MEETING RECORD

NAME OF GROUP:	PLANNING COMMISSION
DATE, TIME AND PLACE OF MEETING:	Wednesday, September 22, 2010, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska
MEMBERS IN ATTENDANCE:	Leirion Gaylor Baird, Michael Cornelius, Dick Esseks, Wendy Francis, Roger Larson, Jim Partington, Lynn Sunderman and Tommy Taylor (Jeanelle Lust absent); Marvin Krout, Steve Henrichsen, Tom Cajka, Jean Preister and Teresa McKinstry of the Planning Department; media and other interested citizens.
STATED PURPOSE OF MEETING:	Regular Planning Commission Meeting

Chair Lynn Sunderman called the meeting to order and acknowledged the posting of the Open Meetings Act in the back of the room.

Sunderman then requested a motion approving the minutes for the regular meeting held September 8, 2010. Motion for approval made by Cornelius, seconded by Larson and carried 7-0: Gaylor Baird, Cornelius, Esseks, Larson, Partington, Sunderman and Taylor voting 'yes'; Francis abstained; Lust absent.

CONSENT AGENDA
PUBLIC HEARING & ADMINISTRATIVE ACTION
BEFORE PLANNING COMMISSION: **September 22, 2010**

Members present: Gaylor Baird, Cornelius, Esseks, Francis, Larson, Partington, Sunderman and Taylor; Lust absent.

The Consent Agenda consisted of the following items: **STREET AND ALLEY VACATION NO. 10013.**

Ex Parte Communications: None

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

WAIVER NO. 10017
TO WAIVE THE CONSTRUCTION OF A SIDEWALK
WITHIN THE PEDESTRIAN EASEMENT
CONNECTING SALINE DRIVE AND
CORNFLOWER DRIVE.
CONT'D PUBLIC HEARING BEFORE PLANNING COMMISSION: September 22, 2010

Members present: Taylor, Esseks, Larson, Partington, Gaylor Baird, Cornelius, Francis and Sunderman; Lust absent.

Ex Parte Communications: Taylor disclosed that he had a conversation with Tom Cajka of Planning staff where he asked some questions about the grading.

Esseks disclosed that he sent a memo of the same nature and circulated it to other members of the Planning Commission.

Staff recommendation: Denial.

Staff presentation: **Tom Cajka of Planning staff** noted that at the last public hearing, the Commission requested a continued public hearing in order to get additional information concerning topography, grading and liability issues. Since then, Public Works did inspect the site to see if the sidewalk could be installed based on the topography, concluding that there was no physical condition that would prevent the construction and use of the sidewalk. The steepest slope is between two houses outside of the outlot. It is estimated that the current slope is between 12 and 14 percent; however, the sidewalk could still be built with some minor cut and fill to reduce that slope to 8 to 10 percent, allowing pedestrians to use that sidewalk for access. It does not meet ADA requirements, but since there is an alternative sidewalk along the street, there is an alternate route for people who would not want to use the steeper slope of the sidewalk in the pedestrian way easement.

With regard to the drainage issues, Public Works concludes that putting the sidewalk through the outlot would not impact the drainage of stormwater through the area.

With regard to liability issues, the City Attorney submitted an opinion finding that the city would not have liability on this sidewalk through the outlot or on the individual property owner's lot.

Esseks recalled that at the first hearing, one or more of the citizens living nearby questioned whether you could put a public sidewalk through this area – it looks as though it has a lot of grass and a wet area. Would it be safe for pedestrians and not cause backup of drainage? **Harry Kroos, Supervisor of Sidewalk Services for Public Works & Utilities,** pointed out that the vegetation shown in the photograph is the limits of what is being mowed. The taller vegetative area is just as dry and firm as the mowed area. There are two discharges for stormwater, but they would still be at least 10-15 feet from the

proposed location of the sidewalk. He does not believe it would present a hazard as shown.

Taylor inquired as to the steepness of the sidewalk. We know that concrete does cause more water flow and less of an area for saturation. What are we going to do to mitigate that situation? He is concerned it would create more of a problem when it comes to drainage. Cajka stated that Public Works is recommending that roughly 6 to 8 inches be cut at the top, and then filled toward the bottom, so it's pretty minimal what they are doing as far as any cut and fill. **Dennis Bartels of Public Works** suggested that the sidewalk would be built at the existing grade at the low point through the outlot. The cut and fill is on the top of the hill closer to the street. There would not be any fill placed through the drainage area. It is his opinion that the construction of the sidewalk would not result in an appreciable change in impervious area.

Esseks then observed that one of the neighbors to the south was concerned that part of the easement for the sidewalk would cut across his private land and he would be personally liable for anything that happened to pedestrians on that sidewalk. Do we have precedence whereby that sidewalk is maintained by the homeowners association and the liability would be theirs? **Tim Sieh of the City Law Department** stated that it would depend on the relationship between the homeowners association and the property owner whereby they allocated the maintenance and liability issues to the homeowners association by agreement. It would be difficult to give a definite answer without that type of relationship. In general, the courts have leaned toward who controls the easement or who is in control of the property where the injury occurs. Arguably, both parties (homeowners association and property owners) probably face some liability issues.

Gaylor Baird inquired whether this sidewalk is different from any other sidewalk in the city in terms of liability. Who is responsible for any accident that happens? Sieh stated that maintenance of sidewalks on public streets lies with the city per the City Charter. But, that is not the case for sidewalks running over private property or pedestrian easements such as this because they do not abut the public street.

Esseks wanted to know how many feet of this easement runs through private property as opposed to NRD property. Cajka did not know. It depends on the depth of the lot – and he guessed it would probably be somewhere around 100 feet. Each of the lots on Cornflower and Saline do have part of the sidewalk going through their property. Saline is part of the outlot owned by the NRD.

Esseks wondered whether there is knowledge as to how they handle maintenance in other parts of the city. Cajka suggested that there are pedestrian sidewalks in pedestrian easements throughout the city in many locations, but he did not know about the maintenance issue.

Taylor understands that there will be additional expense if this sidewalk is constructed – more concrete, additional grading, etc. It seems like a natural flow area that in normal instances would not even necessitate a sidewalk. He sees this as creating a sidewalk that does not necessarily flow with the topography, so would the extra expense be borne by the City or the property owners or the association? Cajka explained that the cost to construct the sidewalk in the pedestrian easement is the developer's responsibility – not the property owners and not the homeowners association.

Cornelius inquired whether there is a difference in terms of liability based on whether or not this pedestrian easement is paved. Sieh suggested that there is more maintenance that goes along with the sidewalk than a simple pedestrian easement. It is an easement open to the public. He is not sure whether there is more or less liability.

Francis pointed out that this easement was incorporated into this development at the time it was platted and approved. Cajka concurred. It appeared on the preliminary plat that was approved in February, 1996, and it appeared on two final plats, approved in December, 1999 and November, 2000.

Proponents

1. Stephanie Biernbaum, 3340 Watercress Lane, appeared on behalf of the Northridge Heights Homeowners Association. They understand that the cost of constructing the sidewalk is the responsibility of the developer; however, any further costs afterwards will be the responsibility of the homeowners association, including any future replacement costs.

The Homeowners Association worked with the NRD to provide a natural mode trail for people to walk and enjoy the wetlands. That trail is on the very edge of the wetland area, but they are not allowed to walk into the wetland area. There is a “no trespassing” sign. The proposed sidewalk is in an area used for water drainage.

The staff advised that this sidewalk could connect to a trail sometime in the future. The homeowners association did talk to the NRD and, at this time, they have no knowledge of an easement going through the wetland for a bike trail, and they do not know that they will permit a bike trail to be built through there. With the future of a bike trail unknown at this time, Biernbaum does not see how the sidewalk is going to connect to anything. Only a few people (maybe 30-40 homes) will gain access from the neighborhood by this shortcut to the park, and it is not much of a shortcut. It is an area that is wet and flooded; it is dry now, but even during the dry season you can see the ponds in the back from water seeping up from the ground. An 8 to 10 percent slope is desirable to skateboarders. She does not see that this will benefit the neighborhood. It is a protected wetland. It took a year to get the NRD to agree to the mode trail.

2. Mark Hunzeker appeared on behalf of **Paul and Linda Babl,** the property owners across whose lot a portion of this sidewalk would be built. Obviously, these easements were a part of the subdivision, but apparently the grades that were approved as part of the plat did not include consideration of the grades of these sidewalks. The grades are presently 12 to 14 percent, which is a very steep grade. In fact, Public Works is recommending that these sidewalks be constructed at an 8 to 10 percent grade, and using some cut and fill would be fine. However, the easement across his clients' property would not allow any cut and fill to revise the grading from the sidewalk in front of his house all the way to the rear of his lot. In fact, the Design Standards for city sidewalks provide that:

> Normally, longitudinal grades for these sidewalks should not exceed 5%. Longitudinal grades not exceeding 8% may be used for short distances to overcome greater elevation differentials.

Therefore, Hunzeker pointed out that the 8 to 10 percent exceeds the design standard maximums and there is no easement available to make cut and fill adjacent to reach that point.

Hunzeker agreed with the legal opinion that there is no liability to the city, but the concern of his clients is the potential liability of private property owners who have a sidewalk running through an easement on their property. The city has clearly disclaimed any responsibility for any maintenance or liability for failure of maintenance or future needs for reconstruction. Hunzeker believes that the homeowner, and not the homeowners association, is probably responsible. It is generally the problem of the lot owner who owns the land under the sidewalk.

With regard to need for this sidewalk, Hunzeker submitted that the only people for whom this presents any sort of shortcut to get to the park or to the high school are people who have signed the petitions in the record opposed to building this sidewalk and asking that this waiver be granted. Even if there is some benefit to a slightly shorter distance for a handful of people, it has been suggested that there may be some benefit to people to walk down through there and get a glimpse of the wetlands. Granted, the area through which this sidewalk would be built is not a wetland; however, the area which is not maintained or at least allowed to grow tall is area which is wet in the springtime. Yes, the outlets to the storm sewer are downstream, but water backs up beyond where the sidewalk would be when storms and other high water events occur. There will be water over that sidewalk, and it takes a very short time for moss to grow on a sidewalk, which creates not only a slipping situation, but a freeze/thaw problem as well.

Hunzeker further submitted that even if there was a wetland to look at, the NRD has posted "No Trespassing".

Given the circumstances, Hunzeker believes that the need for this sidewalk is very small. The cost is going to be very great. The ability to grade this in a way that will meet even the city's maximum slopes is suspect because they don't have easements to do the cut and fill. And you have before you a four-page petition of property owners who live in the area who are asking that the requirement be waived.

Partington noted that it has been mentioned that one justification is the long range strategic consideration for future development of the neighborhood. But, it appears bounded by Salt Creek and wetlands with no possibility for future development at all. Hunzeker agreed. All of the parcels around this subdivision are controlled by the developer of this subdivision. A lot of the areas are well in the floodplain. Partington commented then that the only people that will benefit are the people that are telling us they don't want it.

3. Karlene Davis, 6420 Saline Drive, which is at the north end of the proposed sidewalk, testified in support of the waiver. She inquired whether the Commissioners actually took the time to visit with any of the homeowners about water issues, etc. They had three inches of rain a couple weeks ago. Did anyone bother to come out and look to see the drainage from that rain? A couple of years ago, they had 5" of rain and the area behind her property was full of water. The area slopes and the water gathers in the common area and runs into the wetlands. Even with the three-inch rain, the common area was full and it was coming towards her back yard. "If you put in a sidewalk that obstructs any of that drainage, you are filling my basement."

Davis showed a photograph of the drainage culverts. She is very concerned about safety. There are two drainage culverts – children are going to find it and with a sidewalk to get to it, she is fearful about the safety issue.

As far as a future bike path is concerned, the only way that you can connect a bike path to this sidewalk is to go straight across the wetlands, and the wetlands are federally protected. You have to get a federal permit in order to dig in the wetlands.

Davis has lived in her home for eight years, seven of which she spent trying to get the water draining out of her back yard properly. She received permission from the NRD to let it drain to the wetlands. If this sidewalk is built, it will destroy that drainage from her property.

The only pro's to construction of this sidewalk are 1) a shorter distance for some of the people to get to the park or high school, and 2) to connect to some future bike path (which is now just a dream). There has not been the need for a sidewalk for 8 years. Why do we need one now? The con's to the construction of this sidewalk are 1) obstacle to the water flow and proper drainage; 2) safety issues; 3) extra costs to the association; 4) concrete that will have to be replaced; 5) it will be a skateboard runway; and 6) it is trespassing for people to walk from the sidewalk into the wetlands.

4. Robert Peters, 6342 Cornflower Drive, which is next door to Mr. Babl, testified in support of the waiver. His deck is on the northeast side so he has a great view of the wetlands. He is concerned about disturbing the wildlife in the wetlands. He has also experienced water coming up halfway into his back yard, where it stands for awhile.

There was no testimony in opposition.

Esseks inquired of the sidewalk supervisor whether this sidewalk will impede the drainage. What is the likelihood of a serious drainage problem as result of the construction of this sidewalk? Kroos responded that if a sidewalk is properly constructed, in those situations where you have drainage coming between yards, there will be water drainage across the sidewalk for a period of time during the rain and afterwards. If the sidewalk were properly constructed in this situation, there would be water flowing across the sidewalk, but it would not obstruct any water flow and would not significantly increase the surface drainage in this area. The sidewalk would dry up within a period of time after the rain event. This area is so flat and during heavy rain the water is going to flow into this area, but it is unlikely that water will back out of the wetlands into this area because of the elevation.

Taylor inquired whether sidewalks decrease or increase runoff. Kroos stated advised that concrete is impervious so there is a small increase in runoff. The water will not soak into the surface of the sidewalk. It will flow off onto adjacent ground.

Esseks asked staff to respond to Mr. Hunzeker's testimony that the 5' easement would not allow for cut and fill. Kroos admitted that the impact to Babl's property would be somewhat greater than any impact on the outlot or off of Saline Drive. The recommendation of Public Works would be to do the cut and fill. Short of the Babl's not granting additional space, there would have to be some treatment immediately adjacent to the sidewalk such as a block wall or something like that. Esseks inquired whether that makes the building of the sidewalk unfeasible. Kroos stated that it does not make it unfeasible or impossible, but it increases the impact to the Babl property from an aesthetic standpoint. And someone would have to maintain the stone or wall along the walk.

Kroos went on to state that the developer is individually responsible to build the sidewalk and their design consultant has initiated the process. The city has been in contact with the developer over a period of time regarding completion of the sidewalk requirements. There has always been the "tug and pull" that the neighborhood does not want the sidewalk constructed, but the final plat requirements require that it be built. A number of years ago, there was discussion by the neighborhood that they would come forward with a waiver request, but that was never formally filed, so we are here today because the city has asked that the requirements of the final plat be completed. The developer will have to complete the sidewalk and Babl would have to express his concerns as to how it will meet his property. The city does not have direct design or construction control of the sidewalk or the impact on the Babl property.

Francis inquired as to the height difference from the time you strip off the land versus where you have to put up a retaining wall. Kroos suggested that it somewhat becomes a question of the amount of effort they want to make to minimize the drop in grade through the area. The City does have certain design criteria when building a sidewalk along the street, i.e. running slope of 5%. Greater than 5% is considered a ramp. From the perspective of ADA, in this situation we do not believe that this sidewalk needs to be constructed to ADA accessibility. As long as there is another accessible route to minimize the slope and increase the function of the sidewalk, Public Works would recommend that they do enough grading to make it comfortable for people using the sidewalk. With regard to the height difference, you could cut six to eight to twelve inches toward the top and fill on down a little bit and as the yard crests, you could be down six to twelve inches, but it depends on the amount of work the contractor decides to do.

Gaylor Baird referred to the staff memo listing dozens of examples where these situations exist. She asked Kroos to speak to how exceptional or typical this instance is relative to other places in the community. Kroos stated that this is a somewhat unique situation because there is a significant area of outlot. Most pedestrian easements do lie on private property and most are built at grade. There are some locations that exceed the grade in this situation. You have locations where yards will dive off and go into the next yard. Public Works does not directly supervise the construction of these sidewalks. They just verify that they are constructed. As long as we make the determination that it does not need to be ADA accessible, we will say it meets the intent of having a pedestrian easement. We never survey how many people use it. Most property owners will say there is very limited use. This is not an uncommon situation.

Sunderman inquired as to where the responsibility lies in the event this sidewalk is constructed and needs to be replaced. Kroos stated that generally, the final plat conditions stipulate that as the area develops, the developer is responsible for all improvements. At such time that there is a certain degree of buildout, the developer has the ability to work with the neighborhood and create a homeowners association. At that time, the obligation for sidewalk repair and maintenance would fall on the homeowners association.

Cornelius asked staff to clarify the potential for development of the surrounding area. Cajka stated that there probably will not be any other development around this area because it is owned by the NRD and due to the saline wetlands. Wetlands and open space continue to the north. Although the existing property owners have opposed this sidewalk being installed, the Planning Department needs to look further into the future. Typically, a homeowner stays in their home less than 10 years, so although these homeowners don't want it, potential future property owners may desire it.

Partington suggested that if the sidewalk is not present when future homeowners make decision to purchase, that is probably not a factor to consider. If the sidewalk is not present 20 years from now and someone purchases a home, they will know the sidewalk is not there so they are not being deprived of anything.

Response by the Applicant

Biernbaum pointed out that the sidewalk was shown on the plat map in 1996. In 1996, none of the homeowners in the association owned any of these properties. The homeowners association was created in 2003, and the association was not aware of the sidewalk. When they became aware, there was a vote to request that the sidewalk not be constructed but they never followed through with a formal waiver request. The homeowners association always thought that the sidewalk had been waived, and when they found out that it was not waived, they immediately applied for this waiver.

Biernbaum also submitted that this situation is different from a lot of the sidewalk easements in this town. In this situation, this feels like a sidewalk going from nowhere to nowhere – it is a shortcut for 30-40 homes. We do see the big picture. The area around us is a federally protected wetland. That is part of the reason the property owners purchased these lots. This is a unique situation in its own way. The park is not centrally located, and the sidewalk would not go straight to the high school.

Gaylor Baird recalled that the cost of the sidewalk maintenance would result in roughly a $5 increase per household per year. Biernbaum agreed, but that is just for snow removal and extra mowing. It does not include future cost of replacement or any grading issues. The homeowners association has not raised their dues in nine years, but there must be a 2/3 vote to raise the dues, which means it would take 156 homes to vote in favor of raising the dues. This is almost impossible. It is a hot topic and lots of people would be very much against it, especially for a structure they do not want in the first place.

Francis asked how many of the homeowners were opposed to the sidewalk. Biernbaum did not have the number. That vote was in 2005 and she was not on the board at that time.

ACTION BY PLANNING COMMISSION September 22, 2010

Taylor moved to approve the waiver of the sidewalk, seconded by Larson.

Taylor indicated that he was pretty much convinced at the last meeting to approve this waiver and his mind has not changed. He does not like that this sidewalk would not meet the ADA requirements. He is disappointed that the grade being in excess of 10% was not pointed out previously. He believes it is the role of the Planning Commission to be sensitive and advocate as an ombudsman, so to speak, for situations such as this. We are in a situation where the position of the staff and the developer is in conflict with the desires of the neighborhood. He does not believe the construction of this sidewalk has much future interest or future vision in mind. With there being no future development anticipated, it is his opinion that all the reasons and purposes for denying the waiver have been tossed aside. The people living in the area will suffer even more if we construct this sidewalk. He believes that the construction of the sidewalk will exacerbate the problem and make it

worse. He agrees that the construction of this sidewalk is just not a good idea. He also appreciates the wildlife and does not want to see that disturbed or lost.

Larson stated that he will support the waiver. This would be a rather short sidewalk that is not needed and not desired. There is overwhelming testimony to waive the requirement; there was no testimony in opposition to the waiver, so he does not see any reason whatsoever to deny the request for a waiver.

Esseks stated that he will vote against the motion. We have a policy of encouraging connectivity. This sidewalk has that purpose. We were told that there are similar sidewalks on private land with grades that are 10-15 percent. Mr. Kroos is a professional in this area and believes that this sidewalk can be built at 8-10 percent. We cannot deny a policy that is a connectivity using sidewalks of this nature unless there is a really good reason, such as a clear danger to public safety. Esseks believes that Mr. Kroos has made a persuasive case that the sidewalk is not going to significantly increase the drainage problem and that it is feasible to build even if Mr. Babl will not allow more easement area on either side. He does not believe we can deny the principle of connectivity by approving this waiver on the grounds that have been presented so far, i.e. the homeowners association dues cannot be raised or a neighboring landowner will not allow enough land for a more gradual slope from the property down to the sidewalk. We have to have a really good argument to grant this waiver. He knows that the people in this area say they do not want the sidewalk, but folks in the future may find it very useful. They cannot walk from the sidewalk into the wetlands, but they can walk on the sidewalk and see the wetlands. He does not believe there are grounds for rejecting the policy of connectivity in this case.

Francis indicated that previously she probably would have voted to deny the waiver, but after hearing about the grade and the fact that this sidewalk is not going to be ADA accessible, she does not see the point of building a sidewalk that is not ADA accessible. Why go to that expense? She is concerned about the homeowner who spent $3,000 taking care of a drainage issue that the developer should have done better on in the first place. Today's arguments were much more convincing to her than at the previous meeting.

Partington suggested that whichever way this goes, the cost is not going to be great. And whichever way it goes, the liability is not going to change much. But with a 10% grade sidewalk, there are going to be people falling when it is wet or icy. He appreciates the connectivity argument, but we are providing connectivity for the benefit of the people in the neighborhood and those in the future. In this case, it does not seem to be an issue since they don't want it. He is making his decision based on his view that the people who live in that neighborhood and know it the best are in a better position to make this decision than we as a commission.

Cornelius reminded the Commission that this is a request to waive the construction of the sidewalk, not the pedestrian easement. The easement will still be there. We are talking about a planning principle of connectivity that we codified as a standard for the block

length, and that is what this easement and requirement for a sidewalk is intended to address. In order to accommodate the waiver, we have to examine unique circumstances surrounding this application. What are the unique circumstances that would outweigh the planning principle? We've talked about grade and have heard from a professional that a sidewalk on this grade is feasible; however, we have heard that by the requirements of ADA, it is not something that could be built in a different situation. We have heard about drainage problems from property owners; however, we have heard from staff that the sidewalk itself will not create tremendous drainage problems. What is unique to Cornelius about this situation is that there is little to no chance that there will be further development in the area. Further, it seems as though there is no interest in this connectivity by the people who are on the ground now. There is a concern about liability, and there is the issue of cost, but the overriding issue appears to be that this sidewalk would serve no great purpose in this case.

Gaylor Baird inquired whether Cornelius is suggesting that connectivity is not as significant when it serves fewer people. Cornelius responded, pointing out that this line was drawn on a map in 1996 to serve a principle of connectivity. We have since built out what was drawn on that map except for that line and there are unlikely to be other lines on this map in the future. This line that was drawn to serve a purpose, ultimately does not even serve the purpose it was intended to serve in this case because there will not be further development around it to drive the use of the sidewalk. People that live there do not believe it will be heavily used or used for less than constructive purposes. It is simply a sidewalk that is three lot depths long that cuts off a peninsula of houses in this cul-de-sac development. The people that live around it say it won't serve any purpose for them. It would impose costs on them. It doesn't really serve the purpose for which it was drawn on the map.

Gaylor Baird asked Cornelius if, according to his logic, he therefore views this application as a unique set of circumstances and that the decision to grant the sidewalk waiver does not establish a precedent. Cornelius clarified that, yes, this is his position

Sunderman agrees that this is a unique circumstance. There is no development that is going to occur to the east – what's there is there; and there is overwhelming support from the neighborhood. The slope is excessive – doable but excessive; and he has a concern as to whether the sidewalk will stand up over time. It is a drainage way and over time there is going to be a lot of moisture and heating and freezing will break it up quickly. He appreciates today's testimony and the staff testimony. He would have voted against the motion last week, but he will vote in favor today.

Motion to approve the waiver carried 7-1 (Taylor, Larson, Partington, Gaylor Baird, Cornelius, Francis and Sunderman voting ‘yes’; Esseks voting ‘no’; Lust absent). <u>This is final action, unless appealed to the City Council within 14 days.</u>

There being no further business, the meeting was adjourned at 2:20 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on October 6, 2010.

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