because of First Amendment rights and privileges. There cannot be a total prohibition. You have to leave enough available alternatives that one can find a place to put his business. You cannot prohibit it by application of the facts.

Hunter believes these are what you call "destination" businesses. People will find them regardless of where they are located. Wouldn't it be easier to say it cannot be located in any zoning except for something specific to eliminate the corridors to the city, such as nowhere except I-1? Sellman advised that the approach selected by the City Council and County Board was to use existing zone districts rather than create a new "red-light" type of district. Hunter believes that I-1 is probably the most discreet area where that could be located. Could we narrow it down to that point? Sellman suggested that to be a prerogative that the Planning Commission has in making its recommendation.

Public hearing was closed.

COUNTY CHANGE OF ZONE NO. 202

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

September 6, 2000

Schwinn moved approval of the staff recommendation, seconded by Newman and carried 8-0: Krieser, Newman, Hunter, Duvall, Taylor, Schwinn, Carlson and Bayer voting 'yes'; Steward absent.

CHANGE OF ZONE NO. 3280

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

September 6, 2000

Newman moved approval of the staff recommendation, seconded by Schwinn.

Hunter asked Sellman to recite the type and level of businesses allowed in those zoning districts. Sellman reviewed the permitted uses, conditional uses and special permitted uses in each district.

Sellman also distributed a map showing the locations of the districts being proposed. Carlson pointed out that only the darkest colored areas on the map would be possible locations. Sellman concurred, stating that there was an analysis done of the variety of options so there are three different color tones shown on this map. Only the intensely colored areas are those which would be available under this proposal for the sexually oriented live entertainment establishments.

Hunter moved to amend to restrict approval to only the H-4 district, and that no such business may be located anywhere on a main arterial such as "O" Street and 27th Street, seconded by Taylor.

Hunter is leaning on the fact that she read the responsibilities and requirements that came along with this appointment to the Planning Commission and the Commissioners are to look at protecting any type of blight that may approach the City. She understands that we have to provide a location but it does not have to be at the focal point. She believes this type of use will be detrimental to surrounding businesses and uses. We cannot restrict the use in its entirety because of freedom of speech, etc., but she believes the Planning Commission has the ability to restrict where it is located because it is a destination business, and our restriction should be to the point where it will not have an impact upon businesses and residents of Lincoln.

Carlson stated that he has always been a strong supporter of strengthening neighborhoods, but he is concerned about developing legislation where you have to meet the test of reasonableness. In this instance he is going to rely on the expertise of staff and the legal department in generating the restrictions. It doesn't do any good to come up with legislation which wastes time and money and gets shot down by the courts.

Taylor stated that he seconded the motion because he believes it should be noted that there is a great concern. We are fighting against this type of entertainment which doesn't do our city any good. He wants it made public that some of the Commissioners are strongly against this activity. It is very unreasonable that this can permeate our society. It is a disgrace.

Hunter is a strong believer that if you can't say no now, then you can't say no later. We have the right to say no. We do not have the right to prohibit but we do have the right to designate. It is a destination business. Those who frequent those locations will seek them out and travel to wherever they are.

Carlson agrees, but applauds the efforts that have been made to this point. We talk about reasonableness in the legal sense, not necessarily in the citizen sense. We can vote our conscience, but he is more interested in listening to the legal definition of reasonableness.

Bayer will support the amendment. He wants to limit it as much as he can. He has three children at UNL and these uses could be located there. He feels sorry for Cornhusker Highway.

Newman suggested that limiting to H-4 and not on an arterial street wipes them out completely. Peo explained that one of the things the staff has come forward with is an ordinance that allows sufficient opportunities because we were picking a mixture of districts. We have not done an analysis of what's left when prohibiting certain districts. We don't have enough factual basis to say that is a reasonable selection. There is a tendency to argue reasonableness because B-4 is still allowed. B-4 is not before the Commission. We can't do anything to it. If the Commission wants to pick two areas on the fringe, that is the Commission's call. Hunter means it could not be located on "O" Street or on Cornhusker Highway.

Hunter withdrew her motion to amend, agreed by Taylor, who had seconded the motion to amend.

Hunter moved to amend that this change of zone and use is restricted to H-4 and may not be facing a main arterial street, seconded by Taylor. Motion to amend failed 4-4: Krieser, Hunter, Taylor and Bayer voting 'yes'; Newman, Duvall, Schwinn and Carlson voting 'no'.

Main motion to approve the Planning staff recommendation carried 7-1: Krieser, Newman, Duvall, Taylor, Schwinn, Carlson and Bayer voting 'yes'; Hunter voting 'no'; Steward absent.