



DATE: May 8, 2018

CATEGORY: Public Hearing

DEPT.: Community Development

TITLE: **Appeal of Modifications to a Conditional Use Permit for O'Malley's Sports Pub**

RECOMMENDATION

Adopt a Resolution Upholding the Zoning Administrator's Approval of Modifications to a Conditional Use Permit which Conditionally Permits a Bar and Drinking Place with Live Entertainment in an Existing Commercial Building at 2135 Old Middlefield Way, to be read in title only, further reading waived (Attachment 1 to the Council Report).

BACKGROUND

This appeal relates to O'Malley's Sports Pub, a bar featuring live entertainment located at 2135 Old Middlefield Way. Due to repeated violations of the Conditions of Approval of their existing Conditional Use Permit (CUP) (008-13-UPA), violations of City Code, and neighborhood complaints, the Zoning Administrator held a compliance hearing on October 25, 2017 and imposed modified conditions requiring removal of the outdoor patio at the establishment. Staff's recommendation to uphold the Zoning Administrator's decision is supported by substantial evidence as described in more detail below.

On November 22, 2017, the City received an appeal of the Zoning Administrator's decision to modify the existing CUP. The appellants provide the following reasons why Council should overturn the Zoning Administrator's decision (see Attachment 2—Statement of Appeal):

1. Denial of due process under California and Federal constitutions;
2. Unfair hearing under common law;
3. The order is not substantiated by the record or sufficient evidence;

4. The findings and order are predicated upon information which was not divulged to the appellant;
5. The appellant did not apply for a modification of the CUP;
6. The definition of "live entertainment" was not the one used in the original CUP and is a unilateral retroactive change in the conditions and terms of the original CUP;
7. The definition of "live entertainment" is constitutionally overbroad and uncertain; and
8. The imposition of new conditions is overly restrictive and denies the respondent/appellant equal protection under law.

This appeal public hearing was originally scheduled in February 2018 and was continued at the appellant's request for three months to allow them additional time to prepare for the hearing. The City in good faith granted this continuance but declined to allow a second request for continuance because there was no basis to grant an additional continuance and in the public interest of getting the matter resolved.

Project Site

The project site is located on the south side of Old Middlefield Way, between North Rengstorff Avenue and Independence Avenue, in the CS (Commercial Service) Zoning District. Two buildings are currently located on the property, O'Malley's Sports Pub, which fronts Old Middlefield Way, and a multi-tenant industrial building located at the rear of the property.

Surrounding land uses include commercial and residential to the east, auto body shops to the west, commercial uses and a storage use to the north, and residential to the south.



Location Map

Property Chronology

The site has been used as a bar since its construction in the 1950s and was previously called Francesca's. Since the early 1990s, various approvals for other uses in conjunction with the bar use have been conditionally permitted. Each approval included specific conditions of approval aimed at ensuring the use of the property would not be detrimental to persons residing or working within the neighborhood. Over the years, multiple complaints and issues associated with the property have arisen and the City has continued to work with various tenants and the property owner to address these issues. The following information is provided to give the City Council an overview of prior approvals and issues associated with the site.

- In 1992, a CUP was approved which conditionally permitted live entertainment at the existing bar. The Zoning Administrator was concerned with potential noise impacts to surrounding properties, so conditions of approval to reduce these potential impacts were included with the permit and included restricted hours of operation, a requirement that the back door remain closed, and that soundproofing and noise-muffling devices be installed in the building.
- In February 2005, a new CUP was approved which conditionally permitted modifications to the previous CUP, and allowed a new restaurant (Uncle Frank's) within the existing building already being used as a bar (Francesca's). Over the next two years, multiple incidents occurred which caused the Mountain View Police Department to have significant concerns with the use of property. Records from the Police Department describe 13 incidents, including discharge of firearms, public drunkenness, fights, and assaults. The Police Department worked with the property owner/operator to improve safety and security on the property.
- In June 2011, a Development Review Permit was approved which expanded and improved the back patio area for dining associated with the restaurant use.
- In July 2013, a new CUP (008-13-UPA) was approved which conditionally permitted a change from a restaurant and bar without entertainment to a bar with live entertainment (Francesca's Sports Bar). To avoid negative noise impacts associated with a bar with live music, conditions of approval restricting live entertainment to Thursday, Friday, and Saturday, limiting hours of operation, and requiring all doors to remain closed when the bar is in operation were included. Conditions of approval from the Police Department were also imposed to address

potential safety and security issues (see Attachment 3 – Findings Report for 008-13-UPA – CUP).

- In May 2015, a Development Review Permit was approved which approved the repainting of the exterior of the building and interior modifications such as removal of walls, electrical and plumbing work. This permit was done to legalize the existing work which had already been done without permits.
- In 2015, the current operator, O'Malley's Sports Pub, occupied the building. The City began receiving complaints regarding noise and in May 2016, Planning Division staff met with Flor and Patrick O'Sullivan to discuss the recent complaints as well as ensure that as new tenants of the site, they were aware of the conditions of approval for their operation. The noise complaints primarily revolved around use of the back patio and the rear door remaining open during live entertainment events. The City continued to receive complaints, so in July 2016, Planning Division staff met with Flor and Patrick O'Sullivan again to discuss how they were going to resolve the complaints, comply with their CUP, and discussed their idea to possibly relocate the back patio to the front of the property to reduce noise impacts to the residential uses located at the rear and side of the property.

Violations

The following summary of violations from each department pertains only to 2017 and does not embody the full list of violations and actions that pertain to the property and use over the years.

Police

Condition of Approval Nos. 2, 7, and 12 in CUP 008-13-UPA restrict live entertainment to Thursday, Friday, and Saturday nights, require the applicant to obtain an annual Live Entertainment Permit with the Police Department, and require all doors and windows remain closed while the bar is in operation. The City has received complaints and seen advertisements for live entertainment on nights it is not permitted.

In March 2017, Police received information that O'Malley's was advertising for live entertainment on Tuesday nights. A Police Officer contacted the tenant by phone and was informed that they were not having live entertainment on Tuesday nights. On March 21, Police noticed the advertisement was still posted and drove to O'Malley's to speak in person with the tenant, and the Police Officer was told they were having a

comedian, which was not live entertainment. The Police Officer informed the tenant that live performances of any kind, including comedian shows, classify as live entertainment and that they needed to cancel the show. The tenant told the Police Officer the show would be cancelled.

Later that night, a Police Officer inspected the bar and found the comedian performing. In addition to violating the days and hours that live entertainment is allowed in their Live Entertainment Permit through the Police Department and the CUP, the back door was propped open, which is also prohibited by the CUP. In addition, the Police Officer noticed advertisements were posted in the bar for live entertainment every Tuesday night.

The following day, March 22, 2017, Code Enforcement cited and fined the tenant \$1,000 for violating the CUP. The tenant petitioned the fine based on the argument that they were unaware a comedian counted as live entertainment. On May 24, 2017, an Administrative Hearing was held to determine if the fine could be waived. The Hearing Administrator ruled in the City's favor and required O'Malley's to pay the fine.

In addition to this incident, eight Police reports were filed on the property during 2017 for various reasons, including propping the back door open. These eight incidents only account for occasions where Police reports were formally filed and does not account for additional Police staff time spent working with the tenants.

O'Malley's also had an outstanding False Alarm fee of \$4,580 which was outstanding from June 1, 2016 until January 2018.

Fire

During 2017, the Fire Department conducted 14 inspections at O'Malley's. Over half of these inspections were reinspections due to failure to comply with various Fire Codes. Examples of these violations include, but are not limited to, storing items in the rear exit pathway, padlocking the rear patio exit when the business is occupied, accumulating waste at the garbage enclosure, and having unsecured compressed gas cylinders.

Building

In April 2017, the City received a complaint that illegal construction activity was taking place at the bar. On April 3, a Building Inspector conducted a site visit and noticed modifications to the back patio were being constructed without permits and the Inspector informed the tenants that a permit was needed. On April 6, a Building

Inspector visited the site again when no permits were submitted and the work was still continuing and a stop work order was issued requiring construction activity to cease. On April 27, the City discovered construction was still taking place, so a second stop work order was issued. The illegally constructed patio modifications were not removed until after the Zoning Administrator brought the CUP to a public hearing several months later, on October 25, 2017.

Planning

As previously noted, O'Malley's violated Condition of Approval Nos. 2, 7, and 12 of CUP 008-13-UPA. In addition to restricting live entertainment to Thursday, Friday, and Saturday, Condition of Approval No. 2 also indicates the building is not to be operated as a restaurant, as a restaurant and bar with live entertainment is not permitted in the CS Zone, and only ancillary food is permitted. O'Malley's has been operating the building as a full restaurant and bar, and the City has received complaints about smoke and noise as a result of barbecuing on-site.

Due to the abundance of issues with multiple City departments, violations of conditions of approval and other City codes and ordinances, as well as noise complaints, the Zoning Administrator scheduled the CUP for review at a public hearing. Pursuant to the conditions of approval in the CUP, in the event that problems with the operational criteria of the business arise, the Zoning Administrator may hold a duly noticed public hearing to review the situation and impose new or modified conditions of approval in response to the information received. In addition to this condition, Section 36.56.70 of the Zoning Ordinance (Permit Revocation) allows the Zoning Administrator to hold a duly noticed public hearing in order to revoke or modify any permit or entitlement granted that one or more of the conditions of the permit have not been met and/or that the improvement, use, or activity allowed by the permit is detrimental to public health, safety, or welfare or constitutes a nuisance.

Administrative Zoning Hearing

On September 14, 2017, the Zoning Administrator spoke with Jackie Berryessa, the property owner contact, to inform her that an upcoming public hearing would be held. The property owner confirmed they could attend the hearing and that they would discuss the issues/hearing with the tenant. The current operators of the bar, Flor and Patrick O'Sullivan, were also contacted to inform them of the upcoming public meeting and they also indicated that they would be able to attend. Notices to property owners and tenants within a 300' radius of the project site were mailed on October 6, 2017. The hearing was also noticed in the newspaper and online on the City's website.

Prior to the hearing, City staff received two written public comments from adjacent property owners expressing their concerns and explaining recent issues they had experienced with O'Malley's (see Attachment 4 – Letters from the Public).

On October 25, 2017, the Zoning Administrator held a duly noticed public hearing to review their CUP. The tenants of the bar, the property owners, one of the adjacent property owners, as well as City staff from Police, Fire, Building, and Code Enforcement, attended the hearing. The Zoning Administrator opened the hearing and explained why the CUP had been called for review. City staff from each department spoke and discussed the issues they had experienced with O'Malley's. The property owner, the O'Malley's business operators, and the adjacent property owner spoke during the public comment period.

After listening to City staff comments as well as public comments, the Zoning Administrator indicated that modifications to the CUP which require the removal of the back patio seemed prudent. The patio was originally improved when the building was occupied as a restaurant and was intended for outdoor dining. The back patio was allowed to remain when the building was converted to a bar with live entertainment and no restaurant with conditions of approval that were intended to reduce potential negative impacts associated with the patio. Given the number of complaints and violations associated with the patio, the removal of the back patio would eliminate many of the violations and concerns.

The Zoning Administrator also indicated that another hearing would be held in six months to determine if further modifications to the permit were necessary and if other violations had occurred and included this as a condition of approval. The Zoning Administrator asked if the property owner and/or O'Malley's representative would like to speak about the modified conditions. The property owner stated that they were comfortable removing the back patio and affirmatively agreed to the modifications the Zoning Administrator recommended.

After completion of the public hearing, the conditions of approval were modified to clarify allowed uses and restrictions that were placed on the original CUP and amended an existing condition of approval which allowed the use of the back patio and requires the patio be removed completely (see Attachment 5 – Findings Report for PL-2017-309 – Modification of CUP).

ANALYSIS

Appeal

On November 22, 2017, O'Malley's submitted an appeal contesting the Zoning Administrator's decision. The appellant stated eight reasons for the Council to consider. The following reasons, and staff's analysis as to why these reasons are unjustified, are provided below:

1. *Denial of due process under California and Federal constitutions:*

The Constitutional right of procedural due process requires an applicant in a land use proceeding be provided notice and an opportunity to be heard. The Zoning Administrator held a duly noticed public hearing which the property owner and tenant attended and were provided the opportunity to be heard. The Zoning Administrator asked the property owner/tenants if they would like to discuss the modified conditions and the property owner indicated they would be willing to remove the back patio. Therefore, there was no denial of procedural due process.

Applicants are also afforded substantive due process, which prohibits governmental action that arbitrarily or unreasonably deprives a person of life, liberty, or property. In the context of land use decisions, such as the Zoning Administrator's decision in this case, courts provided great deference to a city's land use regulations, as exercised through its police powers. Here, the Zoning Administrator was acting in furtherance of enforcing validly enacted legislation which governs the CUP process, and no substantive violation of due process occurred.

Pursuant to the conditions of approval in the CUP, in the event that problems with the operational criteria of the business arise, the Zoning Administrator may hold a duly noticed public hearing to review the situation and impose new or modified conditions of approval in response to the information received. In addition to this condition, Section 36.56.70 of the Zoning Ordinance (Permit Revocation) allows the Zoning Administrator to hold a duly noticed public hearing in order to revoke or modify any permit or entitlement granted that one or more of the conditions of the permit have not been met and/or that the improvement, use, or activity allowed by the permit is detrimental to public health, safety, or welfare or constitutes a nuisance.

2. *Unfair hearing under common law:*

Property owners and tenants within a 300' radius of the project site were notified of the public hearing, the notice was posted in the newspaper, and the hearing was posted online on the City's agenda. All statutory noticing and hearing procedures were followed for the Zoning Administrator's October 25, 2017 hearing. Additionally, the property owner, business owners, and the public were permitted to speak during the hearing and affirmatively agreed to the revised condition of approval requiring removal of the patio.

3. *The order is not substantiated by the record or sufficient evidence:*

Police, Fire, Code Enforcement, Building, and Planning records, online advertisements, as well as discussions between staff members and the appellants provide sufficient evidence that conditions of approval of CUP 008-13-UPA were violated as well as other City codes and ordinances.

4. *The findings and order are predicated upon information which was not divulged to the appellant:*

City staff notified and discussed with the appellant the multiple violations of the CUP conditions prior to the October 25, 2017 modification hearing. In addition, the appellant was formally cited for multiple City Code violations prior to the hearing. Throughout the proceedings leading up to the Zoning Administrator's action, as well as during the Administrative Zoning hearing, the City provided the appellant all information upon which the violations and decision were based.

5. *The appellant did not apply for a modification of the CUP:*

Pursuant to the conditions of approval in the CUP, in the event that problems with the operational criteria of the business arise, the Zoning Administrator may hold a duly noticed public hearing to review the situation and impose new or modified conditions of approval in response to the information received. In addition to this condition, Section 36.56.70 of the Zoning Ordinance (Permit Revocation) allows the Zoning Administrator to hold a duly noticed public hearing in order to revoke or modify any permit or entitlement granted that one or more of the conditions of the permit have not been met and/or that the improvement, use, or activity allowed by the permit is detrimental to public health, safety, or welfare or constitutes a nuisance. Therefore, an application submitted from the appellant is not necessary for review of the Conditional Permit at a public hearing.

6. *The definition of "live entertainment" was not the one used in the original CUP, and is a unilateral retroactive change in the conditions and terms of the original CUP:*

Pursuant to Section 36.56.70 of the Zoning Code, the Zoning Administrator has the authority to modify and/or clarify conditions of approval. Regardless, the definition of what constitutes live entertainment has not been changed since the original CUP was issued.

7. *The definition of "live entertainment" is constitutionally overbroad and uncertain:*

The definition of "live entertainment" in the CUP provides:

"Permitted live entertainment and music shall be limited to Thursday, Friday, and Saturday between 5:00 p.m. and 1:30 a.m. Live entertainment is classified as any live person (paid or unpaid) on-site entertaining with or without amplified sound, and/or the use of amplified sound at all."

This definition does not violate the constitutional doctrines which prohibit overbroad or vague laws and regulations. To be considered unconstitutionally overbroad, a statute that affects First Amendment rights must prohibit more protected speech or activity than is necessary to achieve a compelling government interest. Here, the condition of approval is not focused on regulating speech; rather, it places reasonable operational restrictions on a business which includes live musical and other performances. In addition, the condition is sufficiently restricted to a regulating specific subject and accomplishing a specific purpose: regulating the days and hours during which live performances may be conducted.

To be deemed unconstitutionally vague, a regulation must cause people of common intelligence to guess at the regulation's meaning. Here there is nothing unclear in the definition of "live entertainment" that would cause persons to guess at the plain meaning of the definition. In addition, the definition has not been changed for the life of CUP 008-13-UPA.

8. *The imposition of new conditions is overly restrictive and denies the respondent/appellant equal protection under law:*

The constitutional equal protection doctrine requires the City to treat similarly situated persons in a like manner. An applicant in an administrative proceeding involving the City's enforcement of land use regulations, such as the present appeal hearing, may only maintain an equal protection claim if the City intentionally treats the landowner differently from other similarly situated persons

without a rational basis. Here, the Zoning Administrator uniformly conducts all proceedings related to the issuance, review, and modification of CUP. There is no evidence the applicant was "singled out" by the Zoning Administrator in this case.

This use requires a CUP. A bar with live entertainment is a sensitive use, particularly when located adjacent to residential uses. The Zoning Administrator has the authority to revoke the CUP, or modify the conditions as necessary to ensure the use is not detrimental to those working and residing within the neighborhood. Requiring removal of the back patio is not overly restrictive as the business owners may continue operating at the property; however, the operation must be conducted in a manner that will not negatively impact adjacent residential uses.

Subsequent to the Administrative Zoning Hearing and the submittal of the appeal, the property owner and tenants have been issued two additional citations for violations to their CUP, including not having the rear door closed, which resulted in noise complaints; and failure to have any security during a live entertainment event. These citations will be heard at an Administrative Zoning Hearing on May 3, 2018. Additionally, in December 2017, the Department of Alcoholic Beverage Control (ABC) denied the application for use of the back patio for the sale, service, or consumption of alcoholic beverages.

PROCEDURE FOR APPEAL

Staff will begin the item by giving a brief presentation and introducing the item to Council. The appellant will be given 10 minutes to present their appeal and is allowed time for rebuttal. The Council may then ask questions and will open the item for public comment. At their discretion, Council may ask additional questions, allow the appellant additional time, and then will deliberate and act on the item. The appellant has the burden of proof to demonstrate the Zoning Administrator's decision was not supported by substantial evidence.

In order to provide a fair and impartial hearing and preserve due process for the appellant, the City Attorney will act in an advisory role to the City Council as the decision maker; the Senior Assistant City Attorney will act in a prosecutorial role in representing the Community Development Department.

At the conclusion of the hearing, Council will vote on whether to uphold the Zoning Administrator's decision or take alternative action, examples of which have been provided below.

FISCAL IMPACT – None.

CONCLUSION

Staff finds the appellant does not present substantial evidence to support the appeal. The City has attempted to work with the tenants to bring the property into compliance. Prior to requiring the back patio be removed, the Zoning Administrator took into account overall staff time (including Planning, Police, Fire, Building, and Code Enforcement) spent working with the tenants to bring the property into compliance, the tenants' disregard to said attempts, the tenants' disregard to conditions of approval, and complaints associated with the property. After the Zoning Administrator indicated removal of the patio may be required, and asked the property owner to speak on behalf of this solution, the property owner stated they would be willing to remove the back patio. For all of these reasons, the Zoning Administrator approved modifications to the CUP requiring removal of the back patio.

ALTERNATIVES

1. Uphold the Zoning Administrator's decision with additional and/or modified conditions of approval;
2. Refer the CUP back to an Administrative Zoning Hearing for additional consideration;
3. Overturn the Zoning Administrator's decision; or
4. Revoke the CUP for the use of the premises as a bar and drinking place with live entertainment.

PUBLIC NOTICING

All property owners within a 500' radius and other interested stakeholders were notified of this meeting. The Council's Agenda is advertised on Channel 26 and this report appears on the City's website.

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818-05-08-18CR-E

- Attachments:
1. Resolution Upholding the Zoning Administrator's Approval
 2. Statement of Appeal
 3. Findings Report for 008-13-UPA – CUP
 4. Letters from the Public
 5. Findings Report for PL-2017-309 – Modification of CUP