MEETING RECORD

NAME OF GROUP:	PLANNING COMMISSION
DATE, TIME AND PLACE OF MEETING:	Wednesday, December 5, 2007, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska
MEMBERS IN ATTENDANCE:	Leirion Gaylor-Baird, Gene Carroll, Dick Esseks, Wendy Francis, Roger Larson, Robert Moline, Lynn Sunderman and Tommy Taylor (Michael Cornelius absent). Marvin Krout, Ray Hill, Brian Will, Brandon Garrett, Jean Walker and Teresa McKinstry of the Planning Department; media and other interested citizens.
STATED PURPOSE OF MEETING:	Regular Planning Commission Meeting

Chair Gene Carroll called the meeting to order and requested a motion approving the minutes for the regular meeting held November 21, 2007. Motion for approval made by Francis, seconded by Moline and carried 7-0: Carroll, Esseks, Francis, Larson, Moline, Sunderman and Taylor voting 'yes'; Gaylor-Baird abstained; Cornelius absent.

CONSENT AGENDA
PUBLIC HEARING & ADMINISTRATIVE ACTION
BEFORE PLANNING COMMISSION: December 5, 2007

Members present: Gaylor-Baird, Carroll, Esseks, Francis, Larson, Moline, Sunderman and Taylor; Cornelius absent.

The Consent Agenda consisted of the following items: **SPECIAL PERMIT NO. 07051, STREET AND ALLEY VACATION NO. 07009 and STREET AND ALLEY VACATION NO. 07010.**

Ex Parte Communications: None.

Item No. 1.2, Street and Alley Vacation No. 07009, was removed from the Consent Agenda and scheduled for separate public hearing.

Taylor moved to approve the remaining Consent Agenda, seconded by Sunderman and carried 8-0: Gaylor-Baird, Carroll, Esseks, Francis, Larson, Moline, Sunderman and Taylor voting 'yes'; Cornelius absent.

Note: This is final action on Special Permit No. 07051, unless appealed to the City Council by filing a notice of appeal with the City Clerk within 14 days of the action by the Planning Commission.

CHANGE OF ZONE NO. 07059,
FROM B-2 PLANNED NEIGHBORHOOD BUSINESS
TO O-3 OFFICE PARK, AND FROM O-3 OFFICE PARK
TO B-2 PLANNED NEIGHBORHOOD BUSINESS,
and
USE PERMIT NO. 128B,
TO CHANGE OFFICE USE TO HOTEL, RESTAURANTS AND RETAIL SHOPS,
ON PROPERTY GENERALLY LOCATED
AT THE NORTHEAST CORNER OF
84TH STREET AND HOLDREGE STREET.
REQUEST FOR DEFERRAL: December 5, 2007

Members present: Sunderman, Larson, Taylor, Francis, Moline, Gaylor-Baird, Esseks and Carroll; Cornelius absent.

Ex Parte Communications: None.

The Clerk announced that the applicant has requested a two-week deferral.

Sunderman moved deferral, with continued public hearing and action scheduled for December 19, 2007, seconded by Esseks and carried 8-0: Sunderman, Larson, Taylor, Francis, Moline, Gaylor-Baird, Esseks and Carroll voting 'yes'; Cornelius absent.

STREET & ALLEY VACATION NO. 07009
TO VACATE N. 1ST STREET FROM THE
NORTH RIGHT-OF-WAY LINE OF "Q" STREET
TO THE NORTH PROPERTY LINE OF
LOT 57, I.T.
PUBLIC HEARING BEFORE PLANNING COMMISSION: December 5, 2007

Members present: Sunderman, Larson, Taylor, Francis, Moline, Gaylor-Baird, Esseks and Carroll; Cornelius absent.

Ex Parte Communications: None.

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

This application was removed from the Consent Agenda at the request of Planning staff.

Staff presentation: **Tom Cajka of Planning staff** submitted an additional condition of approval requested by the Lower Platte South NRD, requiring that there be an access easement granted to the Lower Platte South NRD over the vacated right-of-way.

Cajka explained that this is an application to vacate a portion of 1st Street north of Q Street. People's City Mission is on the east side and a private property owner is on the west side, both of which have signed the petition to vacate.

Francis inquired how the Fire Department concerns have been addressed regarding access. Cajka explained that fire trucks will have access through the new parking lot to access the west side of the building. There will be access allowing the 18' from side to side.

Esseks asked for an explanation of the purpose of the NRD easement. Cajka explained the easement will be the NRD's access to cross the parking lot get up to the levee.

Proponent

1. Jeremy Williams, Design Associates, 1609 N Street, testified on behalf of the City Mission. As far as access for the Fire Department, Williams explained that the drive area that was vacated last year is under construction. It will allow full access around the facility. The NRD will continue to have the vehicular access that they have today with the easement. They will have access through the new parking lot.

There was no testimony in opposition.

ACTION BY PLANNING COMMISSION: December 5, 2007

Larson moved a finding of conformance with the Comprehensive Plan, with conditions as amended by staff today, seconded by Sunderman and carried 8-0: Sunderman, Larson, Taylor, Francis, Moline, Gaylor-Baird, Esseks and Carroll voting 'yes'; Cornelius absent. This is a recommendation to the City Council.

CHANGE OF ZONE NO. 07058
TEXT AMENDMENT TO TITLE 27
OF THE LINCOLN MUNICIPAL CODE
RELATING TO THE SALE OF ALCOHOL
IN RESTAURANTS IN CERTAIN ZONING DISTRICTS.
PUBLIC HEARING BEFORE PLANNING COMMISSION: December 5, 2007

Members present: Sunderman, Larson, Taylor, Francis, Moline, Gaylor-Baird, Esseks and Carroll; Cornelius absent.

Ex Parte Communications: None.

Staff recommendation: Approval, with revisions.

Staff presentation: **Brian Will of Planning staff** explained this to be a proposed text amendment to the zoning ordinance in the special permit section relating to on-sale alcohol, requested by Brett Richardson, the owner of 9 South Grill.

This proposed amendment proposes to amend the conditions under which a special permit can be granted, specifically, that restaurants would be allowed to apply for a special permit when they are located no less than 25' from a residential zoning district, as opposed to the current 100' restriction. Staff is recommending some modifications to the applicant's proposal for clarity and to eliminate some redundancy. Staff has been supportive of making a distinction between restaurants and the other uses where alcohol can be sold. As a result, staff is recommending approval, with revisions.

This is not the amendment that the City Council referred back to the Planning Commission. That amendment proposed making the sale of alcohol in a restaurant a conditional use (as opposed to requiring a special permit). This proposal is different in that a restaurant that does not meet the 100' separation would have to get a special permit and cannot apply without meeting the conditions set forth by this proposed amendment.

Again, the staff was not the applicant in the application referred by the City Council back to Planning. There have been discussions with that applicant as to their intent but there has been no response at this time.

Esseks inquired as to the Council's concerns in remanding that application back to the Planning Department. Will believes their primary concern was loosening the restrictions without the opportunity for a public hearing. This proposal, in part, addresses that issue but it reduces the standard for separation requirements.

Francis confirmed that approval of this amendment would require any restaurant wanting to sell liquor that is within 25' of a residential district to request a special permit. Will concurred. They would need a special permit for the alcohol. This amendment provides

that if they are a restaurant and no less than 25' from a residential district and meet the criteria, they are eligible to apply for the special permit. As the ordinance exists today, they could not even apply. They must be over 100' away under the current ordinance. This is a proposal for no less than 25' if a restaurant. Will further explained that the 25' is measured from the "licensed premises", a term referring to the state liquor license. The measurement is from the licensed premises to the boundary of the residential zoning district.

Marvin Krout, Director of Planning, discussed the previous application, wherein there was an attempt to mirror the conditional use standards in B-2 and B-5, which have a different measurement other than the licensed premises, and which would have allowed less than 100'. This proposal accomplishes something similar, but in a different way of measurement.

Krout believes that the Council's main concern was approval without some prior notice to and opportunity for public comment by the neighbors. There were general concerns about enforcement of the distinction between a restaurant and a bar based on, for example, a 60/40 split. There is a provision in the special permit section today for revoking a special permit if there is disorderly conduct or problems that are occurring. There was some discussion and maybe an amendment drafted that reduced the closing time (now it is proposed 11:00 p.m. instead of midnight). There was another amendment suggesting that you can only serve a drink in conjunction with serving a meal, and that led to another discussion about enforcement as well. He believes this proposal addresses the main issue of the Council.

Gaylor-Baird inquired about the Police Department's objection. Krout believes that Chief Casady would like to ban alcohol from Lincoln and we would have a lot fewer enforcement problems. If they see a rule that is more likely to reduce the number of calls and enforcement problems, they would be in favor. Building & Safety also indicated that they were concerned that this would add to their administrative load in distinguishing a restaurant from a bar.

Moline understands that the distance requirement under the current ordinance is 100' measured from the front door. Moline is concerned that the proposed 25' puts the alcohol closer to residential neighborhoods. Krout suggested that such consideration will have to be made on a case-by-case basis. Typically, you will have a strip center with the rear of building being more than 25' from the property line; and typically, the side of that building will be 60' or more; then, if you measure to the front entrance of some building in that strip center, it is typically going to be more than 100 feet.

Esseks confirmed that under this proposal, the main door to the restaurant could be as few as 25' from the nearest residential zoning. Krout agreed, but he believes there would be some discretion through the special permit process in determining whether or not it is appropriate or whether there is an opportunity to move the door.

Practically speaking, Esseks suggested that this proposal attempts to accommodate a restaurant which would not represent a nuisance. He asked Krout whether he could think of some practical circumstance where the 25' rule would be sustainable. Krout stated that the reason staff was recommending a conditional use instead of special permit is because there is a grey area, e.g., when dealing with the special permit, if you meet the minimum standard in the language, there is a sort of presumption that you have met your requirements and you should not have too many other hurdles to accomplish. The degree of discretion is always kind of a grey area in special permits and that is why the staff tried to avoid it in the previous application.

Rick Peo of City Law Department explained the special permit is for a use that can be compatible in a particular district but might not normally fit in based on other uses. So under the special permit, the Planning Commission does have the authority to impose reasonable conditions to ensure compatibility to the other permitted uses. When you establish the criteria for the special permit, you basically have made a finding that the criteria makes the special permit compatible in relation to the health and safety of the general public and that will be the general playing field. In order to impose something more strenuous, it should be found that a particular application is more unique than other restaurant applications and so the criteria might not fully satisfy the needs. This amendment establishes a certain criteria and if the applicant can meet the conditions, it is probably almost mandated that it be approved, but there may be minor exceptions. If you say 25' is good, and approve 25', it is going to be hard to require someone else to be 50' away.

Esseks quoted from the Police Department commentary: The proposal “would cause issues not only with previous court tested cases, but would cause confusion and create an unfair set of rules”. Are we concerned about equal application of the law? Peo suggested that there needs to be a rational basis for the difference between a restaurant and a bar, and most people believe a restaurant is a different situation than a bar. He does not see a problem treating restaurants differently, but it is an area of concern that needs to be considered.

Taylor expressed concern about the 25'. In what circumstance would it be an appropriate use for a restaurant that provides alcohol to be within 25' of a residence? He can’t think of an example. Peo suggested that it would most likely be the back yard type situations. If you have a street between them, you will have ample separation from side yards. Front yard would be across the street.

Moline inquired whether the 60/40 rule gives Peo any concern as an attorney. It seems arbitrary to him. Peo’s response was, “you have to draw the line somewhere sometime”. If we are trying to define restaurant, it would seem that your other criteria for a restaurant would require those conditions anyway. But there are some bars that can meet the 60/40 criteria.

From a legal standpoint, Moline believes that this creates havoc for the city in enforcement. Is the standard for “full service kitchen” defined somewhere? Peo stated that the staff is trying to pull some of the definitions from the state liquor commission. The city does have licensing requirements for food establishments. He believes that the full service kitchen is defined by those two entities - the Liquor Control Commission and the City/County Health Department. The more terminology you put in, the more issues you have to sort out and enforce. This is an attempt to allow more flexibility.

Gaylor-Baird wondered whether there are some establishments that would be grandfathered in. Aren’t there some already less than 100'? Peo agreed that if the use was established prior to the adoption of the zoning ordinance for liquor special permits, then yes, there would be some that would be grandfathered.

Esseks posted the hypothetical: We have a restaurant with the main door being on the side, with the front open for seating so people can look out onto a busy street. 25' is the beginning of a residential district – it is a really small side yard setback so that those folks would be within 30' of the main door. Could we say no? Peo suggested that the Planning Commission might be able to deny such a request because you have an existing building that is that close. There is still some discretion in making a finding that it is a unique situation, but it should not be every time.

Francis clarified that this is an attempt to change the law to allow someone to apply if within 25'. This would allow opportunity for business owners to start a business if they are in a unique situation where their property happens to abut a residential area. She doesn’t have a problem looking at each application on its own merit. In this case, we have a letter from the neighborhood association in support, with no concerns about this business having a liquor license.

Moline’s concern is setting up the criteria, and then if an application meets the criteria, it becomes very difficult to turn someone down. Peo agreed. This is doing more than establishing the right to apply. This is setting minimum standards that should be the basis for deciding that it is acceptable, except for a unique situation. There might be other problems such as traffic. The Planning Commission will have discretion to impose additional requirements. This is designed to set out criteria that we believe to be satisfactory. We are trying to vision and establish a minimum standard that is adequate. If the proposed criteria here does not make it compatible, then there should be something different or some different conditions in the ordinance.

If the Planning Commission does not approve this text amendment, Gaylor-Baird inquired whether a restaurant within 100' of a residential area would have any way to seek an exception. Peo stated that the existing ordinance for sale of alcohol on the premises is a 100' separation – no exceptions. This proposed amendment reduces that requirement, but only for restaurants.

Proponent

1. Brett Richardson, 844 South Street, the applicant, stated that the reason he is requesting this amendment is to allow on-sale alcohol in the 9 South Grill restaurant at 9th & South Streets. He is on the South Street Business & Civic Association and the owner of 9 South Grill. On average, the restaurant will have 15 to 20 people come in at night (Chief Casady included), wanting a glass of wine with their steak dinner. When they find out they cannot have the wine, they end up going somewhere else. He considered the old K's Restaurant location, but they cannot reapply for a liquor license because of the setback from the residential area. The current requirements eliminate the older neighborhoods in B-1 and B-3 from bringing in a restaurant business with on-sale alcohol. There will be no vending machines, pool tables, keno, etc., allowed so that it is truly just a restaurant. By taking out the gaming devices, you eliminate the bar aspect of the restaurant.

Taylor inquired about the separation distance of the K's site from the residential area. Richardson believes it is 62'. At the 9th & South location, the license premises would be 47' to the residential district on the back side and 80' on the side.

Gaylor-Baird asked whether the applicant had worked with the neighbors on this proposal. Richardson stated that he has worked with the neighborhoods and the Business & Civic Association, and everyone has been positive.

Moline asked how Richardson came up with the 25' versus 50' or some other number. Richardson stated that with the setbacks along the B-3 district, there needs to be that option to go within 25' when building a new building. The front door will face South Street and the parking will be in the rear.

Francis inquired whether Richardson attended the Everett Neighborhood Association meeting. Richardson indicated that he sent a letter out to the neighborhood associations, and those neighborhood associations also have members on the Board of the South Street Business & Civic Association. He received no objections from any of the other neighborhood associations.

There was no testimony in opposition.

ACTION BY PLANNING COMMISSION: December 5, 2007

Esseks moved approval, with conditions as recommended by staff, seconded by Sunderman.

Francis stated that she is in support because it allows the Commission to deal with each applicant individually. This allows opportunity for some small businesses to be successful and to locate in the smaller neighborhoods.

Esseks stated that he is in favor because if there is special circumstance where it will jeopardize the health, welfare and lifestyles of adjoining residential land uses, the Planning Commission and the City Council could set conditions to prevent those risks.

Taylor wishes he could make an amendment that would make him feel comfortable, but he is concerned about the 25'. He does not believe it is adequate. He empathizes with the applicant and he definitely understands their reasons, but he is not to the point where he feels comfortable. He will not support the motion.

Moline stated that he will also vote no. When you set up a set of rules that are somewhat arbitrary and require definitions, that becomes a standard and he is concerned that we may start having to approve things that meet the standard that we ordinarily might have concerns with. Alcohol is regulated for a reason. He does not believe 25' is far enough from a residential neighborhood. He does not believe old or new neighborhoods should have alcohol that close to residential uses.

Carroll stated that he will support the proposal. 25' will usually be the rear yard in the older neighborhoods so the entrance to the restaurant would be around the building in the front. We should encourage the development of restaurants in older neighborhoods.

Motion for approval, with the revisions recommended by staff, carried 6-2: Sunderman, Larson, Francis, Gaylor-Baird, Esseks and Carroll voting 'yes'; Taylor and Moline voting 'no'; Cornelius absent. This is a recommendation to the City Council.

COMPREHENSIVE PLAN CONFORMANCE NO. 07023
DECLARATION OF SURPLUS PROPERTY
and
STREET & ALLEY VACATION NO. 07008
TO VACATE A PORTION OF S. 46TH STREET,
LOCATED WEST OF PROPERTY DESIGNATED AS "PARK"
AND SOUTH OF "O" STREET LYING BETWEEN
SOUTH 45TH STREET AND SOUTH 46TH STREET.
CONT'D PUBLIC HEARING BEFORE PLANNING COMMISSION: December 5, 2007

Members present: Sunderman, Larson, Taylor, Francis, Moline, Gaylor-Baird, Esseks and Carroll; Cornelius absent.

Ex Parte Communications: None.

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

Staff presentation: **Brian will of Planning staff** reminded the Commission that these applications were on the November 21st agenda and deferred in response to a memo from the City Law Department advising that the property not be surplused.

Will then showed the layout of the original final plat for Witherbee Gardens, showing a couple of entrance points at “O” Street. With the “O” Street widening/paving project, one of the entrance points was closed off. This is a request to declare a portion of the park land as surplus property and to vacate the west leg of Witherbee Blvd. Staff is recommending approval and a finding conformance with the Comprehensive Plan. The staff finds that there is no public purpose to retain that portion of park land. The Parks Advisory Board has also reached this conclusion. The right-of-way is also access and not needed.

Francis inquired whether the issue with the Law Department has been resolved. **Rick Peo of the City Law Department** suggested that it is appropriate for the Planning Commission to at least make a finding of conformance with the Comprehensive Plan and allow it to move from here. It will not be scheduled on the City Council agenda until the staff has had an opportunity to determine whether the park property can be surplused. We are faced with a Nebraska Supreme Court opinion which found that land dedicated by a person for park purposes is dedicated not just to the city but to the public and held in trust for the public. That trust is basically irrevocable. Once dedicated as park property, it is park property. The Parks Department has indicated that there might be some unique situation here with the 46th Street project, and that possibly this is really just a transfer of the park boundary further to the east and therefore we could go ahead and sell off the portion to the west. The Law Department needs to review this further as to relocation of park boundary to resolve the issue.

JJ Yost of the Parks and Recreation Department stated that Parks has worked with the adjacent landowner, the Witherbee Neighborhood Association and Urban Development to develop a master plan for Witherbee Park. As part of the “O” Street widening project, the connection to “O” Street was removed and a hammerhead was installed for the properties adjacent on the west side of 46th Street. The master plan for further development of the park has been an ongoing process with the adjacent landowner and the neighborhood association. From the Parks Department standpoint, the 25' that they are seeking to declare as surplus doesn’t change the park master plan – it is an area where Parks would create a landscape buffer or screening between “O” Street and the park play area. The 25' is adjacent east of the vacated right-of-way. The vacated right-of-way is now a grassed area.

Esseks believes the Planning Commission role is to determine to what extent this change promotes the welfare of the community. Park land is a potentially good resource for promoting recreation, etc. Are we losing it for a good purpose? If not, then he does not believe the Planning Commission can find the surplusing of that park property to be in conformance with the Comprehensive Plan. Yost suggested that this is part of a bigger picture of redevelopment of the area. This is a component of development on an adjacent property. So we think it is a “win-win” that does not take away from the park.

Wynn Hjermstad of Urban Development concurred that this is part of a bigger picture.

When "O" Street was being widened, the property owner there did not have a very good building and it has now been demolished. Urban Development started having conversations with the owner as part of the widening project. It was an unsightly building and not a very good use, i.e. adult book store. The owner was going to give up some right-of-way for the widening. The site is very small and he could not build a whole lot there. All of this kind of grew into looking at the adjacent park, realizing it was not a very sightly green space and not used because of the proximity to "O" Street, so they started looking at this whole site. Urban Development did have several meetings with the neighborhood association and talked about what they would like to see and how to make this a more usable space. The idea of taking the surplus park land provides a little bit more buffer to "O" Street in order to use the park more, and it makes it a more usable and more friendly park. It would also allow the property owner to build a bigger building. The owner has also agreed to remove the billboard and has agreed to use restrictions that are very typical in redevelopment agreements, i.e. no adult book stores, no pawn shops, no alcohol sales, etc. He has also agreed to pay fair market value for the surplus park land. The neighborhood likes it. It improves a park area that is not very usable at this time and it allows some redevelopment to occur at that site.

Hjermstad clarified that the additional 25 feet will be used for parking, with the access being off of 45th Street. The curbcut on "O" Street will be closed.

Gaylor-Baird observed that there are several old trees on the property. Yost confirmed that there are two existing trees – one would be removed and one would stay. There would also be more trees added in the master plan.

46th Street will remain a hammerhead.

There was no testimony in opposition.

COMPREHENSIVE PLAN CONFORMANCE NO. 07023
ACTION BY PLANNING COMMISSION: December 5, 2007

Larson moved a finding of conformance with the Comprehensive Plan, seconded by Moline.

Gaylor-Baird commented that while it is a small piece of land, it is one of the only pieces of attractive land along "O" Street that still has green space. The Comprehensive Plan calls for protection of green space in urban areas. It is close to an area declared as blighted. She is having difficulty supporting this despite the cooperation that seems to have been going on. She believes that there is some merit to considering the protection and integrity of design.

Francis is convinced by the fact that the neighborhood association is on board. It does not

give up all of the green space. In fact, she believes that it will develop some better green space and allow good usage of that frontage.

Carroll suggested that this is a pretty good balance of improving the property site versus the park. It removes the billboard and an old building. The city took land away from this property owner when "O" Street was widened, so he believes this proposal improves the property owner's situation as well as the city. It is a 50/50 balance.

Esseks observed that normally, the Planning Commission should not approve the loss of park land. But, the fact that the neighborhood association accepts it because of the other benefits, he is led to believe that the Commission should show support.

Motion for a finding of conformance with the Comprehensive Plan carried 7-1: Sunderman, Larson, Francis, Esseks, Taylor, Moline and Carroll voting 'yes'; Gaylor-Baird voting 'no'; Cornelius absent. This is a recommendation to the City Council.

STREET & ALLEY VACATION NO. 07008
ACTION BY PLANNING COMMISSION: December 5, 2007

Francis moved a finding of conformance with the Comprehensive Plan, seconded by Moline and carried 7-1: Sunderman, Larson, Francis, Esseks, Taylor, Moline and Carroll voting 'yes'; Gaylor-Baird voting 'no'; Cornelius absent. This is a recommendation to the City Council.

There being no further business, the meeting was adjourned at 2:15 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on December 19, 2007.

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