MEETING RECORD

NAME OF GROUP:	PLANNING COMMISSION
DATE, TIME AND PLACE OF MEETING:	Wednesday, April 21, 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, Brian Will, Tom Cajka, Christy Eichorn, 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 requested a motion approving the minutes for the regular meeting held April 7, 2010. Motion for approval made by Francis, seconded by Cornelius and carried 7-0: Gaylor Baird, Cornelius, Esseks, Francis, Larson, Taylor and Sunderman voting 'yes'; Partington abstained; Lust absent.

CONSENT AGENDA
PUBLIC HEARING & ADMINISTRATIVE ACTION
BEFORE PLANNING COMMISSION: **April 21, 2010**

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

The Consent Agenda consisted of the following items: **CHANGE OF ZONE NO. 10009, SPECIAL PERMIT NO. 10017 and SPECIAL PERMIT NO. 10019.**

Ex Parte Communications: None

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

Note: This is final action on Special Permit No. 10017 and Special Permit No. 10019, unless appealed to the City Council within 14 days of the action by the Planning Commission.

DISCUSSION ON RULE 17 OF THE PLANNING COMMISSION RULES AND PROCEDURES, EX PARTE COMMUNICATIONS: April 21, 2010

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

Rule 17 of the Planning Commission Rules and Procedures is attached hereto as Exhibit "A".

Staff presentation: **Rick Peo, City Law Department,** suggested that the concept of ex parte communications comes up in a variety of manners and probably the most restrictive would be in the judicial setting in cases in front of a court of law – attorneys are not allowed to have ex parte communications with the judge, nor the witnesses with the judge, to try to effect a decision being made. That has been an obvious principle of law for a number of years as a denial of due process.

That type of principle is carried over into governmental law as well and shows up in a couple different manners, one being the certain type of administrative bodies such as board of appeals, with very limited function, acting entirely upon matters that are discretionary akin to a court or judge, and ex parte communications are not allowed.

Then there tends to be some confusion when dealing with the City Council and Planning Commission because those bodies wear two hats. At times they are acting in a legislative capacity, looking at general propositions of law which are city-wide, and the citizens have a right to contact their representative to lobby for decision making, so ex parte communications are not restricted in those types of situations. The problem arises in the situation of wearing the secondary hat of quasi-judicial when you look upon activities that have discretion – the ability to approve or deny some type of permit – and that discretionary authority is deemed to be a quasi-judicial function. Under due process, quasi-judicial functions are designed and required to be fair and impartial, requiring notice be given to the parties involved with notice of the subject matter and opportunity to present their case to the board, both from the proponents and the opponents. That issue of fairness, or the appearance of fairness, is two-fold: First, there needs to be a record and the decision must be made upon only those matters upon which there was a public hearing where everyone had the opportunity to hear, respond, dispute or contest. Secondly, you want to maintain your appearance of non-bias and non-favoritism. If you open up to communications outside that public hearing process, are you opening the door to a limited number of people, so is your decision biased or tainted because of those behaviors?

The appearance of impropriety is harder to define and you cannot regulate it other than your own self-control and self-conduct. On the fairness of the proceeding itself, ex parte communications would probably be deemed to be harmless if there is disclosure at the public hearing prior to an action being taken so that both sides have the opportunity to

know what was said, the other members hear what was said, and everyone has the same ability to present facts for there to be an unbiased and impartial decision.

The issue of whether ex parte communication is good or bad arises from the fact that our system of handling special permits and use permits is very informal. We are doing a quasi-judicial function but we're not taking sworn testimony, we are not allowing the other side to cross-examine witnesses, and we are introducing evidence with maps, documents and other information that are not numbered or accepted as official exhibits. We are fortunate that we do not have a lot of litigation against the Planning Commission or City Council actions in this city, so the system does work. If we start having too broad or to much ex parte communication where there could be an appearance of impropriety, we would have to move into a more formal setting with formal structure which would extend the time frame and the amount of hearings.

Peo took the position that the problem is best resolved by continuing the rule that is in place, i.e. that ex parte communications will sometimes occur, but should not be encouraged, and they need to be disclosed on the record, including the subject and nature of what was discussed. If you do not accept those types of contacts and calls, your job is easier; otherwise, you need to provide that notice to the other side.

Peo then referred to a memo he had written in 2003 to the then Chair of the Planning Commission, Greg Schwinn, which addresses the issue fully (attached hereto as Exhibit "B").

The issue of ex parte communications arose with the recent case involving an application for change of zone and special permit to sell alcohol by CVS Pharmacy and a companion theory that redevelopment in existing areas is difficult. Maybe that companion theory was a generic discussion that needed broader education to the commissioners. But, unfortunately, that situation or issue arose at the same time as a current application with the same or similar subject matter, which created a conflict and it was determined that it was best not to have ex parte communications on the broader issue until after the special permit was heard. However, it does not mean that those types of issues cannot have individual meetings with the Commission.

This problem occurs elsewhere in the country. Peo knows of several city attorneys trying to do discourses with their City Council and Planning Commission about the need to control ex parte; that it was a safeguard for due process of law; and a safeguard to protect City Council and Planning Commission members from being parties to lawsuits. Peo acknowledged that quasi-judicial is a little bit of a grey area. There is quite a bit of case law where applications have been denied or decisions overturned when ex parte communications were discussed. For example, in the Idaho Supreme Court, a governing body acting in quasi-judicial capacity was found to have violated procedural due process

when members received telephone calls from concerned citizens and the names were not disclosed at the public hearing. The permit was reconsidered because the decision must be based upon the record produced at the public hearing.

Francis inquired whether the fact that the Planning Commissioners are appointed as opposed to elected plays into the ex parte communications at all. Peo does not believe so. The Planning Commission is still an advisory board and makes recommendations to the City Council and County Board on comp plan review and whether or not requirements are satisfied. Over the years, more authority has been delegated to this body, but there is no difference between elected or not elected as to the role of an advisor.

Francis then suggested that as a constituent, if she had an issue and wanted to talk to her City Council representative about it, she could call that representative and have a conversation and that would not necessarily be ex parte communication unless it was an item that was going to be voted upon. Peo's response was that general legislation such as passing a law prohibiting texting while driving – anyone can call senators or council persons and say they are or are not in favor as part of the political process. When you get to an individual situation of a special permit to sell alcohol or to operate a salvage yard on a particular site, if the proponents or the applicant start lobbying Planning Commission members individually to say it's a really good idea, the other side is not aware of that and then they don't have a chance to rebut that statement. If those types of conversations do occur, Peo would recommend they be discouraged, or if you do have those conversations, you need to come to this body and say you had the call, who it was and the arguments made so that the other side has the opportunity to refute if they disagree or don't feel it is accurate.

Gaylor Baird asked Peo to clarify to what extent discussions by Commissioners with staff prior to hearings would be ex parte or not. Peo believes technically they are ex parte, but a lot of jurisdictions will not find those to be impermissible. But, because of the way we operate, with the staff making a report and recommendation to the Planning Commission, if you find that that report is insufficient and you make additional inquiries and you get more information than anyone has, then you need to disclose that as ex parte communications because everyone else is relying on that staff report and they should have the additional information as well. Peo suggested that staff should submit a supplemental report or should discuss these conversations and additional information at the public hearing. The idea is to be fair to both sides.

Gaylor Baird presumed that such communications would need to be distributed to the rest of the Commission and to the applicant. Peo agreed. Everyone needs to have the same factual basis upon which to make a decision.

Partington indicated that he does not have a problem with Rule 17 as written. It defines ex parte as "...talking, either in person or by phone, to a commission member when <u>the other side</u> is not present...". Therefore, since it implies that it is for issues that have two sides, he

does not believe the rule should apply to general conversations that apply to planning or other general subjects. Peo explained that in the case which prompted this review and discussion, the general matter which the applicant/attorney wanted to discuss might have been perceived to be an issue in an application before the Commission.

Peo further explained that quasi-judicial is when the Planning Commission has authority to make an administrative decision that is discretionary, such as use permits and special permits.

Partington perceives the concern is that this rule has been used as a form of intimidation to keep the Commissioners from communicating with other people, but it does not appear to be written that way. Peo agreed. He believes Rule 17 is designed to help preserve due process of law so that an applicant and the opposition both get to have the Planning Commission decision made on public testimony at the public hearing and documentary information submitted. If you get information outside of the public hearing that you are relying on or using, the other side should be aware of it and you have to disclose it.

Larson stated that he has a whole lot of problems with this whole situation, and one of them is with the staff's position. He has always had a little bit of thought that when the staff is talking to the applicant, they should have an attitude of helping that applicant prepare an application that would have a chance of succeeding, instead of being absolutely neutral and forcing that applicant to search around by himself for ways to get the project done. He believes it is unfair to the developers, frankly, that the staff doesn't have a role of ombudsman, so to speak, to help the applicant prepare an application for Planning Commission review that would have a chance of succeeding. Peo indicated that that has not been his experience. He has found that staff is helpful to the applicants. The staff instructs the applicant on how to file. The staff cannot say whether or not they are going to support it until they review it as to compliance with the Comprehensive Plan, the affect on abutting properties, etc. The staff can give them guidance, and it may or may not get worked out. The proposal comes to the Planning Commission because the staff is only making a recommendation based on the Comprehensive Plan and the Zoning Ordinance and regulations, and the applicant has the right to sell their real desires to this body and to the City Council. Frequently, a lot of the issues get worked out before they get to the Planning Commission, and there still might be elements of dispute, but he does not find that the staff doesn't help at all and takes such a neutral position that there is no support in coming up with the application. He believes the staff works within the boundaries of what they feel they can support, and then the staff report is written to reflect the facts.

Larson further commented that before he was on the Planning Commission, he has had developers say to him that they have prepared an application and the staff did not tell them the application would not work – they just let the application go through and be denied and then the developer is forced to come back and change it in a way that the staff could have warned him about ahead of time and suggested alternatives to give the application a chance of being approved. Larson does not think there has been that attitude. He does

empathize with the staff – they really have as much authority as the Planning Commission because we accept their recommendations almost all of the time, so they're the ones that are making a lot of the decisions for us and we accept their recommendations. Yet, they should have an attitude of assisting the applicant in preparing an application that will be so plain that it's technically correct in every way. So I think there are an awful lot of problems with staff because they are never asked if there were any ex parte communications, and he's not sure they should be. But, he believes there is much more probability that the influence of the applicant is directed toward the staff than toward the Commissioners. Larson pointed out that he has been on the Commission for seven or eight years and he does not believe he has ever been asked by any applicant or opponent for his vote. Some have explained their position, but the applicant spends a lot of time with the staff. The ex parte question really involves the staff more than the Commissioners.

Esseks stated that he is concerned about being adequately informed to make decisions and recommendations. Maybe unlike the judge of a court, he does not have three years of law school and years of practicing on this subject. He was interested in the offer to get some further background. He interprets the rule that he can communicate with a counselor for the applicant or for a neighborhood association, take notes, and then share the notes both with the other Commissioners and the applicant. Peo advised that if the information is shared, we are protected, but that does not fall within the quasi-judicial function. The two sides in the law dispute are responsible to present their evidence to the judge – the judge is not going to investigate or find witnesses. He has to make a decision on what people submit to him and that's it. That's the public record. That's the best way here – you might have to waive your five-minute rule sometimes. A fair hearing means the right to present your case. Peo agrees that on the general principles there is nothing wrong with talking to the developers or attorneys such as what does the zoning code need, what problems does the city face in development activities, etc. That education does not have to come solely from the staff. There is no problem with those types of discussions.

Peo advised that the City Council does not have the ex parte communication rule, but they are bound by the same principle of due process and if disclosure is not made on the record and there is an appeal to district court, there could be some potential time bombs. The Law Department's advice is to protect the record to make sure there is no appearance of impropriety or unfairness.

Esseks gave the example of there being a really difficult issue coming up and the Planning Commission has not handled it recently, and they don't really know how to judge. We can get information from the hearing, but this is a rather time-constrained process and we're dependent upon whoever shows up. Can we ask staff to let us know when these difficult situations involving principles and issues we've not dealt with before are coming up and then ask for special workshop on the principles? Peo indicated that he would not have a problem with that. He believes the staff has scheduled pre-meeting briefings in the past

when there are broad or larger issues. And those briefings are considered a public meeting – you don't have to take testimony but at least people can attend and know what has been said and the minutes are recorded.

Taylor's concern is that over the years he has been on the Commission, the Commissioners are being more and more stifled. The way the ex parte communication policy has shifted, it's almost like we're protecting ourselves from ourselves. He sees it as a limitation to the complete process. In many situations, visiting with the applicant is an opportunity for education to find out more details about what is going to be presented. But he also agrees that it is very important to dispense that information amongst all of the Planning Commission members. He is bothered with the idea that the communication can be stifled. Sometimes we are able to actually take an extra step and go on the site, and at that time it may be more convenient to meet with the parties there. We should find a way of doing this properly but he does not like being handcuffed with this threat of being wrongfully influenced to make a decision. He would like to be able to have more openness and be able to communicate with the developers rather than cutting them off from communication with the Planning Commission. Peo does not believe that is the case. The applicant has met with staff and worked on the project and there is a staff report written based upon those meetings. The applicant is aware of what the staff is supporting or not supporting. After several meetings, the staff report recommends approval and sometimes it is on the consent agenda. In some situations, an unbeknownst opposition arises and the opponent hasn't had much opportunity to have any contact other than what they see in the report. If you have more conversations and more information, how can the opposition present their case to you? There has to be good public written disclosure ahead of time so that people know the issues and how to address them. He believes the opposition is put on short notice and has a hardship to get prepared. If they don't have access and the developers know how to get to the Planning Commission members, and the Planning Commission members open their doors to them and not to anyone else, the appearance of fairness can be tarnished.

Francis confirmed with Peo that there is nothing that says that either an applicant or someone in opposition can't sit down and supply a written list of their viewpoints for all the Commission to review, so they don't have to feel like they are limited to 5-minute testimony, and they can get that to us prior to the meeting. We receive a lot of e-mails right up until about two minutes before the meeting starts, so it is sometimes hard to keep up. We need to encourage the public that want their voices heard to do a little more due diligence to get to us in a more timely fashion. Peo agreed. He believes the fear people have as to ex parte communication is the one-on-one communication – in other words, the art of persuasion. Through the question and answer you can potentially manipulate an opinion before the case is heard, and that is the fairness issue we are trying to address, i.e. that you don't get subjected to persuasion outside of the public hearing process.

Taylor gave the example of an invitation to attend a neighborhood association meeting on a subject that is coming before the commission. At the meeting, of course, I am going to

receive ex parte communication but I don't see a problem attending a meeting such as that because they are discussing the pro's and con's about the upcoming agenda. This gives me some advance information so that I can be more educated and informed and look at the case when it comes before the Commission from a more clear perspective. In most situations, the applicant/developer is also at the neighborhood meeting. He believes that aids the process.

Larson suggested that there are a couple of problems here. The communication, even that the Planning Commissioners get, is only four or five days before the meeting, which doesn't give the Commissioners much time to do any kind of research on their own other than drive out to the site. He likes the idea of having some sort of a pre-meeting where there wouldn't be any testimony but maybe just the staff, who we are trusting to be fair, to just give us the facts of the case so that we can be more prepared when the case comes before us. However, he does not want to do anything that will slow up the process. Looking at it from the opponent's side, they have even less time because they are probably not aware that there is anything happening at all, except for the posting of the sign and the notification letters. They don't get much of a chance at all to hear the facts of the case.

Francis offered her opinion that staff does a good job of being proactive with issues. e.g. the soil mining ordinances, where staff worked with most of the people who came to the public hearings in objection along with a couple of the Commissioners, so she does not believe the staff is getting a fair shake here. She believes they are proactive and helpful.

Public Testimony

1. Rick Krueger testified as a citizen and native Lincolnite. He recalled that it was not always this way. He believes that the policy about ex parte communication came about in the early part of the Wesely administration. Lincoln has a tradition of honesty and openness in government, and in 35 years he has never known it to be a problem. Everyone is pretty much above board.

The issue he sees is that five minutes it not enough time for testimony in matters of public policy. For example, last year when he testified at the CIP hearing, he was constrained in his testimony by the five-minute rule on the whole issue of sustainability. It is important to organize our thoughts and present thoughts that educate the Commission. A lot of times we cannot do that in the five minutes. Years ago, during the impact fee hearing, the hone builders pushed very hard on that whole idea, and there would have been no way that they could have made a coherent presentation in five minutes. We lost that debate, but we were right. The impact fees tanked the industry. Krueger submitted an exhibit showing the decline in single family permits since the implementation of impact fees. While we didn't win that debate, we were not wrong. These types of policies are real important, especially public policies, and we need to have more discourse, not less. He suggested the Planning Commission create a policy to document any discussions with developers in writing and submit it to all the Commissioners for the public record. We really need to lean on our

tradition in this community of openness and honesty. Krueger requested that the Commission respect all the people that want to provide more information, not less. He encouraged the Commission to figure out some way to meet with people and report on it.

Esseks is aware of another community that always had a Monday workshop before the Wednesday Planning Commission hearing, and at that workshop anyone was allowed to make a presentation. He asked Krueger whether he thought that would work. Krueger stated that he would be there if he had something coming before the Commission. It just seems like the problem is that people do not have the information in time. He does not preclude the idea that the Commissioners meet with people from time to time.

Gaylor Baird pointed out that anyone testifying can request more than five minutes. Krueger was aware of this, but it takes more time when we are talking about major policy, and he believes that is the concern.

Gaylor Baird also pointed out that anyone is also allowed to submit written documentation in addition to what is provided by the staff. Krueger stated that personally, he prefers to meet face-to-face.

2. Derek Zimmerman, attorney with the Baylor Evnen Law Firm, testified on behalf of Mark Hunzeker who could not attend today's meeting. He read a letter written by Mark Hunzeker into the record (attached hereto as Exhibit "C"), contending that Rule 17 does not prohibit ex parte communication. Hunzeker alleged an aggressive campaign by the Planning Director to prevent ex parte communication between Commissioners and himself on the broader issue of the difficulty of redeveloping sites in older areas of town, and alleged that this unprecedented attempt by the Planning Director to control the flow of all information to Planning Commissioners has no basis in rule, policy or law.

Hunzeker's letter acknowledges that Rule 17 recognizes that prevention may be impossible and the rule establishes a protocol. Hunzeker has no objection to items on which Planning Commission has final action being characterized as quasi-judicial proceedings and subject to higher level of sensitivity to ex parte communications, but not prohibition. Text amendments, Comp Plan amendments, Redevelopment Plans and zoning actions should not be subject to such scrutiny. Hunzeker also has no objection to disclosure of any ex parte communications. Prohibition has never been a rule. Rule 17 came into play in 1994. If Rule 17 has meaning, it must allow ex parte communication, otherwise a disclosure requirement is pointless. Until very recently, this process was not broken.

Gaylor Baird took issue with the comments in Hunzeker's letter, stating that the assumption that there was an aggressive campaign by the Planning Director to avoid any sort of meetings with Mr. Hunzeker is blatantly untrue. She stated that she told Mr. Hunzeker that she was being "discouraged" from meeting. She was not told that she could not meet with him but encouraged to think about what it might look like if others came forward and wanted to know about those meetings – it would be very difficult for that to look good to

anybody. She bought that logic. It was not something she was told she could not do. Rule 17 was pointed out.

Secondly, Gaylor Baird suggested that the introduction of an adversarial tone has come from Mr. Hunzeker, not from the Planning Department and not from any of these Commissioners who want to have a fair process. She suggested that the "aggressive campaign" was launched by Mr. Hunzeker himself when he forwarded her reply to members of the Mayor's staff, the Planning Department and outside organizations. A number of the premises in Mr. Hunzeker's letter are unfair and are untrue. Gaylor Baird finds this introduction of an adversarial tone from Mr. Hunzeker's office to be frustrating as a volunteer in this process. She does not have a lot of time to meet with people outside the process, but she wants to do it in a way that is fair and does not give the appearance of impropriety.

Zimmerman suggested that Mr. Hunzeker's letter is simply pointing out that ex parte communications are not prohibited – it's the disclosure requirement. Quasi-judicial situations have implications beyond that in that disclosure of ex parte communications or conducting those types of communications is not just limited to applicants. There is also an issue about communications with other departments, etc.

Francis agreed with Gaylor Baird's comments. She also brought the contact she had with Mr. Hunzeker to the Planning Director's attention. He did not tell her she could not talk with him. He said it would be my choice, but that I would have to disclose it as ex parte. She is not comfortable having behind the scenes conversations about an issue coming before the Commission. She chose to cancel her appointment with Mr. Hunzeker because it did not feel right. If he wants to talk about rules and regulations, he should be doing that with staff and not the Commissioners. With regard to board and neighborhood meetings, Francis stated that she purposely stays away from her association board meetings because she does not want to have any one-sided conversations about any issues that might come before this body. Francis also believes that the staff is always willing to hear from anyone on any rules that people think need to be changed. That's the appropriate route as opposed to setting up individual meetings with the Commissioners. "What I might interpret one way might be entirely different than what one of my fellow commissioners might interpret or understand."

Taylor stated that he was not invited to a meeting with Mr. Hunzeker. However, he would not look at meeting with Mr. Hunzeker as being something that is behind closed doors. He would look at it as an opportunity for Mr. Hunzeker to share his point of view. Of course he wants to provide some influence – that is expected. And Taylor is not against that. He believes in the role of staff, but he also believes in the role of the Commission. We are not working for the staff. We are set apart from the staff. There should be a sense of openness and we should acknowledge the importance of our role. It is important for the developers to recognize that we are in a sense an independent voice. We are volunteers and people that are concerned about our community. We should look for dialogue from the

developers and from the opposition. Zimmerman suggested that it is not just limited to communications that would take place on the applicant's side. A lot of times there is opposition, and the same rules should apply to all.

Gaylor Baird believes it is clear that the rule does apply to everyone. We want to know as much as we can. Mr. Hunzeker should be rest assured that we are seeking ways to have more people heard. She does not think the process is broken.

3. Peter Katt, also an attorney with Baylor Evnen and partner of Mark Hunzeker, stated that he and Mark discussed what precipitated this discussion and defended what he did. The bigger issue is the Planning Commission ex parte policy. That's what's here. The issue that came up was an attempt by the Planning staff to basically skew the ex parte communications rule and take it beyond what it says. It doesn't say "don't". There was clearly an effort by the staff to discourage the Planning Commissioners that chose to take advantage of ex parte communications as an information source to make a determination. From our experience, that is the practice in Lincoln in terms of how we have practiced land use planning law in this city and county for a long time. It works. The other people involved in this area take advantage because it is valuable to both sides. Ex parte communication is not a bad thing, when it is done for a good purpose. We respect what people want to do, but we also want to provide opportunity for additional information to be out there.

Katt disagreed that Mr. Hunzeker's letter is adversarial. It is a statement of fact. If we want to take ex parte communication seriously, then we need to have quasi-judicial hearings or continue the more informal policy that tries to find a good balance between a formal quasi-judicial process and something less formal. Katt does not think the process is broken. At the time this rule was adopted, he thought it was a little silly to put it in place, but it has worked. It hasn't created any problems until now, so we can probably continue to live with it. However, in light of Rick Peo's testimony, he would suggested that Rule 17 be amended to clarify the fact that staff is included in people with whom ex parte communications should be discouraged and if they occur should be disclosed. Katt suggested the following amendments:

> The Planning Commission recognizes that the prevention of ex parte communications may be impossible. In order to do our best to insure a fair and open hearing and decision making process, the Planning Commission will use the following protocol when involved in contacts ~~with the public~~ outside of the public hearing:
>
> 1. Keep such contacts to a minimum in those areas of concern, especially when the issue involves final action by the Planning Commission.

2. If there are ex parte contacts with staff, the applicant or opponent that result in new information, such contacts and the information should be disclosed on the record to give the other side the opportunity to refute. After a public hearing is closed, such contacts should be kept to a minimum.

3. On items that are likely to generate a request to defer the vote for additional information or continued discussion, the Commission should continue the public hearing.

4. The Commissioners will request that comments or additional information be put in writing and sent to the Planning Department for distribution to all Commissioners and the applicant and his/her representative.

5. ~~Commissioners may contact staff to ask questions about upcoming applications.~~ Staff shall endeavor to send written responses to all Commission members and applicants/representatives before the hearing, in addition to presenting the information at the hearing.

It is a matter of fundamental fairness. Communications that the Planning Commission has with staff should be disclosed so that everyone knows what was asked and what was talked about so that it is all part of the public record.

Esseks referred to the recent CVS project, stating that he was faced with a very difficult issue until early that morning when the property owners submitted letters in favor. He wanted more information. The hearing does not seem to be ideal. How do we gather more information on a tricky issue? Katt suggested that it would require knowing that the issues are going to come up in advance. You could put it in writing, but the problem is how much do you put in writing because what is of interest and what needs explanation is different depending upon what viewpoint a particular commissioner brings. That's one of the benefits of the Planning Commission – each one brings a little bit different perspective. As opposed to being able to direct information specifically to your particular interest, trying to craft a one page or five page document that tries to guess what everyone's interest or issue might be would be very difficult and time-consuming. It is also important to recognize that the applicant's representation of the issues does not come without a cost to a client. If we go to that standard of educating commission members, only the largest projects will be able to afford to communicate essential information to people. We do not think it is a good path to follow by limiting the ability to get information that might be helpful in making a decision.

Esseks agrees that communication with individuals are hard. The reason he canceled his appointment with Hunzeker was because he understood there was going to be some kind of workshop on the issue. He suggested that perhaps Hunzeker could now ask the staff to have a special meeting to reach as many of the Commissioners as possible. Katt

believes that was an offer that was made and then withdrawn. They have not done that in the past. There are additional pieces that could be added to the process but they come at time, cost and expense to the applicant. Esseks suggested that is why it is better to have one meeting with eight or nine people. Katt agreed. Every method has its own pluses and minuses. The circumstance in this particular project got blown out of proportion in his view, probably on both sides, but it is important to remember that there is value in having the ability to have ex parte communications. They should be a part of the available options that are open to Planning Commission members. It is unfair for staff to discourage them, because in some circumstances they are an efficient and meaningful way to communicate information. Going to neighborhood association meetings is a wonderful way to gather information on projects, and those folks have a very difficult time collectively bringing their information back to the Commission. The ex parte is not something that is done secretively with bad ill-motives. It is Katt's experience that ex parte communications have been an educational benefit for a better, more informed decision about whether a project is a good thing or a bad thing for this community.

Cornelius presented a hypothetical situation. You are representing an applicant for a redevelopment project in neighborhood X. I come to the hearing and I disclose at the beginning of the hearing that I was invited to a neighborhood association meeting and they are generally against it. Is that sufficient disclosure? At this point in time and under the informal rules, Katt believes that is probably enough. If we start going down a path of more formal quasi-judicial, that would not be enough.

Cornelius reiterated that Rule 17 is not a prohibition, and also pointed out that the 5-minute rule is also not a requirement. If there were greater latitude exercised in general to allow these sorts of communications in the regular hearings, is that a move in the right direction, along with a better understanding of Rule 17 as a non-prohibition of ex parte communication? Katt does believe the five-minute rule has been judiciously and appropriately applied and he does not believe that is an issue. He thinks it helps focus everyone with the understanding you can request additional time. He does not think it is broken. It is working effectively today as long as we keep the door open to a willingness to conduct ex parte discussions on a case-by-case basis. You have to be able to look people in the eye and say, "No, I wasn't unfairly influenced, and I did the right thing."

Sunderman suggested a motion for deferral to continue this discussion at a later date. This is too difficult of a subject to make any changes today. He wants to put some thought into it and would like Commissioner Lust to have an opportunity to listen to this testimony via the Web and participate in the discussion. He has heard that there is a desire for information in a timely fashion; we understand the importance of being fair but also understand the importance to appear fair; and we are dependent on staff. The staff does a wonderful job in what they do and the information they provide to the Commission, but we are an independent body. Is there an appearance that staff is filtering information? He does not believe so.

Larson clarified that he did meet with Mark Hunzeker as requested. He told Hunzeker that he did not want to discuss any specific case, and, in fact, he didn't even know Hunzeker was on the CVS case. The discussion was strictly on the broader issue of urban sprawl versus higher density closer to the core of the city. That is something we need to be aware of. He respectfully disagrees with some of the Commissioners that Director Krout's communication was not persuasive. Obviously, it was persuasive because several of the Commissioners canceled their appointments after receiving that communication. I don't like the idea of someone telling us we can't receive communication. One of the big issues is the lack of information. If we are so subject to persuasion that we make an uninformed decision, then we should not be on the Commission. He voted for the CVS proposal, but he would have voted against it if the owners had not agreed to the rezoning of their property.

Larson went on to state that the big issue is that we need to somehow solve the problem of better communication. Ex parte communications do serve a purpose. If we don't have the character to recognize when we're meeting with someone that they are going to try to persuade us, then it shouldn't have any affect on our vote. We should still vote for what we feel is good for the community. We should not discourage ex parte communications any further than we already have under Rule 17.

Gaylor Baird agreed that this is a very tough subject because we all want more information. The flip side is, if we decide to do away with Rule 17 or suggest that ex parte communications are in absolutely no way discouraged, we open ourselves up as individuals and a collective body to a lot more meetings. How open are we to having a lot of extra meetings? Are there ways to get more information within the structure that we have and within the process that we already have? She would push for that approach. To raise the expectation among the general public that we have an open door to sit down outside the traditional structure is something to think about.

Larson wants to leave it like it is. He does not want anything that would slow down the process.

Cornelius moved to close the public comments and defer this issue for further at a pre-meeting workshop on June 2, 2010, seconded by Esseks.

Cornelius believes the duration of the deferral is appropriate. It sounds like the structure that we have in place is not necessarily broken; however, there is concern about the direction taken by staff. We have time to consider that. That also give us time to review the rules that we have in place and bring some ideas to that workshop.

Motion carried 8-0: Cornelius, Esseks, Gaylor Baird, Partington, Francis, Taylor, and Larson voting 'yes'; Lust absent.

There being no further business, the meeting was adjourned at 2:35 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on May 5, 2010.

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