City Council Introduction: **Monday**, August 27, 2007
Public Hearing: **Monday**, September 10, 2007, at **1:30** p.m. Bill No. 07-142

FACTSHEET

TITLE: **CHANGE OF ZONE NO. 07046,** requested by Mark Hunzeker, amending Title 27 of the Lincoln Municipal Code relating to zoning to define "restaurant" and to make the sale of alcohol in conjunction with a restaurant a conditional use.

STAFF RECOMMENDATION: Approval

SPONSOR: Planning Department

BOARD/COMMITTEE: Planning Commission
Public Hearing: 08/15/07
Administrative Action: 08/15/07

RECOMMENDATION: Approval, with one amendment (6-2: Sunderman, Larson, Carroll, Strand, Taylor and Cornelius voting 'yes'; Esseks and Carlson voting 'no'; Krieser absent).

FINDINGS OF FACT:

1. This amendment to the zoning ordinance proposes to allow on-sale alcohol in restaurants as a conditional use in the O-3, B-1, B-3, H-1, H-2, H-3, H-4, I-1, I-2 and I-3 zoning districts. It also proposes to add a definition for "restaurant" to the Zoning Ordinance to distinguish it from other uses. The conditions are found on p.5. The conditions require that there be no more than 50% of gross sales from alcohol; that the restaurant must serve full-course meals as defined by Nebraska statute; that the restaurant must close by midnight, and any outdoor dining areas must close by 11:00 p.m.; and there are specific provisions set forth for any exterior door opening.

2. The staff recommendation of approval is based upon the "Analysis" as set forth on p.2-6, concluding that the proposed amendment acknowledges that among the uses selling alcohol, some have different operating characteristics that warrant different treatment. The staff presentation is found on p.7.

3. The applicant's testimony is found on p.7-8.

4. Tracy Corr gave testimony on behalf of the Lincoln Neighborhood Alliance, the 40th and A Neighborhood Association and the Mayor's Neighborhood Roundtable, requesting a four-week delay to give the neighborhoods an opportunity to fully review, understand and determine the impacts of this proposal (See Minutes, p.8).

5. On August 15, 2007, a motion to defer for two weeks failed on a tie vote of 4-4: Esseks, Taylor, Cornelius and Carlson voting 'yes'; Sunderman, Larson, Carroll and Strand voting 'no'; Krieser absent (See Minutes, p.10-11).

6. On August 15, 2007, the majority of the Planning Commission agreed with the staff recommendation and voted 6-2 to recommend approval, with amendment to require that the gross sales of alcohol not exceed **40%** of the gross sales of food and drink (Esseks and Carlson dissenting; Krieser absent). See Minutes, p. 11.

FACTSHEET PREPARED BY: Jean L. Walker **DATE**: August 21, 2007

REVIEWED BY:_____ **DATE**: August 21, 2007

REFERENCE NUMBER: FS\CC\2007\CZ.07046 text

LINCOLN/LANCASTER COUNTY PLANNING STAFF REPORT

for August 15, 2007 PLANNING COMMISSION MEETING

PROJECT #: Change of Zone #07046

PROPOSAL: A text amendment allow the sale of alcohol in restaurants as a conditional use in the O-3, B-1, B-3, H-1, H-2, H-3, H-4, I-1, I-2, and I-3 zoning districts.

CONCLUSION: The Zoning Ordinance was amended in 1994 requiring a special permit for the sale of alcohol. The amendment was adopted due to concern about the lack of local control over where alcohol could be sold. However, the requirements essentially treat all alcohol sales the same, regardless of use. That is, bars and liquor stores were treated the same as restaurants and grocery stores. This amendment acknowledges that among the uses selling alcohol, some have different operating characteristics that warrant different treatment.

RECOMMENDATION: Approval

ANALYSIS:

1. The sale of alcohol is only allowed in certain zoning districts and requires a special permit, with three exceptions. It is allowed by special permit in the O-3, B-1, B-3, H-1, H-2, H-3, H-4, I-1, I-2, and I-3 zoning districts, but is a permitted use in the B-4 zoning district and a conditional use in the B-2 and B-5 zoning districts.

2. The special permit requirements for on and off-sale alcohol are the same with two exceptions. The first is that the off-street parking requirement for on-sale is one space per 100 square feet of floor area regardless of the zoning district. Off-sale requires parking based upon the requirement of the applicable zoning district. As a result, the parking requirement for off-sale is usually less that one space per 100 square feet of floor area. Second, a special permit for off-sale is not allowed in the I-2 district. The special permit requirements for on and off-sale alcohol are as follows:

   27.63.680 Sale of Alcoholic Beverages for Consumption On the Premises - Alcoholic beverages may be sold for consumption on the premises in the B-1, B-3, H-1, H-2, H-3, H-4, I-1, I-2, and I-3 zoning districts and on the premises of a restaurant in the O-3 district upon the approval of a special permit. Alcoholic beverages may also be sold for consumption on the premises as an accessory use to a golf course or country club as part of a separate special permit under Section 27.63.130 approving the golf course or country club in any district where recreational facilities are allowed as a permitted use, permitted conditional use, or permitted special use. A special permit for such use may be granted subject to the requirements of the respective districts, all applicable ordinances, and the following conditions:

(a) Parking shall be in conformance with Chapter 27.67 [see 27.67.040(y)].
(b) The sale of alcoholic beverages for consumption off the premises shall not be permitted without issuance of a separate special permit under Section 27.63.685 of this code.

©) The designated area specified in a license issued under the Nebraska Liquor Control Act of any building approved for such activity must be located no closer than 100 feet from a day care facility, park, church, state mental health institution, or a residential district (except where such use is accessory to a golf course or country club).

(d) Any lighting on the property shall be designed and erected in accordance with all applicable lighting regulations and requirements.

(e) Vehicle stacking for a drive-through window used as any part of the permitted business operation shall not be located in any required building setback from a residential district.

(f) The use shall not have any amplified outside sound or noise source, including bells, buzzers, pagers, microphones, or speakers within 150 feet of any residential district. This shall not apply to sound sources audible only to the individual to whom they are directed, such as personal pagers, beepers, or telephones.

(g) No access door to the business, including loading or unloading doors, shall face any residential district if such doors are within 150 feet of the residential district. This shall not apply to emergency exit doors required by building or safety codes. No door facing a residential district shall be kept open during the operation of the establishment.

(h) Vehicular ingress and egress to and from the property shall be designed to avoid, to the fullest extent possible, disruption of any residential district. Particular attention shall be given to avoiding designs that encourage use of residential streets for access to the site instead of major streets.

(I) All other regulatory requirements for liquor sale shall apply, including licensing by the state.

(j) The City Council may consider any of the following as cause to revoke the special permit approved under these regulations:

(1) Revocation or cancellation of the liquor license for the specially permitted premises;
(2) Repeated violations related to the operation of the permittee's business; or
(3) Repeated or continuing failure to take reasonable steps to prevent unreasonable disturbances and anti-social behavior on the premises related to the operation of the permittee's business including, but not limited to, violence on site, drunkenness, vandalism, solicitation, or litter.

Notwithstanding the above, no special permit or amendment thereto shall be required for interior expansions of existing licensed liquor premises.

27.63.685 Sale of Alcoholic Beverages for Consumption Off the Premises - Alcoholic beverages may be sold for consumption off the premises in the B-1, B-3, H-1, H-2, H-3, H-4, I-1, and I-3 zoning districts upon the approval of a special permit. A special permit for such use may be granted subject to the requirements of the respective districts, all applicable ordinances, and the following conditions:

(a) Parking shall be in conformance with Chapter 27.67 of the Lincoln Municipal Code.

(b) The sale of alcoholic beverages for consumption on the premises shall not be permitted without issuance of a permit under Section 27.63.680 of this code.

©) The licensed premises of any building approved for such activity must be located no closer than 100 feet from a day care facility, park, church, state mental health institution, or a residential district.

(d) Any lighting on the property shall be designed and erected in accordance with all applicable lighting regulations and requirements.

(e) Vehicle stacking for a drive-through window used as any part of the permitted business operation shall not be located in any required building setback from a residential district.

(f) The use shall not have any amplified outside sound or noise source, including bells, buzzers, pagers, microphones, or speakers within 150 feet of any residential district. This shall not apply to sound sources audible only to the individual to whom they are directed, such as personal pagers, beepers, or telephones.

(g) No access door to the business, including loading or unloading doors, shall face any residential district if such doors are within 150 feet of the residential district. This shall not apply to emergency exit doors required by building or safety codes. No door facing a residential district shall be kept open during the operation of the establishment.

(h) Vehicular ingress and egress to and from the property shall be designed to avoid, to the fullest extent possible, disruption of any residential district. Particular attention shall be given to avoiding designs that encourage use of residential streets for access to the site instead of major streets.

(I) All other regulatory requirements for liquor sale shall apply, including licensing by the state.

(j) The City Council may consider any of the following as cause to revoke the special permit approved under these regulations:

(1) Revocation or cancellation of the liquor license for the specially permitted premises; or
(2) Repeated violations related to the operation of the permittee's business.
Notwithstanding the above, no special permit or amendment thereto shall be required for interior expansions of existing licensed liquor premises.

3. This amendment proposes to allow on-sale alcohol in restaurants as a conditional use in the O-3, B-1, B-3, H-1, H-2, H-3, H-4, I-1, I-2, and I-3 zoning districts. It also adds a definition for restaurant to the Zoning Ordinance to distinguish it from other uses. The conditions are as follows:

A. Gross sales from the sale of alcoholic drinks shall not exceed fifty percent (50%) of the gross sales of food and drink.

B. The restaurant must serve full-course meals as defined in *Neb. Rev. Stat.* §53-123.04(3)©).

C. The restaurant must close to business by midnight, and any outdoor dining areas must close to business by 11:00 p.m.

D. Except as provided in (ii) and (iii) below, any exterior door opening must meet the following conditions:

(I) Be located at least 100 feet (as measured by the shortest, most direct distance) from a day care facility, church, state mental health institution, park (excluding golf courses and hiker/biker trails), or a residential district; provided that, if there is an intervening exterior wall of the building containing the licensed premises between the exterior door opening and such day care facility, church, state mental health institution, park (excluding golf courses and hiker/biker trails), or residential district, then the 100 feet shall be measured from the exterior door opening, along the exterior base of the building wall(s) to the point where there is no intervening exterior building wall, and from that point the shortest, most direct distance to the day care facility, church, state mental health institution, park (excluding golf courses and hiker/biker trails), or residential district.

(ii) If the exterior door opening is less than 100 feet from a residential district, it must face the opposite direction from that district.

(iii) If the exterior door opening faces a residential district, then such opening shall be at least 150 feet from a residential district as measured by the shortest, most direct perpendicular distance. The exterior door shall not be kept or propped open during the hours of operation.

For purposes of this section, “exterior door opening” shall mean (a) that portion of the exterior wall face of the building containing the licensed premises that contains a break to accommodate the exterior building door, door frame, door vestibule, or door entryway area; and (b) provides public or membership access to the licenses premises. “Exterior door opening” shall not apply to openings for emergency exit doors required by building or safety codes, loading doors or unloading doors that are not available for public or membership access in the ordinary course of business.

4. The amendment makes clear that the sale of alcohol as a conditional use only applies to restaurants that meet the stated requirements. Otherwise, a special permit is required.

5. This amendment differs from the special permit with regard to separation distance for uses with alcohol in two ways. First, it includes the same standard for measuring from the exterior door of the premises to a residential district as the B-2, B-5 conditional use provisions, instead of the 100' separation between the licensed premises and a residential district. Second, it adds a new provision stating that if the exterior door is less than 100' away from a residential district, the door must face in the opposite direction.

6. The range of uses where the sale of alcohol occurs are different, and have different operating characteristics. For example, bars tend to stay open later than other uses, and generally speaking are open for the sole purpose of selling alcoholic beverages. While some restaurants may have a bar component, customers are more likely to be there to have a beer with dinner than to purchase alcohol alone. Restaurants also tend not to be open as late as bars. The existing special permit provisions do not reflect these differences, and treat the sale of alcohol the same regardless of use.

7. Text amendments are no longer typically presented to the Mayor's Neighborhood Roundtable, however because this amendment involves the sale of alcohol it was deemed appropriate that it be presented to that group. It is scheduled to be presented to the Roundtable on August 9, 2007.

8. Public Works, Building and Safety, the Police Department, and the Health Department were asked to review and comment on this request. None of those departments had any comments.

Prepared by:

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August 2, 2007

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CHANGE OF ZONE NO. 07046

PUBLIC HEARING BEFORE PLANNING COMMISSION: August 15, 2007

Members present: Sunderman, Larson, Carroll, Strand, Esseks, Taylor, Cornelius and Carlson; Krieser absent.

Ex Parte Communications: None.

Staff recommendation: Denial.

Staff presentation: **Brian Will of Planning staff** presented the proposal which accomplishes two things: 1) adds the definition of a "restaurant" to the zoning ordinance; and 2) makes the sale of alcohol in conjunction with a restaurant a conditional use.

Back in 1994, the zoning ordinance was amended to include special permits for on-sale and off-sale alcohol. Those permits were basically identical and in effect treated all uses basically the same. Those regulations remained in effect unchanged until just the last couple of years, the most recent change being to allow Planning Commission to take final action on those special permits. Additionally, the most recent change deleted the ability of the Planning Director to approve mitigation if the use were less than 100' from residential uses. Those permits have also been amended to make them a conditional use in the B-2 and B-5 zoning districts with the doorway being 100' from a residential district.

Today's proposed change adds the definition of "restaurant" and then makes sale of alcohol a conditional use for restaurants. The sale of alcohol cannot exceed more than 50% of the gross sales, the restaurant must serve full course meals, close by midnight and outdoor dining areas must close by 11 p.m. The door must be at least 100' from any day care facility, church, state mental health institution, park or residential district. If the door is less than 100', it must face in an opposite direction from the residential use.

This proposal acknowledges that there are several zoning districts where we have commercial buildings that have been placed within 50' of the real property line and would not meet the requirements for a special permit.

Staff is recommending approval.

Proponents

1. Mark Hunzeker appeared on behalf of **West Gate, Inc.,** the applicant and the owner of the West Gate Shopping Center. They have a prospective tenant for one of the buildings at Capitol Beach Boulevard and West "O" Street, that being a new restaurant in the strip center that runs parallel to the north line of the shopping center which is about 30' from the residential zoning district to the north. That shopping center has previously had an off-sale liquor license and an on-sale liquor license in that building but not for some time. When Building & Safety was inquired about having

this Mexican restaurant located in this center with a liquor license, the answer was that they would not qualify under the special permit provisions.

The applicant then met with the staff about whether or not it really makes sense to say to owners of buildings in older commercial areas, "We are never going to allow you to have a restaurant with a bar or any other kind of liquor establishment in those buildings."
Hunzeker suggested that the possibility of a "true" restaurant makes a significant difference in the kind of tenancy you have in that neighborhood business. Staff worked with the applicant to come up with the proposed language which puts into the code a definition of "restaurant" and requires that in order to qualify under the conditional use, there must be at least 50% of the gross sales in something other than alcoholic beverages. The number of 50% came from the discussions had during the smoking ordinance to distinguish between bars and restaurants.

Hunzeker believes this is a very reasonable ordinance, particularly for a shopping center like West Gate that doesn't have any realistic opportunities to acquire additional land or modify its site plan.

Esseks agreed that it is a reasonable change. However, he wondered whether the residents adjoining have been informed about this change in the code. Hunzeker stated that the applicant has not gone to the adjoining residents of that particular center; however, he and Marvin Krout both appeared before the Mayor's Neighborhood Roundtable last week and informed them of this text change. Esseks inquired whether the Roundtable was informed that the Planning Commission might take action today. Hunzeker indicated that they were so advised at the meeting.

Opposition

1. Tracy Corr, 1001 S. 37th Street, appeared on behalf of **Lincoln Neighborhood Alliance,** as a member of **40th and A Neighborhood Association,** and as Chair of the **Mayor's Neighborhood Roundtable.** She requested additional time before the Planning Commission takes action on this proposal. It was less than a week ago that she and the neighborhoods found out about this. This amendment has the potential to affect a lot of the core city neighborhoods and they are really just not yet sure how they will be affected. She is concerned about informing the neighbors to West Gate and all of the other neighborhoods.

Initially, Lincoln Neighborhood Alliance is concerned about the 50/50 split between sales of alcohol and food. They appreciate the attempt to define a restaurant, but the initial reactions by the neighborhoods show that they would favor more of a 60/40 split with no more than 40% from sales of alcohol to assure that it is in fact going to be a restaurant. They have also discussed operating hours and perhaps that would be a way to negate the difference between restaurant and a bar.

Esseks inquired how much time they would need and what process they would incur. Corr indicated that the Lincoln Neighborhood Alliance and the Neighborhood Roundtable would try to get the word out to individual associations. Some of them only meet once a month so they would need at least a one month cycle.

Strand made sure that Corr was aware that the proposed ordinance requires closing by midnight and 11:00 p.m. for outdoor dining. Corr acknowledged these operating hours.

Staff response

Cornelius asked staff whether there are any businesses operating as a restaurant at this point that would not fall under this definition. Will did not know. **Marvin Krout, Director of Planning,** suggested that the 50/50 is a common breakpoint, although 60/40 has been used in some other communities. He knew that there had been some research done and, anecdotally, he has been told that 50/50 would mean that Lazlo's would be a restaurant but Brewsky's would not. Any additional information would require digging through sales tax information that goes through the state. The City Council recently dealt with a similar question at Pioneer Woods and the applicant came in and volunteered some restriction on uses which included a restriction that defined a restaurant in the same manner referring to the state law and the 50/50 split.

Will confirmed that this is a recommendation to the City Council.

Rick Peo, City Law Department, suggested that some of this concept of how to distinguish between a bar and a restaurant came up during the sidewalk café task force. The difference would be having a full service kitchen. The state law definition also talks about serving full-course meals, sit-down dinner with knife, fork, spoon, etc. No walking around eating and standing with food. He thinks there are a lot of provisions built in to make the difference.

Taylor wondered whether there is an example of a restaurant that adheres to 60/40 split. Will advised that such research has not been done. Taylor then wondered whether there is any terminology that would give us an idea of how to set a standard for 60/40 – or is it just by cash register receipts? Will agreed that it would have to be cash register receipts.

Strand noted that the Law Department has been opposed to the Planning Commission deferring an application unless the deferral is requested by the applicant. Peo agreed that to be the policy primarily on special permits, use permits, etc. However, a two-week or four-week delay on something such as a text amendment could be in the discretion of the Commission.

Will advised that the Planning Department did notify all of the neighborhood and homeowner associations which are on the Planning Department contact list.

Cornelius asked Will to describe a "conditional use". Will stated that in any zoning district, there are three types of uses: permitted, conditional and special permitted uses. Permitted uses are uses allowed by right. Conditional uses are slightly more restrictive in that there are a set of conditions outlined that must be met. Special permitted uses are the most restrictive which require an application to the City and public hearing. This text amendment establishes that conditional use.

Response by the Applicant

Hunzeker indicated that he would like to be able to agree with a delay, but he knows that his client has entered into a lease for the premises at West Gate with a contingency on this text amendment. He filed the application in time for a hearing a few weeks ago, but he and staff agreed to defer scheduling the hearing to make sure it was drafted properly and to get it on the Mayor's Neighborhood Roundtable agenda. It has been advertised and promoted to a broader audience. He does not know whether there is any real basis for the 60/40 or 50/50 standard other than the

anecdotal evidence that was put out at the time of the smoking ordinance. Encouraging restaurants in older commercial areas is a good thing and it is very hard in this day to make money in a restaurant without being able to sell at least beer and wine with meals. The hours of operation are already restricted. He believes this has been well thought through by the staff and it is a reasonable change to make. If the Neighborhood Roundtable or any other organization wants to discuss this or propose any amendments between now and the time it appears on the City Council agenda, he is more than willing to listen. "We are not here saying this is the complete total answer to this issue, but we do think it is an issue that deserves to be modified in favor of establishing restaurants in some of these older commercial areas."

Carlson stated that for several years he has been in favor of coming out with a restaurant definition. But he also respects that Hunzeker's client has a timeline, yet he assumes Mr. Hunzeker explained that what his client is wanting to do is against the rules and the rules will need to be changed. Hunzeker agreed. He is here asking to change the rules. However, Hunzeker does believe there has been notice to a broader range of individuals and it has resulted in zero commentary or contact with the Planning staff.

Cornelius moved for two-week deferral, until August 29, 2007, seconded by Esseks.

Strand stated that she was going to move to change the split to 60/40, but she will not support a delay. Notices have been sent out and the Commission has received no comment.

Carroll stated that he will not agree to a delay. It has been on the Commission's pre-agenda for a month. It has been advertised and notices have gone out. There is time before the City Council hearing.

Larson stated that he is also against the delay.

Esseks commented that he is impressed how the community relates to neighborhood associations. The community has shown great respect for them. A representative of the Neighborhood Alliance has asked us for the chance to gather her constituents and give serious consideration. This text amendment affects the whole community. He really thinks the Commission owes them a two-week delay.

Cornelius agreed. There is a significant difference between professionals that deal with this on a day-to-day basis and see these notices all the time and the general recipients of the electronic notices who are dealing with a variety of other things and try to handle this in their spare time. Two weeks gives them the four weeks to react before it goes to City Council.

(The Clerk advised that the public hearing before City Council would be on September 10, 2007, due to the Labor Day Holiday.)

Carlson agreed. We need to commend the people that take their volunteer time to try to become informed in the community. Lincoln Neighborhood Alliance is asking for the time to go out and do the work to get the feedback. It is important in terms of process.

Taylor observed that this potential delay is going to prevent the business that initiated the request. But, in the broader picture, we are looking at the whole community that will be affected. So he will support the delay.

Larson thinks there is enough delay built in with the public hearing before City Council being September 10th. That should be ample time to work their arguments and present it. But, Carlson wants to hear their arguments.

Esseks believes that this body is the one that is supposed to give very careful thought to a change in the ordinance which affects the whole community. We owe it to the whole community to get as much information as possible. This affects the neighborhood where the space between residential and commercial uses are short. He doubts that this delay will affect the health of the enterprise that Hunzeker represents.

Motion for two-week delay failed on a tie vote of 4-4: Esseks, Taylor, Cornelius and Carlson voting 'yes'; Sunderman, Larson, Carroll and Strand voting 'no'; Krieser absent.

ACTION BY PLANNING COMMISSION: August 15, 2007

Carroll moved approval, with amendment changing the 50/50 split to 60/40, seconded by Larson.

Strand commented that this proposal adds to sustainability and viability of older neighborhoods to have their own restaurant. One of the areas that is always looking for a decent restaurant is a Capitol Beach kind of area.

Cornelius is inclined to support the motion because he thinks it is a valuable change to the text. A glance at the calendar suggests that there are four weeks from today before this comes before the City Council. That organization that wants to present testimony will have time to do that organization and make a presentation.

Carlson agreed but he will vote against the motion because he thinks it is important to the process to allow the Planning Commission to hear the comments from the neighborhoods before making a decision.

Esseks believes that this could affect all kinds of people who are not aware of what is going to happen. He does not believe this is giving them enough time to make a presentation to the Planning Commission to make a decision. There is too much at stake here. The distance between the neighbors and the restaurant is so short.

Motion for approval, as amended, carried 6-2: Sunderman, Larson, Carroll, Strand, Taylor and Cornelius voting 'yes'; Esseks and Carlson voting 'no'; Krieser absent. This is a recommendation to the City Council.