

April 9, 2013

Mr. Matt Cosylion, Code Enforcement Supervisor
Ms. Brenda Wisneski, Zoning Administrator
City of Newport Beach
100 Civic Center Drive
Newport Beach, Ca.

Subject: Notice of Violation UP2010-027 and comments on proposed UP1013-005

Attn: Mr. Benjamin Zdeba, Assistant Planner

Dear Mr. Zdeba,

I am a resident of Newport Beach. I have resided continuously in Newport Shores since 1974. I have the following comments on current operations of Eat Chow Restaurant and proposed UP2013-005.

I want to make the City aware that the business subject to Use Permit 2010-027 (Eat Chow Restaurant) is operating in violation of its Use Permit (UP2010-027), and in addition, is illegally operating a pay valet parking business utilizing public streets (details are provided herein). I expect the City to take immediate enforcement actions.

Thank you for the notice of Public Hearing for Project File No. PA 2013-005. Due to the limited nature of the public notice, few Newport Shores residents that have been contacted are aware of this proposal. Below are my comments on proposed Minor Use Permit 2013-005. These concerns are shared by my neighbors.

Eat Chow is a fine restaurant. However, circumstances have changed since its approval in 2010. Assumptions used to justify the initial Use Permit have been invalidated. As a result, parking in the adjacent residential areas has been adversely impacted. For nearby residents, there are few if any on-street parking spaces available for residents and our guests during peak restaurant use periods. The reckless nature of the restaurant's illegal valet parking service has created a safety risk to the public.

Below I address UP2010-027 (PA2010-136) and identifying changes in circumstances and Use Permit violations which require enforcement action pursuant to the Municipal Code and Use Permit Conditions of Approval, followed by comments on proposed UP2013-005; and concluding with a Summary and Recommended Actions.

Existing UP2010-027

The applicant represented in the 2010 Use Permit application (reference 9-27-10 Project description and justification for Directors Use Permit): ***“5. Seating & Parking. In addition to required parking on-site, we will have full use of Spaghetti Bender's parking lot from 7am-4:30pm during the bulk of our most busy time and therefore will have more actual parking than we will realistically need. We can provide you with confirmation of this from Spaghetti Bender's property owner. We have spoken to Ethan Wayne who owns the adjacent building and parking lot about allowing us to use his empty lot after 5pm. In closing, this project will not only benefit Newport Shores, by offering new services, and our business, by increasing revenue, but it will also benefit the City, by generating new revenue and keeping the demand for traffic counts low.”***

Based on this representation the City evaluated the proposed project and made the required Findings of approval. Based on current operating characteristics and changed circumstances, the following Findings are no longer valid.

Finding No 3 (3rd bullet): ***“...this Use Permit will be conditioned to maintain the requirements of Section 20.48.090.”*** This quote states that the permitted use is conditional and must comply with the standards contained in Municipal Code Section 20.48.090 for eating and drinking establishments. The use (Eat Chow Restaurant) is not in compliance with the standards set for in Section 20.48.090. My comments below will provide specific violations.

Finding No 5: ***“The site is physically suitable in terms of design, location, shape, size, operating characteristics, and the provision of public and emergency vehicle (e.g. fire and medical) access and public services and utilities.”***

The City justification for this Finding included the following language ***“...The existing building and parking lot have functioned satisfactorily with the current configuration....”*** This is not true. The entire building was vacant at the time of this application. Over the years numerous businesses have attempted to operate and failed. In my opinion, being in the land development business since 1974, and a nearby resident since 1976, they failed because of a lack of sufficient on-site parking spaces, inadequate parking design and lack of adequate space for delivery vehicles. The result of these inadequacies combined with a change in the operation of the business, (from a business that was represented to have its peak use period from ***“7am to 4:30pm”*** to a business whose peak use period is nighttime) have resulted in the elimination of parking for nearby residents and their guests during peak use periods. Obviously, the site is not physically suitable for a use that requires over 8 parking spaces (hence the need for valet parking during peak use periods), and frequent deliveries.

Finding No 6: ***“Operation of the use at the location proposed would not be detrimental to the harmonious and orderly growth of the City, or endanger, jeopardize, or otherwise constitute a hazard to the public convenience, health, interest, safety, or general welfare of persons residing or working in the neighborhood of the proposed use.”***

The Project Description identified the use as a coffee shop/restaurant. The Applicant, Eat Chow **Café** operates a similar facility in Costa Mesa. The appropriate parking ratio was determined by the City to be 1 space per 50 sq feet of public space requiring a total of 12 spaces (As friendly to business as the Municipal Code allows). The City determined the subject property to be nonconforming pursuant to Section 20.38.060 due to deficient off-street parking; and that the nonconforming status is not intensified by the proposed use (note: the calculation for this

determination is not provided in the Staff Report). I requested this (public) information from Staff twice, it has not been provided.

I do not believe the rationale leading to this conclusion was appropriate in 2010 nor is it appropriate now. I acknowledge that UP2010-027 has been approved the appeal period has long since past. However, there have been changes to the Project Description, on-going violations of the Use Permit Conditions of Approval and changes in circumstances since approval of UP2010-027. These factors require a reanalysis of the Project. Factors that should be considered include:

Standard Condition 48 (see UP2010-027) states: “***This approval was based on the particulars of the individual case and does not in and of itself or in combination with other approvals in the vicinity or Citywide constitute a precedent for future approvals or decisions.***”

Municipal Code Section 20.50.10 B & C instructs Staff to:

“B. Encourage nonconforming uses and structures to become more conforming over time.

C. Reduce the number of nonconforming uses by prohibiting their reestablishment after Abandonment”

Municipal Code Section 20.12.020 D (1) Conflicting Requirements states: “***Zoning Code and Other Municipal Code Provisions. If conflicts occur between requirements of this Zoning Code, or between this Zoning Code and other provisions of the Newport Beach Municipal Code, or other adopted regulations of the City, the more restrictive provision shall prevail.***”

Restaurant uses at this location have been nonconforming pursuant to Section 20.38.060 due to deficient off-street parking for many years. The current use continues to be nonconforming due to inadequate off-street parking and inadequate room for access by delivery vehicles. The Municipal Code is clear “***If conflicts occur between requirements of this Zoning Code, or between this Zoning Code and other provisions of the Newport Beach Municipal Code, or other adopted regulations of the City, the more restrictive provision shall prevail***”. The City should implement Section 20.50.10(B & C) and encouraging nonconforming uses to become more conforming over time or prohibit their reestablishment. The City should require compliance with Municipal Code Section 20.52.110 Off Street Loading Requirements. Clearly parking for any restaurant at this location will have nonconforming parking. If the proposed use relies on off-site public spaces within the adjacent residential zone, the project should be subject to Municipal Code Section 20.52.60 “Parking for Nonresidential Uses in Residential Zoning Districts”.

It is improper for the City to rely upon the prior Use Permit’s nonconforming status as a “***precedent for future approvals or decisions***” and ignore the conflicting requirements of the Municipal Code which are more restrictive per Section 20.12.020 D (1).

Conditions have changed. Peak periods for the approved use are not daytime, as represented in the 2010 Use Permit application (reference 9-27-10 Project description and justification for Directors Use Permit: “***...we will have full use of Spaghetti Bender's parking lot from 7am-4:30pm during the bulk of our most busy time and therefore will have more actual parking than we will realistically need***”). Peak periods are nighttime and to a lesser extent weekend mornings.

During peak use periods, the space is being used primarily as a restaurant, not a coffee shop. The majority of customers drive vehicles to the restaurant particularly during the peak use periods (evenings). The appropriate parking ratio for the Eat Chow restaurant and coffee shop having the bulk of business occurring from 7:00 am to 4:30pm is 1 space per 30 sq feet of public space (not 1 space per 50 sq. ft.), requiring a total of 20 spaces. Due to the restaurant's change in "*our most busy time*" from daytime to evenings, the City must re-examine the parking requirement to determine if the subject property qualifies as nonconforming pursuant to Section 20.38.060 due to deficient off-street parking; and if the nonconforming status is intensified by the proposed use. In addition, the City must determine if Section 20.38,060 is applicable given the conflict with Section 20.50.10(B & C) following the procedure mandated by Section 20.12.020 D (1) to resolve conflicts in the Municipal Code. In addition, the City must determine if it is feasible to safely have delivery vehicles access the property given the limited space available and inconsistency with Section 20.52.110.



Entrance to Eat Chow

Photo Date: April 6, 2013, 6:20 pm

A delivery vehicle (see photo of delivery truck below) cannot safely access the space available in the above photo. Even if a delivery truck could fit in, there is limited sight visibility for trucks backing out and a delivery truck would block access to the remaining commercial space in the building (presumably the address is # 213B).

Finding 6 (3rd bullet) “***The restrictions on seating and net public area prevent adverse traffic impacts for the surrounding residential and commercial uses and patrons who are nearby residents or visitors to the area will likely walk or ride a bicycle to the restaurant. Bus stops are also located in the vicinity.***”

Peak use periods are nighttime and to a lesser extent weekend mornings. The majority of visitors to this area are beach-goers. Beach-goers generally leave Newport in the afternoon. The assumption that “***visitors to the area will likely walk or ride a bicycle to the restaurant***” has not turned out to be true during peak use periods. Nor is the assumption correct that bus users will prevent adverse traffic impacts during peak use periods or that significant numbers of customers will park in the meter parking spaces located across Pacific Coast Highway and walk to the restaurant during peak use periods, (see statement in Finding 3). The Applicant represented that spaces would be available after 5pm at the lot across the street owned by Ethan Wayne. This parking is no longer available. The overwhelming majority of Eat Chow customers now park on the public streets in the adjacent residential area. The Finding that “***the restrictions on seating and net public area prevent adverse traffic impacts for the surrounding residential and commercial uses...***” is invalid. At minimum a Parking Management Plan and compliance with Section 20.52.60 is warranted.

Conclusion

The representations in the by the Project Applicant in his 9-27-10 Project description and justification for Directors Use Permit letter, combined with the commitment to have all employees park off public streets or far away from the Café on public streets, convinced nearby residents that their concerns over the lack of adequate on-site parking and their fear that Eat Chow Café’s customers would park on public streets within the adjacent residential area had been adequately addressed.

The change in the operating characteristics of the business, from a Café represented to have its peak use period from “***7am to 4:30pm***” to a Restaurant whose peak use period is nighttime have resulted in the elimination of parking for nearby residents and their guests during peak use periods.

The use of the Spaghetti Bender parking lot is not available to Eat Chow in the evenings. The parking shortage is so severe, that the Spaghetti Bender has placed a sign and at times an attendant to discourage Eat Chow customers from parking in their lot.

The use of the parking lot for the adjacent building owned by Ethan Wayne while initially available is no longer available at any time.

These changes in circumstances combined with the popularity of the restaurant have reduced the availability of parking in the residential area adjacent to the restaurant. The effects are most significant in the evening hours when the Spaghetti Bender and Eat Chow are at their busiest. As a nearby resident, there are now few if any on-street parking spaces available for residents or our guests during peak restaurant periods.

These changes in circumstances contradict the Applicant's 9-27-2010 Project Description and Justification for Directors Use Permit (UP2010-0027) and invalidate a number of the Findings of approval. Therefore, the City must reevaluate the current use for conformance with UP2010-027 and its findings justifying its approval.

The City's role is clear, the City should implement Section 20.50.10(B & C) and encouraging nonconforming uses to become more conforming over time or prohibit their reestablishment. It is improper for the City to rely upon the prior Use Permit as a "***precedent for future approvals or decisions***". At minimum a Parking Management Plan and compliance with Section 20.52.60 is warranted.

The burden lies with the Applicant to remedy the parking impacts and Use Permit violations created by the use. If the Applicant is unable or willing to do so, the City is required to take appropriate enforcement actions including revocation of Use Permit 2010-027.

Observed Violations (UP2010-027)

Condition No. 36:

“The use of the facilities rear door for deliveries shall be prohibited”.

Delivery trucks regularly illegally park on Newport Shores Drive (red curb) adjacent to the rear door and make deliveries through the rear door. This was the operators plan all along (reference 9-27-10 Project description and justification for Directors Use Permit: ***“The only time a residential neighbor will see our operations will be during small deliveries to the rear door”***). The operator has ignored this Condition of Approval!

“The rear doors of the facility shall remain closed at all times”

This door has been observed open multiple times during the day and night.



Delivery through rear door
Photo Date: April 5, 2013 1:30 pm



Delivery through rear door
Photo Date: April 5, 2013 1:30 pm



Rear door open - nighttime
Photo Date: April 2, 2013 9:30 pm



Rear door open - daytime
Photo Date: April 3, 2013, 10:00 am



Rear door open – daytime
Photo Date: April 4, 2013, 12:00 am



62nd St at Newport Shores Drive
Lack of available parking spaces
Photo Date: April 4, 2013, 7:00 pm



Rear (Kitchen) door open – evening
Note: staining on sidewalk
Photo Date: April 6, 2013, 6:20 pm



62nd St at Newport Shores Drive
Lack of available parking spaces
Photo Date: April 6, 2013, 6:20 pm



Rear Door Open – Note: staining on sidewalk. Why? The building’s other rear door has no staining.
Photo Date: April 4, 2013, 6:00 PM



Photo Date: April 6, 2013, 6:20 pm

Note: The parking problem - Eat Chow valet sign and “Spaghetti Bender Parking Only” sign



Photo Date: April 6, 2013, 6:20 pm

Condition No. 37:

“All deliveries shall be conducted on-site through the front entrance”

Deliveries are conducted off-site either through trucks illegally parking on Newport Shores Drive (adjacent to the red curb) adjacent to the rear of the facility, or trucks park off-site in the adjacent Spaghetti Bender parking lot and utilize the front entrance. Deliveries occur in this manner because there is no room for delivery trucks if cars occupy the available on-site parking area. The Applicant had no intention of complying with this condition as indicated in the Applicants 9-27-10 Project description and justification for Directors Use Permit letter.

Other

- During the consideration of UP2010-027 in 2010, the Applicant committed to the residents to have employee’s park their vehicles away from the restaurant to reduce the impact on adjacent residential areas. This is not occurring. Employees park at the closest available space to the restaurant.
- Eat Chow’s valet services charges \$3.00 to park its customer’s cars off-site on public streets in the adjacent residential area. To provide prompt service, the valet park at the closest available space to the restaurant. This further exacerbates the parking shortage in the residential area adjacent to Eat Chow. The valet is needed because there is a parking shortage on-site and in the project vicinity. The valet has been observed racing to any available parking space. This is extremely dangerous in a residential neighborhood with young children and the elderly and represents a clear risk to public safety. This illegal activity **constitutes a hazard to the public convenience, health, interest, safety, or general welfare of persons residing or working in the neighborhood of the proposed use”**.

Eat Chow illegally operates a valet parking service (\$3.00 charge/car) to park its customer’s vehicles on public streets. Eat Chow has no approved Conditional Use Permit or Parking Management Plan permitting it to do so. Use of public streets for commercial purposes is a violation of Municipal Code Section 10.08.030 “Use of Streets and Sidewalks for Commercial Purposes”.

- As noted in the prior photos, there is staining on the sidewalk adjacent to the rear door to the kitchen of Eat Chow. Please ask the operator for an explanation. The staining cannot be from deliveries because that is prohibited. Therefore, it must be from employees entering and exiting the business. Surprisingly, there is no staining on the sidewalk at the main entrance where customers enter and deliveries are conditioned to occur. We value our environment and do not want kitchen waste, cleaning fluids and/or detergents polluting the harbor!
- EAT Chow was cited by the City for having outdoor dining without a permit. Prior to the issuance of the citation, Eat Chow was warned by the City and ignored the warning resulting in the citation.

Proposed UP2013-005

Comments on RESOLUTION ZA2013-DRAFT

Scope of Analysis: The language in proposed UP2013-005 states “*this approval shall supersede any previous use permit at this location*”. Therefore UP 2013-05 if approved will supersede the existing Use Permit UP2010-027. I interpret this to mean that the proposed Use Permit addresses the whole of the property, is not an addendum to the previous UP2010-027, or in addition to UP2010-0027. Therefore, the whole of the property/use must be analyzed as part of proposed UP2013-005, not just the proposed outdoor dining request.

Section 2 CEQA Determination # 1 & 2:

The Class I CEQA exemption applies to the “*ongoing use of existing buildings where there is negligible or no expansion of use.*”

Staff determined that the proposed Use Permit will have a negligible expansion of use. No justification or explanation for how this determination was made is provided. The Project represents an 11.5% increase in the number of restaurant seats. I do not consider an 11.5% expansion of use negligible.

- What is the definition of “negligible expansion of use”?
- Has this definition been codified and applied uniformly throughout the City, or is this an arbitrary definition developed for this Project?
- What is the CEQA threshold of significance for expansion of use?

The CEQA Class 1 exemption does not distinguish between large and small buildings or the type of use as does the draft Resolution. Certainly, an 11.5% percent expansion of the Balboa Bay Club, Fashion Island or Newport Coast would not qualify for a Class 1 exemption. The proposed Project does not qualify for a CEQA Class 1 exemption.

Section 3 - Required Findings

The proposed “Findings” and “Facts in support findings” contained in proposed UP2013-005 have modified from those contained in approved UP2010-027. Facts in support of findings contained in proposed UP2013-005 must be consistent with those in proposed UP2013-05. The only requested change in the Project is for 4 outdoor seats. One example, the proposed “Findings” do not include the following “Facts in support of findings” contained in UP2010-027:

UP 2010-027 Finding 6 – Facts in support of finding

“The conditions imposed on the use will reduce any possible detriment to the community by ensuring continued consistency with the intent and purpose of the Municipal Code.

The restrictions on seating and net public area prevent adverse traffic impacts for the surrounding residential and commercial uses, and patrons who are nearby residents or visitors to the area will likely walk or ride a bicycle to the restaurant. Bus stops are also located in the vicinity.”

Why has the City omitted and or modified pertinent “Facts in support of findings” contained in UP2010-027?

One example of the significance of these facts is the granting of UP2013-005 will allow an 11.5% increase in seating capacity. This increase in use will by definition, increase the parking problems during peak use periods which contradicts the prior Finding that: “*the restrictions on seating and net public area prevent adverse traffic impacts for the surrounding residential and commercial uses...*”

By eliminating and or modifying 23 Conditions of Approval contained in UP2010-027, the Facts in support of findings that “*The conditions imposed on the use will reduce any possible detriment to the community by ensuring continued consistency with the intent and purpose of the Municipal Code*” this whole concern has been improperly removed from proposed UP2013-005.

Finding (B): “**The use is allowed within the applicable zoning district and complies with all other applicable provisions of this Zoning Code and the Municipal Code.**”

Finding B (3): The existing use is currently in non-compliance with existing Conditions of Approval (see above). Therefore, this Finding cannot be made.

The burden lies with the Applicant to remedy the parking impacts and Use Permit violations created by the use. If the Applicant is unable or willing to do so, the City is required to take appropriate enforcement actions including revocation of Use Permit 2010-027. Any new and/or modified Conditions of Approval should demonstrate compliance with Municipal Code Sections 20.48.090 and 20.40.060 (B).

Finding (C): “*The design, location, size, and operating characteristics of the use are compatible with the allowed uses in the vicinity.*”

Finding C (1): Because this business is operating in violation of UP2010-027 Conditions of Approval; is operating an illegal off-site valet parking business on public streets; is operating under different operating characteristics (peak use period has changed from daytime to nighttime); and its design will not allow required on-site deliveries this Finding cannot be made. Furthermore, the Project is by definition an 11.5% expansion of the existing use. This expansion will adversely impact parking in the adjacent residential area. **The operating characteristics of this use are not compatible with the residential uses in the vicinity.**

Finding (D): “*The site is physically suitable in terms of design, location, shape, size, operating characteristics, and the provision of public and emergency vehicle (e.g., fire and medical) access and public services and utilities.*”

Finding D (1): The existing building and parking lot **have not** functioned satisfactorily with the current configuration. There is no room for on-site deliveries when cars are in the parking area. Consequently, delivery trucks park illegally on Newport Shores Drive and access the building through the rear access door, a violation of UP2010-027 Condition of Approval 36, or use the Spaghetti Bender parking lot for deliveries in violation of Condition of Approval 37. The operating characteristics are adversely impacts residential parking in the adjacent residential area. **The site is not physically suitable in terms of design, location, shape, size, operating characteristic for the existing use.**

Finding (E): ***“Operation of the use at the location proposed would not be detrimental to the harmonious and orderly growth of the City, or endanger, jeopardize, or otherwise constitute a hazard to the public convenience, health, interest, a safety, or general welfare of persons residing or working in the neighborhood of the proposed use.”***

Finding E (1): The “Project” has not been reviewed. The City’s acknowledges that it has not reviewed the existing Use Permit (UP2010-027) or considered the ongoing violations as part of its review. Condition No. 2 states: ***“this approval shall supersede any previous use permit at this location”***. Therefore, the whole of the project must be evaluated. While the whole of the project is not evaluated, proposed Conditions of Approval apply to the whole of the property, not just the outdoor dining area. Why? Alarming the proposed Conditions of Approval reduce the City’s control over the property and its use, and allow the Applicant greater flexibility. These changes to existing UP 2010-027 Conditions of Approval were neither requested by this Use Permit Application nor included in the public notice issued by the City for UP2013-005. These changes in Conditions of Approval among other opportunities provide the operator the potential to increased business during peak hours which will further adversely impact the availability of public parking in the adjacent residential area.

The facts presented herein are not considered by Staff in their preparation of this draft Resolution. The draft Resolution and its attachments do not include any **“conditions to ensure that potential conflicts with the surrounding land uses are minimized to the greatest extent possible”**; do not implement Municipal Code Section 20.50.10. (B & C) let alone any conditions to remedy existing Use Permit violations or illegal activities. Staff has not following Municipal Code Section 20.12.020 D (1) to resolve conflicts.

The operator, while required to take reasonable steps to discourage and correct objectionable conditions, has not taken such steps. In fact, the operator has done the opposite by changing his business to a predominately nighttime business, promoting change through establishing an illegal valet parking service and illegally attempting to promote outdoor dining, for which the operator was cited.

Exhibit A – Conditions of Approval – Draft

Condition

2. Since ***“this approval shall supersede any previous use permit at this location”***, please explain why 23 Conditions of Approval contained in UP2010-0027 have not been carried forward in proposed UP2013-005, or have reduced requirements (specifically, Conditions: 1, 3, 4, 7, 8, 9, 11, 12, 13, 14, 19, 31, 35, 38, 40, 41, 42, 43, 45, 47, 48, 49 and 51 of UP2010-027).

Removal or modification of Conditions of Approval were not requested in the Use Permit Application and were not noticed to the public. Elimination and or Modification of proposed Conditions of Approval to reduce requirements of prior Conditions of Approval are improper.

In addition, please address the following specific questions:

Condition 1 – Why was the following language deleted from proposed Condition 1?
“...stamped and dated with the date of this approval (Except as modified by applicable conditions of approval.)”

Condition 3 – Why remove the counter height limitation? Is this not to insure handicapped compliance in the future?

Condition 7 - Why remove the requirement: ***“The construction plans must meet all applicable State Disabilities Access requirements. Approval from the Orange County Health Department is required prior to the issuance of a building permit.”***?

Will the proposed outdoor seating area meet all applicable Federal and State Disabilities Access requirements? This is not addressed in the Staff Report, Draft Resolution or Draft Conditions of Approval.

Condition 8 - Why remove the requirement: ***“Cleanout shall comply with Public Works Standard-406-L regarding sewer lateral cleanouts.”***?

Condition 19 - Why remove the requirement: ***“There shall be no reduced price alcoholic beverage promotion after 9 p.m.”***? By eliminating this restriction the operator will be able to provide promotions which have the potential to increase patronage. Increased patronage will further adversely impact the availability of parking in the adjacent residential area during peak use periods.

Condition 51 - Why remove this Condition? Condition 51 is not the same as proposed Condition 8 of UP-2013-005. Condition 51 cites ***“Chapter 20.48 of the Municipal Code”*** and include ***“and/or Planning Commission”*** which proposed Condition 8 omits.

9. The review of UP20013-005 application should consider operator compliance with UP2010-027. The change in circumstances since approval of UP2010-027 in operational characteristics, proposed expansion in the number of seats, existing Use Permit violations and language contained in the existing use permit require the processing of a new Use Permit.

19. Condition 19 should be revised to address deliveries which involve trucks parking illegally on Newport Shores Drive and accessing the restaurant through the rear access door, or use the (off-site) Spaghetti Bender parking lot for deliveries. The burden lies with the Applicant to remedy the parking impacts and Use Permit violations created by the use. If the Applicant is unable or willing to do so, the City is required to take appropriate enforcement actions including revocation of Use Permit 2010-027.

20. Appropriate enforcement actions should be taken and new Condition(s) of Approval imposed to insure compliance with Use Permit 2010-027 conditions 36 and 37 and ultimately UP2013-005.

Summary and Recommended Actions

Summary

Eat Chow is a fine restaurant. However, circumstances have changed since its approval in 2010. Applicant representations allowed the City to reach required Findings in support of UP2010-027 have not occurred. Assumptions used by the City to justify the initial Use Permit have been invalidated. As a result, parking in the adjacent residential areas has been adversely impacted. For nearby residents, there are few if any on-street parking spaces available for us and our guests during peak restaurant use periods.

Eat Chow has not turned out to be the type of use it was represented to be. Eat Chow Café is operating as a Restaurant not a café in violation of Conditions of its Use Permit, and operating an illegal valet parking business using public streets. Therefore, the existing use is inconsistent with the required Findings for Use Permit 2010-027 and the City is required by Conditions 51 to take enforcement action.

Condition 2 of UP2013-005 states that: “***this approval shall supersede any previous use permit at this location***”. This requires the City to look at the whole of the Project. Given the adverse impact this restaurant is having on the adjacent residential area, the scope of analysis is that of a new Use Permit including a new parking analysis is required for proposed Use Permit 2013-005.

The City needs to clarify its rationale for claiming a CEQA, Class 1 exemption, particularly in light of the 11.5% expansion of use and evaluate the whole of the Project.

The City needs to justify why it is relinquishing control over this use and providing additional flexibility to the Applicant through elimination and modification of 23 previously adopted Conditions of Approval for UP2010-027. Changes to the existing Use Permit Conditions of Approval are not requested by PA2013-005, nor are they identified in the public notice. As proposed, changes to existing Use Permit/Conditions of Approval are improper and illegal.

Eat Chow Café committed to be “***an excellent neighbor, well aware of its responsibility to the residents...and attentive to the needs of the neighborhood***” and told the City and residents it “***will have more actual parking than we will realistically need***” when it applied for the Use Permit in 2010. Far from that, Eat Chow the restaurant is knowingly operating in violation of Conditions of its Use Permit. Eat Chow knowingly violated outdoor dining regulations and was cited by the City. Eat Chow knows it has a parking deficiency and has implemented an illegal off-site valet parking service on public streets without first obtaining a Conditional Use Permit or approval of a Parking Management Plan.

The burden lies with the City to enforce its regulations.

The burden lies with the Applicant to conduct the use in accordance with these regulations. If the Applicant is unable or willing to do so, the City is required to take appropriate enforcement actions including revocation of Use Permit 2010-027. It is not the resident’s problem to solve.

Eat Chow is asking the City for a discretionary action. In considering this request, the City should take the aforementioned into consideration.

Recommended Actions

1. The City immediately take enforcement action(s) to remedy existing Use Permit and Municipal Code violations;
2. Prior to consideration of UP2013-005, the City must bring the existing use in conformance with its Use Permit 2010-027/Conditions of Approval and demonstrate that the use, as represented in the 2010 permit application or as modified is in conformance with the City's Findings approving UP2010-027. This is required by Condition 51, Municipal Code Section 20.40.060 and the standards set fort in Municipal Code Section 20.48.090;
3. Continue action on UP2013-005 to a future date to allow Staff and the Applicant to address concerns raised by the public; and
4. Instruct staff as a policy to make a reasonable effort to contact surrounding property owners and/or community organizations prior to drafting staff reports and or implementing documents.

Thank you for your consideration of my comments.

Sincerely,

David Tanner
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dave@earsi.com