

Agenda Report

TO: CITY COUNCIL

DATE: MARCH 11, 2002

FROM: CITY MANAGER

SUBJECT: CALL FOR REVIEW OF CONDITIONAL USE PERMIT #3890 TO ALLOW A
NEW TOMMY'S ORIGINAL HAMBURGER, 162-180 NORTH HILL AVENUE

RECOMMENDATION:

1. It is recommended that, the City Council acknowledge that this action is categorically exempt from CEQA; and
2. Uphold the decision of the Board of Zoning Appeals to deny the conditional use permit application to allow the establishment of a new Tommy's Original Hamburger with a drive-thru and 24-hour operation, and to deny the variance from the 500 foot separation requirement between take-out uses for the property located at 162-180 North Hill Avenue.

BACKGROUND:

On April 12, 2001 an application was submitted for a Conditional Use Permit to allow a take-out restaurant with a drive-thru and a Conditional Use Permit for 24-hour operation. On May 11, 2001 the application was deemed complete. It was also determined a traffic study would be required. On August 10, 2001 the completed traffic study was submitted to the Public Works and Transportation Department. On August 28, 2001 the traffic study was approved.

On September 4, 2001 staff was notified (and the applicant) that Starbuck's would be locating across the street. Starbuck's did not need discretionary actions. Building permits and a business license were required to begin operating. Building permits were issued on September 6, 2001. Based on the fact that Starbucks was the first tenant to be issued building permits, Tommy's was required to submit a Variance from the 500-foot separation between take-out restaurants. On November 7, 2001 the Zoning Hearing Officer heard the case. The case was subsequently denied based on the fact that the findings could not be made to allow a take-out restaurant to be established within 500 feet of another take-out restaurant.

On January 16, 2002, the Board of Zoning Appeals conducted a public hearing on the appeal application. Speakers were present both in favor and opposition to the project. Those in favor expressed concern over the aesthetics of the vacant parcel and the need to revitalize the site. Those in opposition expressed

concerns related to traffic, noise and the sites proximity to residential uses. Starbucks submitted a letter that expressed support for Tommy's application. The Board of Zoning Appeals upheld the Zoning Hearing Officer's decision to deny the application by a 3-2 vote. Those who voted in favor of upholding the decision determined the variance findings could not be made to allow a take-out use within 500 feet of another take out use. They also expressed concerns over traffic impacts, and the hours of operation. Those who voted to overturn the hearing officer's decision determined the two uses were dissimilar, and based on past take-out variance applications the findings could be met. They also believed that because Starbucks pulled building permits well after Tommy's application had been submitted and deemed complete, this was unfair to the applicant.

ANALYSIS:

The project as proposed involves demolishing two existing vacant buildings on site. A new 2,431 square foot, single story building will be constructed. An outdoor seating area will be located between the front of the building and the sidewalk along Hill Avenue, as well as an interior seating area with 56 seats. The drive-thru window will be located on the north side of the building with queuing provided for six cars.

Conditional Use Permit: Drive-Thru and 24-Hour Operation

A conditional use permit is required for any use with a drive-thru. Staff found that based on the size of the site, there was adequate queuing for the drive-thru traffic, and a detailed litter and lighting plan was submitted addressing any potential problems related to the drive-thru. The Public Works and Transportation Department reviewed the circulation on site, including the addition of a new two-way driveway and had no issues with the proposed drive-thru.

In a commercial zone a business is allowed to operate from 7:00 a.m. to 10:00 p.m. by right and between the hours of 10:00 p.m. and 7:00 a.m. with a conditional use permit. Based on the fact that the site abuts residentially zoned property staff did not support the application for 24-hour operation of the take-out restaurant. It was determined that noise from patrons in the drive-thru and parking lot, lights and 24-hour activity on the site may cause disturbance to the residential property. At both the Zoning Hearing Officer meeting and the Board of Zoning Appeals hearing the applicants indicated they would be willing to withdraw the conditional use permit for 24- hour operation if the project was approved.

Variance: Take-Out Distance Requirement

The zoning code requires a 500-foot separation between take-out uses on different sites. The separation requirement was established to address the concentration of take-out uses. It was determined that the concentration of this particular use tends to increase traffic, noise and congestion. A take-out restaurant is defined as a restaurant that serves food in *disposable* containers. Starbucks is located across the street (161 Hill Avenue) approximately 80 feet from the subject site. Tommy's Original Hamburger and Starbuck's are both considered take-out restaurants based on the fact that they serve food in disposable containers.

The applicant stated in the original application that the primary reason to support the take-out variance is based on the type of uses that can be accommodated on this particular building site. A 13' 5" wide concrete drainage channel traverses the center of the property. The applicant has stated that based on this drainage channel there are a limited number of uses that could be constructed on site. A memorandum was provided to the property owner addressing questions related to the East Side Storm Drain. The memo outlines the type of construction/occupancy load that can be supported. Permissible occupancies include office, fixed seating assembly uses, vehicle parking and other uses requiring a design live load of 60 p.s.f. (pounds per square feet) or less.

In relating the required findings for the take-out variance staff must establish why there are exceptional or extraordinary circumstances that are applicable to the project site that do not apply generally to other sites in the same zoning district that would warrant the establishment of a take-out restaurant at this site. While the storm drain is not a typical condition that occurs on all CG zoned properties, the drainage channel does extend for a length of 2.91 miles and therefore traverses a number of commercial and residential properties.

The presence of the drainage channel does not make the property undevelopable and uses other than a take-out restaurant could realistically be developed on the property. The proposed take-out restaurant can be developed on site while meeting all applicable development standards such as height, setbacks and parking. However, other uses such as a restaurant (without take-out), office or a retail store could all be constructed on site as well. Staff was unable to make the finding that the existence of the drainage channel creates a site where *only* a take-out restaurant can be developed. The appellant could construct a restaurant without take-out or a drive-thru without any discretionary applications. A number of users could occupy a building of the same construction type as a take-out restaurant, and therefore a hardship does not exist if a take-out restaurant were not approved for this site.

At the Board of Zoning Appeals hearing the applicant's attorney submitted a written statement (Attachment A) that addressed two specific take-out variances that have been approved. Specifically referenced were CUP's #3362 and #3588. CUP #3362 granted a variance from the take-out distance requirement to allow the establishment of Zankou Chicken at 1296 East Colorado Boulevard within 500 feet of an existing McDonalds. The findings were made to allow Zankou Chicken based on the fact that there was no drive-thru proposed, which typically causes negative impacts as light, glare and noise.

CUP#3588 allowed the establishment of a Starbucks across the street from a Dominos Pizza at 1890 East Washington Boulevard in an existing mini-mall storefront. The findings were made to support the variance because neither facility had a drive-thru and Dominos Pizza has very little walk-in traffic. It does not function as a typical take-out restaurant based on the fact that the vast majority of activity is attributed to delivery drivers. Based on this, the findings were made to support the take-out variance.

Although Starbucks and Tommy's are different in that one offers primarily beverages, and the other food, they both draw a high volume of customers to the site. Impacts attributed to a high customer turnover are not eliminated because one use is selling beverages and the other food. Further, the variance findings are based on something unique or extraordinary applicable to the project site that warrants the establishment of a take-out restaurant above all other uses. There is nothing unique about the project site that warrants the establishment of a take out use over a use that is permitted by right (e.g. office, retail etc.) The project site is undeveloped, vacant land. The property can be developed with a number of different uses, including a restaurant (where food is not served in disposable containers). Because the site is undeveloped there are no design constraints to limit the usability of the property. Based on these reasons, staff recommends denial of the take-out variance.

Application Procedures

This application was processed following the standard legal procedures of the city. Further analysis of this issue will be provided by the City Attorney's Office.

ENVIRONMENTAL DETERMINATION:

This project has been determined to be exempt from environmental review pursuant to the guidelines of the California Environmental Quality Act, Class 3, (Title 14, Chapter 3, §15303 of the Administrative Code of the State of California) New Construction or Conversion of Small Structures.

FISCAL IMPACT:

The site is currently a vacant, undeveloped parcel. If the project were improved there would be an incremental increase in sales tax and property tax. However, because the site is vacant, any development of the site will result in increased tax revenue.

Respectfully submitted,



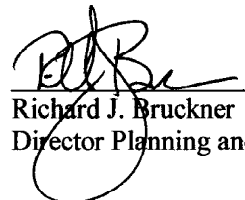
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