



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Term Conditions Within
Conditional Use Permits

DATE: December 4, 2007

INFORMATIONAL MEMORANDUM

BACKGROUND

In the context of reviewing an appropriate mixture and location of nightclub uses in the Downtown, questions have arisen regarding the scope of conditions allowable within a conditional use permit ("CUP"). More specifically, the Council requested information regarding the ability of City to impose a maximum 2-year term on CUPs for nightclub uses in the Downtown.

This informational memorandum is provided to City Council in connection with and in response to this request.

ANALYSIS

A. CUPs – General. The City requires CUPs for uses that can fit and be desirable within the land use patterns and zoning districts of the City, but that need some measure of control through the imposition of conditions by City in order to ensure land use compatibility within a zoning district and to prevent detrimental impacts associated with that use upon the community (such as loud noise, heavy traffic, vehicular or pedestrian congestion, dust, etc.). Examples of uses within the Downtown Zoning District that require CUPs include: entertainment uses, off-sale of alcohol uses, drinking establishments, hospitals, and auditoriums.

B. Term. Pursuant to Section 20.100.300 of City's Zoning Code, and consistent with land use principles generally, CUPs are recorded with the County Recorder's Office against the real property that is the subject of that CUP, and an effective CUP runs with the land (meaning that subsequent owners of that same real property may succeed to and enjoy the benefits of operating under and in accordance with that CUP). Subsequent property owners who operate under an existing CUP also must comply with the terms and conditions of that CUP.

Pursuant to the provisions of Section 20.100.730 *et seq.* of the City's Zoning Code, the City may impose a time-condition as a term within a CUP. The provisions of the City's Zoning Code provide that such a term may be included in a CUP "as appropriate." Historically, the City has found it appropriate to include time conditions in a CUP where the nature of a use is quickly evolving over time, such that appropriate conditions also may change quickly over time, or where the City believes that a review of a use after operations have commenced would be appropriate to ensure that the use as permitted is operating in a manner that does not create negative impacts upon the surrounding area.

The City historically has not included a term condition within a CUP with the idea that the use would cease at the end of the term. Such a notion would run counter to the general principle that CUPs run with the land and are enjoyed by subsequent owners of the real property over time.

Such a notion also would create legal concerns in that once a CUP has been properly issued, and in reliance thereon a permittee has incurred material expense to implement the activities allowed and rights granted under that CUP, some courts have found that the permittee has acquired a property right entitled to protection. The power of City at that point to outright revoke a renewal of that CUP becomes more limited.

These principles are recognized within the City's Zoning Code under Section 20.100.750 – this Section sets forth the findings required to grant a renewal of an existing CUP and specifically provides that there is "a rebuttable presumption that the use as permitted [by the CUP] meets" the required findings for a CUP set forth in the Zoning Code. That is, there currently is codified in City's Zoning Code a presumption that once a permittee obtains a CUP the permit holder will be allowed to retain their CUP. This presumption can be rebutted by evidence of noncompliance with the CUP, any ordinance of the City, or any other law, as well as evidence of changed conditions in the neighborhood or evidence that the use as permitted creates a nuisance or an impairment of public peace, health, safety or welfare. In the absence of those specified elements, however, the general presumption in the Zoning Code remains that the holder of a CUP may continue to operate in accordance with the terms and conditions of their CUP.

CONCLUSION

In essence, the provisions of City's Zoning Code do allow for the City to include a time condition or term within a CUP, but those provisions also recognize, reflect and take into account: (1) that CUPs run with the land, and (2) the need for the City to consider whether an interference with the operations of a previously permitted, lawful business is reasonably necessary to promote a lawful public purpose and also to consider whether or not the means to promote that public purpose are unduly oppressive upon a permittee operating a lawful business under a previously-granted CUP after the

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expenditure of some funds in reliance upon the issuance of that CUP. For those reasons, term provisions within a CUP historically are treated as mechanisms to revisit the effectiveness and appropriateness of conditions contained within a CUP as well as a mechanism to re-examine the surrounding conditions and context under which a CUP was issued, all towards ensuring that land uses are operating effectively and in a compatible manner.

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By



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