

APPEAL #16-001 – PERMIT FOR LOTTERY MACHINES

April 5, 2017

Present were Councilors Sue Lorain, Daniel Jesse, Kerry Smith, Mayor Matt Brown, Attorney Peter Watts, Planner Carole Connell, Administrator Chad Sweet, Applicant Terry Lowenberg and Attorney Jeremy Rust.

The public hearing was called to order at 6pm by Mayor Matt Brown in the matter of An Appeal of the Planning Commission Decision denying a revision to their approved Conditional Use file #16-001CU to allow lottery machines in the approved neighborhood café at 599 Pacific Way, further described as Assessor Plat 6 10 9AA, Tax Lot 6200.

Brown read the disclosure statement into the record. Brown stated the appeal will be heard “On the Record” and read Section 13.060 Appeals (5) Review on the Record. Brown asked for any exparte contact, bias or conflict of interest. Commissioner Jesse stated he has eaten at the café and was shown where potential lottery machines would be placed. Lorain has eaten at the café, and did not view the area where the machines would be placed. Kerry has talked to Lowenberg and other citizens but no discussion about the brew pub. Brown stated he has eaten at the restaurant and has talked to the Lowenberg’s and others but not about video poker, he has received emails but not read those with the subject of lottery machines.

Brown asked if there were any audience challenges to the Councils ability to make an impartial decision of the appeal. None was voiced.

Connell summarized the staff report and Planning Commission decision noting it was on the record and result of the Planning Commission decision denying the request on January 19, 2017.

Watts addressed the legality of video lottery machines brought up by the applicant taking the position placement of video lottery machines were controlled by state law under ORS 461.217 (1) (2) and ORS 461.030 also granting the applicant the right to a conditional use to allow video lottery machines. He stated the council is tasked to measure the weight of the opinion weather the Council has the right to govern under home rule and City code or is preempted by state law. In either determination the applicant will not be precluded from having lottery machines but would need to meet the conditions of state law.

Jeremy Rust, Attorney for the applicant – Rust stated the issues are the requirement for a conditional use is contrary to state law and the denial was not based on facts but prejudice against people who participate in gaming. Rust further stated the installation of the lottery machines and the wall that is required to separate them from minors is not contrary to the initial use. Rust noted case law and Supreme Court rulings say 461.030 are determined to preempt local law and as a result the applicant is not required to have a conditional use to install lottery machines. (Rogue Valley Sewer vs. City of Phoenix – 2015)(AT&T vs. City of Eugene – 2001)

Testimony was open to proponents. None

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Susan Edy, 707 F Street – she reviewed the history of the appeal asking if there was a need for video lottery stating the city already has 2 business that allow video lottery machines. There have been repeated assurances that the business would be a ‘neighborhood café’, a neighborhood café does not invite gambling and the city is not responsible for the success or failure of a business, per her contact with the OLCC food must be the primary emphasis if minors are allowed in a brew pub. Edy further suggests the applicant use his property at the corner of Highway 101 and Pacific Way since it is already licensed for video lottery machines and has been vacant for over a year.

Jeanne Mark, P O Box 2627 – she is in agreement with the City Planners recommendation to denying the conditional use for a video lottery room, there are other options for gaming in Gearhart, the City of Gearhart is not responsible for local business to stay afloat. She asks the council support the Planning Commission’s decision as good for the whole community.

Lisa Cerveny, P O Box 2368 – as a town historically focused on families and children she was of the understanding Gearhart Crossing was going to be a family restaurant, with the evolution of a sports bar and video poker the business is moving farther from a family environment. She is very opposed to adding video poker and recommends the council reject the request.

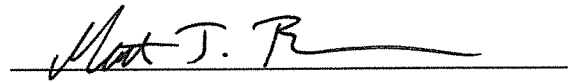
Testimony was open to neutral comments. None

Applicants Rebuttal

Jeremy Rust - Adding video lottery machines will not take away from the family atmosphere, the addition of television screens does not make it a sports bar, it is a good location and works for Gearhart, it won't negatively impact the ambiance and character of the downtown.

The public testimony was closed at 6:50pm.

Watts clarified the options the council had for making a determination, discussion followed on the differing site plans submitted, permitted uses in the zone, OLCC requirements and need. On **MOTION** by Lorain, 2<sup>nd</sup> by Smith, based on the record the Council affirmed the Planning Commission decision denying a revision to their approved Conditional Use file #16-001CU. Motion carried (3-1) Lorain - aye, Jesse – nay, Smith – aye, Brown – aye. (See attached)



Matt Brown, Mayor



Chad Sweet, City Administrator

BEFORE THE CITY COUNCIL  
OF THE CITY OF GEARHART

IN THE MATTER OF A CONDITIONAL USE )  
PERMIT FOR LOTTERY MACHINES ) FINAL FINDINGS  
CITY FILE #16-001CU REVISED ) AND ORDER

This is to affirm **DENIAL** on the appeal of the Planning Commission's decision to deny a Revised Conditional Use Permit request to install lottery machines in the Gearhart Crossing neighborhood cafe

Applicant: Sum Properties LLC  
3457 Hwy 101 North  
Gearhart, Oregon 97138

Property Owner: Sum Properties LLC

Location: 599 Pacific Way; Tax Lot 6200 Map 06N10W09AA

Completeness: 12-01-16  
Notice Mailed: 12-23-16  
Notice Published: 12-23-16  
120-day deadline: 03-28-17, extended by the applicant to the end of April 2017

Exhibits:

- Application submitted by Sum Properties, 11-29-16
- Gearhart Fire Chief, no comments email 12-05-16
- Gearhart Building Inspector, no comment
- Gearhart Police Chief, no concerns email 12-06-16
- Gearhart Public Works, no comment
- Gearhart City Manager, 12-05-16 said the public needs to be notified of the lottery machines
- Letters of objection from Dianne Widdop 12-28-16, Alan Smock 12-28-16, Lisa Cerveney 1-9-17, Steve & Kathy Roos 1-11-17, Penny Sabol 1-11-17, Lori & Dan Thurston 1-4-17

Gearhart Zoning Code Review Criteria:

- GZO Section 3.4 Neighborhood Commercial C-1 Zone
- GZO Section 8.040 Conditional Use Review Criteria
- GZO Section 8.060 Additional Modification of Standards for CUP

- GZO Article 13 Application, Notice & Hearing Procedures

I. FINDINGS

- A. Background: The applicant requests approval to locate poker lottery machines in the approved cafe in an enclosed area adjoining the deli. The state regulates the use of lottery machines. The Conditional Use for a deli/pub/café was approved by the Planning Commission, which was also approved by City Council on appeal May 3, 2016. The applicant's request to revise the Conditional Use by adding lottery machines was denied by the Planning Commission on January 12, 2017
- B. Site information: The subject parcel is an established existing commercial building located at Pacific Way and Cottage Ave. The 4100 square foot building has two existing street entrances, no off-street parking and handicapped access.
- C. Plan and Zone Standards: The site is designated Commercial by the Gearhart Comprehensive Plan and is designated Neighborhood Commercial C-1 by the Gearhart Zoning Ordinance. The definition of a neighborhood café is:

*Section 1.030 Definition #122 Neighborhood Café: A business devoted to the serving of prepared food to the public where food is consumed on the premises while customers are seated at tables and having no more than 1300 square feet of eating area or seating at tables for no more than 40, whichever is less. Service may also include the sale of wines and malt beverages on the premises, where appropriate OLCC licenses have been obtained.*

The narrow definition of a neighborhood café does not include or allude to lottery machines, gambling or gaming. The applicant proposes to revise the floor plan in order to install at least four (4) poker machines enclosed behind an 8-foot wall adjoining the deli kitchen. The machines would add four seats to the café. But the café floor plan has been modified reducing the seating area, reducing the number of tables from 9 to 7, adding 7 seats at a bar counter and 4 seats at the gambling machines, for a total of 39 seats.

- D. Agency Coordination: The proposal was referred to city departments who raised no objections. City staff determined the inclusion of lottery poker machines was not included in the original application for a neighborhood cafe.
- E. GZO Section 3.4 C-1 Neighborhood Commercial Zone  
The purpose of the C-1 zone is to provide the location of needed small businesses and services in the City for the convenience of nearby residents. Businesses are intended to

fit into the residential character of the neighborhood and not create either architectural or traffic conflicts.

FINDINGS: The City finds there are no structural changes proposed to the exterior of the building therefore no architectural conflicts will occur. Existing streets, parking and circulation of vehicles will remain the same. The City found the lottery machines were not included in the initial application to convert the grocery store to a pub/ neighborhood café. City staff determined the machines are a significant change to the original application. Therefore the public should be notified the Planning Commission would consider the change in a public hearing.

Section 3.420 C-1 Conditional Uses. This section of the code permits a neighborhood cafe as a conditional use subject to specific café conditions and compliance with the provisions of Article 8 Conditional Use.

F. GZO Section 8.020 Planning Commission Authority

This section provides that the Planning Commission shall have the authority to approve, approve with conditions or disapprove Conditional Use Permits in accordance with the standards and procedures of the section.

G. GZO Section 8.040 General Conditional Use Review Criteria

Before a conditional use is approved, findings will be made that the use will comply with the following standards:

1. The proposed use is consistent with the policies of the Comprehensive Plan:

The Comprehensive Plan and the Zoning Code designate the subject property C-1 Neighborhood Commercial for limited commercial use suitable for the surrounding neighborhood character. The Gearhart Comprehensive Plan policies do not provide guidance regarding gambling and gaming uses. Comprehensive Plan policies that are relevant to the request include the following:

Existing Plan Policies

- a. *The City will limit commercial activity in the City, in terms of both land devoted to commercial uses and the types of uses permitted in commercial zones, to a level that is compatible with Gearhart's residential character;*

FINDINGS: The amount of land devoted to commercial zones is not affected by the proposal because the site is currently zoned commercial. The type of use is proposed adds lottery gambling machines to the planned neighborhood café. The Planning Commission and City Council carefully considered the recent decision to replace the grocery store with a neighborhood café. Gambling and gaming in the cafe was not

considered at the time. City officials and residents were willing to interpret the café use as suitable because the applicant indicated it would serve as a community gathering place for eating and drinking on a limited basis. The community hopes there may also be a few essential grocery items available for the convenience of the community. This proposal to occupy a portion of the relatively small café with poker gambling machines does not coincide with the intent of the original approval. Lottery machines in a bar environment condone gambling and drinking. According to several studies, gambling and alcohol addictions are on the rise. This activity is not compatible with the intent of the C-1 zone or the residential character of the historic downtown. A neighborhood café is narrowly defined as a business “devoted to the serving of prepared food to customers seated at tables, and may include the sale of wine and beer”. The City finds gambling stations that encourage alcohol consumption do not coincide with the intent of a neighborhood café as defined.

*b. The City will maintain a commercial zone in the center of the City that provides for the needs of residents;*

FINDINGS: The C-1 Neighborhood Commercial zone narrowly lists outright retail commercial uses for the convenience of nearby residents, and “these uses are limited to grocery, drug, a soda fountain, barber or beauty shops, offices or a post office and a home occupation in a residence. The zone specifies only two conditional uses, including a neighborhood café and a variety store. The City Council and Planning Commission determined the neighborhood café was permissible, but only after considerable thought and assurance that the café would be a family-friendly place for residents to gather for food and drink. There is no evidence that adult-only gambling and drinking is a use that Gearhart resident’s need.

*c. The City will establish Zoning ordinance standards to protect residential areas from adjacent commercial development.*

FINDINGS: The C-1 zone was carefully crafted to assure uses would be allowed only if they could operate with low impacts on adjacent residential areas. Approval of the proposed cafe came with some concern over the loss of a convenient grocery, and the addition of a drinking establishment that may result in negative impacts on the adjoining residential areas. The proposed revision to add adult-only gambling conflicts with the promised intent to create a family-friendly café and community gathering place.

The neighborhood café is described as “a business devoted to the serving of prepared food to the public where food is consumed on the premises while customers are

seated at tables.” The City finds the lottery machines are not a use “devoted to the serving of food while customers are seated at tables”.

Plan Compliance Summary: At the time of the original café approval the City found that the proposal is in compliance with a number of the relevant Comprehensive Plan policies and the intent of the C-1 zone. The limited size of the building and the limited hours of operation will provide some assurance that the use may be able to maintain compatibility with the low-key residential character of Gearhart, while providing a viable use for the historic corner of town”. But the proposal to convert some of the limited space exclusively for drinking and gambling conflicts with the original plan and diminishes the assurance that the café will maintain compatibility with the adjacent residential character and needs of Gearhart citizens.

2. A demand exists for the use at the proposed location. Several factors which shall be considered in determining whether or not this demand exists include: accessibility for users (such as customers and employees), availability of similar uses, availability of other appropriately zoned sites, particularly those not requiring conditional use approval, and the desirability of other suitable zoned sites for the use:

PROPOSED FINDINGS: There are two other locations in the Gearhart city limits that have lottery machines, the Great Wall restaurant and the bowling alley. These are restaurant and bar services located on Highway 101 for tourists and residents, which are allowed in the C-2 commercial zone and are not as narrowly defined as in the C-1 zone. In contrast, The Sandtrap bar and restaurant adjoining the golf course, also zoned C-2 does not have gambling machines, an amenity that no McMenemy’s restaurant or bar provides. Multiple McMenemy’s establishments in the state are advertised as family-friendly and are regularly filled with multiple family events. The City finds there is no evidence of demand for additional gambling machines, and further that gambling machines are more suitable and appropriate in the C-2 zone.

3. The location, size, design and operating characteristics of the proposed use are such that the development will have a minimum impact on surrounding properties:

FINDINGS: The installation of poker lottery machines in the approved neighborhood cafe will devote space to adult-only activity that may operate in conflict with surrounding properties. The machines encourage drinking and conflict with the family-friendly character described in the original proposal. The machines conflict with the definition of a neighborhood café which is to devote the serving of prepared food to customers seated at tables.



4. The use will not generate excessive traffic when compared to the traffic generated by uses permitted outright and adjacent streets have the capacity to accommodate the traffic generated.

FINDINGS: The City finds there is no evidence that the gambling machines will generate excessive traffic or reduce the capacity of adjacent street.

5. Public facilities and services are adequate to accommodate the proposed use:

FINDINGS: The vacant building has existing utility connections and access that will be re-established and re-permitted by the city and DEQ prior to occupancy.

6. The site's physical characteristics in terms of topography, soils and other pertinent considerations are appropriate for the intended use; and:

FINDINGS: The site has functioned appropriately for limited commercial activity since the building was originally approved and constructed. There are no known constraints related to topography or soil conditions on the parcel.

7. The site has adequate area to accommodate the proposed use. The site layout has been designed to provide appropriate access points, on site drives, parking area, loading areas, storage facilities, setbacks, buffers, utilities or other facilities which are required by City ordinance or desired by the applicant.

FINDINGS: The site has previously been shown to have adequate area for small scale commercial use. The adjoining sidewalk and street furniture, the loading area, storage and garbage facilities have been well managed and maintained by the current owner. The building has historically operated effectively despite the lack of on-site parking spaces. The City finds the addition of gambling machines will reduce the area devoted to serving customers seated at tables and will reduce the family-oriented clientele.

#### H. Section 8.050 Conditions for a Neighborhood Café

If approved, a neighborhood café shall conform to the following standards:

1. *A public need exists for the use at the proposed location. The following factors shall be considered in determining whether a public need exists: availability of similar uses, availability of other appropriately zoned locations, particularly those not giving call for a conditional use approval; and availability of other suitably zoned sites for the use.*

FINDINGS: The City finds there is no evidence that a demand exists for gambling machines in the central city C-1 zone. The C-2 zone allows eating and drinking establishments as an outright use and two existing businesses in the C-2 zone have been permitted to install lottery machines.

2. *The neighborhood café shall be in operation during a minimum of eleven months in a calendar year.*

FINDINGS: The City finds the applicant agreed to abide by this condition of approval in the original approval.

3. *The neighborhood café shall be closed by 10 p.m.*

FINDINGS: The City finds the applicant agreed to abide by this condition of approval in the original approval.

4. *The neighborhood café, if located in a new structure, shall provide off-street parking spaces in the proportion of one space per 200 square feet of floor area, plus one per employee.*

FINDINGS: This criterion is not applicable

I. Section 8.060 Additional Modifications of Standards for Conditional Uses

The Planning Commission may impose additional conditions if necessary to protect the best interest of the City as a whole. These additional conditions are:

1. Increasing the required lot size or yard dimension;

FINDINGS: This criterion is not applicable since the parcel or the existing building cannot be required to be modified to increase setbacks or property lines.

2. Limiting the height of buildings;

FINDINGS: This criterion is not applicable because the height is not affected by the request.

3. Controlling the location and number of vehicle access points;

FINDINGS: This criterion is not applicable because the location and number of access points is established.

4. Increasing the street width;

FINDINGS: The City finds the street width is established and adequate for the proposed use.

5. Increasing the number of required off-street parking space:

FINDINGS: This criterion is not applicable to an existing structure in the C-1 zone.

6. Limiting the number, size, location and lighting of signs:

FINDINGS: The applicant has not provided a signage plan, but will be required to locate signage in accordance with C-1 sign regulations. C-1 signs are limited to flush signs on the front of the building facing the street that are no more than 2 feet in height. Temporary signs with a maximum height of 8 feet may be permitted. It is possible that lottery signage would be requested if the machines were approved.

7. Requiring diking, fencing, landscaping or other facilities to protect adjacent or nearby property:

FINDINGS: The City finds no diking, fencing or additional landscaping is required to protect adjacent or nearby property.

8. Designating sites for open space; and

FINDINGS: The subject use is not required to provide designated open space.

9. Hours of use or operation.

FINDINGS: In the original approval the café is required to close at 10 p.m.

II. SUMMARY CONCLUSION

The City finds that the request to install poker lottery machines in the proposed cafe is a use that is not in compliance with some of the Comprehensive Plan policies, is not in compliance with the intent of the C-1 zone or the definition of a neighborhood cafe. Further, there is no evidence of demand for the machines in the central city core.

III. DECISION

Based on the record, on April 5, 2017 the City Council decided to affirm the Planning Commission decision to DENY City File #16-001 REVISED CU.

Signed: Matt J. R.  
Matt Brown, Mayor of Gearhart

Date: 4/14/17

DATE MAILED: 04/18 2017

APPEAL

In accordance with the Gearhart Zoning Code Section 13.060, the decision of the City Council may be appealed to the Land Use Board of Appeals by filing a notice of intent to appeal within 21 days of the date the final order is signed.