

**DATE ISSUED:** May 19, 2005                           **REPORT NO.** PC-05-154

**ATTENTION:** Planning Commission, Agenda of May 26, 2005

**SUBJECT:** SAND BAR & GRILL - PROJECT NO. 5470. PROCESS 3 APPEAL.

**REFERENCE:** Hearing Officer Report No. P-04-172.  
Mission Beach Planned District Regulations, LDC §103.0526.15(a)

**OWNER/  
APPLICANT:** Antoinette and John Lococo, Owners/Mark Cirillo, Applicant

### **SUMMARY**

Issue(s) - Should the Planning Commission deny the appeal and deny the Variance No. 9020 requesting an existing fence be allowed to be maintained with a fence height of six feet within the setback where the Mission Beach Planned District regulations allow a maximum fence height of three feet within the setback?

Staff Recommendation -

1. Deny the Appeal; and
2. Deny Variance No. 9020.

Community Planning Group Recommendation - On February 15, 2003, the Mission Beach Precise Planning Board, on a vote of 7-2-2, recommended denial of the variance.

Environmental Review - The project is exempt from the California Environmental Quality Act (CEQA) pursuant to Article 19, Section 15303.3.

Fiscal Impact Statement - No cost to the City. All costs are recovered by payment of a fee funded by the applicant.

Code Enforcement Impact - This application was submitted to the Development Services Department as a result of a Code Violation, Case No. 90557, filed May 20, 2002.

Housing Impact Statement - None with this action.

## **BACKGROUND**

The project site is located at 718 Ventura Place (Attachment 1) in the VC-S zone within the Mission Beach Planned District in the Mission Beach Precise Plan and Mission Beach Community Plan (Attachment 2). The Sand Bar & Grill is located on the north side of Ventura Place in the first block east of the Pacific Ocean and Mission Beach between Ocean Front Walk and Mission Boulevard (Attachment 3). The adjacent land uses are commercial along Ventura Place, recreational at Mission Beach, and commercial/recreational in Belmont Park on the south side of Ventura Place.

In early 2002, the applicant sought approval from the City to upgrade the existing concrete patio by adding a new deck and fence. Because alcohol would be served on the deck, the San Diego Police Department requested the applicant place a glass fence on top of the wooden patio fence to secure the patio to a height of six feet. This request was not consistent with the Mission Beach Planned District regulations. Relying on the request from the Police Department, the applicant submitted construction drawings to the Development Services Department indicating the proposed construction (Attachment 4).

The Development Services Department approved construction plans, on April 11, 2002, with a combination glass and wood fence at the total height of six feet within the setback from the patio elevation which is higher than the adjacent sidewalk (Attachment 4). This approval was not consistent with the Mission Beach Planned District regulations. The applicant subsequently contracted for and completed the construction of the patio, glass and wood fence, and several other renovations. The construction was completed in May 2002. The Development Services Department, Field Inspection Division inspected and gave final approval to the construction on May 10, 2002.

On May 20, 2002 the Neighborhood Code Compliance Department (NCCD) issued a notice of violation, Case No. 90557, to the property owner citing the excessive height of the fence in the front yard setback. The maximum height of fencing within the setback allowed by the Mission Beach Planned District Regulations is limited to three feet above adjacent grade measured from the lowest point (Attachment 5). Neighborhood Code Compliance Department advised the owner could request a variance by applying to Development Services Department or remove the top three feet of the fence. Plans for a variance application (Attachment 6), were submitted to the Development Services Department on September 20, 2002.

The variance was denied at a public hearing held by the Hearing Officer, a designee of the City Manager, on December 8, 2004. During the public hearing the Hearing Officer heard testimony by the applicant, his attorney and members of the community. After considering the testimony

the Hearing Officer took action to deny Variance No. 9020 and adopt the Hearing Officer Resolution No. HO-4865 (Attachment 7).

## **DISCUSSION**

The applicant's appeal (Attachment 8) is requesting the Planning Commission overturn the December 8, 2004 decision of the Hearing Officer by approving the appeal and approving Variance No. 9020. The decision would allow the continued maintenance of the fence within the setback in excess of the height regulations of the Mission Beach Planned District, §103.0526.15(a).

City staff has reviewed and considered the materials submitted with the application, including draft findings of approval provided by the applicant. City staff does not find substantial evidence in the record or in the information presented by the applicant and his attorney to support the necessary findings and recommend approval of the variance. The applicant's attorney asserts the Hearing Officer's decision was based on a factual error and the findings to deny the variance cannot be supported.

### **Appeal**

The appellant has several concerns. The appellant's attorney submitted the appeal citing two reasons for the appeal (Attachment 8). The appeal is based on: 1) Factual Error and 2) Findings Not Supported. The appellant's concerns as stated are noted in the underlined text below. Staff's response follows in regular text.

#### 1. Factual Error

The Variance application was denied by a Hearing Officer on December 8, 2004. Applicant believes that statements or evidence relied upon by the Hearing Officer when denying the variance were in error with respect to the scope and submission of the drawings submitted for staff approval and the violations/similar use occurring on City property in the same neighborhood.

Staff disagrees. Staff responded to the Hearing Officer's questions concerning the construction plans submitted for the remodeled patio and new fence within the setback (Attachment 5). The construction plans title sheet misstated the scope of work. The plans indicated the work is as follows: Remove and replace existing railing at patio (underline added); remove and relocate existing roll up panel doors at patio; add new door at patio; and add new awning. Specifically concerning the existing railing, the height of the railing was less than six feet and was not fully enclosed. Although the construction detail 3 on Sheet AO-1 shows the fence with glass enclosure as constructed, the notes on Sheet T-1 indicated this work was replacing an existing railing. Staff approved the plans in error in reliance that the height of the new fence within the setback with the glass enclosure was to be of the same height as the original, which it was not. The construction plans were inconsistent regarding the facts of the existing railing and proposed

fence within the setback. Although City staff approved the plans in error, this cannot be a basis for granting the variance nor do the findings required to approve a variance consider such circumstances.

The plans submitted for review of the variance application (Attachment 6) clearly show the proposed existing fence within the setback with a glass enclosure in nearly the same detail as the construction detail 3 on sheet AO-1, yet without the inconsistent statements from sheet T-1 of the construction plan set (Attachment 4).

The assertion that a similar use on leased City land at Belmont Park along Ocean Front Walk, which is enclosed by a six foot high chain link fence, is grounds for approving the variance at 718 Ventura Place fails to address the findings required to approve the variance at this location.

The current establishment also has a roof top deck on which food, alcohol and other beverages are served. Should the appeal be denied and the variance be denied, food, alcohol and other beverages could continue to be served in the interior of the establishment, on the roof deck and on the patio. To date, the state's Alcohol Beverage Control (ABC) has not ruled the operation may not serve alcohol on the patio if the existing fence is removed. The Hearing Officer was careful to note the commercial establishment serves food and beverages inside the building, on the roof deck and on the patio and that this constitutes a reasonable use of the property zoned for commercial use. City staff cannot support the determination that the owner would be denied a reasonable use of his property based on his current level of commercial operation, with or without a six foot high fence enclosing the patio along Ventura Place and with or without alcohol being served on the patio adjacent to the street. Staff does not agree the applicant would be denied a reasonable use of his property if the ABC disallows the serving of alcohol on the patio.

## 2. Findings Not Supported

Applicant further asserts the Hearing Officer's findings to deny the variance are not supported by the information provided to the decision maker in that: 1) special circumstances exist at this property to support a variance; 2) that strict application would deprive the applicant of reasonable use of its property; 3) that the variance would be in harmony with the general purpose and intent of the code and not detrimental to the public health, safety or welfare; and 4) that granting the variance would not adversely affect the applicable land use plan.

Staff disagrees. Although the applicant and his attorney assert the findings can be supported, there has been no evidence provided to staff in writing which would meet the legal standard to allow staff to make a recommendation in support of granting the variance. Only the statements above, which lack any elaboration or specific detailed information, have been provided to staff. Staff maintains the findings contained in the original Hearing Officer Resolution No. HO-4865 (Attachment 7) continue to be valid to deny the proposed variance. No new information to the contrary has been presented.

No special circumstances or conditions are present at this site which are peculiar to the land or

premises and which do not apply generally to other properties in the neighborhood. Furthermore there are no conditions present at the site which necessitate the variance which were not created by any act of the applicant. Simply said, the conditions present at the site are a direct result of actions taken by the applicant and or result from the applicants desire to serve alcohol on the outdoor patio adjacent to the public street.

Strict application of the relevant regulations would not deprive the applicant from operating a bar and grill at 718 Ventura Place in that the interior space, roof deck and patio are used solely for this purpose. If the ABC were to deny the applicant the right to serve alcohol on the patio deck certainly the patio could be used for food and other beverage service as well as other uses. Losing the privilege to serve alcohol on the patio would not constitute denial of reasonable use of the property where so much of the property would continue to be permitted to serve alcohol and operate as a restaurant.

Granting the variance would be inconsistent with the Purpose and Intent of the Mission Beach Planned District and the specific regulations governing fence height in setbacks. The Purpose and Intent of the Planned District includes, by reference, the adopted Mission Beach Precise Plan and the policies contained therein, including Appendix A (Attachment 9). Appendix A is composed of several City and Coastal Commission reports and positions. In the San Diego Coast Regional Commission report of June 1, 1979, the Coastal Commission outlines several issues as having greater than local significance. This report, included within Appendix A of the Mission Beach Precise Plan, addresses several issues of special consideration. View issues are listed on pages 33 and 34 of Appendix A. Page 33, item L.1 indicates the "Preservation of public views of the ocean and Mission Bay in new development" as an important factor identified by the City when the Local Coastal Plan was certified (Attachment 9). In the summary of key issues of the Commission report of June 1, 1979 item number 9 restates "Preservation of public views of the ocean and Mission Bay in new development" as a key coastal planning issue. Then again in the San Diego Coast Regional Commission conditions of approval, dated April 11, 1980, page 45 of the Appendix A, number 13 reiterates the views to and along the shoreline from public areas shall be protected from blockage by development and/or vegetation. It is clear the City and Coastal Commission considered the views of the ocean from public places to be of importance.

The top three feet of the existing fence include solid, opaque wooden vertical supports encasing the glass panels. The over height fence does impinge on the public's ability to view the visual resources and would be inconsistent with the policies and goals stated in the Precise Plan and by inclusion Appendix A. As such granting the variance would adversely affect the applicable land use plan. The request for a variance within the frontyard setback adjacent to Ventura Place is inconsistent with the policies of the Mission Beach Precise Plan.

On February 15, 2003, the Mission Beach Precise Planning Board, by a vote of 7-2-2, recommended denial of the variance (Attachment 10). While the attorney for the applicant asserts the findings can be supported, no additional information beyond the statements included in the appeal have been provided to suggest City staff should revise their recommendation.

## **CONCLUSION**

Staff has reviewed the information provided in the appeal and reconsidered the request for a variance to allow a six foot high wooden and glass fence within the setback at 718 Ventura Place. Staff's conclusion is the project does not conform to the applicable sections of the San Diego Municipal Code regulating the development of 718 Ventura Place and the applicant has not presented any defensible findings which meet the legal standard required to approve the variance. Staff has determined the development is inconsistent with the commercial land use regulations of the Mission Beach Planned District, the policies of the Mission Beach Precise Plan and has determined the findings required to approve the variance are not supported by any evidence provided for evaluation. Staff therefore recommends denial of the appeal and denial of the variance.

## **ALTERNATIVES**

1. Approve the Appeal and Approve the Variance No. 9020.
2. Approve the Appeal and Approve the Variance No. 9020, with modifications.

Respectfully submitted,

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Marcela Escobar-Eck  
Deputy Director  
Customer Support and  
Information Division  
Development Services Department

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John S. Fisher  
Development Project Manager  
Customer Support and  
Information Division  
Development Services Department

HALBERT/JSF

Attachments:

1. Aerial Photograph
2. Community Plan Land Use Map
3. Project Location Map
4. Construction Plans
5. LDC §103.0526.15(a)
6. Variance Plans
7. Hearing Officer Resolution No. HO-4865
8. Copy of Appeal

9. Mission Beach Precise Plan, Appendix A, pages 27-34 and 43-45
10. Community Planning Group Recommendation
11. Ownership Disclosure Statement
12. Project Chronology