

City of Garden Grove

INTER-DEPARTMENT MEMORANDUM

To: Scott C. Stiles From: Lisa L. Kim
Dept.: City Manager Dept.: Community and Economic Development
Subject: Consideration of an appeal of a Garden Grove Planning Commission action for a denial of Conditional Use Permit No. CUP-120-2018 for the Pho Hoa An Restaurant located at 14291 Euclid Street #D101, Garden Grove. (Action Item) Date: 7/10/2018

OBJECTIVE

To conduct a Public Hearing to consider the appeal of the Garden Grove Planning Commission's denial of Conditional Use Permit No. CUP-120-2018, regarding an existing restaurant, Pho Hoa An Restaurant, located at 14291 Euclid Street #D101, Garden Grove.

BACKGROUND

The site is improved with a multi-tenant retail shopping center called the Euclid Retail Center. The center includes retail stores, restaurants, medical, and office professional uses. The specific 1,885 square foot tenant space under application has been in operation as a restaurant since 1992, changing ownership several times during subsequent years. According to business license records, the current business owner, the applicant, Kimberly B. Le, has been operating the current restaurant, Pho Hoa An Restaurant, since 2014.

In June of 1999, the City of Garden Grove approved Conditional Use Permit No. CUP-455-99, which allowed the existing restaurant to operate with a new State Alcoholic Beverage Control Type "41" (On-Sale, Beer and Wine, Public Premises) License.

In March of 2003, the City of Garden Grove approved Conditional Use Permit No. CUP-102-03, which allowed the existing restaurant, currently operating with a State Alcoholic Beverage Control Type "41" (On-Sale, Beer and Wine, Public Premises) License, to have live entertainment in the form a solo performer, but with no audience participation, amplified sound system, stage, or dance floor allowed. At the time of the approval of CUP-102-03, the restaurant had existing illegal improvements that included items such as a stage, music instruments, and an amplified sound system. A condition of approval required that all said improvements were to be removed within thirty (30) days from the date of the approval of CUP-102-03.

In late 2016, the applicant had submitted a preliminary inquiry to the City for a request for Conditional Use Permit (CUP) approval to allow an upgrade of the restaurant's existing ABC Type "41" (On-Sale, Beer and Wine, Public Eating Place) License to a new ABC Type "47" (On-Sale, General, Public Eating Place) License. Up to this point, the restaurant had developed a history of non-compliance with its Conditional Use Permit and the applicable conditions of approval, along with other legal violations such as customers smoking within the business. Shortly thereafter, the applicant met with the Police Department to discuss the CUP request. The Police Department outlined past and ongoing issues related to the restaurant including, but not limited to, illegal karaoke live entertainment, amplified music, and the use of an amplified sound system with associated equipment. It should be noted that recent calls for service relating to the restaurant, that were received by the Police Department, included, but were not limited to: disturbing the peace (loud audible music from outside the restaurant), a call relating to a fight, and a call relating to an assault with a deadly weapon.

Typically, if a restaurant has developed a history of non-compliance (e.g., repeated CUP violations) with its CUP and/or demonstrated an unwillingness to correct on-going issues, the Police Department has not supported requests/applications where an applicant's request would intensify and/or expand an existing restaurant use (i.e., upgrading an ABC License to add hard liquor sales to beer and wine sales, increasing hours of operation to later hours, etc.). At its meeting, the Police Department advised the applicant that it could not support the applicant's request unless the applicant operated the restaurant in compliance with its Conditional Use Permit (CUP-102-03), demonstrated good operational behavior, and encouraged the business owner to return to the City and re-submit its request for reconsideration after demonstrating CUP compliance and good operational behavior for a period of at least one (1) year.

In October of 2017, the applicant submitted a follow-up preliminary inquiry to the City for a request for Conditional Use Permit (CUP) approval to allow an upgrade of the restaurant's existing ABC Type "41" (On-Sale, Beer and Wine, Public Eating Place) License to a new ABC Type "47" (On-Sale, General, Public Eating Place) License.

It should be noted that the application review process typically begins with the submittal of a preliminary review application package to Staff for review. Said package may include a request in writing, a business proposal, a menu (if applicable), and proposed plans. During the preliminary review process, Staff will work with the applicant to address any issues with the proposal and/or the proposed plans, to ensure the project complies with the requirements of the Municipal Code and is supportable by Staff. Before Staff had completed its preliminary review of the applicant's request (to determine whether or not the City would support the request), the applicant decided to forgo the preliminary review process and submitted a land use entitlement application for its CUP request on December 5, 2017.

Following receipt of the CUP application, Staff continued its preliminary review. During said review, it was noted by the Police Department that on several occasions, including a business check that occurred on December 23, 2017, police officers had observed CUP violations in the subject restaurant, Pho Hoa An Restaurant. Observations included but were not limited to: loud audible music from outside the restaurant, customers smoking within the establishment, karaoke live entertainment, amplified music, and an amplified sound system with associated equipment. The applicant had not been operating in compliance with its current Conditional Use Permit (CUP-102-03), which includes, but is not limited to, the following conditions of approval:

P. Live entertainment shall be limited to a solo paid professional performer. No audience participation and amplified sound system allowed.

Q. There shall be no dancing, karaoke or disc-jockey entertainment or sport bar permitted at any time.

R. Noise generated from the establishment shall not be audible outside the establishment.

S. There shall be no stage area or dance floor allowed at any time.

T. The existing stage with music instruments and amplified sound system and a big-screened television shall be removed within thirty (30) days from the date of Conditional Use Permit approval.

Staff scheduled the applicant's item for the February 1, 2018, Planning Commission meeting. On January 9, 2018, the applicant submitted a request to withdraw their CUP item from the February 1, 2018 Planning Commission meeting agenda, in order to modify their proposal by adding a request to allow karaoke live entertainment including other associated components (i.e., amplified sound, stage, and karaoke equipment), in addition to its current request to upgrade its ABC Type "41" License to an ABC Type "47" License.

On February 5, 2018, the applicant had met with Staff, which included the Police Department, to discuss their modified CUP request (to add karaoke live entertainment). The Police Department noted there had been no apparent recent efforts made by the applicant to bring its business into compliance with its current Conditional Use Permit (CUP-102-03), to remove all illegal improvements within the establishment, and to demonstrate good operational behavior since the last meeting between the applicant and the Police Department, which took place approximately one (1) year ago. Accordingly, the Police Department noted it would not support the modified CUP request until the business owner had removed all illegal improvements within the establishment, and successfully demonstrated good operational behavior in compliance with its current CUP, for a period of at least one (1) year. After such time, the Police Department again encouraged the business owner to return to the City and re-submit their request for reconsideration. The applicant stated she would remove all existing illegal improvements and operate in compliance with her current CUP.

On March 5, 2018, the applicant submitted a request to agenda her item, Conditional Use Permit No. CUP-120-2018, for the next available Planning Commission meeting, forgoing the Police Department's direction to operate in compliance with its current CUP for at least one (1) year before resubmitting her request.

The restaurant is located in a crime district that is 7% above the average crime count per district, and in an area of an over-concentration of Alcoholic Beverage Control on-sale licenses.

FINDING OF PUBLIC CONVENIENCE OR NECESSITY

A finding for public convenience or necessity would have to be made in order to approve an establishment that is requesting a new original Alcoholic Beverage Control license that is located within a district with a high crime rate and/or in an area with an over-concentration of ABC licenses. California Business and Professions Code Section 23816 prohibits the ABC from issuing new alcoholic licenses in areas of over-concentration. In addition, Business and Professions Code Section 23958 states:

The department further shall deny an application for a license if issuance of that license would tend to create a

The department shall deny an application for a license if issuance of such license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4.

Business and Professions Code Section 23958.4 provides the following exception:

(b) Notwithstanding Section 23958, the department may issue a license as follows:

(2) With respect to any other license, if the local governing body of the area in which the applicant premises are located, or its designated subordinate officer or body, determines within 90 days of notification of a completed application that public convenience or necessity would be served by the issuance. The 90-day period shall commence upon receipt by the local governing body of (A) notification by the department of an application for licensure, or (B) a completed application according to local requirements, if any, whichever is later.

The ABC Census Reporting District No. 889.03 shows the subject site to be located in an over-concentration of Alcoholic Beverage Control on-sale licenses; therefore the City is required to make a finding of public convenience or necessity to approve the ABC request. However, Staff did not believe a finding of public convenience or necessity should be made. Staff believed that the proposal to intensify the existing restaurant use, by upgrading the ABC Type "41" (Beer and wine) License to an ABC Type "47" (Beer, wine, and hard liquor) License and to add karaoke live entertainment, at this time would potentially adversely affect the health, peace, comfort or welfare of persons residing or working in the surrounding area, as the applicant has not successfully demonstrated a continuous display of compliance with its current Conditional Use Permit.

Furthermore, Business and Professions Code Section 23958 states that an application for an ABC license shall be denied if issuance of the license would tend to create a law enforcement problem. Staff believed that the applicant's request would intensify the business operations through the upgrade of the current ABC Type "41" License to an ABC Type "47" License, and the addition of karaoke live entertainment, stage, amplified sound, and associated karaoke equipment. Based on previous observations made by the Police Department, where the applicant had not shown the ability to operate in compliance with its current Conditional Use Permit, Staff further believed that applicant's request would potentially put further strain on Police Department resources and increase the calls for service in an area that is above the average crime count for the district.

On April 19, 2018, the Planning Commission held a public hearing to consider Conditional Use Permit No. CUP-120-2018. Six (6) members of the public, which included the applicant and the applicant's representative, came forward to speak in favor of the project. The Planning Commission expressed concerns with the restaurant operators' history of prior issues and Conditional Use Permit (CUP) violations, and also urged the applicant to follow the Police Department's direction to demonstrate good operational behavior in compliance with the current CUP, for a period of at least one (1) year, after such time returning to the City and re-submitting the request for reconsideration. The Community and Economic Development Department and the Police Department had reviewed the request and did not support the proposal. City Staff had included a proposed Resolution of Denial for the Planning Commission's consideration. The documentation submitted by the applicant in support of its request had also been included for the Planning Commission's consideration. It was noted to the Planning Commission that it was not bound by City Staff's recommendation and should make an independent decision based on the facts and evidence presented at the public hearing. By a vote of 5-0 (with 2 commissioners absent), a successful motion was made by the Planning Commission to adopt Resolution No. 5907-18 to deny CUP-120-2018.

DISCUSSION

Appeal of the Denial of Conditional Use Permit No. CUP-120-2018

On May 8, 2018, the Appellant filed an appeal of the Planning Commission's denial of CUP-120-2018. On the submitted appeal form, the Appellant provided the following comments in support of the appeal: (i) that the applicant has demonstrated compliance with most requirements of the Garden Grove Police Department; (ii) that the restaurant's current Conditional Use Permit is outdated; and (iii) that the applicant's restaurant is the only restaurant in the City that is actively trying to comply with the City's regulations.

On June 2, 2018, the Garden Grove Police Department conducted a business check at the subject restaurant, Pho Hoa An Restaurant. Officers discovered numerous Conditional Use Permit (CUP) violations in the restaurant, including but not limited to: karaoke live entertainment, amplified music, an amplified sound system with associated karaoke equipment, and a stage. It should be noted that although restaurant customers were not observed to be smoking inside the business during the business check, officers noted a strong odor of cigarette smoke inside the business, including numerous cigarette butts dropped on the floor. Due to the observed CUP violations, the business owner, Kimberly B. Le, was issued an administrative citation of \$1,000 for violation of Garden Grove Municipal Code Section 1.22.010(a).

On June 15, 2018, the Garden Grove Police Department conducted a business check at the subject restaurant, Pho Hoa An Restaurant. Officers again observed numerous CUP violations in the restaurant, including but not limited to: karaoke live entertainment, amplified music, an amplified sound system with associated karaoke equipment, and loud

karaoke live entertainment, amplified music, an amplified sound system with associated karaoke equipment, and loud music audible from outside of the business. Due to the lack of compliance with the restaurant's Conditional Use Permit, and continued ongoing problems, the police officers seized the speakers, laptop, and sound equipment that were utilized for the karaoke live entertainment, which were booked into Garden Grove Police Department as evidence. Due to the observed CUP violations, the business owner was again issued an administrative citation of \$1,000 for violation of Garden Grove Municipal Code Section 1.22.010(a).

Staff has reviewed the appeal request and recommends that the City Council uphold the Planning Commission's decision to deny CUP-120-2018. The basis for Staff's recommendation and the Planning Commission's denial of CUP-120-2018 are set forth in detail in the April 19, 2018, Planning Commission Staff Report (Attachment 1), and Planning Commission Resolution No. 5907-18 (Attachment 2).

FINANCIAL IMPACT

None.

RECOMMENDATION

It is recommended that the City Council conduct a Public Hearing and:

- Adopt the attached Resolution denying the appeal submitted by the Appellant, and uphold the Planning Commission's decision to deny Conditional Use Permit No. CUP-120-2018; or
- Provide further direction to Staff.

By: Chris Chung, Associate Planner

ATTACHMENTS:

Description	Upload Date	Type	File Name
Planning Commission Staff Report dated April 19, 2018	6/18/2018	Backup Material	Planning_Commission_Staff_Report_dated_April_19__2018.pdf
Planning Commission Resolution No. 5907-18	6/18/2018	Backup Material	Planning_Commission_Resolution_No._5907-18.docx
Planning Commission Minute Excerpt of April 19, 2018	6/18/2018	Backup Material	Planning_Commission_Minute_Excerpt_of_April_19__2018.doc
CC Draft Resolution of Denial	7/5/2018	Resolution	7-10-18_CC_CUP-120-2018_CCDraftResoDenial.docx
Appellant's Appeal Form	6/18/2018	Resolution	Appellant_s_Appeal_Form.pdf
Appellant's modified Appeal	6/29/2018	Backup Material	7-10-18_Applicant_Request_to_Modify_Appeal_6-25-18.pdf

REVIEWERS:

Department	Reviewer	Action	Comments
Community and Economic Development	Marino, Lee	Approved	
City Clerk	Pomeroy, Teresa	Approved	
City Attorney	Sandoval, Omar	Approved	
Deputy City Manager	Stipe, Maria	Approved	
City Manager	Stiles, Scott	Approved	