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July 26, 2011

Planning Commission
City of Dublin

Re: Appeal of Community Development Director's Interpretations of Municipal Code Regarding Sahara Market Expansion at 6783/6777 Dublin Boulevard.

Dear Chairman Brown and Members of the Planning Commission:

OVERVIEW

We are appealing the Community Development Director's decisions that effectively prevent the proposed expansion of Sahara Market. Her decisions are not based on City standards, requirements or policies. No market in Dublin has ever been held to such arbitrary requirements. The project should have been approved under the same rules and conditions as all other Dublin markets and retailers that contain both seating and food preparation areas as Retail - General Use.

PROPOSED EXPANSION IS A MARKET - NOT AN "EATING AND DRINKING ESTABLISHMENT" (RESTAURANT) IN ACCORDANCE WITH LAND USE SECTION 8.40.030 & 8.40.030G.6

APPROVAL OF LAND USE TYPE BY SENIOR PLANNER, MARNIE WAFFLE – MARCH 16, 2011

The Senior Planner was correct and consistent in her application of the Zoning Ordinance in determining the expansion of Sahara Market as Retail - General, not an Eating and Drinking Establishment (please see Exhibit 1)

On March 16, 2011, the Senior Planner sent the landlord and market owners an *email* stating that the proposed expansion would not be considered a restaurant and would be parked at 1 space per 300 square feet subject to the actual number of parking spaces. Based on the representations of the Senior Planner, the market owners and

landlord signed a lease and have spent thousands of dollars on plans and other requirements.

FLIP-FLOPPING BY STAFF

After the signing of the lease and submission of plans for a building permit, the Community Development Director (Director) reversed the decision of the Senior Planner and determined that the food preparation area and seating area would be classified as a restaurant. The Director did not seem to realize that today's grocery markets generally have seating (please see Exhibit 2). What kind of precedent would be established if an Applicant cannot depend on the decision of a Senior Planner? These delays have already cost the market and Landlord tens of thousands of dollars in lost revenue.

Staff inappropriately concluded that our proposal is a restaurant because it "resembles" a restaurant on a floor plan drawing (please see Staff Report page 2, paragraph 4). No analysis was conducted by staff. Furthermore, staff inappropriately concluded, based on no analysis, that an accessory use can be no more than 10 percent of the leasehold. Staff should have followed Zoning Ordinance Section 8.40.030.A and researched how other markets in Dublin and other cities were treated.

MARKET EXPANSION IS NOT A RESTAURANT

Staff's assumption that the food preparation area and seating area comprise a restaurant is wrong. The proposed expansion of 2,400 square feet is part of the total expanded space of approximately 5,700 square feet. It is not a separate space to be treated separately. Both the June 10, 2011 Determination letter and the July 26, 2011 Staff Report failed to disclose that the expanded portion also included significant grocery shelving and that the new food prep area of 420 square feet was for expansion of the current butcher department.

The Director's decision that the proposed expansion of Sahara Market included two Use Types (a grocery market and a restaurant) is without merit. The determination of whether the expansion of the market constitutes a restaurant is a Land Use decision that Staff failed to make in accordance with Section 8.40.030 (please see Attachment 2) In her June 10, 2011 letter, despite the lack of analysis, findings or determinations, the Community Development Director assumed that the expansion was a restaurant. In the July 26, 2011 Staff Report, it was assumed a restaurant because the floor plan of the expanded area "resembled" a restaurant. **No grocery market in Dublin has ever been held to these arbitrary and confiscatory requirements.** The business name and signs state market, not restaurant. Few if any people would confuse the current or future market use with a restaurant. The project should have been approved under the same conditions as all other Dublin markets and retailers that contain both seating and food preparation areas as Retail -General Use.

It is our contention that on-site food preparation and consumption are inherent activities associated with food markets and are not accessory uses. Grocery markets

typically offer on-site food for consumption. Safeway, for example, typically offers patrons Starbucks coffee, pizza by the slice, Chinese food, and sandwiches (both ready-made and customer choices) for on-site consumption at counters, chairs and tables inside the market. As you know, markets these days offer a wide variety of services and non-food items. Markets often have banking services as well as the sale of toys, flowers, hardware, and small electronic items. The narrow definition of the term "markets" as proposed by staff does not address all activities typically associated with markets in this day and age. We believe the preparation and on-site consumption of food proposed by the Sahara Market are activities commonly associated with and inherent in the use of the term "grocery market".

As discussed above, the Appellants strongly believe that the entire project should be classified as a market. If the Community Development Department insists on two Use Types, this application could have been approved under the City's Primary and Accessory Use Standards. Section 8.40.030.A defines accessory uses, in part, as uses "which are necessarily and customarily associated with, and are appropriate, incidental, and subordinate to, such principal uses." In the case of Sahara Market, the principal use is the market.

In accordance with Section 8.40.030.G.2, cafeterias, delicatessens, and food vending are permitted accessory uses in commercial districts if they contain less than 1,000 square feet. In the case of Sahara Market, the seating area will comprise only 500 square feet. The existing as well as the proposed expansion of the food preparation area are required for the market and are independent of the proposed seating area. The existing and proposed food preparation area should not be included as part of the accessory use.

If Staff had analyzed the issues and applied Section 8.40.030.A and/or 8.40.030.G.2 to our proposal, the Planning Commission would not have to deal with this issue.

EQUAL TREATMENT FOR SMALL LOCAL BUSINESS

Staff wants to consider this application for on-site food preparation and consumption to be a separate use with a more restrictive parking standard. Is this a new City standard? All markets in Dublin should be treated equally. In our search of City files, no reference was found to any mainstream market being classified as part restaurant or having to provide extra parking spaces for square footage because of on-site food consumption. Also, Staff could not tell us about any other markets where regulations such as those proposed for Sahara Market were ever applied.

INAPPROPRIATE USE OF ZONING ORDINANCE

If the correct Land Use decision was made, there would be no need to determine whether a Tenant Space had Multiple Functions, was determined to be an Accessory Use, or was a Small Tenant Space. Also, there would be no need to ascertain whether

Section 8.40.030.G, that mentions the 10% in industrial zones applies or even merits a mention or discussion.

If the City does not want to consider food preparation and consumption to be inherent market use, the Sahara Market proposal should be a permitted Accessory Use as allowed by the Zoning Ordinance. For our proposal to be regulated under Section 8.40.030.G.6, as proposed by staff, is ludicrous and disingenuous. This section states, "Retail sales incidental to wholesale sales in industrial districts where the retail sales space is 10 % or less of the entire sales space" are allowed.

Our parcel does not have an industrial zoning classification. Our parcel has no relationship to industrial zoning or wholesale sales. By applying Section 8.40.030.G.6 to our application, staff has applied an unrelated Code requirement to us and has done the small business community a disservice.

The Director's unprecedented decision that the "**seating area and combined food preparation areas**" are an Accessory Use and shall not exceed 10% of the total square footage of the entire tenant space" is an impossible standard for a grocery market to comply with. Rather than an interpretation of the Zoning Ordinance, the Director fabricated regulations that she would like to see added to the Zoning Ordinance.

The Director determined that the Accessory or secondary use (restaurant) includes the seating area plus the existing and proposed food preparation areas. Under this determination, our project is impossible to implement. The existing food preparation area comprises 19% of the total existing market. Under the proposed market expansion, even without seats, the food preparation area would comprise almost 18% of the total space (please see Exhibit 3). In effect, the Director killed our project.

PARKING

The parking requirements that the City is trying to impose would likely make other spaces within the shopping center unleaseable. To avoid empty Tenant spaces, good planning should dictate working with property owners to come up with viable solutions.

The Director's decision as it relates to parking is counter intuitive. The Director determined that "accessory use" is the "**seating area and combined food preparation**" and shall be parked at 1 parking space for every 100 square feet.

Section 8.76.080 (Parking Requirements by Use Type) actually reduces the parking requirement for the floor area not accessible to the customer (food preparation areas) to only 1 parking space for every 300 square feet (same as retail) compared to the more stringent requirement of "Eating and Drinking Establishment" at 1 parking space for every 100 square feet.

Furthermore, using the Industrial District for guidance as it relates to parking makes no sense. When retail sales space of 10% or less is an accessory use to wholesale, the parking impact is too small to have an impact. The ten percent "standard"

is being used by staff out of its intended context. Staff would like a definition of accessory use to be based on a percentage of the total leasable area. The fact is that no such definition exists in the Dublin Zoning Ordinance. Staff cannot grab 10 percent completely out of its intended context and use it for unintended purposes.

However, if the Staff insists on using the 10 percent factor, we would be comfortable with the Planning Commission approving a 500 square foot seating area, as long as long as the food preparation area is not included.

CONCLUSION

In this letter we have outlined the City obstacles encountered in trying to accommodate the needs of the local Afghani community and expand a market into a now vacant tenant space on Dublin Boulevard. Under the determinations rendered by the Community Development Director, it would be impossible to expand the market and provide a small seating area requested by customers of the market. We believe the proposed expansion was anticipated and is allowed by the Municipal Code. The denial of our application is injurious to the Afghani community, customers, the store owners, and the property owner. The denial of our application provides absolutely no benefit to the City or the community.

We respectfully ask the Planning Commission to overrule the Community Development Director and approve our proposed, small expansion as a grocery market.

Please feel free to contact us if you would like to discuss these issues further.

Very truly yours,


Jay Fink


Brad Sanders