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REVISED

APPROVED AS TO FORM AND LEGALITY
Mark P. Wald
DEPUTY CITY ATTORNEY

OAKLAND CITY COUNCIL

RESOLUTION NO. 82808 C.M.S.

A RESOLUTION UPHOLDING AND APPROVING THE APPEAL (CASE NO. A09-220), THEREBY REVERSING THE PLANNING COMMISSION DECISION AND DENYING THE MAJOR CONDITIONAL USE PERMIT AND VARIANCE AT 6400 SHATTUCK AVENUE FOR ALCOHOLIC BEVERAGE SALES COMMERCIAL ACTIVITY

WHEREAS, the applicants Ashrious and Verniece Pannell (“Owners”), built and opened an alcoholic beverage sales outlet and market at 6400 Shattuck Avenue approximately forty years ago, before adoption of Planning Code requirements regulating Alcoholic Beverage Sales Commercial Activities; and

WHEREAS, sales of alcohol at 6400 Shattuck Avenue were considered to be a legal, nonconforming use/Deemed Approved use; and

WHEREAS, in 2004, the Owners closed the facility and later surrendered the State Alcoholic Beverage Control license; and

WHEREAS, on April 28, 2004 staff sent the Owners a letter putting them on notice that the property’s Deemed Approved (legal, non-conforming) Status had lapsed because there was no alcoholic beverage sales activity for more than ninety (90 days) pursuant to the Oakland Planning Code, and that they had ten days to appeal the decision and that a CUP and/or Variance would be needed to resume the sale of alcoholic beverages at the property; and

WHEREAS, no appeal was filed relating to the decision set forth in the April 28, 2004 letter; and

WHEREAS, in December of 2008 Owners obtained a new state Alcoholic Beverage Sales license and, by staff error, a City Zoning Clearance and the store proceeded to open; and

WHEREAS, on April 29, 2009 the City Zoning Division sent a letter, via certified mail, to the Owners stating that the Zoning Clearance was issued in error and was therefore rescinded

and the Owners could either appeal that determination within 10 days or apply for a Conditional Use Permit for the sale of alcoholic beverages; and

WHEREAS, the Owners voluntarily elected not to appeal the April 29, 2009 decision, thus failing to exhaust their administrative remedies, and, as a result, the City's decision to lapse the Deemed Approved (legal, non-conforming) Status was final; and

WHEREAS, on May 11, 2009, the Owners (hereafter referred to as the "Applicants") voluntarily applied for a Major Conditional Use Permit for a convenience market and also to allow Alcoholic Beverage Sales Commercial Activity and a Major Variance to allow such Activity within 1000 feet radius of another Alcoholic Beverage Sales Commercial Activity ("Project"); and

WHEREAS, on August 5, 2009 a duly noticed public hearing was held before the City Planning Commission for the Project, accompanied by a Planning staff recommendation for denial of the alcoholic beverage sales component of the Project; and

WHEREAS, on August 5, 2009, after hearing from over two dozen neighbors and interested parties, the Commission directed staff, by a 4 to 1 straw vote, to bring back approval findings and conditions for the Project, including Alcoholic Beverage Sales; and

WHEREAS, on October 7, 2009 a continued, duly noticed public hearing was held before the City Planning Commission for the Project; and

WHEREAS, on October 7, 2009, the Planning Commission independently reviewed, considered and determined that the Project is categorically exempt from the environmental review requirements of the California Environmental Quality Act ("CEQA") pursuant to sections 15301, 15303, and 15183 of the State CEQA Guidelines; and

WHEREAS, on October 7, 2009 the Project was approved by the City Planning Commission to allow a convenience market and approximately 400 square feet or 33% of the store floor, whichever is lesser, of Alcoholic Beverage Sales in the market; and

WHEREAS, on October 19, 2009 an appeal of the Planning Commission's October 7, 2009 decision was filed by Mr. Jeffrey Jensen, representing other individuals, ("Appellants") challenging the approval of the Alcoholic Beverage Sales Commercial Activity, but not the convenience market; and

WHEREAS, the approval of the convenience market constituted a final decision of the City Planning Commission and is not the subject of this appeal; and

WHEREAS, after giving due notice to the Appellants, the Applicant, all interested parties, and the public, the Appeal was rescheduled from the March 16, 2010 City Council Agenda; and

WHEREAS, after giving due notice to the Appellants, the Applicant, all interested parties, and the public, the Appeal came before the City Council in a duly noticed public hearing on May 4, 2010; and

WHEREAS, the Appellants, Applicant and all other interested parties were given the opportunity to participate in the public hearing by submittal of oral and written comments; and

WHEREAS, the public hearing on the Appeal was closed by the City Council, but the Council was unable to reach a decision on the merits; and

WHEREAS, in accordance with Oakland Planning Code sections 17.134.070A and 17.148.070A, the matter was continued to the Council's next regularly scheduled meeting of May 18, 2010, and was also duly noticed; and

WHEREAS, the Appellants, Applicant and all other interested parties were again given the opportunity to participate by submittal of oral and written comments at the May 18, 2010 meeting; and

WHEREAS, the motion to continue the item to June 15th for a vote based upon the Applicant's request for a continuance resulted in a tie vote, and, according to Rule 29 of the Council's Rules of Procedure (City Council Resolution No. 82580 C.M.S.) and City Charter section 218, which provides for the Mayor to cast the deciding vote in matters in which the Council is evenly divided, the item was continued to the Council's next regularly scheduled meeting of June 1, 2010; and

WHEREAS, the matter was again duly noticed and appeared on the June 1, 2010 City Council Agenda; and

WHEREAS, the Mayor did not cast the tie breaking vote and no one in the prevailing side moved for reconsiderations, and thus the Council considered the matter on the merits and moved to reopen the public hearing; and

WHEREAS, Appellants, Applicant and all other interested parties were again given the opportunity to participate by submittal of oral and written comments at the June 1, 2010 meeting; and

WHEREAS, the public hearing on the Appeal was closed by the City Council; ; now, therefore, be it

RESOLVED: The City Council independently finds and determines that this Resolution complies with CEQA, as the Disapproved Project is categorically exempt from CEQA pursuant to CEQA Guideline Section 15270, Projects which are disapproved; and be it

FURTHER RESOLVED: That the City Council, having independently heard, considered, and weighed all the evidence in the record presented on behalf of all parties and being fully informed of the Application, the Planning Commission's decision, and the Appeal, finds that the Appellant has shown, by reliance on evidence in the record, that the Planning Commission's decision was made in error, that there was an abuse of discretion by the

Commission, and/or that the Commission's decision was not supported by sufficient, substantial evidence in the record. This decision is based, in part, on the staff prepared August 5, 2009, Planning Commission Report, which is hereby incorporated by reference as if fully set forth herein. Accordingly, the Appeal is approved, the Planning Commission's decision approving a Major Conditional Use Permit for Alcoholic Beverage Sales Commercial Activity and a Major Variance to waive the 1000 foot separation between such uses required by the Oakland Planning Code, is reversed and the alcoholic beverage sales portion of the Project is denied; and be it

FURTHER RESOLVED: That, in support of the City Council's decision to deny the alcoholic beverage sales portion of the Project, the City Council affirms and adopts as its findings and determinations the staff prepared August 5, 2009, Planning Commission Report, [including without limitation the discussion, findings, and conclusions, each of which is hereby separately and independently adopted by this Council in full, and each finding for denial provides a separate and independent basis for denial of the alcoholic beverage sales portion of the Project and when viewed collectively provides an overall basis to deny the alcoholic beverage sales portion of the Project]. Moreover, as a further separate and independent basis, the City Council finds that the Planning Commission's decision to base granting the variance on "historical relevance" to be in error; and be it

FURTHER RESOLVED: That the record before this Council relating to this Project application and appeal includes, without limitation, the following:

1. the Project application, including all accompanying maps and papers;
2. all plans submitted by the Applicant and his representatives;
3. all final staff reports, decision letters and other documentation and information produced by or on behalf of the City.
4. all oral and written evidence received by the City staff, Planning Commission and City Council before and during the public hearings on the application and appeal;
5. all matters of common knowledge and all official enactments and acts of the City, such as (a) the General Plan and the General Plan Conformity Guidelines; (b) Oakland Municipal Code, including, without limitation, the Oakland real estate regulations; (c) Oakland Fire Code; (d) Oakland Planning Code; (e) other applicable City policies and regulations; and, (f) all applicable state and federal laws, rules and regulations; and be it

FURTHER RESOLVED: That the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are respectively: (a) Community & Economic Development Agency, Planning & Zoning Division, 250 Frank H. Ogawa Plaza, Suite 2114, Oakland, CA.; and (b) Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1st floor, Oakland, CA; and be it

FURTHER RESOLVED: That the recitals contained in this resolution are true and correct and are an integral part of the City Council's decision.

IN COUNCIL, OAKLAND, CALIFORNIA, JUN 1 2010

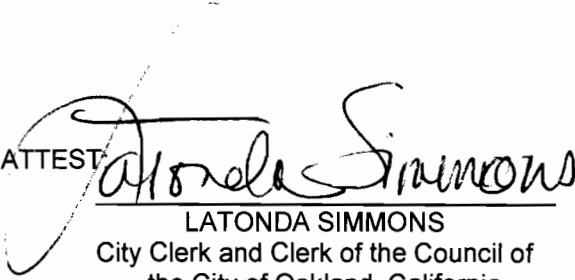
PASSED BY THE FOLLOWING VOTE:

AYES - ~~Brooks~~, DE LA FUENTE, ~~Kaplan~~, KERNIGHAN, NADEL, QUAN, ~~Reid~~, AND PRESIDENT BRUNNER - 5

NOES - Brooks, Kaplan, Reid - 3

ABSENT - 0

ABSTENTION - 0

ATTEST 
LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California

LEGAL NOTICE:

ANY PARTY SEEKING TO CHALLENGE THIS FINAL DECISION IN COURT MUST DO SO WITHIN NINETY (90) DAYS OF THE DATE OF THE ANNOUNCEMENT OF THIS DECISION, UNLESS A DIFFERENT DATE APPLIES