



MEETING DATE: 9/5/06

ITEM NO:

DESK ITEM 2

6

COUNCIL AGENDA REPORT

DATE: September 5, 2006

TO: MAYOR AND TOWN COUNCIL

FROM: DEBRA J. FIGONE, TOWN MANAGER

A handwritten signature in black ink, appearing to read "Debra J. Figone", written over the "FROM:" line.

SUBJECT: CONSIDER AN APPEAL OF A PLANNING COMMISSION DECISION REGARDING MODIFICATIONS OR REVOCATION OF CONDITIONAL USE PERMIT U-94-44 (GOGUEN'S LAST CALL) FOR THE OPERATION OF A BAR ON PROPERTY ZONED C-2. APN: 529-07-046. PROPERTY LOCATION: 408 N. SANTA CRUZ AVENUE. PROPERTY OWNER: LOS GATOS SHOPPING CENTER, LLC. APPELLANT: CYNTHIA GOGUEN.

REMARKS:

Attachment 18 (noted below) was received after the report was completed.

Attachments:

Previously Submitted: (Copies are available for review in the Clerk Administrator's Office)

1. Planning Commission Report dated June 8, 2006 which includes:
 - a. Memorandum from Scott R. Seaman, Chief of Police, dated May 31, 2006 plus attachments
 - b. Memorandum from Roy Alba, Code Enforcement Officer, dated May 30, 2006 plus attachment
 - c. Business Owner's Statement prepared by Kent G. Washburn, dated June 2, 2006.
 - d. Letter to Cynthia Goguen dated April 28, 2006
 - e. Planning Commission Report dated May, 4, 2006
 - f. Planning Commission Desk Item dated May, 10, 2006
 - g. Letters from Los Gatos Shopping Center, LLC dated April 28, 2005 and February 28, 2006
 - h. Conditional Use Permit U-94-44
 - i. Planning Commission Desk Item dated June 14, 2006

PREPARED BY:

BUD N. LORTZ

A handwritten signature in black ink, appearing to read "Bud N. Lortz", written over the name.

DIRECTOR OF COMMUNITY DEVELOPMENT

Reviewed by: PS Assistant Town Manager ALC Town Attorney
____ Clerk Administrator ____ Finance ✓ Community Development

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MAYOR AND TOWN COUNCIL

SUBJECT: APPEAL OF 408 N. SANTA CRUZ AVENUE.

September 5, 2006

2. Planning Commission Report dated June 23, 2006 which includes:
 - a. Required Findings for Modification of CUP
 - b. Draft Conditions of Approval
 - c. Letter from Kent G. Washburn dated June 19, 2006
 - d. Planning Commission Report dated June 8, 2006
 - e. Town Alcohol Policy
 - f. Planning Commission Desk Item dated June 28, 2006
3. Verbatim Transcript of Planning Commission meeting of June 14, 2006
4. Verbatim Transcript of Planning Commission meeting of June 28, 2006
5. Appeal of Planning Commission Decision Form filed July 24, 2006 and Proof of Service (Certified Mail and Return Receipt Requested forms) dated July 26, 2006.
6. Resolution 2006-1
7. Email from Norman Matteoni dated August 8, 2006 (1 page)
8. Letter from Norman Matteoni received August 10, 2006 (2 pages)
9. Fax from Norm Matteoni received August 15, 2006 (3 pages)
10. Fax from Kent G. Washburn received August 16, 2006 (3 pages)
11. Fax from Kent G. Washburn received August 17, 2006 (1 page)
12. Fax from Kent G. Washburn received August 17, 2006 (6 pages)
13. Fax from Kent G. Washburn received August 18, 2006 (1 page)
14. Calls for Service Spreadsheet from Police Department (3 pages)
15. Chart of Seating at Bars (1 page)
16. Chart of Total Calls per Seat (1 page)
17. Email from Paul Dubois received August 31, 2006 (2 pages)

Attached:

18. Fax from Kent. G. Washburn received September 5, 2006 (4 pages)

BNL:mdc

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123 Jewell Street
SANTA CRUZ, CALIFORNIA. 95060

September 5, 2006

The Hon. Diane McNutt, Mayor
Town of Los Gatos
110 E. Main St.
Los Gatos, Ca. 95030

Re: The Last Call

by fax at 4:45 p.m.

Respected Mayor and Council:

The most recent staff report was e-mailed to me late Thursday, and because my Friday was already booked and the department was closed for the long weekend, this morning was my first chance to look through the police reports carefully in light of the brand new "calls per seat" rationale. Before proceeding to that analysis please let me briefly repeat what I believe lies behind and before us.

Background

Someone has influenced the Town staff to look unfavorably and unfairly at The Last Call. We believe it was Mr. Zanardi, the owner of the center. Once his efforts to use the ABC licensing process (at no charge to himself) failed to drive my client out of business, he tried to evict her. That backfired and he was ordered by the court to pay a large attorneys fees bill.

Only then was the first word ever spoken to The Last Call by your staff. It was not a request or warning to improve on certain issues, but rather an adversarial announcement that the Town would proceed to revocation, no questions asked, and announcing that decision by quoting almost verbatim from arguments unsuccessfully made by Mr. Zanardi in the Superior Court. We immediately asked for the backup information, and after more than three months of waiting finally have gained some limited access.

Legal standards

The holder of a conditional use permit has a substantial vested right to continue her operations. When a local government votes to revoke it, the courts will not just defer to the government decision. Instead the judge must use his/her *independent judgment* to weigh up the evidence and see if the revocation or new conditions are justified. This is an expensive process.

Complete compliance with actual use permit

The ostensible purpose of a use permit is to give the permittee and the government objective standards to measure by. Gogean's is not in violation of a single condition of its use permit.

A waste of the Town's money

Mr. Zanardi clearly wants to do something else with his land. He made at least one exploratory attempt to seek Town approval to do so in the past. He cannot go forward to do so freely, however, without getting his present tenants out of the way. Instead of buying out the lease or bearing the legal costs himself, he has somehow seemingly prevailed on Town staff to cause the taxpayers of Los Gatos to pay the cost for him. (Your Town attorney recently recommended that we contact Mr. Zanardi and his attorney, Norm Matteoni, about settling; we did so, but they declined to participate.)

This is a waste of money for several reasons:

1. The Last Call is by no means perfect, but it is not *now* a nuisance.
2. The Last Call is living, and willing to exist in the future, by all *reasonable* conditions as demonstrated in our offers to the Planning Commission and to this Council on all issues.
3. The evidence does not support staff's contentions.

Staff makes five wrong contentions

The August 15 staff report makes five contentions which lack solid evidentiary support:

1. Drug sales.
2. Health department violations.
3. Calls for police response put too great a burden on Town resources.
4. "Disordely house" allegations (seemingly a conclusory label, not a substantive charge.)
5. Attraction of transients

The balance of this letter and the attachments refute these contentions

Drug sales issue

This question has come before two judges already, the Administrative Law Judge who specializes in ABC license enforcement proceedings and Judge Thomas Cain, who specializes in evictions. Both judges found that the owner did not have guilty knowledge of what was going on and took effective action to prevent and stop it when it came to light. In the case of the ALJ the lightest penalty they ever consider – a brief period of actual closure – was imposed. In the case of the Superior Court, who was being asked by Mr. Zanardi to terminate the lease *because the drug sales allegedly constituted a nuisance*, no penalty at all was imposed except the attorneys fees award against landlord.

Are these decisions, even the one where Judge Cain found there was no nuisance, binding on you? No. Are they instructive as to what another Superior Court judge is liable to do if the drug claim is used to revoke the use permit or impose onerous conditions? I believe it is very indicative.

Since that one brief stretch more than two years ago The Last Call has been, and aims to permanently remain, drug free. Security cameras were installed, personnel were hired with formal training or required to obtain it. Last December, because of the state of relations with the Los Gatos force, my client held a mandatory substance abuse prevention training session for all employees, including the cleaning staff, with Officer Steve Brandon and his colleagues of the CHP.

Health Department Allegations

Out of concern for assessing the presence or absence of any colorable evidence that there is a health and safety public nuisance at The Last Call, I contacted the Santa Clara County Department of Environmental Health. They notified me that it was time for a routine inspection, and later that week they performed one.

The attached materials contain the handwritten report of the August 24, 2006 inspection to her supervisor with a candid conclusion "... facility was better than average." You must decide what a judge may be asked to review: whose opinion about whether health and safety conditions at the Last Call are a nuisance is more objectively reliable, Town planning staff or the inspecting County professional?

Number of alleged police calls

The bulk of my argument on this issue will be presented in the form of attachments to this letter. These attachments present objective data about what the police reports actually show.

In its August 31 report in preparation for this meeting your staff suddenly, and with no advance notice to us, switched for the first time to a "police calls per seat" basis of analysis. This tells us nothing about the real question that is before you: is The Last Call *now* a nuisance?

In order to give you the false impression that the Last Call is now a nuisance staff arbitrarily reaches back over a period of some six years, to 1999, to get the figures it presents to you. If there was a constant rate of reports or incidents over those years for The Last Call, perhaps that would have some validity.

Your staff knows, because the report data shows, that there is no such constant rate. Instead The Last Call shows two sharp declines in police calls: once after the 2004 drug arrests and another this past winter after the 30 day suspension was served.

Please recall in this regard that your police department has testified that it has made no formal effort whatsoever to contact The Last Call or work with it in any way to reduce the number of calls. We think we know why. But even in the absence of any police cooperation, supposedly because The Last Call is so horrible and uncooperative, there has been an exponential reduction in calls since 2004. It has all been achieved by The Last Call staff with some help from the California Highway Patrol, and of course the informal counsel of good Los Gatos officers who use police contacts to educate or advise. I urge you to consider this evidence carefully the way an impartial judge would do in using his/her independent judgment. The evidence shows Goguen's is not now a nuisance.

The alleged "disorderly house" issue

As far as I can tell this is an old-fashioned, catch-all term for a place where people break the law. As a label it may be interesting, but it adds nothing to the evidence. It is not an offense or a violation of the law in itself, but rather a conclusory term which does not involve any new evidence.

Transients

This may be the cruelest and most unfair charge in this case. Cynthia Goguen's bar does not cater to the homeless or invite them to her premises. In fact they are not welcome as patrons because of obvious hygiene and behavior issues.

She has done them an occasional kindness – storing a bike temporarily so that it would not be stolen, giving them a few dollars to clean up the Town and private parking areas once in a while, and serving them a hot meal for free at Christmas time. These are acts of simple human decency, not a violation of any standard of law or good conduct.

Instead of catering to the homeless or promoting their misconduct, often, as police department records show, Goguen's has been the one to call and let the department know about transient misbehavior. In the attachments you will see a sad, misspelled and even heart-rending, hand written letter prepared by the homeless for your council when they learned that their presence on Town premises was supposedly a basis for revocation of her permit. It speaks for itself.

Closing hour issue

As you are no doubt well aware, we were in very substantial accord with the Planning Commission on most issues. Early closing time was the one with which we could not live.

I respectfully submit to the Town that in order to impose an earlier closing time on nuisance grounds, there must be some rational nexus between the changed hours and current conditions and operations at the bar. I will submit to you this evening copies of the *only five* allegedly serious reports regarding The Last Call in 2006. Only 1 happened after the midnight closing the Commission imposed.

Conclusion

In summary I trust you see what I see and, if, God forbid we get that far, a judge will see: staff has not given you objective analysis that passes the independent judgment test for revocation or amendment of an existing use permit on nuisance grounds. Instead it has presented you with a biased and pretextual analysis designed to cause revocation for The Last Call.

I urge you to use your own powers of independent judgment to find based on 2006 data that Goguen's is not a nuisance and may continue to operate under its existing permit, perhaps with a more specific set of criteria agreed upon between Goguen's and the police for evaluating its operations.

Very truly yours,



Kent G. Washburn