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## **Via Electronic Mail**

November 28, 2016

City of Alameda Planning Board  
2263 Santa Clara Avenue  
Alameda, CA 94501

**Re: November 28, 2016 Planning Board meeting  
Agenda Item 7: 1200 Park Street (PLN14-0134)**

Dear Members of the Planning Board:

On behalf of Big O Development, LLC, we submit the following comments with regard to the above-referenced Agenda Item. Big O is in negotiations with the current owner to purchase the real property located at 1200 Park Street from the current owner. Once the site is purchased, Big O will continue the automotive repair use on the site and will comply with the terms of the existing conditional use permit (UP88-36).

Staff's recommended action – to revoke the existing use permit by imposing an automatic termination date in July – is unlawful. There is no legal basis to terminate/revoke the use permit, either under the terms of the use permit or under the applicable law. Of the four options presented by Staff for this Board to consider, only option numbers 2-4 are legally defensible. Staff's recommended option is not.

## **I. BACKGROUND**

On August 2, 2016, some residents submitted a request to Staff to set a public hearing "to review the existing use permit for 1200 Park Street with the intention of considering an expiration date on the permit when the current tenant vacates the property within the next year." (Staff Report, Exh. 1.) This submission did not identify any violations of the existing use permit or the City's zoning regulations as the basis for this request. Instead, the neighbors offered that "the reasons for considering a termination of the current use permit" include: (1) the property is too small; (2) auto uses are not appropriate for this location; and (3) with the current tenant vacating next year, "now is the perfect time to think about the future of the Park Street/San Jose Avenue area in terms of planning, and how this corner can fit in with the rest of the business district."

In response to this request, Staff determined that by "amending the Use Permit to add a condition of approval to terminate in July 2017, the City would be accomplishing three objectives:

1. Provide enough time for the existing long term local business to relocate to their new site on Oak Street, where they would be a legal conforming use.
2. Ensure that any potential future users of the property know that automobile repair will not be permissible on the property before those users invest significant resources into either purchasing the property or establishing an auto repair use on the property.
3. Bring the property into conformance with the existing zoning requirements, which all other properties in the district are all required to respect."

To support these stated objectives, Staff recommends that this Board "amend the existing use permit to include a new condition to read: "This use permit and the non-conforming use of the land for automobile repair shall terminate on July 30, 2017.'" Clearly, imposition of this condition would vitiate Big O's property rights upon close of escrow, as its proposed tire store would no longer be conditionally authorized. .

For the reasons set forth below, following Staff's recommendation is unlawful.

## **II. THE CITY CANNOT REVOKE OR IMPOSE NEW CONDITIONS ON THE EXISTING USE PERMIT**

### **A. Use Permits Cannot be Conditioned to Terminate Upon a Change of User**

Terminating the use permit in July when the current permittee is expected to move would be unlawful. In California, "it is widely held that a conditional use permit creates a right which runs with the land; it does not attach to the permittee." (*Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal. App. 3d 855, 858.) The Staff Report similarly recognizes that use permits:

"travel" with the land, not the business. So when businesses like "Big Discount Tire Pros" vacates the property, the use permit remains with the property and a new, similar business may occupy the property, provided that they comply with all of the conditions of the use permit.

In fact, imposing a condition that prevents the permittee from transferring the rights under a use permit sale of the land is unlawful. (*Anza Parking*, 195 Cal. App. 3d at 858.) "Such a condition, if imposed, is beyond the power of the zoning authority, and void." (*Id.*)

Despite this clear prohibition against terminating a use permit upon transfer of the property, Staff proposes to summarily eliminate the use next July when the current permittee moves to new site. In fact, the Staff Report's purported "objectives" supporting the use permit termination are based on the change in tenants.

**B. The Requirements for Termination of the Use Permit Cannot be Met**

*1. Applicable Standards for Termination/Revocation*

a. Case Law

It is well established that an existing, lawful business operating under a use permit must be treated differently than an applicant for a new use permit. "Under California law, the continued operation of an established, lawful business is subject to heightened protections." (*County of Santa Clara v. Superior Court* (2010) 50 Cal. 4th 35, 53.) "Interference with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance. Certainly, this right is sufficiently personal, vested and important to preclude its extinction by a nonjudicial body." (*Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal. App. 4th 1519, 1529.)

Termination of an existing permit by a date certain, as recommended by Staff, is subject to due process limitations that cannot be met here. "A CUP creates a property right which may not be revoked without constitutional rights of due process." (*Malibu Mts. Rec. v. County of L.A.* (1998) 67 Cal. App. 4th 359, 367.) "A municipality's power to revoke a permit is limited. A conditional use permit may not be revoked arbitrarily without cause." (*Cnty. Dev. Com v. City of Fort Bragg* (1988) 204 Cal. App. 3d 1124, 1131-1132.)

"In determining that a permit, validly issued, should be revoked, the governing body of a municipality acts in a quasi-judicial capacity." (*Bauer v. City of San Diego* (1999) 75 Cal. App. 4th 1281, 1294.) "In revoking a permit lawfully granted, due process requires that it act only upon notice to the permittee, upon a hearing, and upon evidence substantially supporting a finding of revocation." (*Id.*)

"Where a permit has been properly obtained and in reliance thereon the permittee has incurred material expense, he acquires a vested property right to the protection of which he is entitled." (*Goat Hill Tavern*, 6 Cal. App. 4th at 1530.) "When a permittee has acquired such a vested right it may be revoked if the permittee fails to comply with reasonable terms or conditions expressed in the permit granted or if there is a compelling public necessity." (*Id.*) "A compelling public necessity warranting the revocation of a use permit for a lawful business may exist where the conduct of that business constitutes a nuisance." (*Id.*)

b. City's Use Permit Revocation Standards

In conformance with the common law standards discussed above, the City Code provides that a use permit may be revoked *only* in "the event of a violation of any of the provisions of the zoning regulations, or in the event of a failure to comply with any prescribed condition of approval...." (City Code, § 30-21.3(d).)

There is no evidence in the record that the current user is failing to comply with the City's zoning regulations or the terms of the use permit, or that the conducts of the business constitutes a nuisance. Therefore, there is no legal justification to terminate the use permit in July.

2. *There is No Evidence Supporting Revocation*

The Staff Report cites no evidence justifying the termination of the use permit. Even the neighbors' reasons for a "termination of the current use permit" fail to cite any use permit condition or zoning regulation that is currently being violated. (Staff Report, Exh. 1, p. 1.) Even the neighbors' generalized concerns about the size of the property and the nature of the use are addressed in correspondence dated November 15, 2016, from the property owner. (Staff Report, Exh. 5.)

The neighbor's third reason for terminating the use permit (future planning) is aligned with the three objectives identified in the Staff Report: revocation makes sense because the new tenant should have to comply with the area's existing zoning requirements. As stated above, this reasoning does not comply with longstanding rules regarding use permits applying to successor users. In addition, a change to the underlying zoning is not a ground to terminate a use or to revoke an existing use permit. (*Livingston Rock etc. Co. v. County of L.A.* (1954) 43 Cal.2d 121, 127 [businesses generally cannot be immediately terminated due to nonconformance with rezoning ordinances, because of the "hardship and doubtful constitutionality" of such discontinuance].)

Conversely, if there were evidence in the record supporting revocation, then the City *must* revoke the use permit immediately following tonight's Planning Board hearing. (City Code, § 30-24.2.) It cannot, as proposed by Staff, simply defer enforcement of the use permit for eight months until July 30, 2017. The City cannot have it both ways: either the use permit must stay in place unless and until the use violates the permit or the law, or the use permit must be revoked immediately if such violations currently exist.

**C. Permit Conditions Must be Reasonable**

Not only is the termination provision unlawful for the reasons above, it is important to remember that *any* condition of approval is subject to certain rules. It has long been the rule in California that conditions of approval imposed on a project be related to the impacts that the project will create. (*Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854; Gov. Code § 65909.) In this case, a lawfully operating business is subject only to new conditions relating to a finding that justifies the

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new condition – a change in the use of the property that creates impacts not addressed by the existing use permit conditions. (*Id.*) There is no stated legal or factual basis upon which this Board could impose a July 2017 termination provision upon the existing use permit that would withstand judicial scrutiny.

For the reasons set forth herein, the Planning Board cannot adopt Staff's recommendation to add a new condition to the existing use permit that mandates its termination on July 30, 2017. The City must respect the law regarding use permits and the rights of the permit holders and their successors in interest.

Very truly yours,



David H. Blackwell

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