

MEETING RECORD

NAME OF GROUP: PLANNING COMMISSION

DATE, TIME AND PLACE OF MEETING: Wednesday, April 25, 2007, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska

MEMBERS IN ATTENDANCE: Jon Carlson, Gene Carroll, Michael Cornelius, Dick Esseks, Gerry Krieser, Roger Larson, Mary Strand, Lynn Sunderman and Tommy Taylor. Marvin Krout, Ray Hill, Mike DeKalb, Brian Will, Brandon Garrett, Jean Walker and Teresa McKinstry of the Planning Department; media and other interested citizens.

STATED PURPOSE OF MEETING: Regular Planning Commission Meeting

Chair Jon Carlson called the meeting to order and requested a motion approving the minutes for the regular meeting held April 11, 2007. Motion for approval made by Strand, seconded by Carroll and carried 9-0: Carlson, Carroll, Cornelius, Esseks, Krieser, Larson, Strand, Sunderman and Taylor voting 'yes'.

CONSENT AGENDA

PUBLIC HEARING & ADMINISTRATIVE ACTION

BEFORE PLANNING COMMISSION:

April 25, 2007

Members present: Carlson, Carroll, Cornelius, Esseks, Krieser, Larson, Strand, Sunderman and Taylor.

The Consent Agenda consisted of the following items: **COMPREHENSIVE PLAN CONFORMANCE NO. 07005, CHANGE OF ZONE NO. 07019, AND STREET AND ALLEY VACATION NO. 07002.**

Ex Parte Communications: None.

Carroll moved to approve the Consent Agenda, seconded by Cornelius and carried 9-0: Carlson, Carroll, Cornelius, Esseks, Krieser, Larson, Strand, Sunderman and Taylor voting 'yes'.

REQUESTS FOR DEFERRAL:

CHANGE OF ZONE NO. 06082
FROM AGR AGRICULTURAL RESIDENTIAL
TO R-3 RESIDENTIAL
and
PRELIMINARY PLAT NO. 06011
WOODLAND VIEW 1ST ADDITION,
ON PROPERTY GENERALLY LOCATED
AT S.W. 40TH STREET AND WEST A STREET.

Members present: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson.

The Clerk announced that the applicant has requested an additional four-week deferral. Carroll moved to defer, with continued public hearing and action scheduled for May 23, 2007, seconded by Strand and carried 9-0: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson.

There was no public testimony.

CHANGE OF ZONE NO. 07020
FROM R-2 RESIDENTIAL TO
B-1 LOCAL BUSINESS DISTRICT
and
SPECIAL PERMIT NO. 07010,
FOR EXPANSION OF A NONCONFORMING USE
ON PROPERTY GENERALLY LOCATED
AT NO. 70TH STREET AND HAVELOCK AVENUE.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 25, 2007

Members present: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson.

Staff recommendation: Approval of a reduced area on the change of zone, and conditional approval of the special permit.

Ex Parte Communications: None.

Additional information for the record: **Brandon Garrett of Planning staff** submitted a letter signed by 32 individuals expressing concerns and posing 19 questions directed toward the applicant and the city; a response by the staff; and a response from Casey's, the applicant.

Staff presentation: Garrett then discussed the special permit and showed a revised site plan, explaining that this application is for a special permit for the expansion of a nonconforming use. In this case, that nonconforming use is the sale of alcohol for consumption off the premises. The reason it is nonconforming is that they were legally selling alcohol before there was a requirement to obtain a special permit to sell alcohol. The business closed in January, 2006, so it will only be nonconforming until January 2008. They have two years to bring the nonconformance into compliance.

In considering this special permit, Garrett advised that the zoning states that there are three key points to be considered when granting a special permit for the expansion of a nonconforming use: 1) affects on adjacent property, i.e. traffic, city utility service needs; 2) density of the land use zoning for the subject property and adjacent property; and c) degree of hardship on the applicant caused by failure to grant such a permit.

Garrett then pointed out that the waiver being requested is to allow less stacking at the pumps. The design proposed provides more space between the pumps than we typically see, allowing vehicles to pass through, thus reducing the stacking requirement. Public Works agrees with this waiver.

More specifically, as noted in the staff report, there is a condition of approval which requires a revised site plan that would be approved by Public Works and Planning before getting a building permit. The reason for this condition is that when this application was first submitted, the applicant submitted a different site plan. Even with the revised site plan shown today, there are still some issues that need to be corrected before obtaining a building permit.

With regard to the change of zone, Garrett pointed out that the staff would support a minimal expansion of the B-1 district into the residential district to accommodate the expansion of this service station. The property just to the west is actually under one ownership and there is just one single family home on the two lots. The east 50' is currently zoned B-1, and the west 50' is zoned R-2. To the south of the existing site there is a four-plex which is also zoned B-1. Thus the whole corner north of the alley up to Havelock is already zoned B-1. There is an existing service station also to the north. The staff had indicated to the applicant that the staff would support approval with a minimal expansion into the R-2 zoning, but not the entire 50' being requested.

Esseks inquired whether the 50' wide lot is buildable. Garrett believes that is the standard width for the R-2 district. Esseks then asked for the justification for this change. Garrett stated that the applicant indicates that they need the extra space to accommodate the expansion of the site, the size of the store and the number of gasoline pumps to meet the company standards (Casey's).

Larson confirmed with Garrett that the applicant will be tearing down the existing building which is currently unoccupied, the four-plex to the south, the home to the west and any outbuildings.

Esseks acknowledged that eight to twelve feet is a minimal change of zoning, but given the desire to maintain the liquor license and their planned positioning of the store, will they be 100' from the nearest residential use? Garrett acknowledged that the facility would not meet the 100' separation. He explained, however, that because it is a nonconforming use, they would not be subject to that 100' requirement. Esseks believes the 100' requirement is a very serious issue. Garrett confirmed that the approval of the expansion of nonconforming use would allow the sale of alcoholic beverages for consumption off the premises without coming back for a special permit for the sale of alcohol. Garrett reiterated that the issue today is the nonconforming use, and that being the sale of alcohol in this case – not the service station. If this special permit is approved, the business can continue to sell alcohol on this site without coming back for another special permit.

Larson recalled other situations like this such as 48th & Randolph.

Carlson inquired whether the staff is making a formal recommendation on the change of zone. Garrett stated that the staff is interested in allowing some flexibility to work with the applicant upon submittal of a revised site plan before being more specific on the change of zone recommendation.

Carlson inquired whether the applicant can use the R-2 portion for a different use. Garrett believes it would reduce the lot size to less than 50', but the intent was for the whole site to be Casey's. Ray Hill of Planning staff added that the remaining part of the R-2 zoned lot would be used as a buffer to get a greater separation between the service station and the adjoining residential uses, such as a landscape buffer area.

Proponents

1. Mark Hunzeker appeared on behalf of **Casey's General Stores**. This is an application to redevelop an existing convenience store site to bring it up to modern standards, specifically standards of the Casey's stores company-wide. The existing store is closed. The abutting four-plex exists on commercial zoning. One house will be removed. Across the street to the northwest is an older commercial use.

Hunzeker stated that the applicant has had at least two meetings with Planning and Public Works about the site plan. The difficulties of fitting a modern standard store on this site arise from several things, one being the fact that both Havelock Avenue and 70th Street have 40' Building Line Districts which extend into the site an additional 7' from the required setback on the property line. In addition, Public Works would strongly prefer that Casey's not use the existing curbcuts on the site. Hunzeker showed the existing curbcuts and existing pump islands on the site. He suggested that it would be possible to redevelop on the existing zoning simply by purchasing the four-plex to the south and making something fit, but it would not be a modern standard store and would not meet any of the Public Works criteria for getting the curbcuts separated from the intersection. Part of the reason the facility will occupy as much of the lot on which they are requesting the change of zone is that Casey's has a fairly high standard for circulation on the site. The waiver of the stacking requirement is acceptable because the spacing between the pump islands is sufficient to allow vehicles to go between the cars and to circulate on the site. Looking across the street, there is another convenience store in a similar situation but the standards there are less generous in terms of site circulation and separation from the intersection. In terms of the criteria for affect on adjacent property, Hunzeker does not believe there is any question that eliminating the current eyesore will be an improvement to this neighborhood. The paving of the alley and movement of curbcuts will improve the traffic situation at the intersection.

Hunzeker did not interpret the letter submitted today as a petition in opposition but more expression of concern. There will be flush mounted lighting on the canopy; there will not be any lights in the alley; the hours of operation are 6 a.m. to 11 p.m. On balance, Hunzeker submitted that there is no adverse impact on surrounding properties and very little change. This special permit changes very little in terms of the density of the commercial use. The size of the building is not tremendously greater than the existing building. They are just using more land to accomplish the same use.

Hunzeker advised the Commission that the existing site is not adequate for Casey's to operate a store which meets their standards. It is an opportunity for new investment in this location. As these applications come along for redevelopment of older commercial areas, the Commission needs to think about the need for new investment in those areas and improvements of those commercial facilities as opposed to limping along with ever-decreasing uses. He would hate to see a location like this turn into a discount cigarette store or something like that because we are not allowed to make the investment to bring it up to standards.

Hunzeker confirmed that there will be four pump islands with one positioned on each side of each pump. There will be sufficient room for a vehicle to stack behind a vehicle that is at the pump. The standard of having room for two vehicles stacked behind each pump with a vehicle at the pump is one that is based on a business model that no one would seriously try to sell anymore. It is very rare to have that sort of activity. Larson commented that theoretically, there could be 32 cars on the lot. Hunzeker acknowledged that the site plan

provides for 16, with room to maneuver between the cars being serviced. The spacing between the pump islands is what convinced Public Works.

Carroll referred to the distance from the west property line. Hunzeker stated that there will be 10' from the west edge of the building to the property line. Casey's prefers to do a heavy green landscaped rear yard as opposed to a fence.

Carroll inquired about a fence on the south boundary line. Hunzeker stated that the applicant does not have the opportunity on their property to place a fence, but they are willing to enter into discussions with any of the south abutting neighbors to get a fence on their side of the alley on their property.

Strand noted that the questions and concerns in the petition letter (#6, 10, 16 and 18) all have to do with the alley. What do you plan to do with the alley, including drainage? Hunzeker stated that the alley will be paved back as far as the drive in front of the store, and it will be used as an access point, which effectively allows the store's access point more than 150' south of the curb line of Havelock so that there is some good separation from the intersection. There will be no lighting in the alley, and they do not expect customers to use the alley for access. It will be much more convenient to use 70th or Havelock. This will not increase traffic through the alley from east to west.

Carlson noted that the revised site plan submitted today proposes to use all but 10' of the currently R-2 zoned lot. Have you talked with Planning about that? Hunzeker stated that the applicant made some changes to the site plan based on recommendations from both Planning and Public Works. One of the recommendations of Public Works was that the curbcut be placed such that when a car turns off Havelock, it is in a driving lane from north to south as opposed to coming in further to the east. This site plan allows the standard separation from the front of the store to the canopy of 55'. The revised site plan shows 60' because of the Public Works recommendation on the curbcut. There is also 7' of additional setback along 70th Street, which is required by the Building Line District. One of the benefits of this project is that it will establish that Building Line District so that in the event 70th or Havelock are widened in the future, there would not be anything in the way of widening along either of those streets.

Esseks stated that he fully understands the need to redevelop this property, and since the southern area is already B-1, he is afraid the adjoining property owners have a problem with a zoning situation already in existence such that they will have to accept the redevelopment of combined properties. He noted the Police Department objection to there not being a 100' buffer from residential uses. Esseks takes the position that the applicant should either meet the 100' setback by reconfiguring the site plan, or not sell alcohol. Hunzeker pointed out that first of all, there was not a waiver of the 100' requirement on the initial store. The existing store had alcohol sales prior to the text change that brought in the special permit requirement. Hunzeker suggested that the process of putting that text change into the ordinance was an arbitrary and anti-competitive motive that drove people

to request that that buffer be placed in the ordinance. At the time that the special permit provision was put in place, the City Council was somewhat frustrated because they couldn't seem to get their recommendation of denial of liquor licenses upheld by the Liquor Control Commission and they were thrashing about for some means of having more impact and at least a public hearing. The then now defunct Retail Package Beverage Association came up with the idea of trying to do something that would make it much more difficult for convenience stores to sell alcohol. They arrived at the strategy of trying to restrict the licensed premise from any sort of existing residential use or zoning district in order to identify as many of the potential sites for convenience stores as they could by going to the B-1 and B-3 areas, the older parts of the city. It had absolutely nothing to do with protection of residential home owners. It had to do with protection of the market place for existing Retail Package Beverage Association owners. When grocery stores began selling alcohol, all of the convenience stores ultimately got licenses. That Association is now defunct.

But, Esseks pointed out that it is still part of the City's laws, and the Police Department is opposed. He has to take their position into account. Can your client either reconfigure the property or simply do without selling alcohol? Hunzeker suggested that by the time you meet the standard of 100' from residential, it restricts the building envelope to some ridiculously low standard. That is not something that Casey's would be interested in doing. Likewise, given the current industry standards, practices and competition, Casey's is unlikely to operate a store without the ability to provide beer sales. It would be very difficult for them to compete against the store right across the street, for example, that sells beer and which does not meet the 100' requirement either. Hunzeker does not believe it is an important health, safety and welfare issue; however, the Police Department continues to take a very rigid stand on this.

Larson inquired about the other Casey's facilities in town. Do they all sell beer? Hunzeker confirmed that they do all sell beer. Larson inquired whether there are other situations in town that are closer than 100'. Hunzeker stated that there are multiple locations – probably 85 to 90 percent of the convenience stores in town would not meet that standard. The only ones that do are ones that have been developed in very recent years. Even up until a few years ago, there was a provision that allowed that standard to be waived, and it was waived regularly until the ordinance was changed.

2. Jo Anne Dyar, Ankeny Iowa, testified in support on behalf of **Casey's**. Casey's bought the Gas N Shops last year. There were several that did not meet the Casey's standards, including this location. Casey's has been actively redeveloping the older stores around town to bring them into ADA compliance. Casey's believes that the existing store is substandard and the store was closed. The store did have a liquor license. Casey's wants to make the neighborhood come alive again with a nice looking corner with a nice new

brick building. Casey's is a good neighbor. This location is very similar to most of their 1400 stores. Casey's is the neighborhood grocery and pharmaceutical store. Because they sell gas, they require the distance between the pumps for safety purposes. The 55' is very important. This is a very, very typical layout for Casey's.

Opposition

1. Larry Menebroker, 6954 Ballard Avenue (residential home right behind the facility and adjacent to the alley), testified in opposition. He has lived there for 30+ years and they have always had problems with this facility. He gets a lot of garbage and trash from this facility and there are problems with traffic. Havelock Avenue is narrow at this intersection and it is very congested at certain times of the day. On to the east on 70th Street, there is another driveway to an apartment building which adds to the congestion. He has seen people use the alley rather than wait in the intersection. There have been robberies at the store and the robbers go through his back yard. He doesn't want to do this again. He does not think there is enough room and there have been problems with transport trucks delivering fuel. They block his driveway waiting to get into the facility. He believes all of the delivery trucks will come down the alley. Another problem is water drainage. Havelock is very flat. All of the yards drain to the alley. He has talked to realtors who have told him that his property value will decrease considerably. He goes out 69th Street to Havelock to go to work but there are times he cannot get across Ballard Street. It is hard to go north. There will also be a problem with snow removal because there is nowhere to put the snow.

2. Janet Claycomb, who owns the property opposite the dumpster with her mother, testified in opposition. She had to lock her mother's gate because people were going through her yard to get to the station. There is fencing all along the alleyway and the applicant has not communicated with her mother, who is 82. Claycomb requested that there be a fence required by the dumpster. There is no reason she and her mother should have to look at trash out the back yard. She is not opposed to Casey's, but she does believe there should be at least an enclosed fence around the dumpsters. She is totally opposed to taking any residential area because it will only lead to more.

Staff response

With regard to being able to build on the lot as it is zoned B-1, Garrett agreed with Hunzeker that the applicant cannot build on that site. In that event, however, they would still need a special permit to expand a nonconforming use because they would still be reconstructing on the site. They could build on the site and comply with the 100' requirement, but the site would be extremely small and would be unrealistic.

In conversation with Public Works, Garrett stated that the staff still believes that there is an opportunity to alter the site plan in order to shift things toward the east by reducing some of the drive aisles to meet city standards rather than Casey's standards. The staff was not happy with the original site plan submitted with the application, and there are still some setback issues that need to be addressed.

Esseks is not willing to ignore an existing ordinance requiring a 100' setback in a reconstruction situation. He finds that very difficult. He would rather have the City Council change the ordinance than for the Planning Commission to unilaterally suggest that the ordinance should be changed. Garrett acknowledged that there is an appearance of a loophole by expanding a nonconforming use, even though we have a requirement for a special permit for that. However, since they are applying for the special permit to expand the nonconforming use, the criteria includes reconstruction, additions, replacements, or expanding beyond the site.

Rick Peo, City Law Department, advised that the City Council has already acknowledged the fact that nonconforming uses by being allowed to be enlarged are not going to comply with the existing ordinance. That is a fact of life. Usually with nonconforming houses, we would want them to expire over a period of time; however, the City has not gone that direction. Adopting the special permit procedure allowing the expansion of a nonconforming use acknowledges that they are going to continue and be allowed to exist, and that existence includes rebuilding. Whether that is good or bad is debatable, but that is the life we have established in Lincoln.

Carlson suggested that just because the special permit exists, there is no presumption of approval. Peo agreed, but there is criteria to grant the expansion of a nonconforming use. It didn't meet the standard and that is why it is nonconforming.

Larson sought confirmation that there have been many instances like this that have been approved. Peo responded that the creation of the special permit for sale of alcohol created a lot of nonconforming uses. In some situations we have declared them to have received their special permit. In other instances, we have said they will be deemed nonstandard. All of these have been attempts to make less impact on the existing business. When the law changes and they become nonconforming, the City has taken the position to try to lessen the impact on those properties and allow them to continue to exist. You just have to evaluate the application based on that history. It is not the right of approval, but a right to have consideration based on criteria in the ordinance. Peo acknowledged that there have been other expansions.

A nonconforming use goes with the land, not the business.

Garrett clarified that the dumpsters are going to be screened with gates.

Carlson asked for a clarification of the staff recommendation on the change of zone. Garrett was hesitant to state a specific number of feet because the staff wants to work further with the applicant on the site plan; however, the number needs to be less than 50'. He believes that the change of zone could be approved for something less than 50' and that number can be specified based on an agreed-upon site plan between now and the time the change of zone appears on the City Council agenda.

Ray Hill suggested that the Planning Commission could approve the change of zone on the "east 35' of the lot", and then between now and City Council, the staff and applicant will be working on some further reduction.

Response by the Applicant

Hunzeker confirmed that the dumpster will be behind a brick fence with a gate.

With regard to the transport truck question, Hunzeker stated that this has been part of the discussion with Public Works. Transport trucks need to be able to get into the site in a way that enables them to circulate in a counter-clockwise motion. They will be entering from Havelock Avenue and will not need to come around over on Ballard. The trucks come and go at times which are designed to avoid the busy time of day for the store.

With regard to water runoff, Hunzeker stated that this has also been discussed with Public Works. Parking lots have design standards which require that drainage be put on the site to drain into public storm sewers, and this site will be designed accordingly.

With respect to the 100' separation requirement, Hunzeker suggested that this application does not ask anyone to ignore the requirement of the underlying zoning for the expansion of that use. This could very well be an expansion of a business use on a property that is zoned residential and it might not even be a permissible use in the district, but that criteria of the special permit is applied to determine whether the pre-existing nonconforming use is able to expand. That is why we're here. The applicant had a very, very productive and healthy meeting with staff on this question. They have been through at least three site plans. The staff has not had the opportunity to review today's site plan, and Hunzeker believes that they may be able to squeeze it down more and get to a point where the applicant would be using less than 35' of the residential lot, but it will be a question of how serious and how strictly some of the preferred standards can be applied to this site.

Hunzeker urged that Casey's investment in this site will be a good thing for the neighborhood and will improve property values. The existing situation is not good and not conducive to good property values. The four-plex parking lot is about 30' deep and it goes the entire width of the rear yard. Hunzeker is quite certain that anything bigger than a Volkswagen cannot get into that parking lot and turn around and come out. You have to go in and back out all the way across the alley. There is not enough parking by any standard that applies today.

Carroll suggested that rather than a lot with split zoning, perhaps we could require a minimum 15' buffer on the west side of the lot rather than two different zonings. Hunzeker believes the effect is the same. It has been done in a number of different locations where the desire was to make sure we didn't move the zoning district line beyond a certain point.

Carroll asked staff to respond to having a lot with two different zonings. Garrett stated that it is common in Lincoln. In this situation, what the residential strip would prevent in the future would be a new use coming in to that site and expanding the entirety of those lots into a business use.

Hill suggested that we also need to consider the impact of that zoning line on the land to the north. If you start moving the zoning line on the south side, it almost gives the individuals to the north an expectation for the same expansion. We are trying to keep the zoning line as far east as possible. The special permit could set the boundaries for this use, but if this use goes away, the zoning line is there and anything allowed in B-1 could come in.

CHANGE OF ZONE NO. 07020

ACTION BY PLANNING COMMISSION:

April 25, 2007

Strand moved approval of the change to B-1 on the east 35' of the lot, seconded by Carroll.

Strand stated that she lived at 71st and Morrill so she is very familiar with this area. We are going to have business there and we might as well accommodate it.

Carlson commented that the change of zone goes toward building a new support system for the local community and he will support the change of zone.

Larson commented that he will support because he believes that overall, this will generally improve the neighborhood. It is an opportunity for a bad corner to become a lot better looking than it is now.

Motion to approve the change of zone to B-1 on the east 35' of the lot carried 9-0: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson voting 'yes'. This is a recommendation to the City Council.

SPECIAL PERMIT NO. 07010

ACTION BY PLANNING COMMISSION:

April 25, 2007

Larson moved to approve the staff recommendation of conditional approval, seconded by Strand.

Carroll believes it is a trade-off. We have an old existing site that could still sell alcohol. You have to go to the better facility and the expansion versus the question of the 100' requirement. They have sold alcohol there before. It is a lot better design.

Esseks understands that all standards are on the table in the approval of this special permit, so we can ignore the 100' buffer if we feel that on balance this is a good project. The objections of the neighbors do not mention alcohol sales as one of their concerns, so he is left with an important principle but not enough neighborhood opposition on which to base a negative vote.

Carlson agreed with Esseks, but he believes there is the opportunity to expand and create a new store and maintain the 100' separation. There are success cases around the city. The change of zone allows the new store but he is opposed to the continued alcohol sales.

Esseks wondered whether the Commission could approve the special permit without the alcohol sales and encourage them to go before the City Council to get that type of exemption. Carlson suggested that this question is the expansion of the nonconforming use and the question of a text amendment is a separate issue.

Larson suggested that the Commission take into consideration the reputation of this company and the looks of the facilities they have throughout the Midwest – they are all in tip-top shape.

Motion for conditional approval carried 8-1: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll and Strand voting 'yes'; Carlson voting 'no'. This is final action unless appealed to the City Council within 14 days.

STREET & ALLEY VACATION NO. 07004
TO VACATE TWO PORTIONS OF ROKEBY ROAD
NEAR ITS INTERSECTION WITH BRAEGAN ROAD.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 25, 2007

Members present: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson.

Staff recommendation: A finding of conformance with the Comprehensive Plan.

Ex Parte Communications: None.

Staff presentation: **Mike DeKalb of Planning staff** explained that this is an application by the County Engineer to vacate two portions of Rokeby Road as demonstrated on the map. The two vacations consist of the original right-of-way and the piece that is the new alignment. Staff understands that this vacation is in conjunction with the South Beltway. The track from Rokeby Road to S. 120th Street is the current location for the parking and

trade-off of coal trains between the Burlington Northern and Santa Fe Railroad (BNSF) and Omaha Public Power District (OPPD). Due to the design of the new interchange of the South Beltway, S. 120th Street and Highway 2, the rail line crossing will be relocated. This relocation will move the parking/handoff location to the west. Staff finds that with the benefit of the South Beltway, connectivity will still be maintained; however, it is acknowledged that this could be a local inconvenience for individuals.

Proponents

1. Don Thomas, County Engineer, submitted an aerial photograph of the intersection and explained that this is about the fourth or fifth result of discussions with NDOR, which will go to the public sometime early in the summer. 120th Street will be moved and going northeast. The NDOR was concerned that a railroad crossing is being added; OPPD had no objections to having two crossings that close together; but, as a result of those discussions, something more important came up. They park their train at 120th Street, OPPD gets their own private crew, picks up the train and takes it to Nebraska City and then brings it back. The crossing of Rokeby Road would be closed for up to four hours during this change. We asked the NDOR to look at ways to improve the access in the triangle in exchange for the closure of Rokeby Road. Thomas explained the alternatives that were considered. There is 5-6 times the traffic on 98th Street as compared to Rokeby Road.

This will go to the public for input in May or June. Thomas submitted additional language so that the physical closure will not occur until 120th Street is moved. If the railroad is abandoned there would be no reason to close the crossing:

The actual vacation and closure of the Rokeby Road rail crossing shall not occur until the parking area for trains between the existing 120th Street crossing and the Rokeby Road crossing is reduced as a result of the realignment of S. 120th Street (south of Highway #2) and the South Beltway interchange construction or the railroad is abandoned.

Opposition

1. Rick Hodtwalker, 13505 Old Cheney Road, testified in opposition. He farms right across the road on the south side of Rokeby Road and on the north side of Braegan Road. He does not want the crossing closed until absolutely necessary. He urged that if two crossings are closed, then two new ones need to be created because of the traffic pressure out in this area.

Response by Staff

DeKalb supported the additional language presented by Mr. Thomas. He also observed that this property is in the City's three-mile jurisdiction, but will require both City Council and County Board action.

ACTION BY PLANNING COMMISSION:

April 25, 2007

Carroll moved a finding of conformance, with the additional language submitted by the County Engineer, seconded by Strand and carried 9-0: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson voting 'yes'. This is a recommendation to the City Council and the Lancaster County Board.

CHANGE OF ZONE NO. 07015 (TITLE 27);
MISCELLANEOUS NO. 07004 (TITLE 26);
and
MISCELLANEOUS NO. 07005
(CITY OF LINCOLN DESIGN STANDARDS),
TEXT AMENDMENTS RELATING TO REGULATIONS
FOR CONSTRUCTION SITE DISCHARGES.
PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 25, 2007

Members present: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson.

Staff recommendation: Approval.

Ex Parte Communications: None.

Additional information for the record: **JB Dixon**, Stormwater Specialist with **Lower Platte South NRD**, submitted a memorandum from Nicole Fleck-Tooze clarifying some of the most recent minor language changes made to the new Title 28 and the Drainage Criteria Manual, and a letter in support from the Board of Directors of the Lower Platte South NRD.

Staff presentation:

1. JB Dixon provided some background information on the proposed legislation. The existing program has been in place since 2000. Sites that are over one acre are the ones that are currently regulated. One of the pieces missing from the current standards is the piece with regard to regulation of individual sites less than one acre but which are part of the larger development plan.

These regulations all stem from the EPA and the Clean Water Act of 1972, the goal being fishable, drinkable, swimmable waters nationwide. Out of that came the NPDES, which began in earnest in 1990 for municipalities greater than 100,000 in population. DEQ oversees the program which contains six main elements, one of which is construction site runoff.

Lincoln received its stormwater permit in 2002. Phase I of NPDES was in 1990, and nationwide that regulated construction sites greater than 5 acres in total land disturbance. In 2003, NPDES Phase II was enacted, which took the construction site threshold down to one acre in total land disturbance. Lincoln set their permitting standards at any land disturbance greater than 2 acres.

Lincoln started formal assessment of the program in 2005. This proposal relates to the the pollutant source being sediment (uncontrolled construction site discharges). EPA believes that the water quality impact from small construction sites is as high or higher than the impact from large construction sites on a per acre basis. Aside from water quality aspects, the detriments from sediment can lead to some safety issues. Another component of the NPDES program includes solid waste as one of the potential contaminants to be regulated as well as hazardous materials and chemical storage.

2. Rock Krzycki of Public Works & Utilities, Watershed Management, discussed the results of the program assessment. The current program does not have provisions for permitting, inspecting and enforcement of these sites. The city is obligated to address individual building sites. If we chose not to comply, the EPA fines are \$32,500 per day per violation and DEQ fines are \$10,000 per day. These same fines would apply to a private developer.

Krzycki then explained the term, "larger common plan of development or sale". The Stormwater Pollution Prevention Plan (SWPPP) is already required for sites greater than one acre. This is simply an 8.5 x 11 plan submitted with the building permit that shows where control measures would be located on the site. Individual sites must also have some type of controls in place to control sediment during construction.

Krzycki explained the various public meetings that were held on this proposal. They invited groups from the City, Home Builders Association, developers, design firms, environmental groups, homeowners associations and NDEQ. Attempts were made to respond to some of the issues raised by the interest groups, including the Home Builders Association, developers, designers, general contractors, and NDEQ, and they corresponded with EPA throughout this process. On June 9, 2006, the interested parties were brought together to provide additional input and formed a working group led by Fred Hoke of the Home Builders Association of Lincoln. In addition, there was a list of over 70 stakeholder contacts that were kept informed as the drafts were completed.

Here is what people said: Developers wanted to do regularly scheduled inspections of the individual sites and work with the builders to achieve compliance. The staff responded to the issues they heard and make changes. This permit has no fee.

This proposal includes the adoption of new Title 28 of the Lincoln Municipal Code for erosion and sediment control (Title 28 does not require any action by the Planning Commission) and updates to Chapter 9 of the Drainage Criteria Manual to provide more options for erosion control measures and how to maintain the measures.

This is a clean water issue that is part of a federal program. Over 5,200 communities nationwide have addressed this same issue. Krzycki explained that the City is updating its standards to come into compliance with the state and federal regulations. The standards are clear and consolidated, fair and reasonable and address the small sites being required to be addressed. This proposal has been taken through a very inclusive process.

Strand inquired whether the state is working on updating their requirements at this time. **Donna Garden of NDEQ**, who supervises the NPDES unit, explained that the state regulations were updated in 2005, including all of the Phase I and Phase II information on stormwater. The state's construction stormwater permit is being updated right now.

Esseks inquired whether the state's 2005 regulations specify anything about the enforcement process such as the frequency of inspections. Garden explained that Phase I and Phase II have been consolidated and that all requirements for Phase II also apply to Phase I. Those restrictions are in the regulations. As far as specifics, the state allows the local program to decide.

Garden further explained that this is a state-wide program. All construction sites, one acre and above, and as part of a larger common plan of development if less than one acre, must be permitted under the state program and they require a stormwater pollution plan. Carroll requested the definition for "construction activity". Nicole Fleck-Tooze referred to her memo dated April 24, 2007. The Commission has updated versions of all of the ordinances upon which the Commission is acting. The Drainage Criteria Manual and Chapter 28.01 were provided after the briefing. The packet that the Planning Commission received included all of the ordinances and design standards and there is no change in that packet. The only thing the Commission has not received is a hard copy of the updated version of Title 28, which the Planning Commission is not acting upon. The materials in the agenda packets are correct. "Construction Activity" shall mean:

....any land disturbance of one acre or more of total land area. Construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or the agricultural use of the land.

“Individual Site Construction” shall mean:

....any land disturbance that disturbs less than one acre of total land area that is part of a larger common plan of development or sale associated with construction activity....

Carroll inquired whether “individual site construction” pertains to infill projects in the city in an existing neighborhood. Fleck-Tooze suggested that if it is not something that is “part of a larger common plan of development”, it would not be included, and the state defines that very broadly. Essentially, this is going to apply to new development. She does not believe that infill projects inside the city would not fall under these provisions.

Carroll inquired whether a “stop work order” refers to any work on site, or just the grading or land disturbance work. **Miki Esposito** of the **City Law Department** stated that it refers to any land disturbance. Carroll is concerned that a stop work order for land disturbance could stop the framing work, etc., that is not disturbing the land. Upon further discussion, Esposito suggested that framing would not fit the definition of land disturbance.

Esseks referred to the letter to Marvin Krout from Karl Fredrickson and Glenn Johnson dated March 28, 2007, where there is a description of the enforcement process. Is that process in the ordinance? Fleck-Tooze answered in the affirmative. The most straight forward reference may be in the new Title 28. Section 28.01.120 would be the primary reference for enforcement. Esseks is concerned that there are adequate guidelines because this will be a larger private sector process.

Esposito added that the proposed Chapter 28.01 refers to unlawful acts, i.e. engaging in construction activity without a permit, violating the provisions of a permit, violating the provisions of a chapter. We do have provisions and it is a misdemeanor with penalty. However, the person in violation is allowed to correct their action within 10 days. A failure to correct the violations within that 10-day working period would cause enforcement action by the City, including stop work orders, assessment of fees, suspension or revocation of the permit. The individual is also requested to verify their compliance within that 10-day working period with pictures, photographs, written evidence, etc.

Esseks inquired whether there is a specified frequency of inspection by the developer. Esposito referred to Section 28.01.080, i.e. SWPPP inspections. There is a process in place for developers to inspect individual site construction. There is also a provision for inspections by the City and Lower Platte South. Fleck-Tooze added that inspection is at least once every 7 calendar days and within 24 hours of rainfall greater than one-half inch.

Strand asked for an explanation of the process in a new subdivision. The lots are owned by individual builders. The developer is responsible for the whole area regardless of who owns the lots. If a stop work order is issued because of sediment in the street, does it stop work in the entire development? Fleck-Tooze answered in the affirmative, if the development is in the development stage. But, if it is in the building construction stage, it would only apply to the individual lots.

Carroll noted that line 7-8 of 26.31.040 strikes out "service by mail". With this strikeout, what is considered the notice to remove? Upon further discussion, Fleck-Tooze agreed to follow-up on this language, although she believes it may now be addressed in another section.

In terms of the "larger common plan", Carlson inquired whether this would apply to a master plan redevelopment, such as the UNL Master Plan. Fleck-Tooze interprets that the state makes that very broad and that it could potentially apply if there is land disturbance. The City's code suggests that it is part of anything that is part of a larger plan associated with land disturbance for construction activity. Typically, a subdivision would be a larger common plan. "Common plan of Development or Sale" is defined to mean:

....a contiguous area where multiple separate and distinct land disturbing activities may be taking place at different times, on different schedules, but are covered under one SWPPP submitted by and under the control of the permittee".

Even though each individual lot may be less than one acre, the cumulative impact is significant.

Support

1. Fred Hoke, Government Affairs Director of the **Home Builders Association of Lincoln (HBAL)**, testified in support and referred to the number of meetings held regarding these regulations. June 2006 was the first meeting he attended, and after that meeting he was asked to chair future working group meetings. The working group then met in July, August and December, and in all of those meetings, after the general working meeting, members of HBAL, developers, builders, and contractors met to again review the deliberations of each of those major meetings. We wanted to be sure that the City did not provide requirements, recommendations and regulations that exceeded NDEQ or EPA guidelines. When dealing with stormwater issues and abating those situations, you are putting into place BMP's that do cost money, and there is an associated cost with each lot and each development. Our constant concern is that we don't add so much money to the cost of a new home that it precludes people from having an affordable home. So we were constantly looking for regulations that were fair and equitable, a process that is easy to understand, and holding overhead to a minimum. After each meeting, we forwarded our concerns to the City about that particular draft and in each case the City responded, and in almost all cases, the City incorporated those comments into the next draft. From the start, the

developers wanted to take full responsibility for the large site, and the City agreed to that arrangement. Initially, there were permit and inspection fees involved. A number of the members opposed that and the city backed away from the fees, and then acquired a grant to provide an individual to provide that inspection process for at least a year.

Hoke further stated that in general, the members of HBAL and the members of these working committees wanted a program that meets but does not exceed the law, a program that is easily understood, fairly enforced and clearly implemented. In general, the members of the working group feel that the proposed regulations do meet those criteria.

Larson inquired whether this new ordinance would increase the cost per lot considerably. Hoke stated that it depends on the situation on the lot, but to stay in compliance with the regulations you may be going from no cost to \$1400 per lot, depending on the slope and BMP's. We want to be cautious that these regulations need to apply across the board.

Opposition

1. Rod Hornby, home builder, testified at this time but stated that he is not necessarily in opposition. He worked on the committee. He has been building for over 20 years. He knew very little about erosion control a year ago. He believes the whole industry is like teenagers that never had to clean their rooms. "We want to clean our rooms – we just don't know how yet." This is all good legislation but he is hopeful that "they teach us to clean our rooms before they punish us." It might take a little bit more time. There is some education legislation. We need to be taught.

2. Peter Katt appeared on behalf of developers and builders in the community. The Erosion and Sediment Control working group started about 1.5 years ago. He was not involved. It seemed to be a good public process. In the fall of 2006, there were at least some members in that group that didn't think people were listening to what they said and he was asked to get involved and look at the proposals and try to make some changes.

Katt then stated that he is appearing on behalf of Hartland Homes and Fowler Custom Homes. The principal of Prairie Homes, Steve Champoux, is also in attendance today.

The question is: Why should Lincoln expand, change, or modify the reach of its current erosion and sediment control regulations today? Why change now? What are the benefits of doing it now as opposed to later?

Katt then submitted the "History" from the staff report where he added a key date, that being 9/01/02, when the City was issued its MS4 Permit. Katt submitted that part of the confusion is, "what are the regulations?". Ms. Garden indicated that there are two different things going on in these stormwater regulations. There is the state's regulatory system – everybody has to do that – which is currently in the process of being updated and changed. It is his understanding that the state is modifying what they have proposed and will have a new draft out in about July of this year. That is important because that is a regulatory

system that is in place that everyone has to follow today. So why does the city regulate stormwater? Because they are required to get an MS4 Permit. Katt then referred to pages 108 and 109 of the agenda, which is an e-mail exchange between Nicole Fleck-Tooze and Donna Garden attached to the staff report wherein they talk about the requirements of the City related to stormwater management as it relates to the City's MS4 Permit. Fleck-Tooze's purpose was, "what do we need to do to be compliant with the MS4 requirements", and Ms. Garden replies with the same confusion. Section 4 of the City's MS4 Permit (also submitted by Mr. Katt) provides that:

The City shall continue to implement the current Construction Site Storm Water Program or an equivalent program to control erosion and sediment loss....

and Ms. Garden correctly says the actual definition of exactly what you are implementing may need legal interpretation. So, who knows the requirements of the City's current MS4 Permit – who knows what they are exactly? They are very uncertain. Katt indicated that the point he is making is that the city's stormwater regulations are a requirement of its MS4 Permit with the state, and "who knows" what the City's current MS4 Permit says about regulating stormwater. It is very open to interpretation.

Katt also submitted an e-mail exchange he had with Nicole Fleck-Tooze on March 12 and March 13, 2007. Katt discovered that the MS4 Permit was issued in 2002 and has a five year life cycle, and that the City was required to submit a new MS4 application by March of this year. As best he can tell, the City timely filed an application and committed to the state that we would have a full application for our MS4 in place by the end of April, 2006. He is still waiting to see it. He believes that the MS4 Permit will resolve all of this.

From Katt's perspective, it would make sense as a community to wait until we put these pieces together because they all build upon one another. Part of the problem he has with the proposal is the definitions that don't match the state definitions that don't match the federal definitions. The City's MS4 Permit is unique in the entire state of Nebraska. He suggested that we should thrive toward a MS4 Permit that is consistent with other communities.

"Now is not the time. Wait. It is in progress. It will happen."

2. Steve Champoux, home builder, testified that he was also part of the working group and attended every meeting. He is concerned that we are headed down a track before we receive the education. EPA inspected 42 sites in town. Up until then, EPA was just a threat. He believes that the developers and builders have taken note and the developers have put the erosion control people to work with the BMP's – the gutter socks, etc. He does not want these requirements implemented until the builders have been given time to get the education and make attempts toward compliance. Permits have dropped 60 percent. Impact fees are increasing. The silt fence adds cost. We need to give the developers a chance to maintain their sediment. Let the developers and builders take the

responsibility first. He does not want to go above and beyond the EPA and state requirements and enforce something that is going to cost more money. Affordability is already a problem. There were 100-150 complaints and there was only one enforcement issue. Let's not make a mountain out of a mole hill. Let's get everyone educated and let's see what happens. He believes the builders are responding to the EPA inspections.

Champoux suggested that it would take a year to get everyone involved and educated. EPA will be back and he believes we will see a difference between last year and this year. We have to do an inspection every seven days. The silt fences have gone up. After every half-inch rain we have to send the inspectors out to check the fences. He believes it will happen without this legislation.

3. Bob Benes, President of Aspen Builders, testified also as a member of the working group. How are we supposed to understand this ordinance? He is not against erosion control or having the policies in place. Developers are already responsible for their SWPPP and for what happens in that development. If a home builder tracks mud on the street, it is the developer that will get fined by the state. The developer wants to be liable and handle it. He believes this ordinance is difficult to understand. He would like to see a sit-down where the developers and home builders can ask questions about the language in the ordinance. We did not want this to go to Building & Safety; we did not want to have Building & Safety in control of a construction site. BMP's are very subjective. We do not want construction held up. Building permits are down 60%. We have a sales tax shortfall because we don't have any construction going on in this town. If we can come up with some more education, we can help the builders and help the developers enforce it. We need a MS4 Permit first. We have to submit a mini-SWPPP to Building & Safety by this ordinance. A SWPPP changes daily. There are too many unanswered questions. He suggested that this legislation be delayed until the City gets its new MS4 Permit.

Staff response

Fleck-Tooze discussed the points raised by Peter Katt. She contends that the current MS4 Permit is clear. The city already has requirements in place from the state and feds to look at sites one acre and above and then the individual lots less than one acre. What has happened the past year or so is that the state has clarified some of this gray area when it comes to the smaller sites.

Fleck-Tooze also clarified the e-mail exchange between Nicole Fleck-Tooze and Donna Garden. The reason for the question was to identify the timeframe within which the City needs to make these changes and adopt these ordinances. We understood that we had to bring the ordinances forward:

....If we assume it to mean you will have a program in place that can effectively be enforced, including but not limited to ordinance requiring erosion and sediment control for Phase II sites, as well as sanctions to ensure compliance by the date of

March 10, 2003, the City is already out of compliance.We would advise you to work as fast as possible to come into compliance and that those efforts will be taken into account in determining whether an enforcement action is necessary. Violations to NPDES permits in the State of Nebraska could result in enforcement penalties up to \$10,000/violation per day.

The EPA also provided a response and recommends formal enforcement action. EPA will be back this year and will be performing audits of some communities. We are trying to make a sincere effort to bring forward these standards. We do not have a lot of flexibility with regard to the timeframe. Fleck-Tooze assured that the City will be addressing the education issue, but the basic framework needs to be in place.

With regard to the concern raised about adequate time to review the ordinances, Fleck-Tooze pointed out that there were several drafts reviewed by the working committee that were provided back in December. The changes have been in response to the issues and concerns that were heard.

With regard to the specific question about withholding a certificate of occupancy, Fleck-Tooze stated that that provision was deleted from the ordinance because of this concern. In lieu of that, there is a requirement that the homeowner be notified of any provisions that are remaining.

Relating to the concern about Building & Safety holding up inspections on individual building sites, Fleck-Tooze assured that none of the provisions included within this ordinance are designed to do that. Nothing is changing in that regard. We already have the ability today to hold up building permits in an egregious situation.

JB Dixon responded to the education component. He commenced employment with the NRD in February of 2001, and his job was designed for this program. One of the big pieces was also education. We knew that there was a large group in the development community to educate and we understood that there was a learning curve to overcome. Therefore, we eased up on the enforcement until we got to that point. When we take it down to the individual site construction, that is an entirely new group of people we need to educate, i.e. subcontractors, truck drivers, etc. The city and NRD understand there is education to be done. The HBAL has spearheaded those efforts working with the Attorney General's office looking for a state-wide education program specifically for this construction stormwater issue. The Stormwater Awareness Network was spearheaded to be that mechanism for some peer-to-peer training and education programs. We have done some pilot presentations for some select groups. We are not going to be "rolling out there the day after this legislation is approved with badge in hand and imposing fines". We understand there is a learning curve, but we need to be cognizant that the City does need to meet the objective of their own permit.

Esposito responded to Carroll's previous question about the notice provision relating to

sediment in the public right-of-way. The reason the reference to “certified mail service” was stricken is because generally, these are unsafe conditions with mud in the street and we did not want to have to wait for the certified mail receipt. The problem needs to be addressed as soon as practical.

With regard to the “why now” issue, Esposito stated that the City does have a MS4 Permit and that permit has requirements. That permit was issued in September 1, 2002. We were supposed to have these requirements in place in March of 2003. In Mr. Katt’s handout, Section 3 of the MS4 Permit requires that:

...The City shall update the current Construction Site Storm Water Program to include sites down to 1 acre in size in compliance with time frame set forth in the Phase II Storm Water regulations.

There is a table that specifies the date of March 17, 2003, to have legal authority in place to regulate construction site discharges down to one acre. That is why now. We are already out of compliance. We want to get another MS4 Permit in August, 2007, which requires this to be place. We do not want to expose ourselves to penalties from the state or federal government.

As far as exceeding state and federal minimum standards, Esposito stated that the City has been very committed not to do so. The proposed provisions come out of the Code of Federal Regulations (CFR). People who are doing these construction sites have to comply with those CFR’s as well. We have tried to make this ordinance easy, fair and equitable.

It was confirmed that there were approximately 20 people on the working committee. He offered that the Web site (E&SC) will take you to that working group page and list who those persons were. Esseks notes that there are three developers asking for a delay. How many other builders and developers were on the committee? Krzycki believes there were probably at least 10 other builders on the committee and at least 7 developers/builders.

Strand urged that the definitions need to be consistent with other communities in the state. Are there differences between the MS4 Permits in different cities? Esposito responded that this is a nation-wide movement. The CFR spells out the requirements for small, medium and large MS4’s. Lincoln is consistent with Omaha. It is universal. Most of the definitions are consistent with what the state is using. Our definition of “construction activity” includes sites down to one acre. The state and federal government defines “small construction activity” and “large construction activity”. That is the only difference. We have the additional piece to address the sites under one acre and we are calling that “individual site construction”, which is a new term that is not in the state and federal regulations.

Fleck-Tooze added that the City is trying to simplify the terminology.

Larson believes this legislation to be very confusing. As he understands it, the state has told the City to get in line. It sounds like the City has been working on that for three or four years. But, his sympathies are with the builders and developers. They have been working on it just a few months and they have a bigger job to do than the City staff. They have to educate so many people on down the line. He does not think they are going to have time to do so. He would like to see a law passed to cover the City with an enforcement date effective a year from now. Fleck-Tooze stated that she understands the concern, but the City has also adopted this program in phases. We actually began in 2000, and throughout that time we have had some huge education efforts. She observed that sometimes it is difficult to get people to the table. Now you are seeing a time where everyone is realizing how important this is. This is not new. We acknowledge that we need to continue working hard on education and we do have a partnership established to do so.

Larson wanted the City to make some formal statement to not enforce the provisions until a certain time. Fleck-Tooze reiterated that there is a 10 working day window of opportunity to voluntarily bring the site into compliance. That provision is already in place today for a development site. She believes that the City will be willing to work with the developers. We do have an obligation in the state and federal regulations to have those official enforcement mechanisms in place, but she does not believe it will change much from our practice today. Larson believes the additional costs could be prevented by education.

Esseks wanted to know the extent of the consequences if the city does not act now. Fleck-Tooze suggested that there are potential multiple consequences. In addition to the consequence of a rain event, we have the potential consequence of the City receiving an audit by EPA and being found to be out of compliance including extremely high fines up to \$32,000/day per violation. Some communities have had the experience where EPA comes in and specifically tells them what they must have in their program. It would be in everyone's best interest to get this going.

In response to the question by Esseks, Fleck-Tooze advised that if fines are issued against the City, the taxpayers would pay it. If the fines are issued against the developer or builder, they would pay.

Sunderman noted there to be a \$500 fine and clarified that to be after the 10-day opportunity to bring into compliance. Therefore, he believes that most of these cases will be on smaller sites. Fleck-Tooze agreed that the smaller sites are the newest part of the program, but there certainly could be issues on larger developments as well.

Carroll wondered whether the City's MS4 Permit would be denied if applied for under the City's current ordinances. Fleck-Tooze again noted that the City is already out of compliance with its current permit and current state and federal regulations, so at any time we are at risk of having some enforcement action taken. If still out of the compliance at the end of the permit period, she believes that enforcement action would occur.

Carroll confirmed that everything being required in this legislation is required by the state. Fleck-Tooze concurred.

CHANGE OF ZONE NO. 07015 (TITLE 27)

ACTION BY PLANNING COMMISSION:

April 25, 2007

Esseks moved approval, seconded by Cornelius.

Strand's only comment was the fact that Fred Hoke worked closely with the City throughout this process, and having been a broker and trying to oversee 50 some agents and compliance with EPA, she knows what developers are working with. She feels for the developers because they suddenly have to get a lot of people to comply very quickly. She is hopeful that HBAL will reach out, not just to their membership but to all people in the community to get trained.

Larson plead for the developers. They are going to pay the fine. They have no legal authority over any of their builders or suppliers. It is going to have to be a manner of education. That is going to take a lot of time. This just adds another cost to the cost of a lot. If we demand immediate compliance, the cost is higher than if education occurs first.

Strand assumes that the developers would certainly have attorneys that could put compliance requirements into the purchase agreements.

Motion for approval carried 9-0: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson voting 'yes'. This is a recommendation to the City Council.

MISCELLANEOUS NO. 07004 (TITLE 26)

ACTION BY PLANNING COMMISSION:

April 25, 2007

Esseks moved approval, seconded by Cornelius.

Carroll expressed disappointment for the Planning Commission not having all of the documents they are voting upon. The Commission should have had something in front of them to read and approve that is complete. He thinks this puts the Planning Commission in a bad position. We don't want to deny something that will impact the City with fines, etc., but we are put in that position now because we're up against the gun. There should have been a better relationship between the builders, developers and City to get this finalized prior to the City running out on the permit.

Strand agreed that the Commission should not be receiving changes today on something this important.

Taylor commented that this is a bad situation all the way around that should have been taken care of in 2001-2002. Now everyone is under the gun for compliance. He does not know what measures of delay can be used that will be adequate to help out the builders and people involved in construction to comply.

Motion for approval carried 9-0: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson voting 'yes'. This is a recommendation to the City Council.

MISCELLANEOUS NO. 07005 (DESIGN STANDARDS)

ACTION BY PLANNING COMMISSION:

April 25, 2007

Esseks moved approval, seconded by Cornelius and carried 9-0: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson voting 'yes'. This is a recommendation to the City Council.

SPECIAL PERMIT NO. 07008

TO EXPAND A NONCONFORMING USE

ON PROPERTY GENERALLY LOCATED

AT N. COTNER BLVD. AND LEIGHTON AVENUE.

CONT'D PUBLIC HEARING BEFORE PLANNING COMMISSION:

April 25, 2007

Members present: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll, Strand and Carlson.

Staff recommendation: Conditional Approval.

Ex Parte Communications: None.

Additional information for the record: **Brandon Garrett of Planning staff** submitted another letter in support, the record now consisting of two communications in support.

Staff presentation: Garrett explained that this application is somewhat similar to the application at 70th & Havelock. This application is for a special permit to expand a nonconforming use, and in this situation as earlier, that nonconforming use happens to be the sale of alcohol for consumption off the premises.

A new site plan was submitted since the packets went out. The existing store is still operational. They are proposing to tear down two adjoining structures where they are proposing to construct the new structure. They are requesting a waiver for stacking in the pump area because of the additional spacing between pumps.

Esseks noted that according to the memo from the Lincoln Police Department, the existing Casey's is 39' from a residential use. How far is that residential use in the revised site plan? Garrett stated that the revised site plan actually would increase that distance. This is a case where we are improving the situation of the separation of the licensed premises. With the original building, they are near the property line and just across the alley from the residential area (20-25 feet). With the new site plan, they would be further from the residential use (50-60 feet).

Proponents:

1. **Mark Hunzeker** appeared on behalf of **Casey's General Stores**. This is an easier application, although it does involve the same basic issue, which is the expansion of nonconforming use for sale of alcohol for consumption off the premises. He agreed that this application does not meet the 100' separation but that separation is being improved. This is an existing store which is operating. Casey's has purchased additional property and intends to remove the existing store, pave the alley and move curbcuts away from the intersection of Cotner & Leighton. This new store will meet the Casey's standards. There will be flush mounted canopy lighting. There will be a brick fence around the dumpsters. It would be virtually impossible to meet the 100' separation, except to back the store up against Cotner Blvd. and to have a very awkward configuration of the pumps. Casey's has requested this special permit to enlarge the site and not meet that 100' setback. This will move the premises further from the residential. It will remove two substandard buildings, will improve traffic control, and improve property values in the area. This does not increase the density of commercial on the site and it is impossible to make this site meet Casey's modern standards without this special permit. This is the kind of investment that we need in older commercial areas to maintain property values and provide services to the older areas on par with newer areas of the city.

There was no testimony in opposition.

ACTION BY PLANNING COMMISSION:

April 25, 2007

Carroll moved to approve the staff recommendation of conditional approval, subject to the revised site plan submitted today, seconded by Taylor.

Larson noted that the Police Department objected to this one as well.

Carlson appreciates the investment they are making but he continues not to support alcohol sales in neighborhood stores. Taylor agreed.

Motion for conditional approval, subject to the revised site plan, carried 8-1: Cornelius, Larson, Sunderman, Taylor, Esseks, Krieser, Carroll and Strand voting 'yes'; Carlson voting 'no'. This is final action unless appealed to the City Council within 14 days.

ITEMS NOT APPEARING ON THE AGENDA:

Charles Hamilton appeared before the Commission and introduced himself and his new property law practice in Lincoln that will focus on land use issues. He was Deputy County Attorney in Adams County for the last four years. He is also on the Board of Directors for the Nebraska Planning and Zoning Association (NPZA) for this district.

There being no further business, the meeting was adjourned at 4:55 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on May 9, 2007.

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