




Office of the City Manager

ACTION CALENDAR  
March 25, 2014

To: Honorable Mayor and Members of the City Council  
From:  Christine Daniel, City Manager  
Submitted by: Eric Angstadt, Director, Planning & Development  
Subject: ZAB Appeal: 2635 Ashby Avenue

RECOMMENDATION

Adopt a Resolution affirming the decision of the Zoning Adjustments Board (ZAB) to adopt a negative declaration and approve Use Permit No. 2013-0033 to establish a 5,282-square-foot Full Service Restaurant within an existing two-story commercial building, to exceed the C-E District’s numerical limit on such restaurants, to establish incidental service of beer, wine and distilled spirits with food, and to exceed the C-E District’s standard operating hours to allow a 12 midnight closing, Friday and Saturday.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On December 12, 2013, the Zoning Adjustments Board (ZAB) held a public hearing and approved the application by a 7-0-1-1 vote (Yes: Allen, Alvarez-Cohen, Donaldson, Hahn, O’Keefe, Pinto, Tregub; No: None; Abstain: Williams; Absent: Matthews). On December 19, 2013, staff issued the notice of the ZAB decision. On January 2, 2014, Rob Carter of 2933 Benvenue Avenue and Stuart and Louise Beattie of 2929 Benvenue Avenue, filed an appeal with the City Clerk on behalf of the Elmwood Neighborhood Association. The appeal was also signed by 33 other neighbors near the project site. The Clerk set the matter for review by the Council on March 25, 2014.

BACKGROUND

The project is a Full Service Restaurant located in an existing vacant commercial space at 2635 Ashby Avenue, approximately 100 feet west of College Avenue. The project requires a negative declaration under the California Environmental Quality Act (CEQA), and the following discretionary permits under the Zoning Ordinance:

- Use Permit to allow a change of use of over 3,000 square feet of floor area (from automotive repair to food service), under BMC Section 23E.44.030.A;
- Use Permit to exceed numerical limitation (i.e. “quota”) on Full Service Restaurants, under BMC Section 23E.44.040; approval of this permit would

increase the number of Full Service Restaurants to 9, where the initial limit for the District was set at 7;

- Use Permit to allow Alcoholic Beverage Service (incidental service of beer, wine and distilled spirits with meals), under BMC Sections 23E.16.040.A and 23E.44.030.A;
- Use Permit to extend hours of operation until 12 midnight, Friday and Saturday, under BMC Section 23E.44.060.A (the latest permitted closing time without a Use Permit is 11 p.m.<sup>1</sup>); and
- Administrative Use Permit to establish a Full Service Restaurant, under BMC Section 23E.44.030.A

The subject tenant space is located at the southeast corner of the building and includes 3,405 square feet at the ground floor and a 1,877-square-foot basement, for a total of 5,282 square feet. The portion of the ground floor devoted to customer seating (including a bar) is approximately 1,900 square feet. The ground floor space would be used for the kitchen, dining area, bar and restrooms, and the basement would be used for storage. The proposed floor plan shows a total of 87 customer seats; however, as requested by the applicant, the ZAB approved the project with up to 100 interior seats, to accommodate possible changes in the seating arrangement. In addition, although sidewalk seating is not currently permitted on Ashby Avenue (State highway 13) due to Caltrans regulations, the Use Permit allows up to 20 sidewalk seats to be added in the future in the event Caltrans regulations are changed.

The current proposal is very similar to a Use Permit approved in 2007 at the same location, which also included an exception to the quota, incidental service of beer, wine and spirits with food, and a 12 midnight closing time on Fridays and Saturdays. However, the prior restaurant was larger, consisting of 5,000 square feet at the ground floor, plus the 1,877-square-foot basement. The ZAB's 6-3 decision to approve this prior permit was appealed to the City Council, and because there were not sufficient votes on the Council to take any action on the appeal within the time set by the Zoning Ordinance, the ZAB's action to approve was affirmed. A lawsuit was filed challenging the City's decision, and as part of a settlement agreement, the applicant relinquished the restaurant portion of the Use Permit, with the option to apply for this again in the future.

At the ZAB hearing for the current proposal, the main issue discussed was parking. Unlike other districts, the C-E District does not impose a higher parking standard for a change of use to a restaurant. However, the ZAB has authority under BMC Section 23E.28.050.B to require more parking than otherwise required, if it finds that "the demand for parking spaces will exceed the minimum requirement." Based on this section, and the high level of community concern regarding this issue, staff required the applicant to submit a study to calculate the project's impact on parking availability in the

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<sup>1</sup> The original application also included a request for an 11:30 p.m. closing time on Sunday through Thursday, but the applicant agreed to remove this request at the ZAB hearing.

vicinity (see Attachment 5, Page 50). The study was prepared under the supervision of, and accepted by, the City's Transportation Division. The study area included all public parking spaces within approximately three blocks of the project site, which is about a six- to seven-minute walk.<sup>2</sup>

According to the study, the restaurant's parking demand would reach a peak of 37 spaces on Saturdays between 12 and 1 p.m., and 7 and 8 p.m., with slightly less demand on weeknights. This estimate was based, in part, on data from the City's goBerkeley project which indicated that less than 50 percent of visitors to the Elmwood District arrive by car. According to the study's parking counts, at least 111, and as many as 174, of the 1,095 parking spaces in the study area were available (i.e. not occupied) within the study area during these peak hours. Therefore, the number of available parking spaces would exceed the restaurant's anticipated peak demand by at least 74 spaces.<sup>3</sup>

The ZAB and applicant discussed various options for reducing the project's impact on neighborhood parking, including valet parking and purchasing employee permits to the Huntmont garage located about ¼-mile west of the site on Ashby Avenue. The applicant stated that valet parking would not be desirable because many customers would not use the service, that valet-parked cars would still be parked in the surrounding neighborhood, and that valets would tend to drive too fast to increase profits by increasing turn-over or overall car volume. The applicant was opposed to purchasing employee permits to the Huntmont garage because he felt that lack of parking was a larger problem that should be addressed "holistically" rather than by imposing a requirement on his business and not other businesses in the area. The applicant stated that if the Use Permit were approved, he would continue to work with other businesses and with City staff to identify district-wide solutions to address parking.

Based on the above data, the ZAB found there would be sufficient parking in the vicinity to accommodate the restaurant's patrons, and the project would not have any substantial adverse impacts related to lack of parking. During the hearing, both the applicant and ZAB members acknowledged that parking was relatively difficult to find in the neighborhood, and that the project would exacerbate this situation, particularly on those streets closest to the site. However, the ZAB found that the project's parking impacts would not rise to the level of "detriment" that would warrant denial of the project, or that they would have a significant impact on the environment under the California Environmental Quality Act (CEQA). Please see below under Response 2 for further

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<sup>2</sup> The Transportation Division determined that most restaurant patrons would be willing to walk six to seven minutes from a parking space.

<sup>3</sup> These estimates do not include the restaurant's basement area, which is limited to storage and utility space and was therefore deemed not to contribute to parking demand. However, in an abundance of caution, revised parking demand calculations were provided at the ZAB hearing, which showed that if the basement area were included in the calculation (without regard to its actual contribution to parking demand), the restaurant's peak parking demand would be increased to 56 spaces, and the minimum number of spaces available in the vicinity (during peak demand periods) would be reduced to 55 spaces.

discussion of this issue. The ZAB also found that traffic impacts would not be significant, based on a traffic study that was reviewed and accepted by the City's Transportation Division.

The ZAB also discussed the requested hours of operation. After hearing the ZAB's concerns regarding the proposed weeknight hours, the applicant withdrew his request to operate until 11:30 p.m. on weeknights, but the ZAB granted the applicant's request to operate until 12 midnight on Fridays and Saturdays. As discussed in the attached ZAB report, the Police Department did not express opposition to the requested hours, provided that certain conditions of approval were included in the permit.

The ZAB's decision on the project included adoption of a negative declaration pursuant to CEQA. The negative declaration was based on an initial study that analyzed the project's potential impacts under a wide variety of environmental topics, including air quality, noise, traffic and parking. The initial study did not identify any significant impacts on the environment, including impacts that would less be significant with mitigation. The above data regarding parking demand were used to support the initial study's finding that the project would not have any substantial adverse impacts related to parking.

The attached ZAB report provides further discussion of other issues that were not discussed in depth at the hearing, including the quota, traffic, loading, alcohol service, noise, and conformance with the General Plan.

#### ENVIRONMENTAL SUSTAINABILITY

The project is in compliance with all state and local environmental requirements. Pursuant to the California Environmental Quality Act (CEQA), staff prepared an initial study, in which the project's environmental impacts were carefully considered and determined to be less than significant. The ZAB agreed with the findings of the initial study and adopted a negative declaration. Although the proposed restaurant would generate additional vehicle trips, it is located in a commercial area with relatively high levels of foot traffic, and with a large number of residential units within walking distance. These factors would help reduce the number of trips and associated emissions from the restaurant, as compared with a similar use in a lower-density, less pedestrian-oriented location.

#### RATIONALE FOR RECOMMENDATION

The issues raised in the appeal, and staff's responses, are as follows. For the sake of brevity, the appeal issues may not be re-stated in their entirety; please refer to the appeal letter for full text.

- Issue 1:            "This project violates the Zoning Ordinance. ... Restaurants are beyond the District's quota limit, and yet ZAB approved a [new] restaurant.... [The proposed restaurant would] operate with weekend hours that would exceed the Elmwood zoning standards."

Response 1: As noted earlier, the project requires, and the ZAB approved, Use Permits to exceed the quota on Full Service Restaurants, and operate past 11 p.m. This does not constitute a violation of the Zoning Ordinance, provided that all required findings are made. In this case, the ZAB made the findings required to exceed the quota and the 11 p.m. threshold, and the appeal does not include any rebuttal of these findings. Therefore, this issue does not warrant reconsideration of the ZAB's decision.

Issue 2: The restaurant would have "an exceptionally high customer volume and significant parking and traffic impacts. ... [A]llowing this restaurant without an EIR would place the closest residents to this restaurant at a critical threshold for health and safety" by forcing them to park "two to three blocks" from their homes.

Response 2: The appeal provides no evidence or argument to support the claim that the restaurant's customer volume would be "exceptionally high" relative to other restaurants in the vicinity. As noted in the ZAB's Finding 3.7, "there two other restaurants in the District with a similar ground floor area, Shen Hua at 2914 College and King Yen at 2995 College, and therefore, the size of the proposed Full Service Restaurant would not be greatly out of proportion to other restaurants in the District, or result in restaurant 'domination.'"

The appeal also provides no evidence or argument to support the claim that parking and traffic impacts would be "significant" under CEQA, nor does it adequately explain how increased parking difficulties would exceed a "critical threshold for health and safety," or what that threshold might be. As discussed earlier, while the restaurant would reduce the availability of parking in the vicinity, the parking study showed that the number of available parking spaces in the vicinity would exceed the restaurant's peak demand by at least 74 spaces, and the ZAB determined this would be an adequate supply to avoid a significant impact under CEQA and to minimize "detriment" under the City's Zoning Ordinance.

The appeal argues that parking impacts would be greater on streets closer to the site, and this was acknowledged by the applicant and ZAB members. However, lack of parking, and the resulting inconvenience to residents, does not, in and of itself, constitute a significant impact under CEQA or detriment under the Zoning Ordinance. Furthermore, the data in the parking survey do not support the appellants' claim that residents would suddenly be forced to park two to three blocks from their homes. Instead, the data show that at the time of peak demand for on-street

parking in the area (Saturdays at 8 p.m.), half of the blocks within the study area have at least two vacant parking spaces, and about two-thirds of the blocks have at least one vacant space. In addition, all blocks within the study area (including those with no vacant spaces) are located within one block of another block that has at least three vacant spaces. Although most residents are already home by 8 p.m., the data show that any residents arriving around or after 8 p.m. who cannot locate a parking space on their blocks would likely find another space within one block, even after accounting for the additional demand from the proposed restaurant. Finally, it should be noted that the above data reflect a relatively infrequent “worst case” scenario, and additional parking is available both before and after 8 p.m. on weekends, and at all times on weeknights.

Ultimately, it is within the ZAB’s purview (and the Council’s, on appeal) whether to allow additional competition for on-street parking. In this case, the ZAB determined that such competition would not be overly burdensome to area residents based on the remaining parking capacity documented in the parking study, and that any additional inconvenience to residents would be acceptable given the benefits of the proposed use.

It should be noted that parking demand within the Elmwood neighborhood is currently being managed and evaluated as part of the City’s goBerkeley program. In July 2013, free bus passes and other travel incentives, valid for one year, were distributed to area employees. In October 2013, parking meter prices and time limits were adjusted in the Elmwood. The effects of these efforts are being evaluated now and may be adjusted further to help alleviate pressure on the neighborhood’s parking supply.

Regarding the claim that significant traffic impacts would occur, the project’s traffic study, which was also reviewed and accepted by the City’s Transportation Division, demonstrated that the project would not generate sufficient vehicle trips to exceed any of the City’s thresholds to result in a significant traffic impact, including the relatively congested Ashby/College intersection. The appeal provides no evidence or argument rebutting the findings of the traffic study.

In conclusion, the ZAB found, based on the parking and traffic studies submitted by the applicant and accepted by the Transportation Division, that the project would not have any significant or detrimental impacts on parking availability or traffic congestion, and the appeal does not provide any evidence to undermine these studies.

Issue 3: The applicant's traffic engineer was not aware that "on Benvenue Avenue, between Ashby Avenue and Russell Street, there are twenty residents who have no off-street parking."

Response 3: The parking choices of residents without off-street parking are reflected in the parking occupancy data collected by the parking study. This point was raised at the ZAB hearing, and the ZAB found it to be without merit.

Issue 4: "Parking blocks away from one's turn of the 20<sup>th</sup> century residence and walking home with children or groceries is not consistent with the suitable living environment that residents have come to expect or deserve."

Response 4: As discussed in Response 2, the data in the parking survey do not support the appellants' claim that residents would suddenly be forced to park two to three blocks from their homes.

#### ALTERNATIVE ACTIONS CONSIDERED

Pursuant to BMC Section 23B.32.060.B, the Council may (1) affirm the ZAB decision and dismiss the appeal, (2) set the matter for a public hearing, (3) remand the matter to the ZAB.

#### Action Deadline:

Pursuant to BMC Section 23B.32.060.C, if none of the three actions described above has been taken by the Council within 30 days from the date the appeal first appears on the Council agenda (not including Council recess), then the decision of the Board shall be deemed affirmed and the appeal shall be deemed denied.

#### CONTACT PERSONS

Eric Angstadt, Director, Planning & Development Department, (510) 981-7401

Aaron Sage, Senior Planner, Planning & Development Department, (510) 981-7425

#### Attachments:

1: Resolution

Exhibit A: Findings and Conditions

Exhibit B: Project Plans received July 17, 2013

2: Appeal Letter dated January 2, 2014

3: ZAB Staff Report, dated December 12, 2013

4: Index to Administrative Record

5: Administrative Record

RESOLUTION NO. ##,###-N.S.

AFFIRMING THE ZONING ADJUSTMENTS BOARD'S APPROVAL OF USE PERMIT NO. 2013-0033 TO ESTABLISH A FULL SERVICE RESTAURANT IN THE ELMWOOD COMMERCIAL (C-E) ZONING DISTRICT AND DISMISSING THE APPEAL

WHEREAS, on July 17, 2013, John Paluska of Belt and Suspenders, LLC ("applicant") filed an application for a Use Permit to establish a Full Service Restaurant within an existing two-story commercial building at 2635 Ashby Avenue ("project"); and

WHEREAS, on August 16, 2013, the application was deemed complete; and

WHEREAS, on November 20, 2013, staff mailed and posted a Notice of Public Hearing and Intent to Adopt a Negative Declaration for the project in accordance with BMC Section 23B.32.020 and the California Environmental Quality Act (CEQA); and

WHEREAS, on December 12, 2013, the ZAB held a public hearing in accordance with BMC Section 23B.32.030, adopted a negative declaration and made all required findings under CEQA, and approved the project; and

WHEREAS, on December 19, 2013, staff issued the notice of the ZAB decision; and

WHEREAS, on January 2, 2014, Rob Carter of 2933 Benvenue Avenue and Stuart and Louise Beattie of 2929 Benvenue Avenue filed an appeal of the ZAB decision with the City Clerk on behalf of the Elmwood Neighborhood Association; and

WHEREAS, on March 25, 2014, the Council considered the record of the proceedings before the ZAB, and the staff report and correspondence presented to the Council, and, in the opinion of this Council, the facts stated in, or ascertainable from this information, do not warrant further hearing.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley hereby adopts the findings made by the ZAB in Exhibit A, affirms the decision of the ZAB to adopt a negative declaration and approve Use Permit No. 2013-0033, adopts the conditions in Exhibit A and the project plans in Exhibit B, and dismisses the appeal.

Exhibits

A: Findings and Conditions

B: Project Plans received July 17, 2013