



TOWN OF FAIRFAX

STAFF REPORT

April 5, 2017

TO: Mayor and Town Council

FROM: Garrett Toy, Town Manager *GT*
Linda Neal, Principal Planner

SUBJECT: Appeal of Planning Commission conditions of approval for a Use Permit to allow live music performances outdoors on a covered patio and in the rear yard area of an existing commercial establishment, Peri's Bar, 29 Broadway

RECOMMENDATION

- 1) Reopen the Public Hearing
- 2) The options available to the Council are:
 - a. Adopt a resolution denying the appeal and upholding the decision of the Planning Commission;
 - b. Adopt a resolution granting the appeal; or
 - c. Adopt a resolution denying the appeal with amendments modifying the findings and condition of approval of the Use Permit as follows:
 - Allow amplified music in the side patio.
 - Do not allow any type of music in the rear patio.
 - Require the business to have a decibel reader on hand at all times during performances to ensure the decibel levels do not exceed the established limit of 94-98 dba.
 - Reconsider these conditions in December 2017 to evaluate of the effectiveness of the dba limit in addressing the neighborhood's concerns.
 - If deemed effective, require the installation of a permanent monitoring system.

BACKGROUND

The original Use Permit (#83-UP-32) for live music inside the building was granted by the Town Council on December 12, 1983, subject to the business complying with the following conditions: 1) The music must end by 1:00 AM; 2) The Town's Noise Ordinance, Town Code Chapter 8.20, must be complied with; and 3) These conditions and any other appropriate conditions shall be reviewed by the Planning Commission when the Conditional Use Permit and all other use permits for live entertainment in the downtown area are brought up for review.

In 1998, both the Design Review Board and the Planning Commission granted discretionary permits to allow a 703-square-foot, covered patio addition to the side of the bar building.

At the regular Planning Commission meeting on June 16, 2016, the Commission approved a modification of the original live entertainment Conditional Use Permit to allow outdoor, acoustic music with vocal amplification in the covered-patio area and occasional private events, some including acoustic music and vocal amplification, in the rear yard of 29 Broadway. The Use Permit was reviewed again on August 18th, 2016 and October 20, 2016.

Resolution No. 16-16 was adopted on October 20, 2016, amending and clarifying the existing Use Permit as follows:

- One (1) amplified keyboard in addition to the one (1) amplified singer is allowed in both the covered patio area and the rear yard when live music occurs on the covered patio and when special events occur in the rear yard.
- Music played by a disc jockey is not allowed in either space.
- The music and entertainment is approved in the backyard from 4:00 PM to 8:00 PM only. Music or entertainment prior to 4:00 PM and after 8:00 PM is a violation of the Use Permit and can result in the Use Permit being reviewed for modification or revocation.
- Only two (2) to three (3) entertainers or musicians are approved to play in the back yard at any one given time.

The Town Council considered an appeal of the conditions placed on the Use Permit by the Planning Commission at their December 7, 2017 meeting. At that meeting the Council directed staff and the appellant to explore what it would take to set up a system that would establish an acceptable decibel level for the outdoor music and allow installation of a self-monitoring computer program for the outdoor music sound system. The Town Council continued this matter from their December 7, 2016 meeting.

The appellant has requested this matter be continued until the March 1, 2017, meeting because he is unable to attend the January 18, 2017 meeting and needs additional time to accomplish the Town Council directive.

DISCUSSION

The appellant has cited that no compelling evidence was presented during the public hearing to warrant the prohibition of exterior amplified instruments and that the outdoor music never violated the Noise Ordinance (Town Code Chapter 8.20). However, there is nothing in the Conditional Use Permit Chapter that indicates the Noise Ordinance is the only factor the Commission needs to take into consideration when granting a Conditional Use Permit.

The Town Staff conducted a sound meter reading test on Friday, March 17, 2017 with the assistance of the appellant who arranged to have a live band perform from 4:00 PM to 7:00 PM. Staff took ambient sound meter readings with no music being played prior to readings with the band performing at various locations on Mono Avenue, Napa Avenue,

Forrest Avenue and Dominga Avenue. At all 10 of the locations where the readings were taken the music never reached a level greater than the ambient noise levels which ranged from 46 dba to 47 dba on Forrest Avenue, from 55 dba to 65 dba on Dominga Avenue, from 60 to 65 dba on the eastern portion of Mono and Napa Avenues, and from 68 dba to 83 dba on Mono Alley directly behind 29 Broadway. The ambient decibel levels immediately adjacent to the outdoor patio ranged from 68 dba to 84 dba while the level when the music was playing ranged from 84 dba to 104 dba.

The test revealed that the sound generated by the outdoor music never raised the decibel levels above those already occurring (the ambient level) throughout the adjacent neighborhoods. It should be noted that there are many different factors that can affect the readings such as the passing cars, kids/adults talking, and/or HVAC equipment operating. At times, it was difficult for staff to even hear the music on Dominga Ave. In some instances, we could hear the music more clearly on Forrest Avenue than on Dominga.

The purpose of the sound reading exercise was to determine if a dba level could be established that would minimize the impact of the music to the adjacent neighborhoods while allowing the bands to play at a comfortable volume level. Based on our data, staff would recommend a limit of 94-98 dba on the side patio for music.

The appellant is requesting that the Town Council consider approving the appeal, modifying Conditional Use Permit to allow the outdoor playing of amplified music on the covered patio for the months of May through October of 2017, on a trial basis. He has offered to have a decibel reader on hand at all times during performances to ensure the decibel levels do not exceed the established dba limit.

At the conclusion of the trial period, should the Town determine the dba limit was effective in addressing the neighborhood's concerns, the appellant would invest in a permanent monitoring system. He estimated the cost to provide and install the monitors, electrical wiring, and new circuits for a decibel reading system that can be monitored from the bar ranges from \$3,000 to \$4,000. The appellant's concern is that the Council could decide in the future that such a system is inadequate in addressing community concerns and would, in essence, not justify this large capital investment.

During this trial period, the Council should consider not allowing any type of music in the rear patio. This may help alleviate some of the residents' concerns.

At the December meeting, the Council also requested the appellant explore the installation of a double door in the rear of the building as an added measure to control sound from the interior of the building. The appellant has obtained two verbal estimates for installing double doors at the rear of the bar from local contractors (Steve Vanni and Michael Weiss). Those estimates were in the \$15,000 range.

Since December, the appellant has made a concerted effort to ensure the doors are closed when the bands are playing. From December 7th to March 13, 2017, the Police received 3 noise complaints. On the evening of Saturday, March 11, 2017, staff conducted a noise reading in Mono Alley and Dominga Avenue with the band playing and the doors closed. The readings did not exceed the noise ordinance limits.

CEQA

Categorically exempt § 15301: modified use of an existing developed property.

FISCAL IMPACT

Not applicable.

ATTACHMENTS

1. Letter from appellant received 3/26/17
2. Applicant's appeal form and supplemental information
3. Planning Commission Resolution No. 16-16
4. Resolution 17-__ denying the appeal and upholding the decision of the Planning Commission
5. Resolution 17-__ approving the appeal and modifying the conditions of approval for Conditional Use Permit No. 83-UP-32
6. Resolution 17-__ denying the appeal and modifying the Use Permit conditions (*Note: the resolution will be distributed prior to the meeting*)

TOWN OF FAIRFAX

MAR 28 2017

To the fairfax town counsel

RECEIVED

In regards to our last meeting where we discussed the options of a double door system for rear door to back yard and also a decibel reading system for patio music. i received two verbal quotes from two local contractors(steve vanni and mike wiess) in regards to double door installation. Both quotes were in the \$15,000 range and would put a significant financial burden upon our business. We have enacted a policy of ensuring that back door is always closed during any indoor performance and feel this has solved any issues that have been a cause of any complaints. In my research for decibel reading system i estimate the cost to range from \$3000/\$4000 for materials and installation in up front cost . We feel that this financial burden is not nessisary.

I would like to ask after the findings of the towns staffs decibel reading's ,that were taken on mar 3rd at Peris bar and i believe provided an accurate idea of the impact of the patio music on the surrounding community ,that for the the spring and summer months (may-oct) you allow on a trial basis Peris to have amplified music at the determined decibel level return to patio. We will have a decibel reader on hand at all times to make sure the level is kept within the allowable levels .

i believe that Peris has for many years proven to be a huge community asset both musically and socially and would ask that you allow us to continue to provide our valuable part to the fabric of our town.

Thank you for your time,
Adam jepson

ATTACHMENT 1



TOWN OF FAIRFAX

142 BOLINAS ROAD, FAIRFAX, CALIFORNIA 94930
(415) 453-1584 / FAX (415) 453-1818

TOWN OF FAIRFAX

NOTICE OF APPEAL

NOV 03 2016

FOR STAFF USE

RECEIVED

Date: 11-3-16 Fee: \$500.00
Appl.# _____
Receipt# 1-49456
Recvd. By: S. Watson
Action: _____

The purpose of the appeal procedure is to provide recourse in case it is alleged that there is an error in any order, requirement, permit, decision or determination by any administrative official, advisory body or commission in the administration or enforcement of the City Ordinances. Any person aggrieved by the action of any administrative official, advisory board or commission in the administration or enforcement of any ordinance in the Town Code may make verified application to the Town Clerk in the manner prescribed by the Town Council within ten (10) days of action that is appealed.

FEE: Fees are set by resolution of the Town Council. See fee schedule for current application fees.

PLEASE PRINT

Appellant's name PERIS BAR

Mailing address 29 BROADWAY Zip: 94930 Day phone (415) 488-7655

Property Address: Same

I appeal the decision of: (list board, commission, or department and decision; for example: Planning Commission denial of variance) application # 03-UP-32

The following are my reasons for appeal:

NO CONVINCING EVIDENCE EXISTS TO SUPPORT OR WARRANT PLANNING COMMISSION'S DECISION TO NOT ALLOW AMPLIFIED INSTRUMENTS. TO THE CONTRARY DECIDE

hereby declare that I have read the foregoing Notice of Appeal and know the contents thereof. I further declare under penalty of perjury that the information supplied by me is true and correct.

Executed this 3 day of NOV 2016

SIGNATURE OF APPELLANT: [Signature] (4/94)

ATTACHMENT 2

EVIDENCE OBTAINED DURING NOISE COMPLAINT
INVESTIGATIONS INDICATES FULL COMPLIANCE
WITH EXISTING NOISE ORDINANCE

Letter of Appeal from Peri’s Bar to the Fairfax Town Council
November 28th, 2016

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Letter of Appeal

11/28/2016

Dear Fairfax Town Council members:

This is a formal written appeal to the most recent ruling by the Fairfax Planning Commission regarding the modification request of Conditional Use Permit # 83-UP-32 for Peri's Silver Dollar Saloon, filed in May of 2016. The request of said modification was to allow Peri's to continue to optionally host musical performances on the side patio Thursdays through Sundays during the hours of 4:00pm through 8:00pm, and to have similar types of performances in the backyard up to 12 times per year. Although the backyard was part of the discussion at all three meetings, the focus of this appeal is exclusively on the live music performed on the side patio.

Background

Peri's began having amplified musical acts outdoors shortly after the construction of the patio in 1999, unknowingly operating outside of what is covered by our existing CUP (Conditional Use Permit) to have musical performances in the building. In April of 2016, upon learning that this practice was not covered by our CUP, we promptly filed to modify the CUP so that we could continue providing our patrons and community with musical entertainment on the patio while operating within compliance of the CUP.

To date, the topic of outdoor music at Peri's was discussed at three separate Planning Commission meetings:

- June 16th, 2016 Initial assessment of modification request of CUP
- August 18th, 2016 Clarification of the backyard music request
- October 20th, 2016 Review of the approval granted in June

We initially made our case for the CUP modification at the Planning Commission meeting in June. To be fair, the language in our application did not sufficiently convey our intent to amplify all performances, but the discussion in the June meeting should have been enough to clarify our intent. After much deliberation, our request had passed unanimously, with the only stipulation being that it would be reviewed on January 19th, 2017 to determine whether modifications would be needed upon gauging the impact after six months.

Despite the clarifications made in June, the Planning Commission incorrectly recalled the agreement as having been modified to limit the performances to only amplified vocals with

acoustic, unamplified instruments. Due to comments made during the August meeting, along with the Planning Commission's erroneous recollection of what they approved, they opted to move the January review up to the October 20th meeting. In that October meeting, we were sternly criticized by the Planning Commission for repeatedly violating their errant version of the agreement. They finally ended the discussion by changing the terms of what could be played on the patio to that of amplified vocals, unamplified acoustic instruments, and an amplified keyboard.

Our contention is that the Planning Commission had an inaccurate account of what was agreed upon: the entire purpose of the approval of our request in June was that we would keep doing what we've been doing, so that the impact of the outdoor performances could be measured for future review. We were wrongfully penalized for continuing to do what had been approved.

Supporting argument overview

In this appeal, we will address several key points that are important to consider while assessing the fairness, legitimacy and consequences of the eventual reversal of the June 16th vote to approve our modification request:

- Peri's modification request
- Primary complainant's own outdoor, amplified performances
- Basis of the Planning Commission's reversal of position
- Punishing "non-compliance" by relaxing the restrictions
- Impact of the Planning Commission's October 20th decision

Peri's modification request

Within the original application, the key wording speaking to the type of music Peri's intended to have on the patio was "typically acoustic instruments,"¹ yet the bulk of the arguments made against our case revolved around claiming that we asked to have exclusively "acoustic music."

Acoustic instruments vs. acoustic music

There is a vital distinction between acoustic *music* and acoustic *instruments*: acoustic *music* implies a narrow set of musical genres, usually limited to folk music. However, it is quite common to amplify acoustic *instruments*, regardless of musical genre or setting. For example, if you were to visit The Roastery on a weekend morning then you would likely see a single

¹ Attachment A: Peri's Modification of Use Permit Application

performer singing and playing an acoustic guitar. Not only would they have a microphone for their vocals, but their acoustic guitar would consistently be amplified, as well. Even in that small, confined space, the amplification of the acoustic guitar is necessary to ensure it has a volume and tone that is compatible with that of the vocals.

What Peri's failed to make clear in our application is that while most of our patio acts do include acoustic instruments, they were indeed always amplified. This omission was due to an error of interpretation of the manager's words by our lawyer, who then wrote up the application that was submitted to the town. Our lawyer is not a musician, and so this distinction was unfortunately lost on him.

The intent behind mentioning acoustic instruments in the application at all was to convey, concisely, that the variety of music on the patio wouldn't be as loud, distorted or "heavy" as the bands on the indoors stage at night can sometimes be. The acts we've hosted on the patio, both before and after the June 16th meeting, have always been consistent with this assertion.

The written request was thoroughly clarified in the June meeting

We regret that what was submitted in writing had allowed for so much confusion. However, the dialog at the Planning Commission meeting on June 16th – in which it was repeatedly stated (13 times, to be exact) that what was being discussed was the amplification of vocals *and* instruments – made our intentions abundantly clear:

"I was provided a written description by someone from the office and... it seemed to indicate that it was acoustic music, but that it was amplified... he [Adam Jepson] said something about... he encourages bass playing" – Principal Planner Neal

Commissioner Newton asked *"would it be a hardship, do you think, for Peri's to limit the outdoor music to acoustic as opposed to amplified,"* to which Josh Burks (representing Peri's) replied *"to a degree, it would be a bit of a hardship..."*

Commissioner Gonzalez-Parber asked *"I'm trying to understand or compare the decibels to... somebody playing an acoustic guitar that's amplified. Do you have any idea what the decibels would be for that?"* Mr. Burks responded by saying *"it depends on the volume knob. But, as far as an acoustic guitar being amplified, if you've ever heard... Tom Finch, Danny Click, all acoustic players for the most part - the entire Sleeping Lady crew - was basically an acoustic amplified guitar setting. So, if you'd ever heard a noise complaint or dealt with anything that they've dealt with, that's basically what we play on our patio. There's never heavy distortion, there's nothing that gets cranked up as far as 12, no Spinal Tap or anything like that. It definitely doesn't get as loud as [the live music] on the inside [of Peri's bar]."*

"The reason why people amplify just even acoustic [instruments] or vocals, it's just so it's on the same level [as one another]." – Member of the public, Tommy Odetto

"In order for a vocalist like myself, who plays music at Peri's ... you need to be amplified, and [a] guitar needs to be amplified in order to meet all the same sound." – Member of the public, Denielle Basom

Additional context to the above quotes (and exact times they were stated) can be found in Attachment A: Excerpts from Fairfax Planning Commission meeting on June 16th, 2016.

Our contention is that these exchanges should have clarified the intent of our original written application. Whatever confusion that could have remained about what types of performances we've held on the patio (and how they are amplified) would have certainly been clarified by listening to the music played on the patio. Our interpretation of comments made by some members of the Commission led us to believe they were aware of the fact that music on the patio was, in fact, amplified. For example:

"... when I get off the bus downtown and I can hear the music at Peri's, it just always perks me up. 'I'm back in Fairfax, the music is playing,' and I really love it. The other thing, I live on Mono, so I walk up Mono with the dogs, and just to hear the music as I'm coming up the alley is one of my most favorite parts about living in Fairfax."² – Commissioner Newton

"I just want to go on record saying that... I love Peri's. I have benefited many-a-times from the live music on the patio from the sidewalk. I like to walk down there on [a] Friday, stand on the sidewalk and listen to the music inside..."³ – Commissioner Gonzalez-Parber [although this was stated in the October meeting, the use of "many-a-times" suggests that she has likely heard the patio performances prior to the June meeting.]

While it could be argued that what we were perhaps requesting approval for was a different brand of music on the patio than we have had in the past, the following statement by Commissioner Green, in our minds, addressed that point directly: *"All we're doing here is seeing whether or not we can approve a permit to allow Peri's to continue what they've been doing for several years, apparently having music in the outdoor patio. It's really limited to that."*⁴

Considering all of the above, our impression was that the Commissioners were aware that all acts would be amplified following the June approval, as the performances had been prior to

² Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Comm. Newtown @ 3:48:31

³ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Gonzalez-Parber @ 4:11:08

⁴ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Comm. Green @ 3:42:24

that meeting. To support this assertion, we've included the entire 2016 schedule of performances on the patio. Except for the Jon Korty Blues Band and the Soul Saturdays DJ, all the acts who performed after June 16th had been part of our regular rotation before it was discussed by the Planning Commission. Please see Attachment C: 2016 Schedule of Acts on the Patio for further details.

Primary complainant's own outdoor, amplified performances

Between February, 2016 and the Planning Commission meeting on October 20th, the Fairfax police received a total of 67 complaints related to the music performed at Peri's. Of those complaints, 56 of them – nearly 85% – came from a single household.⁵ Members of this household have claimed that not only is the outdoor music an imposition on their right to silence, but that any form of amplified music at Peri's beleaguers all their neighbors.

It should be noted that one of the complainants from this household is a musician who had played at Peri's on occasion, both on the patio and the backyard. When the band the complainant played in performed in the backyard, *all* of the instruments were amplified.

The primary complainant stated in the June 16th Planning Commission meeting "*this ordinance isn't about shutting down the music. What we're talking about is volume, and when the volume is happening and where it's happening.*"⁶ However, during the August 18th meeting, the complainant said (during the non-agenda public comments): "*Because if any of you did due diligence regarding the new Use Permit for Peri's...*" Planning Director Moore interjected to point out "*this item is on the agenda tonight.*" The complainant then responded with "*but that's about clarification of the backyard. This is about revoking the permit totally.*"⁷

Basis of the Planning Commission's reversal of position

It appeared to us that some of the members of the Planning Commission had a dramatic shift in their stance on the issue of our request between the June meeting and subsequent meetings. After reviewing the entirety of the recordings between the three meetings, this change in position appears to have come from a flawed recollection of the discussion in June on the part of the Planning Commission.

⁵ "The Police Chief has provided a log of calls that the police department has received related to noise at 29 Broadway... none of the noise violations [complaints] that were logged exceeded the noise ordinance decibel levels... a total of 67 calls have been received since the outdoor music was brought to the Town's attention in February 2016. 56 of the total calls were from the same person..." | Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Principal Planner Neal @ 2:52:06

⁶ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Member of the public @ 3:28:38

⁷ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_8_18_2016.mp3 | Member of the public @ 0:16:46

Accusations of Peri's having a dismissive attitude

During the October meeting, Peri's staff and patrons were repeatedly accused of being both irreverent towards the community, as well as outright ignoring the Planning Commission's June decision. We feel that our actions have proven otherwise. We must point out that as soon as this matter was brought to our attention we then began the process of applying for a modification to the CUP and paying the corresponding fees.

Because of the discussion of music in the backyard during the August meeting, we made a concession and immediately ceased all music in the backyard (despite being allowed to continue under the temporary CUP). We did this as a show of good faith, and as an effort to ease the tension between our neighbors and ourselves. We were trying to find a middle ground that would make both sides happy.

Despite our actions, statements were made by the Planning Commission in October which appeared to dismiss our attempts to defuse the situation. For example, Commissioner Gonzalez-Parber said "*what I've heard here makes me feel that, I don't know, I feel like he [Adam Jepson] is dismissing the neighbors who've had issues.*"⁸ Similar sentiments were expressed three other times that evening, which almost certainly had an impact on the final decision of the Planning Commission.

If Peri's were to be allowed to continue having amplified musicians on the side patio, we will make every effort to be reasonable about the types of music and overall volume of the performances. We would be happy to work with the Planning Commission and/or Town Council to find compromises that work for our business, our neighbors and the culture of Fairfax. For example, there are two acts we've had on the patio several times each in 2016: *Honeydust* and *The Jon Korty Blues Band*. Even if the language of the modified CUP were to allow for these two bands to continue to play on the patio, we acknowledge that bands of this variety play at a volume that is indeed inappropriate for the patio and our neighbors. As such, we would discontinue having them play there. Our interest is not in getting away with as much as we can, but rather in continuing to provide entertainment for our patrons and the community while being reasonable and responsible with this privilege.

"Amplified vocals only" – the pivotal argument against Peri's

Early in the discussion in the October meeting, Commissioner Newton made multiple statements about her recollection of the agreement established in June, including: "*Not only was there a written application, but there was a whole Planning Commission hearing in which the applicant, or his representative, spoke to us, and at no point during that did they say 'oh no,*

⁸ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Gonzalez-Parber @ 4:11:39

that's not right.' We actually talked about the amplification issues, we actually talked about it being limited to the vocals... it was also discussed during a hearing - a public hearing - where we had public comment."⁹

We have repeatedly reviewed the audio recordings of the June meeting, meticulously transcribing every statement related to our request. Having gone through that process, we can say with 100% confidence that the core argument in Commissioner Newton's statement above is patently false. While the matter of outdoor music was of course discussed in a public hearing, with public comments, the limiting of amplification to just that of vocals was neither discussed nor mentioned *once* during the June meeting.

Commissioner Newton had gone down this path several other times, including remarks such as: "*...what we adopted in terms of the Use Permit did limit the amplification to vocal amplification...*"¹⁰

*"... we approved a Use Permit that limited the amplification to vocals in the side patio..."*¹¹

*"... let me just say it again, okay? We approved a Conditional Use Permit allowing acoustic music in the side and back yards – both of them – with the exception of amplified vocals only. And, after we approved that one, there were numerous violations of that condition, correct?"*¹²

Some other members of the Planning Commission followed suit, such as when Commissioner Fragoso said "*I understood that in the side patio, amplified music could only be for the vocalist, and yet the resolution says amplified acoustic and electric on the patio.*"¹³

The reality is that the first time limiting the amplified portion of outdoor music to only vocals was publically discussed was in the *August* meeting. The first time it was mentioned during that meeting was not by a member of the Planning Commission, but by a member of the public – the individual who was responsible for the overwhelming majority of noise complaints about Peri's: "*... all side and back patio events have been amplified. When I spoke with the Police Chief, he said that what was approved was unamplified music except for the vocalist.*"¹⁴ We are still unclear on why this was said then. Again, it was never part of any discussion or written agreement prior to this quoted statement.

Accusations of non-compliance

In the October meeting, there were ten instances of Peri's being accused of being non-

⁹ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Newton @ 2:57:50

¹⁰ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_8_18_2016.mp3 | Comm. Newton @ 0:29:44

¹¹ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Newton @ 2:55:14

¹² Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Newton @ 2:55:56

¹³ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Fragoso @ 2:54:01

¹⁴ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_8_18_2016.mp3 | Member of the public @ 0:18:48

compliant of what was approved, as well as accusations of us being hypocritical. We've included some of the more glaring examples below:

"We approved a Conditional Use Permit allowing acoustic music in the side and back yards – both of them – with the exception of amplified vocals only. And, after we approved that one, there were numerous violations of that condition, correct?"¹⁵ – Commissioner Newton

"... we're talking about people who have asked that the town enforce the permit that was issued, that was completely – in my mind – disregarded by the applicant."¹⁶ – Comm. Newton

"I walked up to Peri's to see what the heck was going on, and... watched the amplified musicians playing in the patio, knowing full well that we had just clarified what the meaning of the, and discussed the non-amplification of instruments except for the vocals. So, for the charge that people are taking advantage by complaining, I feel like a lot of this stuff is really hypocritical, and that what we've been seeing is the applicant taking advantage of the town providing the applicant the permission to play the music on the side patio without amplification except for vocals, and that being completely disregarded. You know, if you guys had complied with that, I would be so much more in your camp than I am. But the fact that I, visually, myself, with my own two eyes, observed numerous, time after time again, the violation of the conditions that we put in the permit, has really soured me against your position, and made me hear all these comments with just like a magnifying glass on how hypocritical they are."¹⁷ – Commissioner Newton

"We did review this at a hearing, at a public hearing, it was very well thought-out what we came up with. I think the new information [questionnaire completed by Peri's], yeah, we can consider it, but we really did discuss what could be allowed and what we were comfortable with and, based on the log, a lot of it was disregarded, that – I have real concerns with that. Why was it disregarded? It feels like an attitude, to me, that doesn't feel very neighborly."¹⁸ – Commissioner Gonzalez-Parber

The last statement above is especially concerning to us. The claim that the Planning Commission specified what could and could not be amplified in the June meeting is simply inaccurate. We did not disregard anything, because we continued to do only what was requested, which is what was approved.

The above claim can be substantiated by Commissioner Ackerman's statement reflecting how there were no restrictions to acoustic music: "... *it sounds like part of what's going on with the*

¹⁵ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Newton @ 2:55:56

¹⁶ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Newton @ 4:16:41

¹⁷ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Newton @ 4:17:29

¹⁸ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Gonzalez-Parber @ 4:14:07

side yard, with the side patio is that what was approved was, didn't restrict the music particularly to acoustic music..."¹⁹

Punishing “non-compliance” by relaxing the restrictions

After the October meeting’s deliberation completed, Commissioner Newton proceeded to suggest a motion for a new set of limitations to what could be played on the patio:

“We had originally – when we had approved this – talked about bringing it back in January, so that we could have a sort of a baseline on which to judge how well it was working under the conditions that we imposed. The fact that the applicant failed to abide by the conditions we imposed blew that idea out of the water. My recommendation for us tonight, if you guys [fellow Commissioners] are on the same page as me, is to allow the music without amplification on the side patio, with the exception of vocal amplification and depending on how you guys [fellow Commissioners] feel, also allow a keyboard to be, you know, allow an electric keyboard to be used.”²⁰ – Commissioner Newton

A few things are quite confusing when you deconstruct the above statement into its basic parts:

- There was an agreement about what was approved, with conditions imposed
- The imposed conditions were that Peri’s could have amplified only vocals on the patio, and all other instruments must be unamplified
- Peri’s failed to abide by the imposed conditions
- Consequently, the Commission moved to modify the agreement by making it the same as what they’ve been [incorrectly] saying had been agreed upon, except now we are also allowed to amplify a keyboard

Impact of the Planning Commission’s October 20th decision

It is our opinion that the Commission’s decision was misguided. Trying to address the concerns of *volume* by limiting the *types* of music that can be played, and not addressing the volume directly is missing the point entirely, and is crippling to the music acts that play the patio currently. It is essentially the death knell of live music of just about any variety on the side patio at Peri’s, as none of the acts we’ve had would be able to effectively perform there unamplified.

For an act as simple as a lone singer/acoustic guitarist, they would have to strum with maximum force at all times to even attempt to compete with the level of amplified vocals. Even if that were sustainable, it would destroy the dynamics of any song. If both the guitar and

¹⁹ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_8_18_2016.mp3 | Comm. Ackerman @ 0:28:40

²⁰ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_10_20_2016.mp3 | Comm. Newton @ 4:29:14

vocals would be unamplified then they admittedly would be somewhat balanced with one another, but at the cost of being inaudible above the ambient noise from the street and sidewalk. For acts with multiple musicians, there is a need for amplification to compensate for the imbalance of the instruments' individual natural acoustic volumes, which varies widely in most cases.

The entertainment of our patrons and passersby is not the only thing that is at stake in this decision; we must also consider the livelihood of the employees at our establishment. For example, our Friday day-shift bartender reports that his earnings for that shift typically go up by 60 to 100% when there is live music on the patio, as opposed to that same shift without a band. Other parties who take an economic hit are the musicians themselves, as well as the surrounding business that see an increase in patronage as a direct result of people coming to Peri's just to see the band on the patio.

The ruling also sets a dangerous precedent that could negatively impact the future of live music of any variety at different establishments in Fairfax. If the October 20th decision remains, what is there to protect The Roastery, for example, from being forced to keep their doors shut while the lone singer/guitarist mentioned before is doing a performance?

Summary

In closing, we hope that we have effectively demonstrated the discrepancies between what the Planning Commission approved in June and their recollection thereof, and how Peri's (and the culture of music in Fairfax) have unfairly paid the price for this misunderstanding.

We will also reiterate that we have had far more of a "team player" mentality than some members of the Planning Commission believe, and that we are willing to police ourselves with respect to the volume levels of the amplified musicians on the side patio.

It is our hope that, with all of this in mind, the appeal to have our clarified request to have amplified instruments will be approved.

Sincerely,

The staff at Peri's

Attachment A: Peri's Modification of Use Permit Application

The attachment below is from the original application from Peri's back in June 2016, and was itself Attachment B to Modification of Use Permit; Application # 83-UP-32. The original attachment can be found in its entirety at [http://www.town-of-fairfax.org/pdfs/planning_comm/packet/2016/061616/29 Broadway.pdf](http://www.town-of-fairfax.org/pdfs/planning_comm/packet/2016/061616/29_Broadway.pdf)

APPLICANT'S SUPPLEMENTAL INFORMATION

Applicant requests a use permit allowing the playing of live music on Thursday through Sunday from 4:00 PM to 8:00 PM on the patio attached to Peri's Tavern, located at 29 Broadway, in the Town of Fairfax, and occasionally in an adjacent backyard area. The primary business of Peri's is that of a tavern engaging in the sale of alcoholic beverages. It is duly licensed by all interested agencies, including the State of CA and the Town of Fairfax. Peri's operates seven days each week. Typical hours of operation are from noon to 2:00 A.M. Monday, Tuesday and Wednesday and 10:00 A.M. to 2:00 A.M. the remainder of the week. The busiest shifts, in order, are typically Friday, Saturday and Sunday at which times there are either two or three employees on duty.

Approval of the use permit will neither act as a special privilege or contravene equity and equal treatment, in that music and free enterprise is part of the fabric of our community. Many other businesses exist within the immediate vicinity of Peri's and continue to share a like commitment to the betterment of business and the community at large. At no time have any of these businesses been a detriment to the community, rather they serve to enhance goals of quality of life in the area.

Music is a characteristic factor in quality of life considerations. It is the continuing goal of Peri's to offer a business in the community that includes a modicum of entertainment for patrons. Patrons regularly report their pleasure and desire that music continue to be a part of the operation, not only to management but to others as well. Only rarely have there been reports of dissatisfaction to management about music at Peri's, and it would be unreasonable to suggest there may be none in the future, however few they may be.

Likewise, it is reasonable to suggest that in granting a use permit, there would be no adverse physical or economic effects or other burdens to the use and enjoyment of the property or businesses in the immediate vicinity of Peri's.

Peri's Tavern is not aware of, and has no reason to believe, that approval of the requested use permit would be in contravention of any adopted master plan, development plan, or any other plan or policy of the Town of Fairfax. Rather, the use contemplated is a fit with the community. Peri's Tavern has successfully been in the described business and location for several decades and is a well-known asset to the community. Live music has been an integral part of the business for many years, and in order to fully comply with applicable regulations, Peri's seeks a Town of Fairfax Use Permit allowing music to be played on its attached patio from 4:00 PM to 8:00 PM, Thursday through Sunday, and on infrequent occasions, in its adjacent backyard. At 8:00 PM the musicians, primarily one to four persons, typically using acoustic instruments, move entirely indoors, where live music is permitted by vis-à-vis Peri's cabaret license. Upon learning of the requirement of a use permit, informal surveys in the vicinity indicated well spread support for the requested use of live music, and no opposition was heard from either businesses or residents in the locale. It is respectfully submitted that the requested use permit will facilitate business and is in keeping with both the character and spirit of the Town of Fairfax.

Attachment B:

Excerpts from Fairfax Planning Commission meeting on June 16th, 2016

Shortly after the discussion began regarding Peri's application for the modification of CUP # 83-UP-32, Commissioner Newtown asked "is there a distinction between acoustic and amplified music here with respect to this item before us?"²¹ Principal Planner Neal responded with "I was provided a written description by someone from the office and... it seemed to indicate that it was acoustic music, but that it was amplified, but not that there were electric basses and electric guitars, but then when I spoke with the manager on the phone... he said something about... he encourages bass playing, so I think you're gonna have to ask the manager to clarify that."²²

Josh Burks, Head Bartender and Assistant Manager at Peri's, addressed this by stating "we've been doing this [having amplified instruments on the patio] since I've been here [for the past] 6 years, [and for] 12 years before I got there."²³ Commissioner Newton then asked "would it be a hardship, do you think, for Peri's to limit the outdoor music to acoustic as opposed to amplified,"²⁴ to which Mr. Burks replied "to a degree, it would be a bit of a hardship."²⁵

Commissioner Gonzalez-Parber then asked "I'm trying to understand or compare the decibels to... somebody playing an acoustic guitar that's amplified. Do you have any idea what the decibels would be for that?"²⁶ Mr. Burks responded by saying "it depends on the volume knob. But, as far as an acoustic guitar being amplified, if you've ever heard... Tom Finch, Danny Click, all acoustic players for the most part - the entire Sleeping Lady crew - was basically an acoustic amplified guitar setting. So, if you'd ever heard a noise complaint or dealt with anything that they've dealt with, that's basically what we play on our patio. There's never heavy distortion, there's nothing that gets cranked up as far as 12, no Spinal Tap or anything like that. It definitely doesn't get as loud as [the live music] on the inside [of Peri's bar]."²⁷ Principal Planner Neal then added "the police have been called and have checked, and they [Peri's] haven't exceeded the noise ordinance level limits."²⁸

Once the discussion was opened to the public, several members of the community made statements that further underscored Peri's intent. Professional guitarist and 5th-generation

²¹ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Comm. Newtown @ 2:59:39
²² Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Principal Planner Neal @ 2:59:54
²³ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Josh Burks @ 3:01:36
²⁴ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Comm. Newtown @ 3:03:07
²⁵ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Josh Burks @ 3:03:23
²⁶ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Comm. Gonzalez-Parber @ 3:04:04
²⁷ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Josh Burks @ 3:04:28
²⁸ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Principal Planner Neal @ 3:05:32

Fairfax resident Tommy Odetto said "you guys are worried about amplified music - this [podium for the public to comment] is amplified, [yet] it's not very loud. The reason why people amplify just even acoustic [instruments] or vocals, it's just so it's on the same level [as one another]."²⁹

Musician Larry Newman stated (on establishing balance through amplifying all instruments) "*I play once a month on the patio with a trio. We're very careful when we set up about balancing [the amplification of the various instruments] and keeping the sound acoustically balanced [overall]...*"³⁰

Vocalist Denile added "*in order for a vocalist like myself, who plays music at Peri's ... you need to be amplified, and [a] guitar needs to be amplified in order to meet all the same sound."³¹*

²⁹ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Tommy Odetto (citizen) @ 3:15:31

³⁰ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Larry Newman (citizen) @ 3:20:14

³¹ Planning Commission Meeting Archive | http://cmcm.tv/files/fairfax/Fairfax_PC_6_16_2016.mp3 | Denile (citizen) @ 3:29:43

Attachment C: 2016 Schedule of Acts on the Patio

Date	Act	Date	Act
01/01/16 (Fri)	No DM	04/01/16 (Fri)	Kingsborough
01/02/16 (Sat)		04/02/16 (Sat)	
01/03/16 (Sun)		04/03/16 (Sun)	
01/08/16 (Fri)	Chris Brown	04/08/16 (Fri)	Chris Brown and Simon Costa
01/09/16 (Sat)	Neck 'n Neck	04/09/16 (Sat)	Neck 'n Neck
01/10/16 (Sun)	Todos Santos	04/10/16 (Sun)	
01/15/16 (Fri)	Kelly Peterson Band	04/15/16 (Fri)	Kelly Peterson Band
01/16/16 (Sat)		04/16/16 (Sat)	
01/17/16 (Sun)		04/17/16 (Sun)	
01/22/16 (Fri)		04/22/16 (Fri)	Otis Scarecroe
01/23/16 (Sat)		04/23/16 (Sat)	
01/24/16 (Sun)		04/24/16 (Sun)	
01/29/16 (Fri)	Todos Santos	04/29/16 (Fri)	Damir & Derek
01/30/16 (Sat)		04/30/16 (Sat)	
01/31/16 (Sun)		05/01/16 (Sun)	
02/05/16 (Fri)		05/06/16 (Fri)	Honeydust*
02/06/16 (Sat)		05/07/16 (Sat)	
02/07/16 (Sun)		05/08/16 (Sun)	
02/12/16 (Fri)	Chris Brown and Simon Costa	05/13/16 (Fri)	Otis Scarecroe
02/13/16 (Sat)	Neck 'n Neck	05/14/16 (Sat)	
02/14/16 (Sun)	Todos Santos	05/15/16 (Sun)	
02/19/16 (Fri)	Kelly Peterson Band	05/20/16 (Fri)	Kelly Peterson Band
02/20/16 (Sat)		05/21/16 (Sat)	
02/21/16 (Sun)		05/22/16 (Sun)	
02/26/16 (Fri)		05/27/16 (Fri)	Todos Santos
02/27/16 (Sat)		05/28/16 (Sat)	
02/28/16 (Sun)		05/29/16 (Sun)	
03/04/16 (Fri)		06/03/16 (Fri)	Kingsborough
03/05/16 (Sat)		06/04/16 (Sat)	Mark & Sierra 5 year anniversary
03/06/16 (Sun)		06/05/16 (Sun)	Todos Santos
03/11/16 (Fri)	Chris Brown and Simon Costa	06/10/16 (Fri)	Chris Brown and Simon Costa
03/12/16 (Sat)	Neck 'n Neck	06/11/16 (Sat)	
03/13/16 (Sun)	Todos Santos	06/12/16 (Sun)	
03/18/16 (Fri)	Kelly Peterson Band	06/17/16 (Fri)	Kelly Peterson Band
03/19/16 (Sat)		06/18/16 (Sat)	Soul Saturdays
03/20/16 (Sun)	Waylon / Arizona and the Volunteers	06/19/16 (Sun)	Otis Scarecroe
03/25/16 (Fri)	Otis Scarecroe	06/24/16 (Fri)	Damir & Derek
03/26/16 (Sat)		06/25/16 (Sat)	
03/27/16 (Sun)	Todos Santos	06/26/16 (Sun)	Jump To It
		07/01/16 (Fri)	Honeydust*

07/02/16 (Sat)	Soul Saturdays	08/27/16 (Sat)	Soul Saturdays
07/03/16 (Sun)		08/28/16 (Sun)	Todos Santos
07/08/16 (Fri)	Chris Brown and Simon Costa	09/02/16 (Fri)	Honeydust*
07/09/16 (Sat)	The Babushka Brothers	09/03/16 (Sat)	Soul Saturdays
07/10/16 (Sun)	Todos Santos	09/04/16 (Sun)	Taylor Jazz Jam
07/15/16 (Fri)	Kelly Peterson Band	09/09/16 (Fri)	Chris Brown and Simon Costa
07/16/16 (Sat)	Tom Finch	09/10/16 (Sat)	Neck 'n Neck
07/17/16 (Sun)	Otis Scarecrow	09/11/16 (Sun)	Phil Hardgrave
07/22/16 (Fri)	Jon Korty Blues Band	09/16/16 (Fri)	Kelly Peterson Band
07/23/16 (Sat)	Soul Saturdays	09/17/16 (Sat)	Soul Saturdays
07/24/16 (Sun)	The Unnamed	09/18/16 (Sun)	Tribulation
07/29/16 (Fri)	Todos Santos	09/23/16 (Fri)	Damir & Derek
07/30/16 (Sat)	Jump To It	09/24/16 (Sat)	
07/31/16 (Sun)		09/25/16 (Sun)	Todos Santos
08/05/16 (Fri)	Honeydust*	09/30/16 (Fri)	Jon Korty Blues Band*
08/06/16 (Sat)	Tom Finch	10/01/16 (Sat)	Soul Saturdays
08/07/16 (Sun)	Taylor Jazz Jam	10/02/16 (Sun)	Taylor Jazz Jam
08/12/16 (Fri)	Chris Brown and Simon Costa	10/07/16 (Fri)	Honeydust*
08/13/16 (Sat)	Neck 'n Neck	10/08/16 (Sat)	Neck 'n Neck
08/14/16 (Sun)		10/09/16 (Sun)	
08/19/16 (Fri)	Kelly Peterson Band	10/14/16 (Fri)	Chris Brown and Simon Costa
08/20/16 (Sat)	Soul Saturdays	10/15/16 (Sat)	Soul Saturdays
08/21/16 (Sun)	Jump To It	10/16/16 (Sun)	Mango Bus
08/26/16 (Fri)	Jon Korty Blues Band*		

* If Peri's request is approved, this act will not be performing on the patio in the future due to the overall volume of their performance.

RESOLUTION NO. 16-16

A Resolution of the Fairfax Planning Commission Approving A Modification of Conditional Use Permit 83-UP-32, to Allow Outdoor Acoustic Music and Special Events on the Covered Patio and Rear Yard of the Commercial Bar Establishment at 29 Broadway Avenue

WHEREAS, the Town of Fairfax has received an application to modify the existing Conditional Use Permit No. 83-UP-32 for 29 Broadway to legalize business operations, music and special events, that have been occurring for many years in outdoor areas; and

WHEREAS, the Planning Commission held a duly noticed Public Hearing on June 16, 2016, at which time all interested parties were given a full opportunity to be heard and to present evidence, and at which time the Planning Commission approved the Use Permit Modification; and

WHEREAS, based on the documentary evidence in the record, as well as testimony at the public hearing, the Planning Commission has determined that the applicant has met the burden of proof required to support the findings necessary for the Project's requested discretionary permit.

WHEREAS, the Commission has made the following findings:

1. The limited hours proposed for acoustic outdoor music and special events, from 4:00 PM through 8:00 PM Thursday through Sunday, will not conflict with or create any significant hardship for other businesses or residential uses in the immediate neighborhood as long as the noise ordinance is complied with. Therefore, the approval of the use permit shall not constitute a grant of special privilege and shall not contravene the doctrines of equity and equal treatment.
2. The limited hours and the fact that the covered patio is enclosed on 2 sides and has a roof helps to mitigate the impacts of the live music on adjacent uses. Therefore, the approval of the Use Permit and use of property as approved under the use permit shall not cause excessive or unreasonable detriment to adjoining properties or premises, or cause adverse physical or economic effects thereto, or create undue or excessive burdens in the use and enjoyment thereof, or any or all of which effects are substantially beyond that which might occur without approval or issuance of the use permit.
3. Approval of the use permit is consistent with those objectives, goals or standards pertinent to the particular case and contained or set forth in any Master Plan, or other plan or policy, officially adopted by the City.
4. Approval of the use permit will result in equal or better development of the premises than would otherwise be the case.

WHEREAS, the Commission has approved the project subject to the applicant's compliance with the following conditions:

1. The applicants shall maintain the premises in a neat and attractive manner at all times. Such maintenance shall include, but not be limited to, exterior building materials, signage, windows, the planters, the ground and the pavement surfaces.
2. The applicant shall comply with all applicable local, county, state and federal laws and regulations. Local ordinances which must be complied with include, but are not limited to: the Noise Ordinance, Chapter 8.20, Polystyrene Foam, Degradable and Recyclable Food Packaging, Chapter 8.16, Garbage and Rubbish Disposal, Chapter 8.08, Urban Runoff Pollution Prevention, Chapter 8.32 and the Americans with Disabilities Act.
3. Any changes made to the exterior of the building, including but not limited to new lighting, new signs, planters, etc. shall comply with the design review regulations of the Town Code, Chapter 17.020, and be approved by the Fairfax Design Review Board (when required).
4. The applicant or permit holder shall defend, indemnify, and hold harmless the Town of Fairfax or its agents, officers and employees from any claim, action, or proceeding against the Town of Fairfax or its agents, officers, or employees to attach, set aside, void, or annul an approval of the Town Council, Planning Commission, Planning Director, Design Review Board or any other department, committee, or agency of the Town concerning a development, variance permit or other land use approval which action is brought within the time period provided for in any applicable statute; provided, however, that the applicant's or permit holders duty to so defend, indemnify, and hold harmless shall be subject to the Town promptly notifying the applicant or permit holder.
5. The Use Permit shall be reviewed at the regular public hearing of the Planning Commission on January 19, 2017. If the Commission determines at that time that the outdoor music is having a significant impact on neighboring uses, they will either revoke the Use Permit or place further conditions on the Use Permit.
6. The indoor music shall occur seven days a week between the hours of 1:00 PM and 1:00 AM and the outdoor music shall only occur Thursday through Sunday between the hours of 4:00 PM and 8:00 PM.
7. The exterior doors and windows of the business shall remain closed at all times when music is being played inside.

NOW, THEREFORE BE IT RESOLVED, the Planning Commission of the Town of Fairfax hereby finds and determines as follows:

1. Because of the limited hours of the outdoor uses/music the approval of the Use Permit can occur without causing significant impacts on neighboring businesses or residences.


The foregoing resolution was adopted at a regular meeting of the Planning Commission held in said Town, on the 16th day of June, 2016, by the following vote:

AYES: Ackerman, Fragoso, Gonzalez-Parber, Green, Newton, Chair Kehrlein
NOES:



Chair, Laura Kehrlein

Attest:



Jim Moore, Director of Planning and Building Services

RESOLUTION 17 -__

**A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX
DENYING THE APPEAL OF THE CONDITIONS OF APPROVAL AND
UPHOLDING THE PLANNING COMMISSION ACTION ON CONDITIONAL USE
PERMIT 83-UP-32, TO ALLOW OUTDOOR ACOUSTIC MUSIC ON THE SIDE PATIO
OF THE COMMERCIAL BAR ESTABLISHMENT AT 29 BROADWAY AVENUE**

WHEREAS, on May 2, 2016, Charles Peri ("Applicant") submitted an application which was deemed complete on May 29, 2016, to modify Conditional Use Permit 83-UP-32 to the Town of Fairfax for the proposed use of a covered patio for live music performances and for special events in the rear yard of 29 Broadway; and

WHEREAS, on June 16, 2016, August 18, 2016 and October 20, 2016, the Planning Commission held duly noticed Public Hearings to consider and clarify the conditions placed upon the Conditional Use Permit with their final action on October 20, 2016, being appealed by the Applicant to the Town Council November 3, 2016; and

WHEREAS, on December 7, 2016, the Town Council held a duly-noticed public hearing to consider anew the Applicant's request for a Conditional Use Permit to allow amplified music on the covered patio; and

WHEREAS, at the December 7, 2016, public hearing, the Town Council considered a staff report and its attached supporting documents, and heard from the Applicant's representative, Adam Jepson, interested members of the public, and staff; and

WHEREAS, as set forth in the staff report prepared for the Town Council, the site bears a zoning designation of 'Central Commercial' (per Figure LU-2 of the Fairfax 2010-2030 General Plan); and

WHEREAS, live outdoor entertainment is a conditionally permitted use within the 'Central Commercial' zoning district, per Town Code §§ 17.100.050(A) and (I); and

WHEREAS, the Town Council at its December 7, 2016 meeting directed staff and the appellant to explore what it would take to set up a system that would establish an acceptable decibel level for the outdoor music and allow installation of a self-monitoring computer program for the outdoor music sound system and continued this matter from their December 7, 2016 meeting; and

WHEREAS, the Town Council at its April 5, 2017 meeting reopened the public hearing; and

WHEREAS, based on the documentary evidence in the record, as well as testimony at the public hearing, the Town Council has determined that the Planning Commission was within the rights bestowed upon them by Fairfax Town Code Chapter 17.032, Use Permits, when they approved a modification of Conditional Use Permit 83-UP-32 with certain conditions, including but not limited to the following:

- One (1) amplified keyboard in addition to the one (1) amplified singer is allowed in both the covered patio area and the rear yard when live music occurs on the covered patio and when special events occur in the rear yard.
- Music played by a disc jockey is not allowed in either space.
- The music and entertainment is approved in the backyard from 4:00 PM to 8:00 PM only. Music or entertainment prior to 4:00 PM and after 8:00 PM is a violation of the Use Permit and can result in the Use Permit being reviewed for modification or revocation.
- Only two (2) to three (3) entertainers or musicians are approved to play in the back yard at any one given time; and

WHEREAS, at the conclusion of the April 5, 2017 public hearing the Town Council found that:

1. The findings required by Section 17.032.060 of the Town Code to approve a conditional use permit for outdoor live entertainment had been made by the Planning Commission;
2. The approval conditions conform to the Fairfax Noise Element of the 2010-2030 Fairfax General Plan, Goal N-3, and maintain the current quality of the acoustical environment;
3. The approval conditions support the General Plan Land Use Element, Objective LU-7.2; Preserve, maintain, and enhance in a sustainable manner, the existing character, scale, and quality of life in Fairfax’s residential neighborhoods;
4. The appellant could or would not establish a sound monitoring system to the satisfaction of the Town Council;

NOW, THEREFORE, BE IT RESOLVED that the Town Council of the Town of Fairfax hereby finds and determines as follows:

Section 1. The recitals set forth above are incorporated herein.

Section 2. Town Code § 17.032.060 sets forth the findings that must be made in order to grant a requested Use Permit. The Town Council has determined that the proposed use will not meet the second of these findings without the conditions placed upon the requested Use Permit modification by the Planning Commission. The second finding, Town Code § 17.032.060(B) states that “The development and use of the property, as approved under the Use Permit, shall not create a public nuisance, cause excessive or unreasonable detriment to adjoining properties or premises, or cause adverse physical or economic effects thereto, or create undue or excessive burdens in the use and enjoyment there, any of all of which effects are substantially beyond that which might occur without approval of issuance of the Use Permit”.

Section 3. The Town Council likewise determined that it could not grant the appeal because the request to have all electric, amplified bands and/or other amplified live entertainment fails to conform to the General Plan, Noise Element Goal N-3 to maintain the current quality of the acoustical environment and the Zoning Ordinance which does not allow, by right, exterior or interior live entertainment but requires Conditional Use Permit approval by the Planning Commission. In addition, Land Use Objective LU-7.2 also applies and requires that the quality of life in Fairfax's residential neighborhoods be preserved, maintained and enhanced in a sustainable manner, which includes minimizing new exterior noise sources that might threaten the quality of life in residential neighborhoods.

The foregoing resolution was adopted at a regular meeting of the Town Council of the Town of Fairfax held in said Town, on the 5th day of April, 2017, by the following vote, to wit:

AYES:
NOES:
ABSENT:

John Reed, Mayor

Attest: _____
Michele Gardner, Town Clerk

RESOLUTION 17-__

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX GRANTING THE APPEAL OF CONDITIONAL USE PERMIT 83-UP-32 PLANNING COMMISSION CONDITIONS, TO ALLOW OUTDOOR AMPLIFIED MUSIC ON THE SIDE PATIO OF 29 BROADWAY AVENUE

WHEREAS, on May 2, 2016, Charles Peri (“Applicant”) submitted an application to the Town of Fairfax, which was deemed complete on May 29, 2016, to modify Conditional Use Permit 83-UP-32 for the proposed use of a covered patio for live music performances and for special events in the rear yard of 29 Broadway; and

WHEREAS, on June 16, 2016, August 18, 2016 and October 20, 2016, the Planning Commission held duly noticed Public Hearings to consider and clarify the conditions placed upon the Conditional Use Permit with their final action on October 20, 2016, appealed by the Applicant to the Town Council on November 3, 2016; and

WHEREAS, on December 7, 2016, the Town Council held a duly-noticed public hearing to consider anew the Applicant’s request for a Conditional Use Permit to allow amplified music on the covered patio; and

WHEREAS, at the December 7, 2016, public hearing, the Town Council considered a staff report and its attached supporting documents, and heard from the Applicant’s representative, Adam Jepson, interested members of the public, and staff; and

WHEREAS, the Town Council at its December 7, 2016 meeting directed staff and the appellant to explore what it would take to set up a system that would establish an acceptable decibel level for the outdoor music and allow installation of a self-monitoring computer program for the outdoor music sound system and continued this matter from their December 7, 2016 meeting; and

WHEREAS, the Town Council at its April 5, 2017 meeting reopened the public hearing; and

WHEREAS, based on the documentary evidence in the record, as well as testimony at the public hearing, the Town Council has determined that the applicant has met the burden of proof required to support the findings necessary for the Project’s requested discretionary permit with the conditions listed below; and

WHEREAS, the Town Council has made the following findings:

1. Approving the appeal to allow amplified outdoor music on the patio, which the owner’s representative has indicated is integral to the financial well-being of the business and its employees, conforms to the 2010-2030 Fairfax General Plan Town Center policy TC-3.2.8 to promote locally owned businesses, such as Peri’s Bar; and
2. The limited hours proposed for amplified outdoor music on the covered patio, from 4:00 PM through 8:00 PM, Thursday through Sunday, will not conflict with or create any significant hardship for other businesses or residential uses in the immediate

neighborhood as long as the noise ordinance is complied with and the patio rear door is kept closed during performances; therefore, the approval of the use permit shall not constitute a grant of special privilege and shall not contravene the doctrines of equity and equal treatment; and,

3. The limited hours and the fact that the covered patio is enclosed on two (2) sides and has a roof help to mitigate the impacts of the live music on adjacent uses; therefore, the approval of the Use Permit and use of property as approved under the Use Permit shall not cause excessive or unreasonable detriment to adjoining properties or premises, or cause adverse physical or economic effects thereto, or create undue or excessive burdens in the use and enjoyment thereof, or any or all of which effects are substantially beyond that which might occur without approval or issuance of the Use Permit; and
4. Approval of the Use Permit subject to the conditions of approval which include limited hours and days of operation, is consistent with the Fairfax Town Code § 17.100.050(C) which allows the operation of theaters, nightclubs and entertainment establishments and (I) which allows establishments or businesses which entertain clientele by musicians, actors or singers or establishments which charge admission or entrance fees in the Central Commercial Zone District with a Conditional Use Permit; and
5. Approval of the Use Permit to allow live amplified music on the covered patio for a limited number of days each week, Thursday through Sunday, and for a limited number of hours, from 4:00 PM to 8:00 PM, will result in equal or better development of the premises than would otherwise be the case;

NOW, THEREFORE, BE IT RESOLVED that the Town Council of the Town of Fairfax hereby finds and determines as follows:

Because of the limited days and hours of the outdoor covered patio live music and the partially enclosed screened location on the patio, the granting of the appeal to allow amplified music can occur without causing significant impacts on neighboring businesses or residences.

The foregoing resolution was adopted at a regular meeting of the Town Council of the Town of Fairfax held in said Town, on the 5th day of April, 2017, by the following vote, to wit:

AYES:
NOES:
ABSENT:

John Reed, Mayor

Attest: _____
Michele Gardner, Town Clerk