

BRENTWOOD RESIDENTS COALITION

January 25, 2010

West Los Angeles Area Planning Commission
200 North Spring Street, Room 532
Los Angeles, CA 90012

Re: Appeal of DIR/CEQA Determinations
Case No. DIR-2009-2905-SPP
CEQA: ENV-2009-2904-CE
Location: 11633 San Vicente Boulevard
Hearing Date: Wednesday, February 3, 2010

Dear Commissioners:

The Brentwood Residents Coalition's appeal of the Director's change-of-use determination must be granted because the applicant lacks code-required parking and has not sought nor obtained a variance or shared-parking variance. The owner of the building is currently required to provide 148 parking spaces for the tenant uses in the building's two structures and the building has only (approximately) 148 parking spaces.¹ The proposed restaurant usage, which would require an additional 25 parking spaces, cannot therefore be accommodated absent a properly issued variance or shared-parking variance. By the Director's Determination, however, the building has *37 more parking spaces than required* – the building owner could thereby lease out those 37 spaces for another use in another building, an arbitrary result given that the building's 148 parking spaces make it *256 parking spaces* shy of current code requirements. Consequently, the appeal filed by the Brentwood Residents Coalition ("BRC") must be granted.

Where, as here, code-required parking is not available, a change of use cannot be granted unless a variance has already been obtained. The variance process assures that deviations from the parking requirements are properly mitigated before a change of use is approved. The mitigation measures required by the variance procedures include, in the case of a shared-parking variance, a detailed and thorough parking analysis and recorded covenants

¹ The number of actual parking spaces has not been verified. While the applicant claims there are 150 parking spaces, the building owner, Douglas Emmett, states that there are approximately 148 parking spaces, which is the number of spaces that have been required since 1983. See *Exh. 10* (previously submitted), p. 1.

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to assure that shared or alternative parking is always available. The change-of-use determination must therefore be reversed and, if the applicant desires to pursue a change of use in the future, he must first obtain a variance.

The hearing on this appeal should not be continued for later hearing in connection with the BRC's pending appeal of the Conditional Use Beverage Permit ("CUB"). The Municipal Code explicitly requires that a deviation from code, including shared-parking variances, are subject to the public procedures required for variances. A CUB is not a substitute for a variance because a change of use is not for a particular restaurant. It is for the space. Once a change of use to restaurant is granted, the space can be used for any restaurant – not just the restaurant proposed at the time the change of use is granted. Restaurant usage is a permitted use on the San Vicente Corridor. A restaurant space can therefore be operated unrestricted by any CUB conditions if the restaurant operator chooses not to serve alcohol. Thus, the only way to guarantee that adequate parking is available (despite the absence of code-required parking) is through the variance process.

1. A change-of-use permit cannot be issued if the building owner lacks capacity to provide the required parking. The Director's Determination approves the change-of-use application because it concludes that the building owner has sufficient parking capacity for the proposed restaurant use. That determination is incorrect because (1) the building owner is already required to provide *148 parking spaces* for the two structures, comprised of *28 spaces* for the original structure and *120 spaces* for the addition; (2) only approximately *148 parking spaces* are provided; and (3) the proposed restaurant would require an additional *25 parking spaces*, which is *25* more than the existing capacity.

2. The requirements to provide 28 and 120 parking spaces for the original structure and addition, respectively, are grandfathered. Section 12.23.B.8(a) of the Municipal Code authorizes the *grandfathering* of existing parking despite a change of code that would otherwise require additional parking. The building owner's obligation to provide 28 parking spaces for the original structure and 120 spaces for the addition, both of which are below current code requirements, are grandfathered rights under Section 12.23.B.8(a).

3. The Municipal Code does not authorize a reduction of grandfathered parking due to a change of use. Section 12.23.B.8 of the Municipal Code addresses the circumstances under which a change of use will trigger a *change* of grandfathered parking requirements. It permits an increase in the number of parking spaces, not a decrease of grandfathered parking. Subparagraph (b) partially preserves the benefit of grandfathered parking if there is a *change of use* that requires *additional* parking spaces. But Section 12.23.B.8 does not authorize a reduction of grandfathered parking due to a change of use.

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The building owner is required to either comply with the grandfathered parking requirement or, if a change-of-use reduction is desired, the owner must take the change-of-use reduction from current code-required parking, not the below-current-code grandfathered parking. Had the City intended to allow change-of-use reductions from grandfathered parking, it would have specified that entitlement in Section 12.23.B.8. It did not do so. **Thus, grandfathered parking cannot be *reduced* by a change of use.** A variance or shared-parking variance are the *only* procedures for *reducing grandfathered parking*. A variance or shared-parking variance requires compliance with the strict safeguards under Municipal Code Sections 12.24 X.20 (shared parking) and 12.27C (variance).

4. Parking spaces required for daytime use cannot be “shared” with the proposed nighttime restaurant use absent a properly issued *shared-parking variance*. At the January 6, 2010 hearing, Commissioner Foster asked Planning Assistant Susan Robinson how she calculated that the building-owner was only required to provide 106 parking spaces, not 148 parking spaces. Instead of answering that question, however, Betsy Weisman, Principal City Planner, responded that the calculation of required parking is “irrelevant” and a “red herring” because, according to Ms. Weisman, there are 110 parking spaces used by medical office tenants (other than UCLA, which has 40 reserved parking spaces) and the medical office tenants “presumably” do not use those spaces in the evening. Based on that presumption, Ms. Weisman concluded that “it doesn’t really matter” whether the building owner is currently required to provide 148 or 106 parking spaces because the proposed restaurant is limited to nighttime operations (although a change-of-use designation would allow future restaurants in the same space to operate at lunchtime by right) and it can presumably share parking allocated to other tenant uses in the daytime. Ms. Weisman’s conclusion, however, would amount to an over-the-counter variance, in violation of the Municipal Code’s requirement for a public procedure for shared-parking variances.

Municipal Code Section 12.24 X.20 expressly provides that *only* a Zoning Administrator can issue a shared-parking variance and, in doing so, the ZA must comply with the strict procedural safeguards for issuing a variance. That has not been done in this case. While the applicant may now seek a shared-parking variance, once the change-of-use application is denied, issuance of a shared-parking variance is not a mere formality:

1) The ZA must base the permitting decision upon a parking analysis. Under 12.24 X.20 subparagraph (a), the ZA must approve a parking analysis. This code-required parking analysis “shall be conducted on an hourly basis, 24 hours per day, for seven consecutive days.” The parking analysis would require consideration of employee parking needs

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prior to the time of opening, before “evening”-designated parking spaces would be available. Nothing like this type of detailed analysis has been attempted for the Jon Douglas Medical Building since 1983, nor could it properly be conducted outside the *public procedures* required for a shared-parking variance.

2) The building owner, not just the tenants, must execute and record the necessary covenants. The ZA, in finding that shared parking is permissible after a duly notice and conducted public hearing, must require the filing and recording of documentation, including covenants and deed restrictions, necessary to assure that the requisite number of parking spaces will be available for all shared uses. The building owner must record a covenant because the covenant must bind the shared users (not just the restaurant tenant) and must also bind any future restaurant business in the same tenant space. Mere valet contracts, such as those submitted by the applicant, are grossly insufficient. Those contracts are terminable by either party on 30-days notice and, most importantly, do not bind the building owner. Moreover, covenants must be recorded to preclude restaurant operations in the space at hours of the day when adequate parking is not available.

3) A shared-parking variance shall not be provided for reserved or otherwise restricted parking spaces. Subparagraph (a)(3) precludes shared parking of restricted parking spaces. There are reserved parking spaces in the parking structures, in addition to the reserved UCLA parking, which cannot be counted for purposes of shared parking. A parking analysis, performed under ZA supervision and subject to the public process, is necessary to determine the number of shared parking spaces available for the applicant.

5. CUB conditions are no substitute for a shared-parking variance. A change-of-use permit allows *a tenant space* to be used as a restaurant. Once the space is designated for restaurant usage, the entitlement stays with the space, regardless of who owns the restaurant or how it is operated. A CUB, by contrast, conditions the operation of a restaurant *only* if it is an alcohol-serving restaurant operating under the particular grant. The change-of-use determination is not therefore specific to the applicant’s proposed restaurant, “Stuzzichini.” If the applicant’s plan for a “tapas bar” is unsuccessful or otherwise closes (or never even opens), the change-of-use entitlement would nevertheless stay with the space – long after Stuzzichini is gone. And if a non-alcohol serving restaurant opens, none of the CUB conditions would apply – including conditions

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limiting the hours of operation. Indeed, a lunch-serving restaurant without alcohol service would be entitled to open as a matter of right, despite the lack of parking. That is why a change of use cannot be granted without code required parking unless a variance or shared-parking variance has already been granted. Variances, not mere CUBs, are required to protect the community.

6. Parking requirements for the Building's two structures are separate. Municipal Code Section 12.23.B.8(c) provides that parking requirements for a grandfathered structure and parking requirements for an addition to that grandfathered structure are *separate*. Thus, contrary to Planning Assistant Susan Robinson's testimony, parking reductions allocated to uses in one structure are separate from and cannot therefore be re-allocated or combined with uses in another structure. See Exhibit 20 (previously submitted), which is the City's calculations for the separate parking requirements for each structure.

7. The 1985 DRB determination did *not* reduce parking to 106 spaces. The Staff Report assumes that there was a reduction of parking requirements from 28 and 120 spaces for the Building's original and addition structures to a *combined* total of just 106 parking spaces when, in 1985, the San Vicente Design Review Board ("DRB") approved a change of use from medical to retail for the original building. The DRB determination (attached as Exhibit 3, previously submitted) did not reduce and could not have reduced the grandfathered parking for *either* structure. *First*, grandfathered parking cannot be *reduced* due to a change of use – only a variance or shared-parking variance issued by a Zoning Administrator can effectuate a reduction of grandfathered parking, and that did not occur. *Second*, the DRB did not even purport to reduce parking and its determination stated no findings (nor did it even mention parking requirements). Indeed, The DRB determination states that "[t]he existing medical building *is part of a larger project which had previously been approved as [DRB] Case No. 83-021,*" which reduced parking for the 20,200 square foot addition from the code-required 161 parking spaces to 120 spaces. *Exhibit No. 19* (previously submitted). *Third*, if the DRB attempted to reduce parking below grandfathered parking for either of the two structures, it would have violated Municipal Code provisions because only a ZA can grant a variance based on the specified procedural requirements and mandated findings, and the Brown Act would also have been violated for failure to provide notice and a public hearing for a variance. *Fourth*, parking requirements for the two structures have always been separate (*Exh. 20*) and are required to be separate under Section 12.23.B.8(c).

8. The proposed change of use would increase the building-owner's parking requirement by 25 spaces, which is approx. 25 spaces more than the capacity. The proposed restaurant use would intensify the parking demand for the 2,120 square foot

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tenant space by changing the use from retail, which requires 3.33 parking spaces per 1,000 square feet, to restaurant, which requires 15 spaces per 1,000 square feet. (The 15 spaces per 1,000 square foot requirement applies because, as demonstrated in the BRC's December 29, 2009 letter, the Jon Douglas Medical Building is *not* a Shopping Center.) Applying Municipal Code Section 12.23.B.8(b) for a change of use that *increases* grandfathered parking, the net increase is 25 parking spaces, which is 25 spaces more than the building owner's 148-space parking capacity.² Thus, code required parking cannot be provided for the proposed change of use. Further, the applicant has submitted several valet-parking contracts for the use of parking in other buildings. This is an implied admission that the building owner lacks sufficient parking to accommodate the proposed restaurant use. These valet contracts are no substitute for a variance and if a variance was sought, particularized parking-space specific covenants would be required, not merely a collection of valet contracts that are likely used for a number of other restaurants.

9. The Director's Determination would improperly exempt *another 67* required parking spaces,³ leaving the Building 256 parking spaces below current code requirement. The various uses in the Jon Douglas Medical Building would be required to provide 375 parking spaces under current code requirements. (See Exhibit 1, attached.) But according to the Director's Determination, the existing requirement is just 106 parking spaces – the calculation of which is nowhere explained in that report or elsewhere – plus 13 spaces for the new restaurant space – based on mislabeling an Office Building as a Shopping Center. This is 256 parking spaces below the current (non-grandfathered) code requirement for the two structures. By the Director's Determination, the owner of the Jon Douglas Medical Building would *have 37 more parking spaces than required* after the new restaurant opens. By that calculation, *the owner could lease out those 37 spaces to restaurants or other businesses in other buildings.* This arbitrary result illustrates why the Municipal Code does not authorize a change-of-use reduction of grandfathered parking.

² Grandfathered retail parking is 7 parking spaces (3.33 spaces per 1,000 sq. ft. x 2.120). Restaurant parking under current code is 32 spaces (15 spaces per 1,000 sq. ft. x 2.120). Applying Section 12.23.B.8(b), the existing, grandfathered parking (7 spaces) is subtracted from the current code-required parking (32 spaces), resulting in a total of 25 parking spaces.

³ The Director's Determination would technically exempt 54 parking spaces (42 spaces in 1985 and 25 minus 13 spaces now, for a total of 54 spaces). But given that there is *no capacity* for the additional 13 spaces that the Director's Determination allocates to the new restaurant, the effective exemption totals 67 parking spaces.

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10. CUB conditions and the applicant’s anemic “parking plan” are irrelevant to the change-of-use determination. The building owner lacks the parking capacity to accommodate the code-required parking for a change of use to restaurant. Absent a variance or shared-parking variance issued by a Zoning Administrator, neither of which have even been applied for, much less obtained, a change of use cannot be granted. Thus, the impropriety of the change-of-use determination is *not* based on a discretionary error that might be cured by conditions imposed through the CUB or change-of-use process. The applicant has also submitted what it characterizes as a parking and traffic plan. The “plan,” which is based on conditions to the issuance of its CUB, does not qualify as a parking analysis under the shared-parking variance ordinance. Moreover, the valet parking conditions, which provide for shared parking and loosely provide for off-site parking not covenanted by the building, cannot be used to satisfy the parking requirements. Shared parking can only be authorized through the shared-parking variance process as required by code, a public process, which has not been initiated.

Finally, the BCC Chair’s testimony about conditions is immaterial to the change-of-use process and the shared-parking variance requirements. Raymond Klein, Chair of the Brentwood Community Council (“BCC”), appeared before the Commission at the January 6, 2010 hearing on the BRC’s appeal of the change-of-use determination and stated: “I don’t understand exactly what is going on or what’s before you because I didn’t think this was a discretionary hearing about the adequacy of parking.” The BRC’s appeal of the Director’s Determination, however, is based on a non-discretionary error in determining the code-required and available parking. Mr. Klein seemed to urge the Commission to disregard the BRC’s appeal because he said that conditions negotiated by the BCC, incorporated into the CUB, eliminate any concern about the adequacy of parking. But Mr. Klein appears not be aware that code requirements for parking cannot be avoided absent a public variance procedure. The findings required for a variance are different than the findings required for a CUB. His suggestion that conditions negotiated by the BCC somehow avert the need for a public variance process is contrary to Municipal Code Sections 12.24 X.20 (shared parking) and 12.27C (variance).

Mr. Klein’s proposal to avoid code-mandated public variance procedures is particularly troubling given that the very BCC negotiations that he would substitute for the public variance procedures have themselves been shrouded in secrecy even within the BCC. In October 2009, Mr. Klein instructed BCC Member Bryan Gordon (not related to applicant Mike Gordon) to negotiate conditions with the applicant, without even notifying the Chair of the Land Use Committee (Wendy-Sue Rosen), the Co-Vice Chair of the Land Use Committee (Donald G. Keller), or other members of the Committee that such private negotiations were occurring. *See Exh. 27, attached.* In choosing Bryan Gordon to conduct the private negotiations, Mr. Klein selected the BCC Member least

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likely to prioritize community concerns over commercial interests. Bryan Gordon is the Business District's representative on the BCC, responsible for representing the business interests in the district. He also owns commercial property on the San Vicente Corridor, a block away from the Jon Douglas Medical Building. Mike Gordon, the applicant, stated at the January 6, 2010 hearing before this Commission that "there is even a member of the Brentwood Community Council who stated that they have about 50 spaces available if you want to lease them, and that's a block away."

Not only were the conditions negotiated in private between Bryan Gordon and Mike Gordon, they have never been approved by the BCC Board or its Executive Committee. See *Exhibit 27*. Further, Mr. Klein's comments at the January 6, 2010 hearing about the BCC's position were inconsistent with the BCC's actual position, which is stated in his November 12, 2009 letter to Zoning Administrator Lourdes Green in the CUB proceedings, attached as *Exhibit 28*. "The BCC *continues to oppose the application*" for a CUB, but it submitted conditions to the ZA pursuant to her request for conditions. That is not an approval of the project. Moreover, the conditions were explicitly "subject to" the "requirement that the Toscana restaurant in the same building and under common control be brought into compliance with its CUB, either by removing seats or amending the CUB." *Id.* Toscana, however, has never come into compliance with its CUB. It is currently operating at $2\frac{1}{2}$ times its approved CUB capacity of 40 seats – see October 28, 1988 CUB for Toscana, attached to the Director's Determination (Nov. 18, 2009) – by seating approximately 70 patrons in the main dining room and another 32 patrons in "The Cellar at Toscana." The (privately-negotiated) conditions were never intended to be implemented without Toscana first coming into compliance – thereby reducing the parking and traffic impacts.

The BCC's behind-closed-doors negotiations with the applicant illustrate just how improper it would be to substitute the BCC's *private negotiations* for the *code-mandated public variance procedures*. Additionally, there is no reason to believe that the conditions for the proposed restaurant's CUB will be complied with. The applicant has been flouting similar conditions applicable to Toscana for years. The Toscana conditions have not been enforced and there is no reason to believe that the new conditions will be enforced. The variance process, by contrast, would require covenants and enforceable conditions.⁴

⁴ The conditions are improper for the reasons specified in the BRC's appeal of the CUB determination. However, an assessment of the conditions is immaterial to the merits of this change-of-use appeal.

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The Director's change-of-use determination is, in effect, both (1) a retroactive and procedurally invalid "variance" exempting 42 parking spaces on the spurious theory that such a "variance" was silently (and therefore illegally) granted by the DRB (not a ZA) in 1985, and (2) a current and procedurally improper "variance" exempting another 25 parking spaces, which is likewise illegal, for a total of 67 improperly exempted parking spaces. (See footnote 3 for the calculation.) The Area Planning Commission must therefore grant the BRC's appeal to avoid this gross violation of code requirements for variances and shared-parking variances.

We ask that the Commission grant the appeal and make the following findings:

- (1) The change-of-use determination must be reversed because the building lacks code-required parking, thereby prohibiting a change of use from retail to restaurant;
- (2) The proposed restaurant requires an additional 25 parking spaces;
- (3) The Jon Douglas Medical Building is not a Shopping Center;
- (4) There is a reasonable possibility that the requested change of use from retail to restaurant for a second restaurant will have significant adverse environmental impacts on parking, traffic congestion, traffic safety, and the peace and tranquility of the neighboring residential areas, which necessitates environmental review under CEQA.

Respectfully submitted,



Wendy-Sue Rosen



Thomas R. Freeman

EXHIBIT 1

Parking Chart
11633 San Vicente Blvd.

Table No: 1

1957: 26, 275 Square Foot Medical Office Building Constructed

<i>Year</i>	<i>Description</i>	<i>Square Footage</i>	<i>Code Parking</i>	<i>Parking Permitted by the City</i>	<i>Exemption</i>
1957	Original Medical Building	26,275		28 spaces per 1957 COO	

Table No: 2

1983: Case No: 83-517 (SPE) Addition of 20,200 square feet of Medical Offices -- Additional Parking Required

<i>Year</i>	<i>Description</i>	<i>Square Footage</i>	<i>Code Parking</i>	<i>Parking Permitted by City</i>	<i>Exemption</i>
1983	Original Medical Building	26,275	210 (8/1000) Per Specific Plan	28 spaces due to grandfathered parking rights	-182
1983	Medical Office Use Addition to Rear of Building	20,200	161 (8/1000) Per Specific Plan	120 parking spaces Parking reduced per Case No: 83-517	-41
1983	Original Building + Addition	46,475	371	148 parking spaces required	-223

Table No: 3

1985: Case No: 85-027 -- Remodel 1st Floor from Medical to Retail -- No Change in Parking

<i>Year</i>	<i>Description</i>	<i>Square Footage</i>	<i>Code Parking</i>	<i>Parking Permitted by the City</i>	<i>Exemption</i>
1985	Medical to Retail 1 st Floor of Remaining Medical Offices of Original Medical Building	8,980 <u>17,295</u> 26,275	30 (3.33/1000) <u>138 (8/1000)</u> 168	28 -- No Change Due to grandfathered parking rights	-140
1985	1983 Medical Offices Addition	20,200	161 (8/1000)	120 -- No Change Per Case No: 83-517	-41
1985	Original Building + Addition	46,475	329	148 parking spaces required	-181

Parking Chart

11633 San Vicente Blvd.

Table No: 4

1988: Case No: ZA 88-0990 (CUB) Change of Use from Retail to Restaurant on 1st Floor -- No Change in Parking

<i>Year</i>	<i>Description</i>	<i>Square Footage</i>	<i>Code Parking</i>	<i>Parking Permitted by the City</i>	<i>Exemption</i>
1988	Retail to Restaurant 1 st Floor	1,872	28 (15/1000)	28 -- No Change	-161
	Remaining Retail 1 st Floor	7,108	23 (3.33/1000)	Due to grandfathered parking rights + Case No: ZA 88-0990 (CUB)	
	Remaining Medical Offices of Original Medical Building	<u>17,295</u>	<u>138 (8/1000)</u>		
		26,275	189		
1988	1983 Medical Offices Addition	20,200	161 (8/1000)	120 -- No Change Per Case No: 83-517	-41
1988	Original Building + Addition	46,475	350	148 parking spaces required	-202

Table No: 5

2009: Case No: DIR 2009-2905-SPP-1A Change of Use from Retail to Restaurant on 1st Floor -- Additional Parking Required

<i>Year</i>	<i>Description</i>	<i>Square Footage</i>	<i>Code Parking</i>	<i>Parking Permitted by the City</i>	<i>Exemption</i>
2009	Retail to Restaurant 1 st Floor	2,120	32 (15/1000)	28 + 25 = 53	-161
	Remaining Restaurant 1 st Floor	1,872	28 (15/1000)	28 Grandfathered parking spaces + *25 additional parking spaces required for change of use from retail to restaurant	
	Remaining Retail 1 st Floor	4,988	16 (3.33/1000)		
	Remaining Medical Offices of Original Medical Building	<u>17,295</u>	<u>138 (8/1000)</u>		
		26,275	214		
2009	1983 Medical Offices Addition	20,200	161 (8/1000)	120 -- No Change Per Case No: 83-517	-41
2009	Original Building + Addition	46,475	375	173 parking spaces required	-202

* Note:

2,120 (15/1000 for restaurant use) = 32

2,120 (3.33/1000 for retail use) = 7

32 - 7 = 25 parking spaces required for change of use from retail to restaurant