

FACTSHEET

TITLE: CHANGE OF ZONE NO. 04003, requested by the Director of Planning to amend Sections 27.63.680 and 27.63.685 of the Lincoln Municipal Code relating to the sale of alcoholic beverages for consumption on the premises and off the premises as a permitted special use, respectively.

STAFF RECOMMENDATION: Approval

SPONSOR: Planning Department

BOARD/COMMITTEE: Planning Commission
Public Hearing: 02/04/04 and 02/18/04
Administrative Action: 02/18/04

RECOMMENDATION: Denial (6-2: Pearson, Krieser, Carroll, Sunderman, Taylor and Bills-Strand voting 'yes'; Carlson and Marvin voting 'no'; Larson absent).

FINDINGS OF FACT:

1. The proposed text amendment:
 - Deletes the provision that allows City Council to waive any of the specifically listed conditions.
 - Deletes the provision that allows the applicant to mitigate the adverse effects when the premises is less than 100' from specific uses and residential zoning districts.
 - Deletes residential uses from the uses that must be at least 100' away from alcohol sales.
 - Deletes the provision that the City Council determines the proper vehicular access to the property.
 - Adds parks, churches, and state mental health institutions to the list of uses that must be 100' away from alcohol sales.
 - Gives the Planning Commission authority to approve the special permit.
2. The staff recommendation of approval is based upon the "Analysis" as set forth on p.3-4, concluding that the deletion of mitigation makes the special permit less subjective, and final action by the Planning Commission will reduce the amount of time involved in the special permit process, while still providing for a public hearing.
3. The minutes of the public hearing and action by the Planning Commission are found on p.5-24. This application was originally heard on February 4, 2004, with continued public hearing on February 18, 2004. The staff presentation is found on p.5-7 and p.14-15. The additional information provided to the Planning Commission at the continued public hearing on February 18, 2004, in response to questions raised at the initial public hearing, is found on p.31-52, which consists of illustrations of the impact of three alternative distance measurements.
4. Two individuals testified in support at the original public hearing (p.7), the record consists of 24 items of correspondence in support (p.53-81), and the "Plan for Action" of the Lincoln Neighborhood Alliance in support submitted by Carol Brown at the original public hearing is found on p.82. Four individuals testified in support at the continued public hearing (p.16-18). The testimony in support agrees with the deletion of mitigation and supports the distance measurement from the licensed premises as opposed to the public access door.
5. Seven individuals testified in opposition at the original public hearing (p.7-10) and nine individuals testified in opposition at the continued public hearing (p.15-19). The opposition does not want the opportunity for mitigation to be deleted and supports proposed amendments submitted by Kent Seacrest which provide for the 100' and 150' measurement to be the walking distance around the building to the public access door of the licensed premises. The alternatives submitted by Kent Seacrest at the original public hearing are found on p.84-85, and the amendments submitted by Kent Seacrest at the continued public hearing are found on p.86-87, which specifically deal with the B-2 zoning district. The record also consists of a letter in opposition from Bruce Bohrer on behalf of the Lincoln Chamber of Commerce (p.83). Some speakers also expressed concern about losing the right to rebuild or expand uses that did not meet the new requirements.
6. On February 4, 2004, the Planning tabled a motion for approval, with amendment to require 100' minimum from public door(s) facing protected uses, and 150' minimum from public door(s) not facing protected uses, as set forth in Alternative 1 submitted by Kent Seacrest (p.84), deleting the "walking distance" language (See Minutes, p.10-14).

7. On February 18, 2004, after continued public hearing, the Planning Commission voted 7-1 to rescind the amendment passed on February 4, 2004; a motion for approval failed 2-6; a motion for deferral for six weeks was withdrawn; and the Planning Commission voted 6-2 to recommend denial (See Minutes, p.21-24). The majority of the Commission agreed that mitigation should be deleted; however, they could not come to a consensus on the distance requirements.

8. Editorial Note: On February 19, 2004, Kent Seacrest made application for text amendments regarding alcohol sales in the B-2 and B-5 zoning districts, which will have public hearing before the Planning Commission on March 17, 2004.

FACTSHEET PREPARED BY: Jean L. Walker

DATE: February 23, 2004

REVIEWED BY: _____

DATE: February 23, 2004

REFERENCE NUMBER: FS\CC\2004\CZ.04003

LINCOLN/LANCASTER COUNTY PLANNING STAFF REPORT

for February 4, 2004 PLANNING COMMISSION MEETING

P.A.S.: Change of Zone #04003

PROPOSAL: A text amendment to Sections 27.63.680 and 27.63.685 of the Lincoln Municipal Code relating to the sale of alcoholic beverages for consumption on and off the premises as follows:

1. Deletes the provision that allows City Council to waive any of the specifically listed conditions.
2. Deletes the provision that allows the applicant to mitigate the adverse effects when the premises is less than 100' from specific uses and residential zoning districts.
3. Deletes residential uses from the uses that must be at least 100' away from alcohol sales.
4. Deletes the provision that the City Council determines the proper vehicular access to the property.
5. Adds parks, churches, and state mental health institutions to the list of uses that must be 100' away from alcohol sales.
6. Gives the Planning Commission authority to approve the special permit.

CONCLUSION: The deletion of mitigation makes the special permit less subjective, and final action by the Planning Commission will reduce the amount of time involved in the special permit process while still providing for a public hearing.

RECOMMENDATION:

Approval

HISTORY:

May 18, 2001 - The Nebraska Supreme Court affirms the City's authority to regulate the sale of alcohol by special permit.

August 15, 1997 - CZ#3064 (Ordinance #17232) was passed amending Sections 27.63.680 (on-sale) and 27.63.685 (off-sale) to include the I-3 district.

November 20, 1995 - CZ#2940 (Ordinance #16899) was passed amending Sections 27.63.680 (on-sale) and 27.63.685 (off-sale) by adding the language "unless waived by City Council."

February 27, 1995 - CZ#2877 (Ordinance #16743) was passed amending Sections 27.63.680 (on-sale) and 27.63.685 (off-sale) adding "no special permit or amendment to be required for interior expansions of existing licensed liquor premises."

July 5, 1994 - CZ#2839 (Ordinance #16627) was passed amending Sections 27.63.680 (on-sale) and 27.63.685 (off-sale) adding "Vehicular ingress and egress to and from the property shall be designed to avoid disruption."

April 11, 1994 - CZ#2808 (Ordinance #16593) was approved creating Lincoln Municipal Code (LMC) Sections 27.63.680 (on-sale) and 27.63.685 (off-sale).

ANALYSIS:

1. There have been recent applications where the licensed premises was located less than 100' away from either a residence or a residential district. Two such applications approved by the City Council were subsequently vetoed by the Mayor. Upon reconsideration, the City Council voted 5-2 to override the veto in both cases.
2. Both applicants and the City's Administration have indicated dissatisfaction with the permit process, and as a result staff was directed to draft a proposed amendment based upon discussions among the Mayor, City Council and staff
3. Currently, the provisions for either on or off-sale permits are virtually identical. Both require a 100' separation between the licensed premises selling alcohol and a residence, a residential district or a day care facility, or a mitigation plan to offset the reduced separation must be approved by the Planning Director. The separation, as well as any other provisions of the special permit can be waived by City Council.
4. This amendment proposes six changes to the Ordinance as follows:
 - A. Deletes the provision that allows City Council to waive any of the specifically listed conditions.
 - B. Deletes the provision that allows the applicant to mitigate the adverse effects when the premises is less than 100' from specific uses and residential districts.
 - C. Deletes residential uses from the uses that must be at least 100' away from alcohol sales.
 - D. Deletes the provision that the City Council determines the proper vehicular access to the property.
 - E. Adds parks, churches, and state mental health institutions to the list of uses that must be 100' away from alcohol sales.
 - F. Gives the Planning Commission authority to approve the special permit.
5. If approved, the number of potential sites for alcohol sales will decrease.

6. The removal of the authority of the Planning Director to approve mitigation plans serves to make the process more objective. Currently, each plan is reviewed on a case-by-case basis and the individual site characteristics determine the mitigation. As no specific mitigation standards exist, it is difficult for applicants to determine what mitigation will be acceptable.
7. Allowing the Planning Commission to be the approving authority means the City Council will only be involved in those cases where the Planning Commission's decision is appealed. This would result in a reduction in the amount of time involved in the special permit process of approximately 3-4 weeks.
8. City Council members requested that two additional uses - parks and "state mental health institutions" - be added to the Mayor's inclusion of churches, as uses that would trigger a 100' separation requirement. Staff interprets "state mental health institution" to be the Regional Center located at South Folsom Street and West Prospector Place. Schools already trigger a longer separation requirement in the State Liquor Control provisions.
9. The Mayor informally discussed her intent to delete the mitigation provision at the January meeting of the Mayor's Neighborhood Roundtable. The proposed amendments will be provided to the roundtable for further consideration at their next regularly scheduled meeting, which is February 12, 2004.

Prepared by:

Brian Will, AICP
Planner
January 22, 2004

APPLICANT: Marvin Krout on behalf of Mayor Coleen Seng
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CHANGE OF ZONE NO. 04003

PUBLIC HEARING BEFORE PLANNING COMMISSION:

February 4, 2004

Members present: Carlson, Krieser, Marvin, Carroll, Taylor, Sunderman, Pearson and Bills-Strand; Larson absent.

Staff recommendation: Approval.

Ex Parte Communications: None.

Brian Will of the Planning staff submitted additional information for the record consisting of six letters in support, including the North Bottoms Neighborhood Association, Hawley Area Neighborhood Association, UniversityPlace Community Organization and Arnold Heights Neighborhood Association. Two other additional items of information include responses to public comments regarding sale of alcohol on golf courses as an accessory use, which is not a change that is being considered in this text amendment.

Brian Will went on to explain that this is an application initiated by the City, which has come about largely in response to several special permit applications that have been considered by the city recently, two of which were ultimately vetoed by the Mayor and the veto was overridden by the City Council and the permits were approved. One of the key issues in those applications dealt with mitigation. Currently, the ordinance includes a provision that allows mitigation plans to be approved by the Planning Director if the license premise is within 100' of a day care, residence or residential district. This text amendment deletes the opportunity to mitigate when the licensed premise is located closer than 100'. Will then referred to the six components contained in this amendment:

1. Deletes the provision that allows the City Council to waive any of the conditions.
2. Deletes the provision that allows the applicant to mitigate the adverse effects when the premises is less than 100' from specific uses and residential districts.
3. Deletes "residential uses" from the uses that must be at least 100' away from alcohol sales.
4. Deletes the provision that the City Council determines the proper vehicular access to the property.
5. Adds parks, churches and state mental health institutions to the list of uses that must be 100' away from alcohol sales.
6. Gives the Planning Commission authority to approve the special permits, with an appeal process to the City Council.

Will went on to state that the staff concludes that the deletion of mitigation makes the special permit process more objective and that final action by the Planning Commission will reduce the amount of time involved for the special permit process but still provides opportunity for public hearing.

Carlson assumed that schools are also covered as far as the distance requirements. Will explained that the distance requirements from schools are not listed in the city ordinance. The sale of alcohol is a two-part process including the special permit process by the city and a liquor license issued by the State. There are requirements to be met for the state liquor license and he believes that one of the state requirements is separation from schools, although not in the city zoning ordinance.

Bills-Strand inquired as to how many grocery stores or small deli's will be impacted or small cafes that can now serve wine with dinner, etc. She noted that grocery stores are often in residential areas. How are we going to deal with those? Will explained that the "residential district" is one of the measurement separations that goes away with this text amendment. The staff did do a brief analysis as far as those properties that would be impacted, and it is a good percentage of the commercial zoned areas throughout the city. Removing the discretionary authority makes it a fairly hard and fast standard and there will be some that are impacted. Any of those that currently exist, however, will be allowed to continue as pre-existing special permits or nonconforming uses.

Bills-Strand discussed the measurement location. For example, if the very back of a large building where a grocery store, deli or café is located is within 100' of residential, the liquor sales would not be allowed anywhere in that building because of this ordinance. Will advised that the ordinance talks about the "licensed premises", which is defined by the state liquor license. In the case of large shopping centers with multi-tenants, the special permit is limited to that portion that is just the licensed premises where the alcohol is sold, consumed or stored. In the case of a large building, it is the licensed premises that is used for the measurement. If the major tenant is a grocery store, Bills-Strand inquired whether they be allowed to sell alcohol. Will stated that they would only be able to sell alcohol if they met these requirements. Wherever the alcohol is stored or sold must be part of the defined licensed premises for the state liquor license. If it does not meet the 100' separation, they would not be allowed. Will pointed out that most of the grocery stores in community unit plans would not be allowed to sell alcohol under this proposed ordinance change.

Bills-Strand wondered whether there might be a different way to mitigate the situation, such as if the majority of their business came from food sales or other sales. Will suggested that in the broader context, other alternatives have been discussed throughout the last couple of years. The staff and others have talked about other alternatives and other ways to regulate, and other methodology for measuring separation distance. There are many ways to do it, but what is before the Commission today is one of those alternatives. Will agreed that there are other alternatives that could be explored.

Taylor confirmed that the existing licenses and special permits are grandfathered and protected. Will concurred. It goes to the definition of the licensed premises as defined in the state liquor license.

Carlson posed the question to Will: Based on your planning experience here in Lincoln, when an applicant comes in with a shopping center proposal, and they discover that they cannot meet the setback requirements, mitigation requirements or distance requirements, are they more likely to take the plans and leave or re-site the building to come into compliance with the regulations? Will recalled that the grocery store at 27th & Yankee Hill Road anticipated selling alcohol and they revised the site plan and moved the buildings to meet the distance requirements.

Support

1. **Carol Brown** testified on behalf of the **Lincoln Neighborhood Alliance** in support. Their “plan for action” is supported by 21 neighborhood associations. Their quality of life issues stress the importance of maintaining or strengthening spacing requirements for alcohol sales to increase safety, decrease conflicting land uses and protect property value in our neighborhoods. She measured 100' from the side of her house, which would be the house across the street. Everyone needs to be conscience of how close this is. All we are asking for is 100'.

2. **Fred Freytag**, 530 S. 38th, testified on behalf of the Witherbee Neighborhood in support. This will be good for the businesses purchasing properties on the corners that used to be gas stations, to have a clear understanding of what they can and cannot do and do not come forward with the expectation of mitigation. Less than 100' would put a number of properties in the Witherbee neighborhood in jeopardy.

Pearson inquired whether the issue is the liquor license or the convenience store? People drive in and out of these convenience stores at all hours for gas and other items. What is the difference if they are selling alcohol? Freytag believes the difference is the increase in crime and increase in traffic. We do not need the convenience of liquor on every corner in every neighborhood.

Opposition

1. **Matt Ludwig**, Store Director of the **HyVee** at 48th & Leighton, testified in opposition, the issue being the deletion of opportunity for mitigation. He believes that the mitigation language needs to either stay in or be changed, such as using the distance from the public access entrance to the building. For example, the back of his licensed premises is within the 100' distance. If something would happen to the building, such as a fire or flood, or if they wanted to enhance the neighborhood by remodeling the building, they may lose their liquor privileges under this ordinance. The loss of liquor sales privileges would be a disservice to their customers. Ludwig agrees with the spirit of the ordinance; however, he would want the grocery channels to be excluded from the 100'.

2. **Jayne Raybould**, Vice-President of **B&R Stores** and Director of Buildings & Equipment, testified in opposition. In case of some type of catastrophic event, the B&R Stores would lose their liquor license privileges. This would put them in a very precarious situation, especially at their 27th & Pine Lake location, which is under that 100' requirement. From her years of experience in Washington, DC, working with the business communities on zoning issues, her experience has been that once the city starts over-regulating things, that is the quickest way to drive out all type of economic development, particularly in neighborhoods that actively seek economic development. Raybould gets 4-5 requests a week to look at sites for grocery stores, but when she looks at a site and sees that the residential property line is a lot closer than 100', she will decline a development on that site. Sometimes it is too expensive to reconfigure the siting of the building. Sometimes it is not worth the investment, the extra lawyers fees and the appeal process. B&R Stores would like to see the mitigation factors remain in the ordinance.

Carlson suggested that they might also be paying more lawyer fees by coming in to argue their case for mitigation. With this ordinance, either you comply or you do not comply.

Pearson inquired as to how many B&R stores do not meet the 100' distance requirements. Raybould did not know but she knows the Pine Lake store is one.

3. Mark Whitehead, President of **Whitehead Oil and U-Stop Convenience Shops**, 2537 Randolph Street, testified in opposition. "Be careful what you wish for because you may get it." He has an obligation to do substance over symbolism and he understands doing that politically is not always the easiest thing to do. You need to look at the facts and reality of a major decision like this. In terms of measuring the problems created by alcohol, limiting the availability of it does not affect demand in any way, shape or form. This is a fact. Speaking personally, Whitehead has 21 convenience store locations, most of which sell alcohol. 27th & Stockwell in the Country Club neighborhood does not sell alcohol. On a per square foot basis, 27th & Stockwell is their weakest performance store. In terms of problems from sale of alcohol, there are many different measurements of it. Whitehead's problems with armed hold-ups across their entire system have been very minimal, with only 2 over the last 7 years. There is not a correlation to the alcohol sales. As far as impact, Whitehead gave the example of their location at the northeast corner of 7th & Washington. If they acquired the two houses to the back, that would be enough real estate to put together the type of stores that Whitehead operates proudly and safely. If this ordinance went into effect, he would have to buy out every single house on that entire block in order to put a convenience store there.

The option of a convenience store without alcohol is not realistic in today's market.

This ordinance will limit the ability of many of the stores to remodel their facilities. The blighted retail locations that you see now would remain that way if this is approved. 9th and South could not be remodeled. 48th & Randolph has been an asset to the neighborhood. Ideal at 27th & "A" would not be able to remodel. Brewsky's at 17th & South would not be able to remodel. Whitehead suggested that there be the flexibility to use discretion where discretion is warranted.

4. Mark Hudson, 500 W. Cuming, owner of **SaveMart** at 11th & Cornhusker, testified in opposition. He trusts the judgment of the Planning Commission and the City Council. He does not want that judgment to be taken away. SaveMart is 100' from a residential neighborhood and about 100' from Cornhusker Highway. Which way do you go? He would hope that the Planning Commission and City Council would be allowed to use their judgment as to whether it works or not. This legislation takes that judgment away. He is a small business person. This ordinance impacts the small business more strongly than a big organization. The bigger companies can build wherever they can meet the requirements. A small business has to take over an existing structure in a more dense area. SaveMart could not buy a house next to it. The small retailer will be impacted much more strongly than the big retailer.

5. Scott Schlatter, 5932 S. 81st Street, Director of **HyVee** at 70th & Pioneers, testified in opposition and requested that the opportunity for mitigation be left in the ordinance.

6. Bruce Bohrer, **Lincoln Chamber of Commerce**, submitted a letter in opposition to the loss of flexibility by removing the mitigation. He submitted that recent applications by some very well-thought-of businesses in this community really show that the mitigation allows the opportunity for businesses that are also very much community members to find some accommodation. The Chamber of Commerce urges that the 100' limitation be maintained with the opportunity and flexibility to allow mitigation.

7. Kent Seacrest appeared on behalf of **Ridge Development Company** and **Southveiw, Inc.** The churches, parks and residential uses all make sense and Planning Commission final action is appropriate. However, he believes there are two other alternatives to getting out of the mitigation business. He understands that most of the grocery stores license the whole building, so that pushes the whole building 100'. We have state and local "zoning" laws, and then we have state and local "land use" laws that deal with liquor. This amendment concentrates on the liquor as opposed to the retail land uses. We have the zoning setback for liquor, we have the 100' rule for liquor, and we have the 150' rule between the access door and the other desirable uses we are trying to protect. The administration's proposal gets rid of the mitigation.

Seacrest then submitted Alternative 1: "Not all Zoning Districts are Created Equal" (attached hereto as Exhibit "A"), and Alternative 2: "Not All Liquor Related Land Uses are Created Equal" (attached hereto as Exhibit "B").

With regard to Alternative 1, Seacrest referred to special permit zones and use permit zones. Special permit is saying that the use should not go into that zone without special conditions. Use permit is a use intended for that zone and we might give it site review and conditions. The B-2 and B-5 zoning districts are already our liquor zones because they allow liquor sales. The B-2 and B-5 districts are also the new zones that we do out at the edge. The older neighborhoods have the B-1 and B-3 zones with minimal setbacks. B-2 and B-5 have larger setbacks. We've now zoned ahead of time in the edge areas before the homes show up. Seacrest suggested that the B-2 and B-5 could have a different set of rules and are entitled to liquor.

With regard to this proposal, Seacrest noted that the administration measures the distance from the building. What are we trying to protect? Seacrest suggested that we are trying to protect "bad bathroom behavior" – people coming out the door and urinating on the neighbor's yard or vomiting. The other thing he believes we are trying to do is noise protection. Seacrest submitted that the building doesn't have any relationship to either one. It's the front door or the public door and that is where the measurement needs to occur. The back of the building is not where the noises come out. Alternative 1 proposes a distance of 150' from the public door if facing a neighborhood; and 100' from the public door if not facing the neighborhood.

With regard to Alternative 2, Seacrest noted that the police are concerned with bars and convenience stores. He does not believe the police would classify grocery stores and "ma and pa restaurants" the same. It is rational to say that land uses should be treated differently. These uses could be classified differently. We should not penalize the grocery store and the "ma and pa restaurants".

Bills-Strand asked Seacrest why he believes convenience stores are different than liquor stores. Seacrest's response was that he has not seen a new liquor store go into this community for a long time. Grocery stores and convenience stores have become the liquor stores. Generally, the liquor is not consumed on-site. We think this compromise makes sense. Otherwise, we are going to add

50' to commercial developments, which means pulling the infrastructure along the road next to that development. It will increase potential for some sprawling. It will be \$20,000 more for that 50' for government, and the developer will lose about an acre or more of land.

Bills-Strand inquired as to how this affects existing grocery stores that could not meet these requirements in older neighborhoods and wanted to remodel or needed to rebuild. Seacrest believes that the vast majority could meet his proposed compromised standard, i.e. measuring from the front door.

Carlson disagrees that the administration proposal would carte blanche add 50 feet to new developments. Seacrest believes there are definitional issues, i.e. what's the difference between a bar and a restaurant? You could use the same definition as the smoking ban. What's the difference between a convenience store and a grocery store? Seacrest thinks it is size. One size should not fit all and you should not put a grocery store in the same camp as a bar.

Response by the Applicant

Will clarified that the 100' separation to a residential district remains – it is the “residential use” that is being deleted.

Carlson asked Law to respond to the ability to rebuild in the event of a catastrophic situation. Rick Peo believes there are different options. If you have over 50% destruction by fire, explosion, etc., then you are not allowed to rebuild a nonconforming use. However, there is a provision to allow a special permit for the expansion, enlargement or reconstruction of a nonconforming use. Nonconforming uses are determined to be disfavored uses, so there would be some difficulty in insuring entitlement to rebuild.

Carlson then inquired whether a previously approved special permit mitigation plan is carried through to reconstruction. Peo stated that it would not, because now you have changed the terms of the law and mitigation is no longer an issue. By changing the terms of the ordinance that previously approved a special permit would make it a nonconforming use.

Carroll asked staff to address the idea of 100' from the front door versus the complete premises, and why not use that as the measurement requirement? Will stated that it is certainly one of the issues that has been discussed as staff has talked to industry representatives and other public officials. He believes that Mr. Seacrest has also submitted his alternatives to these groups previously. Will does not have an opinion and it is certainly a feasible alternative as is the one being considered today. It is a matter of judgment.

Peo clarified that the B-2 and B-5 districts are governed by a separate chapter of the zoning code and those permitted uses have setback requirements. The B-2 and B-5 district requirements are not before the Commission in this amendment. B-2 and B-5 uses are not uses governed by the special permit provisions specifically. It would take a different application to do anything in the B-2 and B-5 districts.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

February 4, 2004

Main Motion: Marvin moved approval, seconded by Carlson.

Marvin believes that the mitigation has been a problem and he will support the proposal by the Mayor.

Motion to Amend #1: Carlson moved to amend, to retain “or residential use” on p.91 and p.93 (p.2 and 4 of the ordinance), and wherever else appropriate, seconded by Marvin.

Carlson noted that the code calls for 100 feet from residential district or residential use, and he wants to leave residential use in place. Residential uses should be able to enjoy the same protection as prescribed for the residential district. For example, 48th & Randolph, where there is a house in the B-3 zoning district—a residential use in B-3. Carlson believes that this neighbor should enjoy the same protection as the neighbor to the south. Pearson understands that a larger company could come in and buy that property and tear the house down and have their liquor store in the B-3 zoning. A smaller operator could not do that. So, in fact, it's already zoned B-3--you're just sort of able to save the house if you put “residential use” back into the ordinance. Carlson suggested that the alternative is to leave “residential use” in and not create the conflict in the first place.

Bills-Strand agreed with Pearson. If the zoning is already there, she does not think the use needs to be a factor. She thinks we need to protect the zoning.

Motion to Amend #1 failed 3-5: Carlson, Krieser and Marvin voting ‘yes’; Carroll, Taylor, Sunderman, Pearson and Bills-Strand voting ‘no’.

Further discussion on main motion. Carlson stated that he appreciates hearing the testimony. The issue of catastrophic destruction is certainly valid, but he believes there are thorough safeguards in the zoning code. Plus, in the one or two times this has occurred, the Commission has allowed the pre-existing use to return by special permit. In regard to some of the discussion about blight, he finds it compelling that during the noon meeting of the Council, the City Attorney representative commented that the city policy is that we don't consider alcohol sales to be a remedy for blight. We spend millions of dollars to remedy blight and to suggest that alcohol sales is the only remedy for blight is kind of silly. There are plenty of circumstances and uses. Carlson does not think 100' will make any of these parcels unusable. For example, the convenience store at 27th & R that came in for a liquor permit that was denied because of the residential use to the north, has been sold and it is now a little Mexican market that is doing quite well. He believes there are plenty of opportunities. It is a mistake to assume it is going to have some drastic and Draconian effects. We have many instances where the community has made the determination that X number of feet is appropriate to provide safety. 100' is not that far. It is basically two lots in an older neighborhood. It seems strange that we would think that the urban renewal--the economic development--hinges on selling a stack of beer next to somebody's house. This seems to be a very reasonable and very prudent choice to make. It is an equitable issue in the case of mitigation. We owe the citizens clear law for their protection and the businesses clear law. It is the better benefit for the community and for everyone involved.

Carroll agrees that mitigation should be removed. It is too difficult to make decisions that are not written in the law. However, he would be in favor of making the change to measure from the front door of the property because there are zoning setbacks that take care of the problem. 100' from

the public front door is a fair thing to ask for versus the whole entire structure. Carroll believes that this is an option that should be considered. He hates to close the door on that option by approving this ordinance now.

Motion to Amend #2: Carroll made a motion to amend to require 100' minimum walking distance (measured along the shortest, legal, practical walking route) between public door(s) not facing protected uses and the protected uses, and 150' minimum between public door(s) facing protected uses and the protected uses, as set forth in Alternative 1 submitted by Kent Seacrest, seconded by Pearson.

Marvin asked if Carroll would consider striking "walking distance" from the amendment. This was acceptable to the maker of the motion.

Carlson stated that he would prefer to do the package as proposed. That change on an infill site is a very significant change because typically the building is capable of taking up a huge amount of the parcel. Setbacks in the older districts are not sufficient.

Pearson agreed that mitigation is not fair and it should be deleted. There are two standards right now – one for existing neighborhoods which have a lot of bars that could not rebuild if they burned down. That does not seem fair. The standard for new neighborhoods is different and she does not favor that. She supports the language providing for 100' to public door not facing neighborhoods and 150' facing neighborhoods.

Carlson suggested that making it 100' from the front door and removing mitigation creates a new situation. Right now you have one or the other and can require additional screening or landscaping. 100' from the front door results in no landscaping.

Ray Hill of Planning staff clarified that the screening requirement has to do with commercial next to residential – not anything to do with the liquor premises. Likewise with the setbacks in the B-2 and B-5 districts--there are screening requirements in those setbacks, so it does not make any difference whether the building is selling alcohol or not. The same for B-1 and B-3.

Carlson asked the Planning Director to respond to the 100' from the front door and not having the potential for mitigation. Marvin Krout, Director of Planning, stated that we would still have a special permit requirement, even if it met the new distance standards in the older business districts (B-1 and B-3), and he believes the Planning Commission can still impose some additional buffer standards beyond the standard requirements. However, if you meet the standards in B-2 and B-5, then you are permitted the use by right and you don't come before the Planning Commission for a special permit.

Carroll clarified that his amendment only applies to the 100' and 150' in any zoning district.

Motion to Amend #2 carried 6-2: Krieser, Marvin, Carroll, Sunderman, Pearson and Bills-Strand voting 'yes'; Carlson and Taylor voting 'no'.

Further discussion on the main motion, as amended:

Marvin stated that he needs an explanation of the 150' requirement [(g) on p.2 of the proposed ordinance]. We are not measuring from the back loading door, but from the public door at 150'. What does the 150' limit? Will explained that paragraph (g) on page 2 of the proposed ordinance provides that no access door, including loading or unloading, shall face any residential district within 150'. Mr. Seacrest's proposed amendment is slightly different but means the same thing. The change is that the distance will now be measured to the main entrance door instead of to the licensed premises in the case where it does not face one of the protected uses. The difference is whether it faces a protected use or a residential district. The 100' is when the back of the building faces those districts. The 150' tries to cover any door facing the residential district, such as an unloading door or secondary access door. That appears to have been eliminated and replaced with the 150' rule for public access facing a residential district or one of the other protected uses.

Carlson gave the example of an application that is 80' away, so it fails the test and needs a mitigation plan. With the amendment, that same use will be permitted to be drastically close because you can measure to the front door as opposed to the building.

Peo then suggested that it might be preferably to have Mr. Seacrest put his proposal into legislative format rather than the Commission and staff speculating as to how it fits. In that case, the Commission may want to defer taking any further action.

Taylor recalled situations where the 100' from the back door was quite questionable. Taylor believes there needs to be more thought put into this. He needs time to learn the ramifications. He believes it is an almost drastic departure from what we have done in the past. He would like to defer for two weeks. We want our private enterprise to be able to make decisions and mitigation does allow that type of discourse between the city and the individuals who are making proposals. He is in favor of getting rid of a portion of this mitigation if we can reconcile our positions that is going to make this change more meaningful. He likes the front door concept to a certain degree but he is concerned about the ramifications due to future changes and how it is going to affect us in the future. Will it make the situation worse?

Marvin stated that he will vote against the main motion and follow that up for deferral in two weeks. Peo advised that a motion to defer would supersede (table) the main motion.

Marvin moved to defer, with continued public hearing and administrative action on February 18, 2004, seconded by Taylor.

Bills-Strand commented that there have been problems with mitigation in the past because there have not been set rules, but at the same time she believes we can over-govern and over-regulate and we have to have flexibility. The Mayor has told the streamline committee that we have to be able to be flexible to take care of the needs. She is not in favor of a lot of bars in residential areas but she likes a restaurant where she can have a glass of wine. We need to allow ourselves some flexibility and not take away our judgment ability. However, there need to be more guidelines on mitigation than we have had in the past. Bills-Strand would like to see some better guidelines on mitigation so as not to avoid flexibility.

Carroll requested that the staff look at the alternatives proposed by Mr. Seacrest and the ramifications of the alternatives.

Marvin Krout inquired as to whether the Commission is asking staff to look for alternatives within the realm of what has been advertised or in terms of what may take additional advertising? Carroll suggested that the review be within the realm of how it has been advertised. Bills-Strand would like the staff to look at mitigation and some other guidelines for mitigation. Krout cautioned that some of that might not be able to be implemented without additional advertising.

Carlson believes that B-2 and B-5 are still a concern. Peo suggested that if the Commission wanted a separate standard for B-2 and B-5, they would have to be amended in their own specific chapters of the ordinance. The special permit provisions only cover the districts listed on p.1 of the proposed ordinance, and B-2 and B-5 are not in that list of districts.

Bills wants to come back to the main motion, as amended, on February 18th.

Motion to defer, with continued public hearing and administrative action on February 18, 2004, carried 7-1: Krieser, Marvin, Carroll, Taylor, Sunderman, Pearson and Bills-Strand voting 'yes'; Carlson voting 'no'; Larson absent.

CONT'D PUBLIC HEARING BEFORE PLANNING COMMISSION: February 18, 2004

Members present: Pearson, Krieser, Carroll, Sunderman, Carlson, Marvin, Taylor and Bills-Strand; Larson absent.

Staff recommendation: Approval.

Ex Parte Communications: Marvin indicated that he had talked with Kent Seacrest to clarify what Seacrest is proposing, which deals with the B-2 and B-5 Districts. They also discussed the measurement requirements and where we are right now.

The Clerk announced that the main motion, as amended, was tabled at the last meeting. The motion on the floor is approval, with the amendment to require 100' minimum distance from the public door when not facing protected uses, and 150' from the public door when facing protected uses.

Brian Will of planning staff submitted additional information, including additional letters submitted in support of the original proposal. In general, the letters are in support of the provision which would leave the measurement of the 100' to the premises from a residential district, versus the other changes discussed, i.e. measurement from the public front door.

Will also submitted a staff memorandum in response to questions raised by the Commission at the last meeting: 1) what would be the impact of the change in measurement as it relates to special permits for alcohol, and 2) other potential measures for mitigation should some sort of flexibility be retained in the special permit ordinance.

With regard to distance measurement, staff did go back and review the six most recent applications that were either controversial or did not meet the 100' separation distance from residential, and the table on page 2 of the memorandum goes through these six special permit applications. The distances relate to the three measurement techniques discussed—the existing ordinance, straight line from the public access doorway, and the doorway when measured along the face of the building. It is

obvious that the most restrictive of the three is currently the way it is measured, i.e. the closest point of the licensed premises to a residential district. The most lenient would be measurement of the doorway as measured around the building face.

With regard to mitigation, there are six measures that could be considered for mitigation including increased landscaping and screening, limits on hours of operation, limits on advertising as it relates to sale of alcohol, limitation on the areas within the premises where alcohol is sold, and requiring additional employees to be on site to serve as security.

Will advised that the Planning staff recommendation remains the same--approval of the proposal as originally submitted.

Public Testimony

1. Larry Albers appeared on behalf of **Enterprise Company**, owner of a small neighborhood shopping center at the southeast corner of the intersection of 14th & Superior Streets. This is a 60,000 sq. ft. center built about 15 years ago. HyVee was the anchor tenant at the time, which has now relocated to a larger box; however, HyVee continued to pay rent until last year. The owner is now in the process of looking for another tenant. The center is zoned B-2. There is residential behind the store, there is residential to the south and Goodrich Middle School is across the street to the west. Thus, the center is surrounded by residential, except for the Walgreens across the street to the north. The owner is still attempting to get a neighborhood grocery store. Grocery stores now want to be able to sell alcohol. Another tenant considered was a bowling alley, which would also want to serve alcohol. Part of the discussion was about the problems with the current ordinance in that if you drew the line through the center of the store, some of the bowling alleys would fall within the limit. The owner is looking at investing \$1.5 million, but finding a tenant for 35,000 sq. ft. is very difficult in that the whole concept of grocery stores has changed. Therefore, the owner is considering other alternative uses. One possibility is splitting the store area up, which gets to be expensive and would result in other uses that would potentially serve alcohol.

Albers believes it is for the benefit of the neighborhood to have the flexibility to bring in a grocery store or bowling alley. Since this store has been vacant, they have had problems with vandalism. Having a vacant store seriously affects the image of the shopping center. Albers requested that the Commission promote the requirement that the measurement be to the front door of the premises.

Albers had indicated that the owner has received requests from the neighborhood for a grocery store. Carlson asked how many requests there have been from the neighbors for alcohol sales. Albers response was that he believes the neighbors would generally go to a neighborhood store for convenience items. Osco Drug is located in the same neighborhood center and has off-sale alcohol. Albers acknowledged that the owner has not had any requests from the residential neighbors for alcohol sales or for a bowling alley.

2. Matt Ludwig, director of the **HyVee Store** at 48th & Leighton, referred to his previous testimony about the chances of a natural disaster and the ability to rebuild. After leaving the last meeting, he was thinking of some other instances where his location would be affected. About five years ago, HyVee Food Stores did a considerable expansion at the 48th & Leighton location. Under the proposed ordinance, the expanded store would no longer be able to sell alcohol. Likewise, looking to the future,

HyVee holds the lease at a building that is adjacent to the 48th & Leighton store in the same strip mall. HyVee may consider a liquor store in that building that is connected to the HyVee Store. He would worry that the new ordinance would not allow that to occur.

3. Ed Caudill, North Bottoms, Neighborhood Association, requested that the Commission give consideration to the people that buy a house in the neighborhood and the people that rent and live in a neighborhood—they should be given as much consideration as the businesses. The North Bottoms Neighborhood Association supports the Mayor’s original proposal, which removes the mitigation, so that everyone knows in advance that they may or may not have a liquor store next to them. He also requested that the 100’ measurement be retained as it is.

4. Mark Whitehead, Whitehead Oil, acknowledged that the convenience stores in residential areas are more intrusive than the old full-service stations. Whitehead Oil operates eight of those full-service stations and he would be surprised if anyone bought the majority of their gas from a non-24-hour or full-service location. Whitehead reiterated that limiting access to alcohol does not affect consumption of alcohol in any objective measure. Increased availability of alcohol also does not significantly contribute the problems with DWI’s. Specifically, Whitehead would accept the alternatives proposed by Mr. Seacrest. When you measure straight line to the 100’, it does eliminate convenience stores entirely from this process. It pits convenience stores against grocery stores. As a comparison, grocery stores are about 4 times larger in terms of land mass with 4 times more traffic and there are a lot more lights. Grocery stores now sell gas and are open 24 hours a day. So in terms of playing with the 100’ or 150’ walking or the 100’ or 150’ straight line, you are not really accomplishing anything. He would like the Commission to consider keeping the mitigation in place. He encouraged the Commission to consider the 100’ “walking” distance. It will require a much larger convenience store, but it still allows at least a degree of alternatives in that process.

5. Jim Hardington, Executive Director of the Nebraska Restaurant Association, testified that without mitigation, it will preclude the opportunity for some smaller restaurants to set up facilities. The Restaurant Association supports measuring the distance from the front public access door around the building to the zoned area.

6. Bob Lewis testified on behalf of **Hampton Development**, developer of neighborhoods and neighborhood centers in opposition to any kind of ordinance that would eliminate tenants in a neighborhood center by restricting the distance requirement.

7. Kathy Siefken, Executive Director of the **Nebraska Grocery Industry Association**, testified that the Association is concerned about some of the unintended consequences that would result from this ordinance amendment. 95% of the grocery stores in Lincoln are members of the Association. The proposed ordinance would affect SaveMart, which is close to a residential district; Leon’s, with a park directly east; and Village Market, with residential across the alley to the west, to name a few. These are small independent grocers having enough problems of survival as it is. The big stores are having trouble, too. For example, Super Saver at 27th and Pine Lake Road is 50’ from the lot line; it will affect Russ’s Market at Coddington; and Russ’s in Havelock. Throughout the city of Lincoln there are existing stores concerned about the ability to rebuild or expand in case of fire, tornado, flood, etc. If they do rebuild, they will want to have alcohol sales in their facilities. In grocery stores, alcohol sales are a huge profit center. Siefken stated that the members of the Association are very responsible retailers. Through the state association, they are involved in a project where they do stings in member stores once a month, and for two years they have been at 90% compliance. In some instances they have

identified the clerks that are doing a bad job and they are no longer working in those locations. It appears that this ordinance is going to cause some unintended consequences. The back of the grocery store buildings are built for the very specific purpose to have semi-trucks pull up and unload product. They do not need an additional 100' in back of the stores. It will cause sprawl, and they do not want kids playing in that area.

Carlson suggested that what Ms. Siefken is calling "wasted space", some people might call a buffer space. Siefken stated that in some instances she would agree; however, there are big semi-trucks that go behind these buildings. She thinks there is a safety issue that needs to be considered. Super Saver at Pine Lake Road gets 20 trucks each day. Carlson thinks it would be safer to have residential farther away. Siefken believes this would result in a bigger area for the children to play in. Semi's and kids don't mix. The docks in the back of the store are required for the semi's to be able to turn around.

8. Mark Hunzeker appeared on behalf of a number of his clients that are in the development business in new and old areas of the city. Clearly the point has been made that the B-2 and B-5 in newer parts of the city have problems as well as the older parts of the community, but there seems to have been a focus on the smaller convenience stores and stand-alone business. The impact of this proposed language and the elimination of any possibility of mitigation will have an impact on all of the old town centers in this community – Havelock, University Place, College View, Bethany, Belmont, those areas down along South Street – any of the areas where we have old town center type commercial. Most of those areas are zoned less than one block deep, so if you have a commercial structure which faces 48th Street in University Place or 48th Street in College View, chances are very high that across the alley on the other side of the block there is residential zoning. How are you going to get restaurants, coffee shops and neighborhood bars to continue to locate and invest in those areas if there is no possibility for them to exist? Those are desirable uses in those areas and this language will prohibit any new investment of that type. Whether you grandfather them or not, there are things that may result in those permits going away and the reinvestment will be impossible under this new language. Hunzeker urged that the discretion that goes with the mitigation is part of being a public official. The Planning Commission has the opportunity to make judgments about individual cases in special permits, as well as the City Council. He believes it is part of the responsibility that goes with these positions.

9. Carol Brown, 2201 Elba Circle, pointed out that alcohol is not a treatment for blight; it is not an economic development tool; it is available everywhere in the community, on every corner; if a convenience store cannot survive without alcohol, should it become a liquor store? We need to go to the Police Department and ask for statistics on convenience stores selling alcohol within such a short distance of neighborhoods. She believes that there are some alarming statistics as far as crime. Are we going to be shoving more of this crime into the neighborhoods? There is a mitigation fence on 48th & Randolph. A car hit it, bent the poles, and busted the fence. That property owner has his house up for sale. Do we want to drive these people out of these neighborhoods? There is a party house at 48th & Hwy 2. Why do we want to tempt the kids to even do worse in this neighborhood? They have already had assault calls in that neighborhood. This ordinance seeks some protection for neighborhoods for a nice, quiet living environment. She lives by Osco Drug and the old HyVee Store. Why do we need alcohol sales next door to each other? What are we doing to our kids? Fast Break at the entrance of

North Star High School has cases of alcohol on sale. Our kids go into these places every day. We are conditioning them to think that this is okay. Somebody save us from this. Let's find out how many accidents are related to alcohol in our community.

10. Craig McCowen, 1970 B Street, testified on his own behalf and as President of the **Near South Neighborhood Association**, in support of the Mayor's proposal. One of Lincoln's greatest strengths is that it is built on historic old neighborhoods, which unfortunately, are not given the same respect as some of the newer urban areas today. You don't see alcohol being built right next to residential in the newer Pine Lake Road area. It appears that we are not giving the same parameters in the older neighborhoods. He wants to see that trend reversed.

11. Fred Freytag, testified on behalf of the **Witherbee Neighborhood**, in support of removing the mitigation and staying with the 100' measurement from the licensed premises. Witherbee has several areas vulnerable to development of convenience stores, and having the mitigation removed would make it clear to the purchaser as to whether they will be able to have liquor sales or not. It will protect the neighborhoods and not put them on the defensive everytime someone wants to develop a property. The fence at 48th & Randolph has not been repaired. How many of you would like to have the bright lights of the station in the back of your home? Do we need to have bright daylight 24 hours a day? If the convenience stores say they need alcohol to survive, maybe there are already too many of them. A lot of these stores are within walking distances to schools. We spend a lot of money educating our young people to stay away from drugs and alcohol and then we put it right in front of them. We need to look at the message we give them and the examples we show them. It is not the grocery stores in the larger commercial areas that are the problem, but the stores on the corner that are invading the neighborhoods where there used to be gas stations.

12. Dave Shoemaker, Shoemaker's Truck Station, urged the Commission to measure the distance to the front doorway around the building as this might affect his business in the future. "If I don't have alcohol and someone else does close by, I am going to lose a lot of business." He is concerned about the remodeling. He is fearful that businesses will not maintain and improve their buildings if they risk the loss of alcohol sales by doing so.

13. Kent Seacrest testified on behalf of **Ridge Development Company** and submitted proposed amendments which reflect the amendment passed by the Commission at the last meeting. He suggested that measuring from the door is the most logical thing to do. The issue is bathroom treatment (puking, urinating and parking distance to the car), which all comes from the public front door—not from the back of the building. Other states have allowed and supported measuring from the door.

Seacrest believes there is some confusion about the walking distance. He agrees that we do not want to use the pure standard of walking distance. What he has presented today measures around the building, at the base of the building. Courts have allowed walking around the building or measurement from the building.

The ordinance proposed by the administration would not have allowed the Valentino's at 48th & Hwy 2. It had the convenience door and the pizza door, but inside they were connected. Seacrest's proposed amendments provide that both doors allow you to walk out with beer. Therefore, you would be measuring from both doors.

Seacrest pointed out that the staff memorandum submitted today suggests that the grandfathering is really tricky. The staff does not even have a recommendation on the grandfathering provision. It is important for the businesses to be able to rebuild in the case of a catastrophic event. The grandfathering is very important.

There is also confusion about where the zoning line starts or stops. Some of us think it is in the middle of the road. The City Attorney opines that roads are not zoned, but Seacrest does not believe that is clear in the ordinance. He believes the zoning should not include the road.

As far as distinguishing the B-2 and B-5 zones from the rest, Seacrest indicated that he would be glad to file the application. These zones are use permit zones and those uses are allowed. Special permit zones are for those uses that are not allowed without all the conditions and protections. He believes it is rational to distinguish and he would be glad to file the application.

One of Seacrest's proposed amendments does distinguish between grocery stores and restaurants. He believes there is a difference between a convenience store and a grocery store. He believes there is a difference between a bar and a restaurant. It would be rational to say grocery stores and restaurants should be 100' and the other uses 150'.

Carlson stated that he hopes and anticipates that the Commission will be doing some further work in the near future to define what is meant by mixed use, what kind of uses we want and what standards will have to apply. The existing code makes it difficult to be specific about those uses that we want. He asked Seacrest whether he anticipates there being further ordinance changes that will call out these anticipated better uses? Seacrest suggested that we need to have a similar vision for the "downtownish" area--those zones deserve mixed use and they deserve alcohol in controlled ways. He believes we need a better mixed use zone than what we have. The B-1 and B-3 are broken. He is not sure this does it. He is afraid it will be difficult to get any rehabilitation going in those areas with the proposed ordinance. If we are not careful, we are going to make it so they don't get rehabilitated. On the other hand, we don't want to make it so easy. Seacrest would encourage a balance. People do want these services, yet the neighborhood does deserve protection. He believes that a restaurant does not create the neighborhood problems that a noisy bar does. There are definitions that can be drafted.

Bills-Strand asked Seacrest what he would like to see recommended today, or whether he would like an opportunity to come back and get some options and alternatives. Seacrest believes that is the Commission's decision. He believes it is grey and he thinks there are versions to draft that are more sophisticated than the simple model. Measuring from the building just doesn't ring a bell with him. We need to at least get the framework right and then debate the number. Right now, we're doing it backwards. He would like to submit something tomorrow, but he needs more guidance from the Commission.

Marvin suggested that if the Commission votes to do something today that adversely impacts the B-2 and B-5, something could be drafted to correct it. Seacrest suggested that if the Commission thinks that is a good strategy, he would prefer that the Commission wait for the B-2 and B-5 language before voting on this proposal, and that would also give staff time to get the grandfathering on the special permit zones cleaned up. Then the whole package can be taken forward in a more comprehensive way.

Staff questions

Carroll asked staff to address the pre-existing uses. Brian Will stated that they can be treated either as a pre-existing special permit or a nonconforming use. Staff has not had time to review this in depth and in any detail to render an opinion of whether those uses would be pre-existing special permits or nonconforming uses. Staff would need more time to answer this issue.

As far as definitions of grocery store, convenience store, allowable use and different measurements, Carroll inquired whether staff has done any research or reviewed other cities. Will stated that such an analysis was done originally when the ordinance was adopted, and they have had those discussions over time.

Carlson confirmed that the staff recommendation remains the same. Will stated that the original proposal as presented in the staff report is still the staff recommendation.

With regard to grandfathering and the ability to rebuild, Carlson understands that if we have a tornado, you would not lose your grandfathering in your special permit, and you would be able to petition to rebuild by special permit. Rick Peo of the City Law Department stated that the existing ordinance provides that a nonconforming use has the right to rebuild if there is less than 50% damage by storm. If there is more than 50% damage or if they want to enlarge, they have the right to request a special permit. We have to remember that that is the existing law today and a lot of the liquor and grocery stores were established prior to adopting the 100' rule in the first place. They were nonconforming at that time. By waiving that now without mitigation, we are going to make some additional ones nonconforming that were granted mitigation. They still have the same safeguards of the potential of a special permit and have the ability to reconstruct. How to give them more security is an issue we are looking at from a broader sense beyond the alcohol sales. We felt that we couldn't rush forward with a quick fix for this particular situation and not have ramifications that we hadn't considered for other uses, so we decided to step back and evaluate that and come forward in the future. Carlson reiterated that the existing mechanism is still there. Peo agreed that there are some safeguards, but it is not a pure guarantee.

Bills-Strand clarified that if the liquor special permits are final action by the Planning Commission, there is always the right to appeal to the City Council. Peo concurred.

If the ordinance is passed as proposed, Carroll inquired whether there is an opportunity to go back and make further changes once we have studied the pre-existing uses. Peo stated that to be something that could be done to try to separate out alcohol sales based on the use they are associated with, whether it be convenience store, or restaurant or some other mixed use category. Peo believes that there is a need to be able to define the impact of each of those particular uses and how alcohol sales relate differently to them than some of the others. We always have to bear in mind that there is split jurisdiction on alcohol. We cannot use land use to prohibit alcohol sales. That is where the state has license authority. We have had case law that limits our zoning jurisdiction. There is a balancing need here and we need to step slowly and tie what we are doing to land use and not to the license of alcohol.

With regard to the B-2 and B-5, Peo stated that we still have to look at the uses that are near. He will attempt to look at that issue.

Carlson suggested that if you change the special permit language in the B-2 and B-5, there still appears to be the waiver option. Peo concurred. Carlson suggested then that the action today may not necessarily have the same impact on B-2 and B-5--they may enjoy their existing options. Peo agreed that to be one interpretation of the language when it was adopted--to give them full protection of the special permit provisions.

Peo explained that the Administration's position is that there was a desire to get away from mitigation and we felt there were not adequate mitigation standards other than separation. Therefore, the proposal was to come forward with a mandatory 100' separation without the ability to be waived. The Commission's recommendation to the City Council is whether or not that is appropriate.

Peo also advised the Commission that there is a motion on the floor upon which the Commission needs to act. The Commission can move to rescind or repeal the prior amendments to the main motion. It would be best to act upon the main motion, and vote it up or down and then start over. If the Commission is not comfortable with the language, additional amendments can be offered, or any of the amendments previously approved can be rescinded.

ADMINISTRATIVE ACTION BY PLANNING COMMISSION:

February 18, 2004

Taylor moved to rescind the amendment regarding the 100' and 150' measurement from the front door, seconded by Carlson.

Carlson commented that the Commission now has additional information that shows that while we were working to try to find a compromise, what was passed actually weakens the existing ordinance and he does not believe that was what the Commission intended to do.

Marvin will vote to rescind the amendment based upon what he has thought about in the last two weeks and the conversations he has had. We can deal with some of these things separately -- we don't have to settle everything all at once. We can go ahead with the Mayor's original proposal and then make further changes.

Taylor understands the concerns of the small business people. He understands that we have businesses that need to operate and he likes the idea of mitigation because this gives the neighbors an opportunity to come forward and determine what they want or do not want in their neighborhood. He does not think that we solve the problem by doing a carte blanche type of behavior. We must allow for a certain amount of personal accountability. He believes these permits must be reviewed on a case-by-case basis. Therefore, he does not believe this ordinance is going in the right direction.

Carroll explained that his intent with the 100' and 150' direct measurement from the front door is to protect the neighborhood, but there should also be consideration to neighborhood grocery stores and restaurants that are improvements to neighborhoods and pre-existing conditions. There have been a lot of questions raised since the last meeting, leaving a lot of problems that the 100' does not address. He would prefer to look at all of those changes. He will support removing the amendment of 100' because there are too many questions to be answered.

Bills-Strand commented that she feels like we have the “cart before the horse” and it’s kind of a “half-baked idea”. She would prefer to see this delayed six or eight weeks and think it through before passing it on. We do need to protect business owners and the neighborhoods, and we need to look at both sides of the issue.

Motion to rescind the amendment providing for the measurement to be 100' and 150' from the front public door carried 7-1: Pearson, Krieser, Carroll, Sunderman, Carlson, Marvin and Taylor voting ‘yes’; Bills-Strand voting ‘no’; Larson absent.

Discussion on main motion for approval. Carroll believes the good part is getting rid of mitigation. The bad part is that it does not help the existing uses. It paints everything with a wide brush, but it has more good than bad. He believes that we will have to go back and revisit this again because it does not satisfy all of the things that need to be taken care of. There are too many problems that are going to be happening because of this proposal. But, it has more good because it removes mitigation. We will need to revisit this.

Carlson believes it is appropriate to make the rules clearer and cleaner. He does not believe it is too high of a standard – he supports the ongoing discussions and he thinks there are going to be elements that apply to the broader city as well. What we get now is uses that create a lot of conflict and nuisance and they have negative impacts on surrounding neighborhoods, and we can do something about that with this change. He believes this is a good change that will provide neighborhoods with protection. We have setback standards in the code now, and he does not believe it is too much to ask to have a 100' buffer for selling liquor next to someone’s house.

Pearson agrees that we need to eliminate mitigation. It should be clear cut. If we can’t write it clear cut, then we’re probably not doing our jobs. She agrees that we need to give neighborhoods protection. She does not believe the 100' protects the neighborhoods. What we want to protect is the front door where the people are coming and going. That’s what the struggle is. Why don’t we talk about what will protect the neighborhoods the best? She still thinks it’s the front door—not the edge of the building. She does not think that we’ve thought it through, so “more good than bad” does not sound like a good idea to her at this time. She thinks we should do more good and she is going to encourage deferring this because we have elements of something that is going to work, i.e. get rid of mitigation, measure to the front door, and look at the difference between restaurants and grocery stores and the bulk of everything else that sells alcohol.

Taylor questions what we are going to accomplish with this ordinance. He questions whether we are improving upon the situation that existed prior to bringing forward these changes. Therefore, he would like to see something more beneficial to the neighbors, but also not detrimental to specifically the grocery outlets and the small, local operators. So many businesses have been put out because of the big box operations. We need to work harder to find something that will be better and make a substantial effective change.

Bills-Strand agrees with Pearson and she would support delaying this so that we can get something that protects both sides.

Motion for approval failed 2-6: Carlson and Marvin voting 'yes'; Pearson, Krieser, Carroll, Sunderman, Taylor and Bills-Strand voting 'no'; Larson absent.

Taylor moved to defer six weeks, seconded by Krieser.

Peo approached the Commission, stating that deferrals are difficult to justify if the applicant wants the application to go forward. You cannot hold the government hostage by not having something go forward to be acted upon. A short deferral is acceptable to work out some of the details, but it appears that we are attempting to negotiate the administration's proposal. Or we need an applicant to come forward and propose a different change of zone. This type of deferral puts pressure on staff to try to come up with something that is not what they've been asked to do by the administration. The administration (the applicant) has not at this time indicated agreement to defer or to make revisions. The Commission's duty is to make a recommendation to the next body for a decision. Sometimes it is better to recommend denial and suggest that the Council send it back for further revision.

Peo does not know what is considered a "reasonable length of time" that the Commission can defer. Staff is recommending the Mayor's proposal. No one else has made application for a different alternative. Bills-Strand noted, however, that there is someone willing to come forward with an application tomorrow.

Marvin Krout, Director of Planning, believes that Mr. Peo is saying that the Commission owes the Mayor the same courtesy that the Commission might provide to an applicant in this case, and we don't have any impression that the Mayor has at this point indicated an interest in some kind of compromised proposal. The pre-existing issue is something the Mayor is probably willing to consider, but that needs further research and time because there are other implications. We are in a very awkward position with this mitigation requirement where the Planning Director makes a decision but sends it on to the Planning Commission and City Council. He is not even sure that the front door is the answer because we see many cases with convenience stores siding to residential neighborhoods with the parking immediately adjacent to the residential property and the impact isn't just someone who walks out the front door. The point that the Mayor is trying to make is that we are in an awkward position and we need to shift the burden of proof for any future amendments. While there may be an interest in pursuing some sort of elimination of the need to obtain a special permit if rebuilding, Krout does not believe anyone who has applied for that special permit to rebuild a nonconforming use has been denied. He thinks there is sympathy with those situation but there is no guarantee. He believes the Mayor would be concerned about due process in terms of further delays on this application.

Peo reiterated that the Planning Commission needs to recognize their duty to make a recommendation on the proposal before them. It is inappropriate to defer for any length of time to try to mandate the applicant to amend their application. If you don't like what is going to happen with this text change, you recommend denial. Krout suggested that sending this on with a recommendation of denial would be a real incentive to some people in the audience to draft a set of amendments that would make the City Council send it back to the Planning Commission.

Carlson believes the Commission should approve the proposal. He would prefer to take action since the applicant has not indicated the willingness to make any changes.

Carroll does not think a delay for six weeks is going to do anything.

Taylor withdrew the motion to defer, and the withdrawal was accepted by Krieser, who had seconded the motion.

Taylor moved to deny, seconded by Sunderman and carried 6-2: Pearson, Krieser, Carroll, Sunderman, Taylor and Bills-Strand voting 'yes'; Carlson and Marvin voting 'no'; Larson absent. This is a recommendation to the City Council.

ORDINANCE NO. _____

1 ~~AN ORDINANCE~~ **AN ORDINANCE** amending Sections 27.63.680 and 27.63.685 of the Lincoln
 2 Municipal Code relating to the sale of alcoholic beverages for consumption on the premises and
 3 off the premises as a permitted special use, respectively, to delete City Council waivers of the
 4 special conditions for said uses, to delete the provision allowing for mitigation of adverse effects
 5 approved by the Planning Director when an licensed premises is located 100 feet or closer to
 6 certain listed uses, to also require a licensed premises to be located no closer than 100 feet
 7 from a park, church, or state mental health institution, to delete the requirement that a licensed
 8 premise be located no closer than 100 feet from residential uses, and to delete provisions
 9 prohibiting approval of the special permits by the Planning Commission; and repealing Sections
 10 27.63.680 and 27.63.685 of the Lincoln Municipal Code as hitherto existing.

11 **BE IT ORDAINED** by the City Council of the City of Lincoln, Nebraska:

12 **Section 1.** That Section 27.63.680 of the Lincoln Municipal Code be amended
 13 to read as follows:

14 **27.63.680 Permitted Special Use: Sale of Alcoholic Beverages for Consumption**
 15 **On the Premises.**

16 Alcoholic beverages may be sold for consumption on the premises in the B-1, B-3, H-1,
 17 H-2, H-3, H-4, I-1, I-2, and I-3 zoning districts upon the approval of a special permit. Alcoholic
 18 beverages may also be sold for consumption on the premises as an accessory use to a golf
 19 course or country club as part of a separate special permit under Section 27.63.130 approving
 20 the golf course or country club in any district where recreational facilities are allowed as a
 21 permitted use, permitted conditional use, or permitted special use. A special permit for such use

1 may be granted subject to the requirements of the respective districts, all applicable ordinances,
2 and, ~~unless waived by the City Council~~, the following conditions:

3 (a) Parking shall be provided on-site at the ratio of one space per 100 square feet
4 of gross floor area.

5 (b) The sale of alcoholic beverages for consumption off the premises shall not be
6 permitted without issuance of a separate special permit under Section 27.63.685 of this code.

7 (c) The designated area specified in a license issued under the Nebraska Liquor
8 Control Act of any building approved for such activity must be located no closer than 100 feet
9 from a day care facility, ~~park, church, state mental health institution, or~~ a residential district
10 (except where such use is accessory to a golf course or country club) ~~or residential use, or, if~~
11 ~~a lesser distance, must mitigate any adverse effects of the reduction in distance through~~
12 ~~landscaping, screening, or other methods approved by the Planning Director.~~

13 (d) Any lighting on the property shall be designed and erected in accordance with all
14 applicable lighting regulations and requirements.

15 (e) Vehicle stacking for a drive-through window used as any part of the permitted
16 business operation shall not be located in any required building setback from a residential
17 district.

18 (f) The use shall not have any amplified outside sound or noise source, including
19 bells, buzzers, pagers, microphones, or speakers within 150 feet of any residential district. This
20 shall not apply to sound sources audible only to the individual to whom they are directed, such
21 as personal pagers, beepers, or telephones.

22 (g) No access door to the business, including loading or unloading doors, shall face
23 any residential district if such doors are within 150 feet of the residential district. This shall not

1 apply to emergency exit doors required by building or safety codes. No door facing a residential
2 district shall be kept open during the operation of the establishment.

3 (h) Vehicular ingress and egress to and from the property shall be designed to avoid,
4 to the fullest extent possible ~~as determined by the City Council~~, disruption of any residential
5 district. Particular attention shall be given to avoiding designs that encourage use of residential
6 streets for access to the site instead of major streets.

7 (i) All other regulatory requirements for liquor sale shall apply, including licensing
8 by the state.

9 (j) The City Council may consider any of the following as cause to revoke the special
10 permit approved under these regulations:

11 (1) Revocation or cancellation of the liquor license for the specially permitted
12 premises;

13 (2) Repeated violations related to the operation of the permittee's business;
14 or

15 (3) Repeated or continuing failure to take reasonable steps to prevent
16 unreasonable disturbances and anti-social behavior on the premises related to the operation
17 of the permittee's business including, but not limited to, violence on site, drunkenness,
18 vandalism, solicitation, or litter.

19 ~~Planning Commission review and City Council authorization is required for this use;~~
20 ~~provided, however, that Notwithstanding the above, no special permit or amendment thereto~~
21 shall be required for interior expansions of existing licensed liquor premises.

22 Section 2. That Section 27.63.685 of the Lincoln Municipal Code be amended
23 to read as follows:

1 **27.63.685 Permitted Special Use: Sale of Alcoholic Beverages for Consumption**
2 **Off the Premises.**

3 Alcoholic beverages may be sold for consumption off the premises in the B-1, B-3, H-1,
4 H-2, H-3, H-4, I-1, and I-3 zoning districts upon the approval of a special permit. A special
5 permit for such use may be granted subject to the requirements of the respective districts, all
6 applicable ordinances, and, ~~unless waived by the City Council,~~ the following conditions:

7 (a) Parking shall be in accordance with Section 27.67.020 of the Lincoln Municipal
8 Code.

9 (b) The sale of alcoholic beverages for consumption on the premises shall not be
10 permitted without issuance of a permit under Section 27.63.680 of this code.

11 (c) The licensed premises of any building approved for such activity must be located
12 no closer than 100 feet from a day care facility, park, church, state mental health institution or
13 ~~a residential district or residential use, or, if a lesser distance, must mitigate any adverse effects~~
14 ~~of the reduction in distance through landscaping, screening, or other methods approved by the~~
15 ~~Planning Director.~~

16 (d) Any lighting on the property shall be designed and erected in accordance with all
17 applicable lighting regulations and requirements.

18 (e) Vehicle stacking for a drive-through window used as any part of the permitted
19 business operation shall not be located in any required building setback from a residential
20 district.

21 (f) The use shall not have any amplified outside sound or noise source, including
22 bells, buzzers, pagers, microphones, or speakers within 150 feet of any residential district. This
23 shall not apply to sound sources audible only to the individual to whom they are directed, such
24 as personal pagers, beepers, or telephones.

1 (g) No access door to the business, including loading or unloading doors, shall face
2 any residential district if such doors are within 150 feet of the residential district. This shall not
3 apply to emergency exit doors required by building or safety codes. No door facing a residential
4 district shall be kept open during the operation of the establishment.

5 (h) Vehicular ingress and egress to and from the property shall be designed to avoid,
6 to the fullest extent possible ~~as determined by the City Council~~, disruption of any residential
7 district. Particular attention shall be given to avoiding designs that encourage use of residential
8 streets for access to the site instead of major streets.

9 (i) All other regulatory requirements for liquor sale shall apply, including licensing
10 by the state.

11 (j) The City Council may consider any of the following as cause to revoke the special
12 permit approved under these regulations:

13 (1) Revocation or cancellation of the liquor license for the specially permitted
14 premises; or

15 (2) Repeated violations related to the operation of the permittee's business.

16 ~~Planning Commission review and City Council approval is required for this use; provided;~~
17 ~~however, that Notwithstanding the above, no special permit or amendment thereto shall be~~
18 ~~required for interior expansions of existing licensed liquor premises.~~

19 Section 3. That Sections 27.63.680 and 27.63.685 of the Lincoln Municipal Code
20 as hitherto existing be and the same are hereby repealed.

21 Section 4. That this ordinance shall take effect and be in force from and after its
22 passage and publication according to law.

Introduced by:

Approved as to Form & Legality:

City Attorney

Approved this ___ day of _____,
2004:

Mayor

MEMORANDUM

TO: Planning Commission
FROM: Brian Will Planning Department
SUBJECT: CZ#04003 to amend Sections 27.63.680 and 27.63.685 relating to the sale of alcohol for consumption on and off the premises
DATE: February 12, 2004

During the February 4, 2004 public hearing on the proposed amendments to special permits for the sale of alcohol, the Planning Commission amended the motion to approve CZ#04003. The amendment changed how the distance to alcohol sales was measured from a measurement to the closest point of the licensed premises, to a straight-line distance to the public entrance to the facility.

During the hearing, the Planning Commission requested that staff assess the impact of the proposed amendments under discussion, and to provide examples of additional mitigation measures. To illustrate the impact how the distance is measured, the following table considers six recent special permit applications that did not provide the 100' separation to a residential district as prescribed by the Zoning Ordinance. The table presents these applications under three scenarios:

- 1 - Using the criteria in CZ#04003 as originally proposed which defines the 100' separation as measured to the closest point of the licensed premises;
2. Using the criteria as recommended by the Planning Commission's motion to amend, which defines the 100' separation by measuring the distance to the public doorway by straight-line method.
- 3 - Using the revised criteria proposed by Kent Seacrest which defines the 100' separation by measuring the distance to the public access door using the shortest, most direct distance unless there is an intervening wall. In that case, the distance is measured from the door opening along the exterior base of the building face.

Please note that this table only displays the separation from a residential district, and does not evaluate the separation from a residential use, day care, church, park, or state mental health institution as proposed by CZ#04003. Copies of the aerial photos, zoning maps and site plans for each of the example applications are attached.

Application/ Location	Distance From the Licensed Premises to the Nearest Residential District	Straight-Line Distance From the Door to the Nearest Residential District	Distance From the Door to the Nearest Residential District Measured Along the Base of the Building	City Council Action
-SP#2039 Valentino's/On- The-Go S.48th St. & Highway 2	50' (R-2 to the east)	102'	102'	Approved by veto override.
-SP#2028 Jax S. 48 th & Van Dorn Sts.	60' (R-2 to the west)	140'	148'	Denied.
-SP#2002 Fast Break S.48th & Randolph Sts.	30' (R-2 to the east)	80'	80'	Approved by veto override.
-SP#1953 Ho-Chunk S. 33 rd & O Sts.	47' (R-4 to the south)	80'	102'	Denied.
-SP#1924 Kabredlos N. 23 rd & R Sts.	75' (R-6 to the east)	75'	75'	Denied.
-SP#1918 Kabredlos 338 N. 27 th Sts.	20' (R-5 to the southeast)	90'	104'	City Council, approval vetoed by Mayor.

*NOTE: Distances were determined by site plan/photo interpretation and are approximate.

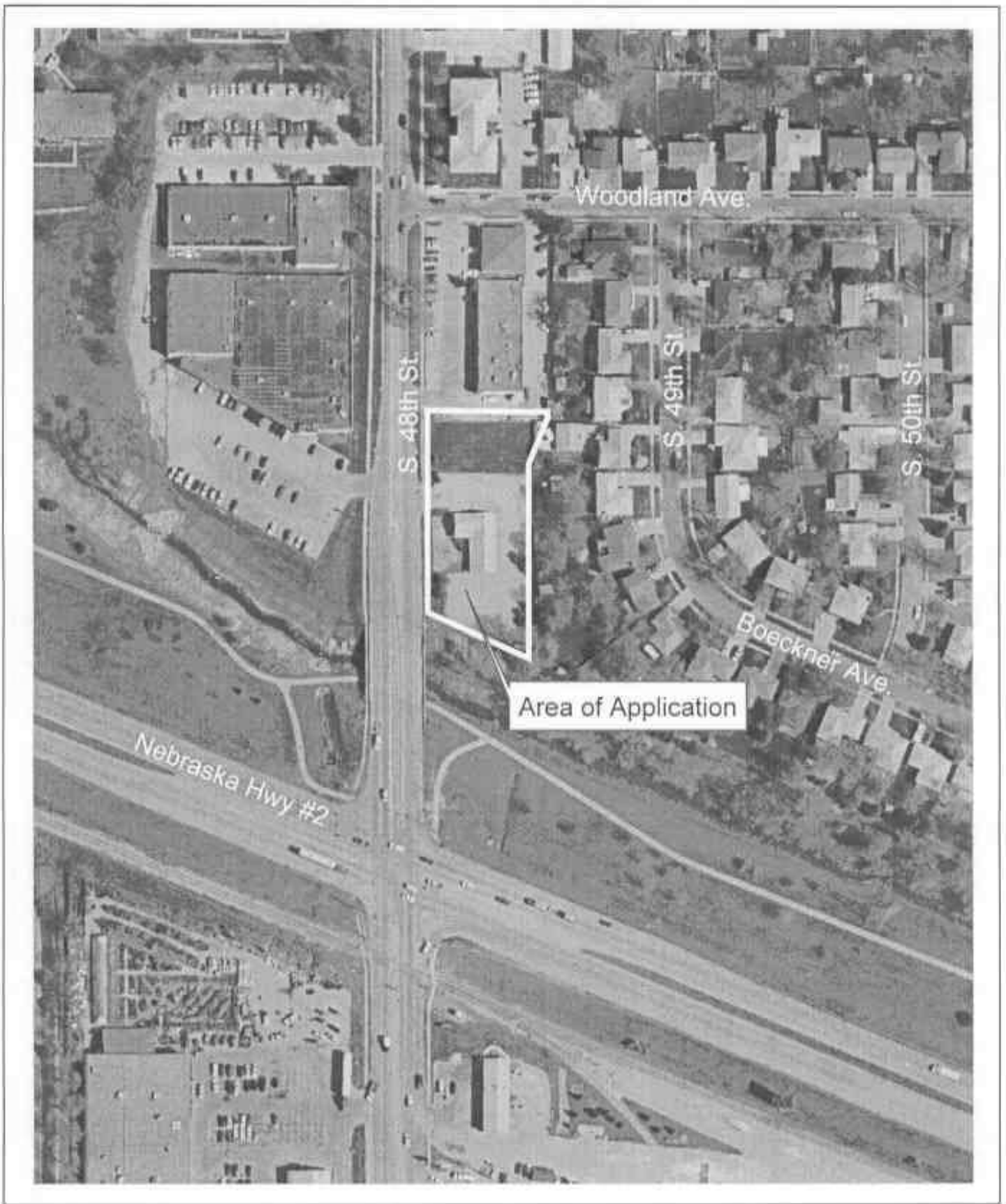
As an option to the three measurements above, a 50' minimum separation to the premises, consistent with the required setback in the B-2 district, could also be included along with a 100' separation from the door. The impact of including this additional separation would be different, as SP#2002, SP#1953, and SP# 1918 as shown in the table do not provide this minimum separation.

Additionally, staff was asked to provide examples of mitigation measures if a more flexible distance standard was adopted. Possible measures include the following:

1. Require additional screening/landscaping beyond the City of Lincoln Design Standards. For example, a 60% screen from 0 to 10' in height is required, and a 6' tall fence is often used to satisfy this requirement. While fences are limited to 6' in height, solid masonry walls could be required instead of wooden fences. Additionally, landscaping in the form of trees and shrubs that grow to mature heights in excess of 6' could be required, such as evergreen trees that grow up to 20'.
2. Constrain the hours of operation during which alcohol may be sold. For example, recent applications proposed limiting the sale of alcohol to between the hours of 7:00 a.m. and 10:00 p.m.
3. Limit signs and outdoor advertising that relate to the sale of alcohol.
4. Limit the areas within the premises where alcohol products can be stored or displayed.
5. For on-site consumption of alcohol - those facilities that do not provide the 100' separation could be limited to those uses where no less than 60% of gross revenue is derived from food sales (no more than 40% from alcohol sales) as mitigation for the reduction in distance, similar to the use ratio of the smoking law.
6. Require additional employees to serve as on-site security.

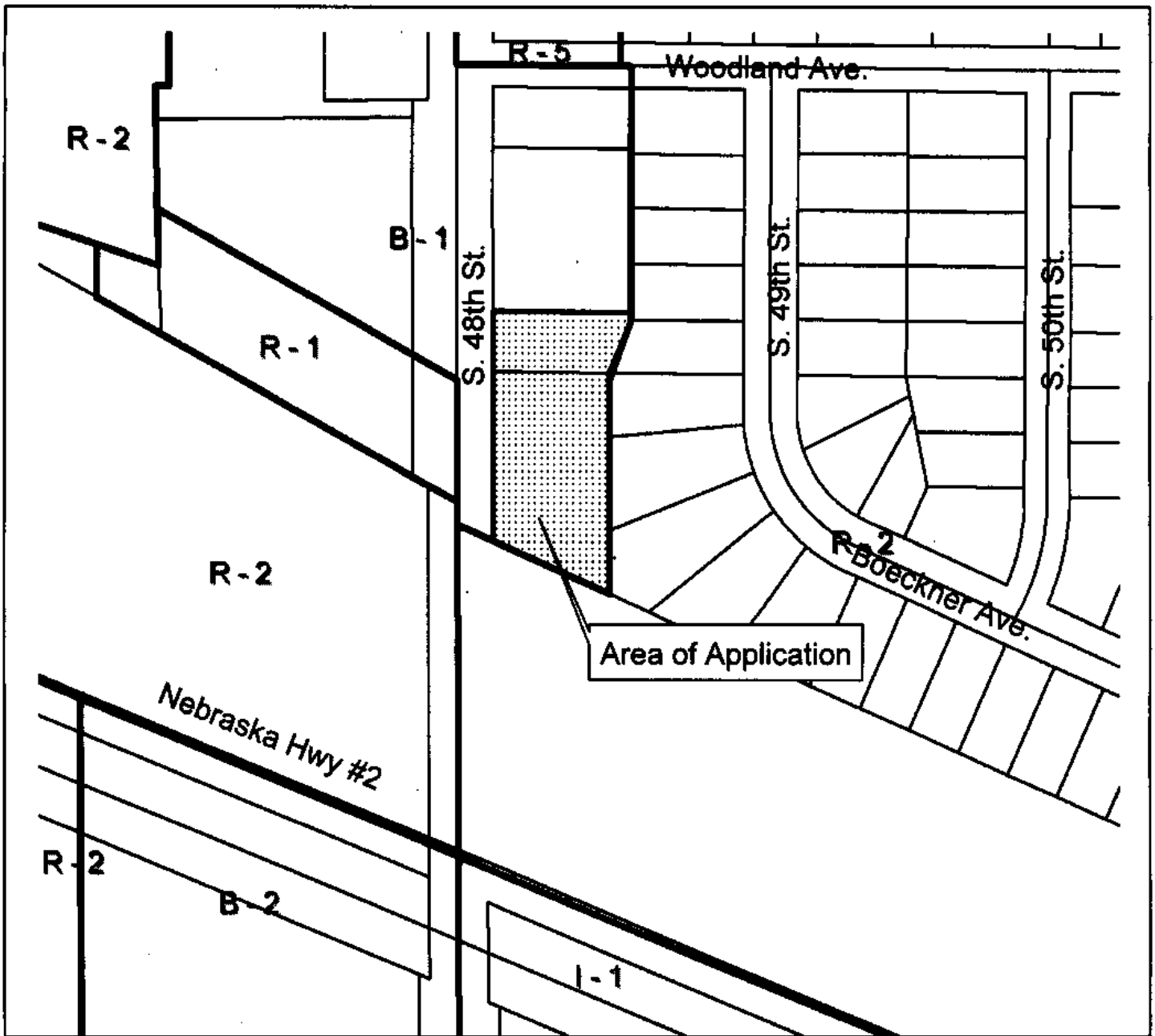
The question of how the proposed amendment would affect existing facilities where alcohol is sold was also raised during the public hearing. Specifically, whether existing facilities would be considered pre-existing special permits or nonstandard uses. The issue is broader and potentially affects more uses than only special permits for the sale of alcohol, and requires more discussion and review. Staff is not prepared to propose an amendment at this time, and any potential amendment to address the issue must be considered at a later date.

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Special Permit #2039
S. 48th St. & Hwy #2



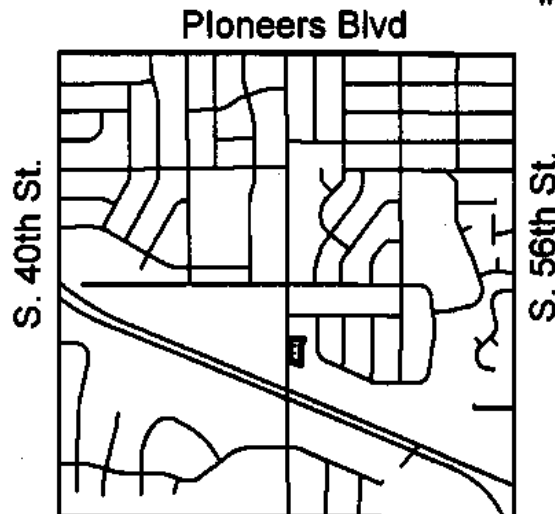
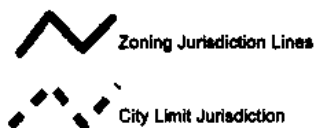


Special Permit #2039
S. 48th St. & Hwy #2

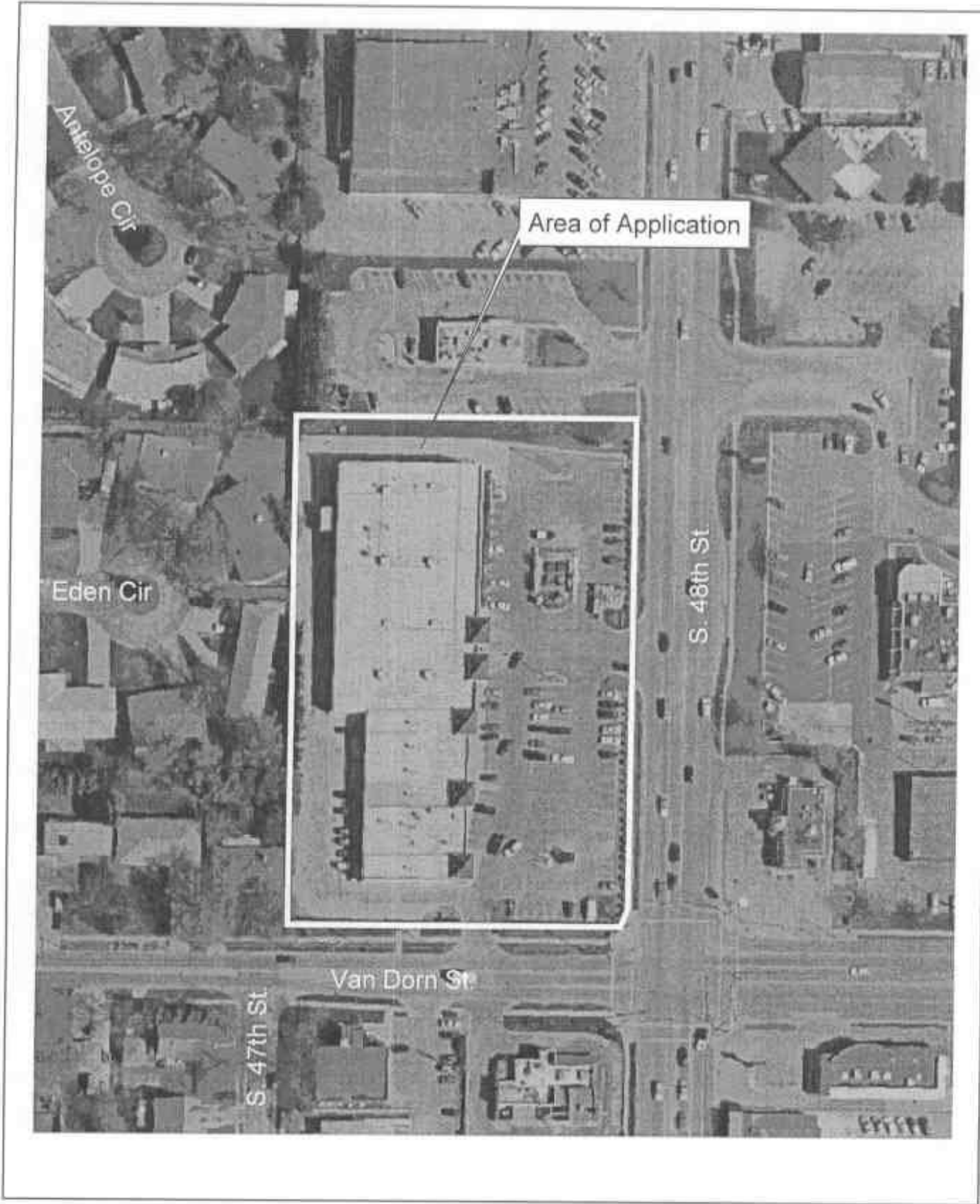
Zoning:

One Square Mile
Sec. 8 T9N R7E

- R-1 to R-8 Residential District
- AG Agricultural District
- AGR Agricultural Residential District
- R-C Residential Conservation District
- O-1 Office District
- O-2 Suburban Office District
- O-3 Office Park District
- R-T Residential Transition District
- B-1 Local Business District
- B-2 Planned Neighborhood Business District
- B-3 Commercial District
- B-4 Lincoln Center Business District
- B-6 Planned Regional Business District
- H-1 Interstate Commercial District
- H-2 Highway Business District
- H-3 Highway Commercial District
- H-4 General Commercial District
- I-1 Industrial District
- I-2 Industrial Park District
- I-3 Employment Center District
- P Public Use District

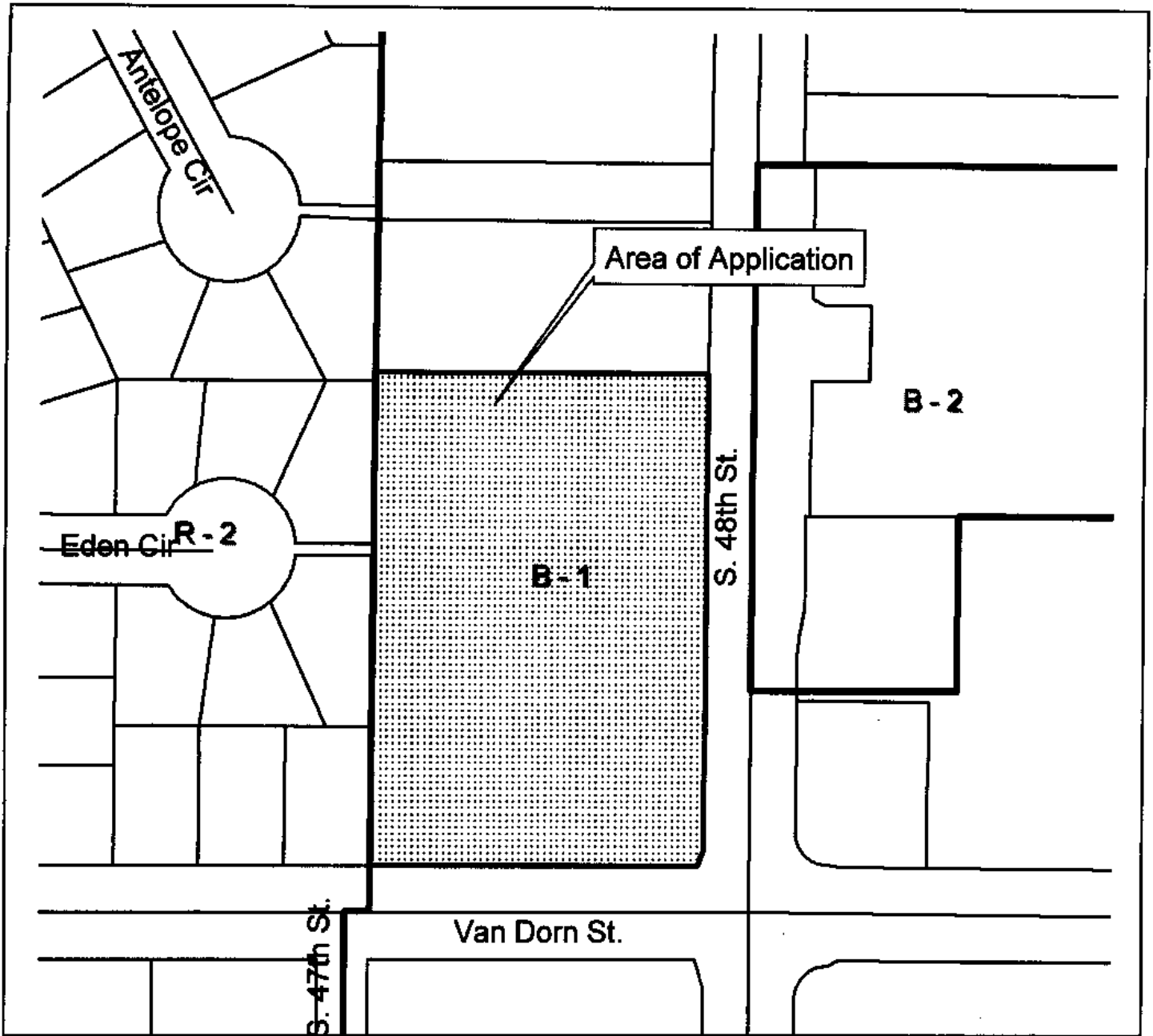


Old Cheney Rd. 035



**Special Permit #2028
S. 48th & Van Dorn St.**



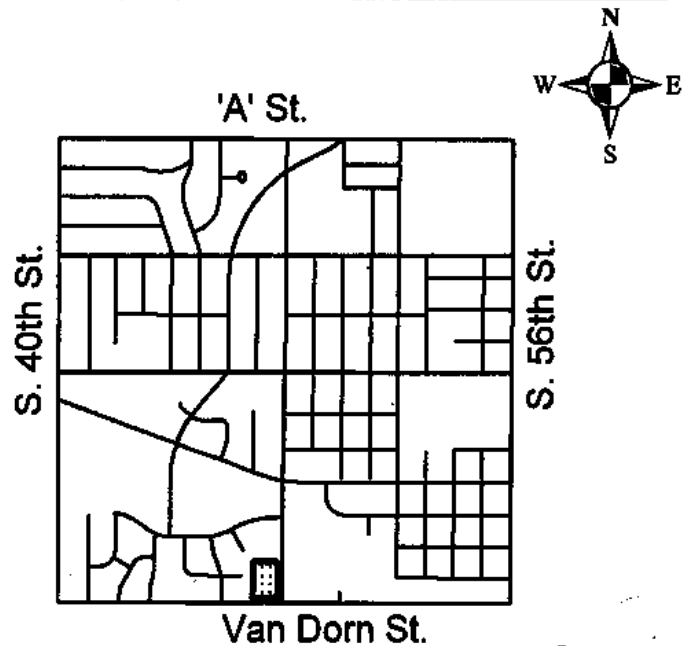


**Special Permit #2028
S. 48th & Van Dorn St.**

Zoning:

- R-1 to R-8 Residential District
- AG Agricultural District
- AGR Agricultural Residential District
- R-C Residential Conservation District
- O-1 Office District
- O-2 Suburban Office District
- O-3 Office Park District
- R-T Residential Transition District
- B-1 Local Business District
- B-2 Planned Neighborhood Business District
- B-3 Commercial District
- B-4 Lincoln Center Business District
- B-5 Planned Regional Business District
- H-1 Inland Commercial District
- H-2 Highway Business District
- H-3 Highway Commercial District
- H-4 General Commercial District
- I-1 Industrial District
- I-2 Industrial Park District
- I-3 Employment Center District
- P Public Use District

One Square Mile
Sec. 32T10N R7E



038

MARK S. CHAMPION, AIA
 ARCHITECT
 500 SOUTH A STREET, LINCOLN, NE 68502 402-425-9400

LANCASTER SQUARE

AS NOTED

BY LOCAL ORDINANCE, THE CITY OF LINCOLN, NEBRASKA, SHALL NOT BE CHARGED, INCURRED, OR ALLEGIED WITHOUT THE PERMISSION FROM THE BUILDING AND SAFETY DEPARTMENT. THIS APPLICABLE TO ALL CONSTRUCTION WORK SHALL BE KEPT ON-SITE AT ALL TIMES DURING WHICH THE WORK AUTHORIZED IS IN PROGRESS AND SHALL BE OPEN TO INSPECTION BY PUBLIC OFFICIALS.

DATE _____

REVIEWER _____

PROJECT # _____

30' FRONT YARD SETBACK LINE

PROPERTY LINE

DELIVERY TRUCK PATH



NORTH

630

Coffee Kiosk area will be available for parking

SCALE: 1" = 50'-0"



ESPRESSO 101

48th & Van Dorn Streets, Lincoln, Nebraska

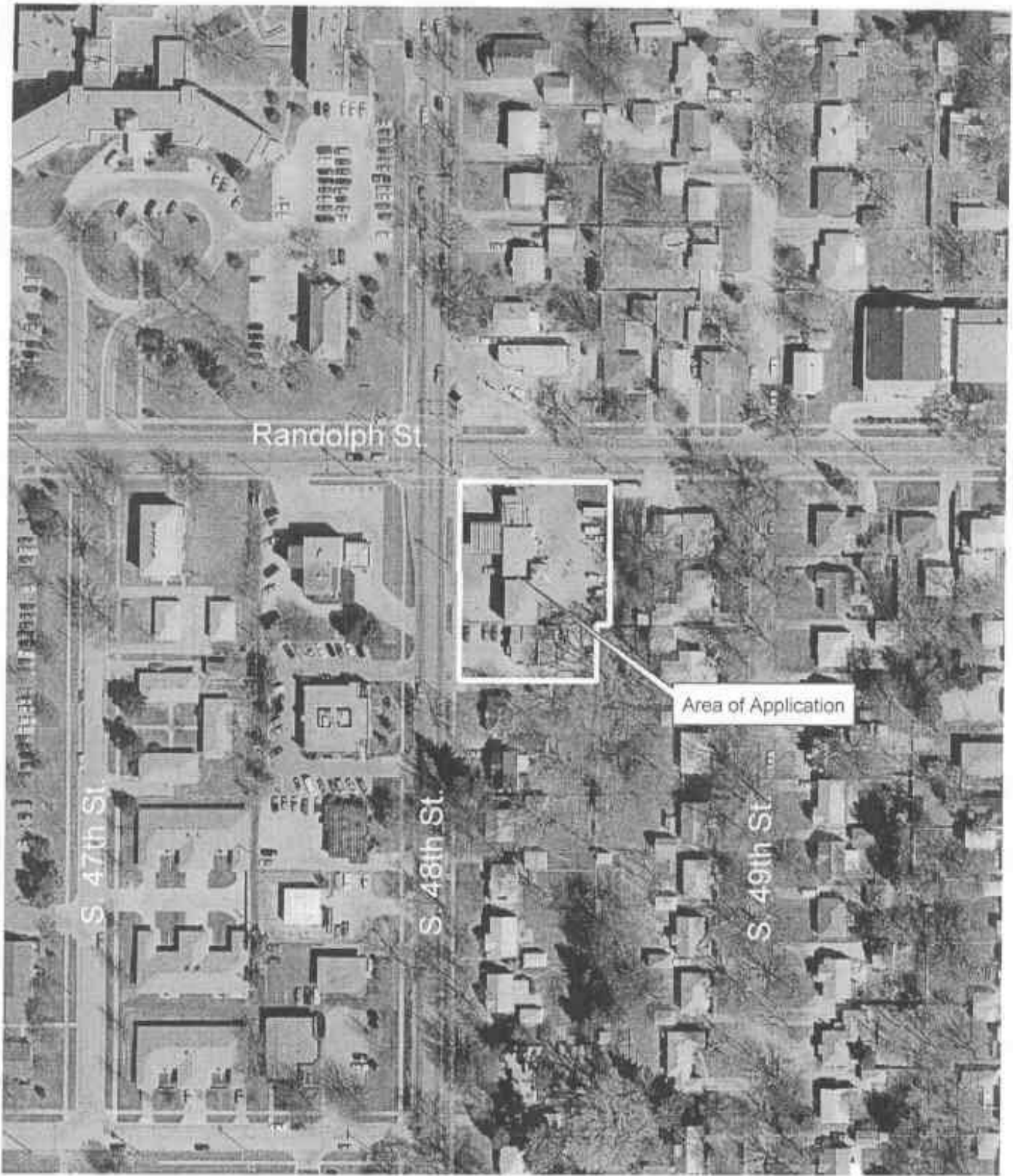
Date: 9 OCT 01
 Project: 01008 r/m
 Dwg: r/m

CHAMPION



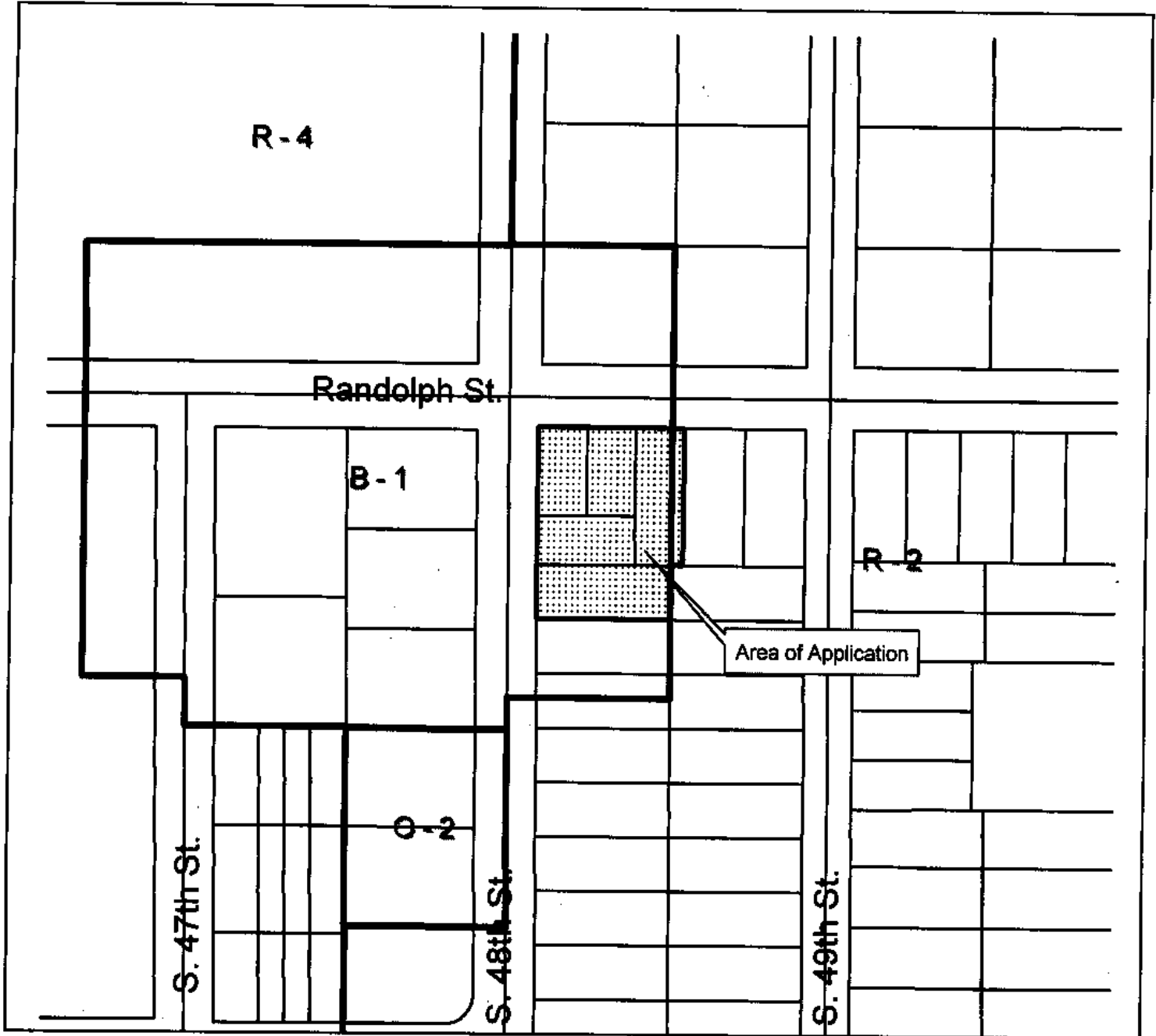
ARCHITECTURE

Van Dorn



**Special Permit #2002
S. 48th & Randolph**



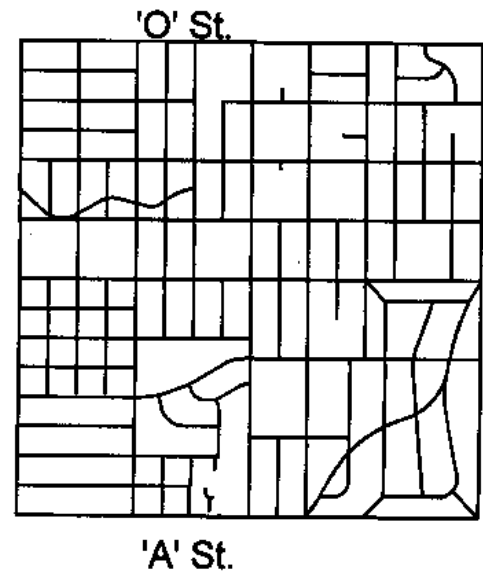
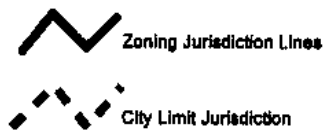


Special Permit #2002
S. 48th & Randolph

Zoning:

One Square Mile
Sec. 29 T10N R7E

- R-1 to R-8 Residential District
- AG Agricultural District
- AGR Agricultural Residential District
- R-C Residential Conservation District
- O-1 Office District
- O-2 Suburban Office District
- O-3 Office Park District
- R-T Residential Transition District
- B-1 Local Business District
- B-2 Planned Neighborhood Business District
- B-3 Commercial District
- B-4 Lincoln Center Business District
- B-6 Planned Regional Business District
- H-1 Interstate Commercial District
- H-2 Highway Business District
- H-3 Highway Commercial District
- H-4 General Commercial District
- I-1 Industrial District
- I-2 Industrial Park District
- I-3 Employment Center District
- P Public Use District



S. 56th St.

041



**Special Permit #1953
33rd & 'O' St.**



Photograph Date: 1997 043

Lincoln City - Lancaster County Planning Dept.