



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Stephen M. Haase

SUBJECT: SEE BELOW

DATE: August 18, 2004

Approved:

Date:

COUNCIL DISTRICT: 3
SNI AREA: NONE

SUBJECT: CP04-058 (FORMERLY RCP04-060). APPEAL OF THE PLANNING COMMISSION'S DECISION TO APPROVE WITH CONDITIONS A CONDITIONAL USE PERMIT TO EXTEND THE HOURS OF LATE NIGHT USE TO 24 HOURS PER DAY FOR A PUBLIC EATING ESTABLISHMENT LOCATED AT 394 SOUTH SECOND STREET.

RECOMMENDATION

Adoption of a resolution to deny the Conditional Use Permit.

BACKGROUND

On April 14, 2004, the Planning Commission voted 5-0-2, Commissioners Platten and Zito absent, to approve a Conditional Use Permit to extend hours of late night use for a public eating establishment until 5:00 a.m. on Saturday and Sunday, with a one-year compliance review, on a site located at 394 South Second Street. On May 1, 2004, the West of 4th Street Neighborhood Group filed a permit appeal of the Planning Commission's decision to approve the project. The appeal expresses concern that (1) the expanded hours would create intolerable noise, patron behavior, and garbage for existing residents, and (2) The San Jose Police can provide only limited security after 2:30 a.m.

Permit History

Palermo Ristorante Italiano was opened as a public eating establishment on South Second Street in November 1987. In 1997, Palermo expanded into the building at 394 South Second Street that was formerly occupied by Grand Auto. On May 7, 2003, the Planning Commission approved Conditional Use Permit File No. RCP03-005 to allow Palermo to operate a banquet facility, drinking and entertainment establishment, known as Club Palermo, with late night use until 2:00 a.m. daily. On January 14, 2004, Palermo filed a Conditional Use Permit (CUP) File No. RCP04-060 with the Redevelopment Agency to allow the public eating establishment component

of the business to operate 24 hours per day. The Planning Commission conditionally approved the CUP to allow extended hours of late night use until 5:00 a.m. on Saturday and Sunday, with a one-year compliance review. The Department of Planning, Building and Code Enforcement is processing this appeal as CUP File No. CP04-058 to replace RCP04-060 in response to the recent change in permitting responsibility for the Downtown.

Since September 9, 1993, Palermo has maintained a valid On-Sale General Eating Place License (ABC License) from the Department of Alcoholic Beverage Control of the State of California. In addition, the applicant currently has a Public Entertainment Permit from the Chief of Police. The permit expires on July 16, 2005.

Planning Commission Hearing

At the Planning Commission hearing on April 14, 2004, Diane Cusimano, the applicant, said extended hours of operation are necessary for her restaurant in order for her business to survive in Downtown San José. Kathy Murillo, representing San Jose State University Studies in American Language at 384 S. Second Street, said Palermo moved the main entrance to the restaurant to San Salvador Street in 2001. Since that time, she said she has observed garbage on the sidewalk in front of her facility when she arrives on weekdays at 8:00 a.m. that is the result of late night activities at Palermo.

Several residents from S. Third Street and staff from the restaurant spoke in support of the proposed CUP. Steve Cohen, representing West of 4th Street Neighborhood Association, said the existing CUP required the restaurant and nightclub to be separated. He said activity in the patio generates excessive noise for surrounding residents during late night operation. Amie Ashton, staff from the Redevelopment Agency, confirmed that the existing CUP allows the restaurant and nightclub to operate in one building.

The applicant acknowledged she is aware of the activity on the street adjacent to her business. She said the sidewalks are cleaned every morning by 10:00 or 11:00 a.m., but agreed it was not accomplished by 8:00 a.m. With regard to noise in the outdoor patio, she said patrons smoke in the patio area and she has not received any complaints from surrounding residents.

Captain Tuck Younis, of the San José Police Department, said he has been in charge of the Downtown entertainment zone for the last eight years. He said the Police Department does not support downtown businesses operating after 2:00 a.m. He introduced Captain Ken Ferguson, Commander of the Downtown Division, who estimated that 3,000 to 4,000 persons attend the nightclubs in the Downtown entertainment district on a busy night. He expressed concern that approximately 800 to 900 persons could migrate to Palermo after the other area nightclubs close if the restaurant is allowed to operate after 2 a.m. He described incidents such as intoxication, drinking, violence, urination, and lewd conduct in the surface parking lot between Second and Third Streets north of San Salvador Street, and his concern these could increase with the proposal.

Sergeant Sergio Cabarin said Police overtime officers leave the area at 2:30 a.m. and that only four units remain to patrol Downtown. He said problems occur on the streets and in the parking lots from the large number of people in the area from the clubs. Commissioner Zamora asked what Downtown restaurants operate after 2:00 a.m. Sergeant Cabarin said Iguanas Taqueria (330 S. Third Street) and Jack-in-the-Box (148 E. San Carlos Street) are the two currently providing food in the area after 2 a.m. of which he is aware.

The Commission then closed the public hearing. Commissioner Zamora said restaurants are needed in the Downtown after the clubs close to allow people to sober up before driving. He said Palermo would likely better control its customers because it is a sit-down restaurant. Commissioner Levy asked if pedestrians from the clubs going to Palermo's would create a problem Downtown. Sergeant Cabarin said that they would create problems because of the estimated 2,000 to 4,000 people already on the streets after the clubs close at 2:00 a.m.

The Planning Commission then voted 5-0-2, Commissioners Platten and Zito absent, to approve the Conditional Use Permit to extend hours of late night use until 5:00 a.m. on Saturday and Sunday for the public eating establishment, with a one-year compliance review

ANALYSIS

The key issues from the appeal are followed by staff responses below. In addition, the memorandum contains an analysis of the proposed project's conformance with Council Policy 6-27: Evaluation of 24-Hour Uses. The attached staff report for CUP File No. RCP04-006 contains additional information regarding the proposal.

1. **Concern:** "The expanded hours create an intolerable noise issue for existing residents."

Response: High-density residential units are located in the adjacent YWCA complex to the north, and the apartments in a converted residence to the east of the subject site. Palermo contains an outdoor patio area adjacent to the residential uses. The Department of Planning, Building and Code Enforcement has not received any complaints regarding noise from Palermo. Allowing Palermo to extend its hours of operation after 2:00 a.m. could create more opportunities for patrons to disturb residents when they congregate in the patio area or walk on the streets adjacent to residential uses during late night hours. Staff believes that proposed late night use after 2:00 a.m. should only be allowed with a condition that all use and activity of the premises be conducted indoors only with doors and windows closed.

2. **Concern:** "The extended hours will attract more intolerable behavior and garbage in a residential mixed use area that is already impacted by the addition of a nightclub."

Response: The proposed extended hours of late night use to 24 hours per day could attract patrons from other Downtown clubs to Palermo after 2:00 a.m. Other Downtown restaurants that are currently permitted to be open after 2:00 a.m. include (1) Agenda Restaurant, Bar and Lounge at 399 S. First Street, (2) Iguanas Taqueria, and (3) Jack-In-The-Box Restaurant. Late night patrons leaving the Downtown nightclub area could migrate to Palermo Restaurant because it would be one of the few establishments that would remain open after 2:00 a.m. The Police Department believes there would be an increased demand for patrol units if additional

late night uses are approved Downtown because they would provide an incentive for club patrons to remain in the entertainment district after 2:00 a.m. Staff believes that proposed late night use after 2:00 a.m. should be allowed only with a condition that restricts such use to 4:00 a.m. Saturday and Sunday, with a one-year compliance review to assess the affect on police operations and adjacent residential.

3. **Concern:** “Limited security from San Jose Police is available after 2:30a.m.”

Response: The Police Department has stated it lacks funding and staff to protect the peace, health, safety, and welfare of persons residing or working in the surrounding area if additional late night uses are approved after 2:30 a.m. The Police Department has indicated it will submit a separate memorandum regarding police operation concerns with the proposal to extend the operational hours of Palermo’s Restaurant, 394 S. 2nd Street in Downtown, past 2:00 a. m.

The Police Department has previously stated it does not support the additional late night hours because limited early morning police staffing, the proximity of residences to the business, and the customer draw of an all night establishment will create additional demands on limited police resources in the Downtown area, which already has significant policing issues.

Council Policy 6-27: Evaluation of 24-Hour Uses

Overview. Council Policy 6-27, (attached, page A5) is intended to provide guidelines for the appropriate development of establishments that operate on a 24-hour basis in the City of San Jose while avoiding the problems associated with such operations. Based on a case-by-case review, specific alternative measures may be appropriate that are demonstrated to meet or exceed the guidelines in the policy.

Area Use Compatibility. Twenty-four hour uses should not be approved unless the facility can operate without detriment to nearby residential uses or the general welfare of the surrounding area. At the April 14, 2004 Planning Commission hearing, two area residents spoke in favor of the proposal, and one resident and one business neighbor spoke in opposition to the proposal based on noise and litter issues. Staff believes such concerns could be addressed by permit conditions prohibiting outdoor use of the facility and cleaning the public right-of-way by 8:00 a.m. before the work day begins in the vicinity.

Use Separation. Generally, 24-hour uses should not be located within 300 feet from any residentially zoned, planned, or used property. Exceptions to the 300-foot separation may be made if the project site is located in the Downtown Core. The subject site is a sit-down restaurant, banquet facility, and club located in the Downtown Core that has had late night use until 2:00 a.m. next to residential uses since May 2003. Exceptions to the 300-foot separation requirement are appropriate in the Downtown if issues related to noise, litter, and police staffing are addressed.

Outdoor activities may be limited for 24-hour operations except in the Downtown Core Area. Due to the unique combination of uses in the Downtown Core Area, 24-hour outdoor activities will be evaluated on a case-by-case basis. Given concern raised in the appeal and proximity of residential uses, staff believes that outdoor use of the patio at Palermo should be prohibited after 2:00 a.m. if a CUP were to be approved for additional hours, in order to avoid disturbances to surrounding residents.

Police Issues. Crime statistics and police safety issues which are directly related to uses operating between 12:00 midnight and 6:00 a.m. should be analyzed and considered in determining the appropriateness of 24-hour uses, and the Police Department will provide a recommendation with or without conditions, for each Conditional Use Permit application for a 24-hour use. The Department of Planning, Building and Code Enforcement concurs and supports the recommendation from the Chief of Police that the proposed CUP not be approved.

Mitigation Management Plan. A mitigation management plan should be required for all conditioned 24-hour uses to ensure compliance with the conditions of approval. Staff believes a one-year compliance review in addition to a mitigation/operation plan should be required if the City Council decides to approve a CUP with extended late night hours.

Conclusion

The Director of Planning, Building and Code Enforcement recommends the City Council adopt a resolution to deny the Conditional Use Permit based on the public safety concerns of the Police Department, and concern regarding additional late night activities near residential uses. However, if the City Council decides to adopt a resolution to approve the CUP, the Director recommends the following condition be included:

- **Hours of Operation.** The hours of operation for the restaurant, banquet use, and bar, will be limited to 9:00 a.m. to 2:00 a.m. the following morning for Sunday. Sunday through Thursday, and 9:00 a.m. to 4:00 a.m. Friday and Saturday. Alcohol service and live entertainment shall cease at 1:30 AM.
- **Security.** A minimum of two uniformed security officers shall be on duty for every 100 patrons using the facility during its hours of operation.
- **Mitigation Management/Operation Plan.** The applicant shall develop a mitigation management/operation plan to ensure compliance with conditions of approval to the satisfaction of the Director of Planning, Building and Code Enforcement.
- **Noise and Acoustics.** During the hours of operation, amplified sound shall not be audible at the property line of adjacent residential uses. Late night use after 2:00 a.m. shall only be conducted inside the premises with doors and windows closed.

- **Cleaning/Litter Control.**
 - a. All publicly-used areas of the premises and the adjacent public rights-of-way shall be maintained free of litter and debris by daily damp washing of all floors, sidewalks, and exterior walls. Cleaning shall be completed by 8:00 a.m. daily.
 - b. Mechanical equipment used for outside maintenance, including blowers and street-sweepers shall not be used between 10:00 PM and 6:00 AM, daily.
 - c. All trash areas, equipment, and containers shall be effectively screened from view and maintained in an orderly state at all times.
 - d. The facility operator shall provide adequate ashtrays in the patio and along the business frontage to accommodate patrons who wish to smoke outdoors. Patrons smoking outdoors shall not impede pedestrian traffic along the adjacent rights-of-way.
- **Patron Parking.** The project operator shall identify and publicize to its patrons the location and availability of parking facilities within the vicinity of the project site.
- **Entertainment Permit.** The project operator shall obtain and maintain the appropriate Entertainment Permit issued by the City of San Jose Police Department.
- **Compliance Review.** A Compliance Review is required one year from the approval of the subject permit.

COORDINATION

Preparation of this memorandum has been coordinated with the Police Department and the City Attorney's office

PUBLIC OUTREACH

Notices for the public hearings for the project and for this appeal were mailed to the owners and occupants of all properties located within 500 feet of the project site.

CEQA

Resolution No. 68839, CP04-058

STEPHEN M. HAASE, AICP, DIRECTOR
Planning, Building and Code Enforcement

HONORABLE MAYOR AND CITY COUNCIL

August 18, 2004

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Attachments:

- Location Map (p. A1)
- West of 4th Street Neighborhood Group Appeal Letter (p. A2)
- City Council Policy 6-27: Evaluation of 24-Hour Uses (p. A5)
- Palermo Ristorante Italiano project description dated August 17, 2004 (p. A12)
- Planning Commission Resolution No. 04-034 (p. A15)
- Planning Commission Staff Report RCP04-006 (p. A21)
- Letter from Renato and Diane Cusimano to Planning Commission dated March 2, 2004 (p. A27)
- Memorandum to Amie Glaser, Redevelopment Agency from Officer Dave Kirkendall dated February 24, 2004 (p. A28)
- Correspondence from Suzanne Murphy, Director, Enterprise & Endowment Programs dated April 14, 2004 (p. A42)
- Planning Commission Resolution No. 03-038 (p. A43)