

RESOLUTION NO. 74566

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN JOSÉ GRANTING, SUBJECT TO CONDITIONS, A CONDITIONAL USE PERMIT TO CONVERT AN EXISTING BOOKSTORE LOCATION TO A DAYCARE CENTER AND PRESCHOOL FOR USE BY UP TO 80 CHILDREN ON THE PROPERTY LOCATED ON THE NORTHWEST CORNER OF BERCAW LANE AND WYRICK AVENUE (14381 BERCAW LANE) ON A 0.40 GROSS ACRE SITE

FILE NO. CP07-092

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on November 7, 2007, an application (File No. CP07-092) was filed for a Conditional Use Permit for the purpose of allowing the conversion of an existing bookstore use to a daycare center and preschool use for up to 80 children on certain real property situated in the CO - Commercial Office Zoning District and located on the northwest corner of Bercaw Lane and Wyrick Avenue (14381 Bercaw Lane), in the City of San José, California (which real property is hereinafter referred to as the "subject property"); and

WHEREAS, the subject property is all that real property described in the legal description of the subject property attached hereto as Exhibit "A" and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code, the Planning Commission, and City Council on appeal, each conducted a public hearing on said application File No. CP07-092, notices of which hearings were duly given; and

WHEREAS, at said respective public hearings, the Planning Commission and this City Council gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter before them; and

WHEREAS, at said respective hearings, the Planning Commission and this City Council received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement on this matter, and the City Council also received the report and recommendation of the Planning Commission on this matter; and

WHEREAS, at said respective hearings, the Planning Commission and this City Council received in evidence a development plan for the subject property entitled, "Tenant improvements to building located at 14381 Bercaw Lane," dated January 8, 2008, and said development plan is on file in the Department of Planning, Building and Code Enforcement, is available for inspection by anyone interested therein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, said public hearings were all conducted in all respects as required by the San José Municipal Code and the rules of the Planning Commission or this City Council, respectively, as appropriate.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSÉ AS FOLLOWS:

After considering all evidence presented to the City Council at its Public Hearing on this matter, the City Council finds that the following are the relevant facts regarding this proposed project:

1. The 0.40 gross acre site of the subject property is located on the northwest corner of Bercaw Lane and Wyrick Avenue (14381 Bercaw Lane).
2. A retail shopping center is located to the northwest of the subject property. The rest of the subject property is surrounded by single-family residences.
3. The subject property is designated as Medium Low Density Residential (8.0 DU/AC) on the 2020 General Plan Land Use Transportation Diagram.
4. The subject property is located within the CO - Commercial Office Zoning District.
5. A child daycare center is permitted in the CO – Commercial Office Zoning District with an approved Conditional Use Permit.
6. The project proposes to complete interior modifications to an existing commercial building and other on-site modifications to create a private daycare center and preschool. Approximately 9 staff members will work for the daycare center and preschool. The facility will have a maximum occupancy of 80 children.
7. The daycare center and preschool are proposed to operate weekdays between the hours of 7:00 am to 6:30 pm, five days per week, Monday through Friday.
8. The subject property is currently developed with a retail building (former Beehive Bookstore), a parking lot, and moderate landscaping with some mature trees.
9. The project was found, pursuant to the provisions and processes set forth in the California Environmental Quality Act, together with certain State Guidelines and Title 21 of the San José Municipal Code promulgated thereunder (collectively, "CEQA"),

to be exempt from environmental review under Section 15332, In-Fill Development of the State Guidelines for Implementation of CEQA. The project is characterized as in-fill development because, as mentioned above, it is consistent the general plan and zoning designations applicable to the subject property, it is located within the City, poses no unique environmental concerns relating to species habitat, traffic, noise, or air or water quality, and can be adequately served by all urban services and utilities, all on a site that is less than 5 acres in size and surrounded by urban uses.

10. On January 7, 2008 approximately 30 people attended a community meeting where the project was discussed. The primary concerns expressed by the community meeting attendees related to possible traffic problems, parking in the residential areas, noise emanating from the subject property, the number of students attending the daycare and potential litter problems.
11. Notices of the community meeting and the public hearings for this project were sent to all property owners within 500 feet of the subject property.
12. Vehicles can enter the subject property via a driveway on Wyrick Avenue.
13. On-site parking spaces are readily available along the drive aisle of the subject property.
14. No demolition or new construction is proposed. Proposed on site improvements include the creation of a fenced outdoor child recreation area along the southeast side of the subject building.
15. There are 14 existing parking spaces on the subject property.
16. The parking required for the proposed use for up to 80 children is 10 spaces.
17. The Planning Commission held a public hearing on June 25, 2008 and approved the subject application.
18. The Planning Commission decision was appealed by an area resident on July 7, 2008.

The City Council concludes and finds, based on an analysis of the above facts, that:

1. The proposed project is consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram.
2. The proposed project complies with all applicable provisions of the Zoning Ordinance.
3. The proposed project is in compliance with the California Environmental Quality Act.
4. The proposed use is compatible with the surrounding neighborhood.
5. The proposed use is in substantial conformance with City Council Policy 6-14: Guidelines for Child Care.

Finally, based upon the above stated findings and facts and subject to the conditions set forth below, the City Council finds that:

1. The proposed use at the location requested will not:

- a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
 - b. Impair the utility or value of a property of other persons located within the vicinity of the subject property; or
 - c. Be detrimental to public health, safety or general welfare; and
2. The project as proposed on the subject property is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in Title 20 of the San José Municipal Code (the Zoning Code), or as is otherwise required in order to integrate said use with the uses in the surrounding area; and
 3. The subject property is adequately served:
 - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quantity of traffic such use would generate; or by other forms of transit adequate to carry the kind and quantity of individuals such use would generate; and
 - b. By other public or private service facilities as are required.

In accordance with the facts and findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby granted. This City Council expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Payment of Recording Fees.** Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara should be submitted to the Director of Planning within 30 days of approval of this permit, but must be submitted prior to issuance of a Building Permit. **Submittal of the recording fee less than one week prior to issuance of a Building Permit will delay the Building Permit issuance** for up to one week to allow for recordation of the permit with the County Recorder. This Permit shall be effective at such time when recordation with the County of Santa Clara occurs.
2. **Acceptance of Permit.** Per Section 20.100.290(B), should the Permittee fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the Permittee shall be deemed to constitute all of the following on behalf of the Permittee:
 - a. Acceptance of the Permit by the Permittee; and
 - b. Agreement by the Permittee to be bound by, to comply with, and to do all things required of or by the Permittee pursuant to all of the terms, provisions, and

conditions of this permit or other approval and the provisions of Title 20 applicable to such Permit.

3. **Building Permit/Certificate of Occupancy.** Procurement of a Building Permit and/or Certificate of Occupancy from the Building Official for the structures described or contemplated under this permit shall be deemed acceptance of all conditions specified in this permit and the Permittee's agreement to fully comply with all of said conditions. No change in the character of occupancy or change to a different group of occupancies as described by the "Building Code" shall be made without first obtaining a Certificate of Occupancy from the Building Official, as required under San José Municipal Code Section 24.02.610, and any such change in occupancy must comply with all other applicable local and state laws.
4. **Prior to Building Clearance for Issuance of Permit.** Prior to Building Clearance for Issuance of Permit the following conditions shall be executed to the satisfaction of the Director of Planning.
5. **Phased Occupancy Requirement.** The uses allowed in this permit shall be implemented in two phases as noted below:
 - a. Phase I operation is limited to 45 children. Once the 45 child enrollment is reached, and no sooner than 1 year from the date of approval of this permit by the City Council, the Permittee may notify the Director of Planning, Building and Code Enforcement that the Permittee desires to expand enrollment under the permit.
 - b. Upon receipt of that notice, the Director shall initiate an Operational Confirmation Review. Under this review, the Director shall gather all information necessary to assess the operational history of the daycare use, including input from the community and relevant information held by other City departments. Based on an assessment of this information, the Director shall determine whether the expansion of enrollment under Phase II at that time would be appropriate in that it would not create undue adverse impacts upon the neighborhood. If the Director does not allow expansion, the Permittee may reapply no more frequently than once every two years.
6. **Requirement for Staggered Drop-off/Pick-up.** The Permittee shall manage the subject facility in such a manner that the arrival time of clients are staggered so that no more than 65% arrive within the same morning peak hour and afternoon peak hour.
7. **Play Area Fencing.** The fence surrounding the proposed play area shall be set back at least 10 feet from the property line, and shall be of a 6 feet in height and designed to be compatible with the surrounding neighborhood. The fence shall constructed of wood or wrought iron.
8. **Maximum Number of Children.** The capacity of the proposed childcare facility and preschool shall be limited to a maximum of 80 children upon completion of Phase II and in accordance with Condition No. 5 in this permit. A Conditional Use Permit

Amendment is required for any proposed changes to the maximum number of children beyond 80.

9. **Plan Conformance Review.** Plan Conformance will be done as a part of Plan Check. The subject permit shall be incorporated into all construction plans submitted to the Building Division as follows:
 - a. Index Sheet shall reference the approved permit (and permit file number CP07-092) any subsequent Amendments, or Adjustments to the approved permit prior to Building
 - b. Plan Check submittal, and applicable sheets.
 - c. The subject permit (with signature) shall be copied in its entirety onto plan set sheets.
 - d. Construction plans shall also incorporate all elements of the approved permit included in the plan set.
10. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
11. **Archaeology.** Construction workers shall be alerted of the potential that site clearing and trenching may uncover buried archaeological materials. Indicators of buried materials include but are not limited to: darker than surrounding soils, concentration of bones, stone or shell fish, artifacts of these materials, evidence of fire such as ash, charcoal, fire affected rock or earth, and human and/or animal burials. If evidence of any archaeological, cultural, and/or historical deposits is found, the following measures shall be taken:
 - a. A qualified professional archaeologist will be notified and all further excavation activity shall be monitored. There shall be no excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains, at least within 50 feet of the discovery, until archaeological monitoring by the qualified archeologist begins.
12. **Hours.** The daycare center and preschool shall be limited to operation between the hours of 6:00 am to 7:00 pm, Monday through Friday, unless a Conditional Use Permit Amendment is approved for other hours of operation.

13. **Compliance With Local and State Laws.** The subject use shall be conducted in full compliance with all local and state laws. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code or state laws. The Permit shall be subject to revocation if the subject use is conducted in such a manner as to cause a nuisance or other violation of any applicable law.
14. **Registration and Obtainment of Licenses.** The daycare center and preschool shall obtain and comply with all Federal, State and Local laws pertaining to the licensing and operation of a child daycare facility and private preschool. The entire facility is required to be staffed with the required and appropriate number of registered nurses and professional care providers as required in accordance with Federal, State and Local laws.
15. **Conformance with Plans.** Except as noted in Condition No. 7 and 8, construction and development shall conform to approve Planned Development plans entitled, "Tenant Improvements to building located at 14381 Bercaw Lane, San José, CA" dated January 8, 2008 and on file with the Department of Planning, Building and Code Enforcement and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
16. **Landscaping.** Planting and irrigation are to be provided, as indicated on the final Approved Plan Set. Landscaped areas shall be maintained and watered and all dead plant material is to be removed and replaced by the property owner. Irrigation is to be installed in accordance with Part 4 of Chapter 15.10 of Title 15 of the San José Municipal Code, Water Efficient Landscape Standards for New and Rehabilitated Landscaping and the City of San José Landscape and Irrigation Guidelines.
17. **Enclosures/Screening.** Utility Structures shall be enclosed or screened to match existing fencing, screening or landscaping.
18. **Trash/Recycling Enclosures.** New enclosed and covered trash and recycling enclosures shall be constructed to City of San José standards. All rubbish and recycling enclosures shall be fully enclosed and covered. All trash areas shall be effectively screened from view and covered and maintained in an orderly state to prevent water from entering into the garbage container. No outdoor storage is allowed or permitted. Trash areas shall be maintained in a manner to discourage illegal dumping.
19. **Lighting.** On-site exterior lighting shall use Low-Pressure Sodium fixtures and be designed, controlled, and maintained so that all on site lighting will be fully shielded. All outdoor lighting systems shall be dimmed at the closing of the businesses operating on the subject property.
20. **Signs.** No signs are approved with this permit.
21. **Tree Removals.** No tree larger than 56 inches in circumference, at a height of 24 inches above the natural grade slope, shall be removed without a Tree Removal Permit issued by the Director of Planning. Trees to be removed shall be mitigated at the following ratios: Each tree less than 12" in diameter will be replaced by a one 15-gallon tree. Each tree 12" - 17" in diameter will be replaced by two 24-inch box

trees. Trees greater than 18” in diameter shall not be removed without a Tree Removal Permit and shall be replaced with four 24-inch box trees.

22. **Tree Protection Standards.** The Permittee shall maintain the trees and other vegetation to be retained in this project. Maintenance shall include pruning and watering as necessary and protection from construction damage. All trees to be preserved shall be permanently identified by metal numbered tags prior to the removal of any tree on the subject property. Fencing may be required for areas subject to direct impact, such as trees to be saved or habitat within areas being developed. Fencing and signage shall be maintained by the Permittee to prevent disturbances during the length of the construction that might disrupt the habitat or trees.
23. **Street Number Visibility.** Street numbers of the buildings shall be easily visible from the street at all times, day and night.
24. **Colors and Materials.** All building colors and materials are to be specified on the approved plan set.
25. **Roof Equipment.** No roof equipment is approved at this time. All roof equipment shall be screened from view.
26. **Fence Standards.** Fences shall be erected in accordance with the standards established on the approved plan set. All fencing shall comply with the City of San José Municipal Code.
27. **Street Trees.** Street trees shall be planted along the street frontages. A permit for this is required from the Department of Streets and Parks, (408) 277-4373.
28. **Public Works Clearance for Building Permit(s):** Prior to the issuance of Building Permits, the Permittee will be required to have satisfied all of the following Public Works conditions (File No. 3-01320) to the satisfaction of the Director of Public Works. The Permittee is strongly advised to apply for any necessary Public Works permits prior to applying for Building Permits.
 - a. **Sewage Fees:** In accordance with City Ordinance, all storm sewer area fees, sanitary sewer connection fees, and sewage treatment plant connection fees, less previous credits, are due and payable.
 - b. **Electrical:** Existing electroliers along the project frontage will be evaluated at the public improvement stage and any street lighting requirements will be included on the public improvement plans.
29. **Storm Water Stenciling.** All drain inlets shall be labeled “No Dumping-Flows to Bay.” Please contact the City of San José, Department of Public Works, at (408) 277-5161 to obtain free stencils.
30. **Construction Hours.** Construction shall be limited to the hours of 8:00 a.m. to 6:00 p.m., Monday through Friday for any on-site or off-site work within 500 feet of any residential unit. Construction activities within the buildings that do not generate any audible noise outside may be permitted on Saturday between the hours of 8:00 a.m. and 6:00 p.m.
31. **Deadline for Commencing Construction or Use.** This permit shall automatically expire two (2) years from and after the date of issuance hereof by the City Council if within such two-year period construction of buildings or uses allowed hereunder

have not commenced pursuant to and in accordance with the provisions of this permit. The date of issuance is the date this permit is approved by the City Council. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this permit for a period of up to two (2) years.

32. **Fire Safety.** Compliance with all applicable fire and building codes and standards relating to fire and panic safety shall be verified by the Fire Department during the Building Permit process to the satisfaction of the Fire Chief. Prior to Building Clearance, all requirements for Fire Safety shall be met to the satisfaction of the Fire Chief.
33. **Hazardous Materials.** Any hazardous materials regulated by Chapter 17.68 of the San José Municipal Code on the subject property must be used and stored within approved buildings and/or within areas specified on the approved plan set, if any, in full compliance with the City's Hazardous Material Ordinance and the Hazardous Materials Management Plan for the site approved by the San José Fire Prevention Bureau.
34. **Removing Graffiti.** The Permittee shall remove all graffiti from buildings, walls and fence surfaces within 48 hours of discovering the defacement.
35. **Amplified Sound.** All amplified sound shall be contained within the building.
36. **Noise.** The sound level generated on the subject property shall not exceed 55dBA at any property line of the subject property that is adjacent to a real property used for residential purposes and shall not exceed 60dBA at any property line adjacent to a property used for commercial or non-residential purposes.
37. **Nuisance.** This use shall be operated in a manner that does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.

CONDITIONS SUBSEQUENT

Revocation, Suspension, Modification. This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 2, Chapter 20.100, Title 20 of the San José Municipal Code it is found that:

1. A violation of any of the conditions of this Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
2. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or

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3. The use as presently conducted creates a nuisance.

ADOPTED this 26th day of August, 2008, by the following vote:

AYES: CHIRCO, CHU, CORTESE, LICCARDO, NGUYEN,
OLIVERIO, PYLE, WILLIAMS; REED.

NOES: NONE.

ABSENT: CAMPOS, CONSTANT.

DISQUALIFIED: NONE.

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk

NOTICE TO PARTIES

The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6.