

CITY OF OAKLAND

AGENDA REPORT

TO: Office of the City Administrator
ATTN: Dan Lindheim
FROM: Community and Economic Development Agency
DATE: March 2, 2010

RE: Conduct a Public Hearing and, Upon Conclusion, Adopt a Resolution Denying the Appeal of Lue R. Bells (Case # A 09-273) and Upholding the Planning Commission's Decision to Revoke the Deemed Approved Status for Alcoholic Beverage Sales from the Property Located at 5007 Bancroft Avenue.

SUMMARY

This appeal involves a liquor store at 5007 Bancroft Avenue that the Oakland Police Department (OPD) alleged was a nuisance and a magnet for crime. After attempts to resolve the problems at the property by stipulation (voluntary agreement amongst the parties) failed, OPD requested a Special Hearing for revocation of the property's Deemed Approved Alcoholic Beverage Sales (legal, nonconforming) status. As relevant to this appeal, the Hearing Officer's resulting decision ordered partial revocation of the property's Deemed Approved Status (and loss of ability to sell alcohol), revoking the status as to the tenants but not the landlord (property owner), on the theory that the tenants had caused the violations at issue. OPD and the tenant appealed the Hearing Officer's decision. The Hearing Officer's decision was amended by the Planning Commission upon appeal, with the resulting decision entirely revoking the property's Deemed Approved Status (and loss of ability to sell alcohol), and allowing the current business operators to remain only for the purpose of operating a convenience market with no alcohol sales.

The property owner, timely submitted an Appeal of the Planning Commission's decision to the Planning & Zoning Division. The Appeal requests that the City Council reverse the Planning Commission's decision and re-establish the property's Deemed Approved Status as to the property owner and thus allow sales of alcohol with a different operator. Notably, the operators of the premises did not appeal the Planning Commission's decision and the decision is final as to them. The events that lead to violation of the stipulation are not disputed and are not on appeal. Even if the landlord is successful in her appeal, she seeks only to preserve her Deemed Approved Status for future tenants and does not seek reinstatement of the current operators' right to sell alcoholic beverages.¹

City Council approval of the Appeal would allow the sale of alcohol, but with a different operator, and preserve the property's Deemed Approved Status. City Council denial of the

¹ On January 20, 2010, the City issued a letter to the operator demanding they cease and desist sale of alcohol because the Planning Commissions' December 3, 2009 decision as applied to them was final.

Item: _____
City Council
March 2, 2010

Appeal would sustain the Planning Commission's revocation of Deemed Approved Status for alcoholic beverage sales. Sales of Alcoholic Beverages could only then resume upon issuance of a Conditional Use Permit by the Oakland Planning Commission.

Staff recommends the City Council deny the Appeal and uphold the Planning Commission's decision to revoke the property's Deemed Approved Status for the reasons discussed in this report.

FISCAL IMPACT

The Appeal relates to a private business located on private property. No public funds are required for the project and therefore there would be no direct fiscal impact to the City. All staff time that is required to process the Appeal is fully cost-covered through fees.

BACKGROUND

The business was a Deemed Approved Alcoholic Beverage Sales establishment, continuously engaging in alcoholic beverage sales since the adoption of the 1977 Ordinance requiring zoning approval for this activity. Under the Planning Code, Deemed Approved establishments must adhere to codified Performance Standards. OPD noted ongoing breaches to the Performance Standards at the site, allegedly involving criminal nuisance.

In an effort to mitigate these nuisances, stipulated conditions of approval were agreed upon between the property owner, business operator, and the City and attached to the property on February 5, 2009 pursuant to OPC chapter 17.156. The stipulation bound all parties, and liability for breach was joint and several. Breaches to stipulated conditions of approval were then noted, and OPD requested a Special Hearing to consider revocation of the property's Deemed Approved status pursuant to OPC chapter 17.156.

On July 2, 2009 and August 6, 2009 the City's Administrative Hearing Officer held Special Hearings (case # DAA 08-002) to consider revocation of Deemed Approved Status (legal, nonconforming status) for alcoholic beverage sales at the property. The hearing officer continued the hearing only for the purpose of giving all parties further opportunities to submit evidence not presented at the first hearing. The Hearing Officer found breaches to two (2) of seven (7) conditions related to requirements for surveillance cameras and on-site security personnel and ultimately issued the Revised Order.

The Hearing Officer issued a Revised Order on August 14, 2009 which imposed a partial revocation of the property's Deemed Approved Status. The Order states that the Deemed Approved Status was revoked as the business operators, who were ordered to vacate the premises, but not as to the landlord.

Item: _____
City Council
March 2, 2010

The Revised Order was appealed to the Planning Commission by the Oakland Police Department on August 19, 2009 (case # A 09-188) and by the business operator's attorney Mr. Clinton Killian on August 27, 2009 (case # A 09-190). On December 2, 2009 the City Planning Commission approved OPD's appeal and denied the business operator's appeal by unanimous 5-0 vote. In doing so, the Commission amended the Revised Order on the recommendation of staff so that it would conform to Planning Code and case law principles that zoning attaches to land, not individual people.

The property owner timely appealed the Planning Commission's decision. The Appeal requests that the City Council reverse the Planning Commission's decision and re-establish the property's Deemed Approved Status as to the property owner and thus allow sales of alcohol with a different operator. Notably, the operators of the premises did not appeal the Planning Commission's decision and the decision is final as to them. The events that lead to violation of the stipulation are not disputed and are not on appeal. Even if the landlord is successful in her appeal, she seeks only to preserve her Deemed Approved Status for future tenants and does not seek reinstatement of the current operators' right to sell alcoholic beverages.²

Property Description

The property is located at the southeast corner of the intersection formed by Bancroft and 50th Avenues. The lot measure 5,759 square-feet in area with 60-feet of frontage along Bancroft Avenue and 80-feet of frontage along 50th Avenue. The property contains a 2-story wooden building situated towards the corner and contains 4 residential units in addition to La Raza at the ground floor with its entrance facing the corner. The legal property address is 5007 Bancroft Avenue but the business address and liquor license are recorded as 5001 Bancroft Avenue.

General Plan Conformity

The site is located within Urban Residential (front & right side - 87% lot area) and Mixed Housing Type Residential (rear left side - 13% lot area) areas of the General Plan's Land Use & Transportation Element. The building lies within the Urban Residential area, only. The Urban Residential area is intended: "*...to create, maintain, and enhance areas of the City that are appropriate for multi-unit, mid-rise or high-rise residential structures in locations with good access to transportation and other services.*"

Zoning Conformity

The property lies within the C-30 District Thoroughfare Commercial Zone/S-4 Design Review Combining Zone (front - 70% lot area) and R-70 High Density Residential Zone (rear - 30% lot area). The building lies within the R-30/S-4 Zones, only. The C-30 Zone is intended: "*...to create, preserve, and enhance areas with a wide range of retail establishments serving both short and*

² On January 20, 2010, the City issued a letter to the operator demanding they cease and desist sale of alcohol because the Planning Commissions' December 3, 2009 decision as applied to them was final.

long term needs in convenient locations, and is typically appropriate along major thoroughfares” and the S-4 Zone is intended: “to create, preserve, and enhance the visual harmony and attractiveness of areas which require special treatment and the consideration of relationships between facilities, and is typically appropriate to areas of special community, historical, or visual significance.”

Appeal Description

Following is the language from the appeal filed by the property owner:

“The Planning Commission erred in accepting the argument advanced by OPD/ABAT that *“it is not possible to revoke the parcel’s zoning status as to one person but not to another”* and in ignoring the specific finding that Lue R. Bells did not violate the terms of the Deemed Approved status. The purported legal principle advanced to support the Planning Commission’s decision does not exist.”

City Council approval of this Appeal would allow the property owner to lease the space to future commercial tenants able to sell alcoholic beverages without additional Zoning approvals (that is, to retain Deemed Approved Status for alcoholic beverage sales). The business operators have not appealed the Planning Commission’s decision and the decision as to them is final. Also, the landlord’s appeal would in effect allow only future operators, not the present operators, to resume the sale of alcoholic beverages.

KEY ISSUES AND IMPACTS—ISSUES RAISED ON APPEAL

Appellant’s Arguments

The Appeal is grounded on a theory that the property’s land use status should attach to individuals, not the property as a whole. Appellants argue the land use entitlements to sell alcoholic beverages should be denied as to the business tenants but not as to the landlord based on the argument that the landlord was not directly responsible for events that were held to be violations of the February 5, 2009 agreement.

Issues

1. Applicability of land use entitlements

The Appellant disagrees with the Planning Commission’s finding that a land use entitlement (Deemed Approved Status for alcoholic beverage sales) runs with a property and not an individual.

Item: _____
City Council
March 2, 2010

Staff Response:

The Planning Code's Nonconforming Uses and Deemed Approved provisions apply to property, not property owners. This is consistent with planning law. The following are applicable excerpts of the Planning Code that demonstrate the legal nonconforming/Deemed Approved Status runs with the land and not specific individuals:

17.114.040 Right to continue nonconforming use, subject to limitations.

A. Right to Continue. A nonconforming use which is in existence on the effective date of the zoning regulations or of any subsequent rezoning or other amendment thereto which makes such use nonconforming, and which existed lawfully under the previous zoning controls, or which is subsequently developed or changed pursuant to Section 17.114.030, may thereafter be continued and maintained indefinitely, and the rights to such use shall run with the land, except as otherwise specified in the nonconforming use regulations. However, no substitution, extension, or other change in activities and no alteration or other change in facilities is permitted except as otherwise provided in Section 17.114.030 and except as specifically provided hereinafter.

17.156.040 Applicability of Deemed Approved Alcoholic Beverage Sale regulations.

A. To Which Property Applicable. The Deemed Approved Alcoholic Beverage Sale regulations shall apply, to the extent permissible under other laws, to all Legal Nonconforming Alcoholic Beverage Sale Commercial Activities within the city.

The property owner's desire to retain the Deemed Approved Status as an individual is not only inconsistent with the Planning Code but with established case law on the subject, as briefed by outside counsel, Mr. Todd Boley. In short, his brief illustrates that The Deemed Approved Ordinance is part of the City's land use regulation, and, as such, the Ordinance controls the use of a parcel of land, not individuals. Basic land use law dictates that Deemed Approved Status can only be granted as to a parcel; it cannot be granted to particular individuals.

2. Responsibility of commercial property owners

The Appellant does not feel responsible for ongoing nuisances at her property and therefore finds that the City should not take enforcement action against them.

Staff Response:

Under the Planning Code, when breaches to performance standards are associated with a Deemed Approved location, a revocation hearing is held to consider removal of status or entitlement allowing alcoholic beverage sales from property. The Planning Code does not state breaches need be the fault of any individual, per se, for the City to review property status by hearing. Moreover, the landlord was a signatory to the stipulation whose terms made liability for performance joint and several.

Item: _____
City Council
March 2, 2010

Importantly, the property owner is not denying breaches of the performance standards or stipulation at this location. The Planning Commission proceeded to determine that the Revised Order failed to conform to established case law and the Oakland Planning Code to the extent it individualized the property's land use status; therefore, the Planning Commission amended the Revised Order to conform to the Ordinance. There was no malice toward the property owner, only concern for public safety.

Common sense also dictates that the provisions of the Planning Code be read so as to hold landlords accountable for the actions of their tenants. If only tenants were liable for nuisance based violations of the zoning code, a loop hole would then entitle any nuisance property to avoid regulation and zoning based penalties by way of leasing to a new tenant. Because a large majority of Oakland's liquor stores are leased, such a reading of the law would eviscerate the City's efforts to mitigate liquor store-related nuisance.

SUSTAINABLE OPPORTUNITIES

The Planning Commission decision would provide the following economic, environmental, and social equity benefits:

Economic: The revocation of Deemed Approved Status for alcoholic beverage sale at 5007 Bancroft Avenue could potentially result in a decrease to sales tax at this location which would likely be compensated for elsewhere within the City as demand could be satisfied at another establishment; the revocation may also result in more private investment in the surrounding neighborhood due to a decrease in crime.

Environmental: The revocation will result in a reduction of public nuisances associated with this problematic land use.

Social Equity: The revocation will increase safety to residents.

DISABILITY AND SENIOR CITIZEN ACCESS

There are no effects on disability and senior citizen access issues from this action.

STAFF RECOMMENDATION AND RATIONALE

Staff recommends that the City Council adopt the attached resolution denying the appeal, and uphold the Planning Commission's decision revoking the deemed approved status for the property for the following reasons:

Item: _____
City Council
March 2, 2010

- 1) The Planning Commission's decision was based on a thorough review of all pertinent aspects of the project;
- 2) The Planning Commission's decision complied in all significant respects with applicable General Plan policies and Zoning regulations and review procedures; and
- 3) The appellant has failed to demonstrate that there was an error or abuse of discretion in the Planning Commission's decision or that the Planning Commission's decision is not supported by substantial evidence in the administrative record.

ALTERNATIVE CITY COUNCIL ACTIONS

The City Council has the option of taking one of the following alternative actions instead of the recommended action above:

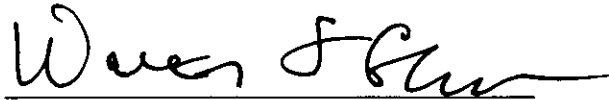
1. Continue the item to a future hearing for further information or clarification.
2. Refer the matter back to the Planning Commission for further consideration on specific issues/concerns of the City Council. Under this option, the item would be forwarded back to the City Council with a recommendation after review by the Planning Commission.
3. Uphold the appeal and overturn the Planning Commission's decision, thereby applying Deemed Approved Status for alcoholic beverage sale to a property owner, as opposed to a property in accordance, and allowing future commercial tenants (business operators) at the property to sell alcoholic beverages. This option would require the City Council to continue the item to a future hearing so that staff can prepare and the Council has an opportunity to review the proposed findings and resolution for approval. Proceeding with this option also allows Council to impose additional conditions, at its discretion.

Item: _____
City Council
March 2, 2010

ACTION REQUESTED OF THE CITY COUNCIL

Staff requests that the Council affirm the Planning Commission's revocation of the Deemed Approved Status at 5007 Bancroft Avenue and deny the Appeal of Lue R. Bells (Case #A09188).

Respectfully submitted,

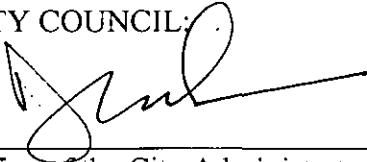


Walter S. Cohen, Director
Community and Economic Development Agency

Reviewed by:
Scott Miller, Zoning Manager
Planning & Zoning Division

Prepared by:
Aubrey Rose, Planner II

APPROVED AND FORWARDED TO THE
CITY COUNCIL:



Office of the City Administrator

ATTACHMENTS:

- A. Appeal letter by 5007 Bancroft Avenue property owner Ms. Lue R. Bells dated December 14, 2009
- B. Planning Commission staff report dated December 2, 2009
- C. Brief submitted by Todd Boley on behalf of the OPD/ABAT
- D. February 5, 2009 Stipulated Conditions of Approval

THE ADMINISTRATIVE RECORD HAS BEEN PROVIDED TO THE CITY COUNCIL OFFICES AND IS ALSO AVAILABLE FOR REVIEW AT THE PLANNING & ZONING DIVISION LOCATED AT 250 FRANK H. OGAWA PLAZA, SUITE 2114 AND THE CITY CLERK'S OFFICE LOCATED AT 1 FRANK H. OGAWA PLAZA, FIRST & SECOND FLOORS, AS WELL AS ON THE CITY'S WEBSITE AT:

Item: _____
City Council
March 2, 2010

<http://www.oaklandnet.com/government/ceda/revised/planningzoning/Commission/December-2-09/item2/AdminRecordVOL1.pdf>

<http://www.oaklandnet.com/government/ceda/revised/planningzoning/Commission/December-2-09/item2/AdminRecordVOL2.pdf>

<http://www.oaklandnet.com/government/ceda/revised/planningzoning/Commission/December-2-09/item2/ExhibitE.pdf>



CITY OF OAKLAND
REQUEST FOR APPEAL OF DECISION TO
PLANNING COMMISSION OR CITY COUNCIL
(REVISED 8/14/02)

RECEIVED

DEC 14 2009
CITY PLANNING COMMISSION
ZONING DIVISION

PROJECT INFORMATION

Case No. of Appealed Project: DAA08002
Project Address of Appealed Project: 5007 ("5001") Bancroft Ave, Oakland

APPELLANT INFORMATION:

Printed Name: Lue Retha Bells Phone Number: (510) 569-4516
Mailing Address: 1909 - 107th Ave Alternate Contact Number:
City/Zip Code Oakland, CA 94603 Representing: Self (Owner)

An appeal is hereby submitted on:

[] AN ADMINISTRATIVE DECISION (TO THE CITY PLANNING COMMISSION)

YOU MUST INDICATE ALL THAT APPLY:

- [] Approving an application for an Administrative Project
[] Denying an application for an Administrative Project
[] Administrative Determination or Interpretation by the Zoning Administrator
[] Other (please specify)

Pursuant to the Oakland Municipal and Planning Codes listed below:

- [] Administrative Determination or Interpretation (OPC Sec. 17.132.020)
[] Determination of General Plan Conformity (OPC Sec. 17.01.080)
[] Design Review (OPC Sec. 17.136.080)
[] Small Project Design Review (OPC Sec. 17.136.130)
[] Minor Conditional Use Permit (OPC Sec. 17.134.060)
[] Minor Variance (OPC Sec. 17.148.060)
[] Tentative Parcel Map (OMC Section 16.304.100)
[] Certain Environmental Determinations (OPC Sec. 17.158.220)
[] Creek Protection Permit (OMC Sec. 13.16.450)
[] Creek Determination (OMC Sec. 13.16.460)
[] Hearing Officer's revocation/impose or amend conditions (OPC Secs. 15.152.150 & 15.156.160)
[] Other (please specify)

[X] A DECISION OF THE CITY PLANNING COMMISSION (TO THE CITY COUNCIL) [X] Granting an application to: OR [] Denying an application to:

Grant the Limited Appeal of OPD/ABAT requesting revocation of the Deemed Approved Status of Owner Lue R. Bells on the grounds set forth in the Limited Appeal.

(continued on reverse)

ATTACHMENT A

(Continued)

A DECISION OF THE CITY PLANNING COMMISSION (TO THE CITY COUNCIL)

YOU MUST INDICATE ALL THAT APPLY:

Pursuant to the Oakland Municipal and Planning Codes listed below:

- Major Conditional Use Permit (OPC Sec. 17.134.070)
- Major Variance (OPC Sec. 17.148.070)
- Design Review (OPC Sec. 17.136.090)
- Tentative Map (OMC Sec. 16.32.090)
- Planned Unit Development (OPC Sec. 17.140.070)
- Environmental Impact Report Certification (OPC Sec. 17.158.220F)
- Rezoning, Landmark Designation, Development Control Map, Law Change (OPC Sec. 17.144.070)
- Revocation/impose or amend conditions (OPC Sec. 17.152.160)
- Revocation of Deemed Approved Status (OPC Sec. 17.156.170)
- Other (please specify) _____

An appeal in accordance with the sections of the Oakland Municipal and Planning Codes listed above shall state specifically wherein it is claimed there was an error or abuse of discretion by the Zoning Administrator, other administrative decisionmaker or Commission (Advisory Agency) or wherein their/its decision is not supported by substantial evidence in the record, or in the case of Rezoning, Landmark Designation, Development Control Map, or Law Change by the Commission, shall state specifically wherein it is claimed the Commission erred in its decision.

You must raise each and every issue you wish to appeal on this Request for Appeal Form (or attached additional sheets). Failure to raise each and every issue you wish to challenge/appeal on this Request for Appeal Form (or attached additional sheets), and provide supporting documentation along with this Request for Appeal Form, may preclude you from raising such issues during your appeal and/or in court.

The appeal is based on the following: *(Attach additional sheets as needed.)*

The Planning Commission erred in accepting the argument advanced by OPD/ABAT that "it is not possible to revoke the parcel's zoning status as to one person but not to another" and in ignoring the specific finding that Lue R. Bells did not violate the terms of her Deemed Approved status. The purported legal principle advanced to support the Planning Commission's decision does not exist.

Supporting Evidence or Documents Attached. *(The appellant must submit all supporting evidence along with this Appeal Form.)*

Lue Retha Bells
Signature of Appellant or Representative of
Appealing Organization

12/14/09
Date

Below For Staff Use Only

Date/Time Received Stamp Below:

Cashier's Receipt Stamp Below:

8/14/02

Location: 5007 ("5001") Bancroft Avenue (APN: 035 -2362-001-00)
Former "La Raza Liquors & Market"

Proposal: 2 Appeals on case no. DAA08002
To appeal the Administrative Hearing Officer's Revised Order of August 14, 2009 following Special Hearings held on July 2 and August 6, 2009, held due to violations of conditions under a stipulated agreement.

The Revised Order: (1) revoked the business operator's Deemed Approved Status to operate a Legal Nonconforming Alcoholic Beverage Sales Commercial Activity and (2) required the operator to vacate the location and transfer the liquor license to a new operator who would establish a business at this location.

Appeal no. 1: OPD/ABAT appealed the Revised Order on the bases that the revocation should apply to the entire property and that the City lacks jurisdiction to require an ABC license transfer.

Appeal no. 2: The business operators' attorney appealed the Revised Order on the bases that a request for continuance of a Special Hearing was wrongly denied, that evidence exists to demonstrate that the business had complied with stipulated Conditions of Approval, and that the Revised Order is excessive.

Appellants/ Phone Numbers: Appeal no. 1: Oakland Police Department - Alcoholic Beverage Action Team (OPD - ABAT) / (510) 777-8674

Appeal no. 2: Clinton Killian, Attorney for Mohsen Mohammed Ali Albasiri & Ali Ahmad Obad / (510) 625-8823

Owner: Ms. Lue R. Bells

General Plan: Urban Residential / *Mixed Housing Type Residential (rear)*

Zoning: C-30 District Thoroughfare Commercial Zone / S-4 Design Review Combining Zone / *R-70 High Density Residential Zone (rear)*

Environmental Determination: Exempt, Section 15321 of the State CEQA Guidelines: Enforcement Actions by Regulatory Agencies

Historic Status: Potential Designated Historic Property (PDHP); Survey rating: Dc3 (potentially secondary importance or superior example)

Service Delivery District: IV- San Antonio / Fruitvale

City Council District: 5 - Vice Mayor De La Fuente

Dates Filed: Appeal no. 1: August 19, 2009

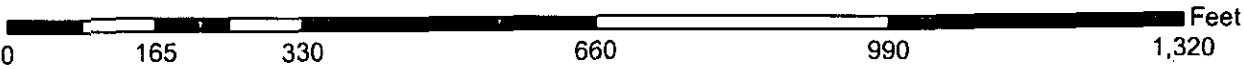
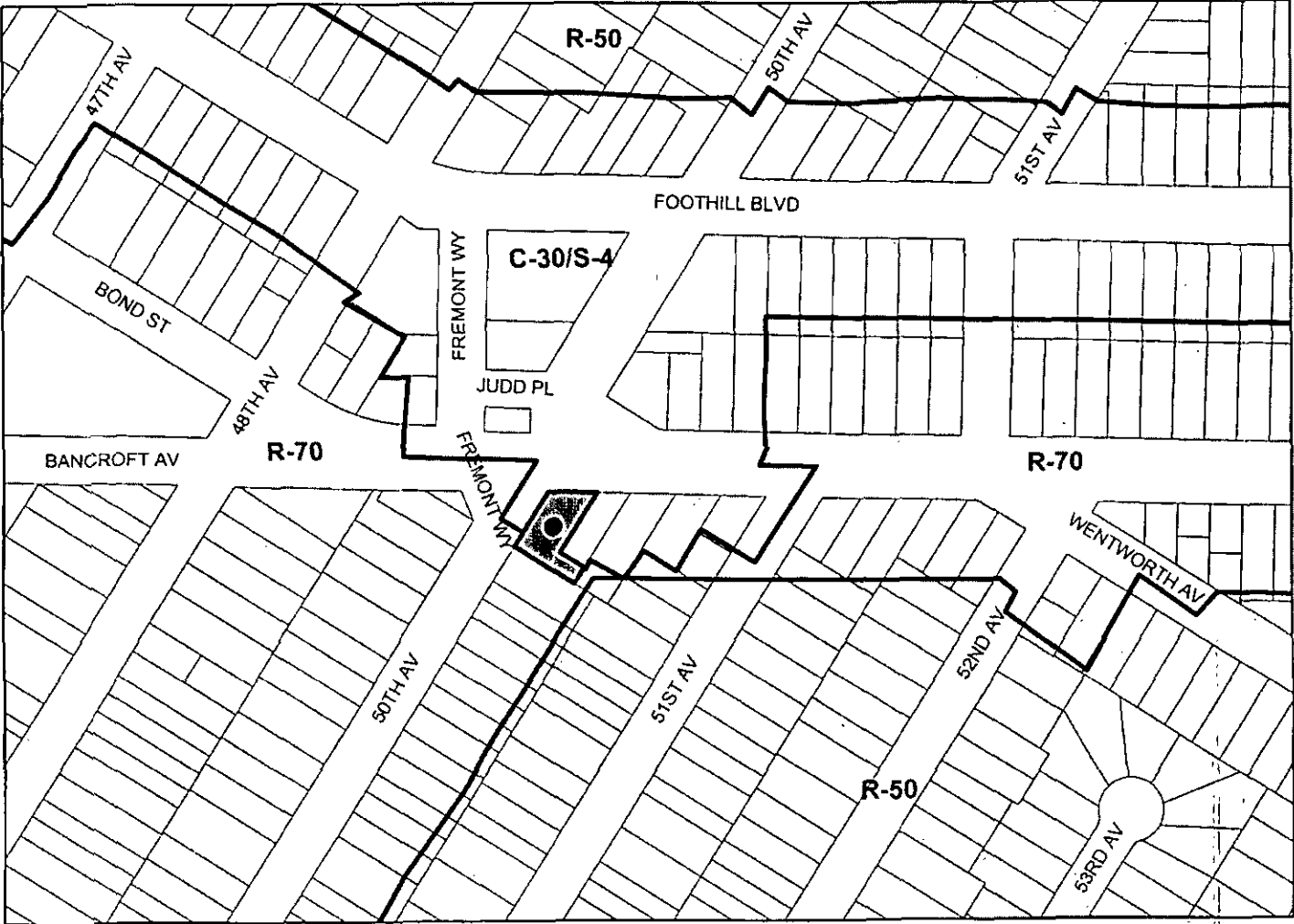
Appeal no. 2: August 27, 2009

Staff Recommendation: *Decision based on staff report*

Finality of Decision: *Revocation of Deemed Approved status is appealable to City Council (OMC Sec. 17.156.170; Imposition of additional Conditions of Approval are final and not administratively appealable.*

For Further Information: Contact case planner **Aubrey Rose, Planner II** at (510) 238-2071 or arose@oaklandnet.com

CITY OF OAKLAND PLANNING COMMISSION



Case File: DAA08002
Applicant:
Address: 5007 (5001) Bancroft Avenue
Zone: C-30/S-4

SUMMARY

This case consists of two Appeals of the same decision (case no. DAA08002): the Administrative Hearing Officer's Revised Order of August 14, 2009 revoking a convenience market/liquor store businesses' Deemed Approved Status for alcoholic beverage sales, following Special Hearings.

Appeal no. 1 is from the Oakland Police Department's Alcoholic Beverage Action Team (ABAT); the Appeal seeks to amend the Revised Order so this location would lose its Deemed Approved Status for sale of alcoholic beverage sales, and to allow the current operators the option to remain at this location for sale of non-alcoholic products.

Appeal no. 2 is from Mr. Clinton Killian, counsel for business operators Mr. Mohsen Mohammed Ali Albasiri and Mr. Ali Ahmad Obad; the Appeal seeks to rescind the Revised Order so that the operator would be permitted to remain and continue alcoholic beverage sales without City permits (as a legal, nonconforming use) at this location.

Staff recommends the Planning Commission grant Appeal no. 1 (ABAT) by amending the Revised Order and deny Appeal no. 2 (Killian/business operators) by upholding the Revised Order as amended by Appeal no. 1.

BACKGROUND

Property history

OPD's ABAT unit has noted a history of crimes associated with this business (formerly "La Raza Liquors & Market") as well as the location. Several of these crimes involved breaches of performance standards uniformly attached to Deemed Approved Alcoholic Beverage Sale establishments. Consequently, ABAT contacted the Planning & Zoning Division and the City Attorney's Office regarding the property (case no. CE03190). In approximately December of 2008, the Divisions coordinated to hold a Special Hearing with the City's Administrative Hearing Officer (case no. DAA08002). The Officer at that time was Mr. S. D. Rine.

The purpose of the Hearing was to provide the Officer an opportunity to review the property history and, if necessary, attach Conditions of Approval to the business that would ensure adherence to performance standards. Alternatively, the Officer could revoke the business' Deemed Approved Status for alcoholic beverage sale. Code enforcement violations involving the building's integrity were also at issue but do not directly relate to these Appeals and have since been resolved. The hearing scheduled for December 18, 2008 was rescheduled at the request of the business operators for February 5, 2009. A few hours before the February 5, 2009 hearing commenced the parties, in lieu of a hearing, entered into a Stipulation setting forth Conditions of Approval.

Stipulated Conditions of Approval

In the stipulation the parties agreed to seven Conditions of Approval related to business operations. Conditions included requirements for façade improvements, camera surveillance, restricted hours of operation, reduction in crime, prohibitions on the sale of certain items, security patrol, and changes to business identity. Following issuance of the stipulation, ABAT continued to observe breaches of Performance Standards and Conditions of Approval at the subject property. The business had been renamed "Bancroft Market" by this point, pursuant to stipulated agreement condition no. 7.

The City also received neighbor complaints regarding continued loitering and lack of security patrol. ABAT subsequently contacted the Planning & Zoning Division and City Attorney's Office again. The City met with the defendants' counsel, Mr. Adante Pointer of The Law Offices of John L. Burris, at which time no evidence contrary to allegations was presented and no solutions were proposed by the business operators or their legal counsel. The City therefore proceeded to hold a Special Hearing on the property.

Special Hearings

Following the breach of conditions under the stipulated agreement, a Special Hearing was held on July 2, 2009. This hearing was held to consider revocation of the property's Deemed Approved Status for alcoholic beverage sale. The Applicant, ABAT, was represented by Mrs. Ortlor Tsai from the City Attorney's Office. Defendants included the business operators, represented by their attorney, and property owner Ms. Lue Bells, represented by her attorney Mr. Jonathan Chase. After cross-examination by the Officer and attorneys of police officers and Zoning staff, the item was continued to August 6, 2009. This continuance was to allow the business operators another opportunity to provide evidence of compliance with the Stipulated Conditions of Approval.

A few hours before the August 6, 2009 hearing commenced, counsel for the business operators requested a continuance, grounded on his clients unavailability due to a death in the family; the request was denied by the Administrative Hearing Officer. The August 6, 2009 hearing proceeded though neither the business operators nor their legal counsel attended.

Revised Order

The Administrative Hearing Officer issued an Order, which was re-issued as a Revised Order on August 14, 2009. (Attachment A - Decision letter) The Revised Order found violations by the business operators to two of the seven conditions: surveillance cameras (condition no. 2) and security patrol (condition no. 7). Specifically, the business did not demonstrate compliance with the requirement to retain security camera tapes for 14 days and to have a security guard present at the business. The property owner was not implicated in these violations.

The Revised Order stated: "...the liquor store at 5007("5001") Bancroft Ave in Oakland, California shall be ENJOINED FROM THE SALE OF ALL ALCOHOLIC BEVERAGES FROM 10 (ten) days of this order, and shall remain ENJOINED FROM THE SALE OF ALL ALCOHOLIC BEVERAGES until the liquor license is transferred to independent parties completely unrelated to Ali Abad Omad and Mohsen Mohamed Albasiri; unless this order is timely appealed. The Order also stated: "Luc R. Bell is hereby found not to have violated the stipulation and consequently her right to continue to use the property for alcoholic beverage sales under "deemed approved" status is hereby allowed. Luc R. Bell is hereby found not to have violated the stipulation and consequently the city shall not seek to obtain enforcement costs and/or attorneys fees.

The property remains open and continues the sales of alcoholic beverages while this appeal is pending.

APPEAL DESCRIPTIONS

Appeal no. 1 – Oakland Police Department / Alcoholic Beverage Action Team

On August 19, 2009, Mrs. Carolyn Ortler Tsai of the City Attorney's Office submitted an Appeal of the Revised Order to the Planning & Zoning Division on behalf of ABAT (Attachment B). The bases of this Appeal were that a partial revocation is "improper and unenforceable"- that a revocation should relate to the entire property, not merely the current commercial tenant - and that the Revised Order exceeds the City's jurisdiction by mandating license transfer, an act wholly under State authority. The Appeal seeks to amend the Revised Order so that alcoholic beverage sales would no longer be permitted at this location, although the operator would not be required to cease operations and could remain at this location to sell non-alcoholic products. ABAT's Appeal is now represented by outside counsel Mr. Todd Boley.

Appeal no. 2 – Mr. Clinton Killian for business operators

On August 27, 2009, The Law Offices of Clinton Killian submitted an Appeal of the Revised Order to the Planning & Zoning Division on behalf of the property owners (Attachment C). The bases of this Appeal were that the denial of a continuance of the Special Hearing of August 6, 2009 was an abuse of discretion on the part of the Administrative Hearing Officer, that evidence exists to support compliance with the stipulation agreement exists (which should be reviewed and the Revised Order reconsidered and reissued, accordingly), and that the Revised Order constituted excessive punishment. The Appeal seeks a denial of the Revised Order so that the operator would thus be permitted to remain and continue alcoholic beverage sales without City permits at this location.

It is worth noting that a few days prior to the appeal, on August 24, 2009, Clinton Killian also submitted a Motion for Reconsideration with the Administrative Hearing Officer (Attachment D, less duplicative documents contained in Attachment C). The Motion argued that prior counsel, Adante Pointer, had failed to present evidence that would have refuted the City's claims that defendants were in violation of the February 5, 2009 Stipulation. The hearing officer did not respond to the motion and accordingly the motion is deemed denied. Because the claims in the motion are duplicative of those raised in the Appeal described herein, staff does not respond to it separately.

Under stipulation agreement condition no. 2, the business was to operate a security camera for surveillance purpose, retaining the tapes for 14 days. Appellant asserts in his appeal that the store was burglarized prior to July 16, 2009, and surveillance video was damaged or stolen and thus cannot be entered into evidence and should therefore be excused. Appellants offer video subsequent to that date to submit to the City for review.

Under stipulation agreement condition no. 7, the business was to retain professional on-site security. Since the February 24, 2009 stipulation agreement, ABAT and anonymous neighbors report witnessing incidents in which the business lacked a security patrol. The Appellant claims security was in fact present and has provided accounting documents to attempt to corroborate this assertion.

STAFF'S RESPONSES TO APPEALS

Under the Planning Code's Deemed Approved Alcoholic Beverage Sale regulations (OMC Sec. 17.156), an appeal of the revocation of Deemed Approved Status is first decided by the Planning Commission. Under the regulations, an appeal of a revocation must indicate "...error or abuse of discretion by the Officer or wherein its decision is not supported by the evidence in the record." (OMC Sec. 17.156.160). The Planning Commission then considers the conformity of the business to performance standards and/or Conditions of Approval.

Staff also notes that the Oakland Municipal Code does not provide for the admission of new evidence into the record upon appeal as proposed by the operators' appeal. Foremost the code states that appeals must state wherein a decision is not supported by the evidence "in the record." This appears both in the section 17.156.160 the underlying authority for the hearing in question, but also in section 17.132.020 the appeal provisions applicable to zoning administrative decisions. The omission of language in these sections permitting the introduction of new evidence is notable.

Also, by analogy, OMC Sec. 17.152.160, which sets forth procedures for Planning Commission appeals involving revocations (excluding Alcoholic Beverage Sales actions) states: "In conducting the appeal, the City Planning Commission shall be authorized to not allow any individual or entity to introduce new ... evidence on appeal, unless it is shown by substantial evidence that the new evidence was improperly excluded by the Hearing Officer, or, with due diligence, the new evidence could not have been presented to the Hearing Officer. Individuals will not be allowed to call witnesses or present new testimonial evidence at the appeal hearing..." Here, the evidence in question was not excluded, as it was not even submitted. The evidence was readily available with the exercise of reasonable diligence at the time and no explanation is offered as to why it was not brought forth when it was due. Though this test is applied only by analogy, the evidence in question meets neither prong.

In short, staff finds that OMC Sec. 17.156 does not expressly provide for the introduction of new evidence upon appeal and that the analogous standards above are illustrative of the extremely limited basis for doing so found in other sections of the Oakland Municipal Code.

The Planning Commission may reinstate Deemed Approved Status, sustain the revocation, or reinstate the Deemed Approved Status with additional Conditions of Approval meant to ensure conformity to performance standards. Unlike typical appeals brought to the Planning Commission, the decision to revoke the Deemed Approved status can be further appealed to the City Council. This provides Appellants two opportunities in revocation cases to reinstate Deemed Approved Status.

In the case of these Appeals, the order for revocation was based on lack of adherence Conditions of Approval set forth in the February 5, 2009 stipulation. In the case of Appeal no. 1 (ABAT), the request is to amend the revocation; staff interprets the Planning Code to consider this request to fall under the option to sustain the revocation. Appeal no. 2 (operators) seeks to rescind the revocation and reinstate Deemed Approved Status.

Appeal no. 1 –Oakland Police Department / ABAT

Appeal no. 1 finds error by the Administrative Hearing Officer:

(1) The revocation should apply to the entire property.

ABAT's Appeal asserts that a revocation of a Deemed Approved Activity does not apply to a business operator but to a property; that is, land use entitlements under Zoning run with the land, not an individual. The Appeal further argues that the intent of the Revised Order is to eliminate the nuisance-generating alcoholic beverage sale component from the property, which is not served merely by switching operators but by removing the nonconforming land use from this location.

Staff's response:

Planning & Zoning Division staff finds the assertion that legal nonconforming status runs with specific properties to be entirely accurate. This is a common tenet of planning law, generally. More specifically, the Planning Code's Nonconforming Uses chapter essentially states the same:

17.114.040 Right to continue nonconforming use, subject to limitations.

A. Right to Continue. A nonconforming use which is in existence on the effective date of the zoning regulations...and which existed lawfully under the previous zoning control...may thereafter be continued and maintained indefinitely, and the rights to such use shall run with the land, except as otherwise specified in the nonconforming use regulations...

Additionally, the Planning Code's Deemed Approved Alcoholic Beverage Sale regulations chapter indicates the regulations apply to properties (as opposed to persons):

17.156.040 Applicability of Deemed Approved Alcoholic Beverage Sale regulations.

A. To Which Property Applicable. The Deemed Approved Alcoholic Beverage Sale regulations shall apply, to the extent permissible under other laws, to all Legal Nonconforming Alcoholic Beverage Sale Commercial Activities within the city.

Therefore, staff agrees with the ABAT Appellant that the revocation cannot be attached to the operator, but the revocation must be attached to the property only.

(2)The City lacks jurisdiction to require an ABC (State Department of Alcoholic Beverage Control) license transfer

Staff's response:

On November 4, 2009, Zoning staff confirmed with the State ABC that a California City does not possess authority to require a liquor license holder to transfer their license to another party. This is confirmed by a reading of Article XX § 20 of the California Constitution, and Business and Professions Code §§ 23051, 23790, 23790.5, and 237901.

In conclusion, staff finds that an error was made in the decision by the Officer: staff finds both the revocation of a land use entitlement only as to the business operator, and a City-mandated ABC license transfer, to be improper under Oakland Zoning regulations, Oakland Planning Code Deemed Approved Alcoholic Beverage Sale regulations, and State Business & Professions Code (ABC).

Staff recommends the Planning Commission sustain the revocation; specifically, staff recommends the Planning Commission amend the Revised Order by applying the revocation to the property and not the business operators, to not require the operator vacate the premises, and to not require a transfer of the liquor license to a new operator; that is, the operators would be allowed to remain in business at this location with the caveat they may no longer engage in alcoholic beverage sales there unless City permits are obtained, specifically a Major Conditional Use Permit and Major Variances from the Planning Commission.

Appeal no. 2 – business operator (by Killian)

(1) Administrative Hearing Officer's denial of hearing continuance request unfair

The first assertion under Appeal no. 2 suggests abuse on the part of the Hearing Officer. On the afternoon of the August 6, 2009 continued hearing, counsel for the business operators requested an additional continuance on the grounds that one of the operators had suffered a death in the family.

Staff's response:

Staff finds no abuse on the part of the Administrative Hearing Officer in denying the request to continue the second hearing of August 6, 2009. Staff notes that the operators did not submit contrary evidence to dispute the two alleged violations over a one month period between hearings, or thereafter until the filing of the Appeal. Furthermore, staff finds no reason why counsel did not attend the August 6, 2009 Special Hearing without the said client to present evidence requested on July 2, 2009 by the Administrative Hearing Officer or to personally request an extension.

(2) Evidence demonstrating compliance with stipulated conditions

The Appellant finds error in the Officer's Revised Order because it's crafting lacked consideration of evidence demonstrating compliance. The evidence in question consists of surveillance video tapes subsequent to July 16, 2009, one Costco receipt for a Lorax surveillance system dated July 16, 2009, one receipt for a closed circuit TV from Robbins Security Company dated January 14, 2008 and one contract for security patrol dated May 5, 2009. This evidence was submitted for the first time on Appeal, and was not before the Hearing Officer. The Appellant finds error due to the denial of a continuance, ostensibly an opportunity to submit this evidence.

Staff's response:

Staff would first point out that, as the Appellant states, Conditions of Approval were breached: at the very least, required surveillance tapes prior to July 16, 2009 will never be admitted. The January 18, 2008 receipt for a closed circuit television does not speak to whether there are recordings of activity at the store from February 5, 2009 (the effective date of the Stipulated Conditions of Approval) to the July 2, 2009 hearing. The City requested video surveillance evidence on numerous occasions between February 5, 2009 and the July 2, 2009. Operators produced no evidence on operating surveillance cameras in response. At the July 2, 2009 hearing, the hearing officer additionally requested the previous two weeks' worth of surveillance be made available by July 27, 2009 ten days before the continued hearing date of August 6, 2009. The deadline passed with no evidence proffered. On August 6, 2009 at the second hearing, counsel for defendants did not attend. Now, in their appeal, the operators assert that the equipment (and all surveillance contained on it) was stolen on July 16, 2009. Even if true, the theft in no way explains why defendants failed to produce the evidence to the hearing officer or the City during the six months preceding the theft.

Also, staff finds a contract for security service does not evidence service received for the period of time covered by the stipulation, beginning February 5, 2009. The purported evidence of a contract was dated May 5, 2009 (three months after the February 5, 2009 stipulation). Moreover, they do not adequately refute ABAT and neighbor observation of lack of security; it is not inconceivable that such services could have been contracted and billed without being fully provided. The appeal states no basis for the assertion that new evidence may be added to the record upon appeal, a matter discussed in more detail above. Staff finds no error by the Officer in issuing a Revised Order; the evidence now proffered was not submitted to the City until after Hearing Officer issued the Order. As stated above, even if such evidence were timely introduced, it does not support the business operators' contentions that the conditions were met.

(3) Revised Order is excessive

The Appellant finds error in the Officer's decision to revoke the business operators of their right of alcoholic beverage sales on the grounds it an unjust punishment relative to the severity of the alleged violations of conditions. While the Appellant denies that conditions were breached, the Appeal letter claims that should these violations have occurred, loss of this entitlement is not proportionate.

Staff's response:

Staff finds revocation to be the intended remedy under the Deemed Approved Ordinance where evidence demonstrates repeated violation of Conditions of Approval. Staff also notes that repeated breaches of performance standards at a legal, nonconforming alcohol outlet, involving serious crimes, led appellants to voluntarily stipulate to the Conditions of Approval which were violated. Again, staff suggests as a remedy that the revocation apply to the property and not the business operator.

Staff does not recommend additional Conditions of Approval to mitigate the nuisance at the property. Foremost, the evidence indicates defendants in the action largely disregarded the Conditions of Approval, effective February 5, 2009, until it was apparent that revocation was imminent. Operators had the benefit of counsel when they voluntarily entered into the stipulation and subsequent numerous opportunities to present evidence of compliance; a failure to do so raises questions of good faith. Second, the nuisance activities that lead to the imposition of the Conditions of Approval were criminal in nature and largely constituted drug related activity around the store. Neighbors have suffered through a year's worth of second chances so that the owners and operators would have every opportunity to cure the problems at the property. Staff finds the City has exhausted its administrative processes and that resort to the most severe remedy of revocation is entirely appropriate.

Appellant's letter refuting opposing Appeal letter claims

As mentioned in the APPEALS DESCRIPTION section of this report, Mr. Killian also submitted a letter to the Planning & Zoning Division on October 2, 2009 addressing the claims of the first (ABAT) Appeal. Because the claims are duplicative of those raised in the Appeal described above, staff does not respond to it separately. The document is attached to this report (Attachment E).

STAFF'S RESPONSE TO SUPPLEMENTAL BRIEFING

Staff has received supplemental briefs from attorneys representing the City and the operators. The operators' brief includes numerous exhibits ostensibly supporting their case; it does not set forth legal arguments or narrative regarding the attached exhibits. The City's brief focuses on case law and facts supporting its legal arguments that (1) the hearing officer's decision for revocation is well supported by the record, (2) the portion of the order demanding the transfer of the liquor license exceeds the City's jurisdiction and should be

eliminated, (3) the operators' appeal improperly relies on evidence not submitted to the hearing officer and (4) the hearing officer did not abuse his discretion in denying the request for a continuance of the August 6, 2009 hearing.

ENVIRONMENTAL DETERMINATION

The California Environmental Quality Act (CEQA) Guidelines categorically exempts specific types of projects from environmental review. Section 15321 categorically exempts enforcement actions by regulatory agencies. The determination letter indicating a legal nonconforming land use had lapsed pursuant to the City's Planning Code conforms to these Sections and hence the action is exempt from Environmental Review.

RECOMMENDATIONS:

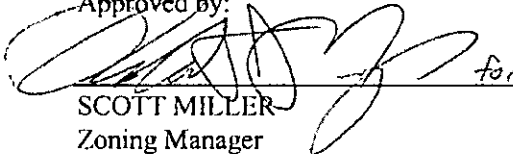
1. Regarding case no. A09188 (Appeal no. 1 – OPD/ABAT): amend the Administrative Hearing Officer's Revised Order dated August 17, 2009 to revoke the Deemed Approved Status allowing sale of alcoholic beverages from the entire property, and to allow the current tenant to remain at the location for sale of non-alcoholic items.
2. Regarding case no. A09190 (Appeal no. 2 – operators): deny the Appeal and uphold the Administrative Hearing Officer's Revised Order dated August 14, 2009 to revoke the Deemed Approved status, as amended by Recommendation no. 1, because sufficient evidence exists that conditions #2 and #7 were repeatedly violated, thus constituting a public nuisance and no further, additional conditions could be imposed to abate the public nuisance..

Prepared by:

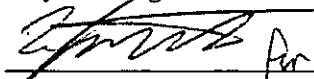
Aubrey Rose

AUBREY ROSE
Planner II

Approved by:

 for
SCOTT MILLER
Zoning Manager

Approved for forwarding to the
City Planning Commission:

 Per
WALTER COHEN
Director
Community & Economic Development Agency

ATTACHMENTS:

- A. Special Hearing revised order decision letter dated August 17, 2009
- B. Appeal by Oakland Police Department submitted August 19, 2009 (Appeal no. 1)
- C. Appeal by Mohsen Mohammed Ali Albasiri & Ali Ahmad Obad submitted by Clinton Killian August 27, 2009 (Appeal no. 2)
- D. Motion for Reconsideration submitted by Clinton Killian August 24, 2009
(Note: Attachment D lacks duplicative receipt and contract documents included in Attachment C)
- E. Letter by Clinton Killian dated October 1, 2009 and submitted October 2, 2009
- F. Brief in support of the Oakland Police Department Appeal/Appeal no. 1
- G. Brief in support of Mohsen Mohammed Ali Albasiri's & Ali Ahmad Obad's Appeal
(Note: Attachment G lacks duplicative documents constituting Attachments C and D)

THE ADMINISTRATIVE RECORD IN THIS MATTER HAS BEEN SEPARATELY FURNISHED TO THE PLANNING COMMISSIONERS, THE APPELLANTS' ATTORNEYS AND THE PROPERTY OWNER'S ATTORNEY AND IS ALSO AVAILABE FOR REVIEW AT:

<http://www.oaklandnet.com/government/ceda/revised/planningzoning/Commission/docs/PlanningCommissionAgenda12-2-09.pdf>

LEGAL NOTICE:

A DECISION IMPOSING ADDITIONAL CONDITIONS OF APPROVAL IS FINAL AND IS NOT ADMINISTRATIVELY APPEALABLE. ANY PARTY SEEKING TO CHALLENGE SUCH A FINAL DECISION IN COURT MUST DO SO WITHIN NINETY (90) DAYS, UNLESS A DIFFERENT PERIOD APPLIES.

A DECISION OF REVOCATION IS APPEALABLE TO THE OAKLAND CITY COUNCIL AND MUST BE FILED NO LATER THAN TEN (10) CALENDAR DAYS FROM THE ANNOUNCEMENT OF THE DECISION. FAILURE TO TIMELY APPEAL WILL PRECLUDE ANY INTERESTED PARTY FROM CHALLENGING THE CITY DECISION IN COURT. THE APPEAL ITSELF MUST RAISE EACH AND EVERY ISSUE THAT IS CONTESTED, ALONG WITH ALL THE ARGUMENTS AND EVIDENCE IN THE RECORD WHICH SUPPORT THE BASES OF THE APPEAL; FAILURE TO DO SO MAY PRECLUDE ANY PARTY FROM RAISING SUCH ISSUES ON APPEAL AND/OR IN COURT.

1 JOHN A. RUSSO, No. 129729
City Attorney
2 CAROLYN TSAI, No. 239631
Deputy City Attorney
3 CITY OF OAKLAND
One Frank H. Ogawa Plaza, 6th Floor
4 Oakland, CA 94612
Tel: (510) 239-3751; Fax: (510) 238-6500
5

6 TODD BOLEY, No. 68119
Attorney at Law
476 Third Street
7 Oakland, California 94607
Tel: (510) 836-4500; Fax: (510) 649-5170
8

9 Attorneys for CITY OF OAKLAND

10 City of Oakland
ADMINISTRATIVE HEARING
11

12 In the Matter of:)	Case No. DAA08002
13 LA RAZA MARKET #1)	
14 Owner: Lue R. Bells)	CITY OF OAKLAND'S BRIEF ON
15 Operator: Mohsen Mohammed Ali)	APPEAL TO CITY COUNCIL
16 Abasiri and Ali Ahmad Obad)	
17 Property: 5001 Bancroft Avenue)	
APN 035-2362-001-00)	

18
19 The CITY OF OAKLAND hereby submits its brief in opposition to the appeal to the
20 City Council of Lue Retha Bells.

21 I.

22 **INTRODUCTION**

23 Appellant appeals from a decision of the Planning Commission which revoked her
24 deemed approved status to sell liquor from property she owns. Her appeal does not contest the
25 allegations that the store which operated on her property was a haven for drug dealers and
26 threatened public safety. Nor does she contest the fact that Conditions of Approval she signed
27 after City staff moved to correct the nuisance were violated. Her sole basis of appeal is that the
28 Planning Commission should have revoked the deemed approved status only as to her tenant

1 and retained for her the ability to sell liquor from her property.

2 The Council should reject the appeal. First and foremost, the City lacks the legal
3 authority to grant the relief the appellant seeks. The ordinance regulates property, it does not
4 regulate individuals. In addition, appellant argues that she has nothing to do with the operation
5 of the store and that if the store is a public nuisance, "it is on them [the store operators]." She
6 cannot disown her responsibility to her neighbors so easily. The City's ordinance properly
7 imposes on landowners the responsibility to insure that their property does not violate the law.

8 II.

9 STATEMENT OF FACTS

10 The subject property is a two-story wooden building at the corner of Bancroft and 50th
11 Avenues. The ground floor contains a convenience market ("La Raza") with its entrance facing
12 the corner. The property is owned by Lue Retha Bells ("Owner"). The Owner has leased the
13 market to Ali Ahmad Obad and Mohsen Mohammed Ali Albasiri ("Operators") The Operators
14 have a license which permits them to sell alcoholic beverages at the property.

15 An OPD problem solving officer described the market as one of the "hubs" of criminal
16 activity in his beat. (AR0204:1-7) OPD received numerous calls for service involving drug
17 dealing and other undesirable activity. (*Id.*) The staff report described the market as "a place
18 where illegal drugs are habitually sold." (AR0005) In addition, the market fostered other
19 criminal activity such as loitering and sale of alcohol to minors. (*Id.*) Numerous police reports
20 documented arrests for sale of drugs, including sales by dealers operating from inside the store.
21 (AR0027-AR0048) Other crimes in and around the sale included robberies immediately in front
22 of the store and sales by the store of alcohol to a minor. (AR0062-AR0073, AR0049-AR0055)

23 In late 2008, City staff commenced a hearing to revoke the "Deemed Approved" status
24 of the property. The staff concluded that "the unlawful activity emanating from the subject
25 property threatens public safety and imposes fear and intimidation into the lives of neighbors."
26 (AR0005) These activities violated the Performance Standards of OMC 17.156.090 and
27 justified revocation of the market's Deemed Approved status.

28 On January 23, 2009, the City Attorney contacted the owner of the property and the

1 operators of the store to suggest a meeting to resolve the appeal. (AR0012-13) The letter
2 included the staff report, all the exhibits and a list of witnesses (*Ibid.*) On the eve of the
3 February 5 hearing, the parties entered into an agreement which imposed specific Conditions of
4 Approval on the property. (AR0014-0018) Both the Owner and the Operators were signatories
5 to the agreement and were referred to collectively as “defendants.” Among the conditions were:

- 6 • Defendants were to maintain in working order exterior and interior surveillance cameras.
7 Recordings from the cameras were to be retained for 14 days from the date of recording.
- 8 • The market’s hours of operation were to be 8:00 a.m. to midnight.
- 9 • From 12:00 noon to 12:00 midnight, defendants were to have a security guard patrolling
10 the premises to remove anyone buying, selling and using drugs, anyone consuming
11 alcoholic beverages in the area adjacent to the premises and anyone loitering for more
12 than five minutes.
- 13 • At all other times, a roving security patrol “shall patrol the property.”
- 14 • A contact number for the roving security patrol shall be given to the City and made
15 available to any neighbors that seek it.

16 The agreement explicitly provided that any violation of these conditions “constitutes a
17 violation of the Decmed Approved Activity’s Conditions of Approval and may result in hearing
18 for revocation of Defendants’ Decmed Approved Status pursuant to OMC 17.156.150.”

19 (AR0014:22-24)

20 Almost immediately, problems arose in achieving compliance with the Conditions of
21 Approval. The market operators failed to provide verification that they had hired security
22 guards as required by the agreement. (AR0095:22-AR0096:12; AR0096:19-22; AR0286:3-10,
23 AR0295:13-16) When the City Attorney contacted the person identified as providing security,
24 he stated that the Operators had cancelled his company’s services. (AR0096:15-18) Police
25 officers and neighbors did not see security guards on duty during the hours required under the
26 agreement. (AR0207:8-AR0210:18; AR0249:9-AR0250:10; AR0276:5-AR0278:14)

27 In addition, the City received numerous reports that the market continued to have a
28 negative influence on the surrounding community. There was no reduction in crime associated

1 with the market since the agreement had been signed and police continued to receive
2 complaints from the neighborhood about the market. (AR0213:6-15; AR0214:6-AR0215:5)
3 City council staff also received numerous complaints about the market even after the owner and
4 operators entered into the Conditions of Approval. (AR0291:3-24) These complaints included
5 littering, drug dealing and public drunkenness at the market. (AR0288:5-AR0289:6)

6 City staff scheduled a public hearing on July 2, 2009 to consider whether the Conditions
7 of Approval were being violated. The staff report concluded that "defendants' compliance with
8 this agreement has been partial, sporadic and lacking in good faith." (AR0081) All of the
9 evidence, including the record of communications between the City Attorney and the operator,
10 were included in the staff report.

11 At the hearing on July 2, attorneys for both the Owner and the Operators were present.
12 OPD Problem Solving Officer Clay Burch testified that, "is the [criminal] activity happening on
13 the corner in plain view and actually occurring with people going in and out of that store? Yes."
14 (AR0228:7-9)

15 The parties agreed to continue the hearing to August 6, 2009. On July 27, 2009, the
16 City Attorney submitted additional evidence including two Nuisance Abatement Notices dated
17 July 7 and 21, 2009. On both occasions, an OPD officer found no security guard on premises.
18 On July 7, the store clerk incorrectly stated that the security guard was to be on duty at 3:00
19 p.m., but that he had not arrived even though it was 3:15 p.m. The clerk did not know the
20 name of the guard or the company who employed him. (AR0388) The City Attorney also
21 submitted data on calls for service, incidents and arrests at the market and similar stores in the
22 area. This evidence was sent to the attorneys representing both the owners and the operators.
23 (AR-0386-87)

24 Neither the Owner nor the Operators served any additional evidence prior to the August
25 6, 2009 hearing. On the morning of the day of the hearing, the Operators' attorneys requested a
26 continuance on the ground that Mr. Obad's grandmother had passed away. (AR0416) The City
27 objected to the continuance because Mr. Obad had already testified. (*Id.*) The Operators'
28 attorney did not give any indication that he could not attend the hearing. However, neither the

1 Operators nor their attorney appeared at the second hearing.

2 The Owner and her attorney were present and the Owner testified. (AR0519:16-
3 AR0533:3) Ms. Bells testified that she understood her obligation under the agreement to be
4 limited to the exterior of the building. (AR0521:13-522:6) She testified that she “had nothing
5 to do with the running of the store at all. Whatever they did in the store, that was on them . . .”
6 (AR0526:2-5) She said that if she saw something at the store that she “didn’t think was right,
7 they needed to clean up, that I told them about. . .” (AR0526:8-10) However, she testified she
8 would not interfere in the running of the store or “how to sell liquor, what to do with the liquor.
9 I had nothing to do with that. Once you sell the license it’s theirs.” (AR0526:11-13) She
10 testified, she never considered evicting the tenant. (AR0526:23-527:6)

11 After the hearing, the City submitted a closing brief (AR0425-AR0445) and an
12 itemization of costs incurred by the City as a result of the proceeding.

13 On August 14, 2009, the Hearing Officer issued a Revised Final Order finding that two
14 provisions of the Conditions of Approval had been violated:

- 15 1) Camera and Surveillance System: The Hearing Officer found the testimony of Mr.
16 Obad regarding the camera and surveillance system “evasive and decidedly not
17 credible.” (AR0455) In addition, the defendants had been given the opportunity to
18 produce recordings from the system at the hearing on August 6, but failed to do so.
19 2) Security: As with the surveillance system, the Hearing Officer found the testimony of
20 “evasive and decidedly not credible.” (AR0458) Furthermore, the defendants had been
21 given the opportunity to produce time records and records of payment for the security
22 guards, but failed to do so.

23 The Hearing Officer concluded that the Operators had violated the Conditions of
24 Approval and revoked their right to use the property for alcoholic beverage sales. (AR0460)
25 However, he found that the Owner had not violated the Conditions of Approval and
26 “consequently, her right to use the property for alcoholic beverage sales under ‘deemed
27 approved’ status is hereby allowed.” (*Id.*)

28 Both the City and the Operators appealed from the decision of the Hearing Officer. The

1 Operator contended that there was insufficient evidence that the Conditions of Approval had
2 been violated or that revocation was a proper remedy. In addition, the Operator contended that
3 the hearing officer abused his discretion in denying their request for continuance. The City
4 appealed the decision on the ground that the deemed approved status should be revoked as to
5 the entire property and as to both the owner and the operator.

6 The Planning Commission held a hearing on both appeals on December 2, 2009. The
7 Planning Commission denied the appeal of the Operator on the ground that there was sufficient
8 evidence that two Conditions of Approval had been violated and that revocation of the Deemed
9 Approved Status was proper. In addition, the Planning Commission found that the hearing
10 officer did not abuse his discretion in denying the continuance and that, in any event, the new
11 evidence which the Operator sought to introduce was unpersuasive.

12 The Planning Commission upheld the appeal of the City and amended the hearing
13 officer's order to revoke the Deemed Approved Status from the entire property (as to both the
14 Operator and Owner) and to permit the continued sale of non-alcoholic beverage items from the
15 store.

16 The Owner then appealed from the portion of the order revoking her Deemed Approved
17 Status.

18 II.

19 ARGUMENT

20 A. The Deemed Approved Status of the Property Was Properly Revoked.

21 The testimony to the Hearing Officer was that the subject market operated as a "hub of
22 criminal activity" in the neighborhood it was supposed to serve. Drug dealing, public
23 drunkenness and littering flourished in plain sight. The evidence that the market was a public
24 nuisance was not challenged by the property owner during the hearing below or in this appeal.
25 Nor has the appellant challenged the determination that the Conditions of Approval were
26 violated. Thus there is no question that the Planning Commission properly concluded that the
27 deemed approved status should be revoked.

28 Even as a pre-existing nonconforming use, the market is subject to regulation under the

1 City's zoning powers. The market's right to operate may be revoked if it fails to comply with
2 reasonable terms or conditions expressed in the permit granted or if there is a compelling public
3 necessity. (*Korean American Legal Advocacy Foundation v. City of Los Angeles* (1994) 23
4 Cal.App.4th 376, 390 n. 5; *O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151,
5 157.) As a result, the market's right to sell alcohol may be terminated on either of two
6 grounds: 1) if it constitutes a nuisance or 2) if it fails to comply with terms or conditions of its
7 permit. Both grounds exist in this case.

8 Oakland's Deemed Approved Alcoholic Beverage Sale regulations are a valid exercise
9 of its police powers "to address public nuisance problems associated with certain alcoholic
10 beverage sale establishments." (*City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740,
11 747) The regulations set standards for determining what constitutes a nuisance and those
12 standards are enforceable against businesses that predate the enactment of the ordinance. (*Id.* at
13 p. 755-756)

14 Here the evidence is that the market operated as a sanctuary for drug dealers and
15 fostered a climate of fear and intimidation in the community. There can be no doubt that the
16 City is empowered to protect its citizens. "To interpret the concept of grandfather rights so far
17 as to allow long-time businesses the freedom to conduct their operations in a manner that
18 promotes nuisances and criminal activities would be absurd." (*City of Oakland v. Superior*
19 *Court, supra*, at p. 757.)

20 In addition, the City may revoke the permit for violations of a permit's conditions.
21 (*Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 783.) Here, the
22 defendants entered into an agreement imposing Conditions of Approval in order to avoid the
23 hearing on February 5, 2009 regarding the numerous complaints concerning the market. The
24 Conditions of Approval became terms and conditions for their Deemed Approved Status. "New
25 conditions of approval shall be made a part of the Deemed Approved Status and the Deemed
26 Approved Activity shall be required to comply with these conditions." (OMC 17.156.140)
27 Their failure to comply with those terms justifies revocation of the Deemed Approved Status.
28 The Planning Commission's decision was consistent with the City's duty to protect the public

1 from nuisances associated with liquor stores and to enforce violations of its rules and orders.

2 **B. The Deemed Approved Status Applies to the Property and Not to Any Individual.**
3 **Therefore, the Revocation must Apply to Both the Tenant and the Landowner.**

4 The Planning Commission properly granted the City's appeal and revoked the Deemed
5 Approved Status as to the entire property. The appellant contends that the City Council should
6 revoke the Deemed Approved Status only as to the operator and not as to the owner. Such an
7 action is contrary to basic principles of zoning and land use law. The City's power is limited
8 to controlling the use of property; it may not grant a right to use a specific parcel to one
9 individual and deny the same right on the same parcel to another.

10 Zoning and land use ordinances regulate land, not individuals. The rights and
11 limitations embodied in a conditional use permit are "not a personal right of the
12 permittee." (*Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th
13 359, 369-370) Instead, the permit is a right that attaches to the property or "runs with the
14 land." That means that the permit has the same effect on subsequent owners and tenants as it
15 did on the individual who owned the property at the time the permit was issued. (*Cohn v.*
16 *County Board of Supervisors* (1955) 135 Cal.App.2d 180, 183-184) The same is true regarding
17 a legal nonconforming use – one that existed lawfully before a zoning restriction became
18 effective – the right to continue the use "runs with the land." (*Hansen Brothers Enterprises, Inc.*
19 *v. Board of Supervisors* (1996) 12 Cal.4th 533, 540-541, fn. 1)

20 Therefore, conditions of approval must relate to the property and not to the particular
21 applicant. (*Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855, 858) "A
22 conditional use permit regulates land, not individuals. Conditions of approval must relate to the
23 property and not to the particular applicant. A condition specifically related to an individual is
24 invalid." (*Sounhein v. City of San Dimas* (1996) 47 Cal.App.4th 1181, 1187-1188 (citation
25 omitted)) Therefore a restriction which is limited to a particular individual is invalid "because
26 zoning condition and restrictions are designed to regulate the land itself and its use and not the
27 person who owns or operates the premises by whom such use is to be exercised." *Anza*
28 *Parking Corp., supra*, 195 Cal.App. 3d at 859 (quoting *Vlahos v. Little Boar's Head District*
(1958) 101 N.H. 460, 146 A.2d 257, 260) Therefore, the Commission may only revoke the

1 Deemed Approved Status of the property; it cannot distinguish between the operators and the
2 owner of the land. "It is not appropriate to condition the issuance of a conditional use permit
3 on the nature of the applicant, as opposed to the use of the property." (*Sounhein, supra*, at p.
4 1191.)

5 This principle has even greater importance in the context of the regulation of liquor
6 stores. The power to control *which individuals* have the right to sell liquor is restricted to the
7 Alcohol Beverage Control. (*Korean American Legal Advocacy Foundation v. City of Los*
8 *Angeles, supra*, 23 Cal.App.4th at 391) A local law such as the City's deemed approved
9 ordinance does not regulate individual licensees, it only controls the use of land. (*Ibid.*)
10 Therefore, the City may not direct which persons have the right to sell liquor at a specific
11 location without infringing on the powers of the ABC.

12 **C. The Appellant Cannot Shift Responsibility for Complying with the Conditions of**
13 **Approval to Her Tenant.**

14 In her appeal, appellant argues that the revocation of the Deemed Approved Status
15 should not apply to her because "she did not violate the terms of her Deemed Approved
16 Status." Appellant attempts to limit her responsibility to the exterior of the building, but in
17 fact, her responsibility extends much farther. A landowner has an obligation to insure that her
18 property is not a public nuisance and to insure compliance with local law. Permitting landlords
19 to escape the effect of non compliance with the ordinance would hamstring the City's efforts to
20 control problem liquor stores.

21 An owner of property cannot avoid prohibitions against public nuisances by leasing the
22 property to another. As a matter of public policy, the landlord – and not the tenant – has the
23 initial duty when "preventative or reparative actions are required by laws and orders governing
24 the premises and their uses." (*Glenn R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal.2d
25 666, 672.)

26 Therefore, appellant's statements that whatever the liquor store operators did in the store
27 "that was on them," or that "once you sell the license, it's theirs" are completely wrong. As a
28 landowner, she cannot turn a blind eye to the fact that the property which she owns and from

1 which she collects rent “threatens public safety and imposes fear and intimidation into the lives
2 of neighbors.” (Sec AR0005)

3 Appellant ignores the power she holds to achieve compliance with city ordinances
4 prohibiting nuisances. Even if the lease with the tenant does not explicitly so provide, a
5 landlord may terminate a lease if the tenant engages in illegal or unlawful activity, including the
6 creation of a nuisance. (Code of Civil Procedure § 1161(4); *Deutsch v. Phillips Petroleum Co.*
7 (1976) 56 Cal.App.3d 586, 589.) Indeed, where the landlord has knowledge of the fact that the
8 tenant is violating regulations designed to protect the public, “a duty is imposed upon the owner
9 to terminate the tenancy or compel the tenant to comply with the regulations.” (*Grant v.*
10 *Hipsher* (1967) 257 Cal.App.2d 375, 381.)

11 Here, the appellant had every opportunity to correct noncompliance with the conditions
12 of approval. Appellant received written notice of the City’s intention to revoke the Deemed
13 Approved Status and detailed documentation of the numerous public safety violations occurring
14 on her property. She also received documentation of her tenant’s evasive noncompliance with
15 the Conditions of Approval which she signed. Numerous witnesses testified that the unlawful
16 conduct and lack of compliance were plainly visible.

17 Nevertheless, appellant took no steps to prevent her property from operating as a
18 nuisance. During the hearing below she silently supported the position of the market operator
19 that nothing was wrong. When it came time for her to testify, she took the position that it was
20 “on them.”

21 Therefore, it is incorrect for her to say that the market’s lack of compliance was her
22 tenants’ doing and none of her own. Appellant had an opportunity to prove that she had acted
23 as a responsible landowner, but she chose instead to throw her lot in with the store operators. It
24 is now too late for her to argue that revocation order should apply only to her tenants.

25 The City’s power to protect the public would be severely handicapped if owners could
26 avoid their responsibilities by delegating them to tenants. “If a landlord may delegate his duty
27 of compliance with safety ordinances and statutes designed for the protection of members of the
28 public rightfully on the premises to persons who may be financially irresponsible, all salutary

1 legislation would soon become a nullity.” (*Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d
2 409, 432 -433.)

3 The City should not permit landowners to avoid the consequences of noncompliance
4 with the ordinance by shifting blame to others. If store owners could retain the power to
5 operate a public nuisance by replacing one store operator with another, then the goals of the law
6 will be frustrated. By requiring landlords to bear the same responsibility as their tenants for
7 compliance with the law, landlords will have an incentive to monitor the actions of their tenants
8 and to prevent their property from undermining the safety of their neighborhoods.

9 **III**

10 **CONCLUSION**

11 For the foregoing reasons, the appeal should be denied and the decision of the Planning
12 Commission be upheld.

13 Respectfully submitted,

14
15
16 Dated: _____, 2010

17 TODD BOLEY
18 Attorney for CITY OF OAKLAND
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

In re the matter of La Raza Liquor Store.
Administrative Hearing, City of Oakland
Case No. DAA08002

THE UNDERSIGNED STATES:

I am a citizen of the United States of America and am employed in the County of Alameda, State of California; I am over the age of 18 years, and am not a party to the above-entitled action. My business address is 476 Third Street, Oakland, California 94607. On June 12, 2009, I served the following:

CITY OF OAKLAND'S BRIEF ON APPEAL

on the party or parties named below as follows:

Jonathan Chase
Chase & Chase
11 Embarcadero West #230
Oakland, California 94607

I placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, for collection and mailing at the office of Todd Boley, Attorney at Law, following ordinary business practices. I am readily familiar with the practice of the office of Todd Boley, Attorney at Law, for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is collected.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California on _____, 2010

Todd Boley

ORDER OF THE ADMINISTRATIVE
HEARING OFFICER S.D. RINE

In the Matter of:
ALI AHMAD OBAD, MOHSEN MOHAMMED
ALI ALBASIRI, & LUE R. BELL

DBA: La Raza Market & Liquor

PREMISES: 5001 Bancroft Ave., Oakland
APN: 035-2362-001-00
LAND USE STATUS: Deemed Approved
Alcoholic Beverage Sales Establishment

CONDITIONS OF APPROVAL
PURSUANT TO OMC 17.156150 ET.
SEQ.

Hearing Date: December 18, 2008

Case No. DAA08-002

PREAMBLE

The parties to this matter are: (1) Lue R. Bells, the owner of record of the improved lot at 5001 Bancroft Avenue, APN: 035-2362-001-00 ("Property"), and her respective successors, heirs, transferees, partners, spouses; tenants, represented by her attorney Jonathan Chase, and (2) the tenants and Alcoholic Beverage Control licensees, Ali Ahmad Obad and Mohsen Mohammed Ali Albasir, and (3) the City of Oakland, ("City"), represented by their attorney Adante Pointer.

Pursuant to Oakland Municipal Code Chapter 17.156.140 Conditions of Approval; contained herein, are hereby imposed on the Deemed Approved Alcohol Beverage Sales Activity land use status ("Deemed Approved Status") of the Subject Property, which shall specifically limit the use of the Subject Property.

Violation of any Condition of Approval set forth in this Order or any violation of the Performance Standards set forth in OMC 17.156.090, constitutes a violation of the Deemed Approved Activity's Conditions of Approval and may result in hearing for revocation of the Defendants' Deemed Approved Status pursuant to OMC 17.156.150. The City may also seek enforcement costs and attorneys fees incurred by the City.

1 Unless another later date is specified herein, all Conditions of Approval referred to
2 herein shall be fully complied with immediately upon issuance of the Order by the
3 Administrative Hearing Officer.

4 **CONDITIONS OF APPROVAL**

5 **1. Façade Improvement:**

6 Within thirty (30) days this Order, Defendants shall submit either an application for
7 a grant and assistance from the City's Façade Improvement Program offered in the
8 Neighborhood Commercial Revitalization Department.

9 Owner shall complete performance of all improvements within six (6) months.
10 These deadlines may be held in abeyance if there is a delay in the State of California's
11 environmental review or a delay in the City's design review, but only if the Oakland City
12 Attorney's Office receives written confirmation of the delay from the relevant agency.

13 The improvements shall make all windows and doors located in the publicly
14 accessible portions of the premises 80% transparent. All obstructions to visibility of
15 windows and the door, including furniture, fixtures, posters, boards, cardboard and signs,
16 are to be removed that exceed 20% of the total visibility into the establishment. No
17 windows may be boarded up or covered in brick, wood, concrete or other nontransparent
18 substance.

19 **2. Cameras and Surveillance:**

20 Defendants shall maintain in working order exterior and interior surveillance
21 cameras and monitors. At a minimum, the external cameras shall monitor the street
22 facing façade of the store, and the internal cameras shall monitor the cash register and
23 primary entrance. Recordings from these cameras shall be retained for at least fourteen

24 (14) days from the date of recording before destruction or re-use.

25 **3. Hours of Operation:**

26 The hours of Property operation shall be 8:00 a.m. to 12:00 a.m, midnight.

1 **4. Crime on the Property:**

2 Defendants shall not permit, condone or knowingly allow drug activity at the
3 Property. Defendants shall not violate the provisions of the Alcoholic Beverage Control
4 Act. Defendants shall not permit, condone or knowingly allow loitering on the Property.
5 Any arrest involving the sale or use of any drugs or possession or use of firearms on the
6 Property, or involving the commission of a violent crime on the Property, constitutes a
7 violation of these Stipulated Conditions, unless Defendants can demonstrate that they
8 contacted the police department for the purpose of removing people engaging in unlawful
9 conduct, including loitering, related to the said incident.

10 **5. Prohibited Items:**

11 Defendants shall not to sell single cigarettes, unpackaged ice, single disposable
12 cups or any drug paraphernalia, including but not limited to Brillo style scrubbing pads
13 and glass enclosed paper roses.

14 **6. Security Patrol:**

15 A security guard patrols the premises during at least ~~from~~^{to} 12:00 noon to 12:00
16 midnight, to remove anyone buying, selling and using drugs, anyone consuming alcoholic
17 beverages in the area adjacent to the premises, and anyone loitering for more than five
18 minutes. During all hours of operation that a security guard is not present, roving security
19 patrol shall patrol the property. A contact number for the roving security patrol shall be
20 given to ABAT and made available to any neighbors that seek it. At the conclusion of six
21 (6) months, the premises may seek relief from this term. Should the City have
22 documentation of continued drug activity or chronic alcohol related nuisance activity the
23 term shall be continued for another six (6) months, with continued opportunities to petition
24 for relief every six (6) months for the life of this agreement. Defendants are deemed to
25 have permitted a nuisance activity to occur if the nuisance activity is blatant and no calls
26 are documented to both the roving security guard and the OPD non-emergency number.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

7. Reputation & Identity:

The premises shall cease to do business as "La Raza". A new name shall be established. Old signage shall be removed and only signage with the new name introduced; new signage shall be properly permitted with the City of Oakland. All employees known to be involved in drug activity must be terminated, and new employees hired only if they are confirmed to have no criminal background and satisfy all employee/clerk requirements of the Alcohol Beverage Control Act. The premises shall close immediately and remain closed for no less than three days and until its identity has changed as set forth in this paragraph.

1 IT IS SO ORDERED:
2 THE CONDITIONS OF APPROVAL ABOVE ARE HEREBY IMPOSED ON THE USE OF
3 5001 BANCROFT AVENUE, OAKLAND, COUNTY OF ALAMEDA, CALIFORNIA,
4 ASSESSOR'S PARCEL NUMBER 035-2362-001-00 PURSUANT TO OAKLAND
5 MUNICIPAL CODE SECTIONS 17.156 et seq.

6 Dated: Feb. 24, 2009 S. D. Rine
7 S.D. RINE,
8 Administrative Hearing Officer

9 Dated: 2/5/09 Lue Retha Bells
10 LUE R. BELLS,
11 Property Owner

12 Dated: 2/5/09 Jonathan Chase
13 JONATHAN CHASE, ESQ.
14 Attorney for Property Owner

15 Dated: 2/4/09 Ali Ahmad Obad
16 ALI AHMAD OBAD
17 Licensee

18 Dated: 2/4/09 Mohsen Mohammed Ali Albasiri
19 MOHSEN MOHAMMED ALI ALBASIRI
20 Licensee

21 Dated: 2/4/09 Adante Pointer
22 ADANTE POINTER, ESQ.
23 Attorney for Licensee

24 Dated: 2/4/09 Carolyn Ortler
25 CAROLYN ORTLER, ESQ.
26 Deputy City Attorney, City of Oakland

FILED
OFFICE OF THE CITY CLERK
OAKLAND
2010 FEB 18 PM 5:23

APPROVED AS TO FORM AND LEGALITY
 2/5/10
DEPUTY CITY ATTORNEY

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

A RESOLUTION DENYING THE APPEAL OF LUE R. BELLS (CASE # A09-273) AND UPHOLDING THE PLANNING COMMISSION'S DECISION TO REVOKE THE DEEMED APPROVED STATUS FOR ALCOHOLIC BEVERAGE SALES FROM THE PROPERTY LOCATED AT 5007 BANCROFT AVENUE

WHEREAS, the Appellant, Ms. Lue R. Bells, owns the property located at 5007 Bancroft Avenue (APN: 035 -2362-001-00); and

WHEREAS, the property located at 5007 Bancroft Avenue contains a commercial space on the ground floor, operated as a liquor store/convenience market which predates the adoption of a Conditional Use Permit for Alcoholic Beverage Sales Commercial Activities and, thus, is considered to be a Deemed Approved (legal nonconforming) use; and

WHEREAS, nuisances were noted in and around the property and the store located there (La Raza Liquors & Market) by the Police Department and neighbors; and

WHEREAS, on February 5, 2009 the City and the Appellant/Owner and the business operator ("Operator") (collectively called "Parties") entered into a stipulation imposing Conditions of Approval on the property designed to mitigate nuisances resulting from the business; and

WHEREAS, breaches of the stipulated Conditions of Approval were noted by the Police Department and neighbors; and

WHEREAS, on July 2, 2009 a duly noticed Special Public Hearing (case no. DAA 08-002) was held to consider amendment to the stipulated Conditions of Approval or revocation of the property's Deemed Approved Status for alcoholic beverage sales; and

WHEREAS, the Administrative Hearing Officer continued the item to a second, duly noticed Special Public Hearing on August 6, 2009 to allow the Parties to submit evidence in furtherance of their claims and defenses; and

WHEREAS, on August 6, 2009 the continued Special Public Hearing was held; and

WHEREAS, on August 14, 2009, the Administrative Hearing Officer issued a Revised Order stating that the Deemed Approved Status was revoked as to the business operators but not as to the landlord, based on a finding that two (2) of seven (7) conditions in the Stipulated Conditions of Approval had been violated.; and

WHEREAS, the Revised Order was appealed to the Planning Commission by the Oakland Police Department on August 19, 2009 (case # A 09-188) and by the business operator's attorney Mr. Clinton Killian on August 27, 2009 (case # A 09-190); and

WHEREAS, on December 2, 2009, a duly noticed public hearing was held, and at the close of the public hearing, the Planning Commission approved the Police Department's Appeal (case # A09188) and denied the Operator's Appeal (case # A09190), thereby revoking the Deemed Approved Status as to both the Owner and the Operator; and

WHEREAS, on December 14, 2009, the Owner appealed the Planning Commission's decision to extend the revocation of the Deemed Approved Status to the property (case # A092373); and

WHEREAS, the Owner's appeal requests that the City Council revoke the Deemed Approved Status only as to the business tenants, but not as to the landlord, based on the arguments that (1) that land use entitlements should apply to an individual and not land, and (2) that she was not responsible for nuisance at her property and therefore should not lose Deemed Approved Status; and

WHEREAS, the Operator did not appeal the Planning Commission's decision and the decision is final as to them. Thus, the events that lead to violation of the stipulation are not disputed and are not on appeal; nor is whether the stipulation was violated on appeal; nor is whether revocation was appropriate remedy as to the Operator on appeal. Even if the Owner had been successful in her appeal, she sought only to preserve her Deemed Approved Status for future tenants and did not seek reinstatement of the current operators' right to sell alcoholic beverages¹; and

WHEREAS, after giving due notice to the Appellant, all interested parties, and the public, the Appeal came before the City Council in a duly noticed public hearing on March 2, 2010; and

WHEREAS, the Appellant 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 on March 2, 2010; now, therefore, be it

¹ On January 20, 2010, the City issued a letter to the operator demanding they cease and desist sale of alcohol because the Planning Commission's December 2, 2009 decision as applied to them was final.

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 Planning Commission's decision, and the Appeal, finds that the Appellant has **not** 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 March 2, 2010, City Council Agenda Report and the December 2, 2009, Approved Planning Commission Report, which are hereby incorporated by reference as if fully set forth herein. Accordingly, the Appeal is denied, the Planning Commission's decision to revoke Deemed Approved Status for alcoholic beverages from the property is upheld; and be it

FURTHER RESOLVED: That, in support of the City Council's decision to deny the Appeal, the City Council affirms and adopts as its findings and determinations (i) the March 2, 2010, City Council Agenda Report including without limitation the discussion and conclusions (each of which is hereby separately and independently adopted by this Council in full), and (ii) the December 2, 2009, Approved City Planning Commission Report, including without limitation the discussion and conclusions (each of which is hereby separately and independently adopted by this Council in full), except where otherwise expressly stated in this Resolution; 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 Appeal, including all accompanying papers;
2. all documents 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, _____, 20_____

PASSED BY THE FOLLOWING VOTE:

AYES – BROOKS, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, REID,
AND PRESIDENT BRUNNER

NOES -

ABSENT -

ABSTENTION –

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, PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1094.6, UNLESS A SHORTER PERIOD APPLIES.