

**COUNTY OF SAN MATEO
PLANNING AND BUILDING DEPARTMENT**

DATE: August 27, 2014

TO: Planning Commission

FROM: Planning Staff

SUBJECT: Consideration of a Resolution to require that the non-conforming commercial use at 3821 Fair Oaks Avenue, in the unincorporated North Fair Oaks area of San Mateo County, be converted to a permitted use within a prescribed period of time pursuant to Section 6134 of the San Mateo County Zoning Ordinance, and consideration of a Zoning Text Amendment, pursuant to Section 6550 of the County Zoning Ordinance, to add specific language to the Zoning Non-Conformities Chapter (Chapter 4) of the Zoning Ordinance.

County File Number: PLN 2012-00315

RECOMMENDATION

That the Planning Commission recommend that the Board of Supervisors adopt a resolution requiring that the non-conforming commercial use at 3821 Fair Oaks Avenue, County File PLN 2012-00315, be converted to a permitted use within a prescribed period of time pursuant to Section 6134 of the San Mateo County Ordinance Code, by adopting the required findings contained in Attachment A.

Staff is also recommending that the Planning Commission recommend that the Board of Supervisors approve a proposed Zoning Text Amendment that would amend Section 6134.1 of the Zoning Ordinance, to include the following language (new language in bold and underlined):

Continuation of Non-Conforming Uses. A non-conforming use may continue to exist providing that all other provisions of this Chapter are met, and the use is not a confined animal use shown to degrade water quality or sensitive habitats. A non-conforming confined animal use shown to degrade water quality and sensitive habitats shall be abated in accordance with the procedure established by the Confined Animal Regulations (San Mateo County Ordinance Code, Division 6, Part 4, Chapter 1). The Board of Supervisors, upon recommendation by the Planning Commission at a public hearing, can require that any non-conforming use (except residential) be removed or converted to a permitted use within a prescribed period of time, as allowed by law, and upon findings that (1) the non-conforming use is detrimental to the health, safety or public welfare of the surrounding area, and (2) it degrades the neighborhood character.

All uses at 3821 Fair Oaks Avenue (APN 060-123-360) not permitted in the R-1 Zoning District shall, on May 10, 2018, cease to be a legal non-conforming use, and shall on that date become a violation of the parcel's zoning.

BACKGROUND

This item was previously heard by the Planning Commission on December 11, 2013. At that time, the Commission recommended that the Board of Supervisors adopt a resolution that would require the uses of the parcel, including the current commercial use (Bay Area Catering and Events - BACE), at 3821 Fair Oaks Avenue, to be converted to a use permitted in the R-1 Zoning District by May 10, 2015. This recommendation was then forwarded to the Board of Supervisors and was to be heard at the January 28, 2014 meeting of the Board. Prior to consideration by the Board, Staff received additional information (including copies of the business owner's lease) and a memorandum from BACE's counsel raising factual and legal matters. In light of this new information and additional research on the relevant case law, the Board of Supervisors, at their March 11, 2014 hearing, remanded this item back to the Planning Commission for further consideration.

PREVIOUS PLANNING COMMISSION ACTION

On December 10, 2013, the Board of Supervisors rezoned the subject parcel from C-1/NFO/FO (Neighborhood Commercial/Fair Oaks) to R-1/S-73 (Single-Family Residential/5,000 sq. ft. minimum parcel size). That action made the current commercial operation at the site a legal non-conforming use and subject to the provisions of Chapter 4 of the Zoning Regulations.

As noted, above, at the meeting of December 11, 2013, your Commission forwarded a resolution to the Board recommending that the Board of Supervisors adopt a resolution that would require the sunsetting of non-conforming uses at the Fair Oaks Avenue parcel.

Much of the information that Staff provided to the Planning Commission in connection with the December 11, 2013 meeting remains relevant at this time. However, the Resolution contained a proposed date by which time commercial activities at the site must cease (i.e., May 10, 2015), that Planning Staff believes should be reconsidered. This date was based upon the information that Staff had at the time of the December hearing. Since then, additional information, regarding lease terms, financial investment by the business owner, and relevant case law, has been submitted to the County and has affected Staff's proposed cessation date. That additional information is discussed below.

ABANDONMENT OF NON-CONFORMING USES

Zoning non-conformities are governed by Chapter 4 of the Zoning Regulations, which state in part that "[a] non-conforming use may continue to exist providing all other

provisions of this Chapter are met...” (Zoning Regulations §6134). Thus, absent further action, the current commercial operation would be allowed to continue as a non-conforming use. Additionally, even if the current business were to vacate the property, it is possible that the property owner could lease the site to a similar commercial business, thereby continuing a use that is in conflict with the surrounding residential uses and the parcel’s residential zoning. That is because Section 6134.3, Abandonment of Non-Conforming Uses, requires an owner to voluntarily abandon a non-conforming use for 18 months before the owner loses the right to continue the use:

Section 6132.1 (DEFINITIONS): **Abandoned** - The voluntary termination of a land use or use of a building or structure for a period of at least 18 months. The inability to operate through no fault or intent of the owner, e.g., unsuccessful attempts to sell/lease property or litigation constraints, shall not be considered voluntary termination or constitute abandonment.

To address the possibility that the current or another commercial use may continue to operate on this site indefinitely, staff is proposing the attached resolution (Attachment B) for your consideration to forward to the Board of Supervisors, which would find that the non-conforming use at 3821 Fair Oaks Avenue is detrimental to the health, safety, and welfare of the surrounding area and that this use degrades the neighborhood character.

REMOVAL OF NON-CONFORMING USES

In order for the non-conforming use to be removed or converted to a permitted use within a prescribed period of time, as allowed by law, the Planning Commission must make a recommendation to the Board of Supervisors. The two findings that are required to support a recommendation for such action are the following: (1) the non-conforming use is detrimental to the health, safety or public welfare of the surrounding area; and (2) it degrades the neighborhood character (Zoning Regulations § 6134.1). The Board of Supervisors then has the authority to require the non-conforming commercial use to be removed or converted to a permitted residential use (or other use allowed in the R-1 Zone) within a prescribed period of time upon making the two above findings.

California law has long recognized that “a zoning ordinance may be amended from time to time as new and changing conditions warrant revision.” *Los Angeles v. Gage* (1954) 127 Cal. App. 2d 442, 452. Moreover, the courts have held that, while it is a deprivation of property without due process of law for a zoning ordinance to require *immediate* discontinuance of a non-conforming use existing when the ordinance is adopted, “zoning legislation may validly provide for the eventual discontinuance of non-conforming uses within a prescribed reasonable amortization period commensurate with the investment involved.” *National Advertising Co. v. County of Monterey* (1970) 1 Cal. 3d 875, 878.

When this item was previously heard by the Commission at your December 11, 2013 hearing, the following information was provided to support making the above findings. Specifically, with regard to the first finding, staff presented the following information:

1. The significant volume of commercial vehicle loading and unloading occurring in this residential neighborhood, where there is inadequate infrastructure to allow the unloading of supply trucks and the loading of delivery trucks without unduly obstructing traffic on Fair Oaks Avenue and San Benito Avenue, impedes the safe flow of traffic and can potentially block the access of emergency vehicles and is therefore detrimental to public safety;
2. Occasional noise and odors emitted from a commercial operation is detrimental to the public welfare;
3. The continuous occupation of the structure during business hours by the number of employees necessary to sustain a commercial operation puts an undue strain on the capacity of the neighborhood infrastructure (including, for example, parking) and is detrimental to the public welfare;
4. The volume of refuse and waste from a commercial operation in a residential neighborhood is detrimental to the public health; and
5. The amount of parking on-site is insufficient to accommodate the number of employees of the business. The lack of parking has resulted in the spillover of employee parking into the surrounding neighborhood, thereby detrimentally impacting public welfare.

Evidence was presented at that time in support of these claims, including photographs of double-parked delivery trucks blocking the public right-of-way and the businesses' delivery trucks parked off-site within the surrounding neighborhood. Additionally, Staff submitted copies of the Violation Case Activity Log for this site which documents the numerous complaints the County has received regarding the business at this location. At the time of the December 11, 2013 Planning Commission hearing, the Planning Department had received 111 complaints regarding the existing commercial use on the site. Through the date of this report, the Planning Department has received another 100 complaints, and staff continues to believe that the continuation of a non-conforming use at this location will generate future complaints.

The other finding that the Commission must consider is whether continuation of the existing commercial use of the site degrades the neighborhood character. Among the reasons that such a finding can be made are that the only commercially sustainable business that has occupied the site in recent history is highly intensive and not a neighborhood-serving establishment that is consistent with the current neighborhood character, and that the existence of a commercial establishment on one corner of a residential neighborhood without significant on-site commercial amenities has resulted in the neighborhood impacts outlined above.

TERMINATION DATE

Among the factors considered in determining the reasonableness of an amortization period with respect to a particular property are the “amount of investment or original cost, present actual or depreciated value, dates of construction, amortization for tax purposes, salvage value, remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing beyond the prescribed amortization period.” *United Business Comm’n v. City of San Diego* (1979) 91 Cal. App. 3d 156, 181. A local land use authority may also consider factors such as the adaptability of the subject parcel to the now-permitted use and the cost of moving and re-establishing the use elsewhere. *People v. Gates* (1974) 41 Cal. App. 3d 590, 603. The party seeking to challenge the validity of an amortization period has the burden to establish its unreasonableness. *National Advertising Co. v. County of Monterey* (1970) 1 Cal. 3d 875, 879.

As noted, at the December hearing, the Planning Commission recommended a sunset date of May 10, 2015 for commercial uses of the parcel, based on testimony presented at the hearing that BACE has a lease with an initial five-year term expiring by that date. However, since the December hearing, County staff has reviewed a copy of the lease between BACE and its landlord that indicates that BACE does, in fact, have a five-year option to continue its lease through May 2020.

Further, while BACE has asserted to staff that it spent approximately \$280,000 for tenant improvements at its present location at the time it began to operate, it has not, to date, offered any documentary evidence regarding the amount of investment that it has made at the subject location nor of the present/depreciated value of its investment. Similarly, BACE has not provided any evidence regarding the salvage value of equipment that it has installed (i.e., whether any equipment could be removed and reinstalled at a new location).

County staff has been informed that BACE has identified another location in which to operate on Middlefield Road in North Fair Oaks, subject to receipt from the County of an off-street parking exception. BACE asserts that it would incur some significant expenses in relocating to this location but, again, County staff has not received probative evidence regarding the scope of BACE’s cost to relocate. Finally, staff has noted that the subject parcel is adaptable to the now-permitted residential use, although the structure on the site would likely have to be removed, given its commercial nature.

Based upon Staff’s analysis of the relevant case law and the information that the County presently has available regarding the terms of BACE’s existing lease and BACE’s claims regarding the amounts that it has expended on tenant improvements at the existing location, Staff is recommending a sunset date of May 10, 2018. First, this amortization date will allow BACE to have benefitted from most of the term of the lease that entitles the business to operate at its present location.

Further, assuming that BACE has incurred expenses in establishing itself at its current location, this proposed amortization period will have allowed the business eight years to

recover its investment and, absent any further information from the business owner, it is reasonable to assume that the sum of the expenses incurred by BACE will be salvageable at that time. Absent further evidence from BACE, staff believes that this amortization period affords BACE a reasonable period of time in which to recoup its investment.

Staff has not been able to evaluate the weight that BACE's relocation costs should have on the amortization analysis because we have not received evidence regarding this factor.

Finally, staff notes that the business has had a significant detrimental impact on the community, as described above, and this factor further supports the proposed amortization period.

PROPOSED ZONING TEXT AMENDMENT

As discussed previously, Staff is also recommending that Chapter 4 of the Zoning Ordinance (Zoning Nonconformities) be amended to add the following language to Section 6134.1:

All uses at 3821 Fair Oaks Avenue (APN 060-123-360) not permitted in the R-1 Zoning District shall, on May 10, 2018, cease to be a legal non-conforming use, and shall on that date become a violation of the parcel's zoning.

Staff recommends that the Planning Commission adopt a provision of the Zoning Regulations to provide expressly for the termination of non-conforming commercial uses at this particular site because doing so provides notice to the owner and potential purchasers of the property that they should not expect to continue the historic use of the property. Staff believes this provides the clearest record to the current owner and prospective purchasers because, otherwise, a purchaser might proceed under the belief that the Zoning Non-Conformities rules might apply to this parcel and proposed uses when such is not the case. In the absence of such a provision, even if a purchaser were aware of the R-1 zoning, they might inspect the property and assume that the existing commercial use could be continued indefinitely.

ATTACHMENTS

- A. Proposed Resolution to find that the non-conforming commercial use at 3821 Fair Oaks Avenue is detrimental to the health, safety and welfare and degrades the neighborhood character.
- B. Draft Ordinance amending Chapter 4 (Zoning Non-Conformities) to add specific language that sunsets commercial activities at 3821 Fair Oaks Avenue.

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DRAFT

RESOLUTION NO. _____

BOARD OF SUPERVISORS, COUNTY OF SAN MATEO, STATE OF CALIFORNIA

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**RESOLUTION TO FIND THE NON-CONFORMING COMMERCIAL USE AT
3821 FAIR OAKS AVENUE IS DETRIMENTAL TO THE HEALTH, SAFETY AND
WELFARE AND DEGRADES THE NEIGHBORHOOD CHARACTER**

RESOLVED, by the Board of Supervisors of the County of San Mateo, State of California, that

WHEREAS, on November 20, 2013, the San Mateo County Planning Commission recommended the adoption of a resolution changing the General Plan Land Use designation for the parcel located at 3821 Fair Oaks Avenue from “Neighborhood Mixed Use (Medium Density) Commercial/Residential/Public” to “Single-Family Residential” and recommended the adoption of an ordinance changing the Zoning designation for the same parcel from “C-1/NFO/Fair Oaks” to “R-1/S-73”; and

WHEREAS, on December 10, 2013, the San Mateo County Board of Supervisors adopted said resolution and ordinance and rezoned the subject parcel, making the existing commercial use at this location non-conforming; and

WHEREAS, at its August 27, 2014 hearing, the Planning Commission recommended the adoption of a resolution that finds that the non-conforming commercial use at 3821 Fair Oaks Avenue is detrimental to the health, safety and welfare and degrades the neighborhood character. The Planning Commission provided the following reasons for its recommendation:

1. That the continuation of the existing commercial use of the site and any potential future commercial use of the site is detrimental to the health, safety and public welfare. Among the reasons for such a finding are:
 - a. The significant volume of commercial vehicle loading and unloading occurring in this residential neighborhood, where there is inadequate infrastructure to allow the unloading of supply trucks and the loading of delivery trucks without unduly obstructing traffic on Fair Oaks Avenue and San Benito Avenue, impedes the safe flow of traffic and can potentially block the access of emergency vehicles and is therefore detrimental to public safety;
 - b. Occasional noise and odors emitted from a commercial operation are detrimental to the public welfare;
 - c. The continuous occupation of the structure during business hours by the number of employees necessary to sustain a commercial operation puts an undue strain on the capacity of the neighborhood infrastructure (including, for example, parking) and is detrimental to the public welfare;
 - d. The volume of refuse and waste from a commercial operation in a residential neighborhood is detrimental to public health; and

- e. The amount of parking on-site is insufficient to accommodate the number of employees of the business. The lack of parking has resulted in the spillover of employee parking into the surrounding neighborhood.
2. That continuation of the existing commercial use of the site degrades the neighborhood character. Among the reasons for such a finding are that the only commercially sustainable business that has occupied the site in recent history is highly intensive and not a neighborhood-serving establishment that is consistent with the current neighborhood character, and that the existence of a commercial establishment on one corner of a residential neighborhood without significant on-site commercial amenities has resulted in the neighborhood impacts outlined above.

WHEREAS, at its _____, 2014 hearing, the Board considered the proposed resolution to find the non-conforming commercial use at 3821 Fair Oaks Avenue is detrimental to the health, safety and welfare and degrades the neighborhood character; and the basis for the Planning Commission’s recommendation.

NOW, THEREFORE, IT IS RESOLVED that the San Mateo County Board of Supervisors hereby finds the non-conforming commercial use at 3821 Fair Oaks Avenue is detrimental to the health, safety and public welfare and that it degrades the neighborhood character.

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DRAFT

**ORDINANCE NO. _____
BOARD OF SUPERVISORS, COUNTY OF SAN MATEO,
STATE OF CALIFORNIA**

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**AN ORDINANCE AMENDING CHAPTER 4 OF DIVISION VI OF THE
SAN MATEO COUNTY ORDINANCE CODE (ZONING ANNEX) TO
ADD LANGUAGE THAT SPECIFICALLY SUNSETS COMMERCIAL
ACTIVITIES AT 3821 FAIR OAKS AVENUE**

The Board of Supervisors of the County of San Mateo, State of California,
ORDAINS as follows

SECTION 1. Section 6134.1 of Chapter 4 of Part One of Division VI of the San Mateo County Ordinance Code (Zoning Annex) shall be amended to read as follows (new language in bold and underlined):

SECTION 6134. NON-CONFORMING USES.

1. Continuation of Non-Conforming Uses. A non-conforming use may continue to exist providing all other provisions of this Chapter are met, and the use is not a confined animal use shown to degrade water quality or sensitive habitats. A non-conforming confined animal use shown to degrade water quality and sensitive habitats shall be abated in accordance with the procedure established by the Confined Animal Regulations (San Mateo County Ordinance Code, Division 6, Part 4, Chapter 1). The Board of Supervisors, upon recommendation by the Planning Commission at a public hearing, can require that any non-conforming use (except

residential) be removed or converted to a permitted use within a prescribed period of time, as allowed by law, and upon findings that (1) the non-conforming use is detrimental to the health, safety or public welfare of the surrounding area, and (2) it degrades the neighborhood character.

All uses at 3821 Fair Oaks Avenue (APN 060-123-360) not permitted in the R-1 Zoning District shall, on May 20, 2018, cease to be a legal non-conforming use, and shall on that date become a violation of the parcel's zoning.

SECTION 2. This ordinance shall be in full force and effect thirty (30) days after its passage.

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