



MEETING DATE: 2/21/2006

ITEM NO: 6

DESK ITEM

COUNCIL AGENDA REPORT

DATE: February 21, 2006

TO: MAYOR AND TOWN COUNCIL

FROM: ORRY P. KORB, TOWN ATTORNE &

SUBJECT: ADOPT RESOLUTION UPHOLDING PLANNING COMMISSION DECISION DENYING A FORMULA RETAIL STORE (AMERICAN APPAREL) ON PROPERTY ZONED C-2. CONDITIONAL USE PERMIT U-06-006. APN 510-44-034. PROPERTY LOCATION: 25 N. SANTA CRUZ AVENUE. PROPERTY OWNER: SANTA CRUZ REAL, LLC. APPLICANT/APPELLANT: TACEE WEBB (CONTINUED FROM 2/6/06)

DISCUSSION:

Attached, for your information, is a letter from William Ross, Attorney at Law, which was received at 4:55 p.m. today.

Attachment: 2/21/06 letter from Willam D. Ross, Attorney at Law

PREPARED BY: **ORRY P. KORB**
Town Attorney

NMGR\AdminWorkFiles\2006 Council Reports\2-21 #6 Desk Item doc

Reviewed by: ^{tit} instant Town Manager Town Attorney
 Clerk Administrator Finance Community Development

Patsy Garcia - Council Consent Item No. 6

From: "William Ross" <wross@lawross.com>
To: <jrose@losgatosca.gov>
Date: 2/21/2006 4:55:57 PM
Subject: Council Consent Item No. 6
CC: <okorb@losgatosca.gov>, <manager@losgatosca.gov>

Please review the attached communication.

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File No.. 449/3

February 21, 2006

VIA **FACSIMILE** & **ELECTRONIC**
TRANSMISSION

(408) 354-8431 & jrose@losgatosca.gov

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
110 East Main Street
Los Gatos, CA 95030

Attn: Town Clerk

Re: Opposition To Council Consent Item No. 6, Adopt Resolution Upholding
Planning Commission Decision Denying A Formula Retail Store (American
Apparel) Conditional Use Permit No. U-06-006; Property Location: 25 N.
Santa Cruz Avenue; Property Owner, Santa Cruz Real, LLC; Request for
Reconsideration

Dear Mayor McNutt and Council Members:

This office represents the owner of improved real property within the Town of Los Gatos ("Town") located at 25 N. Santa Cruz Avenue (the "Property"), Santa Cruz Real, LLC with respect to the January 17, 2006 Council action to uphold the November 9, 2005 Planning Commission denial of the Application for a conditional use permit (the "CUP") of the Owner and American Apparel to operate a formula retail store. The matter is before your Council under Consent Calendar Item No. 6, which provides:

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 2

6. Adopt resolution upholding Planning Commission decision denying a formula retail store (American Apparel) on property zoned C-2 Conditional Use Permit U-06-006. APN 510-44-034. Property Location: 25 N. Santa Cruz Avenue. Property Owner: Santa Real, LLC. Application/Appellant: Tacee Webb.

The proposed Resolution upholding the Planning Commission denial (the "Resolution") consisting of seven (7) pages was forwarded to the Council by the Town Attorney by transmittal dated February 2, 2006 (Revised February 17, 2006).

I. SUMMARY OF OPPOSITION

Council adoption of the Resolution would constitute a prohibited abuse of discretion because: (1) the Resolution contains findings which are contrary to the plain meaning and intent of Town Ordinance No. 2107, the Formula Retail Business Ordinance (the "Ordinance"); (2) the Resolution is legally inadequate as a finding, as it does not bridge the gap between the evidence presented and the eventual decision of denial of the CUP; (3) the Resolution is not supported by substantial evidence as the Applicant presented evidence that its use would be compatible with existing businesses, would not replace existing businesses and its prospective sales of mens, womens and young adults retail clothing does not currently exist; (4) despite boilerplate findings in the Resolution claiming General Plan consistency, no consistency analysis was performed with respect to denial of the CUP; and, (5) the failure to interpret provisions of the Ordinance with its actual context "singles out" the Property application subjecting its review to a one-time arbitrary standard.

Finally, the Town's failure to develop a uniform preliminary interpretation and implementation of the Ordinance is an unlawful business practice as evidenced, by among other things, the January 25, 2006 Planning Commission approval of a formula retail business, Jos. A. Banks at 150 N. Main Street without applying the type of analysis that was applied to the Property CUP.

Accordingly, the Resolution should not be approved, rather, the Council should reconsider the matter and schedule further hearings to evaluate the Application consistent with applicable law.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 3

II. APPLICABLE LAW

A. Town Interpretation Of The Ordinance.

The Town when functioning as an administrative agency in analyzing a land use permit and in carrying out a particular statute (in this instance, the Ordinance) must adopt some preliminary construction of the statute as a basis on which to proceed. *Younger v. State of California* (1982) 137 Cal.App.3d 806, 812; *Western Mun. Water Dist v. Superior Court* (1986) 187 Cal.App.3d 1104, 1111.

B. Findings.

It is well-established that a quasi-judicial adjudicatory law use decision, such as the CUP for the Property, must be supported by legally adequate findings which in turn must be supported by substantial evidence in the record. *Topanga Ass'n for a Scenario Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 511-512 ("*Topanga*").

C. General Plan Consistency.

It is an accepted rule for determining consistency for land use decisions to employ *General Plan Guidelines* standard issued by the Governor's Office of Planning and Research:

An action, program, or project is consistent with the general plan if, considering all of its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.

General Plan Guidelines (2003) p. 164'

' This standard for determining General Plan consistency has been adopted judicially, *Corona-Norco Unified Sch. Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 4

The Resolution advances no evidence of a consistency determination being made other than conclusionary statements with respect to individual General Plan Policies: Resolution (Resolution Finding Number 6).

D. Town Ordinance 2107: The Enabling Authority.

The Formula Retail Business Ordinance provides in pertinent part:

* * *

WHEREAS, an increase in the existing number of formula businesses potentially threatens the Town's unique retail environment in a number of ways, including, but not limited to, the replacement of small, locally owned businesses that often feature unique physical appearances and offer usual or uncommon products or product lines. This can occur either by the replacement of existing retail businesses with new formula retail businesses, or by retail businesses with the capacity to overwhelm existing businesses. An over concentration of formula retail business can result in a retail environment that is indistinguishable from those located elsewhere in the region, the state and the nation.

WHEREAS, the Town's General Plan contains numerous goals, policies and implementing strategies intended to preserve its unique retail environment. For example, the land use designation CBD for the Central Business District (2.4.2) is described as "[encouraging] a mixture of community-oriented commercial goods, services and lodging, that is unique in its accommodation of small town style merchants and the maintenance of a small town feel and character," while descriptions of the Mixed Use, Neighborhood and Service Commercial districts emphasizes maintaining and servicing the needs of the small town residential scale and natural environments of adjacent residential neighborhoods. Elsewhere, concerning the historic downtown area, is a goal to maintain

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 5

mixture of goods and services, identity, environment and commercial viability (L.G.6.2) and a policy to "[e]ncourage the development and retention of small businesses and locally-owned stores and shops that are consistent with small town character and scale" (L.P.6.2).

WHEREAS, Council's intent in adopting this ordinance is to ensure the exercise of greater control over the location of new formula retail businesses in the Town in order to meet the goals, policies and implementing strategies of the Town's General Plan and avoid the transition of the Town's unique retail environment into one that is homogenous with retail areas in other communities.

* * *

Emphasis Added.

The Ordinance amended Town Code Section 29.20.020 to define of "Formula Retail Business" as follows:

Formula retail business means a retail business which, along with one or more other business locations, is required by contractual or other arrangement to maintain any of the following: standardized merchandise, services, decor, uniforms, architecture, colors, signs or other similar features.

This definition was subsequently amended by Town Ordinance No. 2144 (effective October 6, 2005) to provide:

Section 29.10.020. Definitions.

Formula retail business means a retail business which, along with seven (7) or more other business locations, is required by contractual or other arrangement to maintain any of the following: standardized merchandise, services, decor, uniforms, architecture, colors, signs or other similar features.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 6

The burden of proof for a Formula Retail Business Ordinance was also established by the Ordinance.

Town Code section 29.20.190 was amended as follows:

- (a) The deciding body, on the basis of the evidence submitted at the hearing, may grant a conditional use permit when specifically authorized by the provisions of this chapter if it finds that:
 - (1) The proposed uses of the property are essential or desirable to the public convenience or welfare;
 - (2) The proposed uses will not impair the integrity and character of the zone;
 - (3) The proposed uses would not be detrimental to public health, safety or general welfare; and
 - (5) The proposed uses of the property are in harmony with the various elements or objectives of the general plan and the purposes of this chapter.
- * * *
- (b) The deciding body, on the basis of the evidence submitted at the hearing, may deny a conditional use permit for a formula retail businesses if the following findings are made:
 - (1) The proposed use of the property is not in harmony with specific provisions or objectives of the general plan and the purposes of this chapter; and
 - (2) The proposed use will detract from the existing balance and diversity of businesses in the commercial district in which the use is proposed to be located.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 7

III. THE PROPOSED RESOLUTION

Pertinent portions of the Resolution provide:

* * *

- G. Council finds the following:
- (1) Rather than being a unified whole, the CBD consists of five (5) distinct sub-areas distinguished by the policies and goals of the Town found in its General Plan, the requirements of the Zoning Code, the Commercial Design Guidelines, and the Downtown Parking Management Plan, as well as by existing traffic patterns, and urban design factors such as building placement, continuity of building facades, street width, existing uses, and building heights. The sub-areas are:

Sub-Area A: North Santa Cruz Avenue from Highway 9 to Royce Street, characterized by buildings located at the front property line with no setback, having the narrowest building to building cross-section across Santa Cruz Avenue in relation to building height, and mainly featuring first floor retail uses.

- Sub-Area B: North Santa Cruz Avenue from Main Street to Royce Street, characterized by buildings that are set back from the front property line, several parking lots with frontage on Santa Cruz Avenue, frequent breaks in the building facades, larger building to building separation across Santa Cruz Avenue, specifically applicable standards in the Commercial Design Guidelines, and a comparatively greater number of personal service uses.
- Sub-Area C: Retail uses on University Avenue, characterized by the combination of the recently remodeled and new parts of the Old Town Shopping Center.
- Sub-Area D: South Santa Cruz Avenue primarily south of Main Street, characterized by higher automobile traffic volumes and lower pedestrian use as compared to the remainder of the Santa Cruz Avenue

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 8

due to its providing direct access on to and off of Highway 17 and to the location of all businesses, with one exception, on the west side of the street.

- Sub-Area E: Main Street east of Santa Cruz Avenue that differs significantly from North Santa Cruz Avenue due to its wider street cross-section, shorter street blocks, the physical division resulting from the location of the Highway 17 overpass and the relatively high number of personal service businesses.

* * *

- (2) Of the seventeen (17) formula retail businesses in the CBD, sixteen (16) are located in Sub-Area C or Sub-Area B. Only one formula retail store is located in Sub-Area A on Santa Cruz Avenue immediately north of Nicholson Avenue. No formula retail stores are found in Sub-Areas D and E. Of the seven (7) formula retail stores located in Sub-Area B, three (3) are located on the same lock surrounding the location proposed by the applicant/appellant in Sub-Area B.

* * *

- (3) While Council previously determined with the adoption of Ordinance No. 2107 that an over-concentration of formula retail in any one location would have negative impacts on the Town, the record of this hearing establishes that in sub-areas where there are fewer retail businesses, formula retail businesses can have the positive effect of increasing pedestrian traffic, to the benefit on all businesses in the area.

- (4) The location proposed by the applicant/appellant was not one previously occupied by a formula retail store and

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 9

approving the application would, thus, result in an increase in the number of formula retail stores in Sub-Area B of the CBD.

* * *

- (5) Based on the evidence cited herein above, the addition of a new formula retail business in Sub-Area B would result in an over-concentration of such businesses in that Sub-Area.
- (6) Pursuant to Los Gatos Town Code section 29.20.190(b)(1), and based on the evidence cited herein above, the proposed use of the property is not in harmony with specific provisions or objectives of the General Plan and the purposes of this chapter (Chapter 29 of the Town Code); to wit, General Plan goal L.G.1, to preserve, promote, and protect the existing small town character and quality of life within the Town; General Plan policy L.P.1.3, to encourage economic and social activity consistent with the small scale, small town atmosphere and image of the Town; General Plan policy L.P.1.4, to preserve and promote existing commercial centers consistent with the maintenance of a small scale, small town atmosphere and image; General Plan policy L.P.5.1, to maintain a variety of commercial uses to meet the shopping needs of residents and to preserve the small town atmosphere; and General Plan policy L.P.5.5, to encourage the development and retention of locally owned stores and shops.
- (7) Pursuant to Los Gatos Town Code section 29.20.190(b)(2), and based on the evidence cited herein above, the proposed use will detract from the existing balance and diversity of businesses in the commercial district in which the use is proposed to be located,

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 10

specifically in Sub-Area B where the proposed use would result in an over-concentration of formula retail businesses;

- (8) Pursuant to Los Gatos Town Code section 29.20.190(b)(3), and based on the evidence cited herein above, the proposed use would create an over-concentration of similar types of businesses, specifically in Sub-Area B where the proposed use would result in an over-concentration of formula retail businesses.
- (9) Pursuant to Los Gatos Town Code section 29.20.190(b)(4), and based on the evidence cited herein above, the proposed use will detract from the existing land use mix and high urban design standards including uses that promote continuous pedestrian circulation and economic vitality, specifically in Sub-Area B where the proposed use would result in an over-concentration of formula retail businesses.

IV. ANALYSIS

A. Vagueness Of The Ordinance; Lack of Applicability To The Property

As previously noted, the Ordinance was amended by Ordinance 2144 becoming effective on October 6, 2005² redefining formula retail businesses as a retail business which, "... along with seven (7) or more other business location is required by contractual . . ." The Recital provisions of Ordinance 2144 indicates that it reflects the Council intent in adopting

²It is well established that unless there is a Vesting Tentative Map, the law in effect at the time that the discretionary decision is made, here, November 9, 2005 would be applied. [*Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644.] Accordingly, this amended definition of formula retail business would be applicable to the Property CUP.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 11

a modified definition of formula retail businesses to ensure the exercise of greater control over the location of new formula retail business in the Town and in order to meet the goals and policies and implemented strategy of the General Plan. Your Council further indicated that the definition was modified to allow business that have a limited number of stores to be approved without obtained a CUP. A zoning ordinance cannot be so vague or uncertain that a person of common intelligence and understanding must guess as to its meaning. If such an ambiguity is present, the Ordinance is unconstitutional because of a lack of due process of law. *See, Associated Homebuilders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596.

Here, a person of reasonable intelligence would ask where the seven or more business locations were so as to determine whether the business actually is formula retail business. The definition could have easily stated a quantitative distance or a regional reference such as within the County of Santa Clara, within the San Francisco Bay Area, or within Northern California, but it did not.

Thus from the outset, the Applicant and the Owner raise the issue of whether the Ordinance definition of formula retail was even applicable to the matter before the Commission and the Council.

This issue was *not* analyzed in any of the Development Review Committee communications or Staff Reports on this matter. This issue could have been avoided if the Town had complied with its obligations to adopt some preliminary construction of this definition *or* specified a more detailed description of *how* the seven other business locations were to be determined.

B. The Ordinance, As Applied To Uphold The Planning Commission's Denial Of The Application Is Inconsistent With Applicable Law.

Where certain uses are permit by a land use ordinance a city cannot arbitrarily exclude others who would employ a similar use. *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1013 ("*Friends of Davis*"). Further, a zoning ordinance cannot be used to unqualifably to restrict competition [*McDonald's Systems of California, Inc. v. Board of Permit Appeals* (1975) 44 Cal.App.3d 525, 548] or to simply shield existing businesses from competition. *Friends of Davis, supra; LaFranchi v. City of Santa Rosa* (1937) 8 Cal.2d 331, 338.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 12

In summary, a city does not have *carte blanche* to exclude a retail merchant that it, or some of its residents do not like. *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 964-968 ("*Ross*"). Here, a continuing theme of opposition was the need to not compete with local businesses. See, for example, November 3, 2005 e-mail from Ms. Susan Ardizzone,' testimony of Ms. Ginger Rowe, Transcript, November 9, 2005, Planning Commission Transcript, p. 14, lines 7-14.

The arbitrary nature of the application of the decision is amplified by the January 25, 2006 decision of the Town Planning Commission approving Joseph A. Banks, a national retailer and a business subject to the Ordinance,

C. The Denial Of The Appeal Is Inconsistent With the Ordinance.

It is clear that predominant bases for unpopularity with some of the residents was that they do not like the proposed use because it is a national retailer and because of its advertising.

It is respectfully suggested that if the intent of *your* Council was to establish a standard for rejection of business within the City based on advertising (which would be subject to its own legal standards) then one of the burdens of proof for a CUP would be that a business must advertise consistent with an accepted community standard for advertising.

'Other opposition presented issues *outside* the terms of the Ordinance. One member of the public indicated that the project should be rejected because it is not a positive attribute that the Applicant takes nonskilled workers and pays them well. November 9, 2005 Planning Commission Transcript, page 49, lines 20-24. If your Council wanted the labor practices of a business to be an issue to evaluate for issuing a conditional use permit, that criteria should have been specified in the Ordinance, it was not. This is to be contrasted with the continual testimony of the Applicant. See, Applicant's Letter of Justification indicating that they would meet a need for specific retail clothing for men, women and "kids" and that their facility would be compatible with surrounding presentations. The need for this variety of business was also confirmed by several members of the Town's Youth Commission - the individuals that would buy the products which are not now available. See for example, Testimony of Liz Mellema, November 9, 2005 Planning Commission Transcript, pages 53-54.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 13

The absurdity of this position is obvious. An attempt to define such a community standard would meet with a legal challenge for vagueness and would threaten existing businesses. Based on the record testimony in this matter it would require that the use authorizations for existing lingerie stores within the City be revoked.

The lack of compliance with the Ordinance is also paralleled in the lack of the findings of the Resolution findings justifying the decision of denial of the appeal. If the justification for the decision is an over concentration of retail businesses within Subarea B of the CBD then where is the Ordinance definition of "over concentration" and its application to the Property? Moreover, lacking such a standard for a burden of proof, it is also an issue as to the role of determining compatibility with existing businesses (see, letters of Harvest Homes Store, The Law Firm of Gallagher, Reedy & Jones, 19A North Santa Cruz Avenue, and Gardeno Fresco Restaurante Italiano, 51 North Santa Cruz Avenue, indicating the favorability of location of the Applicant).

D. Lack Of Justification Of The Denial Of Appeal Based On General Plan Consistency.

Although the Resolution and the motion denying the appeal make reference to General Plan policies and utilize the term, "in harmony with" and "conformity with" a true consistency analysis which is a requirement of law^o is not reflected in the record. As the record presently stands, those General Plan policies purportedly requiring the preservation of existing business within the Town are given precedence over those General Plan policies favoring businesses within the Town that encourage a mixture of community - oriented commercial, goods and services and maintaining a balance and diversity of businesses in the CBD, something which is prohibited.' See, *Sierra Club v. Board of Supervisors*, (1981) 126 Cal.App.3d 698, 704.

The overall effect of the lack of a preliminary construction and interpretation of the Ordinance and the lack of a standard for determining a concentration of retail businesses

^o See, Section II.C., *supra*.

^oThis very issue was raised in the Development Review Committee Report to the Planning Commission of October 19, 2005, page 3.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 14

within the CBD does single out the property in a manner that is illegal [see, *Ross, supra* 1 Cal.App.4th at 960].

Stated plainly, the absence of a definition of a procedure to determine over concentration of formula retail business to implement the intent of the Ordinance subjects the Property to an *ad hoc* one time determination as to that issue. The lack of any uniform method of analysis of formula retail business concentration is confirmed with the January 25, 2006 approval of a formula retail business conditional use permit for Jos. A. Banks Men's Clothing Store at 150 North Main Street. If there was a definition for over concentration of formula retail businesses, it certainly was not applied in the same manner with respect to Jos. A. Banks as it was with respect to the Property CUP.

V. CONCLUSION

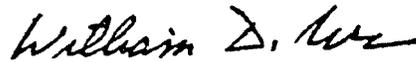
Because there is no preliminary construction of the Ordinance and its definition terms, it is unclear given the very recent revision of the definition of formula retail business whether there actually was a need for a conditional use permit for the Property, as it was not established that the Application met that definition. Further, the lack of an Ordinance definition or procedure for determining over concentration of formula retail businesses supports the fact that the Application was not subjected to a uniform method to determine whether the burden of proof established by Town Code section 29.20.190(b)(2) was met.

The Resolution is inadequate as it does not explain how the decision was made with the infirmities of the Ordinance just noted nor does it take into account the substantial evidence showing that the proposed use would in fact blend in with or be compatible with the presentation of Santa Cruz Avenue and would be consistent with both the Ordinance intent and the General Plan policy of providing for a mix of retail uses previously not existing in the CBD.

The Honorable Diane McNutt, Mayor
and Members of the Town Council
Town of Los Gatos
February 21, 2006
Page 15

Accordingly, the Resolution should not be approved, rather, the Council should reconsider the matter and schedule further hearings to evaluate the Application consistent with applicable law.

Very truly yours,



William D. Ross

WDR:mgl

cc: Alex Giovannotto

Sal Giovannotto

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