

## **FACTSHEET**

**TITLE: SPECIAL PERMIT NO. 12001**, requested by Umbay Corporation, for authority to develop a health care facility for an assisted living facility, on property generally located at S. Coddington and West O Street a/k/a 2231 West O Street.

**SPONSOR:** Planning Department

**BOARD/COMMITTEE:** Planning Commission  
Public Hearing: 02/08/12  
Administrative Action: 02/08/12

**STAFF RECOMMENDATION:** Denial.

**RECOMMENDATION:** Conditional Approval (5-2: Hove, Sunderman, Butcher, Esseks and Lust voting 'yes'; Gaylor Baird and Cornelius voting 'no'; Weber and Francis absent) **Resolution No. PC-01267**

### **FINDINGS OF FACT:**

1. This is a request for authority to convert a hotel to a health care facility, pursuant to § 27.63.080 of the Lincoln Municipal Code, for an assisted living facility providing services to individuals of all ages who have cognitive, intellectual or developmental disabilities. The property is located at 2231 West O Street and is zoned H-3 Highway Commercial, with I-1 Industrial zoning located directly to the south.
2. The operator of the proposed assisted living facility made improvements to the hotel structure for this assisted living facility unaware that a special permit would be required because the operator is a "for-profit" business rather than a "nonprofit" business. They would be allowed this use by right if they were a "nonprofit". (See Analysis #2 - #4, p.9.)
3. The staff recommendation to deny this special permit is based upon the "Analysis" as set forth on p.8-11, concluding that the property is surrounded by H-3 zoning which is surrounded by I-1 zoning, and it is not appropriate to create a special permit for a health care facility that is residential in nature and caters to people with special needs in an area with increased potential for exposure to hazardous materials and chemicals. Permitting more residential uses near industrial zoning districts is not in conformance with the Comprehensive Plan. (Also See Health Department comments in Analysis #11 on page 10.) The staff presentation is found on p.13-14.
4. The applicant's testimony is found on p.14-16, suggesting that these uses are difficult to site in our community; not everyone want them as their neighbor; and it is a challenge to find affordable locations at which these residential uses can become a part of our community. The applicant submitted that the operator has already made \$150,000 of improvements to the existing hotel structure; the proximity of this property to industrial uses is not an overwhelming risk factor; it is one that should not disqualify this special permit; and the applicant has approval of an evacuation plan protecting the residents which has been approved by the Health Department. The applicant suggested that the issue is the "level of incompatibility". Other testimony in support is found on p.16.
5. There was no testimony in opposition; however, the record consists of a letter in opposition from Gary and Carolyn Christensen, who have appealed this special permit to the City Council (p.25). The Christensen's own H-3 and I-1 property to the west and south of the subject site, their major concern being the potential liability of having a health care facility so close to their commercial property and the impact upon future lot buyers who will be concerned with liability and personal safety of the residents.

6. The Planning Commission discussion with staff is found on p.16-18, and the response by the applicant is found on p.19.
7. On February 8, 2012, the Planning Commission voted 5-2 to disagree with the staff recommendation and adopted Resolution No. PC-01267 (p.3-5) approving this special permit, with conditions (Hove, Sunderman, Butcher, Esseks and Lust voting 'yes'; Gaylor Baird and Cornelius voting 'no'; Francis and Weber absent). Commissioners Gaylor Baird and Cornelius did not want to continue the compounding of errors and set a precedent; they did not believe the evacuation plan mitigates the larger policy concerns about the location of residential uses near industrial zoned property. Those commissioners voting in favor were swayed by the fact that this facility could be located at this location by right if it changed its corporate structure to "nonprofit" and that the residents would be protected by the approved evacuation plan (See Minutes, p.19-20).
8. On February 17, 2012, a letter of appeal was filed by Gary Christensen (p.2).

**FACTSHEET PREPARED BY:** Jean L. Preister

**DATE:** February 27, 2012

**REVIEWED BY:** \_\_\_\_\_

**DATE:** February 27, 2012

**REFERENCE NUMBER:** FS\CC\2012\SP12001 Appeal

**APPEAL**  
of Planning Commission action  
to City Council

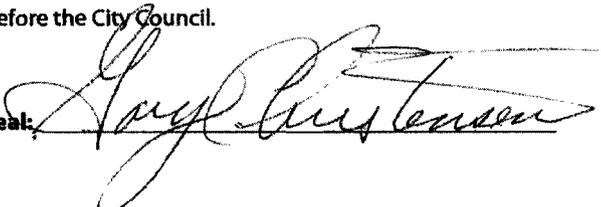
Today's Date 2/17/2012 (this form must be received by the City Clerk within 14 days of the action by the Planning Commission)

To: City Clerk  
Joan Ross  
555 S. 10th St., Ste. 103  
Lincoln NE 68508  
402-441-7436  
jross@lincoln.ne.gov

Dear Clerk:

I am submitting this letter of appeal to Resolution No. 01267, adopted by the Lincoln-Lancaster County Planning Commission on (Date) 02/08/2012, approving Special Permit No. 12001 on property generally located at 2231 W. 'O' St., Lincoln, NE

Please advise me of the hearing date before the City Council.

Signature of person requesting appeal: 

Printed Name Gary Christensen

Address 6830 Shadow Ridge Rd., Lincoln, NE 68512

Street

City

State

ZIP

Phone Number 402 - 217-5400

Email shadowridgetradingco@windstream.net

cc: Planning Department  
Jean Preister  
555 S. 10th St., Ste. 213  
Lincoln NE 68508  
402-441-6365  
jpreister@lincoln.ne.gov

RESOLUTION NO. PC- 01267

SPECIAL PERMIT NO. 12001

1           WHEREAS, Umbay Corporation has submitted an application designated as  
2 Special Permit No. 12001 for authority to develop a health care facility for an assisted living  
3 facility on property generally located at S. Coddington and West O Street a/k/a 2231 West O  
4 Street, and legally described to wit:

5           The remaining portion of Lot 105 I.T., located in the Northwest  
6 Quarter of Section 28, township 10 North, Range 6 East of the 6th  
7 P.M., Lancaster County, Nebraska;

8           WHEREAS, the Lincoln City-Lancaster County Planning Commission has held a  
9 public hearing on said application; and

10           WHEREAS, the community as a whole, the surrounding neighborhood, and the  
11 real property adjacent to the area included within the site plan for this health care facility will not  
12 be adversely affected by granting such a permit; and

13           WHEREAS, said site plan together with the terms and conditions hereinafter set  
14 forth are consistent with the comprehensive plan of the City of Lincoln and with the intent and  
15 purpose of Title 27 of the Lincoln Municipal Code to promote the public health, safety, and  
16 general welfare.

17           NOW, THEREFORE, BE IT RESOLVED by the Lincoln City-Lancaster County  
18 Planning Commission of Lincoln, Nebraska:

1           That the application of Umbay Corporation, hereinafter referred to as  
2 "Permittee", to develop a health care facility for an assisted living facility be and the same is  
3 hereby granted under the provisions of Section 27.63.080 the Lincoln Municipal Code upon  
4 condition that construction of said health care facility be in substantial compliance with said  
5 application, the site plan, and the following additional express terms, conditions, and require-  
6 ments:

7           1.       This permit approves the use of the existing building on the premises as  
8 a health care facility for an assisted living facility.

9           2.       Before receiving building permits the Permittee shall cause to be  
10 prepared and submitted to the Planning Department a revised and reproducible final site plan  
11 including five copies showing the following revisions:

12                   a.       Provide an evacuation plan to the satisfaction of the Health  
13                   Department.

14                   b.       Add to the General Notes, "Signs need not be shown on this site  
15                   plan but need to be in compliance with Chapter 27.69 of the  
16                   Lincoln Zoning Ordinance and must be approved by the Building  
17                   & Safety Department prior to installation."

18                   c.       Identify the odd line shown on the south end of the parking lot.

19           3.       Before the issuance of a building permit:

20                   a.       All development and construction must substantially comply with  
21                   the approved plans.

22                   b.       The Permittee shall provide verification from the Register of  
23                   Deeds that the letter of acceptance as required by the approval of  
24                   the special permit has been recorded.

25                   c.       Remove all nonconforming signs on the premises.

26           4.       Before occupying buildings or starting the operation all development and  
27 construction shall substantially comply with the approved plans.

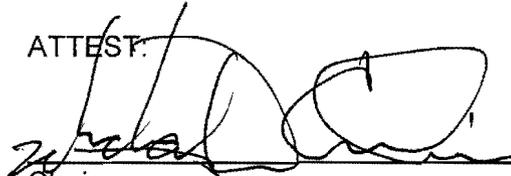
1           5.       The physical location of all setbacks and yards, buildings, parking and  
2 circulation elements, and similar matters must be in substantial compliance with the location of  
3 said items as shown on the approved site plan.

4           6.       The terms, conditions, and requirements of this resolution shall be  
5 binding and obligatory upon the Permittee and the Permittee's successors and assigns. The  
6 building official shall report violations to the City Council which may revoke the special permit or  
7 take such other action as may be necessary to gain compliance.

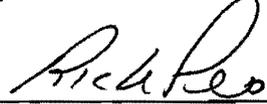
8           7.       The Permittee shall sign and return the letter of acceptance to the City  
9 Clerk. This step should be completed within 60 days following the approval of the special  
10 permit. The City Clerk shall file a copy of the resolution approving the special permit and the  
11 letter of acceptance with the Register of Deeds, filing fees therefore to be paid in advance by  
12 the Permittee. Building permits will not be issued unless the letter of acceptance has been  
13 filed.

14           The foregoing Resolution was approved by the Lincoln City-Lancaster County  
15 Planning Commission on this 8th day of February, 2012.

ATTEST.

  
Chair

Approved as to Form & Legality:

  
\_\_\_\_\_  
Chief Assistant City Attorney

**LINCOLN CITY/LANCASTER COUNTY PLANNING STAFF REPORT**  
**for FEBRUARY 8, 2012 PLANNING COMMISSION MEETING**

**PROJECT #:** Special Permit No. 12001

**PROPOSAL:** A request per Section 27.63.080 for a Health Care Facility

**LOCATION:** Generally located at S. Coddington and West O Street  
Specifically located at 2231 West O Street.

**LAND AREA:** .53 acres more or less

**EXISTING ZONING:** H-3 Highway Commercial District

**WAIVER /MODIFICATION REQUEST:** None Requested

**CONCLUSION:** The current Health Care Facility, is located in an H-3 Highway Commercial district and is located within 300 feet of an industrial zoning district. The applicant suggested the proposed site is as or more suitable than the current location. However, it would not be appropriate to create yet another special permit for a health care facility that is residential in nature and caters to people with special needs in an area with increased potential for exposure to hazardous materials and chemicals. Permitting more residential uses near industrial zoning districts is not in conformance with the Comprehensive Plan.

<b>RECOMMENDATION:</b>	<b>Denial</b>
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**GENERAL INFORMATION:**

**LEGAL DESCRIPTION:** The remaining portion of Lot 105 I.T., located in the NW 1/4 of Section 28-10-6, Lancaster County, Nebraska, generally located at S. Coddington Avenue and West O Street.

**EXISTING LAND USE:** Vacant hotel.

**SURROUNDING LAND USE AND ZONING:**

North: H-3	Highway Commercial District	North of West O Street are 3 vacant commercial lots
South: I-1	Industrial	Vacant
East: H-3	Highway Commercial District	Auto repair facility
West: H-3	Highway Commercial District	Sales office for modular homes

**HISTORY:**

May 1979 The 1979 Zoning update changed this parcel from a split H-2 Highway commercial and K Light Industrial zoning districts to all H-3 Highway commercial zoning district.

**COMPREHENSIVE PLAN SPECIFICATIONS:**

This area is shown as commercial on the future land use plan. (Page 1.8)

Industrial zoning districts should be primarily for industrial uses.(Page 5.18)

**Risk Reduction:** In areas where industrial and residential uses are already close, efforts should focus on changes in the quantity and type of hazardous materials used and on increasing the distance between where hazardous materials are stored and residential districts.

**Notification:** Persons living in close proximity to businesses with hazardous materials should be notified of the hazards. Emergency Planning: Businesses and government agencies should continue to work together on developing and updating Emergency Management Plans for dealing with accidents and emergencies.

**Joint Planning:** Joint planning and health efforts should continue between the Board of Health and Planning Commission. The specific objectives and recommendations already developed should be further reviewed and implemented.(Page 5.18)

The community should plan for sufficient and varied choices for the location of special needs housing. Special needs housing should be encouraged to locate within mixed use commercial centers where it could serve as a transitional use to less intensive residential development and could benefit from closer proximity of services and retail goods within walking distance. (Page 6.2)

Create housing opportunities for residents with special needs throughout the city that are compatible with and integrated into residential neighborhoods.(Page6.2)

Mixed Use Redevelopment Nodes and Corridors should strive to locate: In areas appropriate for residential mixed use redevelopment, outside of areas identified as Industrial Centers and Highway Oriented Commercial Areas in LPlan 2040 to avoid conflicts with health and safety.(Page 6.6)

Medical services, including physical and mental health care services, should be integrated and accessible within the community. (Page 8.2)

Many of the existing medical facilities are located near existing residential neighborhoods and are expected to remain the vital core of health care services in the county and region.(Page 8.2)

**UTILITIES:** Existing

**TRAFFIC ANALYSIS:** West O Street is an Urban Principle Arterial.

**ALTERNATIVE USES:** Although there are other permitted use in the H-3 Highway Commercial zoning district, the existing building is suited for a hotel. Its configuration limits potential alternative uses without demolition of the building.

**ANALYSIS:**

1. Community Supports of Lincoln is an assisted living facility currently located at 4520 N. 56<sup>th</sup> Street in an H-3 Highway Commercial zoning district. It is an assisted living facility that provides services to individuals of all ages who have cognitive, intellectual, or developmental disabilities. This use is classified as is a type of health care facility. They were granted a

special permit for a health care facility at this location in April of 1984. The Special Permit was associated with a text change to allow health care facilities as a special permitted use in the H-3 zoning district. Prior to 1984 Health care facilities were not permitted in H zoning districts. Community Supports current location is located less than 300 feet from an industrial zoning district.

2. Community Supports wanted the potential to add more residential units. In May of 2011 a \$150,000 building permit was taken out on 2231 West O Street to convert a hotel to an assisted living facility where Community Supports would have room to grow. This is in an H-3 Highway Commercial zoning district. The building permit listed this facility as a non-profit organization. Non-profit organizations are a permitted use in the H-3 zoning district.
3. In September of 2011 Community Supports applied for an operating licence through the State of Nebraska Department of Health and Human Services. The State agency contacted the City to confirm that the use had correct zoning. At that time, the City was notified that Community Supports of Lincoln was a for-profit assisted living facility. Because it is a for-profit organization, a special permit for a health care facility would be required for them to operate in the H-3 zoning district.
4. Staff from both the Planning Department and the Health Department met with the applicant in December to discuss the possibilities of obtaining a special permit. The applicant was advised that this was not a good location for an assisted living facility, which is residential in nature, due to its proximity to the I-1 Industrial zoning district. The Health Department strongly recommends keeping residential uses at least 300 feet from industrial zoning districts.
5. Residential uses are not permitted in the H or I zoning districts with the exception of property care takers who function as watchman or security personnel associated with a business.
6. There are various types of health care facilities. They can be either residential or non-residential in nature. Health care facilities include assisted living facilities, hospitals, surgical centers, convalescent homes, nursing homes, and public health clinics. They also include facilities in which sixteen or more disabled people reside while receiving therapy, counseling, or rehabilitation and facilities for out-patient physical, occupational, or vocational therapy or rehabilitation.
7. Health care facilities are allowed by special permit in the H-3 zoning district but none of the other H zoning districts. They are also allowed in the I-1 Industrial zoning district by special permit and in the I-2 and I-3 zoning districts by right. The exception are hospitals which are also a type of health care facility but are not allowed in the I-1 or I-2 zoning districts.
8. Assisted living facilities are generally residential in nature. The term "assisted living facility" is often interchanged with domiciliary care facility. Domiciliary care facilities are very similar to nursing homes or convalescent homes except that they require patients to be 60 years of age or older and require a different special permit with different zoning requirements than health care facilities. Domiciliary care facilities are only allowed in residential zoning districts.

They are not allowed in any commercial or industrial zoning districts. An assisted living facility could be either a domiciliary care facility or a health care facility depending on the age of their residents.

The “Use Groups” proposal will also eliminate the term “nonprofit religious, educational, and philanthropic institution”. This is not really a use but an ownership type. Today there are health care and domiciliary care facilities that call themselves non-profits so that they can locate by right in zoning districts that would otherwise prohibit domiciliary or health care facilities or would require a special permit. By eliminating this term we can eliminate the practice of a use being treated differently based on its ownership or tax status.

9. Planning staff is currently working on a text amendment that would reformat the Zoning Ordinance to reduce redundancies and provide clarity. This text change is called “Use Groups”. As part of that process, the proposal would split health care facilities into two types, residential and non-residential. The amendment would permit, by special permit, health care facilities that are residential in nature in all residential and B zoning districts under the same provisions by which domiciliary care facilities are allowed today.
10. Non-residential health care facilities under “Use Groups” would be allowed in all the H zoning districts, except the H-1 (primarily an auto oriented highway service district). They would also be allowed in the I-3 zoning district (a mixed use campus environment controlled by a use permit) but would be prohibited in the I-1 and I-2 zoning districts.
11. The Lincoln Lancaster County Health Department had the following comments regarding this application for a special permit:

The Lincoln-Lancaster County Health Department (LLCHD) notes that I-1 zoning is located directly south of this proposed health care facility. Historically, the LLCHD has advocated against locating residential and/or susceptible populations in close proximity to industrial zoning.

Because of the potential for exposure to hazardous materials/chemicals from the types of uses allowed by right in the I-1 zoning district, the LLCHD recommends at least a 300 foot buffer between residential/susceptible populations and industrial uses.

In addition to the hazardous material/chemical risks, industrial zoning adjacent to residential/susceptible populations has the potential to create other land-use conflicts from noise pollution, off-site dust emissions, offensive odors, etc.

In the experience of staff, industrial users prefer a buffer of non-residential uses on nearby property due to the potential for increased liability and complaints.

12. The goals in the 2040 Comprehensive Plan regarding health (see Comprehensive Plan Specifications listed earlier), were the result several years ago, of a joint committee of the Planning Commission and Board of Health. This committee produced a report dealing with residential and industrial use conflicts and other related issues. That report includes a

recommendation to restrict a limited number of industrial uses which utilize high volumes of highly hazardous materials from locating within 300 feet of residential zoning or within 300 feet of residential and other “sensitive” uses. In addition to pursuing this code amendment, staff also should review the possibility of rezoning or other techniques for specific identified locations that have potential for residential development but are in or near industrial areas.

13. This case points out a larger issue. The recently adopted Comprehensive Plan includes a new emphasis on the infill and redevelopment of vacant and underutilized land in established areas of the city. In particular the focus on redevelopment is in older commercial and industrial districts. In order to realize this vision, more work is necessary to remove barriers and offer incentives for development. Mixed use development should be encouraged, but with the a responsibility to protect residents from potential hazards posed by the presence of hazardous materials used by nearby industries. It should also maintain viable areas for future industrial growth that is uninhibited by nearby residential uses.
14. Of the 61 special permits for health care facilities that the City has on file only 4 are located within 300 feet of an industrial zoning district. One of those 4 is the current location for the Community Supports of Lincoln on N. 56<sup>th</sup> Street. There could be considerably more healthcare type facilities located near industrial zoning districts. Staff does not have information on the location of healthcare facilities that have called themselves “non-profits” and have located without a special permit on properties next to or in I zoning districts.

This location is surrounded by H-3 zoning which is surrounded by I-1 Industrial zoning. This is not an ideal location for residential uses particularly for people with special needs. Special permits run with the property and allowing the special permit on West O Street does not eliminate the existing special permit on N.56 Street. It only adds to the problem of residential uses next to industrial zoning.

**The recommendation is for denial. However, if the Planning Commission desires to approve the special permit then staff recommends the following conditions:**

**CONDITIONS OF APPROVAL:**

**Site Specific Conditions:**

1. Before receiving building permits the developer shall cause to be prepared and submitted to the Planning Department a revised and reproducible final plot plan including **5** copies with all required revisions and documents as listed below:
  - 1.1 Provide an evacuation plan to the satisfaction of the Health Department.
  - 1.2 Add to the General Notes, "Signs need not be shown on this site plan, but need to be in compliance with chapter 27.69 of the Lincoln Zoning Ordinance, and must be approved by Building & Safety Department prior to installation".
  - 1.3 Identify the odd line shown on the south end of the parking lot.
2. Prior to the issuance of a building permit:
  - 2.1 The construction plans must substantially comply with the approved plans.

- 2.2 Verification from the Register of Deeds that the letter of acceptance as required by the approval of the special permit has been recorded.
- 2.3 Remove all nonconforming signs on the premises.

**Standard Conditions:**

3. The following conditions are applicable to all requests:
  - 3.1 Before occupying the buildings or starting the operation all development and construction shall substantially comply with the approved plans.
  - 3.2 The physical location of all setbacks and yards, buildings, parking and circulation elements, and similar matters be in substantial compliance with the location of said items as shown on the approved site plan.
  - 3.3 The terms, conditions, and requirements of this resolution shall run with the land and be binding upon the Permittee, its successors and assigns.
  - 3.4 The applicant shall sign and return the letter of acceptance to the City Clerk. This step should be completed within 60 days following the approval of the special permit. The City Clerk shall file a copy of the resolution approving the special permit and the letter of acceptance with the Register of Deeds, filling fees therefore to be paid in advance by the applicant. Building permits will not be issued unless the letter of acceptance has been filed.

Prepared by

Christy Eichorn, Planner  
402-441-7603  
ceichorn@lincoln.ne.gov

**DATE:** January 26, 2012

**APPLICANT /OWNER:** Umbay Corporation  
2525 Fairfield Street  
Lincoln, NE 68521

**CONTACT:** Peter Katt  
402-475-1075  
pkatt@baylorevnen.com

# SPECIAL PERMIT NO. 12001

## PUBLIC HEARING BEFORE PLANNING COMMISSION:

February 8, 2012

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

Staff recommendation: Denial.

There were no ex parte communications disclosed.

Staff presentation: **Christy Eichorn of Planning staff** explained that the proposed facility is located on the south side of O Street between Hwy 77 and S. Coddington Avenue. It was previously a hotel until May of this year, when the applicant came to the city and applied for a building permit to convert the hotel to an assisted living facility. At that time, the applicant identified itself as a nonprofit, philanthropic, educational institution, such designation allowing the use in the H-3 zoning district.

In May of 2011, the applicant received a building permit because a nonprofit is allowed in H-3 and they began construction. In September of 2011, this applicant applied to the state for licensing as an assisted living facility. When that application is made, the state often contacts the local authorities for the correct zoning. When the state checked the zoning, it was discovered that the zoning was not correct because they were not a nonprofit.

There are multiple different types of health care facilities, ranging from hospitals and surgical centers all the way to convalescent homes and assisted living. In this case, they are considered an assisted living facility because it is the permanent residence of the people staying there.

Planning and Health met with the applicant and discussed concerns about locating a large amount of people in an area in such close proximity to industrial zoning. Most of the industrial zoning to the south is currently undeveloped; the land to the west is used for mobile home sales; an auto repair shop to the east; and south of the industrial zoning is the Burlington rail yards. The staff informed the applicant that staff would likely not support a special permit for assisted living in this location.

Eichorn then pointed out that the Comprehensive Plan talks about not locating residential uses near industrial areas and not locating industrial uses near residential neighborhoods. For those reasons, the staff has taken the position that this is an incompatible use for this area with negative impact on potential residents and negative impact on property owners investing in industrial and commercial zoning. The applicant then chose to proceed with this application for special permit.

Lust wanted to know why this zoning is allowed for a nonprofit but not a for profit. Eichorn stated that unfortunately, it is a loophole in our zoning ordinance. There is no definition in the zoning ordinance for "assisted living facilities". It has more to do with the tax status rather than the use type. It is something staff is working toward correcting with the upcoming use groups legislation. We do know that there have been other assisted living facilities located in the I and H zoning districts because they were nonprofit, philanthropic, educational institutions. Had this applicant

been a nonprofit, they would not be required to get a special permit. It is being reviewed as a health care facility, whether nonprofit or for profit. The staff's conclusion kept coming back to the position that this is not a good location for a residential type facility.

Lust suggested that it turns on the fact that the applicant is not designated a 501c3 of the tax code, and that's the only distinction. Eichorn agreed. This applicant is not a nonprofit.

Esseks inquired whether there is requirement that the applicant submit evidence of the tax status of the facility or company as being nonprofit or for profit when applying for the building permit. Eichorn stated, "no".

Esseks didn't believe a building permit could be issued unless the use was compatible with the zoning. Eichorn stated that if it is a permitted use in the district, you can get the building permit. In today's code, in H-3, the permitted uses refer to nonprofit, philanthropic, educational institutions as a permitted use. For each individual building permit, they are not required to do a review of surrounding zoning and whether it is compatible.

Lust pointed out that the applicant is going to make \$150,000 improvements to this property.

### Proponents

**1. Peter Katt** appeared on behalf of the applicant, advising that his involvement with this project began in December of last year after the applicant had been to the Planning Department and was told "no," and left with the choice to walk away from \$150,000 of improvements to the building.

Katt stated that when he got involved, his first assumption was that he'd "fix the problem and make them a nonprofit." However, that probably subverts the process and he thought it would be more straight forward to bring this as a request for special permit in the H-3 district and explain why putting these residents in this location is not as scary a proposition as everyone would like to make it to be.

Katt represents the owner that entered into a lease with the operator, Community Alternatives. Their current facility is dated and aging. This is a home for a lot of people. They wanted to improve their living environment and have an opportunity for some expansion. They have looked throughout the city. These uses are very difficult to site in our community. Not everyone wants them as their neighbor. It is a challenge to find affordable locations at which these residential uses can become a part of our community. They found this motel on West O Street. His client was approached and saw it as a reasonable opportunity. This was opportunity re-purpose a building for use for residential purposes.

Katt acknowledged that the applicant made some unfortunate assumptions at that time. However, based on the facts, he does not believe that anyone was trying to find a way to circumvent good public policy.

Katt discussed this as being a problem in the city in terms of uses in proximity to these toxic industrial uses. He does not believe our city policy should be to require everyone to stay 300 feet away from "nasty" uses in the industrial district. Those "nasty" uses should be identified and should be set back 300' on their own property. He thought this was being pursued, but

apparently not. He agrees with the policy to keep toxic uses away. We have a lot of toxicity moving through the community, not just in our industrial areas. However, he views that the proximity of this property to that industrial use is not an overwhelming risk factor and it is one that should not disqualify this special permit. Katt suggested that the adjoining industrial uses are small little lots. The likelihood that one of those small little lots is going to come up with the more toxic use is slim to none and should not become a problem.

Katt also suggested that the Comprehensive Plan talks about the need for infill redevelopment, re-purposing. This is an ideal re-adaptation of a motel use in this location that will serve these new residents for a long period of time.

Katt also suggested that the conditions of approval provided in the staff report in lieu of denial are acceptable to the applicant. They have reached agreement with the Health Department and have established an evacuation plan.

Lust wanted to know why the applicant designated themselves as a nonprofit when applying for the building permit. Katt stated that the architect applying for the building permit assumed that this use was a nonprofit. The owner did not know. It was not a requirement in the lease. These types of facilities are normally operated as nonprofit. It is a unique set of circumstances. It was clearly a mistake through circumstances that no one thought would create this level of a problem.

Esseks suggested that there is a need to be concerned about the affect of this proposed use on the value of adjoining properties. The Comprehensive Plan objective is to respect the value of properties and how our actions may affect such values. The Commission received a letter in opposition from Gary and Carolyn Christensen who believe that the potential liability of having this health care facility and its residential component so close to their commercial property will discourage future lot buyers for commercial uses. On the one hand, the user has invested \$150,000; on the other hand, the Christensen's and their colleague owners of the land are facing the likelihood of a reduction in their property's value which could exceed \$150,000. We have a real conflict.

Katt completely disagreed. The reason the Christensen's do not want this use developed is to protect unlimited uses on their property – nasty toxic uses that the Health Department says require the 300' buffer. Why should his client be denied uses on their property because we need to create a 300' buffer from toxic uses? That is unreasonable. Looking throughout this entire community, Katt suggested that there are commercial businesses that operate safely without a market impact on businesses within 50 feet. This is not an unsafe distance. If you conclude that there is a serious likelihood that nasty things are going to happen, he does not know what they would be. They are not there today. Even if this stays as a motel, the differential of the impact in the market place of this being a motel or an assisted living facility isn't going to amount to a dollar because the people that are going to develop on industrial are going to say it's a motel with people living there. Katt stated that he attempted to contact the Christensen's but was unsuccessful. In his opinion, the potential use of that property will not change to any material degree.

Katt reiterated that the applicant does have an evacuation plan which has been approved by the Health Department.

### Support

**1. David Stirkill**, a resident at 4520 N. 56<sup>th</sup> Street, testified in support. He would like to be able to move to the new facility because it would be a better environment. There is a lot of traffic and industrial uses (plants) near the facility in which he lives today. He would like to get into a new building with a new environment. They spent a lot of money renovating the building. The building he lives in now is run down.

**2. Steven Sheffiele**, a resident at 4520 N. 56<sup>th</sup>, testified in support. He is looking forward to this new place because he is tired of people complaining all the time about the conditions where he stays.

**3. Larry Conover**, a resident at 4520 N. 56<sup>th</sup>, testified in support. He is hopeful to get a chance to at least move into this new site. He has been at Serenity Place for 15 years; the building is run down; there are things constantly going wrong with the place; this will be a better site for everyone.

There was no testimony in opposition.

### Staff questions

Eichorn advised that the \$150,000 of improvements have already been made. The applicant is waiting for occupancy on the building permit. She understands that they have cleaned up the motel rooms. The improvements had more to do with upgrading electrical and plumbing fixtures, new carpet, and paint. A stairway was installed on the south side of the building for emergency exit.

Esseks asked what the property would be used for if not this use with the rather sizable setback. Eichorn stated that it could be used for anything in H-3. Residential uses are not permitted in the H or I zoning districts unless by special permit, such as historic preservation, health care. Domiciliary care facilities are only allowed in residential zoning districts because we have a definition for domiciliary care facility saying it is a residential health care type facility for 60 years and older. In this case, the residents are not 60 years of age or older. Today, the zoning ordinance does not define assisted living facility so it is considered a type of health care facility. We have this loophole (or wild card) with the nonprofit. It's a flaw in our code because it is not based on use. If we took that out and looked at the uses allowed in H and I zoning, you are not going to see residential on that list.

Eichorn also pointed out that this is a special permitted use – not conditional or use by right. The reason it is a special permitted use is because at the time it was added to the H-3 zoning district, it was said that we need to look at site specific conditions – the proximity of surrounding uses, the type of health care facility.

Staff agrees that someone made a mistake in this situation. But if we take that mistake away and look at our charge – this is not an appropriate area for this type of use looking at the surrounding zoning and uses and the potential uses. Staff came to the conclusion that this is

not a good location for this special permit. The Comprehensive Plan talks about incompatible uses. There is nothing more incompatible than putting industrial next to residential. To allow a residential use here as a special permit for health care facility can stay in perpetuity because it runs with the land. This is probably a better facility for the residents, but we must keep in mind that the existing facility is not going away. Although these residents are getting a new home, another health care facility can move into that location on N. 56<sup>th</sup> Street. This perpetuates incompatible uses within our city. We only found 4 out of 60 health care facilities located near industrial districts. It is a residential use near an industrial zoning district, and the expectation of the neighboring properties when they bought into the H zoning district also needs to be considered.

Further, in response to Katt's testimony about the small industrial lots, Eichorn suggested that does not mean that you won't have a potential larger user that sets up shop over all of the lots that are there. The Comprehensive Plan is all about getting rid of industrial areas that are located near residential zoning districts. That is what we want to encourage with infill development and mixed use projects.

Lust asked Eichorn whether she agrees that the lawyers at Baylor Evnen could just restructure this corporate entity as a nonprofit and we wouldn't be here and these residents could move in. Eichorn requested that Katt be asked to answer this question.

Esseks observed that we already have residential use there with a motel. It's not going to go away. The damage has already been done and grandfathered in. Let's make the best of that. Eichorn stated that the motel is not considered a residential use because it is not a permanent residence. So if there is a spill or some sort of hazardous activity in nature, the motel users are not exposed to it for any prolonged period of time. Hotels are considered commercial structures.

Butcher confirmed that the special permit that exists now at 4520 N. 56<sup>th</sup> will stay. Eichorn stated that it will stay there until the property owner writes a letter to Planning asking to rescind that special permit. That property owner is separate from this entity.

Gaylor Baird is concerned about the precedent this may set if approved. Eichorn stated that if this is approved, the Planning Commission should make findings to justify it, such that these are compatible uses. That is really the question. If passed, the resolution will say that these are compatible uses, and that it will have no adverse impact on the surrounding property meaning we don't feel it will increase any liability on the site nor to the surrounding users. The Planning Department has no control if the entity becomes a nonprofit.

Cornelius asked staff to discuss the assertion made on the part of the applicant that the 300' separation that is required between industrial and residential uses is an unfair burden on the surrounding property owners. Cornelius suggested that the 300' separation is guaranteed by the nature of H-3 because no residential is allowed. Eichorn agreed. That's why we zone areas for industrial, and when we do that, we try to put H zoning around them, and at a minimum B zoning, so that when people purchase property in industrial areas they have that expectation to meet those buffers.

Cornelius suggested that the risks we are talking about with a motel at this location vs. a permanent residential facility are primarily economic. We are not talking about danger to life and

limb, except that the permanent resident may incur some kind of economic hardship as the result of being displaced. Eichorn agreed that there is an issue of displacement as well as the issue of how long you are exposed to the potential hazard.

**Scott Holmes, Health Department**, advised that the 300' question relative to industrial uses has been answered relative to what we try to do with zoning, i.e. provide some separation through other zoning districts. We do have some areas that exist with industrial next to residential. That's the nature of putting industrial near residential. One of the primary purposes of zoning was to protect people from industrial uses. This is not new. This was the origination of zoning – to keep people from being exposed to industrial purposes (smoke, odor, dust). Today we have uses which produce more hazards than smoke, odor or dust. Often you don't know they are there until there is a problem.

Holmes then gave examples of uses that locate in industrial areas – a small warehouse which serves as the location where the local pesticide company stores all its pesticides; a small business that works with chemicals such as the companies that use spray-on lining for the back of pickups with a major fire creating very serious smoke concern; infectious waste disposal company. This is the kind of concern we have raised for years. It's not just whatever is there now, but what is allowed tomorrow.

Is there a different risk between those living there and the motel? Holmes explained that with the evacuation plan and provisions incorporated into that plan, you might be able to argue the assisted living facility residents may be safer than the hotel residents. The applicant has made efforts to identify an evacuation plan that would enhance their safety, including the identification of ways to shut down heating and ventilating systems. They believe that they have transportation options for the residents to get off-site safely. But, Holmes submitted that it gets back to the question of precedent and what you want to put in an H-3 zoning area and where you want to locate people that are going to be living there.

Butcher asked if there is any consideration in regard to this property's proximity to the rail yard located directly to the south. Holmes indicated that there is always concern relative to the railroad. Of course, the railroads were built through towns intentionally to help towns grow. But, the closer you are, the greater your risk, and we have had some significant spill issues with rail cars. The Health Department has repeatedly recommended setbacks from the railroad of a considerable distance. This application does meet that setback.

Esseks believes that these folks should be served but we have to be careful about the economic interests that may go next door and be a benefit to our community. Can that 300' setback be waived? Holmes advised that there is no 300' setback rule. It is based on the average minimum distance for most hazardous materials. Many have much larger isolation distances. The fact is, because it is industrial zoning to the south, they can do whatever they are allowed to do by right in the H district and the I district at the present time. All of those examples could operate by right in either one of those zoning districts.

Butcher asked whether staff knows if there are other permits for similar facilities that exist in areas similar to this. Eichorn noted that the staff report talks briefly about areas where we have health care facility applications. There are four out of sixty health care facilities located within 300' of an industrial district. However, it is hard to tell which are residential in nature and which are more nonresidential in nature, like a hospital. And staff does not know whether they are nonprofit or for profit.

## Response by the Applicant

Katt suggested that the issue here is the “level of incompatibility”. It goes both ways in terms of the risks to the residents and to the market cost of the adjoining properties. Katt suggested that you have to dig down below the concept of the I and H-3 zoning. Zoning is a very imprecise tool. We have such an alphabet soup for protection of the public on health and safety on a federal level. The Health Department has lists of all the hazardous chemicals in town. The level of protection today in the public for toxic things that happen is significantly higher and he does not believe that the primary protector of health risks for the public is in our land use zoning ordinance. The facts speak for themselves. If we were relying on the zoning ordinance to provide the protection from a residential use and industrial use, what rational person would allow nonprofits to locate in H-3? What rational person would allow motels to locate there? We need to start slicing through to the facts in this circumstance. This is not an unreasonable use and balances a lot of community objectives and values that we have. He thinks it is safe enough. He does not believe we are putting the residents at serious risk.

### **ACTION BY PLANNING COMMISSION:**

February 8, 2012

Lust moved approval, with the conditions provided in the staff report, seconded Hove.

Lust stated that she appreciates the work that staff has done, and had this come forward at the outset, she would have agreed 100%. But in this circumstance what we truly have is a city ordinance-created problem, whereby the city zoning ordinance in this particular case makes absolutely no sense. It makes no sense that a simple IRS designation determines whether this facility can be located here or not. In this situation, we have recognized the problem too late and after \$150,000 investment in property that needed to be improved. She believes that all of the reasons that Health and Planning have listed go by the wayside when we know that one simple corporate structure change would allow this facility to go forward. Since we have an ordinance-created problem, she thinks this project needs to go forward as originally planned.

Esseks believes we have to be pragmatic. Zoning has to be pragmatic. If this proposal had come before us with that property being totally vacant he would say no. If this proposal had come before us before the organization had invested \$150,000 in improving the motel, he would say no. But they have improved the motel – it may not be usable for any other kind of purpose and it would be a real shame. And then he was still going to vote against it, except the Health Department representative said there is a way to protect these folks with an evacuation plan approved by the Health Department. So if they can be protected against dire health hazards – they will be full-time residents, they can be fully informed and have practice drills – he believes that issue is sufficiently dealt with. The issue of a serious loss of value to the surrounding property owners has not been established since there is no setback requirement. We must be pragmatic in balancing various interests. It looks as though the risk is not that great to residents nor to the surrounding property owners.

Gaylor Baird stated that she disagrees with what has been said so far. While there are mitigating circumstances, the Commission is being asked to decide if it is a compatible use and she believes that has ramifications in the future. She does not think the evacuation plan mitigates the larger policy concerns. The struggle is that this was a mistake – she thinks that we all want to try to help the people who have made this mistake, but she does not want to compromise policies and principles in order to do that. We should not perpetuate something that

contradicts our policies. If we have this loophole and that is the reason to say yes, then we're not a policy-making body and we are becoming a part of the problem. We need to fix that problem so that we have a clear message for people making investments. We need to uphold our principles that industrial and residential uses are not compatible located next to one another. It is this body's charge to follow the guiding principles of our Comprehensive Plan as opposed to trying to figure out a way around it.

Butcher agrees that a precedent should not be set by allowing this because of the evacuation plan, but the practicality of this situation will be that if we deny this special permit, there is the incentive now for these applicants to change their IRS structure. The public policy process is a very slow one. To remove the loophole will take time. It won't take as much time to change the tax status of this organization. Understanding the practicality of this situation, he will be inclined to approve.

Hove suggested the other practical issue is that the hotel is already there and we have to deal with that asset that has already been built and improved. Finding a use that does work is in the best interests of the city.

Gaylor Baird pointed out that the city staff argues that this is a use that doesn't work and there are others that do.

Cornelius believes this is an issue of compounding of error, starting perhaps with the language of nonprofit, educational, philanthropic being allowed in H-3, or I for that matter; maybe you can go further back and say that the imposition of zoning as a policy tool is one layer of error that is being compounded here; we have the error of the paperwork that resulted in a building permit being issued for a use where it probably should not have; and we are led to the idea that if a change is made to the corporate entity this is all a non-issue from the position of this body. He is uncomfortable acknowledging that there have been all of these mistakes, and then adding another mistake on top. We are concerned with whether the use is compatible with its neighbors. Because it is a special permit, we have special responsibility to consider those things. He is sympathetic to the people being served and is sympathetic to the property owners; however, when he looks at this he sees a pair of incompatible uses, one of which is requesting a special permit.

Motion for approval, with conditions, carried 5-2: Hove, Sunderman, Butcher, Esseks and Lust voting 'yes'; Gaylor Baird and Cornelius voting 'no'; Francis and Weber absent. This is final action, unless appealed to the City Council by filing a letter of appeal with the City Clerk within 14 days.



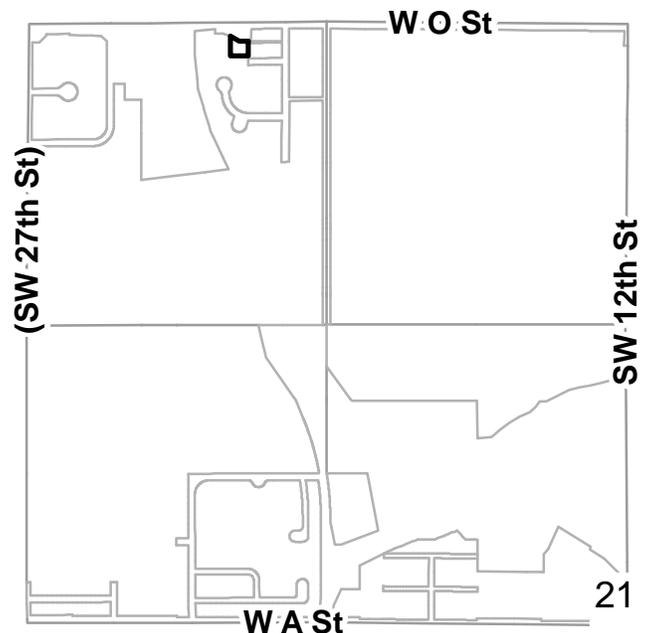
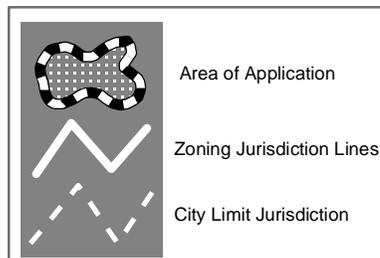
2010 aerial

## Special Permit #12001 S Coddington Ave & W O St

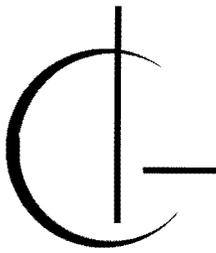
### Zoning:

- R-1 to R-8 Residential District
- AG Agricultural District
- AGR Agricultural Residential District
- O-1 Office District
- O-2 Suburban Office District
- O-3 Office Park District
- R-T Residential Transition District
- B-1 Local Business District
- B-2 Planned Neighborhood Business District
- B-3 Commercial District
- B-4 Lincoln Center Business District
- B-5 Planned Regional Business District
- H-1 Interstate Commercial District
- H-2 Highway Business District
- H-3 Highway Commercial District
- H-4 General Commercial District
- I-1 Industrial District
- I-2 Industrial Park District
- I-3 Employment Center District
- P Public Use District

One Square Mile  
Sec. 28 T10N R06E







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January 11, 2012

Mr. Marvin Krout  
Director of Planning  
City of Lincoln /Lancaster County  
555 South 10<sup>th</sup> Street, Room 213  
Lincoln, NE 68508

**Re: Special Permit for Health Care Facility at 2231 West "O" Street  
CDG Project No. 2011-0003**

Dear Mr. Krout:

On behalf of Umbay Corporation, and in conjunction with Peter Katt, we submit the above mentioned special permit for your review and approval. With this application we are requesting a Special Use Permit for Community Alternatives Nebraska, Inc, DBA Community Supports of Lincoln to operate on this site as a Health Care Facility. Community Supports of Lincoln desires to move to this location from their present operations at 4520 N. 56<sup>th</sup> St.

Umbay Corporation invested heavily in the remodeling and retrofitting of this facility to accommodate Community Supports of Lincoln. Umbay was granted a certificate of occupancy permit by the City of Lincoln following the remodeling work. However, when Community Supports of Lincoln asked the State of Nebraska Department of Health and Human Services to move their Assisted-Living Facility license to this property the DHHS inquired with the planning staff if they would be in compliance with the zoning. At this time it was determined that they would not be in compliance, primarily because their licensure application with DHHS indicated they are a "for profit" corporation. If they were a non-profit corporation, staff would have indicated that they were in compliance with the zoning district as they could be defined as a "Nonprofit religious, educational, and philanthropic institution" which is a Permitted Use in the H-3 Zoning District. Community Supports of Lincoln and their residents were the asked to put their move on hold as a result of this.

Granting this special use permit will allow this Community Support of Lincoln to go forward with their move. The Health Department Staff has expressed concerns about this facility being adjacent to an Industrial zoned district. We have included a note on the permit that calls for an evacuation plan to be created to the satisfaction of the Health Department.

In conjunction with this submittal we submit the following information:

Special Permit Plan - Uploaded via Project Dox  
Special Permit Application Fee - \$300.00  
Special Permit Application

I hope that this letter and the plans provide you with enough information to review this Special Permit. In an effort to facilitate the review process, please call me at (402) 434-8494 if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Eckert". The signature is fluid and cursive, with a large initial "M" and "E".

Mike Eckert, AICP

Encl

cc: Umbay Corporation  
Peter Katt, Baylor Evnen Law Firm

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February 6, 2012

Christy Eichorn  
Lincoln Lancaster County Planning Department  
555 South 10<sup>th</sup> Street  
Lincoln, NE

Re: Special Permit 12001-Health Care Facility  
2231 West 'O' Street

Ms. Eichorn,

My wife Carolyn and I own property on West 'O' Street and Magnum Circle which abuts the proposed Health Care Facility on it's west and south sides. Our land includes the 'O' Street frontage between the applicant property and the Highway 77 northbound exit ramp at west 'O' Street. This property is zoned H-3. We also own all the undeveloped lots to the south which abut Highway 77 and the Burlington Northern Santa Fe Rail yard. These lots are zoned I-1.

Our major concern with this proposed Special Permit is that it allows the owner to provide medical services and residential care directly adjacent to potentially incompatible land uses that are allowed in H-3 and I-1 zoning districts. We are additionally concerned with the Special Permit property's inability to provide additional separation from commercial and industrial uses which are allowed in H-3 and I-1 zoning districts. This would require future purchasers of our lots to provide additional separation because of the proximity to a health care facility.

There are four commercial/industrial buildings built on lots to the South with the potential for nine more buildings. The I-1 zoning on our lots allows industrial uses with 0' setbacks for side yards and rear yards. This means that commercial and industrial buildings built on these lots, could be built within a few feet of the West and South sides of the requested Special Permit. We believe the potential liability of having this Health Care Facility and it's residential component so close to our commercial property will discourage future lot buyers who also will be concerned with liability and personal safety of the residents living there.

Since the announcement of the City's plan to develop the Haymarket Arena and surrounding area, we have had inquiries from potential purchasers and users of our H-3 zoned 'O' Street property which lies directly west of the requested Special Permit. These inquiries have come from national hotel chains, restaurant/bars and convenience stores, all of which expressed interest in an on/off sale liquor license as one of the conditions of land purchase. We have also had inquiries from several other retail developers.

We feel that allowing this proposed Health Care Facility on this changing and developing stretch of west 'O' Street is just not appropriate and most certainly will have a negative impact on our adjacent property.

Sincerely,  
Gary & Carolyn Christensen