FACTSHEET

TITLE:  Text Amendment No. 17001 - Amend Section 27.63.685 of the LMC to delete the access door location requirement, and add exterior door opening requirements for a special permit for alcoholic beverages to be sold for consumption off the premises in zoning districts B-1, B-3, H-1, H-2, H-3, H-4, I-1, and I-3.

APPLICANT:  Brande Payne on behalf of the Open Harvest


STAFF RECOMMENDATION:  DENIAL

SPONSOR:  Planning Department

OPPONENTS:  4 present at the 3 hearings; 10 emails/letters submitted.

REASON FOR LEGISLATION:  This is a request from the Open Harvest Co-op Grocery to amend the special permit for the sale of alcohol for consumption off the premises. It proposes to create an exception for grocery stores which reduces the required separation distance between the licensed premises and a first floor residential use, a day care facility, park, church state mental health facility and residential zoning district from 100’ to 25’.

DISCUSSION / FINDINGS OF FACT:
1.  This proposed text amendment request had initial public hearing before the Planning Commission on October 25, 2017; (See pp.17-28).  The Planning Commission voted to recommend DENIAL; however, due to the lack of receiving 5 affirmative votes (4-4; Corr, Hove, Finnegan and Scheer voting 'yes'; Beckius, Edgerton, Harris and Joy dissenting; Washington absent), the public hearing and action was continued to November 15, 2017.

2.  On November 15, 2017, additional public hearing was held, including discussion relating to a proposed amendment submitted by the applicant (See pp.28-34).  The Planning Commission voted to recommend DENIAL; however, again, the motion failed to obtain 5 affirmative votes (3-4; Corr, Finnegan, Corr, and Scheer voting 'yes'; Edgerton, Harris, Washington, and Joy dissenting; Beckius and Hove absent), and the public hearing and action was continued to December 6, 2017.

3.  On December 6, 2017, additional public hearing focused on a second proposed amendment submitted by the applicant and the applicant’s intent.  Tim Sieh assisted with drafting appropriate language for the amendment to address the applicant’s intent (See pp.34-40).

4.  The staff recommendation of DENIAL of this text amendment is based upon the “Analysis” as set forth on pp.2-4, concluding that this proposed text amendment is vague and subject to interpretation, and can create enforcement difficulties. There is little to no distinction between a grocery store and other retail uses such as convenience stores, pharmacies, and others which also sell food. It would allow the sale of alcohol both in more locations and closer to residential areas and uses. Approving this request would increase the number of locations where off-sale alcohol is allowed without any demonstration that there is currently a shortage of suitable sites, or that there are parts of the city which are underserved by alcohol sales. It increases the likelihood of future amendments to allow alcohol sales to be expanded to include convenience stores, pharmacies, and other similar retail uses due to the lack of distinction between these uses and a grocery store. This proposal would weaken the protection provided by the separation requirement between alcohol sales and sensitive uses, which is contrary to a basic goal of the alcohol regulations when they were originally adopted. The staff presentations are found on pp.17-19, 28-31, and 35.

5.  The applicant’s testimonies can be found on pp.20-21, 31-32, and 35-36.  A total of 4 individuals testified in support, which can be found on pp.20-23, and there were 37 emails and letters of support submitted by proponents. Four individuals testified in opposition, which can be found on pp.23-24, and there were 10 emails.
and letters submitted by opponents. To access the public comments and all other documentation on this proposed text amendment, go to the following link www.lincoln.ne.gov and insert PATS as the keyword. Click on the "Selection Screen" under "Featured Links", type in the application number (i.e. TX17001); click on “Search”, then “Select” and go to “Related Documents”.

6. The applicant’s rebuttals can be found on pp.25-26, 32-33, and 37-38.

7. The Planning Commission discussions with staff is found on pp.25.

8. On December 6, 2017, the Planning Commission voted 5-4 to recommend APPROVAL as amended as submitted by the applicant and redrafted by the Tim Sieh of the City Attorney’s Office to address the applicant’s intent.

FACTSHEET PREPARED BY: Geri Rorabaugh, Administrative Officer

REVIEWED BY: David R. Cary, Director of Planning
COMPATIBILITY WITH THE COMPREHENSIVE PLAN

The proposed amendment decreases protection for residential, and so does not appear to further any principle or goal of the Comprehensive Plan as justification for the change. There are numerous sites in the city that meet the requirements for the sale of alcohol and which meet the 100’ setback, and many have been granted special permits to do so.
ANALYSIS

1. This is a request to amend the Zoning Ordinance by modifying the special permit conditions under which the sale of alcohol for consumption off the premises is allowed in the B-1, B-3, H-1, H-2, H-3, H-4, I-1 and I-3 zoning districts. It would affect the entire city and the three-mile extraterritorial jurisdiction, although the applicant’s goal is to be allowed alcohol sales at the Open Harvest Co-op Grocery located at South 17th & South Streets. No change to the special permit for on-sale alcohol is proposed.

2. This request was originally submitted to the Planning Department on March 1, 2017. The applicant agreed to delay moving the application forward for consideration at the request of the Planning Department to allow time for the City to review the zoning ordinance alcohol regulations.

3. The Planning Commission was designated to conduct the review, and held three public meetings on the subject. The first meeting was informational, and the planning Commission was presented with a brief history of alcohol regulation in Lincoln.

The second meeting was for the purpose of taking public comment, and was an opportunity for those interested in the subject to make their concerns known. Seven people spoke at the meeting, six of which were in favor of no changes to the regulations. Written comments in opposition were also submitted by two others. Brande Payne of Open Harvest was the only speaker in favor of the proposed text amendment.

At the third meeting, questions raised during the process were addressed, and a background summary of the process was presented to the Planning Commission. A copy of that summary titled ‘Alcohol Regulation Summary Memo to Planning Commission 8/2/18’ is attached to this report.

4. The proposed text seeks to amend LMC 27.63.685 by creating what is termed the ‘grocery store exception’. That is, it attempts to define a grocery store, and then proposes reduced separation criteria for that specific use. This is similar to the ‘restaurant’ exception in LMC 27.63.680 for on-sale alcohol, which allows restaurants to be within 25’ of a residential zoning district. The proposed significant provisions are listed individually (in italics, underline) below, with staff comments after each.

A. The licensed premises of any building approved for such activity must be located no closer than (i) 25 feet from the property line of a premises used in whole or in part for a first-floor residential use, day care facility, park, place of religious assembly, or state mental health institution, or (ii) 25 feet from a residential district, and (iii) the nearest public entrance shall be located at least 100 feet away from a residential zoning district.

This proposed provision changes the way the required separation is measured in two ways. First, it reduces the separation from the licensed premises to a first-floor residential use, day care facility, park, place of religious assembly, or state mental health institution from 100’ to 25’. Second, it goes on to change the required separation from a residential zoning district from 100’ as measured to the licensed premises, to 100’ as measured to the nearest public entrance.

Reducing the required separation from the licensed premises from 100’ to 25’ is identical to the separation provision associated with restaurants and on-sale alcohol special permits. Allowing the 100’ separation to be measured around the building to the main public entrance is similar to the provision in the B-2 and B-5 zoning districts where the sale of alcohol is a conditional use.

The reduced separation for restaurants associated with on-sale alcohol special permits was approved because: 1 - Restaurants were deemed to be different from other on-sale outlots as the consumption of food is the primary activity, not the consumption of alcohol; 2 - restaurants are a defined use type, easily discernable from other land uses; 3 - Sit-down style restaurants are a lower intensity impact land use.

This amendment would apply to the B-1, B-3, H-1 - H-4, I-1 and I-3 zoning districts, but measuring the 100’ separation around the building to the front door copies a provision from the B-2 and B-5 zoning districts. The B-2 and B-5 have a different measurement standard due to the design of the zoning district regulations.

The B-2 and B-5 zoning districts were designed to integrate with adjacent residential areas. The districts include larger setbacks, screening/landscaping, and site plan review on the part of the City. The development found in most all B-2 and B-5 zoning districts is in contrast to that found in the older commercial centers. The suburban centers are characterized by larger (minimum 5 acres in B-2, 30 acres in B-5), deeper sites with
multiple tenants. Buildings are typically oriented inward and towards each other, or face onto major streets and away from adjacent residential uses. They are also typically surrounded by landscaped buffer areas which help screen them and separate them from adjacent uses.

The B-1 and B-3 zoning districts exist in the older parts of the city. These older commercial centers such as Havelock, University Place, College View, Bethany, and even West O Street have an entirely different development pattern. It is not unusual for the commercially-zoned properties to share alleys or lot lines with residential uses. There are many instances where the zoning district boundary line extends through the middle of a block, where one half is commercial and the other half is residential. Screening and buffering is also typically lacking.

B. For the purposes of this section, grocery store shall mean a retail establishment that (i) is used for the display and sale of fresh and packaged foods (meat, produce, and dairy products), cleaning supplies, paper goods, pet supplies, health and beauty products, and similar items and may include a bakery, delicatessen or prescription pharmacy; (ii) maintains a complete assortment of saleable food products for off-site consumption; (iii) derives at least 65% of its gross income from the retail sale of non-taxable food items; (iv) relinquishes possession of food to a consumer directly or indirectly through a delivery service, including the home delivery of grocery orders; and (v) maintains at all times that it is open to the public.

A grocery store is not a defined use in the Zoning Ordinance. As such, it is treated as a retail use along with many others. Some uses sell some or most all of the products listed above. Those with the closest resemblance would be convenience stores, pharmacies, or ‘dollar’ stores. The distinction between them is not significant, and is increasingly hard to define.

Among retail uses, which in general have similar operating characteristics, it is difficult to say that one operates in a safer, more professional, or less obtrusive manner that the other retail uses. If an exception is appropriate for grocery stores, it could be argued that a similar exception is also appropriate for other retail uses, such as convenience stores, pharmacies or ‘dollar’ stores.

The definition provided above is not clear and would be difficult to interpret and enforce. It is especially unclear what the statement ‘maintains a complete assortment of saleable food products for off-site consumption’ means. The terms ‘complete assortment’ and ‘saleable food products’ are not defined, and as such would be difficult to enforce. Also, it is not clear what the statement ‘relinquishes possession of food to a consumer directly or indirectly through a delivery service’ means or what unique condition it attempts to describe.

Beyond the unclear wording noted above, the practice of including provisions which have limits on percentages of gross sales for particular items, or the inclusion of definitions as specific as the one listed above for a grocery store, are discouraged. When adopted as part of the Zoning Ordinance, the City assumes the responsibility to uphold them. The practical matter is that such zoning provisions are very difficult to enforce and can require inordinate amounts of resources to administer.

5. The distinction between a grocery store and other retail uses is becoming harder to make. Today, convenience stores, pharmacies, even retailers categorized as ‘dollar stores’ sell food products. Convenience stores are increasingly selling a wider range of products including pet supplies, paper products, food, prepared food-to-go, and limited fresh food and meat.

6. During the public meetings held by the Planning Commission, there was no support for changing the regulations beyond that of the applicant. With that exception, the written and verbal comment was in support of maintaining the status quo.

7. Beyond amending the Zoning Ordinance, other options are available to the applicant with respect to the sale of alcohol. For example, a separate area within the existing store could be established. This area would need to be separated from the rest of the store by walls and have its own separate entrance. Done this way it would be treated as just another tenant bay, but one which meets the 100’ separation requirements.
8. This proposed amendment should be denied both because there are flaws with the proposed text, and because it will be difficult for it to not be expanded to include other retail uses. As proposed, the effect will be to reduce the 100’ separation and allow the sale of alcohol in more locations throughout the city. Within Lancaster County there are approximately 620 liquor licenses across all classes. Approximately 470 of those are on and off-sale licenses within the City of Lincoln. So while there are some commercial locations throughout the city that do not meet the requirements for a special permit, there are many that do. It does not appear there is an issue regarding a shortage of locations which can sustain alcohol sales that needs to be addressed by the City.

Prepared by

Brian Will, Planner
October 10, 2017

Applicant/
Contact: Open Harvest Co-op Grocery
c/o Brande Payne
1618 South Street
Lincoln, NE 68502
402-475-9069
RELEVANT HISTORY (for the off-sale alcohol special permit)

APR 1994 - CZ#2808 adopted special permits regulating both on and off-sale alcohol. Ordinance (ORD) 16593

JUL 1994 - CZ#2839 to modify the access provision by removing the prohibition to access to a local a street, and adding instead language to discourage it. ORD 16627

FEB 1995 - CZ#2877 to add the provision that no special permit was required for an internal expansion of an existing licensed premises. ORD 16743

NOV 1995 - CZ#2940 added a provision allowing the City Council to waive the conditions of the special permit. ORD 16899

MAR 1997 - CZ#3047 to correct an error and removed the H-1 zoning district as one where a special permit for off-sale could be granted. The H-1 district was not originally intended to be included for alcohol sales. ORD 17153

AUG 1997 - CZ#3070 added H-1 as a zoning district where a special permit for off-sale could be granted. ORD 17229

AUG 1997 - CZ#3064 added I-3 as a zoning district where a special permit for off-sale could be granted. ORD 17232

MAY 2001 - The Nebraska Supreme Court affirms the City’s authority to regulate the sale of alcohol by special permit.

MAR 2004 - CZ#04003 eliminated the mitigation provisions to allow a reduction in the 100’ minimum separation, and granted the Planning Commission the authority to approve the special permits. ORD 18325

APR 2004 - CZ#04014 amended the requirements for on and off-sale alcohol making both conditional (instead of permitted) uses in the B-2 and B-5 zoning districts. ORD 18345

JUN 2007 - CZ#07007 relocated the parking requirements to the parking chapter. ORD 18903

JUN 2010 - CZ#10012 included the statement that the licensed premises must be located no closer than (I) 100' from the property line of a premises used in whole or in part for a first-floor residential use, day care facility, park, church, or state mental health facility, or (ii) 100’ from a residential zoning district. ORD 19405

NOV 2016 - CZ#16013 was a request to amend the Zoning Ordinance by modifying the special permit conditions under which the sale of alcohol for consumption off the premises is allowed in the B-1,B-3, H-1, H-2, H-3, H-4, I-1 and I-3 zoning districts. It proposed to allow the separation measurement to be measured from the front door, and to reduce the required separation from 100’ to 50’. This request was denied by the City Council.
ALCOHOL REGULATION SUMMARY MEMO TO
PLANNING COMMISSION  8/2/17

BACKGROUND RECAP

Current Alcohol Spacing Requirements:

A special permit is required in the older commercial areas in the city. These areas can be zoned B-1, B-3, H-1 – H-4, and I-1 - I-3, where the “licensed premises” (usually the footprint of the building) for alcohol sales must be a minimum of 100 feet from any residential zoning, first floor residential use, day care, park, church or state mental health facility.

The sale of alcohol is a conditional use in the newer commercial areas. These areas are the areas zoned B-2 and B-5 and also require the front door to be a minimum 100 feet from any residential zoning, first floor residential use, day care, park, church or state mental health facility. However, instead of a straight line measurement to the nearest point of the licensed premises, the separation is measured around the building to the front door.

The sale of alcohol is a permitted use in the Downtown core where it is zoned B-4. In the B-4 there is no spacing requirement.

FREQUENTLY ASKED QUESTIONS

1. Why are some alcohol retailers allowed to sell alcohol even though they are less than the required 100’ spacing?

A. The alcohol regulations were adopted in 1994, and since then all new alcohol sales are required to comply. However, the majority of alcohol sales outlets pre-existed 1994, and therefore are ‘grandfathered’ and allowed to legally continue to operate.

B. The original alcohol regulations included a provision that allowed the City Council to grant waivers to the spacing requirement as part of the special permit. That waiver provision was eliminated in 2004, but a number of permits with waivers were approved between 1994 and 2004. Because they were legally established, those with waivers are allowed to continue to operate as non-conforming uses until such time as they cease operations for a period of two years or more.

C. It is also possible that a retailer could construct a separate area within the larger store for alcohol sales, but with its own separate entrance and check-out that meets the required separation. In that circumstance, the separate area is considered the licensed premises and the 100 foot spacing is measured from that licensed premises, and not the entire building.
2. Why can restaurants sell alcohol with less than 100 feet of separation?

There is a specific subset of conditions that apply to restaurants, and which are only available with the special permit for on-sale consumption. Restaurants meeting those conditions are allowed a reduced separation of 25'.

This special circumstance was allowed because restaurants were deemed to be different from other on-sale outlets. Specifically, the majority of their income is generated by food sales, and the sale of alcohol is incidental to serving food.

3. Why are the spacing requirements different for the older parts of town versus the newer parts (i.e. B-1 and B-3 versus B-2 and B-5)? Why don't we measure from the residential zoning district to the front door instead of to the nearest wall of the building in all districts?

The rationale for treating the B-2 and B-5 zoning districts with respect to zoning for the sale of alcohol is primarily two-fold. First, the B-2 and B-5 districts are 'use permit' districts. This means that the City has site plan review authority via the use permit prior to any development on the site. A special permit in addition to that review was deemed redundant.

Second, the B-2 and B-5 zoning districts were specifically designed for suburban development. The standards of each district were purposefully designed to maintain compatibly between the commercial centers and adjacent neighborhoods, and include appropriate setbacks, landscaping and buffering. The standards are integral to these districts, and help ensure the centers can coexist with adjacent neighborhoods with a minimum of nuisance and land use conflict. For example, the rear setback abutting residential in the B-5 is 100', compared to 30' in the B-3.

4. What does the Nebraska State Supreme Court say about alcohol regulations in Lincoln?

Lincoln's authority to regulate alcohol sales with spacing requirements via the zoning ordinance has been tested and affirmed by the Nebraska State Supreme Court. There is ongoing concern however, that additional exemptions and exceptions to the alcohol regulations may have the potential to undermine the consistency of the ordinance and make legal defense more difficult.

ALTERNATIVE REGULATION SUGGESTION

1. What amendments to the regulations have been suggested regarding the alcohol spacing requirements? What impacts/Issues do they raise?
A. Bring back the waiver provision which allowed the City Council to waive the required separation by special permit on a case-by-case basis.

IMPACT/ISSUES:

-The waiver provision was originally eliminated partially over concern for the proliferation of alcohol sales, and the associated potential negative impacts upon neighborhoods.

-The original waiver provision included language stating that the 100' separation could be reduced if any adverse effects were mitigated by an approved screening or landscape plan approved by the Planning Director. The waiver process proved difficult to apply uniformly and equitably as the City attempted to be consistent in the application of the standard. Also, adequate screening/landscaping with respect to mitigating the sale of alcohol was difficult to define.

-There were complaints from the public that the waivers were not being treated equitably.

-After the waiver provision was eliminated, all requests for special permits had to provide the required '100' separation, there were no more exceptions.

B. Change the B-1 and B-3 zoning districts to match the B-2 and B-5 districts

IMPACT/ISSUES:

-The B-2 and B-5 zoning districts were designed to integrate with adjacent residential areas. The districts include larger setbacks, screening/landscaping, and site plan review on the part of the City. The development found in most all B-2 and B-5 zoning districts is in contrast to that found in the older commercial centers. The suburban centers are characterized by larger (minimum 5 acres in B-2, 30 acres in B-5), deeper sites with multiple tenants. Buildings are typically oriented inward and towards each other, or face onto major streets and away from adjacent residential uses. They are also typically surrounded by landscaped buffer areas which help screen them and separate them from adjacent uses.

-The B-1 and B-3 zoning districts exist in the older parts of the city. These older commercial centers such as Havelock, University Place, College View, Bethany, and even West O Street have an entirely different development pattern. It is not unusual for the commercially-zoned properties to share alleys or lot lines with residential uses. There are many instances where the zoning district boundary line extends through the middle of a block, where one half is commercial and the other half is residential. Screening and buffering is also typically lacking.
C. Create an exemption for Grocery Stores to sell alcohol at less than 100' of separation.

**IMPACT/ISSUES:**

-Both the Planning and Law Departments believe it will be very difficult to define and enforce regulations specific to a “grocery store”. The reason is that there is a wide range of retail outlets that sell food products beyond grocery stores. This would include convenience stores, some pharmacies, and dollar stores to name a few. The distinction between any of these uses is not significant and hard to define.

-There is no rationale staff is aware of to say that that a grocery store operates in a safer or more professional manner than a convenience store or pharmacy. Given the lack of operational distinction, it is a reasonable assumption that other retail uses would also request exemptions similar to that of grocery stores. The basis for an argument to deny such an amendment is not apparent.

D. Leave the ordinance as-is.

**IMPACT/ISSUES:**

-The current regulations have been in effect since 1994, and the 100' separation has been part of them from the start. While there are some commercial locations throughout the city that do not meet the requirements for a special permit, there are many that do. Within Lancaster County there are approximately 620 liquor licenses across all classes. Approximately 470 of those are on and off-sale licenses within the City of Lincoln.

-At the Planning Commission’s second briefing on this topic, several citizens spoke. Of them, only one spoke of the need to modify the regulations. All the other public comment (and submitted written comment) was in support of maintaining the status quo.

-Staff has surveyed multiple communities over years with regard to the regulation of the sale of alcohol. There is no consistent finding as a result of those surveys. That is, the way various communities choose to regulate alcohol is as varied as the communities themselves. It ranges from no special treatment for the sale of alcohol, to regulation more restrictive than Lincoln’s.

-Only two applicants, Open Harvest and Walgreens, have submitted applications recently to revise the regulations. The request to revise the regulations for the Walgreens at 48th & O Streets was denied. The Open Harvest application for the ‘grocery store exception’ is still pending. Open Harvest agreed to delay the application to allow the Planning Commission time to gather information, but it is anticipated they will now request that the application proceed to public hearing.
-With respect to the current regulations which have been in effect since 1994, it can be said that they represent a community standard. There are any number of ways to regulate the sale of alcohol, but the current regulations were discussed by the community with public hearings, and then eventually adopted by the City.
February 18, 2017

Mr. David Cary
City of Lincoln - Planning Department
555 S. 10th Street, Suite 213
Lincoln, NE 68508

RE: Text Amendment Request - Section 27.63.685 of the Lincoln City Municipal Code

Dr. Mr. Cary:

Attached is an application for a Text Amendment to Section 27.63.685 of the Lincoln City Municipal Code and the proposed language of said Text Amendment. The purpose of this Text Amendment is to establish requirements and conditions for a special permit to allow alcoholic beverages to be sold for consumption off the premises of a grocery store in the B-1, B-3, H-1, H-2, H-3, H-4, I-1 and I-3 zoning districts.

Thank you for accepting this application on behalf of Open Harvest Co-op Grocery. Please contact Brande’ Payne at board@openharvest.coop or 402-202-2018 if you have any questions or require any additional information.

Sincerely,

[Signature]

Brande’ Payne
Board Chair
Open Harvest Co-op Grocery

CC: Brian Will, Planner, City of Lincoln - Planning Department
AN ORDINANCE amending Chapter 27.63 of the Lincoln Municipal Code relating to
Special Permits by amending Section 27.63.685 to delete the access door location requirement,
and add exterior door opening requirements for a special permit for alcoholic beverages to be sold
for consumption off the premises in zoning districts B-1, B-3, H-1, H-2, H-3, H-4, I-1, and I-3,
and repealing Section 27.63.685 as hitherto existing.

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

Section 1. That Section 27.63.685 of the Lincoln Municipal Code be amended to read as
follows:

27.63.685 Sale of Alcoholic Beverages for Consumption Off the Premises.

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

(1a) Parking shall be in conformance with Chapter 27.67 of the Lincoln Municipal
Code.

(2b) The sale of alcoholic beverages for consumption on the premises shall not be
permitted without issuance of a permit under Section 27.63.680 of this code.

(3e) The licensed premises of any building approved for such activity must be located
no closer than (i) 100 feet from the property line of a premises used in whole or
in part for a first-floor residential use, day care facility, park, place of religious
assembly, or state mental health institution, or (ii) 100 feet from a residential
district.

(4d) Any lighting on the property shall be designed and erected in accordance with
all applicable lighting regulations and requirements.

(5e) Vehicle stacking for a drive-through window used as any part of the permitted
business operation shall not be located in any required building setback from a
residential district.

(6f) The use shall not have any amplified outside sound or noise source, including
bells, buzzers, pagers, microphones, or speakers within 150 feet of any
residential district. This shall not apply to sound sources audible only to the
individual to whom they are directed, such as personal pagers, beepers, or
telephones.

(7g) No access door to the business, including loading or unloading doors, shall face
any residential district if such doors are within 150 feet of the residential district.
This shall not apply to emergency exit doors required by building or safety
codes. No door facing a residential district shall be kept open during the
operation of the establishment.

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

(9i) All other regulatory requirements for liquor sale shall apply, including licensing
by the state.
(b) In addition, a special permit may be granted to allow alcoholic beverages to be sold for consumption off the premises of a grocery store in the B-1, B-3, H-1, H-2, H-3, H-4, I-1, and I-3 zoning districts subject to the requirements of the respective districts, all applicable ordinances, and the following conditions:

(1) The Permittee, as the holder of any liquor license issued on the beverages for consumption off the premises of a grocery store, shall agree in writing to voluntarily surrender and consent to the cancelling of the liquor license in the event the special permit is revoked by the City. If the Permittee is not the holder of the liquor license, the Permittee shall require such holder to agree in writing to voluntarily surrender and consent to the cancelling of the liquor license in the event the special permit is revoked by the City. In addition, the City shall request that the Nebraska Liquor Control Commission issue the liquor license contingent upon the premises having such special permit.

(2) The licensed premises of any building approved for such activity must be located no closer than (i) 25 feet from the property line of a premises used in whole or in part for a first-floor residential use, day care facility, park, place of religious assembly, or state mental health institution, or (ii) 25 feet from a residential district, and (iii) the nearest public entrance shall be located at least 100 feet away from a residential zoning district.

(3) Gross sales from the sale of alcoholic beverages shall not exceed ten percent (10%) of total gross sales. Upon request of the City, the license holder/operator shall provide sales receipts for the past six (6) months for the purpose of demonstrating that no more than 10% of the grocery store’s gross sales are derived from the sale of alcohol.
(4) No drive-through windows shall be allowed.

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

(c) For the purposes of this section, grocery store shall mean a retail establishment that (i) is used for the display and sale of fresh and packaged foods (meat, produce, and dairy products), cleaning supplies, paper goods, pet supplies, health and beauty products, and similar items and may include a bakery, delicatessen or prescription pharmacy; (ii) maintains a complete assortment of saleable food products for off-site consumption; (iii) derives at least 65% of its gross income from the retail sale of non-taxable food items; (iv) relinquishes possession of food to a consumer directly or indirectly through a delivery service, including the home delivery of grocery orders; and (v) maintains at all times that it is open to the public.

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

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

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

Notwithstanding the above, no special permit or amendment thereto shall be required for interior expansions of existing licensed liquor premises or for a farm winery.

Section 2. That Section 27.63.685 of the Lincoln Municipal Code as hitherto existing be and the same is hereby repealed.

Section 3. That this ordinance shall take effect and be in force from and after passage and publication in one issue of a daily or weekly newspaper of general circulation in the City, according to law.
Introduced by:

Approved as to Form & Legality:

City Attorney

Approved this ___ day of __________, 2017:

Mayor
TEXT AMENDMENT NO. 17001

TEXT AMENDMENT NO. 17001, AMENDING CHAPTER 27.63.685 OF THE LINCOLN MUNICIPAL CODE RELATED TO DELETE THE ACCESS DOOR LOCATION REQUIREMENT, AND TO ADD EXTERIOR DOOR OPENING REQUIREMENTS FOR A SPECIAL PERMIT FOR OFF-SALE ALCOHOL SALES: October 25, 2017


Staff recommendation: Denial.

Harris disclosed that she had a conversation with Shawn Ryba regarding a letter he previously submitted and whether he still held the same position. He responded that he did.

[After the public hearing on this item occurred, Corr disclosed that she attended a Mayor’s Roundtable meeting where an overview of this topic was given].

Staff Presentation: Brian Will of the Planning Department stated this application was originally submitted on March 1st. This was on the heels of another zoning action request related to off-sale alcohol for the Walgreens at 48th and O Streets. After working through that process, the City asked to take time to revisit this issue in more depth and to bring Planning Commissioners up to date. The applicant graciously agreed. In the interim, Planning Commission was designated to be the body to have the public process. Three meetings were held to talk about the background of these regulations, to give the public ample opportunity to comment, and to summarize and answer questions from Commissioners. At the end of that process, the applicant asked that the application move forward. It is unchanged from when it was first submitted.

This request attempts to modify the regulations in two ways. First, it seeks to define “grocery store” as a specific and distinct use. Then, it seeks to modify the required separations. “Grocery is not currently defined and is considered a retail use. From the perspective of Staff, there are several issues with creating a definition which is vague and open to questioning. As proposed, it is really not separated out from other like uses such as convenience stores, dollar stores, or pharmacies, among others. Even if a distinction could be made, this action opens the door for someone to come in and lessen the distinction, eventually eroding the protections intended by the separation requirements.

The thought process behind separating out a distinct use and treating it differently is not new. It can be seen today in the regulations relating to restaurants, which have unique operating characteristics with distinct traffic and parking needs. Alcohol sales are considered secondary to the primary function of serving food.

One tenant in the same building as Open Harvest is Brewsky’s. They are allowed to sell on-sale because their establishment predates these regulations. Say the entire building was covered by the special permit to sell alcohol, the separation is measured from the premises to the residential zoning district. This building clearly would not meet the 100-foot separation to the nearest wall. This proposal would change that separation to 25 feet. As a point of clarification, Will noted that on a map exhibit, the zoning boundary is shown in the center of the right-of-way, but it actually is at the north side of the right-of-way. The request to reduce the separation
comes from current regulations for the B-2 and B-5 Districts where the distance is measured to the door instead of the entire premises. In this case, measuring from the entrance of Open Harvest and around the building would meet the requirement.

The request to reduce the requirement from 100 feet down to 25 is significant. B-2 and B-5 areas are large, suburban shopping centers. They differ significantly from B-1 and B-3 located in older areas in their characteristics and the way they are designed. Staff views these distinctions between the zoning areas as important. While staff recognizes that the applicant is seeking to get alcohol at their location, this affects the entire city. All commercial centers such as those in University Place, College View, and Havelock would be impacted.

Corr asked how much the fee is for the applicant to apply for this change. Will said he believes it is $330.

Beckius asked how the proposed gross sales of alcohol not exceeding 10% of total sales would be enforced. Will said it is hard enough to enforce what is there, let alone things that require the applicant to submit documentation to the city, so staff does not tend to suggest provisions such as the 10% limit proposed by the applicant. Beckius said he did not see any feedback from staff regarding this point. Will said if someone is renovating and they come in for the appropriate permits, it will be clear based on the facilities, furniture, and the building codes that apply what type of establishment they are. Beckius asked what the follow-up the City does to ensure that businesses do not exceed that amount. Will replied that there is no active surveying of businesses. As with many other things, it would likely be complaint initiated.

Finnegan asked how many places might be impacted if this text were to pass. Will said that a geographical analysis of the city was done with the 48th and O Street application and in excess of 600 properties would be impacted. He is comfortable saying it could be in the hundreds.

Harris requested more information regarding a question asked by Beckius about the history of Open Harvest attempting to meet the requirements for selling off-sale. Beckius noted that 1 person mentioned it had been ongoing for 10 years. Will confirmed it has been going on for at least the past several years. The question from the beginning was how to get to that goal if they do not meet the requirements. Staff saw four viable options, including a PUD over the larger area would be an option, but it has a minimum acreage requirement so neighboring businesses and even some of the residential area would have to be included. With a PUD, any of the zoning requirements can be modified. The reason this option did not go far is because there has to be some reason and rationale for a PUD; it should not be used just to get around regulations. Piedmont is an example where an entire redevelopment project was proposed. That is not to say that Staff wouldn’t consider supporting this option, it just did not go anywhere.

Another option was rezoning to B-2 which would allow for the conditional use where the separation can be measured to the door. Staff does not think that rezoning older districts is the solution. Areas are identified as B-1 and B-3 Districts for good reasons. Again, this would be a case of attempting an action to get around regulations. Often in these older strip centers, there are multiple tenants. Each could be considered as a separate licensed premises under certain conditions. These must have a separate entrance and point of sale. That can be done on a much smaller scale. Staff suggested that a small part of their business could meet
the requirements since only that area would have to be 100 feet away. That option was not
viable for the applicant. The text amendment is what is before this body today.

Harris asked if a request for a change of zone to B-2 would have been achievable. Will replied
that when staff meets with the public, all options are presented whether we like the options
or not. If people ask for advice as to how successful an application might be, we are able to
say certain ones would most likely be supported. The B-2 option was discussed early on with
this applicant and it was expressed that it would most likely not meet internal criteria.

Hove asked whether reducing the separation to 25 feet effectively reduces it to zero since
there is almost always enough distance to meet that. Will said it depends. It would be hard to
say for sure, but that is probably correct.

Beckius wondered if, in theory, the landlord could choose to tear down the current building
and relocated closer to South Street and if that would then meet the requirement. Will said
yes. The property is large enough that located closer to the street would create enough
distance to meet the requirements. Beckius asked if there are examples of businesses
choosing to relocate their buildings in order to meet code. Will said yes.

Beckius asked if there is potential to rezone the residential properties across Rosalyn Terrace,
as CVS did, so that would create distance from residential zoning. Will said that the strategy
of CVS was to rezone residential properties to O-2. There is language that talks about 1st floor
residential use, so if the zoning were made correct, the dwelling would also need to go away.
The language basically prevents that sort of strategy from being used again.

Beckius noted that the Comprehensive Plan does not really address accessibility of food with
the exception of mentioning the importance of growing food locally. Will said staff does think
that is important. Whether that aspect is specifically stated or not, the Comprehensive Plan
does state that having a range of goods and services in or nearby is an integral part of a
thriving neighborhood. Everyone agrees that is a good thing. Open Harvest has an extremely
supportive customer base who agree that having that fresh food available is a good thing.
Alcohol is treated differently. Grocery is considered retail and can go in commercial zoning.

Beckius asked what is being done to encourage the maintenance of retail in core
neighborhoods. Will said Urban Development is the better department to address that
question. David Cary, Director of Planning, came forward to acknowledge that there is a
bigger picture issue at play relating to core neighborhoods and services. The Comprehensive Plan
certainly includes tenets as far as bringing services to the neighborhood level. The City is
in the beginning stages, with Urban Development taking the lead, of discussions on how the City can partner with entities within neighborhoods to identify critical steps to strengthen
them. We know what having access to healthy food can do for the health of a local population
and there are opportunities to look at some of these issues.

Hove asked how many places within the general area are allowed to sell alcohol now. Will
said the convenience store on the corner, Brewsky’s, and the CVS. The Walgreens across the
street cannot. They have tried but they are in the same circumstance. Corr asked if Brewsky’s
in on-sale only. Will said yes.
Proponents:

1. Amy Tabor, 855 S. 35th Street, came forward as General Manager of Open Harvest. The store has been around over 40 years and has been in the current location since 1992. Over 30% of their revenue comes from sale of goods from local farms and businesses within a 200-mile distance of the store. Business is conducted with over 40 local businesses and $3.1 million is moved within the local economy. Since opening, sales have dropped by 16% and every year, new competitors enter the natural foods market. In 2015, retail grocers outsold natural grocers by a 2% margin, which indicates that not only do they compete against other natural grocers, they also have to worry about major chain stores who have increased their natural food sales. There has been a 150% increase in Nebraska brewers and the craft industry is very different today than what it was when the store opened. This mission is not just about sales, it is about providing a complete shopping experience to customers. Small sales mean a lot to local producers. A person might come in and see an interesting local wine and decide to pick up a local cheese and other products with it. Having those choices available elsewhere has eroded the customer count one-by-one. Having a liquor license is not a “silver bullet” that will fix everything, but we work tirelessly to improve customer services, ads, and education. The current ordinance is prohibiting them from being able to compete; they are at a huge disadvantage. Moving to another location or building a store within the store are not good options. Rezoning the houses is not an option. We do not have the money to build. The text as presented provides a clear definition by including fresh food that others lack. This change is no different from those rules that allow on-sale in the exact same neighborhoods.

Harris asked why some of the other options were not attractive. Tabor said having a separate POS is not viable. According to staff, we were short on acreage for the PUD and, additionally, Open Harvest does not own the building so it would be up to the landlord. Harris asked if there is a way to sway the critical mass to pursue that option. Tabor said not that she is aware of.

Beckius asked why the proposal includes the 10% cap. Tabor said that was to demonstrate that alcohol sales are not the primary source of revenue. Open Harvest is a small store and there would not be an entire aisle of alcohol, but only a small display. The limit also helps to further separate out pharmacies or convenience stores. Beckius wondered if the store would be willing to supply sales receipts to show compliance, should that 10% cap pass. Tabor said they are willing to do it on an annual basis and already have 3rd party verification of types of sales in their store. Beckius asked if they would seek to change their hours of operation. Tabor said they would not. Extending hours of operation during the summer has been discussed, but is separate from the request for alcohol sales. Beckius asked if there would be any change to lighting, signage, or noise levels. Tabor said no to all.

Beckius went on to ask why Open Harvest wishes to remain in their current location. Tabor said they have been in that location since 1990 and they are an important part of the neighborhood, especially since Ideal and Sun-Mart are no longer in the area. People in the neighborhood stop in for lunch and to hang out. Open Harvest seeks to be there for their community and owners.

Beckius asked why alcohol sales are important to grocery stores and what other groceries in Lincoln were not allowed to sell alcohol because of the current regulations. Tabor said there are two other stores that she is aware of. Today, people want to get things done all in one
place; pharmacies, banks and groceries are often all in the same location for convenience. In
terms of the industry, in 1994, there was only one local beer or wine that would have been
sold, so at that time, no license was necessary. Open Harvest only seeks to sell a small,
curated set of local products.

Harris noted that in the definition for “grocery”, other items, such as cleaning products, pet
supplies, and health and beauty supplies, were included, beyond the abundance of fresh food.
She wondered the reason for this and whether it actually dilutes the definition. Tabor replied
that the definition was intended to be very specific about the product mix that a grocery
might have. Having the 65% of non-taxable food items is something that other types of
retailers do not have.

Edgerton asked what research was done in coming up with the definition. Tabor said this
version was written years ago after brainstorming and investigating how other cities defined
groceries. Open Harvest is part of a larger network of co-ops so the breakdown of all sales
was accessed to find a consistent number.

Beckius wondered if calling the amendment a “grocery store exemption” was important to
the text change; the City has said they do not find a distinctive difference between groceries
and other retail uses. He wondered if it would be better to drop that exemption and instead
say that any retail that could cap its alcohol sales at 10% would qualify. Tabor said the
intention was to address neighborhood concerns. Smaller grocers could benefit from this, but
not all of the other businesses. They are not tied to the term “grocery”.

Corr asked what year Open Harvest expanded. Tabor said it was in 2009.

2. Mark Hunzeker, 1248 O Street, Suite 600, stated that today, he is not coming forward on
behalf of any client. In his 40 years of experience, he regrets inventing this horrible idea over
the strong objections of Planning and Law. The staff report offers only a vague justification
for its recommendation of denial. The other options described are not meaningful from what
is in front of this body. To create a PUD or to build a separate area for alcohol sales are
ridiculous suggestions. Calling a business a “restaurant” or creating any sort of exception is
only a way of using different words to justify treating a group of businesses differently. The
restaurant exemption is absurd. Brewsky’s probably meets that exemption. There is no way
that allowing a business like Open Harvest to sell alcohol would have a worse impact that
Brewsky’s. There are three ways this problem could be solved. The perfect way would be to
repeal the entire set of regulations that require the special permit for alcohol sales. Another
good option would be to reinstate the waiver provision to allow this body to do their job and
to make determinations on whether or not alcohol sales are appropriate. The adequate action
would be to approve these text changes to allow businesses to do what they can to compete
in this competitive environment and to serve their customers.

3. Kathy Siefken, Executive Director at Nebraska Grocery Industry Association, 5935 S.
56th Street, stated there are a few worrisome things about this proposed amendment. Alcohol
sales at groceries in Lincoln tend to range from 8%-15% depending on the size of the store, so
the 10% may impact some other stores. This ordinance will really only allow three additional
stores in Lincoln to sell. Those are Save Best, Open Harvest, and A Street Market, all of whom
do not have a license due to zoning. We are losing grocery stores within neighborhoods
because their profits are not what they used to be. When the City does not allow a grocery to
sell alcohol to consumers who are asking for it, people move down the street where they can
by the product. Alcohol is an important revenue stream for groceries. Other stores are
grandfathered in, but there are reasonable questions as to whether they continue to be
allowed to sell if they had to rebuild for any reason. If those grocers are lost, those
neighborhoods will not have easy access to fresh food, particularly people without
transportation. Maybe this is not the perfect change, but it is a beginning and making sure
neighborhood grocers can remain vital is so important.

Beckius asked whether grocers are willing to locate or relocate in areas where they are not
allowed to sell alcohol. Siefken said they tend not to even consider locating since it puts them
at such a disadvantage. To her knowledge, there is not a store that has opened in the last five
years without a license to sell alcohol. This means they do not open in densely populated
areas. Losing up to 15% in sales is a make or break deal.

Corr asked the location of Save Best. Siefken said it is at 1101 N. 27th Street.

Harris noted that Siefken seems generally in support of making a change, but not 100% the
specific proposed language. She asked if whether amendments could be proposed or if it
seems too early in the process. Siefken said the 10% cap will become a problem because, for
example, microbreweries have taken off and groceries sell those products. She also sees
problems with government regulation of the types of products retailers can sell. It is confining
at the State level.

Harris asked if the inclusion of the 65% sale of non-taxable food items in the definition would
adequately cover retailers where it is clear fresh foods are the main source of revenue.
Siefken said that again could cause trouble down the road. She would change it to “food”
because there is an established definition in State statute for “food”. Food items are non-
taxable, but if the legislature changes that, everyone would be out of compliance. The
existing definition is also derived from a national definition so it would be easy to add it to
the ordinance.

4. Charley Friedman, 1901 S. 25th Street, said that he stopped at CVS Pharmacy and picked
up a bag of Cheetos, M&Ms, and a bottle of vodka. He then went to Open Harvest, located
100 feet away, and picked up milk, fresh radishes and four apples. Open Harvest is his
neighborhood grocery, is a part of the community, and even a family-gathering place where
people can learn what is happening in the community. They offer nutritious products, are
locally owned, and go out of their way to support local products. While other stores may
brand themselves this way, Open Harvest is really doing it. Under the “Trojan Horse” of
protecting neighborhoods, this community-based store is unable to compete in Lincoln’s
marketplace because of the 100-foot rule. Many other locations are grandfathered in or have
the means to wriggle around the rules. This puts smaller retailers at a disadvantage and
threatens their livelihood. Small retailers being allowed to sell beer would not undermine the
safety of children or the community. These locally owned operations are invested in the fiber
of Lincoln and will not be able to compete with large stores who are only concerned with
profit.

Beckius noted much of the discussion has been specifically about Open Harvest. He assumes
that testimony is intended to support any retailer under the same circumstances. Friedman
said that is correct. He is just a consumer, but he knows that alcohol is a revenue stream that
helps to maintain the sale of other quality food. Some existing stores allowed to sell alcohol were grandfathered in and are even closer to residential neighborhoods. The idea that they are any different and should be grandfathered in is rubbish. Lincoln needs places that sell fresh, wholesome foods. People in those neighborhoods, in his neighborhood, need places like Open Harvest. The Near South neighborhood is 70% under poverty level. The community needs stores to be able to make enough money to provide fresh food.

5. Senator Anna Wishart, District #27, 911 E Street, said that many of her constituents frequent Open Harvest. As a senator, she prioritizes making sure state regulations are as contemporary as possible. She is a community member living in the Everett neighborhood, which is currently undergoing a revitalization. She is also a member of Open Harvest and grew up there, so this is important on a personal level. She appreciates the testimony and hopes this body will support making this change.

Edgerton asked whether, as a State senator, she sees this as a broader issue relating to what this means for our community as a whole and how she weighs potentially conflicting issues. Wishart responded that the benefit of keeping fresh food in neighborhoods outweighs the small increase in alcohol sales.

Harris asked if Wishart, as an experienced Senator, has any recommendations related to the language as it is proposed. Wishart said that some concerns were raised today and she would hope those would be looked into. If the language is too restrictive, it will end up with some stores being out of compliance.

Joy asked if there has been anything at the State level that looks at these kinds of issues, specifically adding a definition of “grocery”. Wishart said no.

Beckius noted that District #27 runs the gamut in terms of access to services and food. He asked how important access to food is in that area. Wishart said it is critical. It is also important to consider that independent groceries are owned by people who live close by, in the community, so there is interaction with them.

Opponents:

1. Pat Anderson Sifuentes, NeighborWorks Lincoln, has worked with neighborhoods across the city. The Neighborhood Plan of Action was endorsed by 27 neighborhoods and we support the 100-foot rule, especially in poorer neighborhoods. Older neighborhoods did not benefit from planning when they were established and do not have covenants to offer protection. She is a member of Open Harvest, and this requested change is not just about them. She remembers the waiver system for approving alcohol sales and advised that it would be unwise to go back to that system. That system was also difficult for citizens who got burned out from the number of waivers requested. Open Harvest could fundraise to be able to move the store on their large lot. Grocers do not consider whether they can sell alcohol, they look at local incomes. That is why in areas where poverty is high, grocery stores leave. There are a number of ethnic stores in her own neighborhood. She wondered if they would be allowed to sell and whether that would become a problem.

Corr asked for clarification about the four specialty groceries. Sifuentes said they are around 11th and B Streets, 14th and D Street, and 11th and G Street.
Beckius asked for thoughts about having groceries within neighborhoods. Sifuentes said it is very important, especially in low-income neighborhoods. Grocers play a big role in creating walkable areas; it is akin to having a neighborhood school. Beckius said he struggles with the possibility of grocers leaving neighborhoods to relocate. Sifuentes said the area around 60th and O Streets has many groceries, but west of 11th Street is a food desert.

Beckius asked if there is concern about the 100-foot rules being a detriment to local groceries. Sifuentes responded that 100 feet is a very reasonable distance and there are communities with even stricter rules. There is a reason CenterPointe is located in the area where it is. Alcohol sales may not be the root of substance abuse issues, but they do not help. There is no lack of alcohol sales in the area. She wants stores to be competitive, but there may be a better alternative than changing the 100-foot rule.

Harris asked what type of alternative would be better. Sifuentes suggested the closing in of a separate area to sell alcohol.

2. Marti Lee, NeighborWorks, stated that it is possible to bring in new stores that meet the current requirements. Stores do not leave areas because they are not allowed to sell liquor. It will be difficult regulating a percentage of alcohol sales. Changing the description of “food” will not be helpful. With a waiver system, the lines become blurred. Grocers locate based on the income of the area and that is why we see them go to where the dollars are.

3. Jim Friedman, 1505 A Street, said that as President of the Near South neighborhood association, this is the 3rd time this issue has been addressed. Open Harvest is a fantastic resource to their neighborhood, but opening up alcohol sales opens that window for the entire community. We have voted several times in opposition to changing the 100-foot rule.

Harris noted the existence of establishments that have been grandfathered in and suggested there is an argument that the problem is already in place. So then it is important to ask whether reducing the restriction compounds the problem. Friedman said alcohol sales are a problem in older neighborhoods where planning did not occur. Residents in these neighborhoods have to fight undesirable changes. Alcohol sales generally do create issues with lighting and increased noise.

Harris asked if the benefit of having fresh food outweighs the risk of additional alcohol sales. Friedman replied that it does not. We support the mission of Open Harvest but feel there could be more problems.

Beckius said that the fact that residents in older neighborhoods have to constantly fight against changes like this struck a chord with him. He wondered if there are circumstances where the two could coexist. Friedman said he was also on his neighborhood board when CVS did the rezoning to allow for alcohol sales. They can coexist if circumstances are right, but there are enough who do not want to see sales near their homes. He has not seen enough evidence to support a reduction to the 100-foot rule.

Hove asked if it is thought that a reduction in the requirement would increase the number of locations where alcohol could be sold, and that, in and of itself, is something they are opposed to. Friedman said that is correct. There are enough places where alcohol is sold.
**Staff Questions:**

Corr asked whether a store that was grandfathered in would be able to sell if they needed to rebuild. Will said that the way the current ordinance is written, it has to do with the timing of the establishment of the business. If it predates 1979, it is grandfathered. Anything between 1979 and 1994 becomes a non-conforming use and might be allowed to sell with a special permit. It is not generally true that if a place burned down, it would never be able to sell.

Harris asked the Law Department if there were any suggested changes heard today that would make for a better ordinance. **Abby Littrell, Law Department**, said that it is not the role of the Law Department to take a policy position. She would echo the comments that some of the suggested percentage caps and sales amounts could be difficult to interpret and enforce. There are practical problems with the enforcement.

Edgerton asked if the 65% of gross income from food items provides enough clarity. Littrell said that practically, they could show that. There was testimony today that suggested that alcohol sales could exceed the 10%, so that could alter some percentage of food sales.

Beckius asked if there would be a way to apply a fee paid by the applicant for the review of sales so there is no additional cost to the City. Littrell said the City regulates a number of things. There is no process in place for this particular issue so it would be best to consult with the affected departments.

Hove asked how other cities deal with this issue. Will said that it truly runs the gamut with regulations more and less restrictive than those in Lincoln. Our ordinance was carefully crafted and has been in place for 23 years; it has become a community standard. That does not mean it is perfect. As it stands, there are some properties that meet the requirements and some that do not; that is the long and short of it.

Harris asked why “grocery” is not defined. Will said it is considered a retail use like any other. There has been no compelling reason to define them differently up until now.

Joy asked if restaurant use is the only other use with a special definition. Will said that it is, within the rules for the special permit for alcohol sales. It has been separated out and is treated differently.

Beckius asked if someone were to come along and rent only the front 30 feet of space, if they would be allowed to open a liquor store. Will said yes. That is a circumstance that exists around the city where portions of properties meet the setbacks. It is possible to meet the distance requirement on one end of a building, but not the other.

Beckius asked if there has been an assessment done as to how many businesses might actually change. Will said that there has not. It is possible someone could come in and redo a building on the site to move it closer to the street to have it meet requirements. The number that was suggested in the staff report was only to get a sense of the City-wide impact and was not intended to be an exact number.

**Applicant Rebuttal:**
Megan Jackson, 1540 Garfield Street, said that it has not been mentioned how clearly this amendment distinguishes “grocery. It is 65% non-taxable food items. When we get to that part of the definition, many of the other issues become obsolete. You will be hard pressed to find other retail uses that can meet that definition. It is important to make that distinction moving forward into the future. Creating food deserts is the result of not placing enough value on groceries. If stores cannot be competitive, they will not nestle into established neighborhoods. Open Harvest does not have multi-millions of dollars and cannot just pick up and move. We have our community. If we had to move, it would be unlikely to be within the core if we were restricted from selling alcohol; that is just not reasonable. It is also not reasonable to deny the amendment just because other options exist. Those other options are not viable solutions for Open Harvest. To build a separate entrance would cost valuable space for fresh foods, the community board. Separating out alcohol sales actually draws more attention and diminishes the emphasis on fresh foods. This solution is not a “silver bullet” for Open Harvest; it is just giving us equal advantage in order to be competitive. She is disappointed that staff could not find a single goal in the Comprehensive Plan to support this when it clearly speaks to providing opportunities for local food production and points of sale, maintaining quality of life, and supporting older districts.

Finnegan asked if Open Harvest sells paper products, health and beauty items, and meat. Jackson said yes.

Corr asked if they had help from an attorney in crafting the proposed definition. She also wondered why there was no push for this change at the time of their remodel. Jackson said they did not have an attorney. They prioritized making more space for fresh food. Creating a separate area with its own point of sale would have cut significantly into labor and space, so it was not considered at the time of the remodel.

Corr asked if there would be any opposition if this item were delayed so language issues could be worked out. Jackson said no. For their situation, and for those in a similar situation, we would be willing to delay if the intent was to come up with language that produced the desired result.

TEXT AMENDMENT NO. 17001
ACTION BY PLANNING COMMISSION:

Corr moved for Denial, seconded by Finnegan.

Finnegan said she is having a hard time with this application. She lives in the neighborhood within a walkable distance from Open Harvest and it does add to the neighborhood flavor. She is not opposed to alcohol sales and does not think this addition would harm the neighborhood. Her main concern is that this change impacts the entire City. There were many letters received in support, but they were all in connection specifically to Open Harvest. The letters of opposition were from all over the city. There is no way to know the final impact across the city. It is important to be cautious in changing laws. She also has concerns about the wording and the fact that there is no process in place to actually enforce the proposed regulations being added. She will vote for the denial with a heavy heart.

Hove said he is also torn. It does not make sense that a community store cannot sell alcohol, while the CVS can. At the same time, there could be unintended consequences because these changes would be city-wide. He will support the denial.
Beckius said he will vote against the denial. His overall sentiment is one of disappointment. Grocers are vital in neighborhoods, particularly in low-income areas. Groceries may be difficult to define given the overlap in services and goods they provide, but he is impressed with the general framework of the changes, even if they are not perfect. The percentage of fresh food sales should ensure that neighborhoods can be served by those looking to supply food. The State has defined “food” but the City has not. That may not even matter if the amount of total alcohol sales does not exceed a certain percentage for any type of retailer. This application has had ample time for discussion, thanks to the applicant’s patience. He is not hearing much willingness on the part of the neighborhood to work through the problem; he is concerned to hear comments about any unwillingness to sit down and talk about the issues or about being tired of addressing this. The business model for grocery stores clearly includes alcohol sales so he wonders if zoning is keeping up with those standards. Grocers are economic drivers and are instrumental to the vitality of neighborhoods. He is voting against the denial, not because this is a perfect solution, but because he would like this discussion to continue and a good solution should be found. This solution is not out of line and it does not buck the community standard.

Harris thanked Open Harvest for their willingness to place their application on hold while we explored the issue. She agrees with Beckius in that if she votes for denial now, it will be a missed opportunity. She is not prepared to send this particular language forward, but does not want to stop the engagements or the progress made on this application. As a small business, Open Harvest cannot be expected to provide a large amount of data or to hire an attorney up front. She hears the perspective of both the small business owners, and of the concerned neighborhood associations. She hopes that by voting against denial, the input received will be considered, and there will be more opportunity to discuss this issue.

Beckius said he would be open to a delay.

Joy said she concurs with Harris and Beckius. This is a City-wide issue, but the position of the small business grocers should be addressed.

Harris recalled past applications for event centers in the County where there was lots of opposition and discussion and specific circumstances to be evaluated. When given more time, she felt she learned a lot and made a better decision. Even though there has been a lot of work on this application already, she is asking for more.

Edgerton said she is also not comfortable voting for denial and is more comfortable delaying, or if necessary, voting against denial.

Corr said she agrees with Finnegan in that this will affect the entire city and that causes concern. This is not just about Open Harvest. She will vote for denial because of that. The rule in place now is a very good one and it has been working for quite some time. Prior to that, neighborhoods had to come forward to maintain the rules. Maintaining the status quo can be tiring, as she knows from her own personal experience serving on two neighborhood boards. In one neighborhood, A Street Market is not allowed to sell even though Moran’s liquor store is right across the parking lot. It makes her wonder how successful the grocery would even be because of this location. In the other neighborhood, the grocery store was lost to fire and a store like Open Harvest would be welcomed. She recognizes that it might be impractical to move, but maybe a second location could be considered. Corr also noted for
the record that she has helped set up farmer’s markets where the grocery store was lost and she knows how difficult it is to get local farmers in, but it is very important for the economy and to combat food deserts. With all of that said, she just cannot support a blanket measure for one business, but she is willing to continue to work with the applicant. There are questions as to why a remodel would not work and she would like to find out more.

Scheer said he will support the motion to deny. As a Commissioner, he believes he needs to vote within the framework of the Comprehensive Plan. There could be unintended consequences with moving this amendment forward. The vote will be tied today, so there will be another opportunity for this body to look at this again. He would like to see the discussion revolve around planning issues, distance, and the zoning ordinances more than about the benefits to a single grocer.

Motion failed to carry due to a lack of majority vote: Finnegan, Hove, Corr and Scheer voting ‘yes’ to recommend Denial; Beckius, Edgerton, Harris and Joy voting ‘no’; Washington absent.

TEXT AMENDMENT NO. 17001, AMENDING CHAPTER 27.63.685 OF THE LINCOLN MUNICIPAL CODE RELATED TO DELETE THE ACCESS DOOR LOCATION REQUIREMENT, AND TO ADD EXTERIOR DOOR OPENING REQUIREMENTS FOR A SPECIAL PERMIT FOR OFF-SALE ALCOHOL SALES: November 15, 2017

Members present: Corr, Edgerton, Finnegan, Harris, Joy, Washington, and Scheer; Beckius and Hove absent.

Staff recommendation: Denial.

There were no ex parte communications disclosed.

Staff Presentation: David Cary, Director of Planning, stated the perspective of staff is to be consistent with what has already been heard. This item is before this body again today due to the 4-4 vote that occurred at the last hearing. The applicant has changed their proposal and has worked with staff. Staff continues to recommend denial based on a few main points. The current regulation for separation for off-sale should remain as is. Commissioners were directly involved in the process over the summer. Information was provided to Commissioners and the community had the opportunity to talk about issues associated with potential changes. The applicant kindly held off so this could take place, and we thank them. The commentary from the community was to maintain the regulations that are in place. The standard has been in place for 13 years and has served the community well. There are not compelling enough changes at this point to make changes. There is concern with treating groceries differently. It is the opinion of the Planning Department that to do so would open the door for challenges for other types of uses and that really is not the intent of the change. Groceries provide obvious value to neighborhoods. That does not mean there is enough reason to make this city-wide change for this particular vendor. It opens the door for other locations, but it also exposes the City more in the future for other types of retail to request the same exception. A convenience store could argue that every neighborhood needs to get their gas, so they should have a separate classification. The same goes for a neighborhood pharmacy.
The current regulation does not prevent stores from locating in neighborhoods. It identifies location that can and cannot be met in particular districts. There are other locations. For this applicant, we know it is a challenge and they cannot meet the requirements in their current situation. That does not mean others cannot propose grocery locations around the City. There is recourse for the applicant. Planning staff acknowledges that it might be financially burdensome, but there is an option for them under the current rules, at their current location.

Harris thanked the applicant for their willingness to delay. She studied the history of alcohol regulations and read all of the minutes from 2004. The ordinance was changed so the City Council could no longer use the waiver process on a case-by-case basis, the Planning Director could no longer mitigate, and the special permit process was created to have final action at the Planning Commission level. At that time, the change was strongly opposed. Planning Commission recommended denial by a 6-2 vote. They specifically cited concerns about small, independent business. City Council minutes were requested, but the discussion was not outlined. She asked what the arguments were for Planning Commission recommending to deny.

Cary said that his understanding is that there was a strong feeling from City Council and neighborhoods similar to what is felt today. Waivers were becoming burdensome in the sense that they could be very variable. There are points and arguments to be made that the waiver system allows for flexibility in the regulation, but the points made at the time was concern about not being consistent and fair enough on a case-by-case basis. He believes City Council went against Planning Commission because they were feeling the same way in that they did not want to field all of those waivers. He also know anecdotally that neighborhoods also felt the burden of having to make their points with every request.

Harris said there was also talk about planning evaluative methodology to deal with this problem. Brian Will was the planner back then and he agreed there could be other alternatives that could be explored. Will said there are other alternatives and the way we do it is not the only way. This was the standard that was adopted in 1994 and have had since then. From what he has gleaned, he believes it was a confluence of three things. A City Council member was involved with Mothers Against Drunk Driving and it was a strong personal issue for her. Mark Hunzeker was representing the packaged liquor dealer’s association, and then there were strong feelings from the neighborhoods. They were all responding to a change in State law where you could buy liquor more places than just the liquor store. Those groups were on common ground and there was enough interest aligned. That resulted in the regulations in place today. Only minor modifications have been made since then, and they have become the community standard that we all live with. This amendment is not saying there is something wrong, or some major malfunction with the current system, or that they underserve some portion of the community.

Cary agreed there are many ways to do zoning. The current setup has been in place for many years and is the standard. There is not an overarching push from the community to make this change. There are particular applicants for whom the current system does not work. That will be the case for most of the codes.

Edgerton asked how long the codes have been in place and when the waiver was done away with. Will said the regulations in their entirety have been in place starting in 1994. In 2004, the waiver system changed. Edgerton wondered about the volume of special permits for alcohol sales that were being seen at that time. Will said he does not have an exact number, but a good
representative guess would be around 100, including on- and off-sale. At one point, the City was sued. The result was that the courts determined that a city can regulate alcohol sales via zoning ordinances.

Cary added that one thing to consider is that the regulations have not changed that much over the years, so there is a strong consistency factor there. It provides the ability to say that we are applying a fair standard for whatever the request may be. That consistency works. The potential for going backward to a system with less consistency could lead to other types of retail proposing the same thing. That is the crux of the recommendation for denial.

Edgerton asked how restaurants were treated prior to being considered an exception. Will said they were treated like all other retail.

Finnegan asked if the neighborhoods were involved in coming up with the compromise that was reached within the current regulations. Will said yes. The neighborhoods were involved and there are some here who took part in the process.

Harris wondered how the restaurant exception came about since, at that time, Planning thought it was appropriate to consider an exception the 100-foot rule specifically for one restaurant. Will responded that staff did not initiate the request; it was the request of a very persistent owner. It became clear in our minds that a restaurant is a different use and warranted the exception. Planning Commission and City Council agreed. Harris noted that there was significant opposition, including from the police and the Building and Safety department, due questions about enforcement, since it is based on a percentage split. Harris asked how that is fundamentally different from what is being proposed by the applicant today. Will agreed that some regulations can be difficult to enforce. In our minds, a restaurant is fairly easily determined, and that was the consensus of the larger group. It is easy to make the distinction between a restaurant and other uses.

Harris asked if any bars meet the same 60/40 rule that restaurants follow. Will said he does not think so. The regulation is clearly generated from food and it is easy to make that distinction. The percentage may help, but the distinction is clear. No enforcement had ever been needed.

Finnegan recalled that part of the conversation was the mitigating factor of alcohol being consumed with food. People go to a restaurant to eat, but not everyone drinks. She also noted the difference between on- and off-sale. Will said that gets to the heart of the issue. There could be multiple retail outlets with off-sale; it is not a nicely niched out area that is easily identifiable.

Harris asked how they would go about it. Will said there is a minimum acreage requirement and it would have to include the entire strip mall and some of the adjacent residential.

Harris asked if the restaurant exception language provides better protection than the restaurant exception because of the required 100-foot distance to the door. Will said he does not know that since it just said “residential district”. Staff has reviewed their proposal and even worked
with them to help them, but the overall opinion has not changed. It does not provide the same level of public safety for all the other reasons the requirements are in place. Harris asked it provides better protection than the rest because of the 100-foot distance. Will agreed that it does.

Joy wondered if it would be enough to simply amend the 100-feet to the door regulation.

Corr said she does not believe there would be a way to get the language succinct enough. It weakens the code. If the City is taken to court, the regulations have been watered-down. Will agreed that if it becomes okay for a grocery, how is that distinguished from some other retail uses in a meaningful way.

Joy asked if staff has looked at how the State defines grocery stores. Will said staff is not hung-up on whether or not “grocery” can be defined. They are retail and they can’t be separated. Cary said staff took the lead from the applicant on the definition. It opens the door for how the regulations could be taken to other retailers.

Edgerton pointed out that it is easy to say that by having the restaurant exception, the door was opened for this conversation today. Cary agreed and said that is his point.

Harris asked if groceries would still need the special permit to sell alcohol. She wondered about mitigating requirements that could be included in a special permit, such as hours or screening. Will said there is a whole variety of ways to mitigate the impact of uses. Cary said the mitigating factor that we want to keep is the 100-foot separation. That is the staff position about the best way to handle this, keeping in mind the consistency factor.

**Proponents:**

1. **Amy Tabor, 855 S. 35th Street**, stated that text was submitted that sets a clear definition of grocery based on fresh food sales and a cap on alcohol sales. That sets groceries apart from other types of retail. We took all of the questions and issues to heart. It has been suggested that changing the ordinance would seem to apply to only one, that there is difficulty in using certain terminology, a lack of process for enforcement, and concern for protection of neighborhoods. Based on that, several changes have been made. They met with the Grocers’ Association and looked at how the State defines things. The altered definition can be applied to all groceries. The focus is on the primary services of selling food, similar to a restaurant. Availability of food should be at the top of the list when it comes to city planning. The current ordinance makes it unlikely that any grocery would choose to serve and underserved area. In order to protect neighborhoods, the 100-foot rule keeps distance between residents and the public entrance without putting burdensome requirements on stores to remodel to create a separate entrance. The percentage cap on alcohol sales was deleted to leave focus on food items and to avoid restricting sales at other locations. The threshold of 65% in food sales ensures the primary purpose is to sell food. It is an industry standard. A final revision was to address oversight where the store is to provide Nebraska Department of Agriculture permit that demonstrates 65% food sales. These changes align with the ordinances and with normal permitted processes in place. It has become clear that the ordinance created over 20 years ago is no longer serving the community the way it was initially intended to.
Harris asked why the language regarding farm winery is not included in the new language. Tabor said that was not intentional. Harris said she does not want to unintentionally exclude farm wineries. Will agreed that it was inadvertent.

Harris asked for more information on doing away with the cap on alcohol sales versus having a 15% cap. Tabor said that stemmed from discussion with the grocers’ association. There is fluctuation in that market based on location and it seemed unnecessary if the food component is clearly defined. It also simplifies the procedures.

Harris asked if the applicant was open to adding language that says maintains “at all times”. Tabor said they would not be opposed to that.

Opponents:

1. Vish Reddi, 1944 B Street, came forward as represented for the Near South neighborhood. He stressed that they love Open Harvest as a business and this is by no means opposition to the co-op. They request that Planning Commission maintain the zoning ordinance, keeping the 100-foot separation. Neighborhoods will be negatively impacted by the change. Russ’s has cut short their hours of operation due to problems related to alcohol sales. This change could put sales 25 feet from some homes and vulnerable uses like daycares.

2. Marti Lee, Neighbor Works, came forward to say that restaurants are dealing with on-sale. Off-sale leads to littering and later hours. It is entirely different. We are in favor of small business. There is no way that making this change will increase economic development. There are places within the city that would be negatively impacted if the change happens. The ordinance continues to serve the community and to provide protection in neighborhoods.

Applicant Rebuttal:

Brande Payne, Chair of Open Harvest Board, said she also manages other seasonal community markets and has worked in local food for a long time. Access to food is especially important. This change would not be limited to Open Harvest. Considerable time has been spent addressing concerns. This change does not pave the way for other retailers to sell alcohol. The clear definition of “grocery” prevents that. This will pave the way for grocers to consider core neighborhood locations and it helps to ensure that others can remain competitive by offering one-stop shopping. Hy-Vee stores are adjusting their sales strategies to include smaller, neighborhood stores which shows that even bigger stores want locations with a smaller footprint. 10,000 square foot buildings are not built in new developments. She would find it surprising if any store would locate in an area where alcohol sales were not permitted. The Comprehensive Plan supports the growth and maintenance of mixed-uses to support a variety of incomes, and walkable neighborhoods. These are important policy ideas and this text amendment supports those values. It is evident even larger corporations see the need to nestle stores into neighborhoods for the benefit of the employees and the city. There has been talk of the known potential impacts, but no talk about the unknowns. What about businesses who have looked at having locations in neighborhoods and decided against it, or have left. We will never know if it has influenced these decision. Losing access to food in the core areas of the city lacks vision.

Finnegan asked for speculation as to why neighborhoods are in opposition to changing the regulations if they will be good for them. Payne said they respect that effort. They are not
trying to make the language too concise for grocers. Open Harvest has looked at the PUD option but would have to bring in residential area and the Walgreens to meet the requirements. Our goal is to help grocers. Their concerns do not really address what we are trying to do and we agree that neighborhoods should be protected. Finnegan said Neighbor Works is involved in the core neighborhoods and do not think this change will help development in neighborhoods. Payne said they are not able to go in and show them there would be benefit. It is a chicken-and-egg situation. Older neighborhoods are getting to a point where there is limited food and walkability. We would love to see it happen and to help work on the process. First, we have to break down this barrier to get there.

**TEXT AMENDMENT NO. 17001**

**ACTION BY PLANNING COMMISSION:**

November 15, 2017

Corr moved for Denial, seconded by Finnegan.

Corr said this is not a barrier problem or defining grocery succinctly enough, and it is definitely not a problem with Open Harvest, who we love. The problem is the watering down of the zoning codes and being able to defend them. If this gets passed, it will bring a lawsuit on the city. Questions will be raised about how groceries can be treated differently from other retail and problems will arise with consistency. The present applicant is not the only consideration and the long term has to be considered. She believes that what is in place is working and maintaining it is a good compromise for business and neighborhoods.

Harris said she will vote against denial and is ready to move this forward with the proposed amendments. She appreciates the statements made in opposition. The standard is in place, but it was not reached through consensus. In 2004, Planning Commission voted to deny doing away with the waiver system and was worried about what it would do to grocers and independent businesses. We worry about the unintended consequences of this ordinance change could create, but we cannot fail to address the unintended consequences of our current ordinances. The situation that Open Harvest finds itself in today is an unintended consequence of the 2004 ordinance change. Older neighborhoods do need protections but a “one size fits all” approach is not flexible enough to incentivize the operators we actually desire, especially in core neighborhoods. Instituting the minimum in food sales and the 100-feet to the door provides added protections. It is universally known that the retail landscape has changed and small businesses need to be able to compete. Enforcement could be a burden on staff, but having the food sales percentage is a tool to enable enforcement. It is difficult to argue that a restaurant has more value than a grocery store, especially knowing that access to fresh food is becoming a problem in some neighborhoods. This is not as simple as making it only about alcohol sales; this is also about the flexibility to encourage accessibility to food and opportunity for small, local providers.

Finnegan said she does not think it is good public policy to change a rule that is working. She has not seen a stampede of other vendors seeking this change. Those who have written letters of support have all been tied to Open Harvest, whereas, the letters in opposition have come from all over the community. The restaurant exception is different because it relates to on-sale only. That is a big distinction. People who work to improve core neighborhoods have come forward in opposition. This would not be good governance if there are not more members of the community coming forward in favor. It is not a good road to go down.

Edgerton said she will vote against the denial. This has been an excellent example of how
reasonable conversation can occur, even if there is disagreement. She sees both sides and could probably make an argument for both sides. She is moved by the fact that we can have a legitimate public policy exception for grocers. They can be accurately distinguished from other retail. They are important for poor neighborhoods and the economic viability issue is important. We can control against the perceived slippery slope.

Washington has been paying attention to this issue. She feels strongly that businesses and individuals who move into neighborhoods accept the rules of the neighborhood when they move in. Things have changed and the business model is changing. It is absolutely important to make sure we do not end up with food deserts. She does not like to be on the wrong end of lawsuits where you start to wonder if it is worth it. That said, this is an opportunity to be very clear about what a grocery is and how it is different from retail. She will vote against the denial.

Joy said she will not reiterate what has already been said. She appreciates the efforts made on all sides. She will vote against the denial. Food can be defined.

Scheer said he will vote in favor of the motion. The waiver process seems appealing, but we have hear that it is not. But this is certainly a case where if that were an option, it would be the right thing to do. The ordinance is rigid, but he shares the same fears about changing an ordinance that works.

Motion failed to carry due to a lack of majority vote (3-4): Finnegan, Corr and Scheer voting ‘yes’ to recommend Denial; Edgerton, Harris, Joy, and Washington voting ‘no’; Beckius and Hove absent.

Cary noted the motion for denial failed today. To move forward, it requires five votes one way or the other. Another motion could be made today, but if it is decided to carry this over to the meeting of December 6th, the ideal would be for all nine commissioners to be present so the result is a 5-4 vote. If that does not happen, he would suggest finding a 5th vote one way or the other in order to allow the applicant to keep this moving forward.

After a short discussion among Commissioners and staff, Washington moved to keep public hearing open, for new information only; seconded by Joy and carried, 7-0: Corr, Edgerton, Finnegan, Harris, Joy, Washington, and Scheer voting ‘yes’; Beckius and Hove absent.

TEXT AMENDMENT NO. 17001, AMENDING CHAPTER 27.63.685 OF THE LINCOLN MUNICIPAL CODE RELATED TO DELETE THE ACCESS DOOR LOCATION REQUIREMENT, AND TO ADD EXTERIOR DOOR OPENING REQUIREMENTS FOR A SPECIAL PERMIT FOR OFF-SALE ALCOHOL SALES: December 6, 2017


Staff recommendation: Denial.

There were no ex parte communications disclosed.
**Staff Presentation:** Brian Will of the Planning Department said this is the third time this appears before Planning Commission. The only new thing is a brief memo that includes some revised text from the applicant.

Edgerton asked if the item will advance to City Council no matter what the vote is. Will said that is correct. This is not final action but a recommendation to the City Council.

Harris said that at the last hearing, there were concerns raised by Commissioners that this amendment would increase the City’s liability and the risk for lawsuits from other retailers that would argue that their service is equally essential as food. She wondered where legal staff stood on the actual, calculated risk. **Tim Sieh of the Law Department** said the City is always at risk of that. This is a legislative action where a distinction is being made. If someone were to challenge, they could question whether the distinction made was somehow arbitrary. Harris asked if this opens the door for other entities and make it more difficult to say “no”. Sieh said it absolutely does. Retailers will come forward asking “why not me?” It is part of your role to make those kinds of decisions. There is always risk of someone challenging decision by Planning Commission or City Council and there could be enforcement issues down the road, but legally, it can be done. It is up to you whether or not it should be.

Corr believes that if this is granted, others will want an exception from retail in order to sell alcohol and it would be difficult to justify a ‘no’ if they seem just as essential. That will become very problematic and will dilute the zoning codes.

Washington said that looking at what is before them today, a third version is presented. Every time a change is made, it creates another opportunity for misunderstanding. There have been changes made to the definition of grocery, changes to how goods are displayed. The intention seems to be to clarify but instead it has given her more pause. Due to changes in legal language, it appears that now there are four options instead of two clear options. That makes the language seem much softer and more tenuous. Her concern is that the changes proposed today do not make the amendment clearer. Sieh said the amendment was not drafted by Law, but by the applicant. Washington asked if Law interpreted it the same way. Sieh suggested that the applicant be allowed to address the question first.

Corr questioned the language “at all times” because it gives the impression a store will be open 24 hours. Harris said that language was her suggestion, intending to mean that food sales were ongoing and not intermittent.

**Proponents:**

1. **Amy Tabor, 855 S. 35th Street,** said that they reached out to other local grocers and made slight revisions with the intent of being more inclusive and to clarify the 100-foot distance. This was based on response from the Near South neighborhood. We realized that the 100-foot requirement from the public entrance was only required from the residential district and not building use like daycare, for example. We added language in an attempt to maintain as much separation as possible. We found that some stores have liquor licenses but are not definitively grandfathered in. They were required to file their status and if the premises is transferred, it would lost its status. In the case of A Street Market, a license under the current ordinance would not allow for the transfer or to rebuild.
Washington asked if the intention was to make certain that anyone in this situation would have 25 feet or a public street. Tabor said the language was modeled after the restaurant exception language.

2. **Brande Payne, Chair of Open Harvest Board**, said they were seeking more clarity in the language and not to bring in any loopholes. We were attempting to shore up concerns.

Harris asked why “public street or alley” was added. Brande said that the street behind Open Harvest is a public street though it is the width of an alley. In speaking with A Street Market, there is a first floor residential use nearby. The alley separates them, but not at the full 25 feet. There has been a long misunderstanding that they did not want to sell, but actually, this ordinance has preventing them from selling as well. Why they may not have the full 25 feet, there is still a clear line of separation.

There was no testimony in opposition.

**Staff Questions:**

Washington asked for Staffs’ impression of the new language provided by the applicant. Sieh said their desire is to have a 25-foot separation between the licensed premises either to the residential district, or the property line of certain uses, and a 100-foot separation from the front door to a residential district or the property line. If he is right about their intent, the most recent language provided does not accomplish that. A motion to amend could be made, or it could be taken up that way at City Council.

Harris asked if the amended version offered at the last public hearing was clearer. Sieh agreed the previous version was clearer. Harris asked if the specific uses like daycare, park, etc. could be added to their last version to accomplish the intent of the applicant. Sieh said it would but the public street or alley would also have to be added.

Harris asked staff how they feel about the inclusion of “street or alley” in the language. Will said this is not about the definition of a grocery store. It is about the distinction made between a grocery and everyone else. The concern is that other retailers will come in and ask why they are so different from a grocery store, and it will be harder to make that distinction to say ‘no’ in the future.

Beckius said he struggles with the idea that the City feels as though a retailer that sells alcohol is any different from say, a 24-hour drive-thru restaurant. They have no separation requirements. The same goes for conveniences stores. That use adds extra lighting, traffic, people and litter. Will responded that the City has not argued that. The ordinance in place was created through a cooperative effort among many different interests. It was more than just staff or Planning Commission coming up with the regulations. They considered the general safety of the community and the regulation of alcohol was part of that standard. Beckius asked if it was that case that community consensus is the reason for the current regulations. Cary responded that it is a good question. Will is correct that this has not been about defining grocery. All throughout our process this time, we did not hear community-wide opinion that warrants staff supporting the change in policy.

Beckius asked if community consensus drives planning policy making. Cary said it is a big part of the process. There has always been a community process and public discussion on some
level and it informs the decisions of staff. It does not drive decision-making because we still use our professional experience to understand the impact.

Beckius asked if the policy would be the same in the B-1 and B-3 Districts were being set up today without any knowledge of the past. Cary said he does not want to speculate on hypothetical situations. There are many things that could be done differently and if we were going to make a big change, there would be a thorough public process. Beckius commented that he can’t get a good gauge of what Planning wants. Cary said that staff is reacting to the proposal that was presented. The question presented was not a matter of cleaning the slate. This is a specific reaction to this proposal. Beckius noted that with other issues, he senses that the changes are moving towards an ideal, such as with the CAD designs passed earlier today.

Corr commented that what is on the books was borne of a compromise reached between many parties in the city. This is the ideal that has been working.

Will commented that staff does not have any sense from the community that the current regulations are missing the mark. This was not an evaluation of the existing regulations; it was an evaluation of the proposal that came in. Our review was based on that specific proposal and whether or not it makes the ordinance better, how it will affect the community, and what will happen if it is approved. We did not ask if we should go back and revisit all the regulations. These are the regulations in place and they have been working. This is a proposed amendment; we give you our best sense of its impact.

Corr asked for clarification about the ability for a grandfathered business to rebuild. Will said there is a provision for nonconforming uses that there is a two year deadline to rebuild once it is completely destroyed. Even that is not a simple, straightforward answer. There are nonconforming uses and pre-existing special permits; it’s all about timing and there is no blanket answer. Corr noted the applicant had mentioned the location of the former Sun Mart at 48th and Van Dorn. Will said that is in the B-2 District so the standards are different and that store would not have been impacted by this.

**Applicant Rebuttal:**

**Brande Payne, Chair of Open Harvest Board,** said that she has heard a few ongoing themes. First is that the change would open the potential for more lawsuits against the City. That is the case for any matter. The City previously decided on a similar exception for restaurants and there have been no issues. We argue that this request is similar. Next, there seems to be a theme that it is up to us to show how this will benefit the entire City. It is often the case that an individual entity sees a problem or a lack of forward-thinking and requests an update. That happened at the hearing today in the case of the signage for Bryan hospital. The applicant saw a way that the codes could be improved and submitted a solution in the form of a text amendment. Finally, many people have brought up the potential impacts of our proposed change. This disregards the fact that we may not understand the negative impacts that may have occurred because of the existing language.

Scheer asked if they are willing to accept the language clarification made at today’s hearing. Payne said yes. That language more clearly expresses their intent.

Sieh drafted amended text that better addresses the intent of the applicant’s December 5th
memo, as follows:

**MOTION TO AMEND TEXT AMENDMENT NO. 17001, AS OFFERED BY THE APPLICANT IN MEMORANDUM DATED DECEMBER 5, 2017**

LMC 27.63.685  
(b) The licensed premises of any building approved for such activity must be located no closer than:  
(i) 25 feet, a public alley, or a public street from the property line of a premises used in whole or in part for a first-floor residential use, day care facility, park, place of religious assembly, or state mental institution or from a residential district, and  
(ii) the nearest public entrance shall be located at least 100 feet away from the property line of a premises used in whole or in part for a first-floor residential use, day care facility, park, place of religious assembly, or state mental institution or from a residential district.

Harris asked if there needed to be further clarification of the phrase “at all times” in the text amendment. Payne said their understanding of that language is that it would be interpreted as meaning during business hours.

Will noted that the width of public streets and alleys can vary from 12 to 20 feet. Payne said the main protection is the 100-foot distance to the main entrance. She assumes no one would be allowed to build a building directly backing a residence.

**TEXT AMENDMENT NO. 17001**  
**ACTION BY PLANNING COMMISSION:** December 6, 2017

Corr moved for denial, seconded by Finnegan.

Corr reiterated her concern that this change will weaken the codes. One day another type of retailer, such as a pharmacy, will appear with their attorney to argue why their use is just as essential. If that request is not granted, they could file a lawsuit. The language adding the public streets and alley makes this proposal even less desirable. She headed the downzoning of the 40th and A neighborhood and this is part of the reason. She has nothing against Moran’s liquor store; they are a friendly business. But she does not believe that A Street Market would even be successful selling with the liquor store and a gas station so nearby. This will not benefit the neighborhood. The intent of the proposed text amendment is to find a way for Open Harvest to sell, but it creates a city-wide change.

Finnegan thanked the applicant for pursuing this change. For her, this has never been about Open Harvest, which she loves. This has been about changing an ordinance that applies to the entire city. She believes in the community process. Thirteen years ago, many groups came together and agreed on the ordinance that was put into practice. Caution should be used in changing an ordinance when there is no widespread community consensus to do so. Outside of the Open Harvest community, there have been no letters or testimony provided in support; in fact, there was more widespread opposition. It is a slippery slope to ignore what we have heard from the community. There are many ways to look at this situation and she does not believe this is the best answer. She is sorry from her heart, but her head is telling her the right thing to do is vote for denial.
Harris thanked the applicant for their patience. She is not completely sure how she feels about public comments, but she is willing to move this proposal forward and is comfortable with the language settled upon today. When she first heard about this, she was reluctant to approve it, but the more she learned about the history of alcohol regulation in Lincoln, the more she changed her mind. In 2004, Mayor Seng proposed to eliminate the waiver system and Planning Commission at that time voted 6-2 against it, arguing that the change would hurt small, local businesses and groceries. Later, an exception was made for restaurants. If you argue that a restaurant brings enough value to neighborhoods, and that food sales mitigate the alcohol sales, then the same argument can be made here. We have repeatedly heard from those in the grocery industry that alcohol sales are a valuable tool to remain profitable. Without this tool, there are consequences, the worst being the creation of food deserts. Food deserts do not have to be large geographic areas; it is related to access to food without access to transportation. Neighborhood groceries within walkable distance are important for the vibrancy of neighborhoods. If we want groceries to locate within neighborhoods, we cannot regulate them out of existence. She decided that when we worry about the unintended consequences of new language, we cannot ignore the unintended consequences of the current ordinances. It is fair to say the situation Open Harvest finds itself in today is an unintended consequence of the 2004 ordinance change. Older neighborhoods do need protections. The question is how to balance protections without sacrificing access to goods and services that make for a vibrant neighborhood. The language presented today is flexible enough to accommodate that.

Beckius said he will vote against the denial. Although neighborhood safety is at the forefront of his mind, the model of grocery stores has changed and grocers today need alcohol sales to be economically viable. He does not believe alcohol sales are any more harmful than a 24-hour drive-thru or gas station. From a planning perspective, there are other factors mixed in, but overall, there are other allowed uses that are not diametrically different from a grocery that sells alcohol.

Washington stated she was supportive of the proposed text amendment at the last hearing. When she saw that the applicant had proposed another change, that muddied the issue and she would not have been able to vote to recommend approval. She was relieved to hear that was not the intention of the applicant. Commissioner Harris expressed concerns eloquently. Core neighborhoods do need protection and respect from within the growing city. Businesses should not be penalized because they did not take advantage of grandfathering. Allowing small grocers to sell in the B1 and B3 Districts will not be a detriment to the city. If problems do arise, they can be addressed.

Hove acknowledged that Open Harvest is a unique and positive business, but for him, this is a case of one business seeking approval for a change that would apply city-wide. He is also unsure that this would be a driving factor in creating more businesses in neighborhoods.

Joy said she echoes the thoughts of Commissioner Harris. She finds this proposed amendment to be a forward-thinking changes.

Edgerton said she will not support the denial. Looking for community consensus is important, as is considering the position of neighborhoods. It is also important to acknowledge that the marketplace has changed. A carte blanche rule without any exceptions does not provide protections. There are plenty of locations that have been grandfathered in.
Scheer said his vote has not changed. He appreciates all of the testimony from all three hearings and thinks it will be helpful for the City Council.

Motion for denial failed to carried, 4-5: Corr, Finnegan, Hove, and Scheer voting ‘yes’; Beckius, Edgerton, Harris, Joy, and Washington voting ‘no’.

Beckius moved approval, as amended by the applicant; seconded by Harris.

Sieh clarified that the motion is for approval, as amended in the proposal submitted by the applicant as of the December 5, 2017, amended memo.


Note: This is a recommendation to the City Council.