MEETING RECORD

NAME OF GROUP:	PLANNING COMMISSION
DATE, TIME AND PLACE OF MEETING:	Wednesday, February 8, 2012, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska
MEMBERS IN ATTENDANCE:	Leirion Gaylor Baird, Greg Butcher, Michael Cornelius, Dick Esseks, Chris Hove, Jeanelle Lust and Lynn Sunderman (Wendy Francis and Ken Weber absent); Marvin Krout, Steve Henrichsen, Brian Will, Tom Cajka, Christy Eichorn, Sara Hartzell, Jean Preister and Teresa McKinstry of the Planning Department; media and other interested citizens.
STATED PURPOSE OF MEETING:	Regular Planning Commission Meeting

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

Cornelius then requested a motion approving the minutes, as amended, for the regular meeting held January 25, 2012. Motion for approval, as amended, made by Lust, seconded by Esseks and carried 7-0: Gaylor Baird, Butcher, Cornelius, Esseks, Hove, Lust and Sunderman voting 'yes'; Francis and Weber absent.

CONSENT AGENDA
PUBLIC HEARING & ADMINISTRATIVE ACTION
BEFORE PLANNING COMMISSION: **February 8, 2012**

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

The Consent Agenda consisted of the following items: **SPECIAL PERMIT NO. 12002.**

Ex Parte Communications: None

Hove moved approval of the Consent Agenda, seconded by Esseks and carried 7-0: Gaylor Baird, Butcher, Cornelius, Esseks, Hove, Lust and Sunderman voting 'yes'; Francis and Weber absent.

Note: This is final action on Special Permit No. 12002, 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. 11042,
LINCOLN PUBLIC SCHOOLS DISTRICT OFFICE
PLANNED UNIT DEVELOPMENT,
ON PROPERTY GENERALLY LOCATED
AT COTNER BLVD. AND O STREET.
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: Conditional approval.

The Clerk announced that the applicant has submitted a request for two-week deferral. The Clerk also submitted a motion from Kent Seacrest on behalf of the applicant, amending the legal description.

Hove moved deferral, with continued public hearing and action scheduled for Wednesday, February 22, 2012, seconded by Lust and carried 7-0: Hove, Sunderman, Butcher, Esseks, Gaylor Baird, Lust and Cornelius; Francis and Weber absent.

There was no public testimony.

SPECIAL PERMIT NO. 06001A,
AN AMENDMENT TO THE GRAND TERRACE
COMMUNITY UNIT PLAN,
ON PROPERTY GENERALLY LOCATED
AT N. 56TH STREET AND MADISON AVENUE.
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: Conditional approval.

The Clerk announced that the applicant has submitted a request for deferral of the public hearing until Wednesday, March 21, 2012.

Lust moved deferral, with continued public hearing and action scheduled for Wednesday, March 21, 2012, seconded by Gaylor Baird and carried 7-0: Hove, Sunderman, Butcher, Esseks, Gaylor Baird, Lust and Cornelius; Francis and Weber absent.

There was no public testimony.

CHANGE OF ZONE NO. 11044,
FROM P TO R-7; FROM R-7 TO P; AND
FROM P AND I-1 TO B-1,
ON PROPERTY GENERALLY LOCATED
AT N. 17TH STREET AND R STREET.
CONT'D 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: Approval.

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

Lust moved deferral, with continued public hearing and action scheduled for Wednesday, February 22, 2012, seconded by Esseks and carried 7-0: Hove, Sunderman, Butcher, Esseks, Gaylor Baird, Lust and Cornelius; Francis and Weber absent.

There was no public testimony.

PRE-EXISTING SPECIAL PERMIT NO. 23G,
TO EXPAND THE BOUNDARIES TO ACCOMMODATE
ADDITIONAL OFF-STREET PARKING FOR
NEBRASKA WESLEYAN UNIVERSITY,
ON PROPERTY GENERALLY LOCATED
AT N. 56TH STREET AND MADISON AVENUE.
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: Conditional approval.

There were no ex parte communications disclosed.

Staff presentation: **Tom Cajka of Planning staff** explained this proposal to expand the boundaries of the special permit to incorporate property owned by Nebraska Wesleyan and include it within the boundaries of the special permit. All of the property being added is on the north side of Madison Avenue in three different areas. The rest of the boundaries are not changing – they stay the same as existing. The land uses within the areas are not changing. The only major change is in the third area between 54th and 56th Street where Wesleyan wants to remove three single family houses that they own and put in a parking

lot. The site plan was displayed. The existing curb cut on Madison Avenue will be widened to allow two-way traffic in and out of the parking lot. The existing access to the alley will remain. There will be no more access points added to the alley.

The new parking lot will have 50 parking stalls, with the hope of alleviating some of the congestion on the local streets in the neighborhood and get more student parking off the streets. There are approximately 10 stalls existing today in the back of the three houses that will be removed. These stalls are currently gravel and do not meet the parking lot design standards. The three houses will be removed and the parking lot will be book-ended by the two existing apartment complexes.

Lust confirmed that currently, there are no other residential uses accessing the alley other than the two apartment complexes. Cajka agreed. The alley does not go all the way to 56th Street. It actually ends at the apartment building.

Cajka then showed the boundaries of the property owned by Nebraska Wesleyan and the location of the accesses to the alley. Butcher wondered where the exit will be located on the north side of the parking lot. Cajka explained that there is access onto the alley for 5448. The new parking lot will be incorporated with the existing parking at 2800 and those residents at 2800 will use that one alley access that exists today.

Esseks noted that the alleyways were not designed to serve as an exit for a parking lot. They are used to allow people to access their garages. He believes this is a major change in use of the property and the alley. We know there has been concern by the neighbors and strong protest against this change. The neighbors are afraid that the alley will be expanded, either the entire space or the paved space. Is that possible? Cajka explained that this proposal does not expand anything to the north. Wesleyan is granting a 2' wide access easement on the south side of the alley, making it a little bit wider but it will not look much different than what it does today, except that Wesleyan is proposing to pave the alley. The hope is that by widening the access on Madison, the majority of the traffic will use Madison for ingress and egress to the parking lot, and not the alley.

Esseks inquired about a second access onto Madison. Cajka stated that Madison is a local street, and they possibly could do a second access on Madison, but that could cause the existing stalls at 2800 to exit onto the alley because they are at an angle. Esseks believes that the second access onto Madison could significantly reduce the traffic through the alley.

Cajka pointed out that the single-family residences currently share the alley access with the 5448 apartment complex.

Hove sought clarification that there are just two exit points from the parking lot - one at Madison and then one at the north side, so there is not one at the end further east. Cajka stated that the parking stalls north of 5448 use the alley.

In further discussion about the access points, Cajka stated that he understands that there will be no access to the alley with a curb in place. The people on the northern most stalls would go east, south and then back west. There is one curb cut onto Madison, and then one to the north which exists today.

Cornelius confirmed that the site plan in the staff report is correct – not the site plan posted on the internet. Cajka agreed.

Proponents

1. Dan Rosenthal, REGA Engineering. 1620 S. 70th Street, appeared on behalf of the applicant. They will be installing a wooden fence along the alley. They do not want to allow the traffic from the parking lot into the alley. Wesleyan has been maintaining the alley with gravel and it is their desire to pave the alley by executive order.

There was some discussion about another driveway, but after meeting with Public Works the applicant decided to widen the existing driveway to make it a two-way. Another access point would reduce the number of parking stalls and put that parking back on the street. The alley will be 16' paved. The parking lot will be paved and two feet will be dedicated on the Wesleyan side of the property to give a little more access. The fence will be on the property line; there will be parking lot lighting that meets city standards for security purposes; the applicant will build storm sewer system out to 56th Street to provide drainage. The alley will only be built to the end of the property, not all the way to 56th Street.

Esseks wondered why people would exit via the alley rather than via Madison. Rosenthal explained the circulation and advised that there will be no break in the alley to get out of the parking lot.

Relating to long term or permit parking, Rosenthal did not know if it would be permit parking but it is long term. Some of the parking stalls will be designated for the parking complexes. The remainder is for commuter traffic coming to Wesleyan.

Esseks pointed out that the Comprehensive Plan provides that we should be sensitive to surrounding neighborhoods. How are you going to make this less of an eyesore for the folks whose homes are just to the north? Rosenthal suggested that this will take 40 vehicles off the street which will help the neighborhood; the houses will be removed and the front will be screened with plantings with a nice fence on the back side. This will take out a gravel parking lot and it will be paved and maintained.

Butcher suggested that this will just shrink down the people that park the furthest away, but he agrees that it will be a benefit to the Wesleyan community. Butcher inquired whether any of the other Wesleyan parking lots exit into alleyways similar to the one being designed here, especially if they abut residential. Rosenthal showed the parking lots on the aerial photo, which have all been in Wesleyan ownership. This amendment is an attempt to make the special permit current with the ownership.

Public Comment:

1. Mark Walters, 2805 N. 56th Street, stated that the parking problem is massive and has been bad for 20 years, so he is not necessarily opposed. But his issue is with the alleyway and what they are going to do with it and some clarification on the other amendments being made to parking lots and the boundaries of the special permit.

The first permit was issued at 50th & Huntington, which is a long ways away from this parking lot. There was one sign put up in a 10-block area. There should have been better notification in that regard. He and his neighbors are not totally against the parking lot, because getting 50 cars off the street is a good thing.

Walter also owns the house next door at the end of the alleyway where it does not go through. The picture of the parking lot on the internet shows diagonal parking. He does not care as long as they stay on that property. They are already parking in the alleyway all the time. He uses the alley access to get to his property. His tenants are not allowed to park in the alley. Walters was curious about why there is not another access off Madison.

2. Gary Bohaty, 5429 Cleveland Avenue, testified with concern. His garage backs up to the property on the alley. He and his neighbors have installed these garages. There are a lot of trees that will need to be removed. The water and drainage is a concern. There will be no place for the water to go if they are going to use the property for paved parking. He does not know that the sewer line will handle it. He thinks it will be a flood in the back yards.

Bohaty also wondered about another access on Madison. He suggested that college students will drive over the curb stops. He has rocked the alley twice himself. His neighbor has done it once.

Bohaty is not against the parking but he does not believe they have thought it through well enough. He needs access to the back of his property and the alley is his access. He does not believe this will relieve the on-street parking in the immediate area.

3. Terry Walters, 2805 N. 56th Street, who also owns 2821 N. 56th, is concerned about people parking in the alley and wondered whether there could be some "no parking" signs erected to resolve the alley being blocked. She wondered whether paving the alley will raise the property taxes on the abutting properties.

4. Paula Bohaty, 5429 Cleveland, added to her husband's testimony, stating that she and her husband did not buy their property to look at a parking lot through their back window.

Staff questions

Lust asked for explanation of the amendments in the other areas. Cajka explained that the only reason the other two areas are shown is that they are properties owned by Wesleyan and should be incorporated within the boundaries of the special permit. Nothing else is changing. The buildings will remain as they are today. The special permit is for a private school and dates way back. There have been five or six amendments over the last 20 years. A zoning sign was put in place to show the location of the parking lot. Whenever a special permit is amended, the entire boundary of the special permit is required to be shown. These amendments are to bring actual ownership into the permitted area.

Esseks was concerned about the drainage off the parking lot. Can we be assured that the city standards regarding parking lots are such that there will be no increase of drainage on the abutting properties? Cajka's response was "yes", they would have to meet all city design standards. REGA Engineering is aware of some of the drainage problems and they are trying to make that better than it is today.

Lust wondered about "no parking" signs on the fence abutting the alleyway. Cajka suggested that it is illegal to block an alley, and if there is parking in the alley, the property owners should call the police department.

Further in regard to the drainage issue, **Dennis Bartels of Public Works,** stated that he raised the issue because there were no details on the drainage and grading submitted with the application. The engineer acknowledged that there was a problem but Bartels has not seen a grading plan. However, Public Works will definitely be involved in reviewing the building plan and paving in the alley so there will be opportunity to review it and the various options. Public Works does have veto power if they do not find the grading and drainage to be adequate.

Esseks inquired whether it is reasonable to expect that that particular street has a storm sewer sufficient to accept the additional water from that impermeable surface? Bartels explained that that will be part of the exercise of reviewing it. The applicant wants to take it to 56th Street, which is flowing toward the south, and the natural drainage is to the north. It will have to be reviewed in terms of whether or not it will overload the sewer system. Bartels further explained that the construction of the paving of the alley is a separate process through the Public Works Department, where the design and construction plans

are reviewed. Public Works will inspect the project as it goes along to assure it is built to the plans as designed and approved. If they are causing a drainage problem, Public Works would not approve the paving without addressing the drainage concern. Bartels acknowledged that currently, there is a low spot in that alley and the water that falls there presently stands and soaks away or drains between the houses to get to the north to Cleveland.

Butcher observed that according to Google maps, there is a garage access at 5419 Cleveland which is directly in line with the Madison access, so those driving in and out through Madison and onto 54th Street may be running directly into the back of that garage.

Butcher also inquired about any further attempts by the applicant to flatten out areas to construct parking lots. Would that come before the Planning Commission? Cajka stated that since those areas will now be within the boundaries of the special permit, the applicant would not have to go through the public hearing process. However, they would be required to do an administrative amendment to the site plan to show the changes. For example, if they were going to do a new parking lot, they would be required to get building permits. Part of that review process includes landscaping to meet parking lot design standards, including grading and drainage.

In terms of students jumping the curb and driving out on Madison, Cajka pointed out that there is a requirement for a landscape screen along Madison Avenue for the new parking area, which is a 90% screen which grows from the ground to three feet.

Esseks wondered whether there would also be landscaping along the alleyway. Cajka stated, “no”, because they have chosen to use a fence, which is an approved screening type in the design standards. The design standards would require it to be 3' tall but he assumes it will be 6' tall.

Esseks inquired about the impact of paving the alleyway on the real estate taxes of adjacent property owners. Cajka did not know what the impact on taxes might be.

Response by the Applicant

Lust inquired about the two buildings in the other amendment areas. Rosenthal believes that they are a fraternity and an apartment building, both having been purchased by Wesleyan. They are used for student housing.

Rosenthal reminded the Commission that this is “conditional” approval – it cannot be built unless the applicant is able to comply with all the review conditions, alley standards, paving standards, storm sewer standards, etc. They will also have to go through a permit process to tear down the existing houses, as well as to remove the tap for the sanitary and the tap for the water. At that time, the driveways will be removed. They will be required to do a curb cut and pour a new curb.

Esseks wondered whether the applicant would object to putting up some type of "no parking" signs along the fence. Rosenthal did not believe Wesleyan would have a problem but they would have to make sure the city would allow it.

Rosenthal confirmed that the fence between the parking lot and the alley will be between four and six feet high.

Hove inquired about the drainage issue. Rosenthal stated that the engineer has done a topographic survey and surveyed the manholes in 56th Street, one at Madison and at Cleveland, to get the slope. This is still under review. They will also look at some hydraulics in the storm sewer pipe.

Butcher inquired whether Wesleyan has a master plan. It seems like they continue to expand. Rosenthal has not seen a master plan but assumes they have one. Butcher wonders whether that master plan might show building vertically versus horizontally for parking at some point. Rosenthal did not know but suggested that would be at a cost of $7,000 to $10,000 per stall.

ACTION BY PLANNING COMMISSION: February 8, 2012

Lust moved approval of the staff recommendation of conditional approval, seconded by Esseks.

Esseks had thought there should be a second exit onto Madison, but when he saw the map of the actual parking spaces, it looks as though folks are going to be going in and out on Madison anyway, and not that many folks should go through the alley to the north. Therefore, it doesn't seem to be necessary to have a second entrance/exit onto Madison.

Lust commented that it appears Wesleyan is trying very much to take into consideration the concerns of the abutting land owners by designing the parking lot in this manner with the diagonal stalls and trying to lead people to use Madison rather than the alley, but obviously they have to leave the alley open to the apartment complex. She thinks they have done a good job to alleviate some of the problems.

Butcher stated that as Wesleyan continues to grow and do projects such as this, he is hopeful that they will continue to contact the community organization so that the residents can be informed of the process from the get-go.

Gaylor Baird observed that there is now a good awareness of the desire of the neighbors for signage about parking, so that will be investigated. While we are not reviewing the plans to address the drainage issue today, that is indeed a process by Public Works during the building permit process.

Cornelius pointed out that the existing traffic problems are to some extent outside of the scope of this application. The existing traffic problems should not be addressed as part of a question about the land use but rather traffic flow and perhaps law enforcement and parking enforcement around Wesleyan. He encouraged the neighbors to be in contact with the city about the law enforcement problems that they perceive and about issues of speeding on Madison or other streets in the area as well as illegal parking. Wesleyan has made efforts to meet the needs of the neighborhood to mitigate any negative impact that this might have. In fact, this may have a positive impact in reducing the amount of congestion caused by parking on the streets in the Wesleyan area.

Motion for conditional approval carried 7-0: Hove, Sunderman, Butcher, Esseks, Gaylor Baird, Lust and Cornelius voting 'yes'; 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..

SPECIAL PERMIT NO. 12001,
FOR A HEALTH CARE FACILITY,
ON PROPERTY GENERALLY LOCATED
AT S. CODDINGTON AVENUE AND WEST O STREET.
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. 56th 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. 56th, 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. 56th, 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. 56th 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. 56th 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. **(**As amended by Commissioner Esseks on 2/21/12**)**

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.

There being no further business, the meeting was adjourned at 3:15 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on February 22, 2012.

Q:\PC\MINUTES\2012\pcm020812.wpd