MEETING RECORD

NAME OF GROUP:	PLANNING COMMISSION
DATE, TIME AND PLACE OF MEETING:	Wednesday, March 21, 2012, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska
MEMBERS IN ATTENDANCE:	Leirion Gaylor Baird, Greg Butcher, Michael Cornelius, Dick Esseks, Wendy Francis, Chris Hove, Jeanelle Lust, Lynn Sunderman and Ken Weber; Steve Henrichsen, Brian Will, Tom Cajka, Rashi Jain, Jean Preister and Teresa McKinstry of the Planning Department; media and other interested citizens.
STATED PURPOSE OF MEETING:	Regular Planning Commission Meeting

Vice-Chair Wendy Francis called the meeting to order and acknowledged the posting of the Open Meetings Act in the back of the room.

Francis then requested a motion approving the minutes for the regular meeting held March 7, 2012, as amended. Motion for approval, as amended, made by Sunderman, seconded by Butcher and carried 7-0: Gaylor Baird, Butcher, Esseks, Francis, Hove, Sunderman and Weber voting 'yes'; Lust abstaining; Cornelius absent.

CONSENT AGENDA
PUBLIC HEARING & ADMINISTRATIVE ACTION
BEFORE PLANNING COMMISSION: **March 21, 2012**

Members present: Gaylor Baird, Butcher, Esseks, Francis, Hove, Lust, Sunderman and Weber; Cornelius declared a conflict of interest

The Consent Agenda consisted of the following items: **CHANGE OF ZONE NO. 12003 and USE PERMIT NO. 82C.**

Ex Parte Communications: None

Item No. 1.1, Change of Zone No. 12003, and Item No. 1.2, Use Permit No. 82C, were removed from the Consent Agenda and scheduled for separate public hearing.

There were no requests for deferral.

USE PERMIT NO. 82C
TO MODIFY THE LAND USE AND
PARKING REQUIREMENTS,
ON PROPERTY GENERALLY LOCATED
AT SOUTH 14TH STREET AND OLD CHENEY ROAD.
PUBLIC HEARING BEFORE PLANNING COMMISSION: March 21, 2012

Members present: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Lust and Francis; Cornelius declared a conflict of interest.

This application was removed from the Consent Agenda for testimony in opposition.

There were no ex parte communications disclosed.

Staff recommendation: Conditional approval.

Staff presentation: **Rashi Jain of Planning staff** stated that this is an application to amend the existing use permit to add medical office use, which was specifically excluded as a permitted use in 1994, due to parking and traffic issues. The applicant for this proposed medical office use (dental office) has proven that they will have enough parking spaces without removing any of the landscaping on the site. Old Cheney Road at 14th Street has been improved to take care of the traffic issues. Thus the staff is recommending conditional approval.

Proponents

1. Mark Palmer of Olsson Associates and the applicant, **Dr. Dustin Bailey,** the dentist proposing to use this office building, appeared to answer any questions.

Support

1. David Bargen, Rembolt Ludtke Law Firm, appeared on behalf of the proposed seller in this transaction in support of the change in the use permit. The use permit is consistent with the Comprehensive Plan and the Lincoln Municipal Code. The original restrictions were put in place on medical facilities because of parking and the traffic issues at 14th Street and Old Cheney Road. Those issues have been dealt with and the five parking stalls will be added.

Opposition

1. Tom Duden, 4700 Happy Hollow Lane, appeared on behalf of **Design Data,** in opposition. The use restrictions were made some 14-15 years ago. In addition, there are restrictive covenants in place, to which the City agreed, that barred the use of medical, dental or other health care professional offices within the office park. The purchaser of this

12 acres has spent a lot of money investing in the landscaping and the design of the office park. It is aesthetically pleasing with the park-like setting, the ponds and stream that are available and makes a tremendous work environment for the staff. Design Data is opposed based on these issues and based on the fact that this change only came to Design Data's attention recently and they have not had a lot of time to prepare. Any changes that would be done to parking would also affect the roadway, the parking lot drainage and the irrigation system that is in place. The fire hydrant system within the office park is private and there would also be a cost to change that. A lot of money has been invested in the landscaping. The proposed parking will be right in the front yard at 1601 Old Cheney Road, changing the appearance of that building and the aesthetics of the front of that facility, and that is just not what was planned when Design Data built their facility on this property. The parking lots all drain into the ponds rather than the roadway. Design Data has done a lot to protect the office park from the neighborhood. Design Data is opposed to making any significant changes to the front yard of any existing structure.

Duden submitted copies of the restrictive covenants, dated April 2, 1996, pointing out that #23 states:

> All lots within the Properties shall be used for commercial office purposes; however, no Lot shall be used for medical, dental or other health care professional offices. Only one (1) building may be constructed on each Lot within the Properties.

Design Data is contesting this application for amendment based on the existing restrictive covenants.

Gaylor Baird inquired whether there were other reasons for restricting medical offices besides the parking. Duden recalled that there were concerns about having an x-ray machine in the area that might affect the housing to the south, but he is not sure that those same concerns exist now since technology has changed.

Esseks inquired whether there is a provision in the covenants for modification. Duden answered in the affirmative, stating that it takes the agreement of the two lot owners. Design Data owns two lots and Bob Bennie owns one.

Rick Peo of the City Law Department approached and advised that he does not see a signature by the City on the restrictive covenants. Typically, the city only executes restrictive covenants to approve the transfer of maintenance responsibility from the developer to an owners association. The City does not typically sign restrictions on the buildings and uses, but only to make sure that developed improvements are maintained and assumed by an owners association.

Peo went on to state that enforcement of covenants is by the property owner and court of law by bringing an injunction.

Sunderman confirmed that the covenants are considered a private agreement between the property owners. Peo agreed that to be the typical case. If the city does sign, it is normally just for a minor provision for maintenance of the common area. He does not see the city's signature on these covenants.

Sunderman then confirmed that if the owners disagree, they could appeal the Planning Commission action to the City Council, but could also bring action in court of law on restrictive covenants if the use is actually commenced. Peo agreed.

Lust asked Peo to respond to #26 of the covenants:

> City Requirements: All buildings and improvements within the Properties shall be constructed in conformity with the applicable building codes of the City of Lincoln, Nebraska, and Use Permit #82, Resolution No. PC-00253 adopted by the Lincoln-Lancaster County Planning Commission on November 8, 1995 ("Use Permit"). No amendment to the Use Permit other than a minor increase in permissible floor area not to exceed 5 percent (5%) and any ancillary amendments to the Use Permit site plan may be applied for without the consent of the Members of the Association other than the Member(s) seeking such amendment.

Peo stated that would not be a city requirement that the city imposes, but just a statement of what the city had done.

Lust then confirmed that the Planning Commission decision is whether the use permit is appropriate. The restrictive covenants is a decision between the property owners. Peo agreed.

2. Bill Morris, Morris and Titus Law Firm, appeared on behalf of **Design Data**, said law firm being involved in the covenants issue. When this office park was originally created, the other tenant was Landscapes Unlimited, and they worked carefully with Design Data to create a magnificent office park. Landscapes Unlimited had a great interest because they sold landscapes. Design Data and Landscapes Unlimited lived happily together in a covenant situation. It is unfortunate that the way the covenants were written at the time because as long as Design Data owns both of those lots, it only has one vote. Landscapes Unlimited sold to Mr. Bennie, and at that time there were differences in vision with respect to the maintenance of the office park which resulted in some litigation where Mr. Bennie prevailed. Now, we are at a point where Design Data has a great difference of opinion and view and vision with respect to the future of the office park. Bennie wants to sell to a dentist and the dentist wants to build parking which will change the vision of this park. We don't know what the other affects might be.

Morris advised that Design Data was not approached or asked to review these plans in advance. Since receiving notice, they have engaged in negotiations with respect to this application and those negotiations have broken down. Design Data's view is that the status

quo should be maintained because Bennie knew what the covenants were when he purchased the property. "Now we're being asked to change the game." This is a private office park, developed at huge cost by Design Data Corporation, which one person is now asking to change to suit his particular needs.

Lust sought confirmation of the voting issue. Does one vote win under the current covenants? Morris stated that if it is a tie, the status quo remains. It takes both tenants to change the status quo and to change the restrictive covenants.

Butcher asked whether the prior litigation being referred to was in regard to the restrictive covenants. Morris answered in the affirmative. Design Data's interpretation will allow Design Data to unilaterally change the restrictive covenants from one vote per owner to one vote per lot. Since Design Data had two lots, they would have two votes. Bennie opposed that and prevailed in the district court, leaving the status quo. We have before us the original covenants, for which Bennie advocated in court when Design Data tried to change them.

Esseks asked for clarification of the Planning Commission's role. Jain explained that this is a use permit in O-3 Office District where medical office is allowed by right. In 1995, medical office was disallowed in this use permit because of parking and transportation issues, which are no longer issues. The conditions of approval require that the applicant not disturb the existing landscaping. From what she perceives, this application complies with the Comprehensive Plan and the Lincoln Municipal Code. It is an allowed use, and there is no reason why we would oppose it.

Response by the Applicant

Palmer reiterated that this is five parking stalls with curb and gutter roads. Drainage will not be an issue. There are three trees that would be relocated. If they cannot be moved, new trees would be planted. The future site plan for this development does show an additional building with a parking lot about the same distance from the road. We are doing this to meet the requirements for a dentist office and meeting the medical office requirements for parking, and will work with staff to meet the city's requirements.

Bargen pointed out that the court of appeals actually struck down Design Data's attempt to unilaterally amend the covenants without input from Bennie. That is a private matter between the parties and the applicant will deal with that. The role today is on the use permit. The restrictive covenants were created with the original use permit because of the parking issues and traffic concerns. Doctors offices are located throughout towns near residential districts and the use of the x-rays is not be an issue.

Again, with regard to aesthetics, Bargen pointed out that it is five parking stalls. The staff does not believe it is going to impact the aesthetics. It is not going to ruin the pond or the acres of green grass. The issues of the covenants are between the parties. It is a private

issue and irrelevant to the Planning Commission decision today. The covenants were based on the original use permit.

Gaylor Baird asked for confirmation from the City Attorney that the issue of the covenants is irrelevant to the Planning Commission decision and outside the scope of the Planning Commission decision. Peo stated that it is outside the scope of the Planning Commission. The city codes and city design standards are the city's voice. The restrictive covenants are private between the parties. The Planning Commission action does not eliminate them from having protective covenants.

ACTION BY PLANNING COMMISSION: March 21, 2012

Esseks made a motion to approve the staff recommendation of conditional approval, seconded by Sunderman.

Lust commented that she wishes the Planning Commission could order the parties to get along, "but that's not our role, nor is it appropriate to be our role." The decision before us is whether a use permit is appropriate. We have to make that decision based on the boundaries of the role of the Planning Commission, so she will vote in favor even though she would like the neighborhood to be in harmony.

If there were evidence that the proposed land use change would substantially hurt the interests of the neighbors, including those in the office park and adjacent, Esseks would have to take a stand and say this is not in the public interest. But, the arguments presented so far show that the public interest, including the interests of the neighboring property owner, are not in substantial jeopardy.

Weber reiterated that the Planning Commission action approving this use permit does not preclude any legal activity on either side.

Although sympathetic to the restrictive covenants, Francis agreed that to be beyond the scope of the Planning Commission, and she does not believe five parking spaces is going to make a big impact to this business park.

Motion for conditional approval carried 8-0: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Lust and Francis voting 'yes'; Cornelius declared a conflict of interest. This is final action unless appealed to the City Council within 14 days.

CHANGE OF ZONE NO. 12003
FROM I-1 INDUSTRIAL DISTRICT TO
P PUBLIC USE DISTRICT, O-2 SUBURBAN OFFICE DISTRICT,
B-4 LINCOLN CENTER BUSINESS DISTRICT AND
I-2 INDUSTRIAL PARK DISTRICT;
FROM H-3 HIGHWAY COMMERCIAL DISTRICT
TO P PUBLIC USE DISTRICT;
AND FROM B-4 LINCOLN CENTER BUSINESS DISTRICT
TO P PUBLIC USE DISTRICT,
ON PROPERTY GENERALLY LOCATED AT
NORTH 9TH STREET TO N. 1ST STREET AND
O STREET TO CHARLESTON STREET.
PUBLIC HEARING BEFORE PLANNING COMMISSION: March 21, 2012

Members present: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Lust, Francis and Cornelius.

This application was removed from the Consent Agenda due to new information.

There were no ex parte communications disclosed.

Staff recommendation: Approval, as revised.

Staff presentation: **Tom Cajka of Planning staff** submitted a revised staff recommendation in response to a request from Mike Rierden on behalf of Cotswold Management LLC, to remove their lot from the boundaries of this change of zone request. The lot in question is located on the south end of the boundary of this change of zone. It was proposed to be changed from I-1 to B-4, but at this time the owner would like it to remain I-1 Industrial. The city has had conversations with them in the past and will continue to talk in the future about changing that parcel to B-4 at a later date to be in context with the rest of the area.

This change of zone is brought by the City as part of the West Haymarket development. The area includes the new arena site and the relocated railroad corridor. The majority of the property within this change of zone is either owned by the City, the Lower Platte South NRD, the West Haymarket JPA, or the BNSF Railroad. There are a few exceptions in private ownership.

The largest area being changed is from I-1 Industrial to P Public Use, owned by the City and the Lower Platte South NRD.

The next largest area is from I-1 to B-4, approximately 60 acres, consisting mainly of the blocks south of the location of the new arena. B-4 is necessary to do residential development, which is not allowed in I-1.

The next largest area is the relocated railroad corridor, changing from I-1 to I-2, the major reason being that I-2 does not allow off-premise signs/billboards.

This change of zone is a vital and necessary step in the redevelopment of the West Haymarket area.

Gaylor Baird inquired whether there were responses from any of the other private property owners. Cajka stated that there were none.

Butcher inquired about the notification methods. Cajka advised that the Planning Department notifies all property owners within the boundary of the application and within 200' outside the boundaries of the application.

Cornelius inquired whether the revised recommendation creates an island of I-1 in the middle of B-4. Cajka stated that it does not. The property being removed from the change of zone application is on the edge and on the southern boundary. The majority of the property to the south is still zoned I-1. It is an office building at the current time.

Gaylor Baird inquired about the R-4 zoning to the west and how it may be impacted. **Steve Henrichsen** of Planning staff pointed to the I-1 zoning on the map showing that basically the entire area is presently zoned I-1. There is a very small area – just a couple of blocks -- of R-4 that is completely surrounded by I-1. The focus was really to look at the redevelopment of the West Haymarket and then a large area of I-1 becoming public use. He acknowledged that it is a challenge in terms of the little blocks of R-4 being completely surrounded by I-1.

There was no testimony in opposition.

ACTION BY PLANNING COMMISSION: March 21, 2012

Hove moved approval of the revised staff recommendation, seconded by Sunderman and carried 9-0: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Cornelius, Lust and Francis voting 'yes'. This is a recommendation to the City Council.

SPECIAL PERMIT NO. 06001A,
AN AMENDMENT TO THE GRAND TERRACE COMMUNITY UNIT PLAN,
ON PROPERTY GENERALLY LOCATED AT
SOUTH 84TH STREET AND HIGHWAY 2.
CONT'D PUBLIC HEARING BEFORE PLANNING COMMISSION: March 21, 2012

Members present: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Lust, Francis and Cornelius.

There were no ex parte communications disclosed.

Staff recommendation: Conditional approval, as revised.

Staff presentation: **Brian Will of Planning staff** reminded the Commission that this application was on the agenda in February and the applicant requested a six week delay to attempt to resolve some concerns raised by the neighbors.

This is an amendment to an existing special permit for the Grand Terrace Community Unit Plan (CUP), consisting of showing a lot layout for an additional 3.31 acres to now be included in the existing special permit. This is all being driven by the development now occurring in Grand Terrace. The lots are being final platted consistent with the original special permit approved in 2006. One of the conditions of that original CUP was that a street connection be made to the north, with street connections being shown to the west and south as well. The location of that north street connection was left open as an option. Portsche Lane terminates at the north boundary of Grand Terrace. At that time, the developer was not sure whether that connection was going to work or some other future street alignment projecting to the north. It was optional with the original CUP that either Portsche Lane be connected where it currently terminates or at some other location.

The motion to amend submitted by the applicant relates to this street connection. South 79th Street is going to be extended to the north, which means it will cross property owned by Stephen Nickel. As part of that street alignment, a "conceptual" lot layout for the Nickel property is also being shown, and the Nickel property is only being brought in for planning purposes. It will still have to be annexed and rezoned before it can be developed. This at least answers the question of how the street connection to the north is going to be made.

Will also explained that Lot 16 is an 8' wide lot extending along the north boundary of Grand Terrace. Lot 16 was created a long time ago and we can only speculate as to why, but presumably to preserve some sort of development rights. That property is now in the ownership of the developer of Grand Terrace and is now being included. The motion to amend submitted by the applicant also relates to how that outlot is going to be divided. It will essentially be divided into thirds, with a western portion being deeded to the Nickels. The staff does not object to the motion to amend regarding Lot 16. It is more of a mechanism for the private property owners involved to reach some agreement.

The staff has submitted proposed amendments to the conditions of approval in response to the motion to amend by the applicant. Staff views this as a fairly minor amendment to the CUP.

Proponents

1. Mike Eckert, Civil Design Group, appeared on behalf of the developer of Grand Terrace. This CUP was originally approved in 2006 and there were references to the different options for the roadway. Earlier this year, the developer was proceeding with a

final plat and Public Works wanted them to show some connection if they were not going to connect to Portsche Lane. The developer began working with Mr. Nickel on his land to make the connection to South 79th Street. The entire eastern half of the development is going to be reliant on a sewer line that comes from Highway 2 down through the Nickel property, and they have to bring a water line in that general vicinity. In working with Nickel, they decided to locate a street in that same location.

Eckert went on to state that the developer was under the assumption that all of the neighbors understood that one of these two road connections would take place in the future when the CUP was approved in 2006, and did not realize there would be opposition to the road connection. They did have a neighborhood meeting and it was close to a unanimous decision that the neighbors would prefer the 79th Street connection versus Portsche Lane, mostly because it would occur later. Eckert commended staff for being very creative in suggesting that the Nickel land be brought into the CUP to provide some unused density to show these seven lots in the CUP so that they would not have to annex or change the zoning at this time. Nickel has no intentions of subdividing his land at this point in time so this will work out good for the neighbors.

Eckert explained that the 8' strip of land was owned by the former developer of Grand Terrace. Eckert advised that the motion to amend submitted includes language that refers to a map showing that Nickel gets the area shown in blue; Thelen gets the green; Parks & Recreation gets the pink, and whenever either the Nickel or Thelen property is subdivided, they must integrate that 8' strip into their lots.

Lust asked for clarification of the street access connection. Eckert stated that the temporary turnaround at Portsche Lane will stay in place; if they subdivide in the future, they will have to put in a conforming cul-de-sac; the 8' strip provides separation between the developers to the south and that right-of-way.

Esseks inquired whether the owner has agreed to the street connection. Eckert stated that Nickel is in agreement with this CUP (which is more or less a preliminary plat) for a future vision of what his land may look like, but more so he is saying that this is where he agrees the road will be. Nickel is technically the applicant on this amendment. Eckert represents the developer of the CUP.

Francis asked Eckert to address the most recent letter received in opposition relating to the street connection and the drainage issues. She assumes that the 79th Street connection should eliminate his concerns. Eckert believes he has explained why the Portsche Lane connection is not being made. Eckert believes that Mr. Irwin has his own set of covenants and has no standing to oppose covenants on the Nickel land because he is not a part of that set of covenants. Nevertheless that is a private issue.

There was no testimony in opposition.

Esseks pointed out that there are five different residents in this area who have submitted letters of concern or protest, their major concern being that they will have to hook into city water and sewer and be assessed for it. He agrees that they do not have the right to say no to this development, but he is hopeful that the Planning Department will inform these property owners that they can get by with their existing sewer and water. Will acknowledged that he has talked with several of those neighbors and has explained that this development does not change any circumstance out there today relative to annexation. It does not make it any more or less likely that there will be any forced or voluntary annexations associated with this.

ACTION BY PLANNING COMMISSION: March 21, 2012

Lust moved to approve the staff recommendation of conditional approval, as revised based on the applicant's motion to amend, seconded by Francis.

Cornelius stated that this is a relatively minor revision that encountered some "hiccups" with surrounding property owners, but it appears that the matters of connectivity and annexation have been addressed. He believes is this is a reasonable application.

Motion for conditional approval, as revised, carried 9-0: Gaylor Baird, Weber, Sunderman, Butcher, Hove, Esseks, Cornelius, Lust and Francis voting 'yes'. This is final action, unless appealed to the City Council within 14 days.

There being no further business, the meeting was adjourned at 2:00 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on April 4, 2012.

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