MEETING RECORD

NAME OF GROUP:	PLANNING COMMISSION
DATE, TIME AND PLACE OF MEETING:	Wednesday, July 27, 2011, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska
MEMBERS IN ATTENDANCE:	Michael Cornelius, Dick Esseks, Wendy Francis, Roger Larson, Jeanelle Lust, Jim Partington, Lynn Sunderman and Tommy Taylor (Leirion Gaylor Baird absent); Marvin Krout, Steve Henrichsen, Brian Will, Jean Preister and Teresa McKinstry of the Planning Department; media and other interested citizens.
STATED PURPOSE OF MEETING:	Regular Planning Commission Meeting

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

Sunderman then requested a motion approving the minutes for the regular meeting held July 13, 2011. Motion for approval made by Francis, seconded by Cornelius and carried 8-0: Cornelius, Esseks, Francis, Larson, Lust, Partington, Sunderman and Taylor voting 'yes'; Gaylor Baird absent.

CONSENT AGENDA
PUBLIC HEARING & ADMINISTRATIVE ACTION
BEFORE PLANNING COMMISSION: **July 27, 2011**

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

The Consent Agenda consisted of the following items: **SPECIAL PERMIT NO. 11019.**

Ex Parte Communications: None

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

Note: This is final action on Special Permit No. 11019, unless appealed to the City Council by filing a letter of appeal with the City Clerk within 14 days of the action by the Planning Commission.

CHANGE OF ZONE NO. 11019,
TEXT AMENDMENT TO TITLE 27
OF THE LINCOLN MUNICIPAL CODE
RELATING TO "ENTERTAINMENT RESTAURANT".
REQUEST FOR DEFERRAL: July 27, 2011

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

The Clerk announced that the applicant has submitted a written request for an additional four-week deferral.

Taylor moved to defer four weeks, with continued public hearing and action scheduled for August 24, 2011, seconded by Francis and carried 8-0: Taylor, Partington, Esseks, Francis, Larson, Lust, Cornelius and Sunderman voting 'yes'; Gaylor Baird absent.

CHANGE OF ZONE NO. 11025,
TEXT AMENDMENT TO TITLE 27
OF THE LINCOLN MUNICIPAL CODE
RELATING TO PERMITTED USES IN THE
B-4 LINCOLN CENTER BUSINESS DISTRICT.
PUBLIC HEARING BEFORE PLANNING COMMISSION: July 27, 2011

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

There were no ex parte communications disclosed.

Staff recommendation: Approval.

Staff presentation: **Steve Henrichsen of Planning staff** explained that this proposed text amendment is in reference to the existing ordinance approved in 2000 for sexually oriented live entertainment establishments (SOLEE). The SOLEE ordinance was brought forward at the request of the City Council and County Board, the purpose of which was to prevent secondary negative impacts (urban blight, crime, drug use and prostitution) that might occur on surrounding residential neighborhoods and specific residential uses. At that time, there was a significant amount of research done that reviewed ordinances nationwide and other adult use studies to look at the negative impacts of the particular land use on adjacent properties. At that time, the SOLEE use was one that was allowed by special permit in the H (highway oriented commercial) and I (industrial) districts and was prohibited from all residential, office, and all of the B business districts, except for the B-4 Downtown, where it was left as a permitted use at that time. This proposed text amendment would prohibit SOLEE in all areas of the B-4 zoning district.

The definition of a SOLEE is where either one of two cases applies – 1) one person is showing specified anatomical areas, or 2) a live performance that is distinguished by having certain acts displayed as a part of the performance (as listed on pages 4 and 5 of the staff report).

The SOLEE is now allowed in B-4 as a permitted use and in the H Highway or I Industrial districts by special permit. The special permit has certain conditions – must be at least 1,500 feet from any existing SOLEE use or other adult live entertainment use, and there must be a 1,000 feet buffer around certain sensitive uses such as church, residential, youth-oriented recreational facilities, museums, etc. At the time, it was shown that with what was allowed in the H and I districts, that there were quite a lot of areas that would be available for this use. It was not a matter of trying to ban the use city-wide.

Recently, because of a potential use operating in the community, the B-4 District drew attention. This proposed text amendment addresses the overall B-4 Downtown district. The staff first started off by looking at B-4 (Exhibit 1) which generally shows the area of the B-4 in the Downtown running from about 7th Street on the west over to 23rd Street east of Antelope Valley from the edge of the UNL campus south to about the north end of the State Capitol. There is some P Public zoning within this area as well. As staff looked in the Downtown, they first looked at a special permit provision, the same as in the H and I districts, i.e. 1,500 feet spacing away from other SOLEE uses (displayed on Exhibit 2). Currently, there are two SOLEE uses in the Downtown area so there are some areas left in the Downtown that would be more than 1,500 feet away. Then staff applied the criteria of the schools, day cares, parks, residential uses, libraries, and museums with the 1,000 feet buffer. Once you map out the appropriate 1,000 buffer, there is not a single part of the B-4 Downtown district where any of the SOLEE uses could fall and be more than 1,000 feet away. Therefore, staff came to the conclusion that it was not appropriate to consider having this use allowed as a permitted use or even special permitted use within the B-4 Downtown district because it could not conform to any of the criteria.

Henrichsen then displayed an exhibit showing areas where the SOLEE would be allowed by special permit if prohibited from the B-4 Downtown district. The map shows all of the H and I districts with the buffer area which would be allowed to have the SOLEE use. Particularly in H and I, there are not a lot of residential uses, unlike the Downtown with over 800 dwelling units within the B-4 Downtown zoning district. While some of the areas are not available, i.e. Kawasaki, rail yards, Norvartis – there is still considerable space vacant or which has small commercial buildings. Therefore, this proposed ordinance would not prohibit the use city-wide but that there would still be appropriate space for the use.

Support

1. Ed Swotek, Chair of The Downtown Lincoln Association (DLA), testified on behalf of Board of Directors and conveyed the very strong, unhesitating and unanimous support of this proposed ordinance. Downtown Lincoln is a very special place – the heart and soul

of our great city – and it has become a magnet for capital investment by a thriving business community and home to many downtown residents and families. It is the entertainment destination and the front door to UNL and Innovation Campus. Downtown was created for conducive business growth and friendly family atmosphere. It is imperative that we preserve, protect and enhance not only the tangible extensive investment we have made in our Downtown, but also the intangible value we place in our community's reputation. We cannot allow this immeasurable investment to be jeopardized by permitting SOLEE which has the potential for adverse consequences including those impacting property values, crime, prostitution and drug use. On behalf of the many businesses, residents and educational institutions represented, the DLA strongly urges the Planning Commission to support this zoning change.

2. Terry Uland, President of DLA, stated that in his 4.5 years as President of the DLA, he has never received as much reaction on a particular subject as this one. From a wide variety of stakeholders, employers, property owners, retailers, and residents, there are usually differences of opinion but there is virtually none on this issue. Uland strongly urged approval.

Esseks inquired as to how many separate businesses belong to the DLA. Uland explained that the ownership is by property parcel and he did not have a specific number, but he believes it would be in the hundreds. The DLA includes three hundred million dollars of assessed property.

3. Dan Parsons, CEO of Parsons Marketing, PR and Design, 129 N. 10th Street, testified in support on behalf of "Lincoln Can Do Better", consisting of business owners and other concerned citizens opposed to the location of the Viper/Drunken Monkey strip club in Downtown. His family moved their residence and business from south Lincoln to Downtown. "Lincoln Can Do Better" is in support and believes the adoption of this ordinance is necessary to the continued growth and prosperity of the pro-business and pro-family atmosphere in our community. The projects in the Downtown will continue to attract shoppers, visitors and others, and SOLEE does not fit with this positive direction our city is heading.

Parsons submitted a petition in support including organizations and businesses such as Union Bank, Bread and Cup, WRK, St. Paul Church and Nelnet. He also pointed out that the Lincoln Journal Star felt strongly enough about this issue to write a fairly strong opinion editorial back on June 29th. The courts have ruled that cities have authority to use zoning laws and licensing requirements to regulate strip clubs. The Lincoln Journal Star believes that city hall might be able to use regulatory tools that are well within constitutional limits. Zoning laws should reflect city goals.

There was no testimony in opposition.

Lust inquired of the City Law Department as to any possible constitutional issues. **Rick Peo** stated that the constitutional issues were looked at when the ordinance was originally adopted specifying this type of use and the secondary effects and cases that supported that type of restrictions. Since that time, additional case law has come out supporting secondary effects as being the basis for regulating this type of industry. There are studies being conducted reaffirming the secondary effects. This ordinance does not change the definition; it does not change the regulatory nature. But rather, it is just imposing restrictions in a particular district, i.e. B-4. The City Law Department is comfortable that this is not a constitutional issue. What is out there today has been deemed to be a freedom of expression issue so you cannot have a total ban city-wide.

Lust confirmed that the Law Department believes there is enough property still available to avoid any argument that there is a total ban. Peo stated that pictorially, it looks sufficient. Case laws are different from jurisdiction to jurisdiction as to how much space you have to have available. We do have to have space that has street access. It has to be a usable area.

Lust inquired whether there has been any analysis done about whether those available areas are in fact usable. Peo did not know.

Lust asked whether there are any other possible litigation concerns. Peo believes the existing uses in the Downtown would be nonconforming and would be able to continue to exist. He does not see any problem.

In terms of the analysis of the areas that are available, Henrichsen pointed out that there are areas located along West O Street. At NW 48th, all of the area between the interstate and West O is inside the city limits with water and sewer service; streets are paved; and the areas are platted and available. As you go west of the interchange, NW 27th out to NW 56th is available and would meet the criteria of not being empty farm land. There is also an area up around N. 56th and Arbor Road where city water has been extended and sewer is generally available, with paved roads and commercial businesses. Between 56th and 70th, north of Cornhusker, there is a significant area that is inside the city limits, with platted lots available, smaller commercial buildings as well as available vacant land.

Francis wanted to know what happens to the two existing businesses downtown if they are sold or change hands. Henrichsen explained that they would become nonconforming uses which are allowed to be sold without losing their nonconforming status. However, if the use ceased for more than two years, they would lose the nonconforming status.

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Larson moved approval, seconded by Francis.

Sunderman agrees that the Downtown has definitely changed over the years to more of a family type area. The business and commerce has remained and there are more residential uses today. The SOLEE use is not appropriate for that area.

Motion for approval carried 8-0: Taylor, Partington, Esseks, Francis, Larson, Lust, Cornelius and Sunderman voting 'yes'; Gaylor Baird absent. This is a recommendation to the City Council.

SPECIAL PERMIT NO. 1114E
TO AMEND THE PHEASANT RUN ADDITION
COMMUNITY UNIT PLAN,
ON PROPERTY GENERALLY LOCATED
AT OLD CHENEY ROAD AND PHEASANT RUN LANE.
PUBLIC HEARING BEFORE PLANNING COMMISSION: July 27, 2011

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

There were no ex parte communications disclosed.

Staff recommendation: Denial.

Staff presentation: **Brian Will of Planning Department** advised that staff is recommending denial of this proposal. This affects the Pheasant Run CUP located at Old Cheney Road and Pheasant Run Lane between 56th Street and 70th Street on Old Cheney Road. The original CUP and the associated preliminary plat were approved in November of 1994, and remained largely unchanged until 1987. At that point in time, a new preliminary plat and an amendment to the CUP came forward revising the lot layout to add dwelling units for total of 232. In addition, at that time, there was a waiver granted relative to sidewalks, to allow sidewalks only on one side of the street, i.e. along only the west side of Pheasant Run Lane, the north side of Pheasant Run Court, and the north side of Pheasant Run Place. Then in 1997, an administrative amendment was approved allowing the sidewalk to be moved from the west side to the east side of Pheasant Run Lane.

This portion of the CUP is largely built out. The last home is now under construction. The first homes built along Pheasant Run Lane in the northeast corner were built in 1990 and 1991, and the sidewalk was required along the west side, but we now have a sidewalk constructed along the east side. The homes along the west side were built subsequent, and a portion of the sidewalk was built along a portion of three of those lots but in the incorrect location.

Today, a portion of the sidewalk is built on the east side and a portion is built on the west side, resulting in a mid-block street crossing for pedestrians. The request before the Commission today is to be allowed to leave the sidewalk as it is now constructed. Will

pointed out that the house at 5630 Pheasant Run Lane has been constructed, with two curbcut driveways and sidewalk on the east side. 5640 Pheasant Run Lane is currently under construction, with those sidewalks to be constructed at the time of building permit. The staff is objecting because 1) there has been a plan in place for a long time for this CUP stating where the sidewalks are to be located, and people have purchased their property with this understanding; and 2) practical and safety issues – the proposed crossing is mid-point in a curve and, given the choice, that would probably be the last place staff would want to see the crossing. It would be the least visible location for someone making the crossing. Additionally, the city is still holding the money that is guaranteed with the final plat to install the sidewalk. It is currently constructed 2/3rds of the way and it would be a matter of extending the sidewalk at the time of the construction of the house. Will advised that staff has done a site visit and there is room to miss the existing tree and mailbox to install the sidewalk on the east side of Pheasant Run Lane. Staff has determined that there is no hardship or reason the sidewalk cannot be constructed.

Taylor commented that he visited the area and noticed that throughout that area there is absence of sidewalks. Are those other areas expecting to build sidewalks? Will stated, “no”. There is one sidewalk along Pheasant Run Place, as approved; they will not have to build one along the south side. The waiver also allowed the sidewalk as it exists on Pheasant Run Court. Those sidewalks were waived as part of the preliminary plat in 1987. Staff does not have an argument with the sidewalk on one side or the other. The mid-block crossing is problematic. Even though sidewalks were waived throughout this development, there is nothing that would prevent a homeowner from constructing a sidewalk along their own property. The city just cannot force it because it was waived. Staff is recommending that there be a sidewalk along the entirety of Pheasant Run Lane along the east side per the approved CUP.

Lust confirmed that the goal is to have one contiguous sidewalk on the east side of Pheasant Run Lane. Will agreed. We do not want pedestrians to have to cross mid-block to be able to walk on the sidewalk.

Esseks confirmed that this is a single family development. Will agreed. It is single family throughout. Esseks suggested that at least 20 or more of these homes could use that road and there could be 20 or more children riding bicycles on the sidewalk and he would not want to have them be the first to cross. Esseks also has a concern about establishing a precedent. Has the city recently allowed this type of fulfillment of sidewalk safety standards? Will stated, “no”. He does not believe what is being proposed is the sort of circumstance that staff would support in any situation. This is only unique due to the sidewalk being on the west side instead of the east side. Constructing the sidewalk on the west side was in violation of the approved CUP.

Partington observed that, even if you complete the sidewalk, there will still be residents with two homes that will have to cross the street to get to the sidewalk. Will agreed (6565 and 5615), but we do not want to make the situation worse. Pedestrians would prefer to be crossing somewhere near the intersection as opposed to the middle of the street length.

Will clarified that Pheasant Run Lane is a private roadway (24' to 25' paved width), and it would be considered a local street at 25 mph.

Sunderman inquired whether the $8,500 bond on file would be used to pay for the sidewalk that has not been built. Will explained that the original subdivider is still under requirement to complete the sidewalks. If the city had to construct the sidewalk, that money would be used. It is not the individual lot owner's responsibility to construct the sidewalk, but rather the subdivider who created the final plat creating the lots.

Proponents

1. Tim Gergen, Olsson Associates, appeared on behalf of the developer, and provided further information on the history of this development. There was a discussion when the homes in Pheasant Run Court were constructed. The three homes on Pheasant Run Lane were not under construction at the time. The home builder had called and asked the city about moving the sidewalk to the west side of the street in order to avoid having to build the sidewalk on the east side which would go through a lot of mature trees. Back in 2004 and 2005, when Pheasant Run Court was being developed, there were a lot more trees in the then vacant lots. The city does not recall that meeting nor giving the developer approval, but the developer insists that the sidewalk on the west side was to avoid going through mature trees on the east side with the sidewalk extension. Gergen suggested that the safety issue of the mid-block crossing can be easily resolved with conditions requiring signing, striping and detector plates on the ramps. The developer would not be opposed to this condition.

Gergen also pointed out that the speed limit on Old Cheney Road is 45 mph. Due to space restrictions when Old Cheney Road was widened, and with a 10' trail, there was not the ability to put a right turn deceleration lane into the development. With this circumstance, you sometimes get a faster speed coming into the development than when there is a right turn lane. The reality of having the sidewalk on one side of the road is approved, but the safety concerns may be more of a concern by having the crossing at Old Cheney Road than at the mid-block as proposed. Pheasant Run Lane is a narrower street at 24'. The mid-block crossing would allow the vehicles to slow down from the 45 mph into the 25 mph.

2. Philip Euler, President of Pheasant Run Road Association, submitted written comments and a petition in support of this proposal. The petition states:

> The existing sidewalks along Pheasant Run Lane are satisfactory as is. We feel it is not necessary to have additional sidewalks on the east side. However, at the homeowner's option, east side sidewalks may be constructed when they are constructed in conformance with general city construction specifications. We support the approval of the proposed Amendment CUP #1114E.

Euler reiterated that this is a private road. There is no access in and out of the development other than Pheasant Run Lane at Old Cheney Road. There is the possibility of 33+ cars that normally navigate this road. There is no outlet. He has lived in this neighborhood since 2006. He does not have young children but does have grandchildren and they do ride their bicycles and scooters on the sidewalks that are available and he has not found it to be a dangerous situation. He agrees about the corner of Pheasant Run Lane and Old Cheney Road being a little more on the dangerous side because of the speed coming off of Old Cheney Road. The proposal is very acceptable from his perspective. Twenty-one of the 33 lots are in support – the balance he was unable to contact. He disagrees that the crossing is in the middle of the curve – it is more at the beginning. There are no shrubs or anything along that part of the road that would block vision. The homeowners know it is a residential street and they slow down.

2. Steve Schmidt also appeared on behalf of the **Pheasant Run Road Association** and echoed Euler's comments. We need to give consideration to the homes that were built in 2008 – when those homes were constructed and they did their landscaping they were under the understanding that there would not be a sidewalk on that side of the street. There is room to construct the sidewalk, if the homeowners choose, but a fair amount of landscaping and planting has gone on in the existing conditions and we need to respect those homeowners. Schmidt also pointed out that the one vote in abstention on the petition is not a vote in opposition.

Francis inquired wether the intersection of Old Cheney Road and Pheasant Run Lane is the only way in and out of this subdivision. Euler confirmed that to be true.

There was testimony in opposition.

Even though this is a private road in a CUP, Francis inquired whether it is typical when lots are platted that the lot does not come clear out to the street. When you survey a property in any other neighborhood, the lot line usually starts about 2-3 feet behind the sidewalk. Will explained that the lot line is one and the same as the edge of the right-of-way (in this case, the outlot where the roadway is located). Typically in a public street, the back of sidewalk is about 3' off the lot line. In this situation, he did not know exactly but it looks like something along those lines. Francis then suggested that the owner who built in 2008 at 5650 did some extensive landscaping – did he landscape further than he should have

under the assumption there would be no sidewalk? Will believes that to be true. That owner has landscaped fully to the front lot line with a mistaken assumption that the sidewalk was not required because there was a sidewalk on the west side.

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Taylor moved approval of the application as requested, with the conditions set forth in the staff report, seconded by Larson.

Taylor stated that he is normally in favor of sidewalks and connectivity, but he has traveled the subject area and he just does not see that the sidewalk is necessary because of the way it is developed and the trees. It is a private roadway. You don't speed in that area. He would think that going from one sidewalk to another would not be that much of an inconvenience because of the way it is situated before the curve. It appears that the sidewalks are not necessary. He does not see the hazard.

Esseks commented that even though this is a private road, it is subject to city standards. What he likes about our city is that we are concerned about the need to use sidewalks. Here we have a road that is used by 33 separate dwelling units – the only road they can use to get out to Old Cheney Road and the rest of the city, so there is not an insignificant amount of traffic here. If we are going to require sidewalks, he would like to have them on both sides. However, if only on one side, it should be on a consistent side--the same side. A pedestrian should not have to cross from one to the other. He believes in sidewalks and consistent standards. This is a very bad precedent. We are not talking about an enormous amount of money. He does not believe we are talking about people who have been mislead. It is a rule where they have agreed to have the sidewalk on the east side. He will vote against the motion.

Francis agreed with Esseks. She believes that the people building on the east side had plenty of notice of the administrative changes made in 1997 and about the location of the sidewalk. She has lived in neighborhoods where sidewalks were partially on one side and partially on the other, and you end up with people walking down the street rather than using the sidewalks. There is enough traffic since this is the main thoroughfare into this area. She thinks the sidewalk needs to be connected all on one side.

Cornelius also expressed concern about the potential for precedent. He is opposed to changing the approval of an agreement after the sidewalk has been built in the wrong place.

Sunderman stated that he is torn. He believes there is a reason that the sidewalk was built on the west side – not just because he decided to build it there. He believes perhaps that the builder may have talked to city staff about that; however, if in the business long enough he should have known that it has to be documented. Sunderman would prefer the sidewalk all on one side. There might be a possibility to extend the sidewalk on the east side further

to the south and get away from that curve, but he is not willing to make an amendment to go that direction at this point.

Motion for approval failed 3-5: Taylor, Partington and Larson voting 'yes'; Esseks, Francis, Lust, Cornelius and Sunderman voting 'no'; Gaylor Baird absent.

Lust moved denial, seconded by Cornelius.

Taylor believes it is unfortunate to deny this application, especially since the sidewalk is constructed on the west side and the area is pretty well developed. He just does not see where it is going to be good. It is unfortunate that it has gotten to this point. He likes the way it is today. He likes the landscaping and the way that street is situated. It may appear to be a precedent but he does not believe that it would be.

Sunderman pointed out that the applicant does have an opportunity to appeal to the City Council if denied by the Planning Commission. He suggested that perhaps the applicant should explore moving the crossing away from the curb.

Motion to deny carried 6-2: Esseks, Francis, Larson, Lust, Cornelius and Sunderman voting 'yes'; Taylor and Partington voting 'no'; Gaylor Baird absent. This is final action unless appealed to the City Council within 14 days.

There being no further business, the meeting was adjourned at 2:10 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on August 10, 2011.

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