

FACTSHEET

TITLE: STREET VACATION NO. 04008, requested by B & J Partnership, to vacate 21st Street between "Y" Street and the abandoned Missouri Pacific Railroad right-of-way.

SPONSOR: Planning Department

BOARD/COMMITTEE: Planning Commission
Public Hearing: 06/09/04
Administrative Action: 06/09/04

STAFF RECOMMENDATION: A finding that the proposed street vacation **is not** in conformance with the Comprehensive Plan.

RECOMMENDATION: A finding that the proposed street vacation **is not** in conformance with the Comprehensive Plan and that the vacation be **denied** (7-1: Sunderman, Carlson, Krieser, Taylor, Marvin, Carroll and Bills-Strand voting 'yes'; Larson voting 'no'; Pearson absent).

FINDINGS OF FACT:

1. This is a request to vacate 21st Street between "Y" Street and the abandoned Missouri Pacific Railroad right-of-way. The purpose is to facilitate loading operations for the intended tenant of a warehouse building on the west side of the street.
2. The original staff recommendation to deny this street vacation was based upon the "Analysis" as set forth on p.2-3. Staff recommended denial because the vacation would leave an inaccessible "island" of what appeared to be public right-of-way in the railroad corridor.
3. Michael Rierden testified on behalf of the petitioner, B & J Partnership, indicating that the petitioner agrees to give the University of Nebraska and Lincoln Lumber a private easement for ingress and egress over 21st Street. Mr. Rierden also submitted a "Petition for a Declaratory Order" brought before the Surface Transportation Board by the City of Lincoln which Mr. Rierden believes portrays that 21st Street does not extend into the railroad right-of-way. Rierden also suggested that the opposition by Lincoln Lumber is an attempt to bring this petitioner into a dispute between Lincoln Lumber and the City regarding the City's intention to construct a bike trail along the railroad corridor (See Minutes, p.5, and p.12-23).
4. The testimony by the Property Manager for the University of Nebraska is found on p.6, and the letter submitted is found on p.24. The University took a neutral position; however, requested that the access easement be granted prior to approval of the street vacation.
5. There was no testimony in opposition; however, the record consists of a letter in opposition from Lincoln Lumber Company (p.25), expressing concern that the vacation would affect current and planned access to their property along the railroad corridor.
6. On June 9, 2004, based on the information then available, the Planning Commission agreed with the staff recommendation and voted 7-1 to find the proposed right-of-way vacation not to be in conformance with the Comprehensive Plan and that it be denied (Larson dissenting; Pearson absent).
7. On June 14, 2004, upon further research of the ownership issue, Rick Peo, Chief Assistant City Attorney, determined that the 21st Street right-of-way does extend south across the railroad corridor. He submitted a letter (p.26) to the applicant's representative, J. Michael Rierden, which states that,

.... Since the University of Nebraska utilizes 21st Street abutting B&J's ownership and abutting the former Missouri Pacific Railroad right-of-way,that 21st Street should not be vacated unless Lincoln Lumber petitions to vacate 21st Street abutting its property and private access easements are provided over 21st Street for the benefit of the University and over that portion of 21st Street abutting B&J Partnership for the benefit of Lincoln Lumber. ...
8. The Petitioner has appealed Condition #1.2 (to post a \$5,000 bond guaranteeing removal of the existing street return and construction of new curb and gutter) and Condition #1.3 (which requires the submittal of a final plat). See p.27. He now intends to grant a public access easement over 21st Street, and requests that the existing street return remain in place so that no bond is needed. The petitioner also indicates that he is willing to submit a final plat prior to the actual land transfer, if the City Council approves the vacation request. The Council has approved other vacations in the past in this manner. City staff is satisfied that the previous concerns about access are resolved by granting the public access easement, and no longer objects to the vacation request.
9. In the event that the street vacation is approved, the City Real Estate Division has recommended that the vacated area be sold to the abutting property owner for \$2,250 (p.28).
10. The City Clerk has determined that the provisions of Chapter 14.20 of the Lincoln Municipal Code have been satisfied.

FACTSHEET PREPARED BY: Jean L. Walker

REVIEWED BY: _____

REFERENCE NUMBER: FS\CC\2004\SAV.04008

DATE: August 23, 2004

DATE: August 23, 2004

LINCOLN CITY/LANCASTER COUNTY PLANNING STAFF REPORT

for June 9, 2004 PLANNING COMMISSION MEETING

- P.A.S.:** Street and Alley vacation #04008
- PROPOSAL:** Vacate 21st Street between “Y” Street and the abandoned Missouri Pacific Railroad right-of-way.
- LOCATION:** 21st and “Y” Streets.
- LAND AREA:** 15,000 square feet, more or less.
- CONCLUSION:** Until such time as questions of right-of-way ownership in the area are answered, this item should be Denied.

RECOMMENDATION: However, if Applicant can show the property immediately south and adjacent to this petition is not public right-of-way, Planning Staff will recommend Approval.	Denial
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GENERAL INFORMATION:

LEGAL DESCRIPTION:

North 21st Street from the south line of “Y” Street right-of-way to the north boundary of the abandoned Missouri Pacific Railroad right-of-way, located in Section 24 T10N R6E, Lancaster County, Nebraska.

SURROUNDING LAND USE AND ZONING:

North:	Single-family residential, Commercial	I-1 Industrial
South:	Former Cushman site	I-1 industrial
East:	Parking lot	I-1 Industrial
West:	Industrial, Parking lot	I-1 Industrial

COMPREHENSIVE PLAN SPECIFICATIONS: The Land Use Plan identifies this area as Industrial. (F 25)

UTILITIES: LES and the Public Works and Utilities Department have facilities within this right-of-way area.

TRAFFIC ANALYSIS: Although this portion of North 21st Street is improved, it dead-ends at the former Cushman property. This right-of-way is not necessary for traffic purposes.

ANALYSIS:

1. This is a petition to vacate 21st Street between “Y” Street and the abandoned Missouri Pacific Railroad right-of-way. This right-of-way will be used for private parking area.
2. There is some doubt as to the ownership of the railroad right-of-way adjacent to this request. City records indicate public right-of-way extends south of this request across the old railroad right-of-way. However, County records indicate the public right-of-way ends at the old railroad right-of-way.
3. Assuming City records are accurate, this petition should be denied since it will create a section of public right-of-way without access. Assuming County records are accurate, this petition may move forward. Planning Staff recommends denial based upon City records. At such time as Applicant can demonstrate County records are accurate, Staff will recommend approval.
4. This vacation will create lots without frontage or access to a public street. As a condition of approval, a final plat should be submitted creating lots conforming to the subdivision ordinance.
5. Should this right-of-way be vacated, the existing street return must be removed and replaced with curb and gutter. A bond in the amount of \$5,000 should be provided to guarantee this work.
6. Easements must be retained for existing and future utilities.
7. The applicant has expressed an intent to purchase the right-of-way if vacated.
8. Lincoln Municipal Code Chapter 14.20 requires the City to establish the proper price to be paid for the right-of-way, as well as any amounts necessary to guarantee required reconstruction within the right-of-way. These values must be established and deposited with the City Clerk prior to scheduling the vacation request with the City Council.
9. As of the date of this report, City staff is working to resolve the ownership issue for the old railroad right-of-way. Planning staff intends to have a resolution prior to June 9, and if so, will revise the recommendation according to this Analysis.

**BEFORE THE VACATION REQUEST IS SCHEDULED ON THE CITY COUNCIL AGENDA
THE FOLLOWING MUST BE COMPLETED:**

- 1.1 Satisfy the provisions of Chapter 14.20 of the Lincoln Municipal Code.
- 1.2 Post a bond in the amount of \$5,000 to guarantee the removal of the existing street return and construction of new curb and gutter.
- 1.3 The abutting owners must submit a final plat creating lots that front on and have access to public streets or private roadways. All requirements of the final plat must be completed except the transfer of ownership of the vacated street to the subdividers.

1.4 Retain an easement over the entire vacated area for existing and future utilities.

Prepared by:

Greg Czaplewski
441.7620, gczaplewski@ci.lincoln.ne.us

Date: May 26, 2004

Applicant: B & J Partnership, Ltd.
and 340 Victory Lane
Owner: Lincoln, NE 68528

Contact: J. Michael Rierden
645 M Street, Suite 200
Lincoln, NE 68508
476.2413

STREET & ALLEY VACATION NO. 04008

PUBLIC HEARING BEFORE PLANNING COMMISSION:

June 9, 2004

Members present: Sunderman, Carlson, Larson, Krieser, Taylor, Marvin, Carroll and Bills-Strand; Pearson absent.

Staff recommendation: Denial.

Ex Parte Communications: None.

Greg Czaplewski of Planning staff submitted a letter in opposition from Lincoln Lumber Company, which is one of the abutting property owners.

Proponents

1. Mike Rierden appeared on behalf of the applicant, **B & J Partnership**. Some time ago, B&J acquired the area on both sides of the requested vacation. Rierden noted that the staff report recommends denial; however, it indicates that if the ownership issue is satisfied, the staff would change their recommendation to approval. Rierden suggested that the entire staff report basically supports the vacation request. There is a statement that this portion of N. 21st is not needed for traffic purposes and it dead-ends into the Cushman facility which is now owned by UNL. B&J has agreed to give the University an easement for ingress and egress over this portion of 21st Street.

Due to the letter in opposition from Lincoln Lumber, Rierden has been advised by the staff that they will continue to recommend denial of this street vacation.

Rierden submitted an exhibit which addresses the ownership issue, and he believes that the City Attorney is now comfortable with the ownership issue mentioned in the staff report. The exhibit also shows that this applicant is being brought into a dispute between Lincoln Lumber and the city regarding the bike trail. It is an administrative proceeding before the Surface Transportation Board between the city and Lincoln Lumber. The city's own engineers have shown the ownership pattern of Lincoln Lumber. The issue in the staff report was whether or not 21st Street extended into the railroad right-of-way, and this exhibit indicates that it did not. Throughout the proceedings there has been a long-standing dispute between Lincoln Lumber and the city concerning this bike trail. The city is trying to go forward with eminent domain proceedings to acquire what they need for the bike path. Rierden is convinced that Lincoln Lumber believes that objecting to this vacation will be part of their opposition to the city and will help his cause in some way. Lincoln Lumber's objection is that Lincoln Lumber will lose access and it will become a hardship; however, Rierden believes there is adequate access elsewhere all along the MoPac trail.

Rierden stated that B&J has also agreed to give Lincoln Lumber, like the University, a perpetual easement so that Lincoln Lumber can continue to use this land just as it does today. Rierden submitted that Lincoln Lumber's objection is without merit.

2. Ken Fougeron, B&J Partnership, stated that the south half of the proposed street vacation will allow access to the east side of the building that is on the west side of 21st Street. The fence will be moved out into the property to the east so that there is adequate turn-around and drive space for deliveries into that building. The north half of the street would remain unchanged. The purpose of this street vacation is to provide a loading area for the building on the west side of N. 21st Street. The tenant in the building will be Valley Vending Service, and it will be operated as a warehouse facility.

3. Linda Cowdin, Property Manager for UNL, spoke in a neutral position. The University suggests that the access easement be granted prior to City Council approval of the street vacation to assure that it does transpire. Without the easement, 21st Street is the University's only legal access to the recently purchased Cushman property at 900 N. 21st. There will be large trucks and tractor trailer deliveries required at that north entrance. There are life safety concerns in that there are two fire hydrants there and the University wants to make sure there is access and maneuverability for the fire trucks into that area. If approved, the conditions require that the street entrance be changed with curb and gutter. If curb and gutter is put in, how does UNL get access back to their building?

There was no testimony in opposition

Staff questions

Carlson wondered whether the deliveries can be done on the public street without vacating it—drive the truck up and unload? Greg Czaplewski of Planning staff believes that would be possible if they would apply for a curb cut for a driveway to the overhead door area. However, he believes the petitioner wants to be able to reorganize the area for use as additional parking stalls. He does believe they could use it as a public street to access the building.

Marvin inquired about Analysis #3 and the confusion between the city and county. Czaplewski advised that the County Assessor records indicate that Lincoln Lumber owns all of the railroad right-of-way. The sectional maps that the city maintains indicate that the part of 21st Street that crosses the railroad right-of-way is still public right-of-way. If it is still right-of-way, then it will be left without access if this street is vacated. The City Law Department and staff are now satisfied that the ownership has been proven to a point that we can move this vacation forward. However, that does not mean that the staff recommendation will be changed to approval. Because of the access issue to both UNL and Lincoln Lumber, the staff recommendation is going to be denial until the issue has been resolved and Lincoln Lumber and UNL both withdraw their opposition.

Carlson inquired about X Street. Czaplewski clarified that it is not a street. It is railroad right-of-way.

Sunderman inquired about any other use of the railroad right-of-way. Czaplewski suggested that provided it met the zoning requirements, any use in the I-1 district could be allowed. However, he is not sure that in and of itself it would be entirely usable for anything other than unloading and loading, etc.

Bills-Strand inquired whether the staff would be satisfied if the issues with UNL were resolved. Czaplewski stated that the University is generally asking for the easement, which staff has heard that the applicant has agreed to provide. If this vacation were approved by the City Council, the University's concern is that they may not actually get the easement. The staff wants those parties to work that out on their own and the University could withdraw their opposition.

Carroll asked whether it is true that 20th Street has been vacated up to the railroad right-of-way, so that Lincoln Lumber only has access off 21st and 22nd Streets. Czaplewski stated that Lincoln Lumber would now have access off of 21st Street, and should also have access off of 22nd and 23rd Streets. Carroll suggested that they would have 22nd to go all the way west.

Marvin wondered whether the easement issue could be resolved if this were deferred for two weeks. Czaplewski believes the applicant has expressed their willingness to do that and should be able to get that accomplished in two weeks.

Rick Peo of City Law Department offered that until the street is vacated, title remains with the city. Typically, the easement documents are where the city puts restrictions on the sale of the property as opposed to B&J. B&J could enter into an agreement with the UNL to provide the easement once they have title to the property. A condition of the sale could be that the proper agreement be reached with Lincoln Lumber and the University prior to conveyance. Peo suggested that a condition of the sale could be that the city not convey title until such time as those agreements have been reached. This would not require a deferral of the street vacation.

Peo also suggested that the issue of ownership of the right-of-way needs a little bit more investigation because sometimes the city has fee title to the railroad crossing and sometimes only a license from the railroad. Carroll does not believe it is fee title. Peo has not been involved in that litigation but he knows there is an issue as to whether the city has rights to use it as a trail.

Carroll wondered how they are going to get access with curb and gutter. Czaplewski explained that if they did not want to do curb and gutter, they would need to apply for a curbcut for a commercial driveway. Public Works did not give any information as to the cost, but that would be an option to open that back up.

Response by the applicant

With regard to the University, Rierden stated that he has talked with Dick Wood at the University and Mike Tavlin of B&J Partnership, and they have agreed in essence. An easement has been drafted and B&J would offer to have that easement as a condition of the vacation. In addition, B&J would agree to make application for the curbcut at Y Street as a condition of approval. As far as Lincoln Lumber, the proceedings he submitted show that Lincoln Lumber will never agree to anything. The easement was offered to Lincoln Lumber and B&J will give it to them if they will accept it.

As to whether or not the vacation is actually needed, Fougeron stated that with the current street with curbs on both the east and west side, they would be blocking that street part of the time if they just had a permit for loading and unloading. B&J would propose to pave the additional area to allow for through traffic either from the University or from Lincoln Lumber. We do not believe that it

would be wise to use a public street for unloading and loading because of the size of the trucks, and it would block the current street.

Carlson inquired whether the applicant anticipates through motions to the south with the additional paving. Does that run into a problem south of the additional paving? Fougerson stated there is a chain link fence on the south side of B&J that infringes on Lincoln Lumber. That will have to be corrected.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

June 9, 2004

Taylor moved to deny, seconded by Carroll.

Taylor thinks that all the parties need to get together so that no one party looks like the bad guy holding this up. We don't want to block access and make it difficult for anyone to do business.

Carroll commented that since there is still a question on the ownership of the railroad public right-of-way next to 21st Street that needs to be clarified, and that Lincoln Lumber needs access to their property (they probably purchased the property because there was street access), he does not see any advantages to vacating the street at this time until all the agreements are worked out.

Larson will vote against denial because he believes the applicant and University are ready to reach agreement, and that Lincoln Lumber is not, primarily because of the issue with the city. He does not see that it would harm Lincoln Lumber at all if they were granted an easement onto their property.

Carlson questions whether we are limiting the public need and facilitating a compelling private need. We are losing some public use and are we really facilitating a better private use? He believes they can create a turnaround to the east.

Rick Peo approached the Commission and suggested that, based upon the testimony today, there is an outstanding question--how does the University cross right-of-way to get to the south? It might be depriving UNL of rights. Maybe the issue of ownership does need some additional research.

Marvin stated that he will support the denial and would also support a deferral. He believes the parties are very close to coming to some sort of agreement.

Motion to deny carried 7-1: Sunderman, Carlson, Krieser, Taylor, Marvin, Carroll and Bills-Strand voting 'yes'; Larson voting 'no'; Pearson absent. This is a recommendation to the City Council.



2002 aerial

Street & Alley Vacation #04008 N. 21st & 'Y' St.

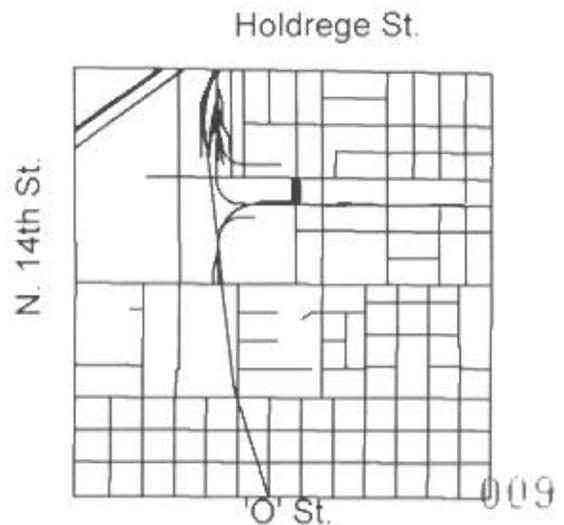
Zoning:

- R-1 to R-8 Residential District
- AG Agricultural District
- AGR Agricultural Residential District
- R-C Residential Conservation District
- O-1 Office District
- O-2 Suburban Office District
- O-3 Office Park District
- R-T Residential Transition District
- B-1 Local Business District
- B-2 Planned Neighborhood Business District
- B-3 Commercial District
- B-4 Lincoln Center Business District
- B-5 Planned Regional Business District
- H-1 Interstate Commercial District
- H-2 Highway Business District
- H-3 Highway Commercial District
- H-4 General Commercial District
- I-1 Industrial District
- I-2 Industrial Park District
- I-3 Employment Center District
- P Public Use District

One Square Mile
Sec.24 T10N R6E



Zoning Jurisdiction Lines
City Limit Jurisdiction

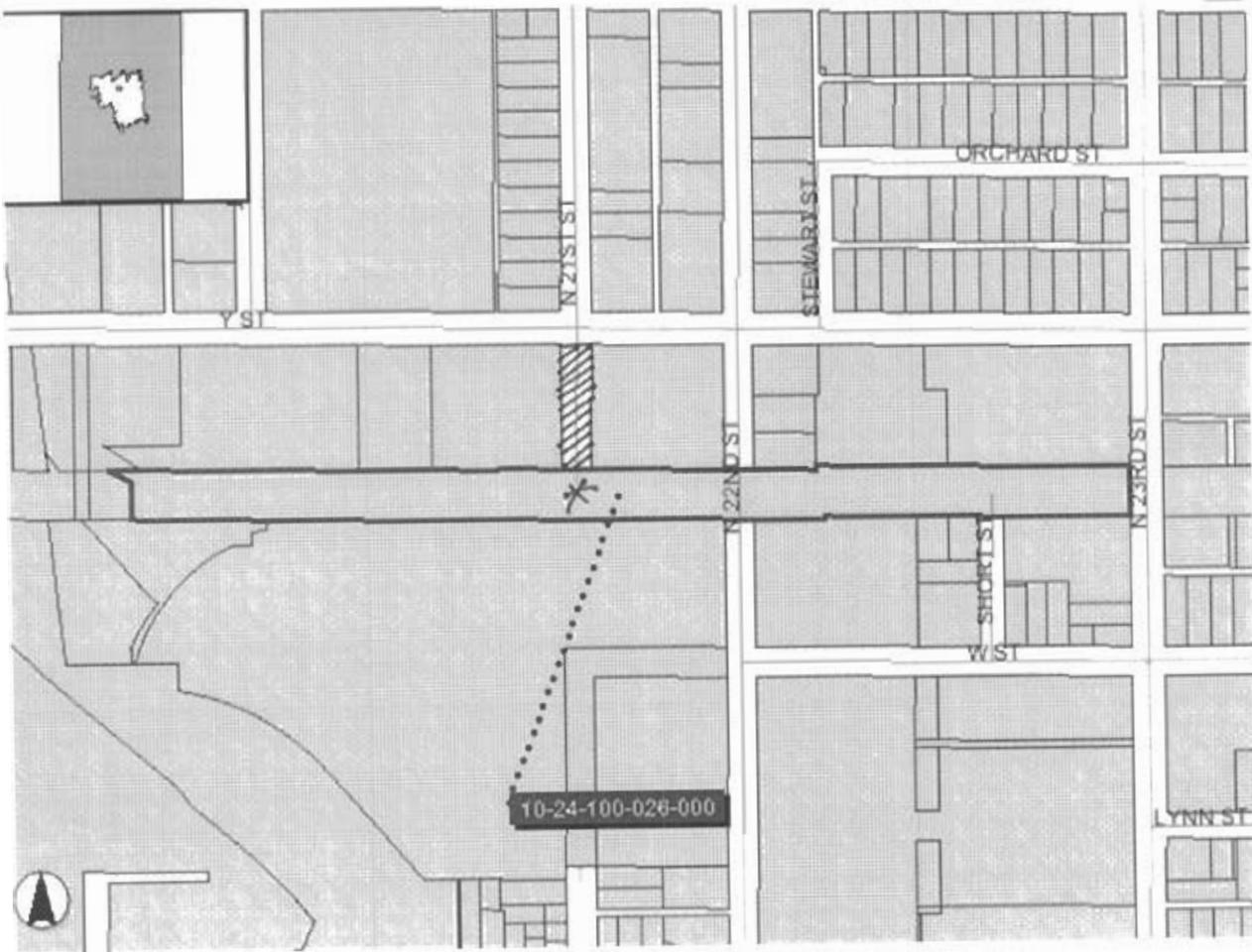




 REQUEST TO VACATE

* SECTION OF PUBLIC
RIGHT-OF-WAY LEFT
WITHOUT ACCESS.





 REQUEST TO VACATE

* OUTLINED PARCEL IS OLD RAILROAD RIGHT-OF-WAY, NOW OWNED BY LINCOLN LUMBER CO.



BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket 34425

CITY OF LINCOLN

PETITION FOR A DECLARATORY ORDER

The City of Lincoln (NE) (hereinafter referred to as "Lincoln" or "City") hereby petitions this Board, pursuant to 49 U.S.C. § 721, 5 U.S.C. § 554(3), 49 C.F.R. Part 1117 and other applicable authority, for a declaratory order determining that the acquisition of certain limited portions of a railroad corridor owned by Lincoln Lumber Company (hereinafter referred to as "LLC") does not constitute either an acquisition or an abandonment/discontinuance of operations for which prior Board approval is required under 49 U.S.C. §§ 10901-03.

More specifically, City of Lincoln wishes to acquire limited portions of a five block railroad corridor (between 19th Street and 24th Street) owned by Lincoln Lumber Company for (a) construction and operation of a vital pedestrian and bicycle commuter trail (the "Husker Link Trail") in the City, and (b) for storm drainage system improvements. LLC originally acquired the five block line of railroad pursuant to an "offer of financial assistance" ("OFA") in 1998, ostensibly for continued rail use. The City needs certain limited portions of the rail corridor for trail purposes, and certain additional underground portions for a storm sewer, in order to complete

both a vital trail linkage, and an important storm sewer project.

Neither project will interfere with continued rail use of the line. Moreover, the City will bear all relevant costs. Nonetheless, LLC refuses cooperation, and has indicated that it will invoke federal railroad preemption under 49 U.S.C. § 10501(b) against any state law eminent domain proceeding.

A map showing the location of the railroad track, the proposed underground storm sewer, and trail is attached as Appendix A ("overview of routes for trail and storm sewer").

Pursuant to the procedures and substantive holdings in State of Texas, Department of Transportation -- Petition for Declaratory Order Regarding Highway Construction in Tarrant County, TX, ICC Finance Dkt. 32589, served Feb. 7, 1995 (copy attached as Appendix B), City of Lincoln seeks a declaratory order sufficient to allow eminent domain of the rights necessary for Lincoln to proceed with the two public projects (storm sewer and trail) for which use of portions of the railroad corridor between 19th and 24th Streets in Lincoln is required.

Motion for Briefing Schedule

The City also moves this Board to order a prompt briefing schedule on this Petition, pursuant to 49 C.F.R. § 1112.2 (modified procedures) and other applicable authority. Inasmuch as the City has served this Petition on all adjoining commercial property owners and tenants (i.e., those parties potentially interested in rail service), including Lincoln Lumber, between

Railroad Company -- Abandonment Exemption -- Lancaster County, NE, AB-33 (Sub-no. 112X), served Jan. 16, 1998 (setting terms and conditions for LLC to acquire the five blocks), pet. to reopen denied, id. served March 2, 1998 (denying LLC petition to reduce price). More specifically, under the OFA, LLC acquired the entire corridor occupied by the old Missouri Pacific between 19th Street and 24th Street in Lincoln, which STB in its decision described as endpoints MP 494.166 to MP 492.88, respectively.

By a decision served September 24, 1997, this Board also issued a Notice of Interim Trail Use (NITU) covering the rail line from 18th Street to end of line at 33d Street. The time for negotiating a railbanking agreement under the NITU was extended several times for the portion of the corridor from 18th to 19th Street, and from 24th Street to 33d Street. E.g., decision served March 15, 2001. Pursuant to the NITU, as extended, Lincoln acquired all the portion of the right of way from 18th Street to end of line at 33d Street, except for the portion in the middle acquired by Lincoln Lumber pursuant to the OFA. Union Pacific donated the remainder of the line covered in AB 33 (Sub-no. 112X), namely 10th Street to 18th Street, to the University of Nebraska. See Genrich V.S. ¶4(d).

Representatives of the City of Lincoln approached Mr. Don Hamill, the owner of LLC, to negotiate acquisition of rights necessary for the Husker Link Trail and the storm sewer project, including a right of entry for survey purposes. See Pedersen

V.S. ¶¶ 5-8; Genrich V.S. at ¶4(f). Mr. Hamill declined to cooperate and refused entry. Id. Indeed, LLC's attorney has indicated to Mr. Pedersen, the Assistant City Attorney for Lincoln handling these projects, that LLC's purpose in pursuing the OFA on the line from 19th Street to 24th Street was to block the trail. Pedersen V.S. ¶ 8. This has been confirmed by subsequent events. LLC's owner has declined to negotiate any location or arrangement for the trail, has refused to allow the sewer project to move forward unless the City abandons the trail project, and has indicated that LLC will assert federal preemption as a defense to state-law eminent domain proceedings which the City wishes to bring in order to move the trail and sewer projects forward. Pedersen V.S. ¶8 and especially Letter, T. McFarland to J. Pedersen, Feb. 11, 2003, stating that LLC will seek a federal injunction against any eminent domain proceeding initiated by the City, attached as exhibit C to Pedersen V.S.

Textron owned most of the land on both sides of the rail corridor at issue here (i.e., 18th to 24th Streets) during the abandonment proceeding. The property was employed by Textron's subsidiary Cushman, Inc. for industrial purposes. Textron leased portions of the corridor from the prior owner Union Pacific. See Pedersen V.S. at ¶ 12(a)-(b). Upon acquisition of the five block corridor, however, LLC revised the lease greatly to increase the amount of rent, as well as the amount of space leased to Textron. See id. ¶ 12(d) et seq. In essence,

University of Nebraska acquired all Textron's holdings south of the rail corridor. B&J Partnership acquired the property on the north side between blocks owned by the University of Nebraska property and Lincoln Housing Authority.¹⁰ The ownership of the land is indicated in the aerial map in Appendix A entitled "property owners." Neither the University of Nebraska nor B&J Partnership employ the line for rail purposes, or any purpose; that is, neither the University nor B&J acquired any interest in the lease.¹¹ Thus, the only shipper is Lincoln Lumber Company.¹² Lincoln Lumber Company's use is 50 carloads or fewer per year.¹³ The City of Lincoln monitored use for one week and ascertained no use at all for that entire week.¹⁴

The Lincoln Lumber/Textron lease remains extant and runs until 2015.¹⁵ It does not contain a clause permitting early termination.¹⁶ Lincoln Lumber has thus ceded use of most of the rail corridor to a third party (Textron) for pedestrian,

¹⁰ Pedersen V.S. ¶12(g) & (h), and Exhibit F.

¹¹ Pedersen V.S. ¶ 12(g).

¹² Compare Genrich V.S. at ¶6(c) (LLC only shipper) with Letter, C. Jackson to Hon. V. Williams, Oct. 23, 2003 (UN "has no current plans for rail use of this property, and we do not foresee any real need on our part at this location in the future").

¹³ Schuchmann V.S. (Appendix G) at ¶5.

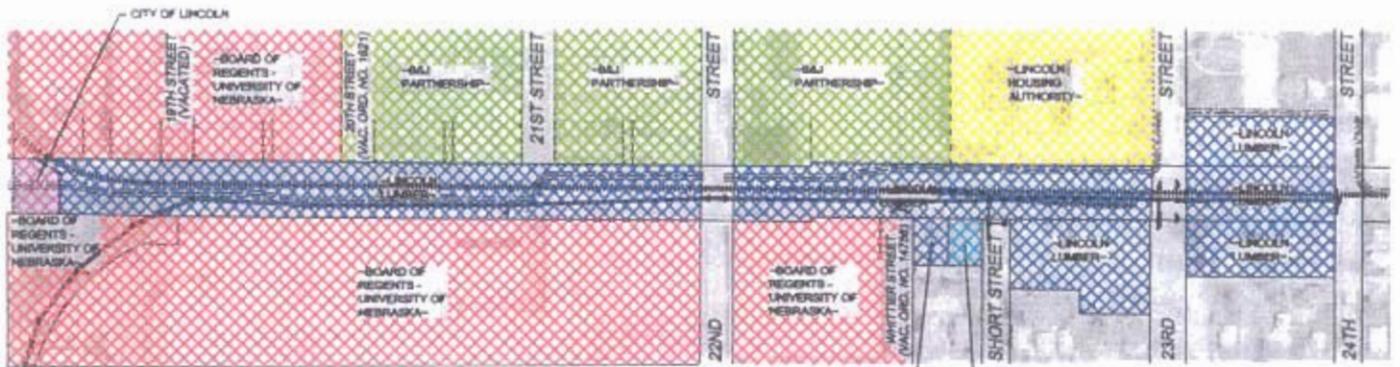
¹⁴ Genrich V.S. at ¶ 6(c).

¹⁵ Exhibit B, §2, to Pedersen V.S.; see Genrich V.S. at ¶6(c).

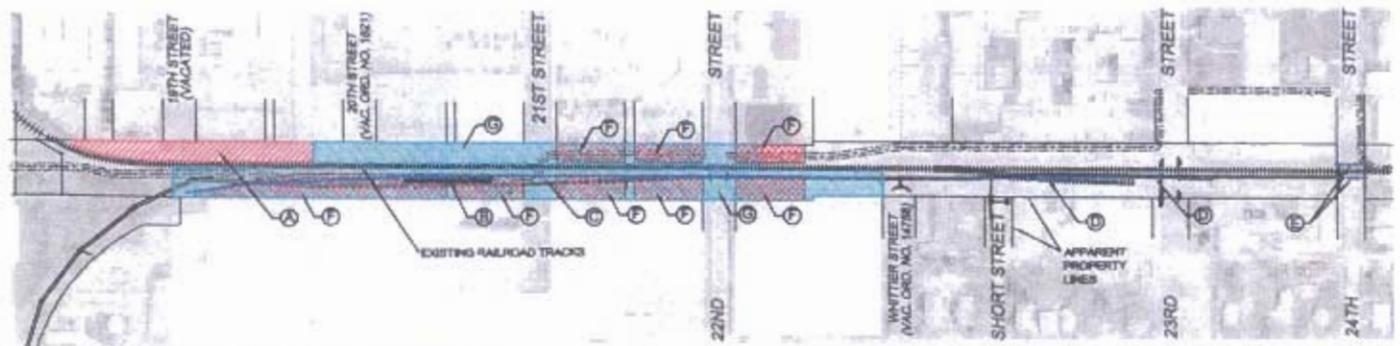
¹⁶ Pedersen V.S. at ¶12(f).



OVERVIEW OF ROUTES FOR TRAIL AND STORM SEWER



PROPERTY OWNERS



RIGHT-OF-WAY ENCROACHMENTS

INDEX OF ENCROACHMENTS	
A	PROPERTY LEASED BY COMMONWEALTH ELECTRIC CO OF THE MIDWEST
B	FORMER COAL HOUSE
C	EXISTING 30" RCP
D	EXISTING 24" CMP
E	FORMER PIPES UNDERNEATH 24TH STREET
F	*PROPERTY FORMERLY LEASED BY TEXTRON FROM UNION PACIFIC
G	**PROPERTY FORMERLY LEASED BY TEXTRON FROM LINCOLN LUMBER (BLUE)

* THE AREA OF PROPERTY FORMERLY LEASED BY TEXTRON FROM UNION PACIFIC WAS 49,127 SQ. FT.

** AFTER LINCOLN LUMBER COMPANY'S PURCHASE OF THE RAILROAD CORRIDOR, THE AREA OF PROPERTY LEASED BY TEXTRON FROM LINCOLN LUMBER INCLUDED 92,115 SQ. FT. THE LEASE DOCUMENTATION STATES THAT LINCOLN LUMBER WAS TO MAINTAIN A 12-FOOT TRACK RIGHT OF WAY

which the City seeks to acquire is excess to rail needs (it is obviously not in rail use and most of it is leased for other uses) and in any event the acquisition will not interfere with rail service. But this compels the conclusion that this Board should determine that its jurisdiction does not apply, thus allowing eminent domain to go forward. State of Texas, supra; see also Sacramento Regional Transit District, supra.

In short, it makes no sense to permit LLC to assert federal rail regulatory authority to interfere with the normal processes of state law in connection with the Husker Link Trail Project or the storm sewer project. In order to lift federal preemption so as to permit state and local eminent domain to be available, City of Lincoln hereby petitions for a declaratory order finding that the proposed acquisitions do not constitute acquisition or abandonment/discontinuance for purposes of 49 U.S.C. §§ 10901-03. See State of Texas, supra, ICC Finance Dkt. 32589, served Feb. 7, 1995 (granting similar petition). Alternatively, this Board may issue an order denying the petition on the ground that the law is clear that eminent domain under the circumstances here is permitted without triggering STB authority. See Sacramento Regional Transit District, supra, STB F.D. 33796, served July 5, 2000.

Should this Board require further briefing, the City of Lincoln requests expeditious treatment of this Petition and has proposed a schedule calling for Replies no later than forty (40) days, plus three days service, from the filing of this

Link Trail could cross to the south side of the track at the public crossing either at 22d Street or 21st Street. Because a sidewalk already exists on the north side between 21st Street and 22d Street, our current design calls for the Trail to be located at the location of the sidewalk, in order to minimize disruption of any leaseholder. (Lincoln Lumber has leased all of this portion of the corridor for parking, motor vehicular and pedestrian use, and storage to a unit of Textron, reserving only 12 feet of the corridor centered on the centerline of the track.) From 22d Street to 19th Street, the trail would be located on the south side of the track adjacent to University of Nebraska property. I attach as Exhibit B drawings showing the currently planned location for the Husker Link Trail in the 24th to 18th Street area.

- (f) Unsuccessful negotiations with Lincoln Lumber and need for state-law eminent domain procedures. The City's proposed design and route is specifically planned to avoid any interference with railroad use of the line. The City's design and route nowhere displaces any track, nor does it interfere with or impinge on use of that track. Even the crossing proposed by the City is planned for an existing public crossing. In addition, the design and route minimizes interference with Lincoln Lumber's private lumber operations. Although the owner of Lincoln Lumber initially indicated that he would work with us to determine a trail location, subsequent to learning of our proposed trail location, he has put piles of lumber in the area which we seek for the Husker Link Trail. He has now declined to permit any access to his property, or to allow us to conduct a survey to develop engineering drawings. The City of Lincoln also plans a storm sewer facility improvement for this rail corridor. Although the owner of Lincoln Lumber says he supports the storm sewer facility, he has told the manager of that project that he will not allow it to be constructed unless the City agrees not to construct the Husker Link Trail. Since negotiations are at an impasse (and time has run out, see next paragraph), the City must employ eminent domain to acquire the property required for the Husker Link Trail and for the storm sewer project. It is my understanding that Lincoln Lumber through its attorney Mr. McFarland has indicated it will assert federal preemption as a defense to any eminent domain proceeding. In order to permit the Trail and the storm sewer project to move forward, the City has directed that this Petition for a Declaratory Order be filed so that there will not be preemption of state-law eminent domain proceedings for the required property.

5. Time constraints. The City has arranged funds to pay for the Husker Line Trail property acquisition and development from three sources: (i) "transportation enhancement funds" ("TE funds") (federal funds made available as grants from the Nebraska Department of Roads), (ii) privately raised donations, and (iii) City funds. I attach hereto as Exhibit C the City's application to the Department of Roads (dated September 20, 2001) for TE funds, Exhibit C also contains letters and resolutions demonstrating broad community support for the Husker Link Trail and also corroborating its importance. The TE funds were initially committed in the fall of 2001, with the expectation that the Husker Link Trail project insofar as relevant here would be under contract by the fall of 2002. This has not happened due to Lincoln Lumber's refusal to sell trail easements or a fee interest for the trail. While the Nebraska Department of Roads has granted

extensions, we have been advised that we will be in jeopardy of losing funds for the Husker Link if we are not under contract for construction by the fall of 2004. (We understand fall of 2004 to mean early October of 2004, which is when the Nebraska Department of Roads allocates or re-allocates TE funds.) A reallocation of funds away from the Husker Link in turn will jeopardize other segments of our non-motorized commuting system because other trail improvements hinge on this vital link. The City has already expended some \$225,000 in City tax dollars as well as \$225,000 in private donations on the Husker Link. These funds will be jeopardized as well should the Link not be constructed. In short, to avoid loss of funds and loss of a vital trail link, it is vital that the City be under contract to construct this portion of the Husker Link Trail by October of 2004. In order to be under contract by that date, we must be able to initiate eminent domain proceedings by the end of March 2004, in order to acquire the property in time to survey it, to complete construction drawings, to advertise for bids, and to award a contract by October 1, 2004; that is, we need a minimum of six months for our Department to complete eminent domain procedures, to complete a survey, to obtain bids, and to let a contract.

6. Rail use.

- (a) Monitoring data. My Department arranged for staff to monitor use of the five block rail corridor owned by Lincoln Lumber from 7 AM to 7 PM from Thursday, October 2 through Wednesday October 8, 2003. Because OL&B Railroad (which picks up and delivers cars for Lincoln Lumber) operates from 6:30 AM until 3:00 PM, this monitoring period is more than adequate to detect levels of rail use. Our monitors saw no trains, locomotives, rail cars, or other rail use on or over the track. There was an occasional truck related to Lincoln Lumber activities at 23d Street. The corridor was mowed on October 4.
- (b) Personal inspection. On personal inspection on October 9, I saw no evidence of rail activity. The mainline between 23d and 24th appeared to have no use whatsoever, being covered to the level of the rail with earth. The mainline between 23d and 22d was also largely covered. It appeared that a spur track running up to 23d Street on the south side of the mainline might be usable for rail, if care were taken. I saw lumber in stacked pallets in most of the 20 foot width of corridor on the north side of the corridor in the area which City of Lincoln wishes to construct the Husker Link Trail between 23d Street and 22d Street. The pallets would preclude use of that area for any rail purpose, including unloading or loading rail cars, especially in connection with the spur track on the south side of the mainline. There is a low-income housing development immediately north of the rail corridor between 22d and 23d Streets. We cannot construct the trail there because it would eliminate parking necessary for the housing development.
- (c) Shippers. Lincoln Lumber is the only shipper on the line. Textron's subsidiary, Cushman, has ceased operations. Textron sold all its property south of the tracks to UN. The former Textron property north of the tracks was sold to a real estate company. Textron leased most of the rail corridor from Lincoln Lumber for parking, storage, and pedestrian and vehicular access purposes. It is our understanding that the lease remains in existence, and runs until 2015. It appears not to have a termination clause. Our trail design is intended to minimize impact

6. I sent a letter to Mr. Don Hamill of Lincoln Lumber Company, record owner of the OFA Parcel, on February 7, 2003 (copy attached as Exhibit "B"), providing notice under applicable law (Neb. Rev. Stat. § 76-702) that the City intended to enter the OFA Parcel to complete a survey and other non-intrusive examinations (no soil tests) in anticipation of acquiring the property for public purposes.

7. Mr. Hamill strenuously objected to the entry and by letter from his attorney of February 11, 2003 (copy attached as Exhibit "C") asserted that our ability to acquire the property under state condemnation laws was preempted by federal law 49 U.S.C. § 10501(b). He unequivocally refused any offer for the City to voluntarily acquire the necessary property rights for both projects.

8. On February 18, 2003 I personally met with Mr. Hamill to discuss the projects and to make one further attempt to voluntarily acquire the property and clarify his objections or at a minimum, to gain access to the property. The meeting followed several telephone calls with Mr. Hamill. Mr. Hamill stated to me that he believed the trail is not important and is merely "recreational" and should not be allowed on his property regardless of the impact (or lack thereof) on his business. The City does not share Mr. Hamill's view. Mr. Hamill made it clear that he supported the storm sewer project and noted "that would help a lot of people," but he linked his approval of the storm sewer acquisition to keeping the trail off his property. A later conversation with Mr. Hamill's attorney made it clear the LLC's interest in pursuing the OFA in the first place involved a deliberate attempt to block any trail use in the corridor regardless of any actual impact to the business. The City was informed that Mr. Hamill would not agree to any amount of compensation or condition which would allow a trail and any trail use whatsoever was simply unacceptable.

9. As a result of LLC's refusal to cooperate, the City did not enter the property for survey and examination in February. Subsequent efforts to achieve a solution have been unfruitful. Because of the public importance of the two projects, the City is compelled to seek a declaratory order from the Board sufficient to permit the City to employ eminent domain to acquire the trail and stormwater property interest.

10. The two City projects involve completion of the Husker Link Trail and a separate storm sewer improvement project.

11. The City is filing other verified statements and evidence showing the importance and public purposes served by the projects, not the least of which are important connections to the Antelope Valley Project.

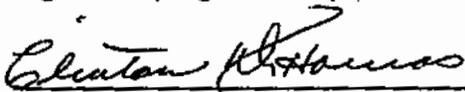
12. Since the OFA proceeding on the OFA parcel several important matters pertinent to the title and leasehold interests in the same have developed:

- a. UP previously had a lease with Cushman, Inc. (now Textron, Inc.) the former owner of property on both the north and south side of the OFA Parcel. At the time of the OFA

and said, "You got it." I told him I had gotten the answer I had come for and had no further business there. He wanted to walk outside and show me where he thought the trail should be placed which we did. While we were headed out viewing the trail, as he perceived it, I told him very candidly I thought the City of Lincoln had statutory right to enter the property for survey purposes. I told him if the individuals who made the decisions wanted the project to go at that location, they would probably continue under that statutory right. At that Mr. Hamill got quite agitated and indicated to me he would fight the City to the end in an effort to keep the trail out of that location. He gave me the number of his attorney in Chicago and asked me to give him a call. He said if he had to spend another \$150,000 to stop the trail he would do so. I told him I hoped that would not be necessary, but I would pass his comments along to the parties responsible for making the decisions regarding the location for the trail. I then thanked Mr. Hamill for his time and departed.

Project: Husker Link Trail, 409-375 & Storm Sewer, 701-321
Tract No.:
Property Tenant:
Property Owners: Lincoln Lumber Company

Agent: (Signature)



Clinton W. Thomas

Date: Jan 13, 2003

dge

The Issue

2. Lincoln Lumber Company (LLC) owns a rail line extending between 19th and 24th Streets parallel to and south of Y Street in Lincoln, NE. (See map presented as Exhibit B in the Verified Statement of Terry Genrich.) Freight operations on the line are conducted by the Omaha, Lincoln and Beatrice Railway Company (OLB). The City of Lincoln wants to install an underground storm sewer within the railroad right-of-way between 19th and 24th Streets and a trail that would use a portion of the right-of-way between 19th and 23rd Streets. Those projects are more fully described in the Verified Statements of Terry Genrich and Bryan Kramer

My Investigation

3. I have reviewed the trail and storm sewer proposals as described in the statements of Messrs. Genrich and Kramer, along with associated maps, photos, drawings and documents. I visited the rail line and surrounding area and took photographs on October 9 and 10, 2003 and interviewed Mr. Robert E. Miller, Chief Financial Officer of OLB on October 10, 2003. I have reviewed other documents including the September 27, 1999 "Lease of Industrial Property at Lincoln, Nebraska" between Missouri Pacific Railroad Company (MP) (lessor) and Cushman, Inc. (lessee) and supplemental agreements including the March 13, 2001 "Second Supplemental Agreement" between LLC (successor to MP interests) and Textron. That lease is included in the Verified Statement of Joel Pedersen, Assistant City Attorney, City of Lincoln.

Existing Situation

4. LLC's rail line consists of a main track between a connection with OLB trackage at 19th Street and 24th Streets, where the line ends just west of the street, and a short, single-ended spur track is located adjacent to LLC's lumberyard



Property Management

June 9, 2004

Lincoln City/Lancaster County
Planning Commission
County-City Building
555 South 10th Street
Lincoln, NE 68508

RE: Miscellaneous Item 3.3 - Street & Alley Vacation No. 04008
[Planning commission Public Hearing - June 9, 2004]

The University of Nebraska has concerns regarding the proposed Street Vacation of North 21st Street between "Y" Street and the abandoned Missouri Pacific Railroad right-of-way, should it be approved.

Currently a perpetual access easement is being negotiated between the University of Nebraska and B & J Partnership, Ltd. The University has no objection to the application to vacate North 21st Street. However, the University does suggest the access easement be granted prior to City Council approval of the street vacation.

As well, if B & J Partnership does not grant the access easement, it is the University's request the application to vacate North 21st Street be denied for the following reasons:

1. 21st Street is the University's only legal access [from the north] to property recently purchased from Cushman Inc [900 N 21st]
2. At times large straight trucks and/or tractor trailer deliveries are required on the north side of the building.
3. Life safety concerns - access and maneuverability of fire trucks should use of the two fire hydrants located on the north side of the 900 building be required.

Thank you for your consideration.

Respectfully,

A handwritten signature in cursive script that reads "Linda Cowdin".

Linda Cowdin
UNL Property Manager



LINCOLN LUMBER COMPANY

Lumber Division
932 No. 23rd Street
402/474-4488

P.O. Box 30373
Station A
Lincoln, Nebraska 68503

Millwork Division
2201 Dudley
402/435-5073

June 8, 2004

Planning Commission
Lincoln, Ne.

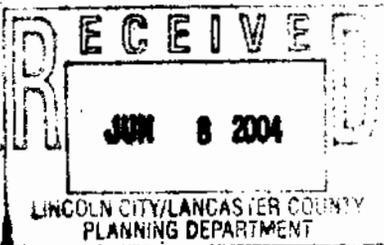
RE: Street & Alley Vacation No. 04008

Lincoln Lumber Company wishes to go on record as opposing this vacation for the following reasons:

1. Lincoln Lumber Company owns the railroad right of way directly south and abutting the proposed vacation. Closing this street would restrict our access to this right-of-way. Our plans include building unloading facilities just west of 21st Street and we anticipate using 21st St. to haul the materials we unload to the jobsite or to more long-term storage.
2. There is a shortage of parking in this area. Both sides of 21st Street from Y to the RR ROW is parked completely full every day.
3. The City has closed all streets between 27th and 17th except for 26th, 23rd and 22nd, and 21st from the RR north. Lincoln Lumber Company and UNL make extensive use of 21st St., and closing it would create a hardship.
4. Lincoln Lumber Company purchased the railroad right-of-way when UP abandoned the line. We have been operating it as a working railroad to bring in building materials ever since that time.
5. If you have any questions or wish to discuss this, call or come see us and we will be glad to help.

Sincerely

Don Hamill
Don Hamill
President & owner





575 South Park Street
Suite 4201
Lincoln, Nebraska 68508

402-441-8812
Pros. fax:
402-441-8813

Special Services
James D. Faison
Steven J. Huggenberger Joel D. Pedersen
Connor L. Reuter Margaret M. Blatchford
Tonya L. Skinner Joe J. Mupp

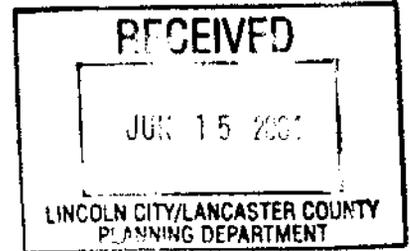
Public Works
Patrick C. Campbell Christine A. Loseke
Rob E. Caples Marcie A. Brownlee
Jessica Kerkhofs



MAYOR COLEEN J. SENG

www.ci.lincoln.ne.us

June 14, 2004



J. Michael Rierden
Attorney at Law
645 "M" Street, Suite 200
Lincoln, NE 68508

RE: Street & Alley Vacation No. 04008
21st Street

Dear Mike:

Following the Planning Commission hearing on Wednesday, June 9, I did some follow-up investigation regarding ownership of 21st Street from the south line of "Y" Street to the north line of the vacated railroad right-of-way. Specifically, I looked at the final plat of Clark & McFarlands in the Register of Deeds Office and determined that 21st Street was a dedicated street in that plat. Subsequent to the dedication of 21st Street, portions of Clark & McFarlands Addition were conveyed to the Missouri Pacific R.W. Company for its right-of-way purposes. For example, Lots 42 and 43 and Lots 30 and 31 on the west and east sides of 21st Street respectively were conveyed to the Missouri Pacific R.W. Company following the filing of the final plat and dedication of 21st Street.

Since it appears the University of Nebraska utilizes 21st Street abutting B&J's ownership and abutting the former Missouri Pacific Railroad right-of-way, I believe that 21st Street should not be vacated unless Lincoln Lumber petitions to vacate 21st Street abutting its property and private access easements are provided over vacated 21st Street for the benefit of the University and over that portion of 21st Street abutting B&J Partnership for the benefit of Lincoln Lumber.

If you have any questions concerning this matter, please contact me.

Yours truly,

Rick Peo
Chief Assistant City Attorney

ERP/skb

c: Greg Czaplowski, Planning

J. Michael Rierden
ATTORNEY AT LAW.

THE COTSWOLD
845 "M" STREET
SUITE 200
LINCOLN, NE 68508

TELEPHONE (402) 478-2413
TELECOPIER (402) 478-2848

CITY CLERK
5555 SOUTH 10th STREET
LINCOLN NEBRASKA 68508

RE: STREET VACATION 04008

PLEASE CONSIDER THIS LETTER AN APPEAL FROM CONDITIONS 1.2 AND 1.3 OF THE
PLANNING DEPARTMENTS REPORT.



FILED
CITY CLERKS OFFICE
2004 JUN 23 P 2 40
CITY OF LINCOLN
NEBRASKA

Fax to Planning 6/23

INTEROFFICE MEMORANDUM

TO: Mayor Seng
& City Council Members

FROM: Clinton W. Thomas

DEPARTMENT: City Council Office

DEPARTMENT: Real Estate Division

ATTENTION:

DATE: August 20, 2004

COPIES TO: Joan Ross
Marvin Krout
Dana Roper
Byron Blum

SUBJECT: Street & Alley Vacation No. 4008
21st Street between Y Street and the
abandoned MoPac RR right-of-way

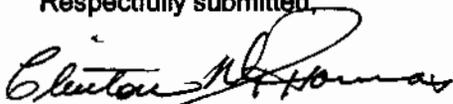
A change has been made to the requirement for the easements to be retained should this street be vacated. Planning Department has requested an easement for public access be retained over the entire area. This being the case, the area will have very little utility to anyone and its value is considered to be approximately 10% of the underlying fee value of the land.

As stated in my previous memo on this subject (dated June 29, 2004), the underlying land value is estimated at \$1.50 per square foot. The calculations for the value of the land with the retention of permanent easement for utilities and a public access easement are as follows:

$$15,000 \text{ sq. ft.} \times \$0.15/\text{sq. ft.} = \$2,250$$

It has also been reported the requirement for a \$5,000 bond to guarantee the removal of the street return and replacement with curb and gutter is to be waived. That being the case, it is recommended if the street be vacated it be sold to the abutting property owner for \$2,250.

Respectfully submitted



Clinton W. Thomas
Certified General Appraiser #990023

dge

