

BRIEFING NOTES

NAME OF GROUP: PLANNING COMMISSION

DATE, TIME AND PLACE OF MEETING: Wednesday, August 2, 2017, City Council Chambers, Room 112, County-City Building, 555 South 10th Street, Lincoln, Nebraska.

MEMBERS IN ATTENDANCE: Tom Beckius, Tracy Corr, Tracy Edgerton, Deane Finnegan, Maja Harris, Chris Hove, Dennis Scheer and Sandra Washington.

OTHERS IN ATTENDANCE: David Cary, Brian Will and Amy Huffman of the Planning Department; Rick Peo of the City Attorney's Office.

STATED PURPOSE: Briefing on "Alcohol Policy Review and Public Input" by Planning staff.

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

Brian Will of the Planning Department said the first of these three sessions covered the history of alcohol policy and the accompanying zoning regulations passed in 1994. A slideshow of the presentation is available on the Planning website. The second session was an open forum for the public and other interested parties to comment. In addition to two letters received by Staff, most comments were in support of maintaining the status quo when it comes to alcohol policies. There was one person present in support of altering the regulations. A memo was sent out to Planning Commissioners to help with today's review. The first section summarizes the current state of the regulations. The second section addresses frequently asked questions.

Harris asked if the standard of measuring around the building and to the front door in B-5 took effect in 1994. Will said no, that change came later. It wasn't until the early 2000s that B-2 and B-5 modifications were made as a result of identifying that those zoning districts have unique characteristics. Harris asked what prompted the change to those districts. Will said he believes there were at least a couple of locations in town that requested the change, including Clocktower at 70th and A Streets and the strip mall at 14th and Pine Lake Road.

Will said that for those who wish to modify the regulations, there have been a few suggestions that have come up more than once. Today, those suggestions will be discussed.

The first suggestion is to bring back a waiver provision, deleted in 2004, which allowed the City Council to grant waivers to regulations on a case-by-case basis, for example, reducing the 100-foot separation. It was used on several occasions in that past. From 2004 on, Planning Commission was given final approval authority on the special permits, and the separation became a hard and fast 100 feet. The reasons why the waiver option is not brought back are the same as the reasons for eliminating the provision in the first place; it is a practical difficulty for Staff to compare the exact same use and decided what is appropriate for one location, but not another. Planning Commission and City Council experienced the same difficulty. That led to complaints that the process was not equitable.

Another common suggestion is to have B-1 and B-3 Districts match B-2 and B-5 Districts, in terms of alcohol regulation. B-2 and B-5 developments have different land use patterns and a different look and feel. They are generally suburban, commercial district regional centers with large setbacks around the perimeter, buildings facing inwards, and located at major intersections. B-1 and B-3 Districts tend to be in older neighborhoods. Places like Havelock, University Place, and College View have commercial strips

along what are now arterial streets. The zoning is not deep, only around a half lot or a single lot, and they often abut residential neighborhoods.

A third suggestion, the same question raised by Open Harvest in their proposed text amendment, asks why there cannot be an exemption for grocery stores. There has been much discussion on this topic and it is complicated.

Rick Peo, City Attorney's Office, said that one of the fundamental rules a city must follow is not to create special regulation, that is to say, creating a class of people who are arbitrarily different, a closed class, where only one will ever meet the regulations. The flipside of that is the creation of groups who are substantially the same, but are treated differently, which may apply more in the case of Open Harvest. Special treatment cannot be given to one entity without a good rational basis for the distinction. It would be easy for others to make an argument that they are substantially the same.

Peo went on to note that there is one option that has not been mentioned thus far. Law allows a city to adopt a prohibitive ordinance, such as the 100-foot rule, but that can be waived if affected parties consent. They are not consenting to use, but rather, to waive the prohibitive range. So potentially, there could be a law under which that is allowed.

Hove noted that for Open Harvest, that would only be a couple of parties. Peo said it could be more for other locations. Hove said the consent must be given by the owners of the properties.

Finnegan asked what would happen if the ownership changes. Peo said the use is already in place at that point. The option to seek consent is less obtrusive than having an arbitrary standard, or having people rezone and expand boundaries of a district, which further continues intrusion. Peo clarified that he is unsure if Planning Department would be supportive of that type of change, but it is out there. He is surprised no one has proposed this type of change to the Municipal Code.

Washington asked whose responsibility it would be to gather consent. Peo said it would be up to the applicant. Only the applicant and adjacent owners could make that decision.

Hove asked if the process would still include going through the public process. Peo said that the special permit would remain with all other terms and conditions being applied. It would merely add a mechanism where the applicant can avoid that single condition by gaining consent.

Edgerton asked if Staff would still need to approve that adjustment. Peo said it would become difficult to deny because if abutting neighbors are okay with it, then the problem disappears. The positive thing is that it does not change requirements for the rest of the City, it takes away the pressure from the political side of things, is uniform, and puts the onus on the applicant.

Edgerton asked for clarification about the differences between special permits and conditional uses. The special permits must go through all of the approvals, but with the conditional use, if they meet all conditions, an applicant can move forward. Will said that is correct. Edgerton asked if all of the criteria must be met before the waiver becomes an option. Will said yes. It would be case-by-case.

Beckius observed that a grocery store does not necessarily make a safer environment for alcohol sales than a pharmacy or convenience store. There are currently on-sale establishments, mostly restaurants, that can serve based on percentage of sales. Peo said the distinction for on-sale between bars and restaurants is clear in terms of type of use. A grocery is not as easy a distinction to make and it becomes an issue of creating a special class, as mentioned earlier. Beckius said he wants to understand the determination that a restaurant is safer than a bar. Peo said they have different types of impact. Much of it is also perception of neighbors. People primarily go to a bar exclusively to drink where that is not

the case with restaurants. Beckius argued that there is no difference in requirements in terms of training and who can sell alcohol. Peo agreed that the server requirements are the same.

Corr said it is not just a matter of safety, but also the intensity of impact between a restaurant and a bar. Things like noise are much bigger issues at a bar. Beckius agreed. He went on to say that to him, there does not seem to be much difference between a grocery, pharmacy, and convenience store. He wanted to understand why the distinction is made that a use like a restaurant is more lawful in certain areas. Peo said it is based on the impact to people within the 100-foot space.

David Cary, Director of Planning Department, stated there are inherent differences between on- and off-sale so on-sale regulations are applied differently. Beckius agreed but noted that a distinction has been made so that one group can do one thing that others cannot. Peo said it is a common perception that restaurants are different from bars, so they are treated differently.

Washington noted that her difficulty with the grocery suggestion is the problem of being able to clearly define "grocery" store. Beckius said that is the point he is trying to make; restaurants have been defined. Peo responded that the State had already defined a restaurant so there was an existing basis to use. One could try to define a class broadly enough that little items are not just being weeded out, but it would be difficult to limit it to one business and not require the same exemption for everyone else. At that point, it gets harder and harder to hold the line.

Beckius wondered if a percentage of sales for products for human consumption would cover it. Peo said that theoretically, it could get to a point of defining the amount of sales too specifically. Beckius said he sees a difference between a grocery and other types of retail.

Cary agreed that a reasonable person can come to that conclusion; however, when discussing the topic in terms of legal defensibility, the line is not as clear. It is important to be able to defend existing regulations, as defined. Staff feels that would not be a strong defensible step to take. Over time, the questions over what is meant by 'this' or 'that' when applied to similar uses would become difficult to answer and we won't be able to hold the line. Then the regulations that the community has accepted could go away altogether. The other part of that is, when the City gets to a point of intricate definitions, the problem of implementation and investigation become real challenges. The City cannot take on the burdensome responsibility of applying consistent enforcement.

Washington asked if the City has other waivers to prohibitive ordinances. Peo said the 100-foot setback to a certain type of use can be considered a prohibitive ordinance. Washington clarified that she meant she was looking for exceptions to prohibitive ordinances. Peo said there is nothing on the books where exceptions can occur with consent, but that does exist in other jurisdictions.

Cary said this is an intriguing option and it is important to start a conversation about whether this is the right choice for Lincoln. Peo added that no one has presented that option, so a change would not occur until that would happen. Washington asked if the City would lead in making a change like that. Cary said Staff would want to do a full-blown study. He expressed concerns that the change could be applied to other types of regulations.

Harris said that Zipline Brewery testified in support at a hearing for Open Harvest. She wondered if there is a scenario where an exception could be made for off-sale at a craft brewery, or a different local business, where a certain percentage of sales comes from local products. She acknowledged that it could create similar problems. Peo replied that gets into the territory where exceptions are being made just to make something work. That would be creating a new class to fit a niche here and there. It doesn't carry the same weight as being able to clearly state a single policy. So far, there has not been a plausible solution presented that would allow these unique entities to come forward.

Cary pointed out that the regulations in place are not so restrictive that we are not allowing the use to happen; there is plenty of opportunity. There is a balance to be achieved between providing exceptions to allow things in more places versus having regulations that the community has been living with and has agreed with, overall. It is not a black and white issue; however, he is comfortable with the fact that the City does allow for the sale of off-sale in a reasonable amount of places and serves the community.

Scheer commented that, from a planning perspective, altering the rules in a way that erodes the 100-foot protection is a big deal in terms of how it continues to be a principle. Cary agreed that when the separation is chipped away, the integrity of the rule gets lost over time.

Will said that with respect to the issue of allowing alcohol sales in restaurants, we are talking about the difference between on- and off-sale. Restaurants only sell on-sale and the community has already agreed upon that distinction. He wanted Commissioners to know that there were lengthy discussions about defining restaurants where alcohol is not a significant proportion of sales.

He went on to say that the regulations have been in place since 1994 and there are vast opportunities to sell within the City; there are a few locations where it just doesn't work. The vast majority of comments received by Staff have been about leaving the regulations as they are. Many have asked what is done in other communities and the answer is that it is all over the board. It is clearly a community standard and Lincoln has decided for many years that this is our standard. In the last few years, there have only been two applicants asking for the reduction; Walgreens at 48th and O Streets was denied, and Open Harvest is currently on hold. Will thanked Open Harvest for their willingness to delay their application to accommodate these informational sessions.

Beckius commented that he has seen nothing regarding the perception of alcohol sales and its connection to addiction and crime. He wonders what the intention of the regulation is. Will said it is most likely not within the purview of Planning Department to make statistical sociological correlations. Cary said there could be an effort to show the relationship between alcohol sales and criminal activity within its vicinity. He is sure Lincoln Police Department would have those statistics. The difficulty with off-sale is that the point-of-sale may occur away from that type of activity. There is a clear connection between disturbance calls and on-sale. That said, in relation to planning, that is not the crux of the topic. It is more appropriate to consider hours of operation or sale in close proximity to certain uses. His point is that, although it should part of the consideration, it is not the driving force when it comes to off-sale.

Beckius said there is much better data available now than when the regulations were set in the past. It might be possible to overlay alcohol sales and crime statistics and he is surprised he has not seen that kind of information yet. Will responded that this is a land use issue, and not a project of social engineering. We are not saying that the sale of alcohol is good or bad, but instead, it is our job to identify that there are effects associated with certain land uses that must be considered. Beckius agreed but wondered if residents in neighborhoods see it that way. If that were the only issue, things could be put in place, like limits to hours of operation. Will said he does not think that is true. There are other associated effects like traffic or trash, for example. There is a hierarchy of land use and there are reasons it is so. Planning would not say that alcohol sales are bad and there are negative effects. Beckius said that neighborhoods do say that.

Harris said another complicating factor is that there are some locations that have been grandfathered in, so that creates the effect of inequity. Will agreed that was the case for many uses. At some point, rules are enacted and the people already doing certain activities are allowed to remain, whereas any new places would not be allowed. Harris believes that is a factor for store owners who want to make the same profits and have the same opportunities as those already established prior to regulations. Cary said that is an issue heard all the time by Planning Department about almost every type of use. At some point, it happens that previously operating businesses are allowed to continue certain activities that are not allowed for new operators.

Scheer thanked Staff. He invited comments from the public.

There was no public testimony.

There being no further business, the meeting was adjourned at 2:20 p.m.

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