

PLANNING COMMISSION MINUTES OF SEPTEMBER 8, 2008

2008-0164: Applicant appeal of the conditions of approval by the Administrative Hearing Officer for a Special Development Permit to allow a deli with indoor seating at an existing shopping center. **Karoon Persian Cuisine** [Applicant] **Ahron Bogomilsky Trustee & Et Al** [Owner]: Application located at **897 E. El Camino Real** (near Wolfe Road) in a C-2/PD (Highway Business/Planned Development) Zoning District. (APN: 211-16-029) NC

Noren Caliva, Assistant Planner, presented the staff report. She said staff recommends the Planning Commission deny the appeal, and uphold the decision of the Administrative Hearing Officer to approve the Special Development Permit, with a maximum of 10 fixed seats (two seats not at tables), with the attached conditions.

Chair Rowe opened the public hearing.

Robert Mapar, the applicant and appellant, thanked Ms. Caliva for her assistance with this project. He said he has been operating the deli for a year with 20 seats. He said there was a complaint and through the complaint process he found out that he needed a permit for his sign, which he removed and then found out he needed a permit for the seating. He said he talked to the Planning Division and was denied seating and was eventually given permission to have 10 seats. He said then the 10 seats were changed from 8 seats secured to the floor with 2 seats on the side. He said if he is required to provide fixed seats that he thinks all the changes would cost about \$10,000 to \$14,000 as he would need to change out the tile floor. He said he is requesting the Commission allow him to have the seats not attached to the floor as the cost of fixing the seats to the floor would be financially difficult and could cause him to have to close down his two businesses at this site. He commented that there are two other restaurants in the shopping center that have large numbers of seats and tables. He said there are no problems with parking in this lot. He said he is asking for the Commission to allow him to have 10 seats that are not fixed to the floor. He thanked the Commission for their consideration.

Comm. McKenna referred to Attachment I, which is the record the applicant kept regarding the number of empty parking spaces in the site's parking lot for the month of June 2008 from noon to 2:00 p.m. daily. Comm. McKenna discussed the record and said she appreciated the applicant for providing this record. Mr. Mapar commented that on several time slots he missed recording the empty parking spaces. Mr. Mapar said that there is often space available in the parking lot and that many times patrons from other nearby shopping malls will

park in the parking lot. Ms. Caliva confirmed that on one of her site visits she did see two people park in the lot and then walk over to a different shopping mall. He said occasionally they have had to tow cars that were parked in their lot and were not patrons.

Comm. Klein said that staff's report on parking seems to be dramatically different from what the applicant reported and asked staff if they had comment regarding the difference. Ms. Caliva said the numbers she reported were based on a one-day survey from May 2008. Comm. Klein asked about the comparison to the two other restaurants, and the number of seats. Comm. Klein asked staff about the two restaurants in the shopping center and asked if they are short on parking. Ms. Caliva said she does not have the parking information on the other two restaurants in relation to non-fixed seats, as the parking for the other restaurants is based on square footage and not seating.

Comm. Hungerford clarified with the applicant that he is asking for 10 non-fixed seats. Mr. Mapar said he would like five tables with two seats at each table.

Comm. McKenna referred to Attachment F, page 2 which shows a picture with four seats at one table. Mr. Mapar said the picture also shows a table with two seats and confirmed that this is what he is requesting. Mr. Mapar said if the Commission would like to allow him more than 10 seats he would appreciate that too, but if the Commission says 10 seats, he will not bring in more seating than 10.

Vice Chair Chang asked staff about the requirement of the fixed seats and whether the other two restaurants are required to have fixed seats. Staff said the other two restaurants are not required to have fixed seating. Vice Chair Chang asked how many other restaurants Sunnyvale has that are required to have fixed seating. **Trudi Ryan**, Planning Officer, said she does not know and said a lot of fast food restaurants have fixed seats. She discussed the regulation, which was introduced a number of years ago. Ms. Ryan said this situation was brought to the City's attention by a complaint.

Comm. Sulser asked staff, if the Commission grants this appeal and allows 10 non-fixed seats, does the approval run with the land or the applicant. Ms. Ryan confirmed that whatever is approved tonight will run with the land and any future operator would be subject to the same regulations as this applicant.

Chair Rowe said that the applicant mentioned other restaurants in this shopping center and asked if they were permitted as restaurants. Ms. Caliva said that both of the restaurants were permitted by right and explained the history. Chair Rowe

discussed with staff that the applicant's site as a deli, was permitted as retail, and once seats were provided that the site had to be approved as a restaurant. Chair Rowe asked the applicant what the outside table with two chairs is used for. Mr. Mapar said the table is not used for eating food, and provides a place for smokers to smoke. Chair Rowe said this shopping center is short on parking with staff explaining that the fixed seats discourage additional chairs from being provided and fixed or not fixed does not affect how long a patron would remain at the deli.

Paul Bogomilsky, an owner of the property, spoke in support of his tenant the appellant. He said his understanding of the appeal for the non-fixed seating is that the installation of the fixed seating is very cost prohibitive. He said Mr. Mapar has been a very good tenant and is a hard working man. He said Mr. Mapar is willing to comply with the prior conditions of approval and is asking only for a change to the fixed seating requirement. Comm. Klein asked Mr. Bogomilsky what he does as an owner to try and keep non-patrons from parking in the lot. He said from time to time he has to go to the parking lot and wait for people to park and if they are not patrons, advise them that they will be towed. He said people are not happy about not being able to park and that about once a month he actually has to have someone towed.

Ahron Bogomilsky, an owner of the property, spoke in support of the appellant. He said there are bus stops at El Camino Real in front of the shopping center and at Wolfe Road. He said many people come to the center from the bus stops. He said since the center was built they have not had complaints from their tenants or neighbors regarding parking. He said the center was built about 23 years ago and they dedicated square footage to the City so drivers from Wolfe Road could make a right turn on El Camino Real. He said at that time the center was deficient 2 or 3 parking spaces. Mr. Bogomilsky said even during lunch time there is available parking. He said he supports the applicant and is okay with the request for the 10 non-fixed seats.

Darab Ghaffary, a Sunnyvale resident, spoke in support of the appellant. He said he frequents both the deli and the Karoon Market. He said these businesses are of cultural value, and that there is a symbiotic relationship between the market and deli. Mr. Ghaffary said that Mr. Mapar's business will not survive if he is required to do what the City is proposing. Mr. Ghaffary said he frequents the restaurant at lunch and has never had problems with parking. He said the market serves the tenants of the large apartment complex nearby and the loss of the market would be a loss to the community. Mr. Ghaffary said the City is putting

undo burden on the business owner and urged the Commission to allow the non-fixed seating in the deli.

Chair Rowe closed the public hearing.

Comm. McKenna asked staff if once the use changed from a deli to a restaurant if there was a change in the restroom requirements for the business. Ms. Caliva said yes, and said the restrooms at the market adequately cover the requirements. Ms. Caliva added that there is a condition of approval that says any modifications required by the building division must be done as well.

Chair Rowe discussed with staff that even one seat added to the deli that allows someone to sit down and eat makes the deli have to convert from retail to a restaurant and that is done by the business owner applying for a Special Development Permit.

Comm. McKenna moved to grant the applicant the ability to have 10 non-fixed seats and to assure that the table size accommodates only two seats per table. **Comm. Hungerford** seconded the motion.

Comm. McKenna said that the issue is whether the seats are fixed or not fixed. She said that she has a difficult time making an applicant fix the seats as long as the City can make sure there are no more than 10 seats.

Comm. Hungerford said the tipping point for him was when Ms. Ryan said that 10 fixed seats versus 10 non-fixed really does not have much to do with the parking and that this is more of an enforcement issue. He said given the equities of what has been heard, that he thinks it makes sense to not to overburden the appellant on this issue.

Comm. Klein said he would be supporting the motion. He said this comes down to seats versus parking and the City is allowing the 10 seats. **Comm. Klein** says it is the honor of the appellant that he will follow the City rules and only have 10 seats and the appropriate number of tables. He said it sounds like the Mr. Maper will follow the permit process, which negates the fixed versus non-fixed seating and that once the appellant follows this everything will be in order for the permit and he can grant the appeal.

Vice Chair Chang said he would be supporting the motion to grant the appeal and it will be up to the appellant to uphold the number of seats and hopefully there will be no enforcement needed.

Comm. Sulser said he would be supporting the motion, though he has a big concern about what is being granted tonight running with the land. He said that the Commission may be opening a can of worms regarding enforcement. He said this applicant may follow the rules being granted and future businesses may not follow the rules.

Comm. Travis said he would be supporting the motion. He said he feels the fixed seating versus the non-fixed seating is cost prohibitive to the appellant and hopefully there will not be problems with potential future tenants.

Chair Rowe said she is concerned about changing the designation of this business from retail to a restaurant. She said that her biggest worry is a potential miniature P.F. Chang moving into this shopping center and that this lot is already short on parking. She said she is concerned about future applicants coming before the Commission with a similar problem.

ACTION: Comm. McKenna made a motion on 2008-0164 to approve the appeal and approve the Special Development Permit, with modifications: to modify condition 1.I to read "The maximum number of indoor seats shall not exceed 10 (may be non-fixed), and shall be designed with appropriate tables that limit the number of seats to two seats per table. The applicant shall work with the Planning Division to determine the appropriate design of the indoor seating area". Comm. Hungerford seconded. Motion carried, 6-1, Chair Rowe dissenting.

APPEAL OPTIONS: This action is final unless appealed to the City Council no later than September 23, 2008.