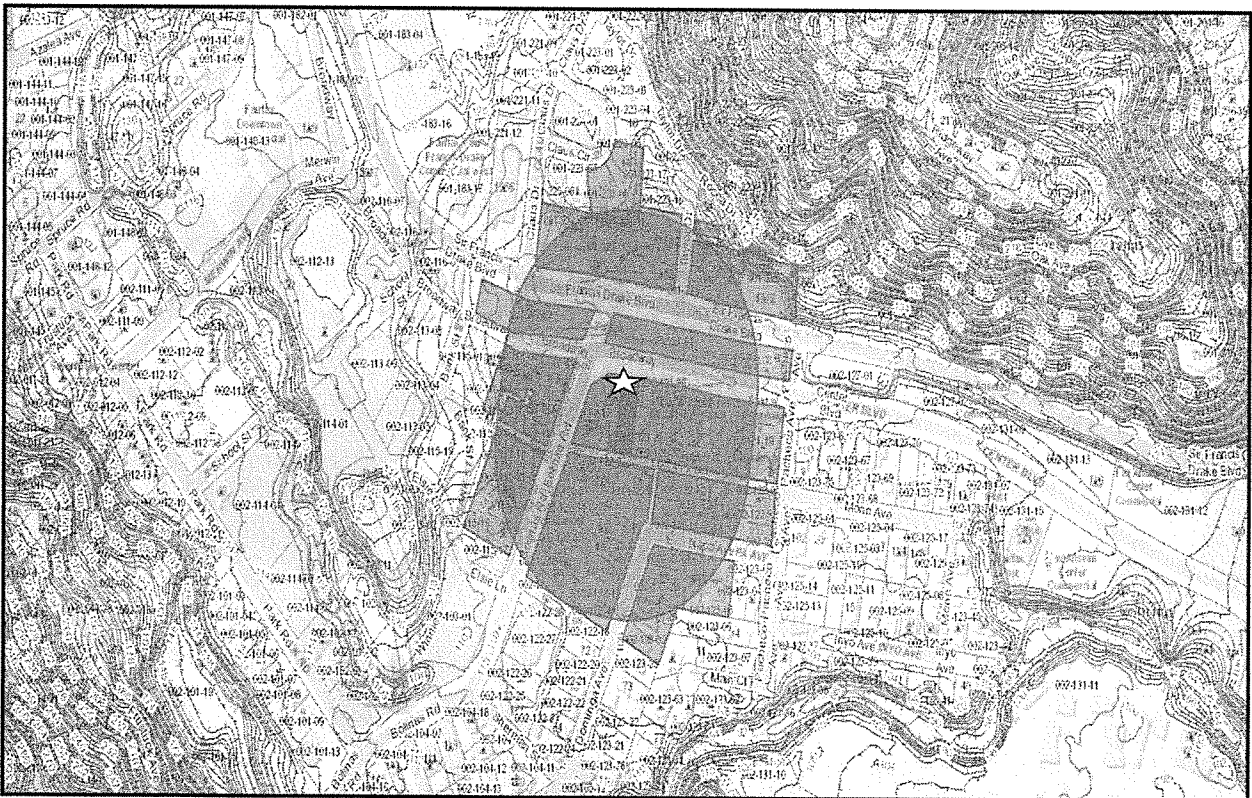


STAFF REPORT
Department of Planning and Building Services

TO: Fairfax Planning Commission
DATE: June 16, 2016
FROM: Jim Moore, Director of Planning and Building Services
Linda Neal, Principal Planner
LOCATION: 29 Broadway; Assessor's Parcel Numbers 002-121-03 and 04
ZONING: Central Commercial CC Zone
PROJECT: Live music and special events outside of the building
ACTION: Modification of Use Permit; Application # 83-UP-32
APPLICANT: Charles Peri
OWNER: Same
CEQA STATUS: Categorically exempt, § 15301



29 BROADWAY

BACKGROUND

The building at 29 Broadway has been used as a bar, in conjunction with the outdoor rear yard, since 1946. The use of the outdoor rear yard by bar patrons predated the adoption of the current Zoning Ordinance (Ordinance No. 352) in 1973. Ordinance No. 352 prohibited the operation of any portion of a business in the Central Commercial Zone outside of a building unless approved by the granting of a Use Permit by the Planning Commission. The casual use of the rear yard by patrons is considered a legal non-conforming use of the outdoor rear yard.

The property is developed with Peri's Bar and the bar parking lot that provides 16 standard (9 foot by 19 foot) parking spaces and 1 accessible space (17 spaces total). On December 12, 1983, the Town Council approved a Use Permit to allow live entertainment inside the bar 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.
3. These conditions and any other appropriate conditions will be reviewed when this use permit and all other use permits for live entertainment in the downtown 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 bar building.

DISCUSSION

In April of 2016, the Department of Planning and Building Services was advised by the Police Department that the business was in violation of their Use Permit which only allowed live music within the building as live music was being performed out of doors in the covered patio area. The Department advised the business owner that if they wanted to continue having outdoor entertainment, the 1983 Conditional Use Permit (CUP) would require modification. The Department of Planning and Building Services along with the Town Manager, agreed to allow the business to continue having the outdoor music until their CUP request was acted upon so existing contracts with musicians could be honored.

The applicant is requesting a modification of Conditional Use Permit 83-UP-32, to include outdoor entertainment on the patio and occasional special events in the 1,920-square-foot rear yard. The outdoor music events would run from 4:00 PM through 8:00 PM, Thursdays through Sundays. Examples of the types of one-time special events that might occur in the outdoor rear yard include wedding receptions, wakes, fashion shows, birthday parties, etc. If approved by the Commission, any outdoor music or

special events would be required to conclude by 8:00 PM. Special events in the rear yard may occur any day of the week from 10:00AM to 8:00 PM.

Town Code § 17.100.050(A) requires that a CUP be obtained for any principal use not conducted entirely within a building, § 17.100.050(C) requires a Conditional Use Permit for theaters, nightclubs and entertainment establishments and § 17.100.050(I) requires a CUP for businesses that entertain customers by musicians. Therefore, having live entertainment outside the building requires a modification of the original use permit which limits entertainment to inside the building.

The purpose of the CUP process is to allow the proper integration into Fairfax of uses which may be suitable only in certain locations in the Town, or in a zone or only if the uses are designed or laid out on the site in a particular manner. In reviewing an application for a use permit, the Planning Commission must take into consideration the nature and condition of all adjacent uses and structures.

To the north of the site is Broadway and the Pakade parking lot, to the east is the Peri's parking lot and a restaurant, and to the south is a residence and a commercial property developed with a mix of commercial uses and 1 residential unit on the second floor (29 and 31 Bolinas Road). The closest residential unit at 50 Dominga Avenue is over 95 feet from the covered patio where the music would be played regularly and 30 feet from the rear yard area where occasional events would be scheduled.

Noise pollution is a growing concern in downtown Fairfax although the police chief has indicated that most of the noise complaints seem to come from the same group of people. Typically, the noise complaints are not about noise that has reached a level that violates the Noise Ordinance maximum limits [Town Code Chapter 8.20, section 8.20.050(B)(1) "Exterior Noise Limits" table for Zone C, Commercial]. This type of conflict is typical in a community where the Commercial zones are either directly adjacent to residential zoned neighborhoods and/or where the Commercial Zones also have residential units.

Allowing outdoor music would certainly increase the noise levels in the Town Center and depending on the number of Conditional Use Permits granted by the Commission for outdoor music in the future, these levels could violate the decibel noise limits set forth by the Town Code for the downtown commercial District which restrict noise levels to 60 decibels for the hours between 10:00 PM and 7:00 AM and 55 decibels for the hours between 7:00 AM and 10:00 PM

However, the businesses that have available outdoor areas large enough to accommodate outdoor music are limited. The following locations have rear or side yards, or patio areas where live music could be staged that have not applied for outdoor music use permits— 19 Broadway, 23 Broadway (previously the Sleeping Lady), 33 Broadway (Fairfix Café) and 31 Bolinas Road (previously Lydia's Lovin Foods).

Note: Later tonight you will be reviewing another request for a Conditional Use Permit for outdoor music at 31 Bolinas Road.

It is difficult to determine the number of permits for outdoor music and the resultant noise levels it would take to exceed the outdoor noise levels beyond those permitted in the Noise Ordinance. The Commission can approve the proposed CUP application and subsequent Conditional Use Permits with the knowledge that Conditional Use Permits are revocable. Therefore if noise levels for outdoor music exceed the Noise Ordinance limits, the CUP can be revoked and/or modified to only allow indoor music.

The Commission could also determine that outdoor music should not be permitted in the Central Commercial Zone District due to the close proximity of residential uses.

Recently when the Town Council reviewed the outdoor music at Deer Park Villa, it discussed the fact that due to increased traffic and other noise sources, there are areas of Town, including the Commercial districts, where ambient noise levels at certain times throughout the day and evening, already exceed the permitted levels set forth in the Town Code (note see the noise level reading tables contained in the 2010-2030 Fairfax General Plan Noise Element). Certain residents asked the Council to amend the noise ordinance to lower the permitted noise levels. After much consideration and testimony at public hearings, the Council made the decision to not amend the Noise Ordinance at that time.

The CUP process gives the Commission the right to deny the request if they receive evidence from the public showing that the use would have a significant negative impact on their lives and/or property. The Commission may also decide to amend the recommended conditions in the attached Resolution (Attachment A) to further address the concerns of the public. Additional conditions to consider include further limitations on the hours and/or days outdoor music/events can occur and/or limiting the outdoor music to non-amplified music only.

Any action taken by the Planning Commission can be appealed to the Town Council, the body that ultimately makes the laws and sets policy for the Town of Fairfax. Whether or not to start allowing outdoor music on a regular basis by businesses may be an issue that needs to be elevated to the Council for a determination on how the Town wants to proceed with this matter going forward. Any decision made by the Planning Commission can be appealed to the Town Council by filing an appeal, with the required \$500.00 appeal fee. The appeal must be made with the Town Clerk within 10 calendar days of this meeting.

The proposed Conditional Use Permit application does not include any changes to the exterior of the building therefore the application does not require the approval of a Design Review permit.

The days and hours that the applicant is proposing to allow outdoor music are limited and both the music and the occasional special events in the rear yard will end by 8:00

PM. Therefore, the requested use permit modification shall not have a significant impact on neighboring uses.

RECOMMENDATION

1. Open the public hearing and take testimony.
2. Close the public hearing.
3. Move to approve the requested modification to Conditional Use Permit # 83-UP-32 by adopting Resolution No. 16-16 setting forth the findings and conditions of approval for the permit which include scheduling the Use Permit for a public hearing to review the use permit on January 19, 2017. The review would include information from the Police Department on the number and outcome of the noise complaints received and responded to at 29 Broadway during that time period.

ATTACHMENTS

Attachment A-Resolution No. 16-16
Attachment B- Applicant's Supplemental Information
Attachment C – e-mail from Ling Shein Bell

RESOLUTION NO. 16-16

A Resolution of the Fairfax Planning Commission Approving A Modification of Conditional Use Permit 83-UP-32, to Allow Outdoor Musical 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 outdoor music and 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 AM.
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:

NOES:
ABSENT:

Chair, Laura Kehrlein

Attest:

Jim Moore, Director of Planning and Building Services

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.

Linda Neal

From: Mimi Newton [REDACTED]
Sent: Wednesday, June 08, 2016 9:48 PM
To: Jim Moore; Linda Neal
Subject: Fwd: Thoughts on acoustic and amplified music

Jim & Linda

If you are planning any Planning items pertaining to amplified music in the downtown area, please include this message I received from Ling Shien Bell in the materials. Thank you -
Mimi

----- Forwarded message -----

From: Helmmusic <[REDACTED]>
Date: Wednesday, May 18, 2016
Subject: Thoughts on acoustic and amplified music
To: [REDACTED]

With the amplified music getting louder and louder, I am enjoying more and more the sound of acoustic music, it is to me the most organic, natural sound, that agrees completely with me at the core level. Granted, being able to project is not as easy as turning the volume knob, you have to learn how to use your voice, work on the sound quality of your instrument, figure out where the best place will be so you can project more... all things that are part of being a musician. Furthermore, when amplified sound travels, it gets distorted and becomes flat out ugly, be it speech or music. I have never heard acoustic sound getting distorted as it travels. Some instruments that are naturally loud and could be used to play outdoors without amplification: piano, accordion, the whole brass family, percussion instruments, oboes and bagpipes, then you wouldn't get the annoying distortion factor. All this brings me to believe that amplified sound belongs indoors, where it can be controlled with appropriate sound proofing so that the surrounding residential areas don't have to hear it. Even indoors, I'm not sure it needs to be so loud that you have to scream at the person seating next to you, it's got to do some damage to your auditive nerves, and it greatly limits the contents of your conversation. Of course when there is a festival, you expect to have your sound space occupied by loud music, but it shouldn't be the norm, recurring every time anything happens, like a farmers market, or a baseball game, I feel we need to be able to relax outdoors too, and not have to lock ourselves indoors in order to have some peace. *I thought I might use the topic of the baseball games to illustrate my point about the difference of sound quality: I live on Dominga, and the sound travels very well from the field; I've experienced that the sound of the crowd cheering, being acoustic and therefore not distorted, is a lot more pleasant than the amplified announcements.*
Luckily there seems to be a little resurgence of acoustic music, I really hope it grows, so we can enjoy the sound of the human voice and musical instruments in their natural state.

Helm
Ling Shien Bell
Co-director, Composer, Musician
[REDACTED]
[REDACTED]