

# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Planning Commission

**SUBJECT:** SEE BELOW

**DATE:** October 27, 2008

**COUNCIL DISTRICT:** 6  
**SNI AREA:** N/A

**SUBJECT: PDC07-046. PLANNED DEVELOPMENT REZONING FROM CN COMMERCIAL NEIGHBORHOOD ZONING DISTRICT TO A(PD) PLANNED DEVELOPMENT ZONING DISTRICT TO ALLOW AN OUTDOOR EATING ESTABLISHMENT AND REDUCTION IN STANDARD PARKING REQUIREMENTS FOR AN EXISTING FULL-SERVICE RESTAURANT ON A 0.375 GROSS ACRE SITE LOCATED ON THE SOUTH SIDE OF HAMILTON AVENUE APPROXIMATELY 320 FEET EASTERLY OF MERIDIAN AVENUE.**

## RECOMMENDATION

The Planning Commission voted 4-1-1-1 (Jensen opposed, Platten absent, Do abstained) to recommend that the City Council approve the proposed rezoning from CN Commercial Neighborhood Zoning District to A(PD) Planned Development Zoning District to allow an outdoor eating establishment and reduction in the standard parking requirements with conditions for 1) a maximum of 119 indoor seats, 2) a maximum of 50 seats on an outdoor patio, and 3) no simultaneous use of the patio and indoor banquet areas between 4:00 p.m. to 6:00 p.m. daily, for an existing full-service restaurant on a 0.375 gross acre site.

## OUTCOME

Should the City Council approve the Planned Development Rezoning, the applicant would be able to file and secure a subsequent Planned Development Permit to facilitate the build-out of the project as described above.

## BACKGROUND

On October 22, 2008, the Planning Commission held a public hearing to consider the proposed Planned Development Rezoning. The Director of Planning, Building and Code Enforcement recommended denial of the proposed rezoning. In a brief report, staff noted additional correspondence that had been received from restaurant patrons and other businesses within the shopping center in support of the project (see attached correspondence), and indicated that after a

lengthy analysis working closely with the applicant, staff's conclusion was that without a recorded covenant of easement for reciprocal parking for the entire shopping center including the Safeway, or an equivalent non-expiring parking contract, a reduction in the parking ratio requirement as afforded to shopping centers over 100,000 square feet in size would not be adequate, utilizing the off-street parking requirements contained in the Zoning Code as a guide of appropriate parking levels for a public eating establishment use. Staff further stated that approval of the proposed outdoor patio restaurant expansion without a recorded covenant of easement for reciprocal parking across the shopping center could potentially establish an inappropriate new precedent citywide.

### **Public Testimony**

The applicant was represented by Gerry Strangis and Joan Gallo, who both spoke on behalf of the project. Gerry Strangis thanked staff for their efforts to explore all available options to resolve the onsite parking issues. He stated that the applicant had over 1,000 letters in support of the proposal, including all other businesses in the center other than Safeway. Joan Gallo stated that in review of a Planned Development Zoning, the Commission was not bound by the findings that were required for the previously proposed Conditional Use Permit; therefore, the parking standards required by Title 20 did not directly preclude the ability to approve a Planned Development Zoning on the site.

Thirteen members of the public spoke, eleven speaking in support of the project stating that parking has always been available at the shopping center and that they often visited other tenants of the shopping center when they visited Tomato Thyme. One supporter, Ed Rast, mentioned the importance of allowing the restaurant to expand to avoid having people dine out in Campbell instead. Two speakers, Shig Hamamatsu and Dennis Lowe, residents of the single-family neighborhood immediately behind the restaurant, spoke out in opposition to the project, citing concerns with noise and potential decreases to property values.

Dave Tymn, speaking on behalf of the applicant, cited a noise report that had been prepared for the project stating that the proposal would meet applicable City noise standards. He stated that the applicant was proposing to construct a 26-foot tall storage building between the patio and the residences to the rear which would further mitigate for any potential noise impacts. The Planning Commission then closed the public hearing.

In response to the testimony, staff noted that despite patron statements that parking is always available on the site, no formal, independent analysis of parking availability on the site had been completed, despite that suggestion by staff. Staff noted that while the site might currently function adequately for parking with the existing mix of uses, this proposed zoning offers no assurance that existing uses in the surrounding center will not change to different types of uses (such as other restaurants) that could present more problematic parking issues, and that because no overall parking agreement exists on the site beyond the next year, no formal agreement would prevent businesses from restricting the use of their parking areas in the future.

### **Commission Discussion**

Commissioner Kalra asked the City Attorney to confirm what discretion the Commission has to make findings for a recommendation and Counsel responded that because the proposal is a Planned Development Zoning, the Commission would not be bound by the same type of CUP findings required in connection with parking requirements of Title 20. Commissioner Kamkar commented on the large amount of support for the project and stated that in such cases, the Commission should follow the will of the people rather than strict adherence to codes and guidelines. Commissioner Kalra then made a motion, which was seconded, to recommend approval of the Planned Development Rezoning, noting that the applicant had proposed a significant barrier to mitigate potential noise impacts in response to the concerns of the neighborhood to the rear.

Commissioner Campos stated that the City could not afford to lose potential business, especially under current economic conditions. Commissioner Jensen stated that she was concerned with the potential for the operator to add more seating, given the history of the site that staff presented in the staff report. Commissioner Zito then questioned staff to ask if the proposal was a new use going into the existing center, would it be possible to permit it. Staff noted that in the case of a new use, existing parking would have been evaluated for a new proposal and would have shown existing parking would not support the restaurant use at its current size, even without the added patio.

Staff commented that if the Commission was going to support the project, staff would need recommendations for the Development Standards for the zoning. Commissioner Kalra suggested adding requirements that the banquet room and outdoor patio could not operate simultaneously from 4 pm to 6 pm daily, and that the maximum seating at the restaurant be set at 119 for the interior as exists today and 50 seats for the outdoor patio, all agreeable to the applicant.

Commissioner Zito asked whether the proposed zoning could have future impacts on restricting other new uses on the site in the future and staff and counsel confirmed that it could. Commissioner Zito also asked that if the zoning were to be approved, could it be undone if the situation became a problem. Counsel stated that zonings are legislative actions that run with the land and are not intended to be revoked and even if the site were subsequently rezoned, the use, once permitted, would then be considered legal non-conforming. Commissioner Kalra then suggested that a report come back to the Commission for information one year after approval of the Planned Development Permit.

The Commission focused its deliberations primarily on the parking issues, and had no specific discussion about the proposed substandard rear building setback and narrow truck circulation driveway, or the project's overall conformance to the Commercial Design Guidelines as described in the original report.

The Planning Commission then voted 4-1-1-1, with Commissioner Jensen opposed, Commissioner Platten absent, and Commissioner Do abstaining, to recommend approve of the project.

## **ANALYSIS**

A complete analysis of the issues regarding this project, including General Plan conformance and consistency with the Commercial Design Guidelines, is contained in the attached staff report.

In response to the Planning Commission's recommended approval of the project, staff has prepared draft Development Standards (attached) to reflect the Planning Commission's direction for approval. Staff has included that the allowed uses are those of the CN Commercial Neighborhood Zoning District, consistent with the zoning of the surrounding center, as well as criteria for the allowed restaurant including the three conditions specifically recommended by the Commission with hours of operation proposed by the applicant.

Staff also proposes and has included as a condition in the draft Development Standards that the outdoor patio area should be limited to 1,500 square feet in size. The applicant's current proposal is for 2,100 square feet for just 50 seats. The Aquil Grill and Bar, a similarly popular Willow Glen restaurant, has an outdoor seating area that has 40 + seats but is approximately 1,200-1300 square feet in size. Concern was raised by Commissioner Jensen and staff that a 2,100 square foot patio could easily accommodate more seating and that the indoor seating is much more tightly configured. A small reduction in the maximum size of the patio would also increase the distance between the noise-generating outdoor use and the adjacent residences which would help respond to concerns by residents in homes abutting the rear of the shopping center. Staff believes that a slightly smaller patio would decrease the likelihood that this or a future operator would attempt to add more seats into the patio than what the proposed zoning would allow. Further, a slight reduction in the size of the patio would enable the rear building setback to be increased to better conform to the Commercial Design Guidelines and provide for a standard-sized truck circulation driveway, also used by other tenants, that conforms to the City's minimum width requirements. A specific condition regarding the circulation driveway has also been included in the draft Development Standards.

In response to the difficulties encountered on this site for confirmation of access and parking easements of the different property owners and in recognition that the existing parking agreement for half the site (not including Safeway) is set to expire in 2009, staff has included conditions that this applicant/property owner shall provide irrevocable offers for cross access and reciprocal parking to all property owners within the shopping center, for both truck and patron access and circulation in the future.

## **EVALUATION AND FOLLOW-UP**

The applicant will be required to secure a Planned Development Permit from the Planning Director in order to implement the subject rezoning.

## **POLICY ALTERNATIVES**

Not Applicable

### **PUBLIC OUTREACH/INTEREST**

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater.  
**(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Although this item does not meet any of the above criteria, staff followed Council Policy 6-30: Public Outreach Policy. No new community meeting was held for the rezoning proposal project as it addressed similar issues to the previous Conditional Use Permit, CP02-008. During that application process, residents wrote that they have complained about the restaurant's noise level in the past, when the workers of the restaurant woke the residents at odd hours. They indicated concern that an outdoor dining facility at the rear of Tomato Thyme would generate constant noise. Residents of Whispering Willow Place, a cul-de-sac to the southeast of the proposed patio, stated that alcohol use on the outdoor patio would increase the potential for loud and rowdy patrons carrying on conversations in the outdoor dining area.

A business owner in the shopping center expressed concern regarding the existing parking situation. According to the owner, the shopping center's available parking is very tight on site, and there have been instances of customers parking in spaces not designated for parking, where their cars have been towed. This business owner stated that the shopping center would not be able to accommodate any additional parking demand.

A notice of the public hearing was distributed to the owners and tenants of all properties located within 500 feet of the project site and posted on the City website. The rezoning was also published in a local newspaper. This staff report is also posted on the City's website. Staff has been available to respond to questions from the public.

### **COORDINATION**

This project was coordinated with the Department of Public Works, Fire Department, Police Department, Environmental Services Department and the City Attorney.

### **FISCAL/POLICY ALIGNMENT**

This project is consistent with applicable General Plan policies and City Council approved design guidelines as further discussed in attached staff report.

HONORABLE MAYOR AND CITY COUNCIL

October 27, 2008

**Subject:** PDC07-046

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**COST SUMMARY/IMPLICATIONS**

Not applicable.

**BUDGET REFERENCE**

Not applicable.

**CEQA**

CEQA: Mitigated Negative Declaration (CP02-008)

  
*for* JOSEPH HORWEDEL, SECRETARY  
Planning Commission

For questions please contact Ed Schreiner at 408-535-7845.

**Attachments:**

Draft Development Standards drafted October 24, 2008  
Public correspondence

Server:PDC07-046 CC memo2

**PDC 07-046**  
**Draft**  
**General Development Plan**  
*Per Planning Commission recommendation*  
*(October 24, 2008)*

**USES ALLOWED**

**Permitted Uses**

All Permitted uses as allowed in the CN Commercial Neighborhood Zoning District per Title 20 of the San Jose Municipal Code, as amended with the following restrictions and requirements:

- A maximum of one public eating establishment with:
  - Interior seating maximum: 119 seats
  - Outdoor patio seating maximum: 50 seats, 1500 square feet
  - Addition of storage building to boundary of patio to achieve noise mitigation requirements. Only equipment and supplies required for operation of the use on the premises may be stored on site.
  - Between the hours of 4:00 p.m. to 6:00 p.m. every day, no simultaneous use of at least 50 interior seats, which interior seating area shall include the rear banquet room, when the outdoor patio eating area is in use
  - No patron use of outside patio dining area except between the hours of 10:00 am to 10:00 pm. All staff activity on patio to cease by 11 pm daily and no use of mechanical equipment allowed on the patio
- Uses allowed in conjunction with the one public eating establishment are limited to those with a parking requirement of 1 per 200 square feet or less, per Title 20 of the San Jose Municipal Code, as amended.
- The developer shall provide an irrevocable offer for cross access and reciprocal parking to all property owners within the entire shopping center prior to issuance of a building permit for the new patio and storage building.
- All Conditional and Special uses as allowed in the CN Commercial Neighborhood Zoning District per Title 20 of the San Jose Municipal Code, as amended, require approval through the issuance of a Planned Development Permit at the discretion of the Director of Planning exercised in accordance with the provisions of Title 20 of the San José Municipal Code, as amended from time to time.

**DEVELOPMENT STANDARDS**

***HEIGHT/SETBACKS***

As allowed in the CN Commercial Neighborhood Zoning District per Title 20 of the San Jose Municipal Code, as amended. A 26' (net) truck circulation driveway shall be provided at the rear of the building with appropriate cross access easements for the benefit of other tenants in the shopping center.

***PARKING***

**PDC 07-046**  
**Draft**  
**General Development Plan**  
*Per Planning Commission recommendation*  
*(October 24, 2008)*

The restaurant is located within a shopping center comprised of several additional legal parcels, which include parking dedicated to other commercial uses present in the shopping center. Absent a City-approved off-site, alternating use parking agreement, the parking present on the other legal parcels can not be recognized under the Zoning Code as parking available to support the restaurant. Uses in addition to a restaurant as allowed above shall not require parking in excess of 1 per 200 square feet per Title 20 of the San Jose Municipal Code, as amended.

**ENVIRONMENTAL MITIGATION**

*Air Quality*

- Water all active construction areas at least twice daily and more often during windy periods to prevent visible dust from leaving the site; active areas adjacent to windy periods; active areas adjacent to existing land uses shall be kept damp at all times, or shall be treated with non-toxic stabilizers or dust palliatives.
- Cover all trucks hauling soil, sand and other loose materials *or* require all trucks to maintain at least two feet of freeboard;
- Pave, apply water at least three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas at construction sites.
- Sweep daily, or as often as necessary, (with water sweepers) to prevent visible dust from leaving the site. All paved access roads, parking areas and staging areas at construction sites shall be swept and any excess water shall be vacuumed up to prevent any run-off impacts to water quality;
- Sweep streets daily (with water sweepers) if visible soil material is carried onto adjacent public streets.

*Noise*

Prior to approval of the project, the applicant shall submit a operational plan explaining how they will implement the measures below, to the satisfaction of the Director of Planning, Building and Code Enforcement.

- Construct an additional storage building at the east side of the courtyard patio area to connect air-tight to the planned storage building and to the existing buildings along the east side of the courtyard. The additional storage shed shall be minimum 26 feet high along the side boundary of the courtyard patio.
- The service/emergency gate shall be maintained closed when not in use for the intended purposes. Patrons shall not enter or exit via the rear of the facility.

**PDC 07-046**  
**Draft**  
**General Development Plan**  
*Per Planning Commission recommendation*  
*(October 24, 2008)*

- Limit the patron capacity in the courtyard patio to no more than 50 people at any time.
- Any special events or parties shall be limited to no more than 30 people and only one party will be allowed in the courtyard patio at a time.
- Limit dining parties on the patio/to no more than 10 people per party.
- Limit background music sound levels to 55dBA at the plane of the courtyard patio barrier described above.
- Speakers for background music shall be distributed to lower the output of each speaker. The speakers shall be installed within 3 feet of the courtyard patio floor.
- Limit the hours of dining in the patio courtyard to 10:00a.m. to 10:00p.m.
- Limit staff activity and clean-up to no later than 11:00p.m. No mechanical equipment, such as powered washers, vacuums or other noise generating devices are allowed in the patio.
- Construction will be limited to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday for any on-site or off-site work within 500 feet of any residential unit. Construction outside of these hours may be approved through a development permit based on a site-specific construction noise mitigation plan and a finding by the Director of Planning, Building and Code Enforcement that the construction noise mitigation plan is adequate to prevent noise disturbance of affected residential uses.
- The contractor shall use “new technology” power construction equipment with state-of-the-art noise shielding and muffling devices. All internal combustion engines used on the project site shall be equipped with adequate mufflers and shall be in good mechanical condition to minimize noise created by faulty or poor maintained engines or other components.
- Staging areas shall be located a minimum of 200 feet from noise sensitive receptors, such as residential uses.



**BANK OF THE WEST**

October 22, 2008

CITY OF SAN JOSE  
PLANNING COMMISSION  
200 E Santa Clara St  
San Jose, CA 95112

Attn: Mr. Jim Zito-Planning Commission Chair  
Mr. Joseph Horwedel-Director, Planning  
Members- Planning Commission

Re: PDC07-046 Tomato Thyme Outdoor Dining Patio, Mr. John Smith et al,  
Owner Applicant

Dear Chairperson and Council Members;

I am writing in support of Tomato Thyme's application for a Planned Development Permit to allow an outdoor dining patio. I am the manager of a neighboring business and I recognize Tomato Thyme as a great asset to local businesses and the Willow Glenn neighborhood as a whole.

After reviewing Mr. Smith's plans for the planed patio I do not see or anticipate any negative impact in the parking capacity or traffic flow of our shopping center.

Due to other previous commitments I will not be able to attend tonight's hearing. This does not diminish my support for the proposed Tomato Thyme patio plans.

Best regards,

Miguel Ortiz  
Vice President & Branch Manager





**BANK OF THE WEST**

November 14, 2006

Tomato Thyme  
John Smith, Proprietor  
15525-D Los Gatos Blvd  
Los Gatos CA 95032

Re: City of San Jose-Planning Dept. Public Hearing re: Outdoor Patio (The Hamilton location)

Mr. Smith;

I regret to inform you that due to the short notice and prior commitments I will not be able to attend the above mentioned hearing to which you have invited me. I hope that the outcome favors you and your company.

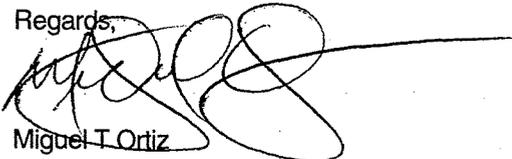
I must add that my company favors sensible business growth. From what you tell me that is exactly what you are attempting to achieve for your company.

Finally to address you questions to me in regards stated claims in the "Public Outreach" portion of the City's written response to you: First, none of my officers or supervisors have had any vehicles towed from the shopping center parking lot. Parking conditions have not been as severe as to warrant this. Second, while I have noticed that certain sections of the parking lot become congested during certain hours of the day other sections of the same (along the Hamilton side of the parking lot) seem to be continuously vacant.

I hope that city officials take the above into account and rule in your favor.

Please feel free to call me should you have addition questions.

Regards,

  
Miguel T. Ortiz

Vice President & Manager

Cc: bf



Hamilton Office  
1590 Hamilton Avenue San Jose, California 95125 (408) 998-6771 Fax (408) 266-6086

Member FDIC

# LOYAL ORDER OF MOOSE



CAMPBELL LODGE NO. 1811 DAVE DIFFENDERFER, ADMINISTRATOR 1580 HAMILTON AVE. SAN JOSE, CA 95125 (408) 264-1580

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November 14, 2006

To: San Jose City Council  
Subject: Tomato Thyme Restaurant  
Patio construction plans.

To Whom It May Concern

As the Vice President of operation and a neighboring business owner, we the members of Moose Lodge #1811, located three businesses down from Tomato Thyme, have no objections to their plans to construct a patio area behind their building. Since Tomato Thyme arrived in our shopping complex they have generated good will and many of our members have enjoyed their food.

Having visited John and Holly Smith at their establishment, visited the area planned for the patio, again, we have no objections. The information sent to us, along with the diagram of the proposed patio area, will most likely be a plus for us and other people from the various businesses in the shopping center. The paring issue was discussed and it has never been a serious problem. The activity outside in regards to parking is not much of a concern here because each business has peak and low demand times.

We will try to be in attendance at the Public Hearing scheduled to be held on November 15, 2006 at the City of San Jose Planning Department. If for some reason we do not have a representative at the meeting, we hope that this letter acts as a positive input to the issue, and indicates are vote of yes to the proposal. We do not see the parking issue as being a problem.

With regards,

A handwritten signature in black ink that reads "David P. Diffenderfer". The signature is written in a cursive style with a large, prominent initial "D".

David P. Diffenderfer  
Vice President  
Of Operations

City of San Jose, Planning Commissioners

City of San Jose, City Council Members

200 E. Santa Clara St.

San Jose CA 95113

October 20, 2008

RE: Planned Development Rezoning File No. PDC07-046

LETTER IN SUPPORT OF ADDING AN OUTDOOR PATIO

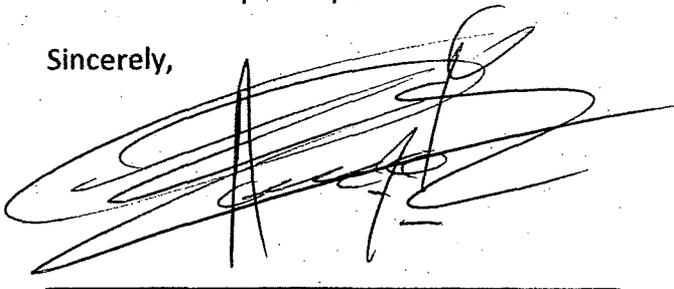
To Whom It May Concern:

John Smith, the owner of Tomato Thyme-Willow Glen has spoken to our members and staff about the proposed patio and outdoor seating.

We at Ballys Total Fitness support the patio; it will be a welcome addition for this Shopping Center. We do not believe that parking will be a problem. Tomato Thyme attracts good customers and is good for the community. We have many of the same customers. They also welcome this addition to the shopping center.

There is currently not a parking problem, nor do we foresee a parking problem in the future, even after the patio opens.

Sincerely,



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Manager, Ballys Total Fitness

City of San Jose, Planning Commissioners

City of San Jose, City Council Members

200 E. Santa Clara St.

San Jose CA 95113

October 20, 2008

RE: Planned Development Rezoning File No. PDC07-046

LETTER IN SUPPORT OF ADDING AN OUTDOOR PATIO

To Whom It May Concern:

I have talked with John Smith, the owner of Tomato Thyme-Willow Glen about the proposed patio and outdoor seating.

I am the Manager of Rite Aid next door to the restaurant location. I cannot make it to the Hearing on Oct. 22<sup>nd</sup>, 2008, but I want to go on record to state that this center does not have a parking problem. I have never once had any customer complain about lack of parking.

I support the Patio, I think it would be good for this shopping center. The Smith's are always trying to improve the center. They are even out there sweeping the parking lot, returning shopping carts, pulling weeds, or whatever it takes. The restaurant attracts good customers and is good for this neighborhood community.

There is currently not a parking problem, nor do we foresee a parking problem in the future, even after the patio opens.

Sincerely, *Clementina Perez*



Manager, Rite Aid - Hamilton Ave., San Jose CA 95125

City of San Jose, Planning Commissioners  
City of San Jose, City Council Members  
200 E. Santa Clara St.  
San Jose CA. 95113

Ki C. Moon  
Moon's Best Cleaners  
1562 Hamilton Ave  
San Jose, CA. 95125

RE: New addition of Tomato Thyme Outdoor Patio

To whom it may concern:

It gives me a great deal of pleasure to be able to write for an exceptional opportunity. The purpose of this letter is to articulate our enthusiastic support for the construction of Tomato Thyme's outdoor patio project.

Having attended the initial City Council meeting, we understand the conflicting concerns for available parking. We do not have shortage in available parking at this commercial center. In our daily observation, parking lot has ample amount of parking spaces at all times of the day and none of my employees or customers have issues with parking or had their vehicles towed in the past.

Tomato Thyme has established itself as a popular neighborhood family restaurant. It is apparent that many Willow Glen restaurants offer pleasant patio dining. The Tomato Thyme's vision and determination is a direct reflection of what the community enjoys. It further demonstrates the growing and changing life style of this community.

We recommend the council members and planning commissioners to recognize the strong voice and support from the community members and neighboring businesses.

In short, we hope the members of the board will engage in candid and forthright consideration with aim at finding a positive conclusion by approving this project.

Yours truly

Ki C. Moon

