

CITY OF CUPERTINO  
10300 Torre Avenue  
Cupertino, CA 95014

CITY OF CUPERTINO  
PLANNING COMMISSION MEETING  
DRAFT MINUTES

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6:45 P.M.	JULY 26, 2016	TUESDAY
CITY COUNCIL CHAMBERS		

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The regular Planning Commission meeting of July 26, 2016, was called to order at 6:45 p.m. in the Cupertino Council Chambers, 10350 Torre Avenue, Cupertino, CA. by Chair Takahashi.

**SALUTE TO THE FLAG**  
**ROLL CALL**

Commissioners Present:	Chairperson:	Alan Takahashi
	Vice Chairperson:	Margaret Gong
	Commissioner:	Winnie Lee
	Commissioner:	Geoff Paulsen
Commissioners Absent:	Commissioner:	Don Sun

Staff Present:	Asst. City Manager:	Aarti Shrivastava
	Asst. Community Development Director:	Benjamin Fu
	Asst. City Attorney:	Colleen Winchester
	Associate Planner:	Erick Serrano

**APPROVAL OF MINUTES:**

***1. Minutes of the June 14, 2016 Planning Commission meeting:***

**MOTION:** Motion by Vice Chair Gong, second by Chair Takahashi, and carried 4-0-0, Com. Sun absent, to approve the June 14, 2016 minutes as presented.

**WRITTEN COMMUNICATIONS:** None other than related to agenda item.

**POSTPONEMENTS/REMOVAL FROM CALENDAR:** None

**ORAL COMMUNICATIONS:** None

**CONSENT CALENDAR:** None

**PUBLIC HEARING**

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| <b>2. ASA-2015-22, DP-2015-05, U-2015-06, TR-2016-04, EXC-2016-03, EXC-2016-05, (EA-2015-05) Amy Chan (DeAnza Venture LLC) 10122 Bandley Dr. &amp;</b> | Architectural and Site Approval to allow construction of a 122 room hotel, 2 mixed use buildings with 188 apartment units, and approx. 22,600 sq. ft. of commercial space and associated site and off-site improvements. Development Permit to allow the demolition of approx. 44,000 sq. ft. of commercial space and construct a 122-room hotel, 2 mixed use buildings with approx. |
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**10145 DeAnza Blvd.  
(Marina Plaza)**

22,600 sq. ft. of commercial space and 188 apartments with associated underground and surface parking. The project Proposes 16 units as very low income, Below Market Rate units making the project eligible for density bonus; Use Permit to allow 24 hour operations for a 122-room hotel including a restaurant with separate bar; Tree Removal Permit to allow the removal and replacement of 90 trees, Heart of the City Exception for Building A to allow rear and side setbacks of 10 ft. where 22.5 feet are required; and to allow a 16-ft. setback for an architectural feature where 31 feet is allowed; Fence Exception to allow electronic vehicle gates. *Continued from the June 14, 2016 Planning Commission meeting.*

It was noted that Com. Sun has a conflict of interest relative to the application, therefore he will not participate in the meeting.

**Erick Serrano, Associate Planner, presented the staff report:**

- Referred to the overhead presentation and reviewed the updates to the application for redevelopment of Marina Foods with associated site and off-site improvements as outlined in the staff report. He reviewed the project description, project site, setbacks, architecture, landscaping and tree removal, transportation/parking, participation in the Transportation Demand Management Association when formed; and environmental review, which are outlined in detail in the attached staff report.
- Since the last meeting, the applicant has proposed a Development Agreement, which includes benefits in exchange for certainty regarding standards and conditions that will apply for the project. Some of the key points from the Development Agreement include transportation benefits with traffic signal modification at the corner of Bandlely and Stevens Creek; bicycle improvements in the vicinity of the project consisting with the city's recently adopted 2016 Bicycle Transportation Plan; new bus shelter and benches along Stevens Creek Blvd. and the participation in the Transportation Management Association future Transportation Management Association. The applicant will also contribute to FUHSD and CUSD; part of it will be parcel tax over 20 years and free use of the community room when available. The applicant will also provide a hotel conference room for the city at the hotel.
- During the June 14, 2016, public hearing, comments were received regarding the easement on the property, most notably the Bank of America and the Saich property, the applicants are continuing to work with the adjacent property owners and easement holders. The city has added conditions as previously mentioned in the June 14<sup>th</sup> meeting that require that the easement issues be resolved and updated and no building permit be issued until the easements have been updated. If the applicant changes the site plan or any buildings, they will be required to come back to the Planning Commission for approval.
- During the public comment period, or during the public comments during the June 14<sup>th</sup> meeting, the comments that included support of the BMR unit, or the inclusion of the BMR units, the mixed nature of the project is viewed favorably; there were as mentioned before concerns over the private easements; there were also concerns over the lack of new allocations throughout the city communications for the General Plan, the project was liked because of the consistency with the development standards and there was the concern of the loss of retail, most notably the grocery store. Relative to the environmental review, the project went under initial study mitigated negative declaration which tiered off the General Plan. The General Plan analyzes full implementation of uses and physical development proposed under the General Plan which includes identifying measures to mitigate the significant adverse program level and facts associated with growth in the General Plan. The project was identified as all new growth as anticipated in the General Plan and General Plan EIR, and the project is consistent with the General Plan and the General Plan EIR. At the May 26<sup>th</sup> Environmental Review Committee the ERC recommended approval of the mitigated negative declaration.
- Staff recommends that the Planning Commission recommend that the City Council approve the application.

- Staff answered commissioners' question about the application and the qualifications for the BMR units.

**Colleen Winchester, Asst. City Attorney:**

- Said she had the opportunity to review the submission received from the development parcel owners attorneys at 4:24 p.m. from Rossi Hammerslough Reischl & Chuck, dated July 25, 2016. There was a dispute between the adjacent property owners or surrounding property owners, and the development parcel owners. They contend that some of the Saich property and adjacent surrounding properties don't have the easements they claim they have; they are disputing that the easements exist. At the last hearing, the surrounding parcels and their attorneys contend they do have easement rights that are being impacted by the project. There is no way to determine the easement rights based on what has been presented.

**Amy Chan, Applicant:**

- Said they had no information to add, but were available to answer questions.

**John Thatch, Architect:**

- Provided information on the kitchen dimensions; restaurant seating is 250, including outside dining. There is adequate space for flexibility, part of the idea is being able to activate the green space relative to outdoor dining. Relative to square footage, said it depended on which direction they went. Said he did not have detailed information with him at the meeting.

**Amy Chan:**

- The one Saich Property has a 22-1/2 foot easement; the easement in dispute is about 25 feet; as we look at some of the contingency that Chair Takahashi mentioned, we would have to push the building back about 2-1/2 feet; that change will be minor; some square footage will be lost but less than 1,000; but we don't believe it would impact the design. The other easement mentioned in the middle of the block, we don't think it is an issue right now, but if it is, it would have to come back to the Planning Commission for their consideration.

**Com. Paulsen:**

- Said that relative to outdoor dining, earlier this year the Planning Commission voted to recommend to the City Council that the Council eliminate the outmoded law saying that a restaurant could only have 20% of its seating outdoors. Is there a provision for expanding the outdoor dining if the law is changed? There was consensus that the issue was not voted on at that time.

**Vice Chair Gong:**

- Asked staff for their interpretation of the document received on the bench. She asked that both attorneys express their opinion also, and what caused the easement rights to be terminated.

**Samuel Chuck, Attorney representing the applicant:**

- Referred to images of the easements and explained they were prepared but not recorded. Said a search did not turn up a recorded easement; Mr. Saich thought he had the easement; however the documents were never recorded; the only one that was recorded was the green one; there is no pink easement; the big one does not exist for the benefit of the Saich property. If the green easement does exist, it is of minimal impact. His letter to the client explained that in his opinion as a matter of law, the court would have to decide that easement although originally recorded has been extinguished. The way the law works on easements, is if you record them and put them on title, they are there but they can be extinguished; one way is if they agree to it but another way is prescription law which means if the easement is blocked for a period of 5 years or longer, then your easement ceases to exist. If you visit the property and look at this area of the green that is on our property, it is a planter box with large trees on it, there are berms that prevent anybody from driving through that easement. He said he has litigated

enough of those cases in his opinion to establish that the easement has been extinguished by a prescription. It effectively means that my client as the property owner built obstructions in it to a point where it doesn't exist anymore. Can a city determine that? No, a court would in theory have to look at that issue. With respect to this application there is a condition that says we have to resolve this issue. He said he was still optimistic because Mr. Connor and he have a good relationship and will work something out. Is that guaranteed? No, but if not, they would have to go to the next step. Regardless, even if they went to build around the easement that is of record, it is a minimal impact.

**Gale Connor, Attorney representing the Saich family:**

- Said he agreed with some points but disagreed on some key points. They investigated a lot over the last month and found copies of grant deeds and quit claim deeds, communications to and from the city, and communications between the property owners. When the Alpha Beta store was developed by Norcal the city had required Norcal to enter into reciprocal easement agreements with all the surrounding property owners; various owners signed different agreements with Norcal, different documents were prepared and recorded; the map shown was prepared and recorded by Norcal, and it showed a 50 foot easement which was to benefit both the Saich property and the adjacent property that was then owned by Home Savings.
- There were grant deeds prepared granting interest in this to the Saich family, and the Saich family likewise had prepared quit claim deeds quit claiming this portion of the inner easement to Norcal. There was a probate proceeding because one of the family members who had interest in the property was deceased. Records were located in the Probate Court authorizing the agreement to swap easements; attorneys were contacted and they still represented Norcal and the Saich family at that time; they acknowledged that the documents had been signed, the deeds had been notarized, signed and delivered. Whether or not they were recorded, isn't the determination as to whether an easement was created; an easement can be created by a present intent of the party's transaction and the delivery of an instrument conveying the property interest. We believe that both of them exist. We acknowledge that the fact they are not of record makes it a little bit murky, but we believe there is enough evidence out there to show that easement was created. If there were to be a court proceeding and the court looked at these two easements one of the things they would have to consider is if there was not a swap,, this inner easement is a parcel of record, or title insurance company has identified it as parcel 2; it includes both this access driveway, as well as the strip of land adjacent to right between the Marina Plaza and Saich property. There is a curb cut a driveway and for 40 years longer cars have been going in and out of there, in a direction to the drive aisle and gone in direction to Bandlely Blvd. We believe that under any circumstances a court would find that there is an easement for ingress egress from the Saich property across from what is now the Marina Plaza property. We disagree on the legal conclusion. As for discussions there have been some preliminary discussions about working something out; that got put on hold when the question was asked about a month ago, what documents you have that show that these easements exist and we did this deep dive for the last month. I too am cautiously optimistic that something could be worked out. We would need more time to do this because now I think we both did our due diligence on what is out there and further discussions may be helpful. One point I want to make is that whatever is going to happen would involve some redesign of the project; there was an initial proposal put on the table that would redesign some of the landscaping, some of the setbacks, possible location of building, so if we can reach an agreement, I believe that the applicant would need to come back to you in any event with whatever the changed configuration is; so rather than putting this off to being resolved down the road in connection with the building permit I would urge that more time be afforded both parties to see if we can work this thing through and whatever changes are made can be brought back to you before it goes to City Council.

**Chair Takahashi:**

- In terms of a change that requires coming back for Planning Commission and City Council approval, what is the threshold; whose discretion is it in terms of it any change, is there criteria by which change is measured against that occurs, or is it any change at all; what's the city's policy?

**Aarti Shrivastava:**

- Said projects approved by City Council when modified come back to the Planning Commission for the modification; if there is a minor modification, that determination is made by the Director; it could be a landscape change; the bldg. skootches back a foot or so with no significant changes and nothing else; that could be processed through an administrative hearing or thru a Director's minor modification. We do these all the time; we determine when a project has reached a level of having to come back to a hearing where there are significant enough changes.

Chair Takahashi opened the public hearing.

**John Saich:**

- Said he and his daughter have interests which have been substantiated, and are not going to relinquish at this time.

**Jennifer Griffin, Rancho Rinconada resident:**

- Said she was disappointed about losing the grocery store; there has always been a grocery store presence at that site and it is one of the anchor sites, first Alpha Beta and later Marina Foods. Before the Target store there was a GEMCO store, and it appears that some planning work is being done to keep a retail component in the center with retail on the ground floor. The area has multiple accesses because of Alves, Bandle, Stevens Creek, Sunnyvale/Saratoga Rd; it is a unique property; there are many ingresses and egresses, exits and entrances; lots of bus traffic; the brick building was initially occupied by Apple in the late 80s. Said there is a small portion of Heart of the City that extends into Sunnyvale/Saratoga and it sounds like from the ERC meeting that they would need to have buffers and setbacks from the road, etc. Also, if they are considering traffic improvements at Bandle and Stevens Creek, having a left turn signal as moving up north would be beneficial.

**Stephen Gettel, real estate advisor for Saich family:**

- Said that in the past month they have endeavored and done a great deal of due diligence to pull up the documentation supporting those easements, the property rights involved, not only of their property but the other properties; and found that the easement adjoining the property is fully substantiated as a deeded easement from its origination as Gale Connor had spoken to. The second easement in the late 70s and early 80s as required by the city in the development of the Alpha Beta store was executed and delivered by the parties involved. At the current time the proposed development was not only on one of those easements but on both of those easements and without setback.
- Subsequent to the June 14<sup>th</sup> meeting they received from the applicant's attorney a redesign that is still in those easements without sufficient setbacks. He said he felt they were willing to get together and discuss it to a fair conclusion to see both the applicant's development move forward and for them to preserve some of their rights, but need more time to do that, and would ask for at least one more extension to work it out.

Chair Takahashi closed the public hearing.

**Chair Takahashi:**

- Asked if there was any implied time pressure associated with the Commission and Council approving it and the time to reach an agreement between the applicant and the adjacent property owner.

**Benjamin Fu:**

- Said that tonight's action is not approval; it is a recommendation to the City Council. There is a certain level of pressure in terms of the approval period; staff would need to make sure the project moves forward to the Council for consideration.

**Chair Takahashi:**

- Summarized if they follow the recommendation of staff in terms of continuing on, recommending Council address this, City Council approves; there is still a condition associated with an agreement reached between the applicant and the adjacent property owner. What is the time element associated in reaching an agreement, if any, after the City Council would approve this?

**Benjamin Fu:**

- The condition stipulates that no building permit will be issued until an agreement has been made. The Development Agreement is good for one year after original approval date.

**Aarti Shrivastava:**

- Projects are typically good for 2 years; can get an extension for another 2; this development agreement is good for one year which takes it to 5 years. They do have some time, but pressure is on the applicant because they cannot pull a building permit and there is no permit streamlining in terms of the city having to give a permit; there is one on the planning site.

**Vice Chair Gong:**

- Asked if they decide to recommend it to City Council to view, could they also recommend that they request increased amounts of retail space?

**Aarti Shrivastava:**

- Said it is difficult for the city to get in the middle; it is their job to make sure that the project does meet all the circulation and safety requirements; that is definitely a concern of the city. The Planning Commission is free to discuss and make recommendations; noted that this is primarily a housing element site that must meet certain findings, if there is an issue with the project. Also noted it was a rental project; it would have to be agreed upon by the owner.

**Com. Paulsen:**

- Said he agreed with staff that it isn't within their purview to get involved with the legal details of easements; said personally it did not matter to him and as a commissioner whether they vote to approve it or not at this point; he felt it would be helpful to follow the staff recommendation because they have done more research on it.
- He commented to Mr. Saich that just as his father was a pioneer in founding Cupertino, an action for which he is grateful; Mr. Saich had the opportunity to be a pioneer in helping create a Heart of the City in this location. He discussed with staff that it is beneficial to plan a whole block as one unit rather than it be piecemeal with one small easement; and he would encourage him to consider redeveloping his property in a way that would benefit both him and his daughter as well as the city. That is outside the purview of this project that is before them and is his personal opinion; said it would be great to have them work together not just on the easement but on the whole block.

**Com. Lee:**

- Said they have discussed the retail spots before; the spaces, location, sizes; there are some nice area restaurants with bars, 800 to 1000 square feet, not 2000. As a city they have prescriptions; bathrooms of certain size, the General Plan does not state they need healthy food places, some cities may have that; if it's not in the General Plan it is hard to push forward to make findings. It is not in the General

Plan that there has to be retail spaces that actually work; it is too bad, there has to be retail square footage. As a Planning Commission they can discuss it, retail is a concern.

**Com. Paulsen:**

- Said at times it is helpful to let market forces help decide how a space is divided up; developers have to work with various prospective tenants to help decide what space would be best; sometimes tenants will work to subdivide their own space and make a smaller store or combine them. It is sometimes difficult when staff requires through zoning a particular size and then the market forces change to go in a different direction.

**Chair Takahashi:**

- Said they have a significant need for hotel rooms and hotel space; and a major need for housing, especially affordable housing for Cupertino and for the valley as a whole. It is driving traffic patterns and it is forcing people to drive a long way for the jobs. Office won't be addressed because it is not in this project. However, there are strong opinions on office space. If we look at those two elements, those are being proposed by this project, and they are two needs leaving the third component of retail which is also being accommodated to a lesser extent than what is currently on the site; and the needs of the housing and hotel are greater than the needs of the retail at this point in time for this specific location. Said from that perspective he felt the retail that is there will hopefully be useful to the general public and ideally useful to the residents and the hotel guests. The need for the housing and hotel are the key elements driving this project. For the city as a whole in general with regard to large retail spaces, there is really not many left that can support something that is traditional large retail, definitely no locations that support big box retail; which is something that needs to as a city planning staff needs to understand how much retail space should the city work to provide for the citizens because it is a very dynamic market retail and retail space.
- Presently the city is seeing much more demand for restaurants in terms of retail space vs. the traditional retail shop primarily driven by the availability of online shopping and everything else. Said that was his perspective with regard to the elements associated with this proposed project.

**Vice Chair Gong:**

- Said she agreed with Chair Takahashi that they were in need of housing; she was a proponent for it to be a housing site. The hotel is too large on the corner, it is needed; there are the allocations; said she felt there was not one person who would disagree that it would be a huge loss and void in the community that Marina Market is going away; it is not just a grocery store, it is a deli, the way of retail, and the current owners should consider it a huge compliment because it is a mainstay in Cupertino and has been an anchor in the city for decades; let's acknowledge if it goes away it is going to be a huge loss. The consideration for retail is understood, that it fits into the footprint of what is fillable to maximize the housing, the hotel allocation.
- Said she understood it from a developer's perspective but was not fully supportive of it as a Cupertino citizen. Said they were not present to approve the project, but recommend it be sent up to City Council for further review. Staff put in the provisions that no building permits would be issued without the agreement reached; and both attorneys said they were both cautiously optimistic which gives her a bit of cautious optimism that agreement can be reached. Said she felt they have reached as far as their duties and responsibilities allow.

**Chair Takahashi:**

- One area that nobody has addressed is the request of the adjacent property owner to postpone this specific element which is the recommendation; it warrants some discussion because that is a critical element of why they are there.

**Aarti Shrivastava:**

- Said they had their recommendation; the fact that there is a condition and this is not a unique project, the pressure is on the applicant because they don't get a building permit. They have a little time but they are not going to be able to build until they work it out. Said she did not feel it would give an unfair advantage with regard to dispute resolution over the long term. The city has a job to do, given that this is a housing element that meets all the city's rules, the protections are put in.

**Chair Takahashi:**

- The city's perspective is they have to work it out, the property owners; said he understood and agreed, but they start the clock by moving on and approving. Now the applicant feels some level of time pressure to reach an agreement whereas the adjacent property owner has no motivation to reach any agreement.

**Aarti Shrivastava:**

- Said not approving it doesn't change it in any way; she was optimistic that both parties want to get together; they will encourage them, but typically staff doesn't get involved in those discussions. They are private for a reason, but publically want to make sure the project meets all the safety requirements.

**Vice Chair Gong:**

- Said her perspective is that their duties, responsibilities and parameters are to review the findings and to deem if they are within or out of the ordinance. If according to the findings there doesn't appear to be anything beyond the ordinance or restrictions, the question is what is accomplished if they were to further delay this recommendation to the Council; what is accomplished?

**Aarti Shrivastava:**

- Said they don't get involved in those discussions and are not privy to anything which is why they weren't able to share any of the information until the neighborhood property owner shared it with them. At staff level they don't accomplish anything particularly.

**MOTION: Motion by Com. Paulsen, second by Chair Takahashi and carried 3-1-1, Com. Lee No, Com. Sun. absent (recused) to approve DP-2015-05, ASA-2015-22, U-2015-06, DA-2016-01, EXC-2016-03, EXC-2016-05, TR-2016-14, and EA-2015-05 and the mitigated negative declaration.**

**OLD BUSINESS:** None

**NEW BUSINESS:** None

**REPORT OF THE PLANNING COMMISSION**

**Environmental Review Committee:** No meeting.

**Housing Commission:** No meeting.

**Economic Development Committee Meeting:**

**Mayor's Monthly Meeting With Commissioners:** No report.

**Report of the Assistant Director of Community Development:** None

**ADJOURNMENT:**

- The meeting was adjourned to next Planning Commission meeting on August 9, 2016, at 6:45 p.m.

Respectfully Submitted: /s/Elizabeth Ellis  
Elizabeth Ellis, Recording Secretary