



CITY OF OAKLAND

REQUEST FOR APPEAL OF DECISION TO PLANNING COMMISSION OR CITY COUNCIL

(REVISED 8/14/02)

PROJECT INFORMATION

Case No. of Appealed Project: _____

Project Address of Appealed Project: 500 LAKE PARK AVE, OAKLAND, CA

APPELLANT INFORMATION:

Printed Name: ALEX HAHN Phone Number: 510-444-7722

Mailing Address: M, 80 GRAND AVE Alternate Contact Number: _____

City/Zip Code OAKLAND 94612 Representing: HAHN FAMILY TRUST

An appeal is hereby submitted on:

AN ADMINISTRATIVE DECISION (TO THE CITY PLANNING COMMISSION)

YOU MUST INDICATE ALL THAT APPLY:

- Approving an application for an Administrative Project
- Denying an application for an Administrative Project
- Administrative Determination or Interpretation by the Zoning Administrator
- Other (please specify) _____

Pursuant to the Oakland Municipal and Planning Codes listed below:

- Administrative Determination or Interpretation (OPC Sec. 17.132.020)
- Determination of General Plan Conformity (OPC Sec. 17.01.080)
- Design Review (OPC Sec. 17.136.080)
- Small Project Design Review (OPC Sec. 17.136.130)
- Minor Conditional Use Permit (OPC Sec. 17.134.060)
- Minor Variance (OPC Sec. 17.148.060)
- Tentative Parcel Map (OMC Section 16.304.100)
- Certain Environmental Determinations (OPC Sec. 17.158.220)
- Creek Protection Permit (OMC Sec. 13.16.450)
- Creek Determination (OMC Sec. 13.16.460)
- Hearing Officer's revocation/impose or amend conditions (OPC Secs. 15.152.150 & 15.156.160)
- Other (please specify) including 17.090.040, 14.14.020, 17.114.020, 17.114.110, 17.114.080, 17.134.020, 17.114.070, 17.102.290, 17.120.050

A DECISION OF THE CITY PLANNING COMMISSION (TO THE CITY COUNCIL) Granting an application to: OR Denying an application to:

(continued on reverse)

(Continued)

A DECISION OF THE CITY PLANNING COMMISSION (TO THE CITY COUNCIL)

YOU MUST INDICATE ALL THAT APPLY:

Pursuant to the Oakland Municipal and Planning Codes listed below:

- Major Conditional Use Permit (OPC Sec. 17.134.070)
- Major Variance (OPC Sec. 17.148.070)
- Design Review (OPC Sec. 17.136.090)
- Tentative Map (OMC Sec. 16.32.090)
- Planned Unit Development (OPC Sec. 17.140.070)
- Environmental Impact Report Certification (OPC Sec. 17.158.220F)
- Rezoning, Landmark Designation, Development Control Map, Law Change (OPC Sec. 17.144.070)
- Revocation/impose or amend conditions (OPC Sec. 17.152.160)
- Revocation of Deemed Approved Status (OPC Sec. 17.156.170)
- Other (please specify) _____


An appeal in accordance with the sections of the Oakland Municipal and Planning Codes listed above shall state specifically wherein it is claimed there was an error or abuse of discretion by the Zoning Administrator, other administrative decisionmaker or Commission (Advisory Agency) or wherein their/its decision is not supported by substantial evidence in the record, or in the case of Rezoning, Landmark Designation, Development Control Map, or Law Change by the Commission, shall state specifically wherein it is claimed the Commission erred in its decision.

You must raise each and every issue you wish to appeal on this Request for Appeal Form (or attached additional sheets). Failure to raise each and every issue you wish to challenge/appeal on this Request for Appeal Form (or attached additional sheets), and provide supporting documentation along with this Request for Appeal Form, may preclude you from raising such issues during your appeal and/or in court.

The appeal is based on the following: *(Attach additional sheets as needed.)*

SEE ATTACHED

Supporting Evidence or Documents Attached. *(The appellant must submit all supporting evidence along with this Appeal Form.)*



Signature of Appellant or Representative of
Appealing Organization

05/03/2004

Date

Date/Time Received Stamp Below:

Below For Staff Use Only

Cashier's Receipt Stamp Below:

8/14/02

The Zoning Administrator has issued an administrative determination pertaining to the legal non-conforming use at 500 Lake Park Avenue, Oakland. The Zoning Administrator determined that the proposed change of tenancy of a Kwik Way fast-food restaurant to a McDonald's fast-food restaurant is a "substitution" of activities that will require a Major Conditional Use Permit from the City. This determination was in error, is an abuse of discretion, and is not supported by substantial evidence, as discussed below.

No Substitution of Activities Is Contemplated:

As the Zoning Administrator correctly notes, the Kwik Way restaurant is a legal non-conforming use that predates the adoption of Oakland's Planning Code. A "substitution of activities" is defined in Oakland Planning Code section 17.114.020 to mean "the replacement of an existing activity by a new activity, or a change in the nature of an existing activity." The Planning Code section goes on to clarify, however, that a "substitution of activities" does *not* include "a change of ownership, tenancy, or management where the previous line of business or other function is substantially unchanged." Oakland Planning Code § 14.114.020. *See also* Planning Code section 17.09.040 ("Substitution (of activities)' means the replacement of an existing activity by a new activity, or a change in the nature of an existing activity, but not including a change of ownership, tenancy, or management where the previous line of business is substantially unchanged"). Here, nothing more than a change of tenancy is planned. The previous line of business will be substantially unchanged when the McDonald's restaurant replaces the Kwik Way restaurant. Kwik Way has been engaged in the activity of operating a fast-food restaurant, including a drive-through, at the project location for at least 30 years. The proposed change – for which building, electrical, plumbing, mechanical, and sign permits have already been secured – is merely a change of tenancy that will continue the previous fast-food restaurant without substantial change¹.

It is misleading and incorrect for the Zoning Administrator to suggest that the proposed extended business hours following the transfer of tenancy would make the non-conforming use "more permanent" and increase its impact on the neighborhood. The Kwik Way restaurant has been operating in the present location for over 30 years, and has been accepted and treated as a permanent part of the neighborhood. Moreover, there is no evidence whatsoever that the proposed increase in hours would increase the impact on the surrounding community. The Zoning Administrator suggests that extended business hours will "increase[e] the hours of food production, increase[e] the number of customers, escalat[e] automotive trip generation and intensif[y] other [unspecified] activities related to operation of a fast food restaurant." Although increased hours will, by definition, increase the hours of food production, there is no evidence that this will

¹ Although not referenced in the Zoning Administrator's administrative determination, and presumably not a basis for his determination, public opposition to the proposed change in tenancy has virtually nothing to do with the existence of a fast food restaurant on the location, and is instead based on an irrational dislike for McDonald's itself. Although members of the community have raised some of the same spurious traffic and noise issues raised by the Zoning Administrator, public support for replacement of the Kwik Way by *another* fast food restaurant establishes that neighborhood response is directed only to McDonald's.

have any effect whatsoever on the neighborhood. There is no evidence that increased hours will result in an increase in the number of customers, “automotive trip generation,” or “other activities related to operation of a fast food restaurant.” Moreover, there is no evidence that, even if the number of customers or “automotive trips” is increased, the increase will have any impact on the neighborhood. The Grand Lake area is zoned C-30 (“District Thoroughfare Commercial Zone”) and is home to numerous businesses, many of which are open as early and/or as late as the proposed McDonald’s restaurant. For example, the Grand Lake Theatre shows movies running until at least midnight, and numerous restaurants (which include a Kentucky Fried Chicken restaurant located at 470 Grand Lake Avenue) are open throughout the day.

The objections to the planned drive-through at the McDonald’s restaurant project are unsupported by evidence. Kwik Way has operated a drive-through for many years; there is no evidence that the change in tenancy would impede pedestrian circulation or create safety issues to any greater extent than the existing non-conforming use. The Zoning Administrator appears to acknowledge that there is no evidence that the transfer of tenancy would impact automotive traffic. He writes that increased hours “*may* create traffic due to cars queuing on to the street” (emphasis added). This ignores the history of Kwik Way’s drive-through, and is nothing more than speculation. Finally, there is no evidence that the amplification system or increased hours would have any impact on nearby residential areas. In light of the freeway ramp configuration, and the existence of other McDonald’s restaurants in more accessible locations, it is highly unlikely that anyone from outside of the neighborhood would travel to the Grand Lake area specifically to eat at the McDonald’s restaurant. Kwik Way has operated for many years, apparently without raising significant noise concerns. There is no reason to believe that the change in tenancy would increase the impact on the neighborhood.

The change in tenancy from Kwik Way to McDonald’s does not amount to a “substitution” of activities. The Zoning Administrator’s decision should be reversed.

No Alteration of the Facility is Contemplated:

Non-conforming facilities such as the Kwik Way restaurant may be altered “in any way which does not create any new nonconformity or increase the degree of existing nonconformity with respect to any requirement applying to facilities.” Oakland Planning Code section 17.114.110. The Zoning Administrator suggests that the proposed interior renovations at the McDonald’s project will “alter the facility and increase the degree of the existing non-conformity.” There is no evidence to support this contention, and the nature of these concerns is unclear. The Appellant requests that the Zoning Administrator be required to provide evidence upon which he bases his determination on this point. Because the Zoning Administrator has completely failed to provide any evidence to date, his determination is void *ab initio*. If the Zoning Administrator provides such information, the Appellant respectfully requests the opportunity to respond more fully to the Zoning Administrator’s particular concerns about the physical changes. The alterations proposed – for which the City of Oakland has already issued permits – are primarily to the interior of the restaurant. The exterior changes anticipated are minor, and

were designated to retain the historical character of the Kwik Way building and the neighborhood. Although the signage will change and the interior will be updated, the structure will not be substantially changed.

The Zoning Administrator also notes that the cost of *alterations* for which a building or sign permit is required may not exceed 25% of the replacement cost of the building within any five year period. Here, the Zoning Administrator asserts that the proposed alterations exceed this threshold, claiming that the value of the improvements is at least \$65,000 and that the replacement value of the restaurant is \$152,000. As explained above, the proposed changes are not “alterations.” Therefore, the 25% rule of Planning Code section 17.114.080 is not triggered, and the limitation does not apply. Since the proposed changes are not alterations, there is no need to consider this issue further. Moreover, most of the changes made to the restaurant will be internal fixtures, owned by the operator of the McDonald’s restaurant, and not part of the building. In addition, the Appellant is not aware of any basis for the Zoning Administrator’s estimates. The building permit estimates the value of changes as \$35,000 – well under 25% of \$152,000, even assuming that the estimated replacement value can be supported. (The issued permits are attached to this appeal.)

In sum, the proposed changes will not amount to an “alteration” within the scope of the Planning Code. Therefore, no Conditional Use Permit is required, and the Zoning Administrator’s determination should be reversed.

At Most, Only A Minor Conditional Use Permit Can Be Required:

No Conditional Use Permit is required because the change from the Kwik Way to a McDonald’s restaurant does not constitute a “substitution” or “alteration.” Even assuming that an impermissible alteration or substitution is proposed – which the Appellant vigorously disputes – there is no support whatsoever for the Zoning Administrator’s conclusion that a Major Conditional Use Permit is required. Major Conditional Use Permits are required for fast-food restaurants and drive-throughs except where the proposal involves “only accessory parking, the resumption of a discontinued nonconforming activity, or an addition to an existing activity which does not increase the existing floor area by more than twenty (20) percent.” Planning Code section 17.134.020(A)(2). Any other project requires only a Minor Conditional Use Permit. The Planning Code section does not directly address the situation here – the continuation of a nonconforming activity that has *not* been discontinued – because no Conditional Use Permit should be required. Even if the changes were to constitute a “substitution” or “alteration,” however, there is no basis in law or fact to support giving the McDonald’s restaurant less favorable treatment than if the Kwik Way had been closed, or if the proposed changes were to increase the floor area by 19 percent, two situations which would require only a Minor Conditional Use Permit. The minor changes contemplated do not require – or merit – the expanded investigation associated with a Major Conditional Use Permit.