

LARA WEISIGER

From: Jay <garsurg@comcast.net>
Sent: Monday, July 17, 2017 5:32 PM
To: LARA WEISIGER
Cc: Blackwell, David
Subject: Additional submission and Blackwell Brief re Agenda item 6-B - July 18,2017 City Council Meeting
Attachments: 1200 Park St. Rebuttal to Staff Report for 7-18 Council Mtg 7-17-17.pdf; Blackwell Brief -TBC_appeal_letter_to_Alameda_City_Council.pdf

Hi Lara,

I'm attaching what I hope will be our final submission for tomorrow's meeting.

I'm also attaching a copy of the Blackwell brief that you said you didn't receive.

Thanks again for your patience and assistance.

Jay Garfinkle

From: LARA WEISIGER [mailto:LWEISIGER@alamedaca.gov]
Sent: Monday, July 17, 2017 5:03 PM
To: 'Jay'
Subject: RE: Additional submissions re Agenda item 6-B - July 18,2017 City Council Meeting

Hi Jay,

All of your submissions will be distributed to the Council and posted. I have not seen David Blackwell's legal brief. If someone can send it to me, I will make sure it is distributed and posted.

As long as you send documents by 6:00 p.m. tomorrow, I will ensure they are posted and distributed. Additionally, documents can be submitted at the meeting. If you would bring something to the meeting, please provide 10 copies if possible.

Please feel free to contact me if you have further questions or need anything else.

Thanks,
Lara

Owner/Appellant Rebuttal to Staff Report for July 18, 2017 City Council Meeting

The Staff Report submitted for this Appeal before the City Council relies on the Administrative Record attached to this agenda item. The Owners contend that the Report intentionally and factually distorts the true historical record of events at 1200 Park Street in the hopes of persuading the Council to affirm the Planning Board's decision on May 8th to revoke the CUP. The Staff has been on a mission to end the current use of the property as a tire store and has shown it will stop at nothing to achieve its goal. This report is but one more example of their unfairness. Sometimes the distortion is an intentional omission, or an exaggeration or a self-serving subversion of the facts, while at other times it is just plain wrong. Accumulatively the reader is left with a different sense of reality compared to what the simple facts would show.

The items addressed are numbered (n) immediately preceding the Staff's version highlighted in yellow. The Owners' comments are beneath it in red with matching numbers.

Public Hearing to Consider Adoption of Resolution to Uphold the Planning Board Decision to Terminate the Use Permit for Automobile Repair at 1200 Park Street 60 Days After Final Action by the City Council. (Community Development 481005)
Body

To: Honorable Mayor and Members of the City Council

From: Jill Keimach, City Manager

Re: Public Hearing to Consider Adoption of Resolution to Uphold the Planning Board Decision to Terminate the Use Permit for Automobile Repair at 1200 Park Street 60 Days After Final Action by the City Council

BACKGROUND

(1) Over documented objections from residents living near 1200 Park Street--including a concern about the impact the use would have on parking in the neighborhood--the Planning Board, in March 1979, conditionally approved a use permit for an automobile tire repair services business on the property located at 1200 Park Street. See Exhibit 1 ("Ex. 1") at pps. 007-008. In an effort to address these concerns, the Planning Board at that time limited the term of the use permit to five years and imposed conditions requiring all automobiles serviced at the site be confined to the property itself, that parking of cars on the site be limited, that all work on the cars occur within the building, and that no cars be parked overnight on the property. Planning Board Resolution No. 1010 [Ex. 1, pps. 012-013.]

(1) The "documented objections" came from a total of 3 residents, the closest one lives 8 blocks (1/2 mile) away. Only one brought up the subject of parking. [EX. 1, 8]

In 1982 a franchisee of Big O Tires became the operator of the business and applied for a use permit to operate at the Park Street location. As part of the application process, planning staff

sent out notices to area (2) residents, who then submitted letters objecting to the City's granting a use permit for the business citing, for example, the parking problems in the neighborhood that the business had created and may continue to create. Ex. 1, pps. 014-028. The City determined, however, that the use permit issued in 1979 was still valid. Planning staff sent a letter to the operator summarizing discussions between staff and the operator that confirmed that the property must be used primarily to sell and install tires, that the use permit for tire sales/installation would expire in 1984 (but could be renewed), and that parking of vehicles must be restricted to the site. Ex. 1, pps 029-031.

(2) A total of 9 letters were submitted. None asserted that the current business had created any parking problem. Of the two that even mentioned the current parking situation (in 1979), one blamed it on the employees of other businesses on Park St. and the other said The Wrenhouse doesn't require on street parking. [Ex.1 pps 27-28]

Notwithstanding that the use permit was to sunset in 1984, the use was allowed to continue beyond 1984. In 1988, another use permit application was submitted to the City.

(3) As they had nine years earlier, residents who lived in the areas near the site objected to the City issuing another permit for this site. Ex. 1, pps. 032-039. They argued that the operators of the business had not complied with the 1979 conditions of approval, in particular the restrictions to parking serviced vehicles in the neighborhood because (3b) the number of cars being serviced greatly exceeded the number of cars that could be reasonably parked on site and the operator was parking cars to be serviced in the adjoining neighborhood, thereby making it difficult for residents to find on-street parking. The staff report to the Planning Board reflected the neighbors' concerns by pointing out that the number of on-site parking spaces for customers' cars were inadequate, causing those vehicles to be routinely parked on City streets, thereby reducing the on-street parking opportunities for the adjoining residents. Ex. 1, pps. 040-042. At the Planning Board's hearing, staff noted that the use had a impact on parking in the area and that a petition from residents objecting to the use permit had been submitted. Ex. 1, pps. 045-047.

(3a) There is no complaints about anything in the record for nine years. Of the 3 letters received in 1988/89, 1 letter complained about Big O using street parking while another protested working in the lot because it would reduce the available parking in the lot. This letter was accompanied by the now famous photograph showing The Big O truck being parked on Park Avenue. This single complaint is apparently the origin of the current CUP Condition #3 about "business vehicle(s). The 3rd letter did not mention parking. [Ex.1 pps 35-36]

(3b) There is no support for use of the word the "greatly" in the statement.

(4) The Planning Board conditionally approved a new use permit (Use Permit 88-36). To address the neighbors' complaints about the overflow parking impacting street parking, the Board imposed a condition requiring the operators to "find an alternative long term parking site for customer cars, as well as for employees" within 60 days. Ex. 1, pps. 058-059.

(4) The vote was unanimous, 5-0 in favor of the new Use Permit.

In May, 1990 Planning (5) staff sent a letter to the operator advising him that the use was not in compliance with the conditions of approval, in particular the continued parking of cars in the adjoining neighborhood and the failure to secure an alternative site to park cars to be serviced and to park employees' cars. Ex. 1, pps. 060-061.

(5) The letter did not say they were in non-compliance for "continued parking of cars". It said they were in non-compliance for parking the company's "business vehicle" on the street. This is the same distortion of the facts that Staff attempted to apply to the 2017 Notices of Violation. The difference is now they know they were wrong so this willful use of "cars" here is a blatant attempt to distort the truth.

Between 1990 and 2013, the Planning Department's (6) files do not reflect whether residents in the area continued to experience parking related issues associated with the business.

(6) The statement chosen attempts to cast doubt over the fact that there were no complaints for 23 years about parking. It wants you to think that maybe there were some but they can't find the files. The record to this point in 2013 is that over 34 years, a total of 15 complaints were lodged for various reasons, only 1 mentioned that there was a current parking problem.

In January 2013, however, Planning (7a) staff received a letter from an attorney representing a resident in the area, pointing out that the conditions of approval of the conditional use permit were being violated, including the business parking cars on City streets for long periods of time, thereby (7b) making it difficult for residents to find on-street parking close to their residences and/or parking cars on metered City streets, thereby taking up parking spaces intended for shoppers along Park Street. Ex. 1, pps. 062-065. The City continued to receive similar complaints about the operation of the business. Ex. 1 pps. 072-073; 076-091; 096-098.

(7a) The attorney did not represent an area "resident". He represented Mr. Art Thoms, the business owner of the Washboard Laundromat located across the street from 1200. [EX. 1, 62]

(7b) The letter only complains about parking in metered spaces because Mr. Thoms wants those public street metered parking spaces to be available for his customers. [EX. 1, 63]

The operators submitted an application on February 18, 2014 to amend the 1988 conditional use permit, including deleting the requirement that the operator find an alternative site on which to park its customers' vehicles, and allowing minor automobile repair work to be done outside of the structure. Ex. 1, pps. 099-102.

When the Planning Board heard the amendment to the use permit in July 2015 planning staff did not recommend eliminating that requirement, noting that the business' use of public parking spaces impacted the neighborhood and the operator should confine its operation to its own property because to do otherwise impacts the adjoining neighborhood and other businesses along Park Street. Ex. 1, pps. 131-136. (8a) Numerous letters and petitions signed by approximately

150 persons requested the Board deny the amendment to the use permit on grounds that customers' vehicles are parked throughout the neighborhood and on Park Street, making it very difficult for residents to find parking near their homes and impacting other businesses on Park Street. Ex. 1, pps. 105-130. In addition, (8b) at the Planning Board's hearing, about 23 speakers addressed the Planning Board, about half of whom were in opposition to allowing the use to continue in that location on grounds that the business negatively impacted parking in the surrounding neighborhood and along Park Street. Speakers in support of the use permit cited the operator's use of the valet service, the success of this Big O, and that the use of on-street parking by other businesses is not unique to this neighborhood. Ex. 1, pps. 141-146.

(8a) "Numerous letters" is actually 5. The petitions were circulated by Art Thoms [EX. 1, 143] who has a specific business interest to protect the metered spaces near the Landromat. There is no mention of the receipt of 500 form letters received in favor of Big O, the origin of which is not disclosed. [EX. 1, pps 107, 135-136]. The Minutes reveal a total of 171 petitioners against Big O and 518 letters supporting them. [EX. 1, 142].

(8b) The issue was not about allowing "...the use to continue...", it was approving or not approving Staff's recommendation to amend the CUP condition about finding an off-site parking lot. The Minutes list 9 speakers against Big O and 11 in favor of them but the statement puts wrongly puts the emphasis on those who were opposed to the change..

There is no mention of the request by Board Members Knox-White and Koster for Staff to conduct traffic and parking studies. [EX. 1, pps 145-146]

The Planning Board voted to continue the item in order to give the operator additional time in which to find an alternative site for the overflow parking. Following that meeting, the operator advised Planning staff that it had identified a site that would be large enough for the entire operation to locate there within two years. Planning staff re-noticed the public hearing on the amendment of the use permit for November 9, 2015. Ex. 1, pps.148-150.

In recognition that the operator had represented that a different location had been found on which to move the entire business operation, (9) the Board on November 9, 2015, amended the conditions of the Use Permit to require the operator continue its efforts to secure a long-term parking site for its customers' and employees' cars. Ex. 1, pps. 156-157; 160-161.

(9) The vote was unanimous, 7-0. [EX. 1, 157]

Nevertheless, in August 2016, planning staff received a petition from about 20 residents in the area of the business requesting a public hearing to review the use permit because of their long-standing position that the property was too small for this type of business and the overflow parking needs of the business continued to impact the neighborhood. Ex. 1 pps. 162-163.

The Planning Board conducted a public hearing on November 28, 2016, to consider the (10a) Planning staff's recommendation that the use permit be terminated. Ex. 1, pps. 184-189. Representatives from Big O Tires, who had an interest in continuing to conduct the business after the current operators left the site, and the property owner, requested the Board not terminate the

use permit without additional and current information that the conditions of approval were not being observed. Ex. 1, pps. 191-195; 177-181. The Planning Board agreed to that request and (10b) directed the Planning staff to continue to monitor the activities of the business concerning compliance with the conditions of approval and then schedule another public hearing in the spring of 2017. Ex. 1, pps. 194-195.

(10a) Staff's recommendation to terminate the permit was made before the Owner was ever contacted for their input.

(10b) Once again the Board asked Staff for a parking study, which was never done. [EX. 1, 194]

Thereafter, (11) Planning staff documented instances where the conditions of approval were not being observed, including employees of the operator parking customers vehicles on City streets. Ex. 1, pps. 203-207; 210.

(11) This is perhaps the most egregious distortion of the facts. Staff determined that only one condition (#3), not multiple conditions, was not in compliance and notified the Operator. When this Staff Report was written for this Appeal, it was understood by the City Attorney's Office, the Planning Department, including Mr. Thomas, and the Planning Board, that Condition #3 was only about "company business vehicles", which were not observed. Parking of customer or employee cars on the City streets is not a violation of any condition.

The Planning Board conducted another public hearing on May 8, 2017, to consider whether to terminate the use permit or to modify the conditions of approval in order to allow the use to continue. Ex. 1, pps. 255-261. (12a) After receiving documentary and considerable testimony from residents who chronicled the lengthy history of the operators not complying with the conditions of approval, receiving testimony and documentary evidence from the property owners and representatives of Big O Tires who urged the Board not to terminate the use permit, and discussing the matter at length. Ex. 1 pps. 230-254 and pps. 269-275 (12b) The Planning Board, as a practical matter, voted to terminate the use permit by modifying the use permit to include a condition that the use permit and non-conforming use of the property for auto repair shall terminate within 60 days of final action by the City of Alameda. Ex. 1, pps. 263-265.

(12a) There were 4 speakers who spoke in favor of Staff's recommendation to revoke the permit and 2 against it. One of the 4 was Art Thoms, who is not a resident, continuing his vendetta against the use. The "lengthy history" of non-compliance has never been established by the record, which shows only one Notice of Violation prior to 2017. The evidence presented by Mr. Thomas showed one photograph of one customer car, not a business vehicle, parked on Park Avenue. He later acknowledged that this was not a violation of Condition #3, the only Condition he accused the operator of violating. [EX. 1, 272]

(12b) "a practical matter" is an interesting way to describe the Owner being stripped their rights of Due Process; ignoring the rules of evidence for the violation asserted. The Planning Board chose to ignore the facts and deny the Owner Due Process in voting to terminate the use permit.

The property owner filed a timely appeal of the Planning Board's action. Exhibit 2. The grounds for appeal include (1) the taking of property rights, (2) lack of evidence of street parking problems caused by the use, (3) failure to provide notice (of the violations) to the property owners and (4) failure to document violations of the conditions.

DISCUSSION

The Alameda Municipal Code does not allow this type of use on Park Street and has not allowed this type of use for many years. This property is zoned Community Commercial (C-C) and the Zoning Ordinance provides the property owners with a wide range of uses that are consistent with the property's zoning, any one of which will provide the owners with a viable, economic use of the property. Planning staff has advised the property owners of their options both verbally and in writing. (Ex. 1. P 164.) Termination of this particular use permit has no bearing on the property owners' rights to use the property consistent with the Alameda Municipal Code, the same as any other Park Street property owner. Accordingly, (13) there is no merit that terminating this use permit rises to the level of a taking of property rights or is otherwise fundamentally unfair.

(13) Revoking the CUP by not following the rules of Due Process prevents the Owner from exercising their legal right to continue to use the property as it has been used for the last 38 years. Accordingly, the City's illegal act amounts to a taking of our property rights. It also interferes with our ability to close the sale which was in contract 7 months before the petition was filed.

Second, the (14a) records that go back nearly 40 years provide compelling evidence the operators of this business have failed to comply with the conditions of approval and it is not realistic to believe, given the nature of the business, that if the use is allowed to continue, a new operator will not park customers' cars on City streets. For example, when this use was originally before the Planning Board (14b) in 1979, adjacent residents objected to the use, fearing-as it turns out correctly-that the use would negatively impact parking in the neighborhood. In an effort to address those concerns, the 1979 Use Permit for the property clearly stated that the business should not be parking customer vehicles in the neighborhood and that the cars should be contained on-site.

(14a) This is hardly "40 years of compelling evidence" when only one Notice of Violation was involved over that course of time. [EX. 1, pps 60-61]

(14b) In 1979 a total of three residents, the closest of whom lived one-half mile away argues against allowing the use and only one of these mentioned parking. The Owners fail to see how this rises to the alarming level of "compelling evidence". It is barely a footnote. [EX. 1, 8]

(15a) By 1989, the failure of the operators of the business to comply with the conditions of the use permit was well documented. At the Planning Board's 1989 public hearing, the Board discussed the violations of the use permit and modified it to require that the operators acquire an off-site lot to park vehicles to be serviced. Within a year, (15b) Planning staff, in response to continued complaints from the adjacent residents, had to send communications to the operators

about their continued lack of compliance with the use permit conditions. (15c) Years later, Planning staff received complaints from neighboring residents complaining about the City's lack of enforcement of the conditions of approval and documenting continuing violations of the use permit conditions. Moreover, (15d) by 2013--fourteen years after the operators were to find an alternative site to park vehicles to be serviced--the operators had still not purchased or leased such a site and, in violation of the use permit, continued routinely to use City streets to park customers' vehicles, to the detriment of the neighboring residents.

(15a) "By 1989" reflects straight 10 years since the 1979 permit was issued of no documented complaints, and there had not been any Notices of Violation.

(15b) There is no record of "continued complaints" from anyone. The single Notice of Violation in 1990 made no reference to "continued lack of compliance". The two conditions cited were new as of 1989.

(15c) "Years later" is 24 years! and the complaints from "neighboring residents" is only from Art Thoms, the business owner across the street and his attorney, hardly "neighboring residents".

(15d) If the purported violations were so onerous, why didn't the City issue Notices of Violation? Could it be that there were no complaints because there is no significant parking problem?

Third, (16) the property owners' claim that they have received insufficient notice about these matters is without merit. Over the course of the past two years, the property owners have been fully engaged in the Planning Board's discussions and deliberations. In July 2015, and again in November 2015, the Planning Board held public hearings to discuss the violations. One of the property owners attended the July 2015 meeting and assured the Planning Board that the parking problems would be resolved. The property owners and their representatives were also at the November 2016 Planning Board public hearing, where they argued against staff's recommendation to terminate the permit. Finally, the property owners and their representatives attended and spoke at great length at the May 8, 2017 public hearing, again urging the Planning Board not to terminate the use permit.

(16) Being involved with Staff as the Owners have been, is not the same thing as getting timely notices of important events or official actions taken by the City. The Staff sat on the August 2016 petition for 10 weeks before the Owners accidentally learned of its existence. By then, Staff has already determined it wanted to revoke the CUP when the current tenant's lease expired in 2017. This deprived the Owner of any opportunity to tell their story.

Staff mailed the two Notices of Violations to the Property address and not to the Owner of the Property, knowing full well we don't live there and that the tenant was incentivized to violate the CUP in order to prevent competition from taking over their location when they moved. When the Notices were returned by the Post Office, no one did anything to inform the Owner of their existence. As in the case of the Petition, we learned about the first Notice by accident almost two

weeks after it was mailed and we learned of the 2nd, dated February 27th on May 4th from the Staff Report, days before the May 8 Board meeting.

The Owner learned of Board meetings by word of mouth from either casual conversations with Staff or from Big O after they had been informed by Mr. Thomas. Staff never contacted the Owner directly about these or later date changes.

The property owners also take issue with the staff's January and February 2017 violation letters which reference a violation of "Condition #3", which condition provides the "business vehicle(s) shall be stored on the site, not on adjacent residential streets". But as made clear in the letters, the violations occurred because employees of the business had parked customers' cars on, and then retrieved the cars from, City streets in order to service the vehicles at the business. The inspection logs that accompanied the violation letters also reflect instances where employees are retrieving customers' vehicles parked along Jackson Park in order to return them to the business to be serviced. Ex. 1 pps_203-207. That activity has been the main objection of the residents for 40 years. Accordingly, even if (17) the January and February 2017 violation letters erred in the condition reference, the failure of the operators either to secure or to use an alternative site on which to store customers' cars-which is also a condition of the use permit-had routinely occurred in the past and was observed by staff in January and February 2017.

(17) Despite admitting that he cited a condition that is only about "business vehicles", and that his evidence failed to show any business vehicle parked on nearby streets, this report prepared by Mr. Thomas completely undermines the fundamental rights of Due Process, as if they are immaterial. Former Assistant City Attorney spoke at the November 28, 2016 PB meeting and stated, "revocation hearings are... where Due Process requirements, where evidence is presented and then you decide to revoke the Use Permit or not." Condition #2, though not cited, nonetheless does not require using the alternate site to be in compliance nor does it prohibit the use of street parking. It requires that the City be notified when "a site is secured" and this was done in 2015. If the City wants to issue accuse the Operator of not being in compliance with a different condition, Due Process requires a Notice of Violation citing that specific condition.

In conclusion, (18a) there is substantial evidence in the record to support the Council's decision to terminate this use permit. The use of the property as conditionally approved in 1979, and later in 1988, is not appropriate in that the operators failed over the course of 40 years to satisfy the conditions of approval, notwithstanding the commitments from the operators of the business and the property owners that the conditions would be met. In particular, (18b) the inability to secure an off-site location on which to park customers' vehicles to be serviced has led to an adverse impact on those vehicles being parked on City streets, thereby exacerbating what is already a parking shortage. Accordingly, not only is the current use not consistent with the Zoning Ordinance but it also (a) is not proper in relation to adjacent uses, (b) is materially detrimental to the character of the immediate neighborhood and (c) the conditions of approval that were intended to protect the best interests of the surrounding neighborhood have not been observed.

(18a) The report continues to distort the record. On three occasions, 1979, 1989 and 2015, the PB took up the matter and voted unanimously each time to approve the permit and stated each time that the “use is compatible”. Over 38 years, until the recent debacle, there exists only one Notice of Violation in the record.

(18b) An off-site location has been secured and the Planning Department was notified in 2015. Staff is in no position to make any official statement about a parking shortage as it failed on multiple occasions to do any kind of study as requested by the PB. In the absence of any City directed parking study, the Owner submitted two photographic studies totaling 33 visits to the area, documenting averages of 32 and 35 available spaces during the tire stores operating hours. Even Mr. Thomas admitted at the May 8th meeting, “Every time I observed it, they (the Operator of 1200 Park Street) were able to find a parking space for those cars though, right on Park Ave. They weren’t driving 3 or 4 blocks away. They were parking right on Park Ave., retrieving cars from Park Ave., around the park”.

Moreover, (19a) It is not realistic to think a different operator, especially a successful one, will not be faced with the same challenge. Planning staff cannot be expected to monitor the activities of this use on a daily or weekly basis to ensure compliance. (19b) It is within the Council’s authority to terminate this use permit and termination of the use permit does not affect the property owners’ rights to use the property consistent with the Alameda Municipal Code.

(19a) It is unrealistic and unfair to assume that all parties will act the same under the same set of circumstances. As to Big O taking over this location, the volume of cars being serviced will be significantly reduced on day one, perhaps by half. As property owners with a financial interest in the store as well as the property, they have the incentive and resources to comply with whatever conditions are imposed on them.

(19b) Terminating the permit by the means being used through these proceedings is not consistent with the laws of the State of California and amounts to a taking of property rights.

A notice for this hearing was mailed to property owners and residents within 300 feet of the project site, published in the Alameda Journal and posted at the subject property.

Staff supports the Planning Board’s decision to terminate the use permit and ensure that all future uses of the site be consistent with the requirements of the Alameda Municipal Code. Staff recommends that the City Council uphold the Planning Board’s decision to terminate the use permit.

FINANCIAL IMPACT

(20) There is no financial impact on the General Fund by adopting a resolution to terminate the use permit; the property owner has paid the processing fees for the appeal.

(20) If this property cannot be used for a tire store, it could sit vacant for a long period of time, denying the City revenue from business and sales taxes, not to mention being a blight on the neighborhood.

MUNICIPAL CODE/POLICY DOCUMENT CROSS REFERENCE

General Plan Land Use Element policies support pedestrian friendly retail on Park Street and support efforts to minimize commercial off-site impacts on adjacent residential uses.

The Alameda Municipal Code/Zoning Ordinance prohibits automobile repair business on Park Street facing properties in the Park Street CC Community Commercial District.

ENVIRONMENTAL REVIEW

Terminating the use permit is Categorically Exempt from additional environmental review pursuant to California Environmental Quality Act (CEQA) Guidelines, Section 15321-Enforcement Action by a Regulatory Agency.

RECOMMENDATION

Hold a public hearing to consider adoption of resolution to uphold the Planning Board decision to terminate the Use Permit for automobile repair at 1200 park street 60 days after final action by the City Council.

Respectfully submitted,
Debbie Potter, Community Development Director

By,
Andrew Thomas, Assistant Community Development Director

Financial Impact section reviewed,
Elena Adair, Finance Director

Exhibits:

1. Administrative Record Concerning the Use Permits for 1200 Park Street
2. Petition for Appeal dated May 15, 2017

Allen Matkins

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Via Electronic Mail

July 13, 2017

City of Alameda City Council
2263 Santa Clara Avenue
Alameda, CA 94501

**Re: July 18, 2017 City Council meeting
Agenda Item 6-B: 1200 Park Street UP Revocation Appeal (PB-17-07)**

Dear Council Members:

On behalf of Big O Development, LLC, we submit the following comments with regard to the above-referenced Agenda Item. Big O supports the petition for appeal filed by the owners (Garfinkle) of the above-referenced property.

On May 8, 2017, by a 4-3 vote, the Planning Board adopted Resolution No. PB-17-07 to revoke the subject property's use permit (UP-88-36) while giving the alleged violator tenant time to complete its planned relocation to a competing site. This action is unlawful and must be reversed by this Council. There is no legal basis to terminate/revoke the use permit, either under the terms of the use permit or under the applicable law.

Big O strongly supports this appeal. Once Big O purchases the property from the owners, Big O will continue the automotive repair use on the site and has consistently assured the City that it will comply with the terms of the existing conditional use permit (sometimes referred to herein as "CUP"). Unlike the current tenant, Big O will own and operate the facility.

I. BACKGROUND

A. November 28, 2016 Planning Board Meeting

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." (AR 162-163.) 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." (AR 162.)

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."

(AR 187.)

To support these stated objectives, Staff recommended that the 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.'" (AR 188.) At the conclusion of the November 28 hearing, the Planning Board directed Staff to conduct 4-6 site visits to monitor violations and to provide potential noise-related conditions for the Board to consider. (AR 194-195.)

B. May 8, 2017 Planning Board Meeting

On March 20, 2017, Big O emailed to planner Andrew Thomas proposed revisions to UP-88-36 to address the concerns raised during the November Planning Board meeting, including noise. Two days later, Rick O'Neil from Big O met with Mr. Thomas to discuss the proposed amendments. (AR 215.) Mr. Thomas asked Big O to include an enforcement provision, which Big O drafted and provided to Mr. Thomas on April 6, 2017. (AR 215-22.)

Big O did not receive any comments from City Staff until the Staff Report from the May 8 meeting was distributed to the public. In that Staff Report, Mr. Thomas claimed that Big O's offered enforcement section "creates an unworkable enforcement mechanism that is to the favor of Big O." (AR 258.) Although Staff apparently held this belief as soon as it received Big O's April 6 proposal (AR 215), it was never communicated to Big O until the Staff Report was published a month later.

The Staff Report also stated for the first time that "staff does not believe adding new or modified provisions, or deleting conditions, to the old use permit will resolve the problems associated with this use on this site." (AR 259.) Staff did not propose any noise-related conditions, as requested by the Planning Board, and as provided by Big O.

In response to the Planning Board's direction from November 2016 to identify current violations of the use permit, Staff claimed that it found two violations based on 3 (not the requested 4-6) site visits. (AR 257.) On January 19, 2017, the City issued a Notice of Violation to the tenant, claiming that:

On December 27, 2016, and again on December 28, 2016, an Alameda city official conducted an inspection of your business at 1200 Park Street and witnessed and photographed violations of your use permit. The Alameda city official observed your staff retrieving customer cars on Park Avenue and driving them to 1200 Park Street, in violation of condition #3.

(AR 203.)

A similar Notice of Violation, alleging the same violation, was issued on February 27, 2017. (AR 210.)

Condition #3, however, does *not* refer to customer cars. Instead, it provides, in full: "Applicant's business vehicle(s) shall be stored on the site, not on adjacent residential streets." When the Planning Board informed Staff that "customer cars" were different than "business vehicles," Mr. Thomas reversed course and stated it was actually Condition #2 that was violated, even though that condition was never referenced in either Notice of Violation or in the Staff Report.

Moreover, Condition #2 does not prohibit the permittee from retrieving cars parked offsite. Instead, Condition #2 provides in full:

The applicant shall continue to work to locate and secure a long-term parking site for customer cars, as well as for employees. Once a site is secured, the applicant shall notify the Community Development Department that this condition has been fulfilled.

Therefore, the *only* identified reason for revoking the use permit was based on Staff's misreading of the use permit and two flawed Notices of Violation resulting therefrom.

When some Planning Board members raised questions regarding the validity of the Notices of Violation and the ability to revoke a use permit based in faulty findings and evidence, the City Attorney opined that the Board should "look at the totality of violations" instead of the actual text of

the use permit or revocation Resolution. Some Planning Board members, as well as the City Attorney, believed that the City could discern the 1989 use permit's "intent" instead of its actual text and conditions.

The Planning Board then voted 4-3 to support the amendment/revocation of the use permit, thereby giving the tenant that purportedly violated the use permit the ability to continue operations for another two months before relocating to a competing site in the City. This action effectively prevents Big O from establishing its tire center on the site and thereby punishes the wrong party.

On May 15, 2017, the owners timely filed a petition for appeal.

II. THE PLANNING BOARD'S REVOCATION PROCEEDINGS WERE LEGALLY FLAWED

A. Applicable Standards for Use Permit Amendment/Revocation

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.)

"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.*)

The Staff Report fails to appreciate this stark difference between granting a CUP and revoking a CUP. It concludes by citing (at p. 3) the standards for granting a CUP (*e.g.*, compatibility with surrounding uses), which are irrelevant here. The draft Resolution makes the same error. 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).) In this case, the *only* evidence in the record that the current user failed to comply with the terms of the use permit is erroneous. Therefore, there is no legal justification to terminate the CUP.

B. Inconsistency with Zoning is Not a Legal Basis for Revocation

Before we address Staff's references to the wrong use permit condition of approval as the basis for revocation, it is important to understand perhaps the driving reason for the use permit revocation. As summarized in the May Staff Report (emphasis added): "Staff is recommending that the Planning Board revoke the use permit in its entirety **because the use is not consistent with the underlying zoning requirements for the site**, and as documented in Exhibit 1, the use has consistently violated the conditions of approval for this use on this site."

As stated above, this reasoning does not comply with longstanding rules regarding protecting the due process rights of use permit holders and their successors. 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]; see also *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal. App. 2d 776, 791: "where a permit has been duly and regularly issued and rights have vested thereunder, the adoption of a zoning ordinance prohibiting the permitted use of the property does not *ipso facto* revoke the permit. The amendments may not be given retroactive effect.")

The current Staff Report appears to have backed off from this argument, and has refashioned it as support for its argument that the Planning Board's action is not a regulatory taking. Staff also claims, however, that because the current zoning does not allow the current use, terminating the use permit is not "otherwise fundamentally unfair." (Staff Report, p. 2.) As stated above, using an inconsistency with current zoning regulations as a basis to revoke a use permit is unlawful and "fundamentally unfair."

C. The Only Use Permit Violations Cited By Staff Were Erroneous

As explained in section I.B. above, Staff cited, and the Planning Board relied upon, erroneous violations of conditions of approval in order to revoke the use permit. In fact, the record is bereft of a clear statement regarding existing violations of a particular condition of approval. The City cannot gloss over the actual use permit conditions and instead rely on vague references to the "intent" behind the 1989 use permit. As set forth in section II.A. above, the City must make express findings supported by evidence in the record supporting revocation. The City failed to do so here.

In *O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal. App. 3d 151, 164, the court reversed the revocation of a validly issued use permit because the decision was based on erroneous findings unsupported by evidence. The court held that the use permit could not be revoked without facts supporting a compelling public necessity or findings relating to violations of actual permit conditions. (*Id.* at 160.) Just as in *O'Hagen*, the City has not established or alleged any breach of actual permit conditions. The City's decision, instead, was based on erroneous facts that cannot logically lead to a conclusion that any permit conditions were violated.

The current Staff Report claims that even though the wrong condition was relied upon in both Notices of Violation, the Notices "made clear" that the "violations occurred because employees of the business had parked customers' cars on, and then retrieved the cars from, City streets in order to service the vehicles at the business." Again, the Staff Report fails to identify which condition was violated. Condition #3 clearly does not apply, and Condition #2 only requires the permit holder to "continue to work to locate and secure a long-term parking site," and does *not* expressly prohibit the parking of customer cars offsite.

The Planning Board's actions not only conflict with the property owner's due process rights, they constitute an abuse of discretion because the Board's decision was not supported by proper findings, nor was there evidence in the record to support such findings. (Code of Civil Proc. § 1094.5; *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) As such, the Planning Board's decision must be reversed.

D. Use Permits Cannot be Amended to Terminate Upon a Later Date to Coincide with a Change of User

Finally, the Planning Board's action to delay termination of the use permit until the alleged violator tenant moves to a new location to continue its business is unfair and unlawful. It is unfair because it rewards the current user while punishing the subsequent user/owner (Big O) that had nothing to do with the alleged violations. In addition, but scorching the earth as it leaves, the current tire operator will effectively eliminate competition from Big O by killing Big O's plans to locate at 1200 Park, which would be a disservice to tire customers in the City.

Delaying termination of the use permit is unlawful for several reasons. First, the existence of a use permit cannot be based on the identity of the end user. The termination of the use permit is expressly tied to the departure of the current user. In fact, a prior Staff Report's purported "objective" supporting the use permit termination was based on the change in tenants. 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.) Imposing a condition that prevents the permittee from transferring rights under a use permit upon sale of the land is unlawful. (*Id.* at 858.) "Such a condition, if imposed, is beyond the power of the zoning authority, and void." (*Ibid.*) But that is the effect of the Planning Board's action: the use permit has been modified to terminate upon the change of user.

The second reason that termination of an existing permit by a date certain is unlawful is because it violates due process. "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.)¹ "A municipality's power to revoke a permit is limited. A conditional use permit may not

¹ The owners' appeal states that they did not receive proper notice, and during the Planning Board

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.*)

Revoking the use permit in this case, but delaying the revocation for 60 days for no reason other than to give the current user the ability to continue violating the use permit before moving to a new site, is the epitome of an arbitrary action for which no evidence is offered to support. The current Staff Report refers to decades of violations on the site, yet the City never revoked the use permit. To do so now, just as the alleged violator is leaving anyway, is an abuse of discretion.

Third, the proposed action violates the City Code. If there were evidence in the record supporting revocation, then the City was required to immediately revoke the use permit. (City Code, § 30-24.2.) It cannot, as proposed by Staff, simply defer enforcement of the use permit for 60 days to allow the current tenant to continue to operate in the same manner before it relocates to another site in the City.

III. THE STAFF REPORT'S CONCLUSION HIGHLIGHTS WHY THE APPEAL MUST BE GRANTED BY THIS COUNCIL

Staff concludes that there have been 40 years of failure to meet the use permit's conditions. Staff does not explain why those failures did not result in revocation of the use permit, or why it allowed the alleged failures to continue for decades without remedial action. Only now -- on the eve of the alleged violator's move to a new location -- do Staff and the Planning Board insist that the use permit be revoked. This is the epitome of an arbitrary and capricious action, and certainly constitutes an abuse of discretion.

With regard to some of the Staff Report's particular conclusions, Staff claims that the inability to secure an off-site parking location for customer vehicles "has led to an adverse impact on those vehicles being parked on City streets, thereby exacerbating what is already a parking shortage." The record contains no evidence of a "parking shortage" or any evidence about how customer cars create an impact that differs from any other retail establishment in the area, all of which involve customers parking their cars in the nearby streets.

The Staff Report then again repeats its erroneous complaint that "the current use is not consistent with the Zoning Ordinance," and then again vaguely cites the standards for granting a use

hearing, the owners explained that they did not receive copies of either Notice of Violation, and therefore had no opportunity to cure the alleged violations. The Staff Report only addresses the adequacy of the public hearing notices, and not the inadequacy of the NOV's.

Alameda City Council
July 13, 2017
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permit instead of those for revoking a use permit. Furthermore, the *critical* finding for revoking a use permit – failure to comply with a condition of approval – is not met as there is no explanation as to how any condition of approval was violated.

Finally, Staff claims that "it is not realistic to think that a different operator, especially a successful one, will not be faced with the same challenge." Staff makes this claim despite categorically refusing to consider Big O's recent proposed new conditions and its discussion of how it operates its business differently from the current operators.

Staff then claims that it "cannot be expected to monitor the activities of this use on a daily or weekly basis to ensure compliance." The basis of this complaint is unclear: the City approved the use permit decades ago. The City's responsibilities and duties regarding compliance have not changed, as the conditions have not fundamentally changed. If Staff is simply tired of monitoring compliance with a use permit that was duly issued by the City, that is not a legally adequate basis to revoke a use permit.

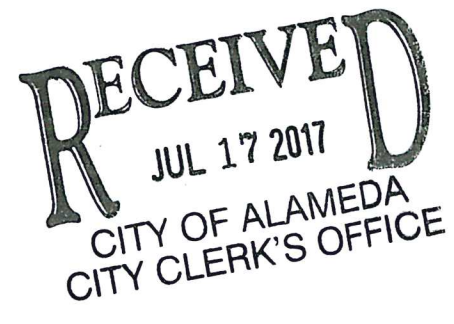
In sum, the law zealously protects existing use permits, and allows their revocation only if a specific condition is violated (and the violator is duly notified of the violation) or if the use constitutes a public nuisance. That has not happened here. Instead, the Planning Board relied on a flawed Staff Report in adopting a flawed Resolution, the effect of which does nothing to address the problems purportedly causes by the current user. Instead of prolonging a procedurally and substantively flawed decision, this Council should grant the appeal and provide Big O with an opportunity to replace the current user and to fully satisfy the use permit's conditions.

Very truly yours,



David H. Blackwell

July 13, 2017



Alameda City Council
City Hall
2263 Santa Clara Avenue
Alameda, CA 94501

Subject: 2017-4492
1200 Park Street, Alameda
Big O Tires site

Ladies and Gentlemen:

We are neighbors and customers of the former Big O Tires and current Big Discount Tire Pros. We respectfully request that the Alameda City Council uphold the Planning Board decision to terminate the conditional use permit for an automotive business at 1200 Park Street due to years of non-compliance with conditions of the permit by Big O Tires. We have attached our December 15, 2016, letter to the Planning Board, which is relevant to your upcoming decision. The following paragraphs present additional reasons for terminating the use permit.

The customers' cars at an automotive repair business such as Big O Tires are very different from customers' cars at other Park Street businesses. The cars are not at the business as a result of having transported shoppers or diners to the business. The cars themselves are the object and the product of the business's work. The cars are at the business for an industrial purpose and should not be parked on Park Street or in the surrounding neighborhood while waiting for the work to be done and waiting for their owners to retrieve them.

At the May 8, 2017, Planning Board hearing, former Big O franchisee Guido Bertoli testified that he and his partner Gary Voss ceased being Big O franchisees after Big O's corporate office repeatedly told them to delay searching for a new location with adequate parking space. In doing so, Big O's corporate office encouraged its Alameda franchisees to continue violating the conditional use permit. This flagrant disregard for City permit conditions does not reassure us that Big O Tires would comply with any conditional use permit in the future.

Because the business at 1200 Park Street is no longer Big O Tires (and the current operators have off-site parking on Oak Street), recent documentation of violations of the use permit and counts of available parking spaces in the surrounding neighborhood are not representative of Big O's past practices or predictive of its potential future practices. The decades of documented violations of the use permit during Big O's tenure provide evidence that Big O would likely violate permit conditions in the future.

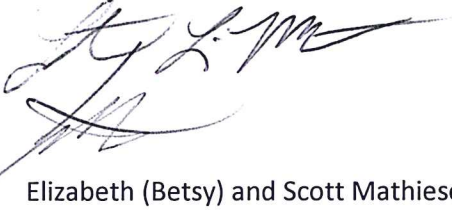
July 13, 2017

Page 2

At the May 8, 2017, Planning Board hearing, Rick O'Neil, Big O's Western Division Vice President, proudly stated that 1200 Park Street was the most profitable Big O store in the country during Big O's tenure at the site; the Alameda location serviced an average of 65 cars per day, compared with a national average of 24 to 25 cars per day per store. Mr. O'Neil was "amazed" that the location could achieve that volume "on such a small footprint." He ignored the fact that the footprint actually extended up and down San Jose Avenue and along both sides of Park Avenue. An historic business district adjacent to an historic residential neighborhood fronting Alameda's oldest city park is not an appropriate setting for the nation's largest-volume location of any automotive repair business.

We encourage you to revoke the conditional use permit for 1200 Park Street due to non-compliance by Big O Tires. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth and Scott Mathieson", written in a cursive style.

Elizabeth (Betsy) and Scott Mathieson
1185 Park Avenue
Alameda, CA 94501
(510) 523-5852

Attachment

COPY

December 15, 2016

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

Subject: PLN14-0134 - 1200 Park Street, Alameda
Big O Tires site

Ladies and Gentlemen:

We respectfully request that the City of Alameda Planning Board revoke the conditional use permit for an automotive business at 1200 Park Street due to years of non-compliance with conditions of the permit. As documented in the meeting materials for the November 28, 2016, public hearing, over the years your board has imposed the following conditions on use permits for the legal non-conforming automotive use at the site:

- 1979 (Use Permit No. 79-3): "That Parking be restricted to the approved site plan and those spaces marked."
 - In 1982 (Letter from City Zoning Administrator), this condition was reiterated to Henry C. Cohen before he opened his tire sales and installation business at the site.
- 1989 (Use Permit UP-88-36 issued for Big O Tires and sent to Henry C. Cohen): "Within 60 days... applicant shall find an alternative long-term parking site for customer cars, as well as for employees."
 - In 1990 (Letter from Planning Department), the Planning Department warned Mr. Cohen that the Department had "no record of the leasing of additional parking for customer cars as required..." and the business was out of compliance with the conditions of the use permit.

According to the draft resolution prepared for the November 28, 2016, public hearing:

- In 2013 Big O tires reported that it was unable to find an off-site parking lot and had implemented a valet service to minimize street parking.
- In 2014, Big O submitted an application to amend the use permit by removing the condition related to an off-street parking lot. The application was subsequently suspended.

In 2015 two public hearings were held, with neighboring residents and at least one business owner asking that the use permit be revoked for non-compliance with conditions including provision of adequate off-street parking. At the hearing, representatives of Big O Tires asked the neighbors to be patient because they were negotiating to move to a new location, at which time the impacts on the neighborhood would end.

December 15, 2016

Page 2

In late 2015 or early 2016 the business at 1200 Park Street ceased to be a Big O Tires franchise, changed its name to Big Discount Tire Pros, and prepared to move to 1835 Oak Street. We and our neighbors breathed signs of relief in anticipation of the departure of the tire business.

Now, after decades of non-compliance with the conditions of its use permit, Big O Tires plans to buy the property at 1200 Park Street and open a new tire business. A November 14, 2016, letter from Jay Garfinkle, representing the owners (prospective sellers) of 1200 Park Street, stated, "the business in question has been operating successfully at this location for nearly thirty five years. The site is clearly not too small for 'this type of business.'" The letter continued, "our tenant has.. acquired an additional property where vehicles can be parked if and when needed and is, therefore, in compliance with the element of the CUP..."

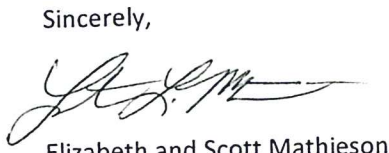
At the November 28, 2016, public hearing, a representative of Big O Tires described how tremendously successful the 1200 Park Street location has been over the years and implored your board not to force Big O Tires "to leave Alameda."

Clearly the business owes its profitability in no small part to its lack of compliance with its use permit. As neighbors we witness daily the tire store employees arriving to work and parking along Jackson Park, returning time after time throughout the day to park and retrieve and repark and retrieve customers' cars, and returning to their own cars at the end of the work day. The idea of using valet parking "if and when needed" acknowledges that valet parking won't be used until all on-street parking spots are full, shutting out residents, customers of other businesses, and users of Jackson Park who arrive by car.

Big O Tires has *already* left Alameda, after decades of non-compliance with its use permit. If Big O Tires returns to Alameda it will be in direct competition with the relocated Big Discount Tire Pros on Oak Street. With two large tire businesses in the Park Street area, Big O Tires would find it even more difficult to be profitable without continuing to violate the conditions of the use permit and without continuing to impact the surrounding neighborhood.

We encourage you to revoke the 1200 Park Street conditional use permit due to non-compliance. Thank you for your consideration.

Sincerely,



Elizabeth and Scott Mathieson
1185 Park Avenue
Alameda, CA 94501
(510) 523-5852



LARA WEISIGER

From: Jay <garsurg@comcast.net>
Sent: Monday, July 17, 2017 4:20 PM
To: LARA WEISIGER
Subject: Additional submissions re Agenda item 6-B - July 18,2017 City Council Meeting
Attachments: 1200 Park St. Alternate Resolution for Council 7-17-17.pdf; 1200 Park St. Annotated Due Process Final for Council 07-17.pdf; 1200 No Parking Problem Council Mtg w-photos 7-18-17 r1.pdf

Importance: High

Hi Lara,

I've attached three items that I'm hopeful can be included in the Council's document file for tomorrow night's meeting. I apologize for sending them at this late hour. Unfortunately, we still have one more to submit.

Can I expect all submissions, including the ones I'm sending now to show up in the on line Agenda? And will they reach the Councilmembers in advance of the meeting? I note that David Blackwell's legal brief which he submitted last week does not appear among the Exhibits in the Agenda found on line. Have the members of the Council received his brief?

Is there a cutoff time by which you must receive submissions in order for them to reach the Council in time to be reviewed for the meeting?

Thanks.

Jay Garfinkle
510-421-5071 cell

1200 Park Street Appeal Before the city Council
July 18, 2017

The Appellant is submitting an Alternate Resolution to the one presented by Staff. It has been prepared to more accurately reflect the historical foundation leading up to the Council's decision. It is the Appellant's belief that the Staff's version is bias and self serving and does not fairly reflect the historical record. This Alternate Resolution cites the Administrative Record to corroborate its accuracy.

Thank you for your consideration.

City of Alameda Resolution No. _____

A RESOLUTION RENEWING AND CONTINUING
USE PERMIT 88 – 36 AND THE NON-CONFIRMING USE
OF THE PROPERTY AT 1200 PARK STREET, ALAMEDA,
CALIFORNIA.

WHEREAS, the Planning Board, on March 19, 1979,
on a 7 to 0 vote, conditionally approved a use permit for an
automobile tire repair services business on the property
located at 1200 Park Street, with a finding that the proposed
“use” was consistent with the prior use, with a term of the
use permit being for five (5) years and imposing conditions
requiring all automobiles to be serviced at the site to be
confined to the property itself, that parking of cars be on the
site, that all work on the cars occur within the building, and
that no cars be parked for extended periods or for sale on the
property; and

WHEREAS, in 1982 against opposition primarily focused
against “uprooting” the existing auto repair shop,
“Wrenchouse”, a franchisee of Big O Tires became the
operator of the business and applied for a use permit to
operate at the Park Street location. City staff determined
that the use permit issued in 1979 was still valid and
confirmed to the operator that the property must be used
primarily to sell and install tires, that the use permit for tire
sales/installation would expire in 1984 (but could be
renewed), and that parking of vehicles be restricted to the
site; and

WHEREAS, in 1988, an application for renewal of the use permit for the same use was submitted to the City; and

WHEREAS, five residents in the areas near the site and a landlord objected to the City's issuing a renewal for this site, based on assertions that there was inadequate parking in the adjoining neighborhood, thereby making it difficult for residents to find on-street parking; and

WHEREAS, the Planning Staff recommendations found that the use was "compatible with the other land uses in the general neighborhood" and that "the site ... will have adequate parking provided in the vicinity" and thus Staff recommended approval of the use permit; and

WHEREAS, on January 30, 1989, the Planning Board conditionally approved a renewal of the use permit (UP - 88 -36) and to address the residents' complaints about the overflow parking impacting street parking, the Board imposed a condition requiring the operators within 60 days to "find an alternative long term parking site for customer cars, as well as for employees"; and

WHEREAS, some 18 months later, on May 10, 1990, Planning Staff sent a letter to the operator advising him that the use was not in compliance with the condition of the approval, in particular the parking of "business vehicle(s)" (Condition #3 of the UP - 88 -36) in the adjoining neighborhood and Condition #2, the lack of evidence in the Planning Department's files of a lease for alternative long-term parking for customers cars and employee cars; and

WHEREAS, on June 22, 2011, the City of Alameda Transportation Commission found that the residents around Jackson Park on San Jose Avenue made it clear to the Commission that there was more than enough parking in their vicinity and that they opposed turning a red zone at the Park on San Jose Avenue into more parking spaces as had been proposed by the Public Works Director. The Commission supported the residents and found that there was ample existing parking and thus not necessary to create more; and

WHEREAS, thereafter in January, 2013, Planning Staff received a lengthy letter from an attorney representing Arthur “Art” Thoms, the laundry business owner across the street from the 1200 property, asserting that the conditions of approval of the CUP were being violated, including Big O not securing offsite parking for “employees, staff and customers”, and thus “saturating metered parking at peak periods”. In support of Big O’s CUP 88-36, the contiguous neighbor on the San Jose Avenue side, wrote on March 8, 2013 (Administrative Record (“AR”) pages 066-067) that “without exception, Big O management and employees have been nothing but the best of neighbors for all of those 23 years” (that she has lived there); and

WHEREAS, thereafter Mr. Thoms, his attorney and the attorneys for Big O; Wendel, Rosen, Black, and Dean, of Oakland; engaged in some thirty (30) pages (of the Administrative Record, pages 068 – 097) of back and forth; and

WHEREAS, the Planning Department on January 29, 2014, sent a letter to Art Thoms (AR 098) explaining that Big O would be making application for an Amendment to the CUP and that there would be a hearing before the PB to “address the issues at hand”; and

WHEREAS, the operators submitted an application to Amend the 1988 CUP on or about February 13, 2014 (AR110-111), explaining by email on February 18, 2014 the difficulties of procuring a lease for alternate offsite long-term parking and describing their valet service that they instituted, which was being well received by their customers. Their request was to Amend the CUP to “remove the off-street parking requirement” and for the City to “provide guidance through an addendum that in limited circumstances some work may be done outside the structure” (see AR 099 – 102). There were three letters of support of the requested amendment dated June, 2014 (AR103), November, 2014 (AR104) and June, 2015 (AR107) as well as Mr. Thoms’ lawyer, dated March 25, 2015 (AR105-106) and June 16, 2015 (AR108-109) against. In the later email by Big O, Big O stated their efforts to comply and restated their requests. Big O included at AR114 their efforts to reach out to Mr. Thoms to mitigate any affect Big O was allegedly having on Mr. Thoms’ laundromat across the street; and

WHEREAS, the PB meeting was set for July 13, 2015. The Planning Staff through its Assistant Director, Andrew Thomas recommended: As to Condition #1 to the CUP that it be amended to allow “minor repair work (outside the building)... that did not exceed 30 minutes” (AR133). As to

Condition #2, that the applicant no longer be subject to finding an alternative long-term parking site and that instead the Applicant would be subject to the potential of a revocation or modification hearing upon the receipt of three (3) verifiable violations of using public parking spaces for the storage of cars waiting for service or for customer pick up (AR134-135). As to Condition #5: The no left turn sign was acknowledged as being in compliance. The PB voted unanimously to continue this matter, which was thereafter set for November 9, 2015 to see if the operator could come up with an alternative long-term parking site; and

WHEREAS, Andrew Thomas' Staff Recommendations for the November 9, 2015 PB meeting (AR148-150) were: As to Condition #1: That "all outdoor parking areas shall be cleared of all cars on stationary or stabilizer jacks during evening hours and weekend hours when the business is closed"; as to Condition #2: "The Applicant (Big O) shall continue to work to locate and secure a long-term parking site for customer cars, as well as for employees. Once a site is secured, the Applicant shall notify the Community Development Department that this condition has been fulfilled"; and as to Condition #5: The no left turn sign has been installed, thus Condition #5 is in compliance; and

WHEREAS, on November 9, 2015, in recognition of the Staff recommendations and that the operator had represented that an off-site location had been found which could act as the long-term parking site until they moved to that site, the PB on November 9, 2015 Amended the conditions of the CUP consistent with the Staff recommendation, adding that the valet service continue. The PB voted 7-0 to approve the CUP

Amendment. During the PB meeting Mr. Thoms stated that he was “mostly concerned with the usage of the meters”; and

WHEREAS, on August 4, 2016, the Planning Staff received a Petition dated August 2, 2014 from some 20 residents in the area of the business requesting a public hearing to review the use permit, citing that their opinion was that the site was 1. “too small for this type of business and overflow parking needs would impact the surrounding neighborhood”; 2. They were concerned about the “soils produced by the business”; and 3. That the 30 year tenant was vacating and thus it was a good time to think about “how this corner could fit in with the rest of the business district” (AR162-163); and

WHEREAS, the Owners express their concern about the lack of timely notice of said Petition by email of October 11, 2016, stating that the Owners did not get notice of the August 2nd Petition until October 11, 2016 (AR165); and

WHEREAS, the Owners lodged a detailed rebuttal of the Petition complete with photographs (AR 167-175) evidencing that there was no negative impact on the surrounding residential community related to parking availability; and

WHEREAS, David Blackwell, Counsel for Big O Tires, the franchisor and potential Owner/User of the site at 1200 Park Street, submitted a five page legal brief (AR177-181) addressing and challenging the legality of attempting to terminate the CUP; and

WHEREAS, Andrew Thomas' Staff Recommendations of November 28, 2016 recognizes that the CUP "travels with the land, not the business. So when the (current) business 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" (AR 187) [emphasis added]. The Staff Recommendation concludes that the CUP should prospectively terminate on July 31, 2017 (AR188); and

WHEREAS, on November 28, 2016, the PB conducted a public hearing to consider the Planning Staff's Recommendation of termination, but continued the matter on a 7 - 0 vote to a future date, with instructions to Staff to perform a parking study and 4 -6 random site observations and report back at the future hearing; and

WHEREAS, apparent violations to the CUP Condition #3: "Applicant's business vehicle(s) shall be stored on the site, not on adjacent residential streets" were sent to the Operator on January 19, 2017 and February 27, 2017 based on customer cars being retrieved from the neighborhood which is not specifically addressed as a condition to the CUP (AR203-207, 210); and

WHEREAS, Big O, the potential Owner/User, by their March 3, 2017 letter, committed to "secure a remote location to stage any vehicular overflow" and, even though not a condition of the CUP, committed to a silent communications system (no loudspeakers) and "increased sound insulation as well as performing all work indoors" (AR211) and on

April 6, 2017 Big O emailed Andrew Thomas with a set of conditions that Big O would commit to, including “enforcement” provisions and provisions that go beyond the scope of the existing CUP (AR217-218); and

WHEREAS, on May 8, 2017, the PB conducted a public hearing to take Staff’s parking report and observations and consider the Staff Recommendation of termination prospectively on July 31, 2017. Andrew Thomas was asked and admitted that no parking study was done. Additional photographs of the area’s parking availability, taken by the Owner documenting an average of 35 available spaces on 8 separate visits were submitted (AR237-254). Having heard the people in support of the CUP and those opposed, and asking the City Attorney whether the PB was within its rights to depend on violations that stated the wrong reason, and having received “you can rely on the overall intent” as Mr. Roush’s answer, the PB voted 4 to 3 to prospectively terminate the CUP 60 days after final action by the City of Alameda; and

WHEREAS, no approved Minutes have been lodged in the public record for that May 8, 2017 PB meeting; and

WHEREAS, the property Owner (the Garfinkle Family) filed a timely Appeal to the PB’s decision; and

WHEREAS, the property Owner commissioned Al Wright a local professional photographer to conduct a photographic study of the parking conditions in the area in May and June, 2017. The scope of said study included twenty-five (25) separate visits on eight (8) separate work days, at set times

during business hours and set locations. The study found an average of 32 available parking spaces on any given visit (External Correspondence 7 – 61); and

WHEREAS, on July 18, 2017, the City Council conducted a public hearing on the Appeal, at which time it considered all of the evidence, the Administrative Record, and testimony provided by those in support and in opposition, as well as the public record; and

NOW THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF ALAMEDA AS FOLLOW:

Based thereon, the City Council finds that the CUP should be maintained with its current conditions left unchanged as set forth in UP – 88 -36, as revised on November 9, 2015, and that should Big O Tires purchase or lease the premises at 1200 Park Street, they can do so knowing that the referenced CUP is in place.

This Resolution shall take effect immediately upon its adoption.

The undersigned hereby certifies that the foregoing Resolution was duly and regularly adopted and passed by the Council of the City of Alameda in a regular meeting assembled on the 18th day of July, 2017 by the following vote:

AYES:

NOES;

ABSENT:

ABSTENTIONS:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said City this 19th day of July, 2017.

Lara Weisiger, City Clerk
City of Alameda

Approved as to form:

Janet C. Kern, City Attorney
City of Alameda

July 14, 2017: Annotated Owner's Position of Due Process Violations
and other Issues to be Noted:

Owner/Appellant Argument In Support of Retention of the
Conditional Use Permit

by Robert Lane, Counsel for Owner/Appellant

The issue before the Planning Board was whether there have been ongoing violations of the Conditional Use Permit (CUP) for 1200 Park Street, Alameda following a Planning Board (PB) hearing November 28, 2016. The primary area of concern relates to parking in the neighboring residential streets. A motion was passed on a unanimous vote to come back at a later date and have a revocation/modification hearing if the operator was out of compliance with the CUP. Assistant City Attorney Farimah Brown advised the board that "revocation hearings are usually a little bit different where you, it's more immediate, you have a hearing where Due Process requirements, where evidence is presented and then you decide to revoke the Use Permit or not."

Owner/Appellant strongly believes that their rights of Due Process were trampled by a slim 4-3 majority of the Planning Board ("PB"). The PB failed to follow its own rules, failed to insist that City Planning Staff ("Staff") do the study (garner evidence) that it was charged to do, and failed to acknowledge the total lack of evidence of the alleged violations that would allow revocation of the CUP under existing law. Ironically, even that one-vote majority was concerned that the basis for the Staff's recommendation of revocation would not hold up to scrutiny since the recommendation was and is based on wrong reasoning, that of an alleged violation of "business vehicles" being parked in the adjoining residential neighborhood, Condition #3 to the CUP. The acting assistant City Attorney was questioned as to whether "business vehicle" included "customer or employee cars" in the definition but he gave no confirmation one way or the other, saying only, in essence, that the actual written basis did not matter and could be justified by what the Board felt was the "intent". The PB justifying their position on a misplaced reliance on some vague

notion of “intent” gives no notice to the CUP holder of the specific basis of the alleged “violation” and is thus a violation of Due Process. Without further specifics, the four-member majority took “intent” to be good enough to justify prospective revocation of the CUP at the end of the current Lessee/Operator’s lease, which “prospective revocation” ignores another material issue, that being that the CUP runs with the land not the operator! Revocation cannot be “prospective”.

We remain a nation of laws and the conditions to the CUP, which have the effect of “laws”, are very specific. The Staff’s assertion of “violations” are based on two (2) Notices of Violation, one dated January 19, 2017 and one dated February 27, 2017. Both “violations” are identical; each “Notice of Violation” sent to the tenant at 1200 Park Street only citing Condition #3 of the CUP, thus the basis for any PB revocation can only be Condition #3:

“Applicant’s business vehicle(s) shall be stored on the site, not on adjacent residential streets.”

We know that Condition #3 is solely the Operator’s “business vehicles” and not “customer or employee cars” because that specific issue was raised in the PB meeting of January 30, 1989, when one person complained and submitted photographs, evidencing the Big O name-on-the-side “business vehicle” parked in the neighborhood. That issue, of whether “business vehicles” are “customer or employee cars” has been resolved. They are separate and are not to be definitionally comingled. The Board voted to amend the CUP with the language that is still in the CUP today and they used the word “vehicle(s)” in case the operator had more than one business vehicle. This alone would preclude any suggestion that this condition was about “customer and employee cars” as this phrase would automatically be used in the plural form as it is in Condition #2. That same hearing also separately addressed the issue of customer and employee cars when it crafted Condition #2:

“Within 60 days of the date of approval of this Use Permit, applicant shall find an alternative long-term parking site for customer cars, as well as for employees. Leasing arrangements made by the applicant shall be reviewed and approved by the Planning Director.”

This language did not change until November 9, 2015 (below) and remains the same today.

“The applicant shall continue to work to locate and secure a long-term parking site for customer cars, as well as for employees. Once a site is secured, the applicant shall notify the Community Development Department that this condition has been fulfilled. “

Staff attempted to unilaterally expand the definition of “business vehicle(s)” without the authority of this body to do so and chose to ignore the actual intent at the time these conditions were imposed. On February 1, 2017, the owners became aware of the first Notice of Violation dated January 19th. As we considered our options to cure the alleged violation, which even included eviction, on February 21st I contacted Ms. Brown to get a definition of “business vehicles” and “store” as used in Condition #3. Despite several unsuccessful attempts to get this information from her office, the Owners were informed on April 19th by Andrew Thomas, the Assistant Planning Director and the head of Staff, that the definition was “The use of public on street parking to store vehicles that have been left in the care of this business is not allowed by the use permit”. We have recently learned that Ms. Brown asked Mr. Thomas on March 8th “...what we mean by “business vehicles” and Mr. Thomas replied to her the same day, “Cars that are being fixed”. There is no evidence to show any further effort by any City employees to define the phrases yet it took a total of 8 weeks for Mr. Thomas to essentially give us the same answer he had given Ms. Brown 6 weeks earlier. This left the Owners with only days before the then scheduled hearing date of April 24th to cure the violation and we still had not heard from the City Attorney’s office with a legal definition that would enable us to evict the tenant. Due Process in this matter must give the owner a right to cure or comply with any alleged violations. The City’s

handling of our request for this vital information effectively blocked our ability to cure and violated our rights. What transpired is consistent with Staff's efforts to subvert the process, making unsubstantiated claims of never-ending complaints ("40 years" of them) while admitting that some 23 years went by without even one complaint!, (see current Staff Report for both statements). This self-serving assertion of "40 years" of complaints is not supported by the record, and had the effect of steering the PB into voting to revoke the CUP, which it had recommended to the Board at the November hearing before the Owner was ever allowed to present its case to Staff.

It wasn't until the Staff Report and Exhibit 1 was released a week before the May 8th PB meeting that we discovered the actual intent from the 1989 PB hearing that established these conditions. It revealed what we now know is the correct definition, "business vehicles" are company owned vehicles and not customer or employee vehicles. We made this argument before the Board and apparently changed some people's minds. The transcripts from the May 8th PB meeting on this topic are revealing:

PB Member David Mitchell to Andrew Thomas:

"....I'm just worried that this language [of Condition 3] legally is problematic because you actually don't say that customer vehicles should be stored off, they cannot be stored offsite, you just say that business vehicles shall be stored onsite. But are business vehicles the same thing as customer vehicles?"

Andrew Thomas:

"No, I don't think they are the same, but I think the intent of that condition about the satellite parking lot [Condition 2] is very clear, it's for customer vehicles. Not the Condition [3] that says "business vehicles", the Condition [2] about the alternate site, you shall get an alternate site. "

Note that this is just two weeks after he told us that "business

vehicles" in Condition #3 were for "vehicles that were left in the care of the business".

PB Member John Knox-White:

"I have a quick question for [Assistant City Attorney] Michael [Roush]. It was pointed out that two citations, or the two notices of being out of compliance, cited the "business vehicle", is there a reason we cannot revoke? I tend to actually believe that "business vehicles" are "business vehicles", they're things with logos on the side of them. Item Number 2 says "customer cars". The actual language is very specific so is there a reason why if we, and I'm not saying if we did or didn't, but if the city cited the wrong Conditional Use, is there, is there any legal reason we could not still vote, just given, given that I think there is a, I do not believe that Number 2 is being met. I'm curious if there is any legal reason why we would be in trouble with moving forward [to revoke] based on the notices that have been given?"

Michael Roush:

"I think you can proceed on the basis of what you have heard from the neighbors both from tonight and from your previous meetings and in the record. It is true that ideally what was cited referenced the wrong section but I think going to what the underlying intent of all the conditions were, which is to prevent the parking in the residential areas was the, was the clear motivation for this matter coming before the commission both in 89 and during the, during the more recent years, so the fact that the citation or the reference to the citation indicated "Condition 3" rather than "Condition 2", I don't see that as particularly fatal to the decision, if the decision of the commission is to revoke the permit. "

Mr. Roush's opinion is so far removed from the basic rights of Due Process it defies logic. You simply cannot accuse the Operator of violating one law but then realizing that the Operator is in compliance with that law, turn around and convict the Operator on

the basis of the intent of another law, which, in this case, also happens to be in compliance! If the Owner is being accused of violating a different law, we have the same Due Process rights of notice and the specifics of the law we are violating. The fact is that at the May 8th hearing, Mr. Roush tried to cover for the Staff in stating his opinion that that vague notion of “intent” was enough and the Appellant was never even given the opportunity to speak again before the vote was taken to revoke the CUP, let alone come back at a later date to mount a full and factual defense to what amounts to a new charge.

So, absent these fundamental legal standards, Mr. Knox-White voted to revoke the permit as did PB Member Ron Curtis who stated, “...that there was ample opportunity to cure this thing with parking. There was, and, and, that’s the issue. The issue was, was anything done?” Our answer is simply, “yes”, we attempted to cure Condition #3, which as it turns out, was not in violation. We wrote 4 letters to our tenant following the November 2016 PB meeting (Administrative Record, “AR”197, 198, 208, 213-214), only to be told by their attorney by his April 14, 2017 letter, that they were in compliance (AR 221). We aggressively sought a legal opinion from the City Attorney’s office, which never materialized, so we could proceed with eviction if the letters failed to produce the desired results. But with the opinion from Mr. Roush, they felt free to use the “intent” of a different condition, one which we could not use to cure because the tenant had not been accused of violating it. Therefore our tenant had not breached their Lease with the landlord, which prevented us from evicting them and curing the matter. We only needed one more vote to prevail and maintain the CUP. We lost at least two votes due to a subverted process.

On February 27th, Mr. Thomas sent a second Notice of Violation, again only citing Condition #3. Our research shows that he had prepared a first draft on January 18th where he had cited Conditions #1 and #3, not Condition #2. (Condition #1 relates to cars left in the lot while the business is closed). His handwritten notes indicate violations of Conditions #1 and #3. At no time was Condition #2

ever considered in violation by Mr. Thomas because he believed that all the applicant had to do was locate and secure a long-term parking site, which they had done in November 2015. He told Jay Garfinkle they were in compliance with Condition #2 (AR201) but later denied it in the PB meeting of May 8. Regardless, while the wording which caused the confusion doesn't say that the site must actually be used for customer and employee cars, what is not confusing is that the condition ends by explicitly stating "...Once a site is secured, the applicant shall notify the Community Development Department that this condition has been fulfilled." So as soon as they notified the Department, the condition was fulfilled. There is no ambiguity in that statement.

Further, Staff has no foundation, no evidence of a negative impact on parking by the Big O operation during business hours or otherwise. As the findings state in PB Resolution No. PB-17-07 at page 3, Staff was "directed (at the November 28, 2016 meeting) to monitor operations at the property and return at a future date with a report on use permit compliance." No such study ("report") was ever made and during the PB meeting of May 8, 2017, Mr. Thomas was asked whether that study had been done:

John Knox-White making his motion to revoke the CUP:
"...I had asked Staff to do some parking counts. Because we continue to have kind of different people coming in with different stories about how many, what, what is the state of parking on Park Ave.? ... So, I'm just curious is there a reason Staff didn't actually do a parking any sort of parking census over a number of days so we can actually have that data in front of us for this conversation?"

Andrew Thomas:
"I don't remember that direction".

Thus, not only is there no parking study done by Staff, there is no foundation for a finding of non-compliance with the CUP since there is no evidence of a Condition #3 violation, nor is there even an

allegation that a “business vehicle” has been parked in the neighborhood. Due Process has not been afforded the Appellant.

Even if, *arguendo*, the PB was within its rights to unilaterally (and without notice) expand the definition of a “business vehicle” to include “customer and employee cars”, there is no foundational evidence for that finding either, since Staff failed to monitor (make a study of) the business (parking situation) after being directed to do so during the PB meeting in November 2016. The PB not only failed to follow its own laws and rules (being specific as to any alleged violations of conditions and thus giving actual notice of the violation asserted) but it fails to acknowledge that their Staff has not done the job it was directed to do, which job the Appellant believes would have proved that there is no negative impact on parking resulting from the Big O Tire operation. In the absence of the Staff having performed a study of the parking situation, the Appellant has done so, and the Appellant’s proof that there is no shortage of parking in the area of 1200 Park Street is found in the Parking Survey which accompanies this submission; see the Declaration of Al Wright, Professional Photographer with observational and photographic proof attached. (See “External Correspondence” pages 5-61). He visited and documented the neighborhood 25 times over an eight (8) day period, at predetermined times during business hours, and reported that there was an average of 32 available spaces per visit. That finding of sufficient parking is also backed up by the City of Alameda’s Transportation Commission’s findings of June 22, 2011, during which meeting the residents around Jackson Park and on San Jose Avenue made it clear to the Commission that there was more than enough parking already and that the City should not turn the red zone at the Park on San Jose Avenue, into more parking as the Public Works Director wanted to do. The red zone was not made into parking.

Further supporting Appellant’s position that there is ample parking in the area, Andrew Thomas, head of Staff, reported at the May 8, 2017 hearing that: “Every time I observed it, they (the Operator of 1200 Park Street) were able to find a parking space for those cars

though, right on Park Ave. They weren't driving 3 or 4 blocks away. They were parking right on Park Ave., retrieving cars from Park Ave., around the park". The Owner restates their position that there is no negative impact to parking in the area due to the business at 1200 Park Street; there is no parking problem.

Four additional matters should be stated for the record: (1) To the extent that a parking concern remains in peoples' minds, it can be implied that the problem, if any, is being created by the current operator, knowing that their former franchisor is the buyer of the property and intends to compete; (2) With the current operator moving to Oak Street and Big O Tires as an Owner-User at 1200 Park Street, the market (traffic) will be split, thereby reducing rather than increasing any future parking concern; (3) The City's tax income from this business, apart from real property taxes, is estimated to be in the realm of One Hundred Thousand Dollars (\$100,000.00) per year based on information provided by the City's Finance Director; and (4) The currently operative Resolution, PB-15-23 as well as the previous Resolution of January 30, 1989 both were passed by the PB by unanimous votes and both specifically stated that the "use" at 1200 Park Street was "compatible".

Finally, there is the Due Process matter of proper "Notice". From the outset the City has failed to give proper notice to the Owner/Appellant in this matter.

Item	Date	Owner is told	Source of notice
Neighbors Petition	8/2/16	10/11/16	No official notice, City Staff casual conversation
1 st Notice of Violation	1/19/17	2/1/17	Mr. Thomas by email after being told we had not received a notice
2 nd Notice of Violation	2/27/17	5/4/17	Staff Report, Exhibit 1 for 5/8 PB mtg
Notice of PB mtg moved from 3/28 to 4/24/17		3/7/17	No official notice, City Staff in a casual conversation
Notice of PB mtg, moved from 4/24 to 5/8/17		4/15/17	No official notice, Rick O'Neil of Big O when asked if he knew mtg date

On May 2nd we learned from Mr. Thomas that all of our official notices were being returned by the Post Office because, as is City practice, they get mailed to the Property address of the business and not to the address of the Property Owner. When the notices were returned, Staff made no effort to re-mail these notices to the Owner nor otherwise contact us despite emails and phone calls between all of the parties. When we requested that notices be sent to the Owner's address as the County does when it mails property tax statements, we were told that what the City does, it is legally required to do and they have no plans to change this policy. Staff should be instructed to change their procedure so the Owners are assured they are getting proper and timely notices. Failure to give us timely notice has interfered with our efforts to timely respond. California real property law concerning notices to the proper parties states that if the sender has actual knowledge of a different address , other than the property itself, that would more likely reach the proper party, then that address must be used; see California Civil Code §2924, et seq. also concerning potential loss of property rights.

In summary, since this Hearing before the Council is under the Council's power of conducting a hearing de novo, this Council should resist the temptation of remanding the matter with instructions to the PB, and find that the Resolution of the PB, Resolution No. PB-17-07 was ill founded (that the PB failed to abide by its own rules or to enforce its own directives) and that the conditions of the CUP are thus not in violation; and that the use is in compliance; and that it is compatible with the neighborhood. (An AutoZone store is going in across the street at 1125 Park Street, which has its own parking lot.)

This process has been flawed and the rights of the Owner relegated to the sidelines since the Planning Department received the Petition from 21 neighbors on August 2, 2016. Why did it take 10 weeks for anyone in the Department to communicate to the Owner that a petition even existed? At the PB hearing on November 28th, the Staff Report recommended terminating the CUP when the lease of our

current tenant, Big Tire Pros, expires on July 31, 2017. We argued that any attempt to revoke entitled the Owners to rights of Due Process. This required the City to notify us of any violations of the CUP, substantiate the violations and give us the opportunity to comply. The PB requested a continuance and that the Staff monitor the parking situation by making 4-6 visits to the site to determine if the operator was in violation of the CUP, and come back at a later time to take up the matter again. Mr. Thomas visited the site a total of three times. Two of these visits were made before issuing the Notice of Violation on January 19th which the owner finally learned about on February 1st due to a suboptimal process as discussed above. Our efforts to cure this alleged violation were effectively blocked by the City Attorney's office failure to timely respond to our request for definitions of key terms in the Condition cited as being in violation. When a definition was finally put forth by Mr. Thomas, instead of the attorney, only one week before the then scheduled hearing date of April 24, it turned out to be his desire rather than factual. The fact is that, no CUP conditions were actually violated, but the City's attorney of record at the May 8th meeting, Mr. Roush determined that the "intent" (concerning parking) was an acceptable ground to revoke the CUP. The City took no responsibility for all of its egregious errors and instead put the burden on the Owner to fix what wasn't broken. The Staff Report submitted for this appeal continues to deprive us of our Due Process rights as it admits that they cited a Condition that has nothing to do with customer cars. Then they proceed to say that a different condition was violated, but never gave us notice of that violation much less the opportunity to comply with the Condition. The obvious course for the Staff would have been to start over and do it right.

Some members of the PB were deeply troubled by the chain of events and expressed concern at the May 8th meeting before the vote was taken:

David Mitchell

"... so I'm really clear that, I'm just worried that because my wife's an attorney, and I understand how this works, and if the

language isn't precise and it's not there, the city could be liable for any sort of loss and profit that the property owner might fail to achieve if they lose this permit and they can claim a loss from that. So I'm just concerned about that, but that's why I'm asking the [legal] question now."

If the Council affirms the actions of the PB, we are quite convinced that an impartial judge without an agenda to remove this use from 1200 Park Street, will see things differently. In the event the Council has continuing concerns regarding the CUP, this Council can condition the CUP as it reasonably sees fit. Big O Tire, the franchisor and buyer of this property is and has been most cooperative throughout this process, including engaging with Staff to resolve any concerns and thus should be afforded the opportunity to abide by the CUP. As an Owner/User Big O Tires has the ability, financial strength, and motivation to resolve any concerns that the City and community may have.

Or the Council can accept Staff's other recommendation put forth at the May 8th meeting:

"Alternatively, if the Planning Board believes that tire repair is an appropriate use of the property, then the Planning Board should remove the conditions of approval related to parking in neighborhood areas and the repair of cars in the lot."

However you decide to do it, the Council should allow the use to continue, recognizing that Big O Tires will have, as Owner/Users, the motivation to be good neighbors, financial resources, that they will be a stable income source for the City, and that this use has been found to be a "compatible use" not only in the present era (2015 unanimously by the PB) but dating from the 1920s, owned and controlled by the long time Alameda residents, the Garfinkle Family.

Thank you for your consideration,
Robert Lane, Counsel for Owner/ Appellant

City Council Meeting July 18, 2017
1200 Park Street - No Parking Issue
Submission by Owners

The Owners have presented two photographic studies of actual examples of parking in this area showing that there is no parking problem. The Staff was told to do a parking study but did not. The Owners' parking studies are as follows:

- Survey #1 - Photos taken on 8 days, at specified different times, between October 2016 and before the May 8, PM meeting
 - There are approximately 150 parking spaces in the area
 - On average, 35 spaces or 23% were available at any one time
 - It ranged from a high of 50 spaces, or 33%, to a low of 23 spaces, or 15% being vacant
 - (See PB Meeting 5/8/17, Exhibit 3 "Letter from Garfinkle Family with Photographs, pgs 3-20"). One example is attached.
- Survey #2 - Photos taken between May 16 and June 10, 2017 by Al Wright, professional photographer
 - He made 25 visits over 7 days including 2 Saturdays, at specified times throughout each day
 - His summary sheet shows an average 32 spaces were available
 - (See this Agenda Item, Exhibit 3 "External Correspondence, pgs 5-61"). One example is attached.

How big of a problem is there now, based on current volume?

- With a new operator at 1200 Park Street in Big O Corporation, there will be a major reduction in demand for off-street parking.
 - If they split the existing 60 cars per day business with Tire Pros, they will only service around 30 cars spread out over the course of the day
 - There are approximately 26 spaces on the lot
 - Many customers wait while their car serviced, so it never leaves the lot
 - The off-street parking need will go down to near 0, because only the overage beyond the lot capacity needs to park on the street
 - It should be noted that this business is a day time business, thus once the business hours are over, there is no potential parking impact

- How does this neighborhood compare to other neighborhoods that are adjacent to a commercial district?
 - Andrew Thomas told us, he doesn't think parking is any more difficult here, than in other comparable areas adjacent to a commercial zone
- The residents of this particular neighborhood enjoy more than double the number of spaces that most residential areas in Alameda enjoy because they live around Jackson Park.
 - There are no homes on other side of the street, or curb cuts for driveways, so there are block-long stretches of parking spaces
 - In the block on San Jose, between the east side of Park Avenue and Regent St., there are 5 homes that face, or have sides on San Jose Avenue. There are about 18 unmarked spaces, for the two homes lacking off-street parking
 - Go one block in the other direction across Park St., and parking is extremely limited along Oak St., from San Jose to Encinal
 - Consider the situation for the residents of this strictly residential section of Willow St., between Encinal and Clinton, where you can't park on either side of the street
- The City is not obligated to provide street parking, for every resident in Alameda who lacks off-street parking.
 - How many open spaces throughout the course of the day, do you think there should be in this area?
 - What's a reasonable number, or percentage, that meets most people's needs?
- What evidence did the petitioners present to support their claim of a parking problem?
 - Did they ever show that there was zero, or nearly zero parking in the area under discussion?
 - Did they ever factually demonstrate a problem?
- What did the City do, to vet these claims?
 - Did they ever study the availability of parking to determine the degree of the problem?
 - The PB asked them to provide studies in 2015 and 2016 yet failed to do so any studies

There were no neighborhood parking complaints for 23 years after the 1989 Planning Board's unanimous decision that the business was "compatible" with the neighborhood.

This controversy was artificially generated in 2013 when a neighboring business complained about the current Operator using metered parking spaces. Hearings were held and some residents were upset to see the tire store employees parking their own cars, and retrieving customer cars during the day, even though there is ample parking otherwise. The Owners agree that the city has an obligation to respond to these complaints and to find out whether there is a negative impact resulting from the allegations being made. In this regard, the City has done nothing to substantiate the merits of the complaints yet it went ahead and revoked the use permit on the grounds that the Operator was in violation of a single permit condition that went back to 1989.

The question of whether a 28 year old permit condition about parking was still relevant or even correctly understood was never really a consideration. Staff and some Planning Board Members by that time were focused on ending the use at this location by any means necessary.

The Owners contend, based on actual physical evidence, that there is no parking problem in the vicinity of 1200 Park Street.

Photographic Parking Survey Summary

The table below is a summary of available off-street parking spaces in the vicinity of 1200 Park St. The area includes San Jose Avenue from Park St. to Regent St. and Park Avenue from Encinal Avenue to the end of Jackson Park. It does not include spaces on Park St or on San Jose across Park St. The counts do not include handicap spaces and photos were not taken during street sweeping hours.

Date	Day	Time	Available Spaces
October 19, 2016	Wednesday	2:00pm	39
October 24, 2016	Monday	9:30am	35
October 28, 2016	Friday	1:00pm	50
November 28, 2016	Monday	1:00pm	23
November 29, 2016	Tuesday	2:00pm	32
December 7, 2016	Wednesday	2:30pm	41
April 11, 2017	Tuesday	2:00pm	23
April 18, 2017	Tuesday	9:45am	41

There was an average of 35.5 spaces per visit to the site when these photographs were taken.

Photographs taken by Ben Garfinkle on random dates and times as indicated.

4/18/17 @ 9:45AM, 41 total spaces, 27 on Park Ave., 3 metered, 4 free on San Jose, 7 spaces San Jose between Park Ave & Regent





Declaration of
Al Wright, Photographer

I, Al Wright, hereby declare that:

I am Al Wright, an Alameda professional photographer with my long time studio located at 1205 Park Street, Alameda.

In the middle of May, 2017, I was commissioned by Ben Garfinkle, on behalf of the Garfinkle Family Trust, to perform a representative Parking Survey with photographs for their property at 1200 Park Street (Big O Tires). I am acquainted with the Garfinkle family by way of having been a tenant of theirs in the past.

The purpose of my Parking Survey, a true and correct copy of which is attached hereto as group Exhibit "A" ("Project"), was and is to show the availability of parking during the Big O business hours in the vicinity of 1200 Park, both in the commercial zone and the surrounding residential neighborhood. The geographic area covered is the few metered parking spaces on the east side of Park Street directly in front of the Big O Tire location, San Jose Avenue from Park Street to Regent Street, including the six (6) metered spaces on San Jose right at Park Street, and both sides of Park Avenue around Jackson Park from Encinal Avenue down to the south end of the park.

The agreed schedule for the Project was to take a sample of available parking four (4) times a day (at approximately 9:30 a.m.; 11:30 a.m.; 2:00 p.m.; and 4:30 p.m.) on six (6) separate days.

On May 16th at approximately 9:30 a.m. I did a trial run to get an idea of how much time it would take to complete a segment of the assignment. That trial run on May 16th is included in Exhibit A, otherwise Exhibit A shows that the Project included taking the sampling at the four (4) different times on six (6) days; Tuesday, May 30; Wednesday, May 31; Saturday, June 3; Monday, June 5; Wednesday, June 7; and Saturday, June 10 for a total sampling of twenty-five (25) samples of the available parking.

Note: No sampling was done on Thursday or Friday of either week since the Park Avenue area is posted for street sweeping on those days.

I declare under penalty of perjury that the foregoing is true and correct of my own personal knowledge, and that if called upon to confirm these statements, can competently do so.

Executed on July 5, 2017, at Alameda, California.



Al Wright

Exhibit “A”

Parking Availability around Big O Tires

Day	Date	Time	San Jose Park St-Park Ave		San Jose Park Ave- Regent	Park Ave	Total
			Meter	Non			
Tue	5/16	9:30	2		6	16	24
Tue	5/30	9:30	4	1	10	27	42
Tue	5/30	11:30	1		6	10	17
Tue	5/30	2:00	1		7	16	24
Tue	5/30	4:30	4		7	20	31
Wed	5/31	9:30	1	1	11	24	37
Wed	5/31	11:30	2		8	21	31
Wed	5/31	2:00	1	3	9	18	31
Wed	5/31	4:30	4	1	11	15	31
Sat	6/03	9:30	5		11	41	57
Sat	6/03	11:30			8	24	32
Sat	6/03	2:00	2		2	4	8
Sat	6/03	4:30	2	2	11	38	53
Mon	6/05	9:30	3	1	14	18	36
Mon	6/05	11:30	6		14	7	27
Mon	6/05	2:00	4	2	15	12	33
Mon	6/05	4:30	5	1	11	22	39
Wed	6/07	9:30	4		10	16	30
Wed	6/07	11:30	2		10	12	24
Wed	6/07	2:00	3	1	14	10	28
Wed	6/07	4:30	4	1	7	21	33
Sat	6/10	9:30	1	1	2	42	46
Sat	6/10	11:30			6	23	29
Sat	6/10	2:00			8	19	27
Sat	6/10	4:30	4	3	1	25	33
AVERAGES			2.6	0.7	8.8	20	32.1



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LARA WEISIGER

From: darlene <darlenethoms@aol.com>
Sent: Monday, July 17, 2017 3:41 PM
To: darlenethoms@aol.com; ANDREW THOMAS; City Clerk; Trish Spencer; Malia Vella; mezzashcroft@alamedaca.gov; Frank Matarrese; Jim Oddie; artthoms@ymail.com

Darlene
Thoms
July 17, 2017
1105 Sherman Street
Alameda, CA. 94501
Co-Owner.
Washboard Landromat
1198 Park Street
Alameda, Ca. 94501

Re: Big O Tires Franchise
Petition to renew Use Permit &
City of Alameda Planning Board - Resolution No. 1010

Recipients of email:
Mayor - Trish Herrera Spencer
Vice Mayor - Milia Vella
Council Members:
Marilyn Ezzy Ashcraft
Frank Matarrese
Jim Oddie

Dear Mayor Spencer, Vice Mayor Vella and Council Members,

This email is regarding the renewal of Big O Tires Use Permit. My concerns vary slightly from my husband, Art Thoms who has worked tirelessly over the years to resolve the parking issue with Gary Voss. Unfortunately, it escalated into where we are today. Although, I must say that both Gary and Art have continued to have a friendly relationship!

Rather than present this at the public meeting tomorrow night, I am sending this concern privately to each of you.
It is regarding Resolution No. 1010, Page One. In the Fourth paragraph: "Whereas, said Board has made the following findings:

1. "The proposed use is consistent with the prior use of the site as a **gas station** and auto repair facility."

(I noted in the letter dated May 8, 2017, Mr. Garfinkle failed to mention the 26 year gap between the "Clamp-Swing Pricing Company operating from 1924 - 1956 and the current Big O Tires business which began sometime between 1979 and 1982.)

This is important because there was a gas station at that site (according to Resolution 1010 sighted above) which had/has the potential for a negative environmental impact. The Resolution continues with # 2 saying there is "adequate off-street parking."

3. States "removal of the gasoline pumps will reduce traffic associated with the site."

My question(s) are the following:

1. What reports and written documents does the City of Alameda or Mr. Garfinkle have regarding the removal of the gasoline pumps?

Was there an environmental engineering firm hired to confirm there was no petroleum or groundwater contamination released into the surrounding soil or subsurface soil?

If so, I would like to obtain a copy of this report.

2. I am interested in knowing about the environmental remediation regarding, the removal of the underground storage tanks that contained petroleum and other hazardous substances and how they effectively protected against pollution or contaminants from environmental media such as soil, groundwater, sediment, water table, or surface water and what its impact is on human health and the environment. Did the disposal of the tanks and gas station equipment meet the regulatory requirements during their removal from both environmental and a public health safety? Were any assessments made to determine the human health and ecological risks according to EPA standards? If so, were there any contaminants such as oil, mercury or hydrocarbon found? If so, what process was used for evacuation? Was there any lead found in the soil? If so, then it has elevated concentrations of contaminated soil that is "hazardous" waste. Do you know what the geological conditions are beneath the site?

I know in the 1980's the cleanups did not follow the modern procedures we have today. And, I'm not sure what the soil is under the 1200 Park Street structure but if it is a sandy soil then, the man made subsurface structures, such as utility pipes and electrical conduits provide a pathway for contaminants to spread. Therefore, I would have obvious concern for my business and the resident neighbors about the release of petroleum which, often percolates through the soil column into the underlying groundwater table. The flow of groundwater can then, carry the contaminants off-site to surrounding properties.

The well-publicized gasoline additive known as methyl tert-butyl ether (MTBE), is especially susceptible to off-site migration. It does not strongly adhere to soil nor readily dissolve in water therefore, it can travel relatively long distances in a short time.

Needless to say, chasing off-site contamination plumes adds layers of liability and other legal issues for the redevelopment of the Big O Tire Business at that location. I would assume that Mr. Garfinkle did his "due diligence" when his family removed the former gas station and rented the land to Big O Tires via Mr. Voss.

Vapor intrusion has received significant attention at former gasoline stations. Chemicals present in soil and groundwater may volatilize and move up through the soil column into overlaying buildings contaminating indoor air. I mention this because one of the long term employee's (that I agreed not

to name) for Gary Voss at Big O Tires, alerted Art to the fact that he can smell chemicals and said he is "aware of groundwater contamination." For gasoline contaminated sites, benzene is the major contamination of concern for vapor intrusion. Was there ever a soil vapor and indoor sampling required or done for the surrounding properties when the land was converted from a gas station to Big O Tires? Was there any risk - based corrective action strategy for site cleanup? Does Mr. Garfinkle have copies of all environmental studies or have any indemnification agreements with Mr. Voss or Big O Tires?

3. Are there any UST's still in the ground? If so, were they made of bare steel? If yes, it is likely to corrode allowing the contents to leak and be released into the soil and groundwater.

4. Did the City of Alameda or local agency ever insure notification that the technical requirements had been met? Was the Regional Water Quality Control Board ever contacted to ensure the proper steps had been taken in the event of groundwater contamination and ensured it had been remediated properly?

Has the California Department of Toxic Substances Control overseen and been notified of any soil contamination?

Has the City of Alameda Planning Board and/or City Council ensured compliance and enforced the UST regulations at 1200 Park Street? Have they ensured the protection of public health, the environment and the neighboring businesses by enforcing the federal laws, state laws and local laws regarding this site as a former gas station converted into a Tire and Repair shop?

Just from an environmental perspective, is this site geo-technically suitable for a continuation of a repair / tire shop?

I have a concern for the environment and how these hazardous chemicals affect humans, animals and the earth itself.

The same employee who said he can smell chemicals (and he is not a disgruntled employee - he is still there and a credible source), said "chemical contamination is in the warehouse and the gas from the former gas station has reached the underground water table for sure." He also said, "there are chemicals and the smell of chemicals consistent with the former "Red Onion" dry cleaners in the storage room. They simply put up a concrete wall to cover it but I can still smell it." This is troublesome if the owners are aware of this exposure to their employee's and customers yet, did nothing to protect them.

The final questions and statements I have are again taken from the Resolution 1010, Page One, under the Fifth Paragraph.

Item # 2., "That parking be restricted to the approved site plan and those spaces marked." This item has clearly been violated for at least, the past 15 years. That is when it began to affect our business and the surrounding businesses on Park Street. They have not honored the requirements of the Use Permit. As we have personally dealt with these issues, my husband has been threatened by the Big O employees and cursed at from across the street. One day he was sitting in his car eating lunch and a Big O employee came right up to him and got in his face yelling and threatening him. Is this what we want in Alameda?

3., "That cars not be permitted to be parked for extended periods of time or advertised for sale." We have already submitted photo's of this violation. We submitted photo's of cars being left up on high - jacks over the weekend. That concerned me knowing children or anyone could have been injured.

Item # 4., "That all work will be conducted within enclosed structures." Of course, you already have the photo's of this violation.

Item # 7., ".....Driveway entrances will be chained to bar parking by itinerant drivers during the periods when the business is closed." They do not chain the driveway entrance on San Jose.

In regard to Mr. Garfinkle's letter dated May 8, 2017:

Fourth Paragraph - Please, note he failed to mention the gas station between the closing of the Clamp-Swing business and the Big O Tires Business being opened. The Clamp Swing Business existed (according to his letter) from 1924-1956. What was there between 1956 and 1979? It was conveniently absent in his letter. It makes me wonder why? Why leave out what existed on the property for those 23-26 years in between?

Paragraph Five: re: the photo's they took.....I am sure this is easy to see through and predictable. It is simple to "stage" photo's to strengthen an argument when you own the property! He admits in this same letter that they service at least, 60 cars a day. I would argue it is more than 60. However, even with 60 cars a day where do they put them? Where do they work on them? We submitted photo's of them having the blue plastic numbers on the top of cars parked in metered parking (without paying the meter!). Plus, they only have approximately 14 painted spots on the lot and in the Use Permit, it says "all" cars connected to the business have to be parked ON the lot. So, where do they put the 20 employee cars plus, the customer cars?

To say, "In that light, we believe that the petition was generated for and is serving his (Art) personal commercial goals." ???? Well, I suppose if serving your "personal commercial goals" is to provide fair access to parking spaces (that the customer has to pay the City for through the use of the metered parking) is considered "personal commercial goals," then, we as well as, the other businesses are guilty! This is a laughable argument so, excuse my sarcasm! It doesn't make sense.

Paragraph Eight:

If the Garfinkle family "is in contract to sell the property to Big O Tires, the corporate Franchiser who will initially operate the business as a company owned site and thereafter, oversee a future franchisee operating as the local Big O."

Does this mean that they DO have the environmental reports? Have they had a full disclosure about any contaminates on the property?

On the top of page 2, he states "...continuation of the same type of business that has been there going back to 1982, probably before most of the resident in the neighborhood moved in." This actually brings up a good argument why they should not be allowed to continue. At the time they were given the Use Permit, it was a different environment with probably less residents. However, the area has now changed and it no longer "fits" the neighborhood. The needs have changed and the business has outgrown 1200 Park Street. That is why Gary Voss has found a new location off of Park Street. From the beginning of the design in Alameda, there was never a Tire shop or repair shop in the design right on Park Street. It kills the beauty of the City and the small town feel of

where I grew up. I went to Lincoln Elementary School and to Alameda High School. (My father was in the Navy so, we were here for the Alameda Naval Air Station. Then, my dad flew for World Airways.) With these big businesses coming in and taking over the City, it has lost the intimate small town Island feel. I'm not against capitalism but I am against big business coming in and shutting out the small business owners like, Gary Voss and our business. It is damaging not only to us but to the town as a whole. People live in Alameda because they are attracted to preservation of a small town. With Gary's new business and the Good Year Tire Business who, by the way does all their work inside and they have adequate parking, we don't need big corporations coming in and shutting out the other businesses. In fact, on the second page of the letter paragraph three, it says, "Another consideration is that people who regularly buy tires in Alameda could be the beneficiaries of a price war between these two competing merchants." It shows the lack of character and integrity of this company and the Garfinkle family. Gary has been a loyal employee and representative to the Big O Franchise since 1982 and a faithful and loyal tenant to the Garfinkle family. Where has all the integrity in business gone today?

At the end of the letter, they want to "strike the parking conditions for #2 and #3 given the evidence that there is no actual negative impact related to parking and confirm that the current business use of our property is a valuable asset to the community."

Again, no integrity. Ignoring the loyalty of Gary Voss and ignoring what the actual neighbors and businesses are saying who live there and work there daily and have years of photo's and video of the violations! The Garfinkle family is "renting out the space for profit." They don't live there or work there! They think the property is valuable to the community. Well, it maybe if they use it for something other than a Big O Tire/Repair shop! We already have two Tire shops in Alameda!

I urge you to say "NO" and not allow Big O Tires Corporation (or any repair shop on Park Street) to set up shop again. If they do, it will be worse than it has ever been. Please, due your due diligence and protect the Island and it's small business owners who built this City. We used to be like a "Carmel by the Sea!" Let's keep what we have! Say "Bye" to Big O Corporation!

Thank you, for your time and consideration.

Sincerely,

Darlene Thoms

LARA WEISIGER

From: ANDREW THOMAS
Sent: Monday, July 17, 2017 11:14 AM
To: Karin Sidwell; Trish Spencer; Frank Matarrese; Marilyn Ezzy Ashcraft; Malia Vella; Jim Oddie; Allen Tai; Deborah Diamond; LARA WEISIGER
Subject: RE: 1200 Park Street City Council meeting July 18th

Dear Karin:

I just read your letter to the City Council, and I thought I should clarify something for you: The Planning Board's recommendation to terminate the Use Permit, DOES NOT "force an existing business out of business". The existing business Big Discount Tire Pros is moving to Oak Street. They are not going out of business; they are moving their business.

The question before the City Council, is whether the City Council wants another non-conforming tire repair and replacement business to fill the space after the existing businesses relocated to Oak Street. The Planning Board decided that the Use Permit should terminate so that the new business that moves in would be consistent with the Park Street zoning.

Hope this information is helpful to you.

- Andrew Thomas

From: Karin Sidwell [mailto:karinsidwell@gmail.com]
Sent: Monday, July 17, 2017 9:24 AM
To: Trish Spencer <TSpencer@alamedaca.gov>; Frank Matarrese <FMatarrese@alamedaca.gov>; Marilyn Ezzy Ashcraft <MEzzyAshcraft@alamedaca.gov>; Malia Vella <MVella@alamedaca.gov>; Jim Oddie <JOddie@alamedaca.gov>; ANDREW THOMAS <ATHOMAS@alamedaca.gov>; Allen Tai <ATai@alamedaca.gov>; Deborah Diamond <DDiamond@alamedaca.gov>; LARA WEISIGER <LWEISIGER@alamedaca.gov>
Subject: 1200 Park Street City Council meeting July 18th

Thank you

LARA WEISIGER

From: Karin Sidwell <karinsidwell@gmail.com>
Sent: Monday, July 17, 2017 9:24 AM
To: Trish Spencer; Frank Matarrese; Marilyn Ezzy Ashcraft; Malia Vella; Jim Oddie; ANDREW THOMAS; Allen Tai; Deborah Diamond; LARA WEISIGER
Subject: 1200 Park Street City Council meeting July 18th
Attachments: 1200 Parkcitycouncil.pdf

Thank you

(By electronic transmission)
Mayor and City Council
City of Alameda
2263 Santa Clara Avenue
Alameda, CA 94501

Subject: 1200 Park Street conditional use permit

Dear Mayor Spencer and Councilmembers:

Thank you for your consideration of this matter. I first need to apologize for commenting on this matter so late in the process. I only learned about it when the City Hall Facebook page called out the agenda items for July 18, 2017. I believe revoking the conditional use permit for 1200 Park would result in unintentional consequences for the neighbors who are requesting this action be taken.

The neighborhood has been concerned about parking for all most thirty years. Yet if this business were replaced by very popular shop; wouldn't the parking problem be the same? Essentially, a different high demand business would put the same parking demands on the neighborhood. Just one block north, spill over parking ends up on the surrounding streets (Park Ave) and those popular restaurants and shops have a parking lot (although limited). If the popularity of Park Street moves south one block – customers would be looking for parking on surrounding streets.

By revoking the conditional use permit – the business is essentially being put out of business. The owners are operating a popular business and happily utilizing the existing building. If they can not find a new business to operate from this location the building is threatened. This is an historic resource on the study list. It is a rare building type. If the property owner decides to sell the property the threat to the building is even greater. The current lot (as seen by a developer) is underutilized, one-story buildings set at the edge of the lot and a large expanse of unused land (parking). According to the City of Alameda Zoning Map this property is zoned Community Commercial. A new building could be 5 stories high and have a zero lot line, provide no parking and include housing on the upper stories. I believe this would be a much worse outcome for the neighborhood.

30-4.9A - C-C, Community Commercial Zone.

b. 1 (u) Dwelling units—when the units are located in structures also containing nonresidential uses and are not located on the ground floor,

g.2."Building Height Limit: Building height shall be regulated as follows: Park Street District—Maximum height shall be five (5) stories but not to exceed sixty (60') feet for properties fronting on Park Street north of Encinal Avenue. In the remaining areas of the Park Street C-C District the height limit shall **be three (3) stories but not to exceed forty (40') feet and the height within this area may be increased to a maximum of five (5) stories** but not to exceed sixty (60') feet upon approval of a use permit. **Parking structures, including parking structures which have a commercial use component,**

are exempt from the height limit provided the structure does not exceed six (6) stories, the commercial floor area does not exceed fifty (50%) percent of the overall floor area of the structure, and public parking is provided in addition to the parking required for the commercial component.”

g.3. Building Coverage: Buildings may cover one hundred (100%) percent of the building site, provided the ratio of all floor space to lot size shall not exceed three (3) to one (1).

Why do I believe this is a likely outcome. In my professional life – my expertise are only requested reactively. I rarely get hired to proactively evaluate the significance of a building. I am hired when a property owner is mandated by a city because they either want to significantly alter the primary façade or demolish the building. In the case of commercial buildings, especially the type at 1200 Park, it is because they want to demolish the building and maximize the use of the lot.

I believe a better solution needs to be found. In reading the documents provided in agenda, it appears the conditions of the conditional use permit were never enforced. I could not find what that enforcement would be. Is there a penalty? Or is it an all or nothing approach; one either complies 100% or they get the permit revoked.

I don't believe the neighborhood would gain from revoking the conditional use permit and essentially putting this business out of business. This would result in unintentional consequences. The worse outcome would be a 5- story mixed use building with no parking. And then the neighborhoods problem would be exasperated.

Thank you for your consideration,

Karin Sidwell

Historic Resource Consultant

2025 Pacific Avenue

LARA WEISIGER

From: ANDREW THOMAS
Sent: Friday, July 14, 2017 12:44 PM
To: Janet Kern; LARA WEISIGER; Jill Keimach; mhrlegal@comcast.net; Andrico Penick; DEBBIE POTTER
Subject: Fwd: July 18 City Council meeting -- Agenda Item 6-B -- SUPPORT termination of use permit
Attachments: Mathieson Big O letter to City Council 2017-07-13+attach.pdf; ATT00001.htm

FYI.

Sent from my iPhone

Begin forwarded message:

From: "Betsy Mathieson" <emathieson@exponent.com>
To: "Trish Spencer" <TSpencer@alamedaca.gov>, "Malia Vella" <MVella@alamedaca.gov>, "Marilyn Ezzy Ashcraft" <MEzzyAshcraft@alamedaca.gov>, "Frank Matarrese" <FMatarrese@alamedaca.gov>, "Jim Oddie" <JOddie@alamedaca.gov>
Cc: "NANCY McPeak" <NMcPeak@alamedaca.gov>, "ANDREW THOMAS" <ATHOMAS@alamedaca.gov>, "jacksonparkwatch@googlegroups.com" <jacksonparkwatch@googlegroups.com>
Subject: July 18 City Council meeting -- Agenda Item 6-B -- SUPPORT termination of use permit

Ladies and gentlemen:

Please see the attached letter. My husband and I will not be able to attend Tuesday evening's City Council meeting, but the Big O Tires issue is very important to us. Thank you.

Sincerely,

Betsy Mathieson
1185 Park Avenue
Alameda, CA 94501
(510) 523-5852

July 13, 2017

Alameda City Council
City Hall
2263 Santa Clara Avenue
Alameda, CA 94501

Subject: 2017-4492
1200 Park Street, Alameda
Big O Tires site

Ladies and Gentlemen:

We are neighbors and customers of the former Big O Tires and current Big Discount Tire Pros. We respectfully request that the Alameda City Council uphold the Planning Board decision to terminate the conditional use permit for an automotive business at 1200 Park Street due to years of non-compliance with conditions of the permit by Big O Tires. We have attached our December 15, 2016, letter to the Planning Board, which is relevant to your upcoming decision. The following paragraphs present additional reasons for terminating the use permit.

The customers' cars at an automotive repair business such as Big O Tires are very different from customers' cars at other Park Street businesses. The cars are not at the business as a result of having transported shoppers or diners to the business. The cars themselves are the object and the product of the business's work. The cars are at the business for an industrial purpose and should not be parked on Park Street or in the surrounding neighborhood while waiting for the work to be done and waiting for their owners to retrieve them.

At the May 8, 2017, Planning Board hearing, former Big O franchisee Guido Bertoli testified that he and his partner Gary Voss ceased being Big O franchisees after Big O's corporate office repeatedly told them to delay searching for a new location with adequate parking space. In doing so, Big O's corporate office encouraged its Alameda franchisees to continue violating the conditional use permit. This flagrant disregard for City permit conditions does not reassure us that Big O Tires would comply with any conditional use permit in the future.

Because the business at 1200 Park Street is no longer Big O Tires (and the current operators have off-site parking on Oak Street), recent documentation of violations of the use permit and counts of available parking spaces in the surrounding neighborhood are not representative of Big O's past practices or predictive of its potential future practices. The decades of documented violations of the use permit during Big O's tenure provide evidence that Big O would likely violate permit conditions in the future.

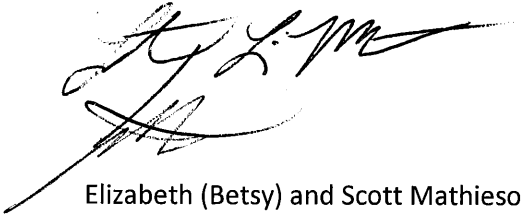
July 13, 2017

Page 2

At the May 8, 2017, Planning Board hearing, Rick O'Neil, Big O's Western Division Vice President, proudly stated that 1200 Park Street was the most profitable Big O store in the country during Big O's tenure at the site; the Alameda location serviced an average of 65 cars per day, compared with a national average of 24 to 25 cars per day per store. Mr. O'Neil was "amazed" that the location could achieve that volume "on such a small footprint." He ignored the fact that the footprint actually extended up and down San Jose Avenue and along both sides of Park Avenue. An historic business district adjacent to an historic residential neighborhood fronting Alameda's oldest city park is not an appropriate setting for the nation's largest-volume location of any automotive repair business.

We encourage you to revoke the conditional use permit for 1200 Park Street due to non-compliance by Big O Tires. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth and Scott Mathieson", with a large, stylized flourish extending from the end of the signature.

Elizabeth (Betsy) and Scott Mathieson
1185 Park Avenue
Alameda, CA 94501
(510) 523-5852

Attachment

December 15, 2016

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

Subject: PLN14-0134 - 1200 Park Street, Alameda
Big O Tires site

Ladies and Gentlemen:

We respectfully request that the City of Alameda Planning Board revoke the conditional use permit for an automotive business at 1200 Park Street due to years of non-compliance with conditions of the permit. As documented in the meeting materials for the November 28, 2016, public hearing, over the years your board has imposed the following conditions on use permits for the legal non-conforming automotive use at the site:

- 1979 (Use Permit No. 79-3): "That Parking be restricted to the approved site plan and those spaces marked."
 - In 1982 (Letter from City Zoning Administrator), this condition was reiterated to Henry C. Cohen before he opened his tire sales and installation business at the site.
- 1989 (Use Permit UP-88-36 issued for Big O Tires and sent to Henry C. Cohen): "Within 60 days... applicant shall find an alternative long-term parking site for customer cars, as well as for employees."
 - In 1990 (Letter from Planning Department), the Planning Department warned Mr. Cohen that the Department had "no record of the leasing of additional parking for customer cars as required..." and the business was out of compliance with the conditions of the use permit.

According to the draft resolution prepared for the November 28, 2016, public hearing:

- In 2013 Big O tires reported that it was unable to find an off-site parking lot and had implemented a valet service to minimize street parking.
- In 2014, Big O submitted an application to amend the use permit by removing the condition related to an off-street parking lot. The application was subsequently suspended.

In 2015 two public hearings were held, with neighboring residents and at least one business owner asking that the use permit be revoked for non-compliance with conditions including provision of adequate off-street parking. At the hearing, representatives of Big O Tires asked the neighbors to be patient because they were negotiating to move to a new location, at which time the impacts on the neighborhood would end.

December 15, 2016

Page 2

In late 2015 or early 2016 the business at 1200 Park Street ceased to be a Big O Tires franchise, changed its name to Big Discount Tire Pros, and prepared to move to 1835 Oak Street. We and our neighbors breathed signs of relief in anticipation of the departure of the tire business.

Now, after decades of non-compliance with the conditions of its use permit, Big O Tires plans to buy the property at 1200 Park Street and open a new tire business. A November 14, 2016, letter from Jay Garfinkle, representing the owners (prospective sellers) of 1200 Park Street, stated, "the business in question has been operating successfully at this location for nearly thirty five years. The site is clearly not too small for 'this type of business.'" The letter continued, "our tenant has.. acquired an additional property where vehicles can be parked if and when needed and is, therefore, in compliance with the element of the CUP..."

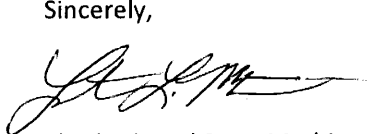
At the November 28, 2016, public hearing, a representative of Big O Tires described how tremendously successful the 1200 Park Street location has been over the years and implored your board not to force Big O Tires "to leave Alameda."

Clearly the business owes its profitability in no small part to its lack of compliance with its use permit. As neighbors we witness daily the tire store employees arriving to work and parking along Jackson Park, returning time after time throughout the day to park and retrieve and repark and retrieve customers' cars, and returning to their own cars at the end of the work day. The idea of using valet parking "if and when needed" acknowledges that valet parking won't be used until all on-street parking spots are full, shutting out residents, customers of other businesses, and users of Jackson Park who arrive by car.

Big O Tires has *already* left Alameda, after decades of non-compliance with its use permit. If Big O Tires returns to Alameda it will be in direct competition with the relocated Big Discount Tire Pros on Oak Street. With two large tire businesses in the Park Street area, Big O Tires would find it even more difficult to be profitable without continuing to violate the conditions of the use permit and without continuing to impact the surrounding neighborhood.

We encourage you to revoke the 1200 Park Street conditional use permit due to non-compliance. Thank you for your consideration.

Sincerely,



Elizabeth and Scott Mathieson
1185 Park Avenue
Alameda, CA 94501
(510) 523-5852

