

Agenda Item: ID#17-1244 (10:05 A.M.)

Date: 9/28/17

FRESNO CITY COUNCIL



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Supplemental Information Packet

Agenda Related Item(s) – ID#17-1244 (10:05 A.M.)

Contents of Supplement: Petition for Appeal of Approval/Adoption of CUP C-17-013

Item(s)

HEARING to consider Conditional Use Permit Application No. C-17-013 and related Environmental Assessment No. C-17-013, for property located on the southwest corner of North Figarden Drive and West Bullard Avenue. This is an appeal of the July 19, 2017 Planning Commission decision. (Council District 2)

Supplemental Information:

Any agenda related public documents received and distributed to a majority of the City Council after the Agenda Packet is printed are included in Supplemental Packets. Supplemental Packets are produced as needed. The Supplemental Packet is available for public inspection in the City Clerk's Office, 2600 Fresno Street, during normal business hours (main location pursuant to the Brown Act, G.C. 54957.5(2)). In addition, Supplemental Packets are available for public review at the City Council meeting in the City Council Chambers, 2600 Fresno Street. Supplemental Packets are also available on-line on the City Clerk's website.

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August 3, 2017

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Re: **Petition for Appeal of Planning Commission
Approval of and/or Adoption of a Negative
Declaration of Conditional Use Permit Application
C-17-013**

Dear Director Clark, Councilmember Brandau and Mayor Brand:

Our office represents Second Generation LP., the owners of real property located at 5650 North Figarden Dr, Fresno, CA 93722. Our client's property is directly across the street from the property at issue in the Conditional Use Permit ("CUP") # C-17-013, APN: 509-290-07, currently zoned CC/UGM, and located at 5647 North Figarden Drive, (the Project).

Second Generation LP., hereby appeals the Planning Commission's July 19, 2017 approval of the above-referenced project to the City Council.

We are filing the appeal with the Director, with copies to the Mayor and the Council member for the area pursuant to Fresno Code § 15-5017.

BASIS of APPEAL

1. The City Council should support the Director's decision to deny the approval of an off-site alcohol license because the census tract is already over concentrated and there is another off site alcohol sales establishment within 500 feet. Each circumstance independently requires that the City deny another alcohol license at the proposed project. With both issues it is clear that no alcohol should be allowed in this project.
2. The City's environmental document states that the project will cause increases in noise and traffic. In particular, the additional traffic will cause the neighboring intersection to fall below the required level of service.

3. The proposed project is a 24 hour convenience store adjacent to a residential neighborhood. The combination of the traffic, noise, light and alcohol that the project is proposing with the 24 hour operation makes the project unsuitable for the neighborhood.

4. The Negative Declaration prepared by the City is inadequate to address impacts under the California Environmental Quality Act. The fatal flaw is that the Negative Declaration relies almost entirely on the Master EIR prepared by the City in the past. The Negative Declaration for this project failed to address all of the current and site specific issues presented by the project. The MEIR can only be used for general matters that were both adequately analyzed in the past and that have not experienced substantial changes. The problem is that the MEIR assumes that all City policies are applied to any new projects. This project violates the City policies for location and density of establishments selling alcohol and the Traffic impact study states that the traffic will violate the City requirement for level of service at City intersections. No study of the impact of those violations was done and no mitigation was proposed. Therefore, the Negative Declaration is inadequate and cannot be relied upon to approve this project.

ARGUMENT

I

THE PLANNING COMMISSION'S ADOPTED RESOLUTION FAILED TO ADEQUATELY CONSIDER THE EVIDENCE SUPPORTING DENIAL OF THE ALCOHOL EXEMPTION

The Planning Department recommend denial of the Project's request to establish a Type 20 alcohol license in its am/pm convenience store. The Planning Commission overrode that recommendation on the sole basis that the police failed to submit an objection. The police did not affirmatively support an exception to the general policies concerning concentration of establishments selling alcohol. Substantial evidence supports the conclusion that the alcohol license should be denied and that approval overturned.

The Fresno Bee¹ July 30, 2017 states:

"[a]mong California's 10 largest cities, Fresno has the highest concentration of retail stores licensed by the state to sell beer, wine and liquor – more stores per 10,000 residents than Los Angeles, San Diego, San Jose or San Francisco, and more than the statewide average, a Fresno Bee analysis shows. The number of licensees exceeds what state law typically allows in a community." The report to the Planning Commission for the Project states that "[a]ccording to the ABC, census tract 42.12 has 14 currently active off-sale alcohol licenses, four more than has been authorized

¹ <http://www.fresnobee.com/news/local/article163625628.html>

for that census tract; therefore the census tract is [already] over concentrated. . . . the proposed project is located within both a high concentration area (according to ABC), and within 500 feet of an existing establishment therefore, the proposed alcohol CUP is prohibited”

A number of studies have found that in and near neighborhoods where there is a high density of places that sell alcohol, there is a higher rate of violence.²

The State Business and Professions Code § 23817.5(a)(2) provides that this project should not be approved for alcohol sales. The Code states: “[t]he number of premises for which an off-sale beer and wine license is issued in a city and county, in combination with the number of premises for which an off-sale general license is issued in a city and county, shall be limited to one for each 1,250, or fraction thereof, inhabitants of the city and county in which the premises are situated. No additional off-sale beer and wine license, other than a renewal or transfer or as permitted by Section 23821, shall be issued in any city and county where the number of premises for which all off-sale beer and wine licenses in combination with off-sale general licenses are issued is more than one for each 1,250, or fraction thereof, inhabitants of the city and county.” (Emphasis added.)

The Bee Article states “in Fresno, that would work out to 416 off-sale licenses. Fresno however had 468 licensees – or 52 more than specified by the formula in State Code – as of mid 2016— to serve the 522,053 inhabitants of California’s fifth largest city.” Commenting on the article, Councilmember Bredefeld said zoning laws that govern where new liquor retailers can go are the most effective solution that the city has available; “[W]e need to make sure we don’t have businesses that create adverse impacts on the quality of life in neighborhoods.” Mayor Brand was quoted as stating that “[t]he obvious answer is when we have a saturated area, we have to draw the line. We can’t keep proliferating liquor licenses.” We could not agree more.

The clear overabundance of alcohol licenses in the area requires that no more be approved. The applicant agreed to stop selling alcohol at midnight but that does nothing to alleviate the excessive concentration.³

The applicant stated at the Planning Commission meeting, their business plan requires operating 24 hours a day and selling beer and wine to be profitable. If the project is approved

² See, Gorman, D., Speer, P., Gruenewald, P., and Labouvie, E. (2001) Journal of Studies on Alcohol, 62: 628-636; See also, Scribner, R. et al. (1995) The risk of assaultive violence and alcohol availability in LA County, American Journal of Public Health, 85:335-340; and see, Gruenewald, P.J. and Remer, L. Changes in outlet densities affect violence rates. In review, Alcoholism: Clinical and Experimental Research, 2004.

³ It is pointed out that the appellant herein does not believe the volunteered restriction for stopping beer and wine sales by midnight each night by the applicant was properly included in the motion that was ultimately passed by the Planning Commission.

without the alcohol license or with a time restriction, the applicants have essentially stated that they will be back to add alcohol sales to achieve their bottom line.

The Planning Commission approved alcohol by improperly applying Municipal Code §15-2706, that can provide an exemption based on the police not determining that; “a) would be detrimental to the public health, safety, or welfare of persons located in the area, or b) would increase the severity of existing law enforcement or public nuisance problems in the area. The letter provided by the Fresno Police Department is a stock letter, essentially stating conditions of the Fresno Municipal Code, State and Federal laws must be complied with along with other conditions such as video cameras, ABC education, etc. That does not qualify as a police finding that another establishment should be given a waiver to sell alcohol in a place where the concentration of alcohol establishments already exceeds State and City limits. There is no evidence that the Fresno Police Department made a judgment on this project based on quantifiable information in light of the 24-hour operation and the increased alcohol sales, crime and vagrancy that it is likely to bring to the neighborhood. For these reasons, and the reasons set forth below, the City Council should overturn the decision of the Planning Commission.

II

THE PLANNING COMMISSION’S ADOPTED RESOLUTION FAILED TO ADEQUATELY CONSIDER THE 24-HOUR NATURE OF THE PROJECT AND THE PROBLEMS IT WILL BRING TO THE SURROUNDING NEIGHBORHOOD

Bullard and Figarden Loop is not an “all night” avenue. There is no compelling reason for the City to turn it into an all night avenue solely to accommodate this project. The neighborhood will absorb problems with no offsetting benefits. The City should be selective in permitting 24-hour convenience stores in the city limits only on major thoroughfares where they do not adversely affect neighborhoods with, noise, lights, traffic, crime, vagrancy and homelessness.

This location is not appropriate for a 24-hour operation. This is a neighborhood with curving streets and commercial establishments that serve the neighborhood. The neighborhood is bounded by the major east west corridors, Shaw and Herndon. All night services should be placed on those established corridors that are accessible to all night travelers and noise and lights all night already exist and do not impact neighborhoods. There are no other businesses at that intersection that are permitted to operate 24-hours a day and for good reason.

III

APPROVAL OF THE NEGATIVE DECLARATION DOES NOT COMPLY WITH CEQA

1. *The City’s use of the MASTER ENVIRONMENTAL IMPACT REPORT is not appropriate because there is a substantial evidence from the City’s own studies that show a*

reasonable possibility that the proposed Project will likely result in significant negative effects to traffic, noise, and/or water quality.

The findings in the Proposed Negative Declaration (Neg. Dec.) are not site specific. The Neg. Dec. relies without sufficient factual support on the City's prior Master Environmental Impact Report (MEIR). Conclusions drawn from the MEIR were not supported by adequate site and project specific information.

The California Environmental Quality Act (CEQA) requires that "[a]ll phases of project planning, implementation, and operation must be considered in the Initial Study of the project." (Code of Regulations, Title 14, Div. 1, Chapter 3, Article 19, §15063(a)(1). As stated the Neg. Dec. "[e]arlier analyses may be used where, pursuant to the tiering, program EIR or MEIR, or other CEQA process, ***an effect has been adequately analyzed in an earlier EIR*** or negative declaration. Section 15063(c)(3)(D)" (Emphasis added.)

The findings in the small amount of site specific environmental study for this project establish that the broad conclusions from the MEIR are inconsistent with the significant effects that the Project will have on noise, light and traffic.

The Traffic Impact Study ("TIS") notes that while the studied intersections, "are currently above the TIZ III LOS D standard, with the addition of the project and approved/pending projects the study intersections are projected to continue to operate at or above the TIZ III LOS D standard. The intersections of Bullard and Dante Avenues and Figarden and Bullard Avenues are project[ed] to operate below the TIZ III LOS D standard in the cumulative year scenarios."

The TIS *is* substantial evidence that the Project will degrade the two intersections from their current compliance with City standards to operating below the acceptable standards.

In addition, the Project's traffic impacts, light, and noise impacts all require more site-specific study and appropriate mitigation through a public process rather than approval by general conclusions pulled from the MEIR performed for the General Plan and Development Code Update process. The most basic requirement of CEQA is to perform an initial study to determine the specific issues that need to be addressed for each project. Here, no Initial Study was done so the process does not comply with the requirements of Code of Regulations, Title 14, Div. 1, Chapter 3, Article 5, §15063.

A Negative Declaration can only be used "if there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment. The City does not have sufficient information to conclude that there is no substantial evidence of adverse impacts.

The statute that CEQA regulations are based in part on, Pub. Res. Code § 21083, which provide that “a project may have a “significant effect on the environment” if one or more of the following conditions exist:

- (1) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.
- (2) The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, “cumulatively considerable” means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.
- (3) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

(Emphasis added.)

The regulations similarly provide that “in evaluating the significance of the environmental effect of a project, the Lead Agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project.” (Code of Regulations, Title 14, Div. 1, Chapter 3, Article 5, §15064(d).) The regulations specifically state that “examples of direct physical changes in the environment are the dust, **noise, and traffic** . . .” (*Id.* (Emphasis added).)

The Project will surely cause substantial adverse impacts on human beings in the surrounding neighborhoods due to the likely increased noise from a 24-hour gas station/convenience store on the Project site and the traffic impacts as noted in the TIS. CEQA requires the impact of this Project to be evaluated under a proper Initial Study before there can be any approval.

CEQA requires a genuine evaluation on the particular project’s impact on the surrounding environment, not just a conclusion that a project will have no impact based on a previously issued MEIR that did not actually assess the impact that the specific project at issue would have on the environment.

2. *The conclusions of the impacts of the Project on the environment are inaccurate and self-serving.*

Page 4 of the deficient Initial Study, states “the proposed project is a subsequent project identified in the MEIR and that it is fully within the scope of the MEIR because it would have no additional significant effects that were not examined in the MEIR such that no new additional mitigation measures or alternatives may be required. All applicable mitigation measures contained in

the Mitigation Measure Monitoring Checklist shall be imposed upon the proposed project. A NEGATIVE DECLARATION will be prepared.”

The MEIR did not, however, contemplate a 24-hour gas station/convenience store selling alcohol adjacent to a residential neighborhood.

The evidence in this Project shows that a 24-hour operation will likely attract and promote vagrancy and noise and light pollution late at night next to a residential neighborhood. Those potential adverse impacts were not identified in the initial study and there is no substantial evidence that the MEIR general mitigation measures will adequately mitigate the issues. Therefore, the initial study and the Neg. Dec. are insufficient to support approval of this project.

The Land Use and Planning portion of the Initial Study states that the “[o]bjectives and policies within the Fresno General Plan support economic development, efficient and equitable use of resources, and infill development, Another gas station in this area is not needed to serve the public. There are already a substantial number of gas stations/convenience stores in the immediate area. At least eight (8) gas/service stations are within a two mile radius from the proposed Project. Permitting another gas station at this location will only serve to dilute the already saturated gas station/convenience store market and make it more difficult for those businesses to continue to be economically viable. The proposed Project is fundamentally not an efficient or equitable use of resources justifying the infill development at this site.

The Noise section of the purported Initial Study states that “Traffic to and from the project site is anticipated to be heavier during daytime, lessening during nighttime hours.” The Initial Study further concludes that: “[t]he proposed project will not expose persons to excessive noise levels. Although the project will create additional activity in the area, the project will be required to comply with all noise policies from the Fresno General Plan and noise ordinance of the Fresno Municipal Code. Therefore, there will be no exposure to excessive noise and noise impacts would be less than significant.”

Significantly, the surrounding properties include residential areas, which limits decibel levels to 50 between the hours of 10:00 p.m. to 7:00 a.m. There is no information supporting the conclusion that a 24 hour gas station at this location will not result in noise levels above 50 decibels for this project site. Just the 24 hour nature of the Project by itself, there is substantial evidence for a reasonable person to conclude that there will certainly be more traffic and noise generated that will result in noise levels exceeding those permitted by the “Noise Ordinance of the City of Fresno.” (Fresno Municipal Code (FMC) Section 10-101, et seq.) The unsupported conclusions are insufficient for purposes of determining CEQA compliance under these circumstances.

For all of the foregoing reasons, we strongly disagree with the conclusions that this Project “does not have the potential to degrade the quality of the environment,” that “there is no

evidence in the record to indicate that incremental environmental impacts facilitated by this project would be cumulatively significant” and that “[t]here is no evidence in the record that the proposed project would have any adverse impacts directly, or indirectly, on human beings. Therefore there are no mandatory findings of significance.”

CONCLUSION

The proposed Project cannot legally move forward under the circumstances and conditions that have been proposed. The alcohol license expansions in this area exceed both state and local norms as this market is already over saturated. This site location should not be turned into a 24-hour “all night” avenue.

Substantial evidence shows that the initial study and the Negative Declaration are both deficient under CEQA guidelines because the Project will have significant effects on the environment. The City’s reliance on the broad conclusions located within the MEIR did not adequately address nor examine the effects of this specific Project on the surrounding environment. Without an adequate explanation of how the MEIR does address the effects of the Project, the MEIR’s conclusions cannot satisfy the legal requirements for CEQA compliance.

For all the foregoing reasons, we appeal the decision by the Planning Commission and request that the City Council reject the proposed Project.

Very truly yours,



Christopher L. Campbell
BAKER MANOCK & JENSEN, PC

CLC/at
cc: Steve Brandau