

***EXCERPTS OF THE
MINUTES OF THE REGULAR MEETING
CITY OF SAN LEANDRO
BOARD OF ZONING ADJUSTMENTS
JANUARY 5, 2012***

7:05 p.m. Regular Meeting

Item 1: Roll Call

Present: Members Jane Abelee, Thomas Makin, René Mendieta, Janet Palma, Lee Thomas, Vice Chair Catherine Vierra Houston (arrived 7:08 p.m.), Chair Philip Daly.

Absent: None.

Staff: Sally Barros, Secretary to the Board of Zoning Adjustments (Senior Planner); Elmer Penaranda, Senior Planner; Luke Sims, Community Development Director; Tom Liao, Planning and Housing Manager; Richard Pio Roda and Stephen Muzio, Assistant City Attorneys; Larry Ornellas, Facilities Coordinator; Sgt. Ted Henderson, San Leandro Police Department (SLPD); Barbara Templeton, Recording Secretary.

Item 5: Correspondence and Oral Communication

Secretary Barros said that correspondence related to the public hearing is included in the agenda packets.

Item 7A: Public Hearings

A. Matter of Revocation of PLN2001-00021; to consider revoking Conditional Use Permit (CUP) to operate a trailer rental and sales business at 2661 Alvarado Street, Unit 22. The property referenced in the CUP was used for an unauthorized activity other than the operation of the trailer rental business through rental to an entity that conducted a public assembly in the trailer business location. The unauthorized occupancy violated the PLN20011-00021 Conditions of Approval. Pursuant to Zoning Code Article 29, the Board of Zoning Adjustments shall conduct the public hearing to consider revoking the CUP by making one or more findings listed in Article 29:

- 1) That the permit was issued on the basis of erroneous or misleading information or representation;
- 2) That the terms or conditions of approval of the permit have been violated or that other laws or regulations have been violated;
- 3) That there has been a discontinuance of the exercise of the entitlement granted by the permit for one hundred eighty (180) days; and/or
- 4) That the approval has been as exercised to constitute a public nuisance or be detrimental to public health and safety.

Assessor's Parcel Number 77A-658-3-11); Damon McKinney, C&M Trailer Rental (applicant); 2661 Alvarado LLC (property owner): IG Industrial General District. This item was postponed from the December 1, 2011 BZA meeting and re-noticed for the meeting of January 5, 2012 BZA. (Penaranda)

Chair Daly recused himself because he understands that a criminal prosecution is related to the site involved in this matter and he works in the Alameda County District Attorney's office.

Senior Planner Penaranda stated that the BZA granted the CUP in this matter on September 1, 2011, for the owner to operate a trailer rental and sales business at the subject property. On the night of September 30, 2011 and into the early hours of October 1, 2011, the property was used for an unauthorized activity, having been rented to an entity that conducted a public assembly. Planner Penaranda said that the CUP clearly sets forth the property's use, and added that industrial areas typically are located on quiet and underserved streets. The buildings have minimal exiting for persons to gather and lack adequate sanitary facilities to accommodate public gatherings.

According to Planner Penaranda, the police investigation, in the wake of a triple homicide occurring in the immediate area shortly after the unauthorized activity ended, revealed that the business owner had advertised the space for rent for activities other than the conditionally approved use. Accordingly, he said that staff recommends revoking the CUP based on two findings that comply with requirements of Zoning Code Article 29:

- 1) The permit was issued on the basis of misleading information and misrepresentation, and
- 2) The terms and conditions of approval had been violated.

Planner Penaranda said that if the BZA concurs with staff's recommendation, the agenda packets contain a resolution prepared to accomplish the revocation.

Member Palma questioned whether the finding regarding misleading information is applicable, because when the BZA approved the CUP, the BZA was unaware of potential uses of the site for public assembly and perhaps the owner did not even know about that use at the time. She also wondered why the revocation recommendation does not cite the finding from Article 29 "that the approval has been so exercised to constitute a public nuisance or be detrimental to public health and safety."

Member Makin asked why the copy of the Agreement to Conditions in the agenda packet is unsigned. Planner Penaranda said that the paperwork was in process of being mailed with a cover letter to the applicant when the incident occurred. Referring to applicant Damon McKinney's letter in the agenda packet, Member Makin also asked about the \$8,600 fee (\$250 per month), noting that he found no explanation about that money. Planner Penaranda explained that the sum cited is the Development Fee for Street Improvements (DFSI), which is required by ordinance when there's a change of use to a building. To calculate the DFSI, he explained, an amount for the type of use approved is multiplied by square footage of the tenant space. He also said that Mr. McKinney would have been aware of the amount prior to the September 1, 2011 meeting at which his CUP application was approved.

Member Abelee, citing the January 5, 2012 staff report's reference to the possibility of a change in the permit being approved by the Community Development Director, said that she assumed that did not happen. Planner Penaranda said that her assumption was correct.

Acting Chair Houston called the applicant to the microphone.

Damon McKinney, owner of C&M Trailer Rental, apologized for what staff and the SLPD had to go through, and said that his heart goes out to family and friends who lost loved ones. He stated that he did not receive a copy of the CUP until October 7, 2011, when he should have received it, according to code, within seven days of the September 1, 2011 approval. He further said that the City's letter was backdated, and that he has both the letter and the envelope it came in. He also said that he was unaware of any language in the CUP until after the incident occurred on the night of September 30, 2011. He also noted that since the CUP approval, he has made investments in the property, including some that the City requested. For instance, he said that he was asked to provide a set of architectural plans, which cost him \$1,000. He brought these plans in, he said, and he was turned down.

In terms of the findings cited, Mr. McKinney said that he does not believe he violated the terms or conditions of the CUP by conducting another activity. He said that the trailer rental business is the primary business in operation at that location, and he was unaware that rental of the facility for other activities required authorization other than the landlord's. He said that C&M Trailer did not provide any erroneous information, nor was the use of the facility misrepresented. He said that he was renting the facility to bring in extra income to cover the fees. He further stated that he was unaware of the \$8,600 in fees until the very end of the process. Mr. McKinney contended that C&M Trailer did not operate out of compliance of the CUP, leading to a triple homicide; he said he could not be out of compliance with a document he had not received or reviewed, and furthermore, he's operating the trailer rental business that he presented in his application. He indicated, too, that the homicides occurred after his facility closed for the day, nearly 1,000 feet away from his door in the parking lot. He stated that he's no more responsible for what took place than Wal-Mart is for recent shootings in its parking lot.

Mr. McKinney informed the BZA that he's been at the subject location for almost two years and no problems have involved his business. He stated that he has neither been convicted of a crime nor cited for being a public nuisance, nor done anything that would be considered detrimental to public health and safety.

He said that he's willing to accept a fine and renegotiate the CUP with further restrictions. He pointed out, too, that during the application process he presented everything to staff, including flyers and his website address, which indicated that he would host community events.

In response to **Member Thomas**, Mr. McKinney said that he hadn't told the landlord he would be renting out the facility before he did so. Member Thomas, noting that Mr. McKinney's letter stated that he decided to rent out the facility to bring in extra income due to a financial bind, asked about his current financial situation. Mr. McKinney said that he's been a plumber for 13 years, and after taking off six months to get the trailer business going, for the past two months he's again been working as a foreman. He said this work has been based at the Embarcadero Center buildings in San Francisco for the past eight years.

Member Palma pointed out that a CUP stipulates the kind of business an applicant may operate, and if the applicant wants to do something else, he must request permission to do so. Mr. McKinney said that the unexpected costs led him to use the facility to cover additional expenses, but he didn't think to ask permission. The CUP, he said, doesn't state what he cannot do. Mr. McKinney emphasized that he didn't host the event, and some "fake" promoters in addition to the individual who rented the facility used social media to promote the event as if it were theirs.

Member Makin pointed out that Mr. McKinney may not have received the mailed CUP until later, but he did have it, with the conditions spelled out, in the September 1, 2011 agenda packet. Member Makin further stated that those conditions were discussed at length during that meeting, and that Mr. McKinney answered a number of questions, including the hours of operation. Thus, he said, Mr. McKinney should understand why the BZA feels he misrepresented his intent and why he's created a serious credibility issue.

Secretary Barros explained that prior to a CUP hearing, the proposed CUP with conditions of approval is mailed to the applicant and distributed to the BZA. The later CUP mailing to the applicant is simply a reformatted version of the same document (the Agreement to Conditions). After the hearing and the BZA vote, she added, the Chair asked the applicant whether he had read and agreed to the CUP and he said he did.

Member Thomas asked how many times the C&M Trailer Rental facility had been rented out prior to September 30, 2011. Mr. McKinney said that was the first time, although he had held a personal party there once. Member Thomas asked, too, what Mr. McKinney's current backup plan is, in case he encounters another financial hardship. Mr. McKinney said that he makes \$120,000 annually, and if necessary, he can access \$90,000.

Acting Chair Houston recalled that at the September 1, 2011 meeting, Mr. McKinney had indicated receiving and understanding the conditions as well as the filing time required for any changes. She asked how long after that meeting Mr. McKinney posted the first advertisement (on Craigslist) about the facility being available for rent. Mr. McKinney said it may have been two weeks. He said, too, that if this were something that he had planned, he would have been doing it already inasmuch as he'd been at that location for almost two years. He said that he amended the Craigslist posting the day after the homicides.

Acting Chair Houston excused the applicant and opened the public hearing.

Robert Legallet, 1401 Griffith, San Francisco, is the landlord and manager of 2661 Alvarado LLC. He said he would not reiterate what he wrote in his letter (in the agenda packet). He said the tragedy has been very traumatic for him, Mr. McKinney and other tenants. He explained that 2661 Alvarado LLC is an entity formed in 2005 to purchase the Gardco Lighting plant, and the LLC isn't a bunch of Wall Street people, a REIT or anything like that. In addition to himself, those in the LLC are relatives, close friends and some other individuals who operate small businesses. Mr. Legallet said that when the family's leather tannery in San Francisco went out of business in 1979, he went the LLC route, specializing in "adaptive reuse" of single-user buildings as multi-tenant spaces that typically attract smaller, less sophisticated, artisan-type tenants. He said that even he is intimidated and "thrown amuck" by all the different codes and things that are involved in running a business over the last 10 to 15 years.

He said that uses in these spaces tend to be hard to define uses, and while the tenants spend most of their time in their space doing a particular business, he said it isn't uncommon to find a carpenter, for instance, changing the oil in his car on a weekend. Typically, even if such activity violates a code, he said, it doesn't affect anyone.

On the Monday after the tragedy, on October 3, 2011, Mr. Legallet said that he called all of his 26 tenants, and reported that not one has moved because of what happened that night. Three tenants did leave because they were intimidated by being "under the microscope," when five City inspectors with clipboards came through each unit. Mr. Legallet said he's testifying in

support of Mr. McKinney, and hopes a way can be found to keep him in business while satisfying the City that nothing of this nature will ever happen again.

Darren Gill, 18442 Standish Avenue, Hayward, said that he's with Any Seven Offroad and a tenant in the 2661 Alvarado building, two doors down from Mr. McKinney. He said that he considers Mr. McKinney a very honest man of great character who has put a lot of work, time and money into his business. He said that if Mr. McKinney had known renting his property would violate his CUP he wouldn't have done so.

Dan Dillman, 350 Williams Street, who said that he's devastated by the loss of life and cannot imagine the pain the families are going through, indicated that he didn't come to the BZA meeting either to judge or to support the business owner, the BZA or staff, but to point out several facts. He said that he witnessed the business owner passing out marketing material at the BZA meeting on September 1, 2011 stating that he would be doing monthly events. He said that he assumed staff was fully aware of this, and at minimum, staff should have been privy to the marketing material on the business owner's website as part of vetting the business owner and his plans and should be held accountable for the lack of due diligence. Mr. Dillman said that as he understands it, the CUP in question does not explicitly prohibit renting the property or having events, and further stated that property owners and business owners have a right to hold private parties at their property at least three times a year without a permit. He noted, too, that no one has suggested shutting down Wal-Mart despite two shootings within the last month. Considering its low prices and limited supplies create chaos and unruly crowds, he said that it could be argued that Wal-Mart poses a public nuisance. Mr. Dillman also mentioned crimes at Bayfair Center properties, with no subsequent attempts to shut it down. He wondered whether the City, in an effort to hold someone accountable, might have wanted to shut down the Bal Theatre (which he owns) if he'd been hosting an event the night there was a shooting on the nearby Flyers property. He said that bad things happen, but it shouldn't prompt a rush to judgment.

Jesse Rieder, 2659 Williams Street, San Leandro, said that he's a business owner in the City and has known Mr. McKinney for a few years. He said he's a fabricator who makes all the parts and retrofits the trailers for Mr. McKinney's company. He described Mr. McKinney as a "definite asset" to the City, a tremendous businessman and a good friend.

John Hopson, 2549 Williams Street, San Leandro, said he works with Mr. Rieder, and they use materials from San Leandro. Due to the volume of business they get from Mr. McKinney, he said that if Mr. McKinney can no longer operate in San Leandro, he said he fears that he, too, might have to move elsewhere.

Tre Jackson, 16521 Brock Way, San Leandro, said that he's a good friend of Mr. McKinney's and has helped him with his business. Having grown up in Oakland, Mr. Jackson said it's unfortunately not surprising to him how humans can behave. He said that Mr. McKinney did not mislead the City, and that his flyer indicated he would be having community events, and the September 30, 2011 event was the first in more than 700 days that Mr. McKinney has been a tenant at the location. Mr. Jackson said that he believes the tragedy is being used to bring Mr. McKinney's CUP under scrutiny, and urged the BZA to recognize that Mr. McKinney is a hard-working father with a career who put up everything to invest in his dream to open up a business, and it would be hard to "pull out the rug out from under him" due to savagery that was beyond his control. He said that Mr. McKinney needs more than a slap on the wrist, but doesn't need his dream and efforts to be snatched from him, either.

Acting Chair Houston asked Mr. Legallet to return to the microphone, and inquired when the LLC was established in relation to the closure of the leather tanning business. Mr. Legallet explained that the two were not related. His father’s generation shuttered the leather tannery, he said, but he’d learned from his father and uncle about rehabilitating antiquated single-use buildings and converting them into productive, economic, affordable smaller spaces. The 97,000-square-foot Gardco building was acquired in 2005, with the intention of turning it into 26 units, and his father and uncle primarily served as mentors and advisers. The LLC, comprised for the most part of silent, passive investors, started renting the spaces in 2007. Sole proprietors/entrepreneurs occupy the majority of the building’s 2,000-square-foot spaces. One unit contains 8,000 square feet. Mr. Legallet said that as the managing member, he’s the active one in the LLC, signing leases, paying bills, etc.

Member Palma said that C&M Trailer received its CUP in September 2011, but Mr. McKinney had indicated being at that location nearly two years. She asked what he’d been doing until applying for the CUP. Mr. Legallet said that based on what he observed, Mr. McKinney was in the process of getting his business off the ground, but it wasn’t yet active. He further explained that some of the units are rented by individuals solely to store personal effects.

In response to **Member Makin**, Mr. Legallet said that he was aware of Mr. McKinney’s intent to hold community events, because he saw the marketing material. He said, too, that “no” is his standard response to tenants who want to hold after-hours public events, and he was not aware that Mr. McKinney planned one.

Acting Chair Houston asked how many parking spaces are assigned to Mr. McKinney’s space. Mr. Legallet said that parking is first-come, first served, and the parking lot accommodates roughly 125 vehicles – at least whatever the code requires. Acting Chair Houston indicated that she had understood the event was expected to draw approximately 30 people, but more than 150 actually attended, which took it beyond its capacity.

Member Thomas said that he doesn’t recall receiving any marketing materials related to this business that involved community events. **Planner Penaranda** said that he doesn’t remember marketing materials. It was not part of the supporting statement for C&M Trailer Rental’s CUP.

Member Mendieta, referring to a statement of Mr. Dillman’s about Mr. McKinney’s plans to hold public events, said that he has no recollection of anything being stated in regard to such events. **Secretary Barros** said she has no recollection of receiving marketing material and saw no mention of such within the minutes of the September 1, 2011 BZA meeting that pertain to the CUP discussion and action.

Motion to close public hearing

Mendieta/Thomas: 6 Aye, 0 No

Member Makin said aside from the gravity of the situation, the proximity of the violation to the time of the CUP approval is troubling. He could have understood a grand opening party or something of that nature. He also acknowledged that the number of things a business owner must comply with can be daunting, but it was clear what Mr. McKinney sought in his CUP application, and BZA members asked a lot of questions, including the hours of operation.

Member Makin said that Mr. McKinney referred to the CUP document in his packet during the September 1, 2011 meeting, so clearly he knew what he was agreeing to.

Member Palma said that at first the situation appeared pretty black-and-white. She said she's still not clear what happened and why on the night of September 30, 2011. She also said that the conditions of approval spell out clearly that the permitted use is to operate a trailer rental and sales business, and any change deemed minor could be approved by the Community Development Director. If Mr. McKinney wanted something else, she said, he could have come to the City or petitioned the Director to ask whether he could make extra money by renting out the space. Member Palma also said she did not understand Mr. Dillman's claim that business owners have an inherent right to hold other kinds of events at their facilities. She noted that Mr. McKinney's landlord himself would not have approved such a request. Member Palma said that she doesn't want to discourage small business owners, adding that it would really be a shame for other business people to suffer any repercussions as a result of this situation. She said it's a hard lesson to learn about how not to do business, but it's clear what should and should not have happened.

Member Mendieta said that it's clear a violation of the CUP occurred, and that his heart sank when he heard about the tragedy that resulted. He said that he certainly understands that Mr. McKinney never intended anything bad to happen, but things got out of control. He said that as Planner Penaranda had pointed out, the facility was not even equipped to accommodate the volume of people in the first place, and when more people than expected showed up, it should have been canceled. Mr. Dillman, in contrast to Mr. McKinney, Member Mendieta stated, has a CUP that allows him to hold public events at his place of business. At Mr. McKinney's place, it was an unauthorized activity that had tragic consequences.

Acting Chair Houston said that the BZA covered the very specific uses of the facility in the September 1, 2011 meeting, with many questions, including questions about the hours of operation. Mr. McKinney had indicated then that the business would be pretty much a 9-to-5 type situation, with customers coming in by appointment only. On occasions, he had stated that a customer might come in earlier or later, but not before 7:30 a.m. or after 7:30 p.m. Acting Chair Houston also stated that after examining all of the materials, she found no references to any public or community events. She said that this is a difficult situation, involving a good, well-liked tenant and a tragic loss of life.

Motion to accept staff recommendation to revoke CUP PLN2011-00021

Makin/Palma: 6 Aye, 0 No, 1 Recused (Daly)

Secretary Barros said that decisions of the BZA are final unless appealed to the City Council, and appeals may be filed with the City Clerk's office within 15 days of the BZA decision.