

Kathy Flamson

From: Dylan Feik
Sent: Friday, July 13, 2018 10:35 PM
To: Kathy Flamson
Subject: Fwd: Real Estate Formula Business Appeal

FYI.

Begin forwarded message:

From: Leslie Wilkes
Date: July 13, 2018 at 2:33:06 PM PDT
To: Chris Canning <ccanning@ci.calistoga.ca.us>, Jim And Bev Barnes <jbarnes@ci.calistoga.ca.us>, gkraus@ci.calistoga.ca.us, mdunsford@ci.calistoga.ca.us, Irais Lopez-Ortega <ilopez-ortega@ci.calistoga.ca.us>
Cc: dfeik@ci.calistoga.ca.us
Subject: Real Estate Formula Business Appeal

City Council Members,

I am aware that the real estate applicant is receiving a great deal of support from friends and fellow merchants for you to overturn the denial of her application. Much of her support appears to be based on the fact that she was raised in Calistoga, and that she would be occupying a long-vacant building that everyone would like to see occupied.

Understanding this, the question before you is - do you decide in favor of this sentiment at the risk that having done so, you would potentially void the enforceability of the entire Formula Business Ordinance?

I know of no evidence that the local community is currently under served by the existing multiple real estate businesses in Calistoga.

If there is no rationale that the community needs aren't being met then there is no rationale to make an exception to the Formula Business Ordinance.

Sincerely,
Leslie Wilkes

CORRESPONDENCE RECEIVED: ITEM I-7

SCOTT ATKINSON
2103 Oat Hill Court
Calistoga, CA 94515-1171
(707) 303-0010
E-Mail: atki@sonic.net

July 15, 2018

To: Calistoga City Council
RE: Sandy Tucker Appeal UP 2018-5

Honorable Mayor & Members of the Council:

I am writing this letter in support of Sandy Tucker. Her project should be allowed to continue forward for the betterment of the community.

I spent over ten years on the Calistoga Planning Commission including many years as Chairman. I am also a lifelong Calistoga resident. The original attempt to put a formula business ordinance on the books occurred while I was on the planning commission. The commission at that time turned the ordinance down because we felt it would not hold up to a legal challenge. This came after many discussions with the League of California Cities and specific communities who had one, or attempted one in their own communities. I firmly believe the only reason a formula business ordinance remains in our municipal code is that it has never been challenged by someone with the financial resources to do so. Once that challenge happens, I believe the City will come out on the losing end.

The City recently approved an expansion of Solage, which if you read every piece of marketing literature they put out, ties them to the Auberge Resorts. That alone would be cause for a legal challenge. 17.04.132 (A) defines a formula business as a "Business name common to a similar business located elsewhere". How many of the (too) many tasting rooms on Lincoln Avenue in Calistoga are affiliated by name and ownership with a winery facility located separately from the tasting room? Any more than one of them, is also a sign of lack of consistency in the ordinance.

The intent of the formula business ordinance has always been to keep companies such as McDonald's, Starbucks, and other chain food restaurants out of Calistoga to maintain the small town (funkiness was a term bantered about for many years) charm. It was never designed to punish a local businesswomen from establishing a small office that has a square footage similar to a 2 car residential garage.

Saving one dog will not change the world, but surely for that one dog, the world will change forever.

July 15, 2018
Scott Atkinson
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I would much rather see this office located in this building rather than another tasting room. Real Estate firms by their nature are much more local-serving than a tasting room. It also would be a thousand times better than the current use, which is (another) empty Lincoln Avenue building. We have too many of those already, and this particular building has been a vacant eyesore for many years.

Doing business in the State of California has been constantly rated as one of the most difficult in the country. Even in regards to this project, Ms. Tucker was originally given the green light by city staff, paid her fees and did significant improvements before all work was ordered stopped. These delays come at significant financial hardship to a small business. By allowing her to get as far along as she did, staff must have felt the project was in compliance.

This community is already concerned about the direction recent council actions have had on the community. Many in the community are of the opinion that the council is too much pro tourism and mega resort complexes, while driving local business away from the Calistoga. This is a solid opportunity for the council to do the proper and correct thing by approving Ms. Tucker's application.

Sincerely,



Scott Atkinson

CORRESPONDENCE RECEIVED
ITEM I-7



LAW OFFICES OF TINA WALLIS

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Santa Rosa, California 95404 www.twallislaw.com

July 16, 2018

Calistoga City Council
City Hall
1232 Washington Street
Calistoga, CA 94515

Re: Appeal from Planning Commission Denial of Use Permit UP 2018-5 for Realty Office,
1437 Lincoln Avenue

Dear Councilmembers:

My office represents the Kala Group, the applicant for use permit (UP 2018-5) for a real estate office named “NextHome in the Valley” at 1437 Lincoln Avenue in Calistoga. The Planning Commission denied the Kala Group’s use permit application on June 26, 2018. Sandy Tucker, the president of Kala Group and a licensed realtor with deep roots in Calistoga, appealed the Commission’s decision on June 28, 2018.

This letter explains the legal basis for this appeal, and why approval of Ms. Tucker’s use permit will benefit the unique, small-town “feel” of Calistoga and the City’s economic interests as well, sending a message that independently owned, innovative, technology-savvy small businesses can set up shop in Calistoga and compete on a level playing field. The City committed to this vision when it adopted or approved its “formula business” ordinance and the policies and goals in the Land Use, Economic Development, and Community Character Elements of the City’s General Plan.

Background

Ms. Tucker began the process of opening her real estate office in early February of this year. Her site at 1437 Lincoln has been vacant for a long time and the City was enthusiastic about having someone ready and willing to revitalize the property. She asked City staff whether Planning Commission approval would be necessary, because of her affiliation with NextHome, and was informed that because her business was independently owned and operated, it was not a “formula business” and would not require a use permit. She then obtained a business license from the City and took preparatory steps, including spending about \$50,000 in reliance on information City staff provided.

Ms. Tucker was almost ready to open for business when the City Manager told her, for the first time and contrary to all other staff representations, that she must obtain a conditional use permit because the real estate office she proposed was a “formula business.”

NextHome is a web-based provider of real estate technology services, tools for marketing, and support for realtors. To use the services, realtors must have experience and an established track



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record. The organization helps realtors attract a younger, technology-oriented clientele, but does not impose any policies, procedures, business plans or formulas dictating how the realtor should run her business. The branding and signage requirements are minimal, and Ms. Tucker is already developing her own unique branding strategy very much in keeping with the charming boutique business aesthetics of the downtown. As reflected in the Planning Commission's June 26, 2018 minutes, Ms. Tucker worked closely with City staff "over several months, to determine how best to achieve her goal of opening a real estate office affiliated with a nationwide real estate service."¹

The Staff Report to the Planning Commission provided analysis of required use permit findings, formula business ordinance provisions, and consistency of the proposed use with the General Plan, concluding that Ms. Tucker's proposed use met all of the legal and policy-based requirements for a use permit. Thus, **staff recommended that the Commission approve the use permit.**

A. *The Planning Commission prejudicially abused its discretion by failing to follow legal standards of statutory interpretation and making underground amendments to the formula business use permit requirements.*

The essential provisions of the City's formula business ordinance are: formula restaurants and visitor accommodations are prohibited, but otherwise permissible uses (for the applicable zoning district) meeting the definition of a formula business are allowed with a conditional use permit. When the plain language of an ordinance is clear, decisionmakers must interpret the requirements based on the plain language of the ordinance.² Unambiguous language must be given its plain meaning, and rules of statutory construction are applied only if there is ambiguity or a conflict in the provisions or if a literal interpretation would lead to absurd consequences.³

The Commissioners who voted to deny Ms. Tucker's permit added requirements not included in the plain language of the ordinance and relied on speculative opinions about the history of the formula business provisions. Commissioner Wilkes said:

[The] last portion of the ordinance provides for businesses that are local-serving, but the ordinance includes no detailed definition of what constitutes 'local serving.' **Certainly a real estate office is local-serving**, but it also serves non-locals. . . . [The] formula business ordinance is meant to allow the kinds of businesses that cannot occur unless there is a larger or national affiliation, such as banks. . . . Independent gas stations don't have [local access to gas], so a national affiliation is necessary. However, it's not a

¹ Minutes of June 27, 2018 Planning Commission Meeting ("6/27 PC Minutes"), p. 3.

² *Torres v Parkhouse Tire Serv., Inc.* (2001) 26 Cal.4th 995, 1003

³ *Castaneda v. Holcomb* (1981) 114 Cal.App.3d 939, 942.



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requirement for a real estate business; Calistoga Realty and Beck & Taylor exist without it.^{4,5}

Except for his reference to the “local-serving,” Commissioner Wilkes’s comments are an underground amendment to the formula business requirements because he impermissibly added language to the ordinance that does not exist. A city official may not informally rewrite the language of city ordinances.⁶

Commissioner Coates also added a requirement to the list of required findings for approval of a formula business use permit. He “agree[d] that **the requested use permit meets the findings criteria overall**,” but asserted that this was not enough, stating that “It’s allowable, but it doesn’t rise to the occasion.”⁷ The Commission cannot add new and arbitrary standards beyond the existing ordinance. The Commission’s failure to follow the City’s ordinance when considering Ms. Tucker’s permit application, and its underground amendments to the City’s formula business requirements, was a prejudicial abuse of discretion.

B. Approving the use permit does not set a precedent.

The Commission expressed concern that Ms. Tucker’s application is a matter of “first impression” that would threaten the “very precious and fragile ordinance.”⁸ This is not accurate. Since 1996, when the City began regulating formula businesses, other applications have been reviewed and either approved or denied. Generally, adjudicatory actions by a local agency do not establish precedent that has legally binding effect on subsequent agency decisions.⁹ It is legally impossible for an adjudicatory decision on a use permit to “set a precedent” for any future use permit application or “open the floodgates for a McDonalds.” Basic fairness and due process require the City to consider each adjudicatory matter on its own merits.

⁴ 6/26 PC Meeting Minutes, p. 4.

⁵ The ‘formula business ordinance’ has several parts: definitions of formula business, formula restaurant and formula visitor accommodations in sections 17.04.132, 17.04.616 and 17.04.639; conditional and prohibited uses for the Downtown Commercial (DC) district in sections 17.21.030 and 17.21.050; conditional and prohibited uses for the Community Commercial (CC) district in sections 17.22.030 and 17.22.050, and required findings for conditional use permits in section 17.40.030, specifically the last finding in subdivision D. 5. requiring a finding that the proposed use be “resident-serving, in the case of a formula business.”

⁶ *City of Pasadena v AT&T Communications of Cal., Inc.* (2002) 103 Cal.App.4th 981, 984.

⁷ 6/26 PC Minutes, p. 5, emphasis added.

⁸ Vice-Chair Wilkes, 6/27 PC Minutes, p.4.

⁹ *Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 42 [under Administrative Procedure Act (“APA”), Gov. Code, § 11410.60, agency decision could not circumvent rulemaking process]; *Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 Cal.App.4th 81, 91 [although APA does not control hearings before local agencies, its provisions exemplify the elements of a fair procedure].



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Because adjudicatory actions cannot have precedential effect, the formula business ordinance has withstood multiple tests and no “floodgates” have opened. Notably, the City approved Copperfield Books in 1999 (ultimately determined not to be a ‘formula business’ due to its private ownership, much like Ms. Tucker’s independent ownership and operation of her real estate business affiliated with NextHome), a gas station-convenience store on the corner of Lincoln Avenue and Foothill, and, in 2003, a “Curves 30-Minute Fitness Center” gym franchise previously located at 1133 Washington Avenue.¹⁰

In recommending approval of the Curves fitness franchise, City staff noted that

[A]lthough Curves is a national corporation or franchise, this particular application does not present a design that is applied to its other locations. The exterior of the building (i.e., colors and signs) is unique to Calistoga promoting the community’s objective to enhance Calistoga’s history of independent, unique and single location businesses which contribute to the town’s uniqueness and its local economy.¹¹

Approval of this highly-recognizable formula business 15 years ago did not break the formula business ordinance, nor did it subject the City to a flood of new chain store use permit applications. As an adjudicatory action, it did not set a legal precedent. However, Curves is an example of a formula business that benefitted Calistoga residents, supported the City’s economic development goals, and preserved the overall character of the downtown. Similarly, Ms. Tucker is maintaining the building as an independently owned, unique businesses that will contribute to the local economy. She is restoring a large mural on an interior wall of the office depicting scenes of historic.

Ms. Tucker’s real estate business is a resident-serving, independently-owned business with appropriate design features. Approving Ms. Tucker’s permit is an adjudicatory act that does not set a legal precedent.

C. The proposed use meets all the requirements for a formula business conditional use permit, is consistent with the General Plan, and supports the City’s economic development goals and objectives.

Calistoga regulates formula businesses to preserve the “unique and historic character of [the City’s] downtown commercial district and appearance of the downtown”¹² by strictly prohibiting

¹⁰ See attached PC Staff Report, August 27, 2003 (“8/27/03 PC Staff Report”) and Conditional Use Permit No. U 2003-8.

¹¹ 8/27/03 PC Staff Report, p. 2.

¹² Planning Commission Staff Report, June 26, 2018 (“6/26/18 PC Staff Report”), p. 3.



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chain restaurants and visitor accommodations, while requiring a conditional use permit for other types of formula businesses. The flexibility of this policy is the key to its effectiveness and resiliency. Use permits formula businesses require that the proposed use is “resident-serving.”¹³ General Plan Land Use Element Policy P.1.1.-1 echoes this requirement, stating that exceptions to the general prohibition on formula businesses “may be made for businesses primarily meeting local residents’ and business owners’ needs.” Additionally, the Community Identity Element Community Identity Element Policy P.1.2.-9 allows formula businesses if they reflect Calistoga’s unique small-town qualities and do not include common design elements found in other communities. As Ms. Tucker previously communicated to City staff, she has worked with NextHome and obtained permission to modify signage and design elements in keeping with the unique and historic appearance of the downtown to ensure consistency with this policy.¹⁴

Despite Ms. Tucker’s credentials and the inherently local and unique nature of land and the localized nature of helping existing or potential residents find or sell homes in the area, two of the three voting Commissioners at the hearing opined that the proposed use is not sufficiently resident-serving. The proposed use easily meets the “resident-serving” finding requirement, as determined by both the City Manager and planning staff.¹⁵

A complete analysis of Ms. Tucker’s proposed use with the Land Use and Community Identity elements of the General Plan is provided in Ms. Wallis’s letter and the June 26, 2018 Staff Report prepared by Planning & Building Director Lynn Goldberg. The proposed use is also consistent with the Economic Development Element of the General Plan. Ms. Tucker is a Calistoga community member and local business owner. She wants to establish a physical office space in her home town to enable her to provide valuable, individualized, tech-savvy realty services to current and future Calistoga residents. The proposed use is exactly the type of business that promotes the City’s interest in the economic and commercial diversity of its downtown along Lincoln Avenue, as provided in both the Land Use and Economic Development elements of the General Plan.¹⁶ The Economic Development Element states that

“[N]ew economy” businesses based on science and technology may have the potential to locate in Calistoga, both because they tend to be less influenced by locational constraints such as distance to markets, and because they often have fewer employees and

¹³ Calistoga City Code §17.40.030, subd. D. 5.

¹⁴ See email of Sandy Tucker to City Manager Dylan Feik and Mayor Christopher Canning, May 23, 2018 (stating that she had “worked with NextHome to get them to agree to no sign and no logo on the front).

¹⁵ See email of City Manager Dylan Feik to the Mayor and City Council, June 22, 2018, (stating, “a realty office is resident-serving”); 6/26/18 PC Staff Report, p. 2 (finding that the proposed use is consistent with Land Use Element Policy P.1-1 because it would meet local residents’ and business owners’ real estate needs); see also Letter of Tina Wallis, June 18, 2018, p. 2.

¹⁶ General Plan, pp. LU-7 and ED-10.



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specialized space requirements, so can be accommodated within existing and potential space available in Calistoga.¹⁷

Through NextHome, Ms. Tucker has access to “new economy” resources enabling her to serve the needs of a younger demographic, with a very minimal footprint, in a previously vacant downtown space in need of repair.

Commissioner Wilkes said the Commission “doesn’t decide whether the City needs another real estate company.”¹⁸ However, this is exactly what the Commission decided, stating without further explanation that the applicant’s business would not “serve local needs.” Furthermore, in the Staff Report prepared for the City Council hearing on July 17, 2018, staff indicates that there are three existing real estate offices in the City and others “in the vicinity,” and that Ms. Tucker has not demonstrated an ‘unmet need’ for her services.¹⁹ Generally, the market economy and people seeking services are best suited to determine what the market can support, and open competition generally works to the advantage of consumers. An additional local option for real estate services will encourage more residents to “shop local,” rather than seeking realty services outside of the City.

As stated in the Economic Development Element under “Opportunities for Economic Expansion:”

[Strategies] for economic development should focus on the City’s strengths, including its small-town character and lifestyle, its compact pedestrian scale, and the affordable housing stock relative to other Napa County communities. Such strategies should recognize these assets while at the same time embrace opportunities for diversification.²⁰

Ms. Tucker’s business exemplifies these strategies, including General Plan Goal ED-1, “Foster a diversified economy that will provide the City with adequate tax revenue *and residents with entrepreneurial opportunities and a broad range of occupations*” (emphasis added), and Objective ED-1.2, “Expand economic activity in Calistoga that builds on the community’s strengths and reinforces its small-town character.” The proposed use is consistent with and promotes the goals set out in *all* applicable elements of the General Plan and complies with all of the City’s zoning code requirements for a conditional use permit.

¹⁷ ED-10.

¹⁸ 6/27 PC Minutes, p. 4.

¹⁹ See Staff Report to City Council, July 17, 2018 (stating that “[there] are three active real estate businesses currently operating in Calistoga itself, with many others in the vicinity, and the applicant has not demonstrated that there is an unmet need for the services of the proposed business in a community with a small population.”)

²⁰ ED-9.



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D. There was no opposition to Ms. Tucker's application at the Planning Commission.

There were no letters or public comments opposing Ms. Tucker's application before the Commission. As Commissioner McNair pointed out, if the proposed use was indeed incompatible with the unique small-town look and feel of Calistoga, then "where are all the public comments expressing concerns about this application?"

E. The City's delay in responding to applicant's request for public records may be prejudicial.

Ms. Tucker's counsel submitted a Public Records Act request to the City on July 2, 2018. City staff said that it could not respond to this request within ten days and required twenty more days to respond to the request. Thus, I am unable to comment on it at this time, except for observing that these responses may provide additional bases for a challenge.

Conclusion

Ms. Tucker respectfully requests that the Council grant this appeal, overturn the Planning Commission's denial and approve the use permit application for her NextHome-affiliated real estate office at 1437 Lincoln Avenue.

Thank you for your consideration. Please feel free to call my office at (707) 595-8681 with any questions about this letter.

Very truly yours,

Emily Fisher
Law Offices of Tina Wallis, Inc.

c: Client