

MEETING RECORD

NAME OF GROUP: PLANNING COMMISSION

DATE, TIME AND PLACE OF MEETING: Wednesday, February 4, 2004, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska

MEMBERS IN ATTENDANCE: Jon Carlson, Eugene Carroll, Gerry Krieser, Dan Marvin, Melinda Pearson, Mary Bills-Strand, Lynn Sunderman and Tommy Taylor (Roger Larson absent); Marvin Krout, Ray Hill, Mike DeKalb, Brian Will, Tom Cajka, Greg Czaplewski, Jean Walker and Teresa McKinstry of the Planning Department; media and other interested citizens.

STATED PURPOSE OF MEETING: Regular Planning Commission Meeting

Chair Mary Bills-Strand called the meeting to order and requested a motion approving the minutes for the regular meeting held January 21, 2004. Motion for approval made by Taylor, seconded by Carlson and carried 8-0: Carlson, Carroll, Krieser, Marvin, Pearson, Bills-Strand, Sunderman and Taylor voting 'yes'; Larson absent.

CONSENT AGENDA

PUBLIC HEARING & ADMINISTRATIVE ACTION

BEFORE PLANNING COMMISSION:

January 21, 2004

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

The Consent Agenda consisted of the following items: **CHANGE OF ZONE NO. 70HP; CHANGE OF ZONE NO. 80HP; SPECIAL PERMIT NO. 04002; COUNTY FINAL PLAT NO. 03075, WYNDAM PLACE 1ST ADDITION; STREET AND ALLEY VACATION NO. 03020; STREET AND ALLEY VACATION NO. 03021; STREET AND ALLEY VACATION NO. 04001; and WAIVER NO. 04001.**

Item No. 1.3, Special Permit No. 04002, was withdrawn by the applicant. Item No. 1.7, Street and Alley Vacation No. 04001, was removed from the Consent Agenda at the request of Commissioner Pearson and scheduled for separate public hearing.

Marvin moved to approve the remaining Consent Agenda, seconded by Taylor and carried 8-0: Carlson, Carroll, Krieser, Marvin, Pearson, Bills-Strand, Sunderman and Taylor voting 'yes'; Larson absent.

Note: This is final action on Waiver No. 04001, unless appealed to the City Council by filing a letter of appeal with the City Clerk within 14 days of the action by the Planning Commission.

STREET & ALLEY VACATION NO. 04001
TO VACATE SOUTH 43RD STREET BETWEEN
THE SOUTH LINE OF THE NORTH HALF
OF LOT 4, BLOCK 2, WOODS BROTHERS
BRYAN SUMNER ACRES.

PUBLIC HEARING BEFORE PLANNING COMMISSION:

February 4, 2004

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

This application was removed from the Consent Agenda and had separate public hearing at the request of Commissioner Pearson.

Staff recommendation: A finding of conformance with the Comprehensive Plan.

Ex Parte Communications: Carlson indicated that he had a phone conversation with the president of the 40th and A Neighborhood Association, who indicated that they had had conversations with Christ Lutheran Church and that the neighborhood association had taken no position on this application.

Proponents

1. **Tim Gergen of Olsson Associates** testified on behalf of the petitioner, **Christ Lutheran Church**, to vacate a portion of S. 43rd Street in order to increase the parking for the church. The church is now in need of parking. A lot of the members are parking on the street and on the surrounding neighborhood streets and the church would like to provide more convenience for their patrons. Gergen showed the proposed vacation on the map. The purpose of the street vacation is to allow parking bays on the side of the street and an additional parking lot on the vacated lots. There is one house not owned by the church and they will still be providing access for the owner of that house to go north or south on 43rd Street.

Pearson confirmed with the applicant that they cannot provide parking on both sides of the street without vacating the street. Gergen's response was that it would require parallel parking if the street is not vacated, which is not the most convenient way to park and most citizens would choose not to parallel park. The vacation will allow more efficient 90 degree parking.

Pearson inquired as to what kind of assurances the city has that the church won't remove the street when it is vacated. Rick Peo, City Law Department, advised that when the

property is vacated and conveyed to the church, the city will retain a public access easement over the vacated right-of-way to insure that the public can still use it.

There was no testimony in opposition.

Staff questions

Marvin recalled a previous vacation that closed a street that was not on the Consent Agenda. He asked staff to explain how it is determined whether an application goes on the Consent Agenda. Greg Czapski of Planning staff explained that if the applicant agrees to the conditions of approval, and the staff is not aware of any opposition, the street vacation is placed on the Consent Agenda.

Carlson referred to Analysis #4 which addresses the public access easement; however, he does not see where it is listed in the conditions of approval. Rick Peo advised that the public access easement is an item that the Law Department takes care of when they prepare the deed conveying the property. It is standard procedure just like retaining utility easements. Thus, it does not need to be addressed specifically in the conditions of approval.

Carroll inquired whether there have been any conversations with the property owner next to this property. Czapski had not had any conversations with them; however, they were notified by the applicant.

Pearson referred to Condition #1.2, which requires the posting of a bond to remove the existing paving and street return. Is that just for the one house? Czapski explained that this condition refers to removing the paving in the part of the street that has been vacated and change the street return to a driveway return for their parking lot, and that would be done when they vacate the rest of 43rd Street.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

February 4, 2004

Taylor moved a finding of conformance, seconded by Marvin and carried 8-0: Carlson, Krieser, Marvin, Carroll, Taylor, Sunderman, Pearson and Bills-Strand voting 'yes'; Larson absent. This is a recommendation to the City Council.

CHANGE OF ZONE NO. 04003
TEXT AMENDMENT TO TITLE 27 OF THE
LINCOLN MUNICIPAL CODE REGARDING
THE SALE OF ALCOHOLIC BEVERAGES
FOR CONSUMPTION ON AND OFF THE PREMISES
AS A PERMITTED SPECIAL USE.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

February 4, 2004

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

Staff recommendation: Approval.

Ex Parte Communications: None.

Brian Will of the Planning staff submitted additional information for the record consisting of six letters in support, including the North Bottoms Neighborhood Association, Hawley Area Neighborhood Association, University Place Community Organization and Arnold Heights Neighborhood Association. Two other additional items of information include responses to public comments regarding sale of alcohol on golf courses as an accessory use, which is not a change that is being considered in this text amendment.

Brian Will went on to explain that this is an application initiated by the City, which has come about largely in response to several special permit applications that have been considered by the city recently, two of which were ultimately vetoed by the Mayor and the veto was overridden by the City Council and the permits were approved. One of the key issues in those applications dealt with mitigation. Currently, the ordinance includes a provision that allows mitigation plans to be approved by the Planning Director if the license premise is within 100' of a day care, residence or residential district. This text amendment deletes the opportunity to mitigate when the licensed premise is located closer than 100'. Will then referred to the six components contained in this amendment:

1. Deletes the provision that allows the City Council to waive any of the conditions.
2. Deletes the provision that allows the applicant to mitigate the adverse effects when the premises is less than 100' from specific uses and residential districts.
3. Deletes "residential uses" from the uses that must be at least 100' away from alcohol sales.
4. Deletes the provision that the City Council determines the proper vehicular access to the property.

5. Adds parks, churches and state mental health institutions to the list of uses that must be 100' away from alcohol sales.
6. Gives the Planning Commission authority to approve the special permits, with an appeal process to the City Council.

Will went on to state that the staff concludes that the deletion of mitigation makes the special permit process more objective and that final action by the Planning Commission will reduce the amount of time involved for the special permit process but still provides opportunity for public hearing.

Carlson assumed that schools are also covered as far as the distance requirements. Will explained that the distance requirements from schools are not listed in the city ordinance. The sale of alcohol is a two-part process including the special permit process by the city and a liquor license issued by the State. There are requirements to be met for the state liquor license and he believes that one of the state requirements is separation from schools, although not in the city zoning ordinance.

Bills-Strand inquired as to how many grocery stores or small deli's will be impacted or small cafes that can now serve wine with dinner, etc. She noted that grocery stores are often in residential areas. How are we going to deal with those? Will explained that the "residential district" is one of the measurement separations that goes away with this text amendment. The staff did do a brief analysis as far as those properties that would be impacted, and it is a good percentage of the commercial zoned areas throughout the city. Removing the discretionary authority makes it a fairly hard and fast standard and there will be some that are impacted. Any of those that currently exist, however, will be allowed to continue as pre-existing special permits or nonconforming uses.

Bills-Strand discussed the measurement location. For example, if the very back of a large building where a grocery store, deli or café is located is within 100' of residential, the liquor sales would not be allowed anywhere in that building because of this ordinance. Will advised that the ordinance talks about the "licensed premises", which is defined by the state liquor license. In the case of large shopping centers with multi-tenants, the special permit is limited to that portion that is just the licensed premises where the alcohol is sold, consumed or stored. In the case of a large building, it is the licensed premises that is used for the measurement. If the major tenant is a grocery store, Bills-Strand inquired whether they be allowed to sell alcohol. Will stated that they would only be able to sell alcohol if they met these requirements. Wherever the alcohol is stored or sold must be part of the defined licensed premises for the state liquor license. If it does not meet the 100' separation, they would not be allowed. Will pointed out that most of the grocery stores in community unit plans would not be allowed to sell alcohol under this proposed ordinance change.

Bills-Strand wondered whether there might be a different way to mitigate the situation, such as if the majority of their business came from food sales or other sales. Will suggested that in the broader context, other alternatives have been discussed throughout the last couple of years. The staff and others have talked about other alternatives and other ways to regulate, and other methodology for measuring separation distance. There are many ways to do it, but what is before the Commission today is one of those alternatives. Will agreed that there are other alternatives that could be explored.

Taylor confirmed that the existing licenses and special permits are grandfathered and protected. Will concurred. It goes to the definition of the licensed premises as defined in the state liquor license.

Carlson posed the question to Will: Based on your planning experience here in Lincoln, when an applicant comes in with a shopping center proposal, and they discover that they cannot meet the setback requirements, mitigation requirements or distance requirements, are they more likely to take the plans and leave or re-site the building to come into compliance with the regulations? Will recalled that the grocery store at 27th & Yankee Hill Road anticipated selling alcohol and they revised the site plan and moved the buildings to meet the distance requirements.

Support

1. Carol Brown testified on behalf of the **Lincoln Neighborhood Alliance** in support. Their “plan for action” is supported by 21 neighborhood associations. Their quality of life issues stress the importance of maintaining or strengthening spacing requirements for alcohol sales to increase safety, decrease conflicting land uses and protect property value in our neighborhoods. She measured 100' from the side of her house, which would be the house across the street. Everyone needs to be conscience of how close this is. All we are asking for is 100'.

2. Fred Freytag, 530 S. 38th, testified on behalf of the Witherbee Neighborhood in support. This will be good for the businesses purchasing properties on the corners that used to be gas stations, to have a clear understanding of what they can and cannot do and do not come forward with the expectation of mitigation. Less than 100' would put a number of properties in the Witherbee neighborhood in jeopardy.

Pearson inquired whether the issue is the liquor license or the convenience store? People drive in and out of these convenience stores at all hours for gas and other items. What is the difference if they are selling alcohol? Freytag believes the difference is the increase in crime and increase in traffic. We do not need the convenience of liquor on every corner in every neighborhood.

Opposition

1. Matt Ludwig, Store Director of the **HyVee** at 48th & Leighton, testified in opposition, the issue being the deletion of opportunity for mitigation. He believes that the mitigation language needs to either stay in or be changed, such as using the distance from the public access entrance to the building. For example, the back of his licensed premises is within the 100' distance. If something would happen to the building, such as a fire or flood, or if they wanted to enhance the neighborhood by remodeling the building, they may lose their liquor privileges under this ordinance. The loss of liquor sales privileges would be a disservice to their customers. Ludwig agrees with the spirit of the ordinance; however, he would want the grocery channels to be excluded from the 100'.

2. Jayne Raybould, Vice-President of **B&R Stores** and Director of Buildings & Equipment, testified in opposition. In case of some type of catastrophic event, the B&R Stores would lose their liquor license privileges. This would put them in a very precarious situation, especially at their 27th & Pine Lake location, which is under that 100' requirement. From her years of experience in Washington, DC, working with the business communities on zoning issues, her experience has been that once the city starts over-regulating things, that is the quickest way to drive out all type of economic development, particularly in neighborhoods that actively seek economic development. Raybould gets 4-5 requests a week to look at sites for grocery stores, but when she looks at a site and sees that the residential property line is a lot closer than 100', she will decline a development on that site. Sometimes it is too expensive to reconfigure the siting of the building. Sometimes it is not worth the investment, the extra lawyers fees and the appeal process. B&R Stores would like to see the mitigation factors remain in the ordinance.

Carlson suggested that they might also be paying more lawyer fees by coming in to argue their case for mitigation. With this ordinance, either you comply or you do not comply.

Pearson inquired as to how many B&R stores do not meet the 100' distance requirements. Raybould did not know but she knows the Pine Lake store is one.

3. Mark Whitehead, President of **Whitehead Oil and U-Stop Convenience Shops**, 2537 Randolph Street, testified in opposition. "Be careful what you wish for because you may get it." He has an obligation to do substance over symbolism and he understands doing that politically is not always the easiest thing to do. You need to look at the facts and reality of a major decision like this. In terms of measuring the problems created by alcohol, limiting the availability of it does not affect demand in any way, shape or form. This is a fact. Speaking personally, Whitehead has 21 convenience store locations, most of which sell alcohol. 27th & Stockwell in the Country Club neighborhood does not sell alcohol. On a per square foot basis, 27th & Stockwell is their weakest performance store. In terms of problems from sale of alcohol, there are many different measurements of it. Whitehead's problems with armed hold-ups across their entire system have been very minimal, with only 2 over the last 7 years. There is not a correlation to the alcohol sales. As far as impact,

Whitehead gave the example of their location at the northeast corner of 7th & Washington. If they acquired the two houses to the back, that would be enough real estate to put together the type of stores that Whitehead operates proudly and safely. If this ordinance went into effect, he would have to buy out every single house on that entire block in order to put a convenience store there.

The option of a convenience store without alcohol is not realistic in today's market.

This ordinance will limit the ability of many of the stores to remodel their facilities. The blighted retail locations that you see now would remain that way if this is approved. 9th and South could not be remodeled. 48th & Randolph has been an asset to the neighborhood. Ideal at 27th & "A" would not be able to remodel. Brewsky's at 17th & South would not be able to remodel. Whitehead suggested that there be the flexibility to use discretion where discretion is warranted.

4. Mark Hudson, 500 W. Cuming, owner of **SaveMart** at 11th & Cornhusker, testified in opposition. He trusts the judgment of the Planning Commission and the City Council. He does not want that judgment to be taken away. SaveMart is 100' from a residential neighborhood and about 100' from Cornhusker Highway. Which way do you go? He would hope that the Planning Commission and City Council would be allowed to use their judgment as to whether it works or not. This legislation takes that judgment away. He is a small business person. This ordinance impacts the small business more strongly than a big organization. The bigger companies can build wherever they can meet the requirements. A small business has to take over an existing structure in a more dense area. SaveMart could not buy a house next to it. The small retailer will be impacted much more strongly than the big retailer.

5. Scott Schlatter, 5932 S. 81st Street, Director of **HyVee** at 70th & Pioneers, testified in opposition and requested that the opportunity for mitigation be left in the ordinance.

6. Bruce Bohrer, Lincoln Chamber of Commerce, submitted a letter in opposition to the loss of flexibility by removing the mitigation. He submitted that recent applications by some very well-thought-of businesses in this community really show that the mitigation allows the opportunity for businesses that are also very much community members to find some accommodation. The Chamber of Commerce urges that the 100' limitation be maintained with the opportunity and flexibility to allow mitigation.

7. Kent Seacrest appeared on behalf of **Ridge Development Company** and **Southveiw, Inc.** The churches, parks and residential uses all make sense and Planning Commission final action is appropriate. However, he believes there are two other alternatives to getting out of the mitigation business. He understands that most of the grocery stores license the whole building, so that pushes the whole building 100'. We have state and local "zoning" laws, and then we have state and local "land use" laws that deal with liquor. This amendment concentrates on the liquor as opposed to the retail land uses. We have the

zoning setback for liquor, we have the 100' rule for liquor, and we have the 150' rule between the access door and the other desirable uses we are trying to protect. The administration's proposal gets rid of the mitigation.

Seacrest then submitted Alternative 1: "Not all Zoning Districts are Created Equal" (attached hereto as Exhibit "A"), and Alternative 2: "Not All Liquor Related Land Uses are Created Equal" (attached hereto as Exhibit "B").

With regard to Alternative 1, Seacrest referred to special permit zones and use permit zones. Special permit is saying that the use should not go into that zone without special conditions. Use permit is a use intended for that zone and we might give it site review and conditions. The B-2 and B-5 zoning districts are already our liquor zones because they allow liquor sales. The B-2 and B-5 districts are also the new zones that we do out at the edge. The older neighborhoods have the B-1 and B-3 zones with minimal setbacks. B-2 and B-5 have larger setbacks. We've now zoned ahead of time in the edge areas before the homes show up. Seacrest suggested that the B-2 and B-5 could have a different set of rules and are entitled to liquor.

With regard to this proposal, Seacrest noted that the administration measures the distance from the building. What are we trying to protect? Seacrest suggested that we are trying to protect "bad bathroom behavior" – people coming out the door and urinating on the neighbor's yard or vomiting. The other thing he believes we are trying to do is noise protection. Seacrest submitted that the building doesn't have any relationship to either one. It's the front door or the public door and that is where the measurement needs to occur. The back of the building is not where the noises come out. Alternative 1 proposes a distance of 150' from the public door if facing a neighborhood; and 100' from the public door if not facing the neighborhood.

With regard to Alternative 2, Seacrest noted that the police are concerned with bars and convenience stores. He does not believe the police would classify grocery stores and "ma and pa restaurants" the same. It is rational to say that land uses should be treated differently. These uses could be classified differently. We should not penalize the grocery store and the "ma and pa restaurants".

Bills-Strand asked Seacrest why he believes convenience stores are different than liquor stores. Seacrest's response was that he has not seen a new liquor store go into this community for a long time. Grocery stores and convenience stores have become the liquor stores. Generally, the liquor is not consumed on-site. We think this compromise makes sense. Otherwise, we are going to add 50' to commercial developments, which means pulling the infrastructure along the road next to that development. It will increase potential for some sprawling. It will be \$20,000 more for that 50' for government, and the developer will lose about an acre or more of land.

Bills-Strand inquired as to how this affects existing grocery stores that could not meet these requirements in older neighborhoods and wanted to remodel or needed to rebuild. Seacrest believes that the vast majority could meet his proposed compromised standard, i.e. measuring from the front door.

Carlson disagrees that the administration proposal would carte blanche add 50 feet to new developments. Seacrest believes there are definitional issues, i.e. what's the difference between a bar and a restaurant? You could use the same definition as the smoking ban. What's the difference between a convenience store and a grocery store? Seacrest thinks it is size. One size should not fit all and you should not put a grocery store in the same camp as a bar.

Response by the Applicant

Will clarified that the 100' separation to a residential district remains – it is the “residential use” that is being deleted.

Carlson asked Law to respond to the ability to rebuild in the event of a catastrophic situation. Rick Peo believes there are different options. If you have over 50% destruction by fire, explosion, etc., then you are not allowed to rebuild a nonconforming use. However, there is a provision to allow a special permit for the expansion, enlargement or reconstruction of a nonconforming use. Nonconforming uses are determined to be disfavored uses, so there would be some difficulty in insuring entitlement to rebuild.

Carlson then inquired whether a previously approved special permit mitigation plan is carried through to reconstruction. Peo stated that it would not, because now you have changed the terms of the law and mitigation is no longer an issue. By changing the terms of the ordinance that previously approved a special permit would make it a nonconforming use.

Carroll asked staff to address the idea of 100' from the front door versus the complete premises, and why not use that as the measurement requirement? Will stated that it is certainly one of the issues that has been discussed as staff has talked to industry representatives and other public officials. He believes that Mr. Seacrest has also submitted his alternatives to these groups previously. Will does not have an opinion and it is certainly a feasible alternative as is the one being considered today. It is a matter of judgment.

Peo clarified that the B-2 and B-5 districts are governed by a separate chapter of the zoning code and those permitted uses have setback requirements. The B-2 and B-5 district requirements are not before the Commission in this amendment. B-2 and B-5 uses are not uses governed by the special permit provisions specifically. It would take a different application to do anything in the B-2 and B-5 districts.

Main Motion: Marvin moved approval, seconded by Carlson.

Marvin believes that the mitigation has been a problem and he will support the proposal by the Mayor.

Motion to Amend #1: Carlson moved to amend, to retain “or residential use” on p.91 and p.93 (p.2 and 4 of the ordinance), and wherever else appropriate, seconded by Marvin.

Carlson noted that the code calls for 100 feet from residential district or residential use, and he wants to leave residential use in place. Residential uses should be able to enjoy the same protection as prescribed for the residential district. For example, 48th & Randolph, where there is a house in the B-3 zoning district—a residential use in B-3. Carlson believes that this neighbor should enjoy the same protection as the neighbor to the south. Pearson understands that a larger company could come in and buy that property and tear the house down and have their liquor store in the B-3 zoning. A smaller operator could not do that. So, in fact, it's already zoned B-3--you're just sort of able to save the house if you put “residential use” back into the ordinance. Carlson suggested that the alternative is to leave “residential use” in and not create the conflict in the first place.

Bills-Strand agreed with Pearson. If the zoning is already there, she does not think the use needs to be a factor. She thinks we need to protect the zoning.

Motion to Amend #1 failed 3-5: Carlson, Krieser and Marvin voting ‘yes’; Carroll, Taylor, Sunderman, Pearson and Bills-Strand voting ‘no’.

Further discussion on main motion. Carlson stated that he appreciates hearing the testimony. The issue of catastrophic destruction is certainly valid, but he believes there are thorough safeguards in the zoning code. Plus, in the one or two times this has occurred, the Commission has allowed the pre-existing use to return by special permit. In regard to some of the discussion about blight, he finds it compelling that during the noon meeting of the Council, the City Attorney representative commented that the city policy is that we don't consider alcohol sales to be a remedy for blight. We spend millions of dollars to remedy blight and to suggest that alcohol sales is the only remedy for blight is kind of silly. There are plenty of circumstances and uses. Carlson does not think 100' will make any of these parcels unusable. For example, the convenience store at 27th & R that came in for a liquor permit that was denied because of the residential use to the north, has been sold and it is now a little Mexican market that is doing quite well. He believes there are plenty of opportunities. It is a mistake to assume it is going to have some drastic and Draconian effects. We have many instances where the community has made the determination that X number of feet is appropriate to provide safety. 100' is not that far. It is basically two lots in an older neighborhood. It seems strange that we would think that the urban renewal--the economic development--hinges on selling a stack of beer next to somebody's house. This seems to be a very reasonable and very prudent choice to make. It is an equitable issue in the case of mitigation. We owe the citizens clear law for their protection and the

businesses clear law. It is the better benefit for the community and for everyone involved.

Carroll agrees that mitigation should be removed. It is too difficult to make decisions that are not written in the law. However, he would be in favor of making the change to measure from the front door of the property because there are zoning setbacks that take care of the problem. 100' from the public front door is a fair thing to ask for versus the whole entire structure. Carroll believes that this is an option that should be considered. He hates to close the door on that option by approving this ordinance now.

Motion to Amend #2: Carroll made a motion to amend to require 100' minimum walking distance (measured along the shortest, legal, practical walking route) between public door(s) not facing protected uses and the protected uses, and 150' minimum between public door(s) facing protected uses and the protected uses, as set forth in Alternative 1 submitted by Kent Seacrest, seconded by Pearson.

Marvin asked if Carroll would consider striking "walking distance" from the amendment. This was acceptable to the maker of the motion.

Carlson stated that he would prefer to do the package as proposed. That change on an infill site is a very significant change because typically the building is capable of taking up a huge amount of the parcel. Setbacks in the older districts are not sufficient.

Pearson agreed that mitigation is not fair and it should be deleted. There are two standards right now – one for existing neighborhoods which have a lot of bars that could not rebuild if they burned down. That does not seem fair. The standard for new neighborhoods is different and she does not favor that. She supports the language providing for 100' to public door not facing neighborhoods and 150' facing neighborhoods.

Carlson suggested that making it 100' from the front door and removing mitigation creates a new situation. Right now you have one or the other and can require additional screening or landscaping. 100' from the front door results in no landscaping.

Ray Hill of Planning staff clarified that the screening requirement has to do with commercial next to residential – not anything to do with the liquor premises. Likewise with the setbacks in the B-2 and B-5 districts--there are screening requirements in those setbacks, so it does not make any difference whether the building is selling alcohol or not. The same for B-1 and B-3.

Carlson asked the Planning Director to respond to the 100' from the front door and not having the potential for mitigation. Marvin Krout, Director of Planning, stated that we would still have a special permit requirement, even if it met the new distance standards in the older business districts (B-1 and B-3), and he believes the Planning Commission can still impose some additional buffer standards beyond the standard requirements. However, if you meet the standards in B-2 and B-5, then you are permitted the use by right and you don't come before the Planning Commission for a special permit.

Carroll clarified that his amendment only applies to the 100' and 150' in any zoning district.

Motion to Amend #2 carried 6-2: Krieser, Marvin, Carroll, Sunderman, Pearson and Bills-Strand voting 'yes'; Carlson and Taylor voting 'no'.

Further discussion on the main motion, as amended:

Marvin stated that he needs an explanation of the 150' requirement [(g) on p.2 of the proposed ordinance]. We are not measuring from the back loading door, but from the public door at 150'. What does the 150' limit? Will explained that paragraph (g) on page 2 of the proposed ordinance provides that no access door, including loading or unloading, shall face any residential district within 150'. Mr. Seacrest's proposed amendment is slightly different but means the same thing. The change is that the distance will now be measured to the main entrance door instead of to the licensed premises in the case where it does not face one of the protected uses. The difference is whether it faces a protected use or a residential district. The 100' is when the back of the building faces those districts. The 150' tries to cover any door facing the residential district, such as an unloading door or secondary access door. That appears to have been eliminated and replaced with the 150' rule for public access facing a residential district or one of the other protected uses.

Carlson gave the example of an application that is 80' away, so it fails the test and needs a mitigation plan. With the amendment, that same use will be permitted to be drastically close because you can measure to the front door as opposed to the building.

Peo then suggested that it might be preferably to have Mr. Seacrest put his proposal into legislative format rather than the Commission and staff speculating as to how it fits. In that case, the Commission may want to defer taking any further action.

Taylor recalled situations where the 100' from the back door was quite questionable. Taylor believes there needs to be more thought put into this. He needs time to learn the ramifications. He believes it is an almost drastic departure from what we have done in the past. He would like to defer for two weeks. We want our private enterprise to be able to make decisions and mitigation does allow that type of discourse between the city and the individuals who are making proposals. He is in favor of getting rid of a portion of this mitigation if we can reconcile our positions that is going to make this change more meaningful. He likes the front door concept to a certain degree but he is concerned about the ramifications due to future changes and how it is going to affect us in the future. Will it make the situation worse?

Marvin stated that he will vote against the main motion and follow that up for deferral in two weeks.

Peo advised that a motion to defer would supersede (table) the main motion.

Marvin moved to defer, with continued public hearing and administrative action on February

18, 2004, seconded by Taylor.

Bills-Strand commented that there have been problems with mitigation in the past because there have not been set rules, but at the same time she believes we can over- govern and over-regulate and we have to have flexibility. The Mayor has told the streamline committee that we have to be able to be flexible to take care of the needs. She is not in favor of a lot of bars in residential areas but she likes a restaurant where she can have a glass of wine. We need to allow ourselves some flexibility and not take away our judgment ability. However, there need to be more guidelines on mitigation than we have had in the past. Bills-Strand would like to see some better guidelines on mitigation so as not to avoid flexibility.

Carroll requested that the staff look at the alternatives proposed by Mr. Seacrest and the ramifications of the alternatives.

Marvin Krout inquired as to whether the Commission is asking staff to look for alternatives within the realm of what has been advertised or in terms of what may take additional advertising? Carroll suggested that the review be within the realm of how it has been advertised. Bills-Strand would like the staff to look at mitigation and some other guidelines for mitigation. Krout cautioned that some of that might not be able to be implemented without additional advertising.

Carlson believes that B-2 and B-5 are still a concern. Peo suggested that if the Commission wanted a separate standard for B-2 and B-5, they would have to be amended in their own specific chapters of the ordinance. The special permit provisions only cover the districts listed on p.1 of the proposed ordinance, and B-2 and B-5 are not in that list of districts.

Bills wants to come back to the main motion, as amended, on February 18th.

Motion to defer, with continued public hearing and administrative action on February 18, 2004, carried 7-1: Krieser, Marvin, Carroll, Taylor, Sunderman, Pearson and Bills-Strand voting 'yes'; Carlson voting 'no'; Larson absent.

*** Break ***

CHANGE OF ZONE NO. 3421
FROM H-3 HIGHWAY COMMERCIAL TO R-3 RESIDENTIAL;
SPECIAL PERMIT NO. 1928A, AN AMENDMENT
TO THE OAK CREEK APARTMENTS COMMUNITY UNIT PLAN;
and
PRELIMINARY PLAT NO. 03011, OUTFIELD PARK,
ON PROPERTY GENERALLY LOCATED
AT N. 1ST STREET & W. CHARLESTON STREET.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

February 4, 2004

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

Staff recommendation: Approval of the change of zone and conditional approval of the special permit and preliminary plat.

Ex Parte Communications: Marvin recalled having some phone calls back when Phase 1 came forward.

Proponents

1. Michael Rierden appeared on behalf of the applicant, **The Dinerstein Companies**, Approximately two years ago, Rierden presented Phase I of this project, which has been successfully completed and is a very nice project. The city was fortunate to have someone of this applicant's quality to come in and successfully develop a piece of ground that sits in an area that has had some difficult uses (landfill, floodplain and wetlands). Rierden submitted a letter from the President of the North Bottoms Neighborhood Association setting forth the agreement that has been reached between the applicant and the neighborhood to help mitigate the neighborhood's concerns about there being the large student population in and around the neighborhood and the floodplain issue. That agreement includes:

- Fill dirt will come from within the project site resulting in no net rise in the floodplain.
- A one time contribution of \$15,000 to help fund a police substation within the North Bottoms Neighborhood.
- Install street lighting and sidewalks along the west side of West Charleston Street between phases I and II.
- Shuttle buses will not travel via streets within the neighborhood except North 10th and Military Road.

- Adopt West Charleston Street for the purposes of regular litter pick up.
- Support the relocation of the city tow lot away from the area.
- Support the retention of a Belmont/North 10th Street connection when Sun Valley Boulevard is reconfigured.
- Join the North Bottoms Neighborhood Association and support their efforts to improve this area of Lincoln.

2. Ron Ross with Ross Engineering, 201 N. 8th, did further presentation on the proposal. The Dinerstein Companies is out of Houston, Texas. They do multitudes of different types of development and happen to be the most successful student housing developer in the country with 36 completed projects at major universities. They have five projects currently under construction and five projects currently in the planning stages. The first phase, which is built, had 157 units. These units were comprised of more of an apartment type unit. Each unit was 1,300 to 1,500 sq. ft. and had 2, 3 or four bedrooms. The proposed phase II area is an upscale project. The units will be 2 to 2.5 stories—not apartments but a townhouse looking structure—1,800 sq. ft. and more expensive. Each project has a full clubhouse and office. The inside of the clubhouse has a show unit. They have a complete exercise and weight room, computer labs, social area, swim pool, basketball and volleyball courts, security unit, shuttle bus to and from the University running throughout the day, and bus shelter. The students are hired as a substantial portion of the staff. If a tenant has three legal infractions within their criteria, they are evicted from the facility. The parents are required to sign the leases.

The issues are wetlands, floodplain, landfill and access. Wetlands was a concern in phase I as to whether they are saline. It was determined that those wetlands and the phase II wetlands are not saline and therefore are not category I. This project does not mitigate or destroy any of the wetlands. There are special design and construction features to be approved by the NRD due to the proximity to the existing wetlands.

With regard to floodplain, Ross advised that the applicant currently has floodplain and NPDES permits ready to be submitted for phase II. Fortunately, 2/3 of the phase II area already has approved floodplain and NPDES permits to allow fill. As in phase I, no dirt was trucked in. It all came from between the railroad tracks, and that is the native material being used to fill phase II. The preliminary plat which involves the land a little to the north of phase I and to the south does require some material to be brought in that is outside of the floodplain. We have been asked to report how many cubic yards we will need to complete the project, but the property is included in the original fill permits. They had to build up streets and a certain portion of the remaining commercial lots, but that has been done in a smaller isolated area. The balance of the commercial lots will be minimal amount of fill in accordance with the approved NPDES permits.

Ross then addressed the landfill issues. Landfill was a concern in phase I but phase I was in an area removed from the landfill issue. A venting system was designed that was not required. Phase II is close to the landfill. They have put in 230 borings and test pits after a complete electromagnetic survey to determine the limits of the landfill based on finding varying degrees of different material underground. They then went out and put in a considerable amount of borings to pinpoint the landfill. The site was designed to stay out of the landfill area. The financial lending for phase II will not permit the applicant to purchase any land that has landfill. Landfill material will be removed in approximately six small pockets, and a renovation plan will be done. This will all occur prior to construction. They will be removing 8800 cubic yards of landfill materials, the result being that this site will be purchased without any landfill whatsoever. The applicant will be requesting GTSI to furnish the test boring information to report the methane gas. Ross reiterated that there will not be any landfill within the limits of the project. The only place that methane was detected was where there was underlying landfill. That landfill material will be removed. A clay blanket will be built up beneath each of the structures which will be impermeable. On top of the clay blanket is a poly vapor barrier. The applicant does not anticipate having to vent the buildings in phase II. This additional information will be provided to the Health Department.

With regard to access issues, Ross acknowledged that access was somewhat of a concern in phase I, and the applicant was required to pave W. Charleston to 33'. Access has been a little bit of issue in Phase II, and the staff recommends that there be a secondary entrance in the event of an accident. The applicant has shown a secondary connection, and has agreed to construct an 18' wide emergency secondary connection from the south limits of phase II all the way south and east to the traffic signal, which is the entrance to the baseball stadium. This has been approved by Public Works.

Ross further advised that W. Charleston will be widened by 6' for approximately 220' at the intersection of N. 1st Street, which was a recommendation in the consultant traffic study. Ross believes there is a misconception on utilities. The utilities are public for water and sanitary going through phase II to get to the Chameleon property to the south. All other utilities will be private, similar to what was done in phase I. The gravity system is deep enough, which should resolve the issue of utilities.

Ross submitted proposed amendments to the conditions of approval on the preliminary plat (attached hereto as Exhibit "C"). Due to the large extent of area of landfill, the developer does not expect this to be an intensive commercial area. They would anticipate something like a truck terminal. There are 7.5 acres of commercial area to the north of phase II and 25 acres of commercial to the south of phase II. They do not want trucks coming through the student housing area. Therefore, there will be protective covenants placed on the land providing that future development of the commercial area to the south will need to head their truck traffic to the south. Therefore, Ross does not believe there is a need for the 33' of paving, and requested the following amendment to Condition #1.1.4: Provide 33' wide Private Roadway for 300 feet west of Sun Valley Boulevard, then narrow to 27 feet for the

remainder of the distance to W. Charleston Street.

Ross requested that Condition #1.1.15 be deleted relating to floodplain and fill.

Ross also requested that several of the conditions required to be completed prior to scheduling on the City Council agenda, be moved to a new Condition #4 so that they can be done prior to receiving a building permit. Ross believes that Public Works is in agreement with this change.

Pearson asked the applicant to show a map of the floodplain area. Ross explained that the entire area is within the limits of the 100 year floodplain. It goes all the way to Sun Valley Boulevard, including the intersection of 1st and W. Charleston.

Carroll inquired about the proximity of the private roadway to phase II. Ross showed this on the map. He also noted that someday Sun Valley will be relocated. The balance of that private roadway that continues west and heads north is what the applicant is proposing be a 27' wide paved private roadway. Carroll inquired why it should not be kept at 33' since all of that area will still be zoned H-3. Ross indicated that because of the intensiveness of the landfill, they don't expect that the buildings will be the large normal commercial buildings, because when they build, most financial companies will require that they remove any landfill under the building, so low intensity uses are anticipated as compared to most commercial development. Thus Ross does not believe the 33' wide street is necessary. With protective covenants between the two developers, they are not going to allow that traffic to go north through the student housing.

Carroll inquired as to the depth of the excavation of the landfill. Ross stated that it will vary. The deepest area found was 13'. The average is about 4' to 4.5' of landfill. Carroll inquired whether they will test for methane gas during excavation. Ross stated that the excavation will be done in accordance with NDEQ criteria. He does not recall the test for methane gas being a requirement, but he agreed to further investigate. There was no testimony in opposition.

Staff questions

Marvin asked staff to address the proposed amendments. Greg Czaplewski of Planning staff indicated that staff would agree to the first four amendments. As far as moving some of the Site Specific conditions of approval, Czaplewski suggested that they become a part of the conditions required "prior to receiving a final plat" as opposed to building permit.

Dennis Bartels of Public Works addressed the 33' street width, stating that 33' is typically the standard commercial width street. The design standards do not talk about any wider than 27' for private roadway. But if you go to 27', a truck turning in or out will use the whole street. That is why you have the 33' or 39' wide street in commercial areas. Bartels also agreed with Czaplewski as far as moving some of the site specific conditions to being

requirements before final plat because we do not want the final plat to be approved and then it can't be built.

Marvin noted that something is being done on Military Road in the Antelope Valley project. Is there going to be any disruption of traffic flow? Bartels does not believe there is any relationship between Antelope Valley and this project.

Bartels further discussed the street width, stating that the 27' meets design standards but as an engineer he recommends 33'.

Carroll referred to Condition #1.1.7 and inquired whether "adequate" buffer area for the wetlands as opposed to 25' is acceptable as there is no definition of "adequate". Czaplewski stated that there is no standard for that buffer area. The Design Standards recommend 25-50 feet. He would assume that the recommendation from the NRD would probably fall within that range. Bartels agreed with the language proposed by the applicant because it gives them some flexibility.

Pearson thought that the city was currently doing a study for floodplain regulations. Marvin Krout, Director of Planning, advised that the Floodplain Task Force report is finished and the public hearing before the Planning Commission is tentatively scheduled for March 31st on new floodplain regulations for "new developing areas". "New developing areas" means areas outside of the city limits. Those recommendations will not include this area. There were recommendations in the report for the developed areas that were similar to the recommendations for the new developing areas. There was a recommendation for no net rise and compensatory storage for Salt Creek and other developed areas. In this case, the developer is meeting the no net rise requirement but not providing compensatory storage. The Public Works stormwater section has accepted this proposal. The belief of the administration was that the Salt Creek and tributaries in developed areas have already had so much development that is already there, that it needed further study and it needed a set of guidelines that would be more flexible than for the new developing areas. That committee may be reconvened to look in more detail at the developed areas.

Bills-Strand referred to the street width of 33', noting that this is a private roadway and it looks like it is going through residential. If we make it 33' she is worried that it will become a very fast-paced street with baseball traffic seeing it as a shortcut. Bartels responded, pointing out that the developer is changing this to residential and part of the design of this project is creating that problem. He is thinking in terms of narrowing it through the apartment complex as a compromise and amending the language of the condition "to the satisfaction of Public Works" as opposed to 27'. Bartels would therefore suggest that Condition #1.1.4 read: "Provide 33' wide private roadway or a roadway to the satisfaction of Public Works."

Response by the Applicant

Ross agreed with Bartels regarding Condition #1.1.4. He agrees the roadway would be 33' at least at the intersection connecting with Sun Valley Boulevard. This drive will serve some commercial development and should be 33' wide. Ross reiterated that there are three reasons why this area south of phase II will develop rather sparsely over a long period of time without intensive commercial, i.e. "landfill, landfill, landfill". To run a commercial street 33' wide through the student housing could be very negative and an unsafe situation. The developer believes that the future development of the 25 acres might result in 19 acres of commercial development. There are two commercial lots in this preliminary plat, but they do not anticipate that they will develop intensely. The developer does not believe that 33' is needed for the entire distance and they will continue to work with Public Works.

Mike Rierden has talked with Dennis Bartels during this hearing and the applicant will agree to changing Condition #1.1.4 as requested by Bartels. He believes they can reach a compromise that would be beneficial to all parties.

CHANGE OF ZONE NO. 3421

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

February 4, 2004

Taylor moved approval, seconded by Marvin.

Pearson stated that she does not support new development in the floodplain. Until the recommendations of the Floodplain Task Force are presented, she intends to vote against every new development in the floodplain, let alone those in the area of wetlands.

Carlson remembers the hearing on phase I and because of the floodplain issue and the landfill and access issues, he takes the position that it continues to be a poor choice for student housing.

Motion for approval failed 4-4: Marvin, Taylor, Sunderman and Bills-Strand voting 'yes'; Carlson, Krieser, Carroll and Pearson voting 'no'; Larson absent.

This item is held over until February 18, 2004.

SPECIAL PERMIT NO. 1928A,

AMENDMENT TO THE OAK CREEK APARTMENTS COMMUNITY UNIT PLAN.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

February 4, 2004

Pearson moved to deny, seconded by Carlson.

Pearson believes that the Commission is close to receiving the Floodplain Task Force recommendations and she would like to see those recommendations before continuing to approve development in the floodplain. The applicant can come back after that information is available. She does not want to rush it.

Taylor stated that he will vote against denial because of the work that has already been done in the area. This is a continuation of the phase I activity.

Bills-Strand would rather defer voting on this application since the change of zone was held over.

Motion to deny failed 4-4: Carlson, Krieser, Carroll and Pearson voting 'yes'; Marvin, Taylor, Sunderman and Bills-Strand voting 'no'; Larson absent.

This item is held over until February 18, 2004.

PRELIMINARY PLAT NO. 03011, OUTFIELD PARK.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

February 4, 2004

Taylor moved to defer for two weeks, seconded by Sunderman and carried 6-2: Krieser, Marvin, Carroll, Taylor, Sunderman and Bills-Strand voting 'yes'; Carlson and Pearson voting 'no'; Larson absent.

This item is deferred until February 18, 2004.

WAIVER NO. 03016

TO WAIVE SIDEWALKS

ON PROPERTY GENERALLY LOCATED

AT S. 59TH STREET AND PIONEERS BLVD.

PUBLIC HEARING BEFORE PLANNING COMMISSION:

February 4, 2004

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

Staff recommendation: Denial.

Ex Parte Communications: None.

The Clerk advised that the applicant has submitted a written request for deferral until March 3, 2004.

Sunderman moved to defer, with continued public hearing and administrative action scheduled for March 3, 2004, seconded by Taylor and carried 8-0: Carlson, Krieser, Marvin, Carroll, Taylor, Sunderman, Pearson and Bills-Strand voting 'yes'; Larson absent.

There was no testimony in support or in opposition.

There being no further business, the meeting was adjourned at 3:40 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on February 18, 2004.

Q:\PC\MINUTES\2004\pcm020404.wpd