

CITY OF GEARHART CITY COUNCIL

From: Carole Connell, City Planner

Re: Reconsideration of Appeal of Planning Commission Denial of a request for a Revised Conditional Use Permit

CITY STAFF REPORT

July 5, 2017

City File: #16-001 CUP Lowenberg Neighborhood Café

Application Purpose: An application for approval of a Revised Conditional Use Permit to install five video poker machines inside a separated area of a building, currently used as a neighborhood café, pursuant to a Conditional Use Permit, not included in the original plans filed with the Conditional Use Permit.

Public Hearing Date: July 5, 2017

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 applicant to the end of April, 2017

Exhibits (request desired copies):

- 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 1.030 (122) Definition, Neighborhood Cafe
- 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 modify a conditional use permit, granted on May 3, 2016. The requested modification would permit a room separated from the main dining room by an eight foot wall, for the purpose of locating five video poker lottery machines. Applicant submitted the current conditional use application on November 29, 2016. The November 29, 2016 application is construed as a request to revise or amend the conditional use, neighborhood café, approved on May 3, 2016.

On January 5, 2017, the Planning Commission denied the application for the revised conditional use permit. On January 19, 2017, Mr. Lowenberg filed an appeal of the denial to the Gearhart City Council. On April 5, 2017, the City Council affirmed the Planning Commission’s denial. On May 4, 2017, Mr. Lowenberg filed a notice of intent to appeal the City Council’s decision, to the Oregon Land Use Board of Appeals (LUBA). On May 25, 2017, the City filed a notice with LUBA to withdraw the decision for reconsideration. The matter is currently before the City Council for a hearing on reconsideration.

- 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.

Proposed Findings: The applicant proposes to revise the floor plan in order to install five (5) video poker machines enclosed in a separated area behind an 8-foot wall adjoining the deli kitchen. The Applicant will add four seats in the separated area, but has not established that the seats will be at tables, where customers sit and consume prepared food. The café floor plan has been modified reducing the seating area, reducing the number of tables from 9 to 7, and adding 7 seats at a bar counter, or a total of 35 seats in the café. The addition of 4 seats behind the 8-foot wall separated area would create a total of 39 seats in the building. The City does not read the neighborhood café code section to allow fixtures for an activity other than consuming prepared food at tables, be it video arcade machines, or video poker machines. The area behind the 8-foot wall, to conduct separate activities, does not meet the definition of neighborhood café. The City acknowledges that Applicant has argued that the City is preempted from prohibiting video poker so long as Applicant has a qualifying license from the OLCC. The City acknowledges that ORS 461.030 makes inapplicable any local law or regulation prohibiting the possession or sale of lottery tickets or shares. Accordingly, the City takes no position regarding the video poker machines, and/or whether or not the City may prohibit the machines in the main dining area of the neighborhood cafe. Applicant argues that Applicant can place the video poker machines in the main dining room of the neighborhood café, without a modification to his conditional use permit, due to the state law preemption language. The City makes no findings regarding whether or not the City can prohibit video poker in the neighborhood café. The City's interpretation is merely whether or not the neighborhood café section of the City Code can be read broadly enough to allow the City to grant a conditional use permit to allow a separate activity in an enclosed room that does not meet the criteria of an outright permitted or conditional use in a C-1 zone.

D. Agency Coordination: The proposal was referred to city departments. No objections were raised. City staff determined the inclusion of lottery poker machines was a change that the public should be notified of considered by the Planning Commission in a public hearing.

E. GZO Section 3.4 C-1 Neighborhood Commercial Zone

The site is zoned C-1, Neighborhood Commercial Zone. GZO 3.410 provides, 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.

PROPOSED FINDINGS: The City finds there are no structural changes to the exterior of the building therefore no architectural conflicts will occur. Existing streets, parking and circulation of vehicles will remain the same.

Section 3.420 and 3.430, C-1 Outright Permitted and Conditional Uses. Outright permitted uses in a C-1 zone include retail business for the convenience of nearby residents (grocery, drug, barber and beauty shops), Home Occupations, Post Offices, Offices, Manufactured Dwellings, recreation vehicles or construction offices, subject to certain limitations, and soda fountains. Conditional Uses include Neighborhood Cafes (as defined above) and Variety Stores. This section of the code permitting a neighborhood cafe as a conditional use is subject to specific café conditions. Conditional uses must comply with the provisions of Article 8 Conditional Use which are addressed in this report.

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, addressed below.

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. Comprehensive Plan policies that are relevant to the request include the following:

Existing Plan Policies

- a. *Commercial Development Policy 1 - 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;*

PROPOSED FINDINGS: The amount of land devoted to commercial zones is not affected by the proposal because the site is currently zoned commercial. The types of uses allowed in commercial zones, in this case neighborhood commercial zones, are set out in the GZO, as provided above. These uses define whether the use of the property is compatible with Gearhart's residential character. The Applicant's

proposed use, an area separate by an 8' tall wall, with seats and no tables, does not meet the definition of an allowed or conditional use in the C-1 zone. The City takes no position regarding the video lottery machines.

b. Commercial Development Policy 6 - The City will maintain a commercial zone in the center of the City that provides for the needs of residents;

PROPOSED FINDINGS: The City maintains a commercial zone through its zoning ordinance and zoning designations and regulations. The C-1 Neighborhood Commercial zone narrowly lists outright permitted and conditional uses, as set forth above. The Applicant's proposed use, constructing an area behind the 8-foot wall with five seats, does not meet the definition of a neighborhood café, because it does not establish that it is an area devoted to the serving of prepared food to customers seated at tables. The Applicant has not demonstrated that the proposed use meets any other outright permitted or conditional use allowed in the C-1 zone. The City takes no position regarding the video lottery machines.

c. Commercial Development Policy 6 - The City will establish Zoning ordinance standards to protect residential areas from adjacent commercial development.

PROPOSED FINDINGS: The C-1 zone uses and ordinance standards were carefully crafted to assure uses would be allowed only if they could operate with low impacts on adjacent residential areas.

The proposed use in the proposed revision to the conditional use permit, does not propose a use that meets the definition of neighborhood cafe or any other allowed or conditional use in the C-1 zone, so it does not meet the established C-1 zone ordinance standards. The City takes no position regarding the video lottery machines.

Plan Compliance Summary: At the time of the original neighborhood 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 provided 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 for a use that does not meet any of the outright permitted or conditional uses, does not comply with the relevant comprehensive plan policies and standards in the C-1 zone.

2. GZO 8.040(2) provides, 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: The Council finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this criterion is not applicable. To the extent it might be applicable the Council finds that the proposed use will not impact accessibility for the site. The Council further finds that other areas of the City, zoned C-2, allow eating and drinking establishments as outright permitted uses, so these areas are available for similar uses, are appropriately zones for such uses, because they are permitted in the Zoning Ordinance and therefore are interpreted as more desirable locations for such uses.

3. GZO 8.040(3) provides, The location, size, design and operating characteristics of the proposed use are such that the development will have a minimum impact on surrounding properties;

PROPOSED FINDINGS: The Council finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this criterion is not applicable. To the extent it might be applicable the City finds there are no changes in location. The size, design and operating characteristics of the proposed use will not have more than a minimum impact on surrounding properties.

4. GZO 8.040(4) states, 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.

PROPOSED FINDINGS: The Council finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this criterion is not applicable. To the extent it might be applicable the City finds there is no evidence that the proposed use will generate excessive traffic or reduce the capacity of adjacent streets.

5. GZO 8.040(5) provides, Public facilities and services are adequate to accommodate the proposed use.

PROPOSED FINDINGS: The Council finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this criterion is not

applicable. To the extent it might be applicable the City finds the public facilities and services that are adequate to serve the use of the property as a neighborhood café would also be adequate to accommodate the proposed use.

6. GZO 8.040(6) provides, The site's physical characteristics in terms of topography, soils and other pertinent considerations are appropriate for the intended use; and:

PROPOSED FINDINGS: The Council finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this criterion is not applicable. To the extent it might be applicable, the City finds 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. GZO 8.040(7) provides, 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.

PROPOSED FINDINGS: The Council finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this criterion is not applicable. To the extent it might be applicable the City finds that 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 site layout for the proposed use will reduce the area of the neighborhood café, that is the area of the building devoted to serving customers seated at tables consuming food, but there is no evidence that it would render the area too small to comply with the zoning ordinance requirements for neighborhood café.

H. Section 8.050(5) 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.*

PROPOSED FINDINGS: The City finds the proposed use is not a neighborhood café, so this criterion is not applicable.

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

PROPOSED FINDINGS: The City finds the proposed use is not a neighborhood café, so this criterion is not applicable.

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

PROPOSED FINDINGS: The City finds the proposed use is not a neighborhood café, so this criterion is not applicable.

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.*

PROPOSED FINDINGS: The City finds that 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;

PROPOSED FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable the City finds that it is not necessary to impose this condition 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;

PROPOSED FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable the City finds that it is not necessary to impose this condition because the height is not affected by the request.

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

FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable the City finds that it is not necessary to impose this condition because the location and number of access points is established.

4. Increasing the street width:

PROPOSED FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable the City finds that it is not necessary to impose this condition because the street width is established and adequate for the proposed use.

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

PROPOSED FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable the City finds that it is not necessary to impose this condition.

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

PROPOSED FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable, the City finds that if signage is necessary. Applicant would 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.

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

PROPOSED FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable the City finds that it is not necessary to impose this condition because no diking, fencing or additional landscaping is required to protect adjacent or nearby property.

8. Designating sites for open space; and

PROPOSED FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable the City finds that it is not necessary to impose this condition because the subject use is not required to provide designated open space.

9. Hours of use or operation.

FINDINGS: The City finds that Applicant's proposed use does not meet the definition of any allowed conditional use in the C-1 zone, so this condition is not applicable. To the extent it might be applicable the City finds it would condition the proposed use as being required to be closed at 10pm, the same time as the neighborhood café. If this condition is imposed, the City finds this criterion would be met.

II. SUMMARY CONCLUSION

The City finds that the request to install video poker lottery machines in the 8-foot tall area separate from the rest of the building is a use that is not in compliance with at least some of the relevant Comprehensive Plan policies, nor the C-1 zone regulations and outright permitted or conditional uses, including the definition of a neighborhood cafe. The City again acknowledges that ORS 461.030 makes inapplicable any local law or regulation prohibiting the possession or sale of lottery tickets or shares. Accordingly, the City takes no position regarding the video poker machines. The City does, however, find that the 8-foot tall separated area will create a space separate from the neighborhood cafe that will not be used for any of the outright permitted or conditional uses authorized in the C-1 zone, for the reasons discussed above.

III. RECOMMENDATION

Based on the findings in the Staff Report it is recommended that the City Council affirm the Planning Commission's DENIAL of the applicant's request to install four video poker machines in a separate area separated by an 8 foot tall wall, in the building located at 599 Pacific Way, for the reasons set forth in the proposed findings above.