

**MINUTES OF MEETING
WEST COUNTY BOARD OF ZONING ADJUSTMENTS
MAY 24, 2006
(APPROVED, JUNE 14, 2006)**

The meeting was held at the hour of 1:30 p.m. in the Alameda County Building, 224 West Winton Avenue, Hayward, California.

REGULAR MEETING: 1:30 p.m.

MEMBERS PRESENT: Chair; Ron Palmeri; Members, Frank Peixoto, Lester Friedman and Dawn Clark - Montenegro.

MEMBERS EXCUSED: Jewell Spalding.

OTHERS PRESENT: Phil Sawrey-Kubicek, Senior Planner; Yvonne Bea Grundy, Recording Secretary

There were approximately 11 people in the audience.

CALL TO ORDER:

The meeting was called to order by the Chair at 1:30 p.m.

ANNOUNCEMENTS BY THE CHAIR: The Chair made no announcements.

OPEN FORUM:

Open forum is provided for any members of the public wishing to speak on an item not listed on the agenda. Each speaker is limited to three (3) minutes.

No one requested to be heard under open forum.

CONSENT CALENDAR:

1. **GUADALUPE LOZA/FRED FULCHER, CONDITIONAL USE PERMIT, C-8271** – Application to allow continued operation of a drive-in business (catering truck), in a PD-ZU-1487 (Planned Development, 1487th Zoning Unit) District, located at 691 West A Street, north side, corner, northwest of Royal Avenue, unincorporated Hayward area of Alameda County, bearing Assessor's Parcel 0432-0016-035-00. (Continued from February 11, April 14, April 28, May 26, July 14, September 8, October 13, 2004, March 23, June 22, October 12, December 14, 2005, and March 22, 2006; to be continued without discussion to September 13, 2006).
2. **FRANCISCO PENA, CONDITIONAL USE PERMIT, C-8389** – Application to allow the operation of a temporary outdoor business (Catering Truck) in a TC (Transit Corridor) District, located at 16211 East 14th Street, southwest end of 162nd Avenue, unincorporated Ashland area of Alameda County, designated Assessor's Parcel Number: 080C-0479-003-00. (Continued from January 11 and March 22, 2006; to be continued to September 13, 2006).
3. **T-MOBILE USA, CONDITIONAL USE PERMIT, C-8487** – Application to

allow continued operation of a wireless communication facility in an "A" (Agricultural) District, located at 6390 Grassland Drive, north east side, approximately 1,200 feet southeast of Sunnyslope Avenue, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Numbers: 085A-1400-001-10 and 085A-1400-001-07.

(To be continued without discussion to June 14, 2006).

4. **PHOI PHAN, VARIANCE, V-11951** – Application to allow construction of four dwelling units with: a) A five foot side yard; b) a two foot driveway set back, raised to four feet; c) 1,536 square feet of open space where 2,400 square feet of open space is required; d) no sidewalk; and e) A 13 foot wide driveway where 16 feet is required in an R-S-D-20 (Suburban Residence, 2,000 square feet Minimum Building Site Area per Dwelling Unit) District, located at 230 Laurel Avenue, north side, approximately 400 feet west of Princeton Street, unincorporated Cherryland area of Alameda County, designated Assessor's Parcel Number: 429-0091-058-00. (Continued from April 26, 2006; to be continued without discussion to June 28, 2006).
5. **PATRICK LOVE, VARIANCE, V-11982** – Application to allow a garage conversion with on-site parking in the side yard, in an R-1-SU-RV (Single Family Residence, Secondary Unit, Recreational Vehicle) District, located at 3773 Cottage Court, north side, approximately, 284 feet west of Parsons Avenue, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Number: 084D-1329-017-00. (Continued from April 12, 2006; to be continued without discussion to July 12, 2006).
6. **LUIS ROBLES/GURCHARAN DHALIWAL, VARIANCE, V-11995** – Application to allow construction of a second dwelling providing a 10 foot wide driveway where 12 feet is the minimum and a zero foot setback between a driveway and a dwelling, and a dwelling and dwelling wall, in an R-S-D-35 (Suburban Residence, 3,500 square feet Minimum Building Site Area per Dwelling Unit) District, located at 167 Blossom Way, south side, approximately, 300 feet east of Meekland Avenue, unincorporated Cherryland area of Alameda County, designated Assessor's Parcel Number: 0429-0032-017-00. (Continued from April 12, 2006).

REGULAR CALENDAR

1. **BEHZAD BARFEEI, CONDITIONAL USE PERMIT, C-7992** – Application to allow operation of an auto sales and minor service facility in the ACBDSP (Ashland Cherryland Business District Specific Plan) District, located at 21265 and 21273 Mission Blvd, southwest side, approximately 150 feet northwest of Blossom Way, unincorporated Cherryland area of Alameda County, bearing Assessor's Parcel Number: 414-0076-028-00 (Continued from May 22, 2002; January 22, March 26, and November 5, 2003; April 14, September 8, November 10 2004 and March 9, August 24, 2005 and April 12, 2006).

The staff recommendation was approval with a correction to Tentative Finding #4. The use will be contrary to the performance standards established for the District. Although the auto oriented use is not consistent with the Ashland Cherryland Business District, Transit Access Plan this issue will be either be

resolved when the plan is updated or the use will be phased out. The continued operation will not be expanded. The Chair asked staff what specific solution was being considered since the application had been in question for a period of four years. The County's goal is to adopt a policy and method to phase out discontinued uses. Member Friedman suggested language be added to the staff report to explain that fact. The Chair asked County Counsel for direction. The current ACBD Plan precludes this use. Currently a draft of an updated Eden Area General Plan exists. When the Eden Area Plan is adopted which version would supersede. Counsel, said it would depend on the language the Plan would encompass. Additional time would be needed to ascertain since he is not familiar enough with either plan. Public testimony was opened.

The applicant, Mr. Behzad Barfee was present. The original permit issued in 1999 and expired in 2002. A renewal application was submitted at that time, and has been under consideration. In the past the property had been used to install auto glass. He asked the Board for a 5 to 6 year expiration period due to the lengthy application process. He was informed by Cal Trans that the proposed street widening would take 6 to 9 years before it reached his property. His understanding is that the use on the property is "Grandfathered" in. He would like to make improvements to attract a tenant. Public testimony was closed.

Member Pexioto asked County Counsel for an opinion. Counsel stated it did appear that the use was prohibited with the ABCD Plan and was not consistent with the Draft of the Eden Plan as well. The Chair pointed out that the use, though illegal had been going on for 9 years. If the Board were to deny the application such action would trigger a determination regarding non-conforming uses. Counsel said it was his understanding that the business did not start until after 1995. A CUP was issued. It is under the Board's purview to extend a CUP.

Member Pexioto moved to approve the application for a period of three years. Member Clark seconded the motion. Member Friedman was not in favor of approval. Motion carried 3/1/1. Member Spalding was excused.

2. **JAVIER PENA, CONDITIONAL USE PERMIT, C-8499** – Application to allow the operation of an alcohol outlet in conjunction with a supermarket (El Rancho Supermercado), in a C-N (Neighborhood Business) District, located at 22291 Redwood road, west side, north corner of Grove Way, unincorporated Castro Valley area of Alameda County, designated Assessor's Parcel Number: 415-0100-054-00.

Staff requested that the application be continued to allow review by CVMAC on June 12, 2006. Although the Board had the authority to hear and act on the application now, CVMAC requested they be allowed to give input. Member Pexioto said he observed during a field trip that another alcohol outlet was located three doors away. He asked staff to review the guidelines as to what the proximity limits were. The Chair asked how long Trader Joe's had been open. Staff said Trader Joes's was approved in April, 2004. A recent application for another proposed alcohol outlet on Rufus Court was denied. The Chair announced public testimony could be submitted, however no action would be taken. Public testimony was opened.

Member Friedman asked what kind of alcohol selection El Mercado offered that varied from Trader Joe's. Mr. Mario Prado pointed out that El Mercado was a family run store that sold products that cater to a specialized market. A full butcher shop is featured. Families do their weekly shopping there. El Mercado would like to provide a small assortment of light beer and some specialty beers from Mexico which they will be able to offer product at better price than other retailers. The customer will have the convenience of purchasing all of their groceries in one location. The offering will complement the store

business model. Trader Joes's is across a busy street and only offers a specialty butcher shop. The other nearby liquor store only sells snack food, where our customer is purchasing groceries. Member Pexioto asked if wine would be sold. Mr. Prado said depending on the market, table wine might be offered in the future. Public testimony was closed.

Ms. Liz Morales asked the Board if a decision would be made. The Chair said that the request of the CVMAC would be honored. Past policy has been to consider the input of CVMAC prior to making a decision on an application. The Board will adhere to past policy. Ms. Morales announced she would reserve her comments for the next formal hearing of the application.

Member Pexioto motioned to continue the application to June 14, 2006. Member Friedman seconded the motion. Motion carried 4/0. Member Spalding was excused.

3. **ANTONIO LOPEZ, CONDITIONAL USE PERMIT, C-8410** – Application to allow continued operation of an outdoor storage facility for pallets and materials associated with a pallet business in an M-1 (Light Industrial) District, located at 2493 Dunn Road, north side, approximately 92 feet east of the Southern Pacific Railroad, unincorporated Eden area of Alameda County, designated Assessor's Parcel Number: 0439-0013-017-00. (Continued from April 12, 2006).

The staff recommendation was approval. Board questions were as follows:

- Will the current use eventually be phased out
- Have all past permit conditions been in compliance, including Fire, Building and requests from the City of Hayward
- Has the Dunn Road entrance been paved

Public testimony was opened. Staff said that the access road was currently paved with gravel but in need of resurfacing. The prior CUP required the applicant to pave the road with concrete. The applicant has met with Margaret Elliot however paving has been completed as of yet. Public testimony was opened.

Mr. Felipe Lopez was present on behalf of his brother, Mr. Antonio Lopez. An environmental company has been retained to assist with development of a water plan. The height of pallets stacked on the property have been lowered to 12 feet, and moved away from the property line. Signage has been posted outside the property to enforce smoking restrictions. Currently they are working with Scott Owen to determine what is required to bring all on site buildings up to code. Some electrical cords are still being in the shop area. Scott Owen will be conducting additional inspections to determine the total electrical needs for the property. Mr. Lopez is in agreement with all staff recommendations, and requested the Board allow the business to operate until 2011. Thus far the applicant has not been successful in locating an alternate site for the business in the area. Locations in the immediate area are costly and limited in square footage. The Stockton or Fresno area will probably be the appropriate for future re-location.

The property owner, Mr. Richard Silva was also present. The structures on the property were erected by his Father who is now deceased. Unfortunately he has limited knowledge of age, etc. Some structures will be torn down. A new shop will be built closer to existing electrical access. A draft site plan has been prepared, which will be finalized after receiving recommendation from Building. The necessary permits can be obtained and work completed within the required time frame. Mr. Silva requested that the Board

grant him 5 years to move the business. Public testimony was closed.

Member Friedman stated he was still concerned based on the statement submitted by the Fire Marshal. He believed existing issues might represent a clear and present danger. As a result he was not inclined to grant a CUP for a long period of time. A two and one half year period to phase out the business might be appropriate. If granted the applicant should return to the Board in 120 days to verify Fire Department compliance.

Member Friedman motioned to approve the application with an expiration date of December 31, 2008. Condition #5 shall be modified to reflect compliance within 120 days. The use shall be phased out after a period of two years, unless an express recommendation is submitted by the Fire Department to extend said use. Member Pexioto asked for clarification to the motion. Member Friedman restated that the applicant shall be in compliance with conditions #2, #3, #4, #5 and all Fire Department recommendations within 120 days at which time the Board reserved the right to revoke the Conditional Use Permit. The permit shall also be reviewed by the Board again in a period of one year.

Member Pexioto accepted the modification with the addition of language to Condition #5. The Board will review the permit to verify fire and electrical compliance within a period of 120 days at which time the permit may be revoked. Modification accepted. Motion to approve the application carried 4/0/1. Member Spalding was excused.

4. **ANTHONY WRIGHT, VARIANCE, V-11989** – Application to allow construction of a seven foot, six inch high fence where four feet, zero inches is the maximum height allowed, in an “A” (Agricultural) District, located at 22469 Eden Canyon Road, north west side, approximately 0.65 miles north east of Hollis Canyon Road, unincorporated Castro Valley area of Alameda County, designated Assessor’s Parcel Number: 085A-0100-003-00. (Continued from April 12, 2006).

Staff recommended denial of the application. Public testimony was opened. The applicant was not present. There were no requests to speak. Public testimony was closed.

The Chair asked staff if there had been recent contact or feedback from the applicant. Staff responded there had been none. Member Pexioto did not believe the applicant could make the findings. However he did not want to motion for denial without the applicant present.

Member Pexioto motioned to continue the application to June 14, 2006 to allow the applicant to be present and confer with staff. Member Friedman seconded the motion. Motion carried 4/0/1. Member Spalding was excused.

5. **DEL RIO/GOMES, VARIANCE- V-12000** – Application to construct an attached addition (garage) providing a six foot side yard where 15 feet is the minimum, in an R-1-L-B-E-CSU-RV (Single Family Residence, Limited Agricultural Uses, 5 Acre Minimum Building Site Area, Secondary Unit, Recreational Vehicle) District, located at 8216 Crow Canyon Road, west side, approximately $\frac{1}{4}$ mile north of Norris Canyon Road, unincorporated Castro Valley area of Alameda County, designated Assessor’s Parcel Number: 085-1750-005-22.

Staff reviewed the application. The recommendation was denial. Public testimony was opened.

Project designer, Daniel Del Rio represented the applicant Mr. Gomes, who had been delayed. The property is located off of Crow Canyon Road in a rural like setting. The site is further hidden by bushes and trees close to the canyon. Originally when he spoke to planning about the project he was told the side yard setback requirement was 10 feet. At this juncture of the project he has now discovered the setback is 15 feet. A boundary adjustment was done with the adjoining parcel. This was prior to the applicant purchase to accommodate a bedroom addition. As a result Mr. Gomes property is now smaller. The property angles in, and is reduced in the side yard area where the attached addition is proposed. Placement options are restricted due to an existing leach field. The adjoining neighbor is not opposed to the addition and has submitted a letter of support.

Board Members had the following questions:

- Would a second boundary adjustment be possible
- Have alternate designs been considered
- Will a portion of the garage be used as a work shop

Mr. Del Rio said eventually the applicant may convert a bedroom into a work shop but that is a consideration in the distant future. Staff said the leach field would present limitations. However the applicant could reduce the proposed addition and opt for a two car garage. This would meet all Zoning requirements. Public testimony was closed.

Member Friedman thought a continuation may be in order since Mr. Gomes was not present. Member Pexioto stated that his observation during the field trip was that design options were available to the applicant. Granting the current proposed design would constitute special privilege. The Chair asked staff if CVMAC was in favor of the application. Staff confirmed CVMAC had recommended approval.

Member Pexioto motioned to continue the application to June 14, 2006 to allow the applicant to be present. Member Friedman seconded the motion. Motion carried 4/0/1. Member Spalding was excused.

6. **GURDEEP MAHAL, VARIANCE, V-12010** – Application to allow construction of a single family dwelling 30 feet in height where 25 feet is the maximum, in a P-D-ZU-1451 (Planned Development, 1451st Zoning Unit) District, located at 2850 Eugene Terrace, north east side, approximately 3,000 feet north west of Carlton Avenue, unincorporated Castro Valley area, designated Assessor's Parcel Number: 084B-0405-030-00.

The Castro Valley Municipal Advisory Board recommended approval. Staff recommended approval of the application as well. Although the 85 foot median lot depth does not meet requirements, all other requirements are in compliance with current zoning. The extreme slope limitation limits the buildable portion of the lot. The Chair recused himself and turned the meeting over to Vice Chair, Frank Pexioto. Public testimony was opened.

Mr. Mike Corelli, representing the applicant explained that the property was surrounded on three sides by a road. The home was designed to fit the steep slope of the parcel. The placement of the front door is on the east. The width side of the property is longer, reversing the typical depth and width orientation. Member Clark asked if the home was currently under construction. Mr. Corelli confirmed that it was. Originally the applicant did not recognize that a height variance would be needed, just a side yard variance. Staff explained that an error occurred when the original height calculations were done. Height

of Buildings, 17.08.100 of the R-1 District was applied to accommodate the height. This section however restricts median lot depth to a minimum of 100 feet. The parcel meets all other requirements except it has a median lot depth of 85 feet. Using the required 100 foot depth to calculate height, results in a 30 foot high structure.

Chair, Pexioto asked if any additional structural changes had been made to the original plans. Member Friedman asked staff's opinion regarding the letter submitted that afternoon. Staff said they were not aware of any structural changes from the original plans. They have not discussed suggestions contained in the letter as it received only today.

Member Friedman motioned to approve the application and adopt the staff Tentative Findings. Member Clark seconded the motion. Motion carried 3/0/1. Chair, Palmeri recused himself. Member Spalding was excused.

Acting, Chair Pexioto asked staff how the height discrepancy came to their attention. Staff said via a Code Enforcement compliant. The Chair asked if the complaint was about "view". Staff confirmed that was correct.

7. **DETERMINATION, D-155** – A referral by the Board of Supervisors for a Determination whether a non-conforming Alcohol Outlet (a use established prior to the requirement for a Conditional Use Permit), that has been closed longer than six months, has been abandoned under Section 17.52.690 of the Alameda County General Ordinance Code and whether the use has experienced a break in continuous operation, substantial change in mode or character of operation under Section 17.52.695 of the Alameda County General Ordinance Code, at an existing structure located on two parcels, located at 2688 Castro Valley Boulevard, Castro Valley area, Assessor's Parcel Numbers: 84A-0181-057-03 and 84A-0181-57-02.

Staff reviewed the application which was a referral from the Board of Supervisor's. The request: to determine whether a non conforming use of an alcohol outlet that has been closed for longer than a period of 6 months had been abandoned under Ordinance Section 17.52.690, and whether the use has experienced a break in continuous operation, substantial change in mode of character or operation under Ordinance 17.52.695. The staff recommendation was that the applicant be allowed to continue to operate without the need of a conditional use permit. A correction to the staff report was noted. The word tavern should be replaced by the word alcohol outlet.

The Board had the following questions:

- What is the definition of abandonment
- Was rent paid during the period that the building was red tagged
- Does the voluntary surrender of the ABC License constitute a substantial change in the operation or character of the business
- Were all of the Building Code violations on the property brought into compliance. If so did the use become conforming when the repairs and remodeling of building were completed
- Have any new violations occurred

- There were several assignees, assigned to the lease, the last being the applicant. At any point did the lease terminate
- Was more than one individual assigned to the lease

Staff responded that Zoning Ordinance, Section 17.52.690 did not contain an actual definition of abandonment. However the section discusses what shall happen to the use if abandonment does occur. County Counsel, Ray Mackay said that Webster's Dictionary definition of abandonment suggests intentional withdrawal from a particular type of activity as opposed to involuntarily being shut down. Based on his understanding of the ordinance from staff, this use existed prior to the Zoning Ordinance which would not require a cup. In reference to, substantial change in the operation or character of the business, Counsel said his understanding is that the ABC license was turned in as a requirement of Alameda County, due to the lack of a cup. Public testimony would be required to verify the circumstances. The correction of building code violations would not necessarily mean there was a change in the use of the building.

Member Friedman asked for clarification regarding the lease being assigned to another person. In this case, a lease was assigned in 1996 after the zoning ordinance was established. He also asked if the manner in which business was conducted at the site could affect the right to continue the use. Staff told the Board thus far the applicant did not provide them with a copy of the original lease. They are not aware of any new ABC violations but will follow up with the Sheriff's Department. County Counsel said further research would be required to respond to those questions. Public testimony was opened.

The Chair asked the applicant's attorney, Mr. Alan West to address points raised in a letter dated May 18, 2006. The Chair commented that his observation was that Ordinance 17.52.690 was broad in the sense it referred to change or abandonment for a continuous period of six months or more. Ordinance 17.52.695 gives some statutory exceptions due to circumstances, etc. He asked Mr. West's opinion. Mr. West said he believed Section 17.52.695 was controlling because it specifically mentions alcohol outlets. On that point he was in agreement with the conclusion in the staff report. Section 17.52.695 was more applicable. The Chair then asked Mr. West his interpretation of 17.52.695, Sub-Section #b, aside from Mr. Hoang's rationale for surrendering the ABC license. Mr. West said there are two types of surrender, voluntary and involuntary. Mr. Hoang was required to surrender his license due to the fact he no longer had a place to conduct alcohol sales. He believed the staff report supported the concept that surrender does not mean that the use was discontinued. The former owner failed to complete building repairs required by Alameda County Building Department. The staff report also stated the license surrender should not mean the non-conforming use was lost or changed. The Chair asked Mr. West if he believed an estoppel argument could be made because Mr. Hoang said he was misinformed by the County a CUP would be required which triggered the involuntary surrender of the ABC License. Mr. West said it was his position that the Ordinance already states Mr. Hoang can re-open his business when he regains his ABC License. All that is required is a finding by the West County BZA or the Board of Supervisors.

Mr. West wanted to dispel the misconception that remodeling took place. The roof collapsed and the structural integrity of the building was in question. The landlord had to address the issues. More than \$200,000.00 of work was completed which involved the former owner's insurance company and FEMA. Mr. Hoang purchased the property at the end of 2005 when the repairs were complete. Mr. West referred to a copy of the Assignment of Lease. Section d, allowed Mr. Hoang to exercise two five year options. He exercised both. Although a full copy of the 1980 Lease was not available, the Lease Assignment Section b, states Mr. Hoang was entitled to all right, title and interest in the lease. This was in conjunction with premises and the non-conforming use. In regard to the question of past conduct of the

applicant, the statute has no bearing on the requirement of a CUP.

Member Friedman had more specific questions about the July, 1980 lease. The 1980 lease could be relevant if it stated, forfeiture occurred if the property were destroyed. Mr. West interjected and said the lease was irrelevant. It is a moot point since Mr. Hoang cured the problem. Ultimately the action of the parties shows responsibility. Staff noted Exhibit B. A letter from Mr. Hoang's former attorney shows tenancy existed in December 2004. Member Friedman asked if there was an agreement as to what repairs would take place. Also was rent being paid during the time of repairs. Mr. West reiterated that payment of rent was irrelevant. A contract can still be in effect without the payment of rent. The landlord did not seek to evict Mr. Hoang. Diligent effort has been put forth to locate an original copy of the lease to no avail. However, ultimately, the landlord repaired the structure and took responsibility. It was the intent of both parties to repair and restore the building. Mr. Hoang did not purchase the building until after the repairs were complete. Mr. West offered to have Mr. Hoang testify as to his intent. The Chair confirmed that he would like Mr. Hoang to testify on the record.

The Chair asked Mr. Hoang if he had been a continuous tenant up until the time he purchased the building. Mr. Hoang stated that he had been a tenant until the purchase in 2005. Further Board questions for Mr. Hoang are as follows:

- Is Mr. Hoang engaged in any other types of business ventures
- Was it always his intent to continue operation of the liquor store business
- Did Mr. Hoang have an actual lease with the former landlord or an assignment of lease when he started at the liquor business
- Did the landlord or an attorney draw up the paperwork

Mr. Hoang said he was not involved in any other businesses. It was always his intent to re-open the store. He plans to run the liquor business until he retires. He did have some paperwork that was drawn up by the landlord's attorney, Mr. Peacock. Unfortunately a break-in occurred when the store was closed. All of his papers were taken. Member Friedman asked Mr. Hoang if he had been in contact the former landlord, Ms. Elvera Fara to obtain her testimony or documentation. Mr. Hoang believed Ms. Fara was in her 80's. She may possibly be available but he was instructed by his lawyers in 2004 not to contact her directly. In July, 2004 when the building was condemned he asked her to fix the building. At that time she did not want to make repairs. He let his lawyers communicate with her.

Mr. Ruben Massa, a Prevention Specialist representing Compre stated his organization was opposed to the application. Mr. Hoang surrendered his license on October 21, 2004, according to ABC records. A copy of the documentation was then submitted to the Board. The applicant has stated that the use was not abolished because of the due diligence of the property owner. Ordinance 17.52.695, Subsection A, states closure is up to 180 days during diligent pursuit of building repair or remodeling. The applicant did not buy the property until 18 months after the closure. ComPre respectfully submits that the extended time period, constitutes a substantial change. Therefore, non-conforming status was lost. The Chair requested the documentation be entered into the record.

Mr. West requested to view the documentation presented by Compre. He pointed out that it had been printed from the internet. Mr. Massa interjected that the documentation had been printed form the Official ABC Website. Staff added that a copy of the same documentation was already included in the original Board packet. Mr. West continued to testify that Ordinance Section 17.52.695 was pertinent and

appropriate, given all of the facts. Extraordinary circumstances were indeed present and beyond Mr. Hoang's control. Mr. Hoang should therefore be exempt from the time limit of the statute. He closed, requesting the Board find that a Conditional Use Permit is not required.

Additional Board questions were as follows:

- When was the building permit requested
- What was the approximate time to process a permit
- When did the Building Department conduct the first inspection

Staff responded that the original permit submission date is not known. A permit for temporary electrical power was submitted on July 22, 2005. It takes approximately 60 days to get referral responses and process permits. The first inspection was completed on the 29th of August, 2005. Public testimony was re-opened.

Mr. Hoang said approximately one week after the closure the owner sent a letter, stating that repairs would begin as soon as possible to allow him to re-open the business. The process was taking a long time so he retained an attorney in September of 2004 to insure the process would move forward. When the property owner received communication from his attorney the process began to accelerate. Mr. West added that FEMA and the owner's insurance company were involved. He believes that FEMA uses a calculation to determine if repair costs will exceed more than 50% of the property value. If so FEMA does not pay out on the claim. He reiterated, ultimately it was the property owner's responsibility to complete the repairs and obtain the building permits, not the assignee. Public testimony was closed.

The Chair asked County Counsel for further clarification as to if the nonconforming use ran with the property or the licensee. County Counsel said the use runs with the property when applied to 17.52.695. However it will depend on the specific issues being discussed. Under the Ordinance Section there are three distinct set of circumstances or rules. The Board can determine which specific subsection(s) / rules would apply regarding this determination of the use.

The Chair stated he was convinced after listening to testimony from Mr. West and County Counsel, Ordinance Section 17.52.695 controlled the issue. Not Ordinance Section 17.52.690 as was thought at the previous meeting. The problem is that the statute is relatively explicit in terms of its definition as to break in continuous operation. Mr. Hoang states, circumstances were beyond his control and it was the responsibility of the landlord. Given that the former landlord was not present, Mr. Hoang is given the benefit of the doubt. However the reference to the portion of Subsection #A, stating closure up to 180 days during the diligent pursuit of building repairs or remodeling undertaken pursuant to a valid building permit is important; permits were only issued a few months prior to the sale of the property. The break exceeded 180 days. As to the ABC license there appears to be a gray area in respect to whether the surrender was voluntary or not.

In any case the voluntary surrender appears to have happened one year prior to the building permit. The Chair said his inclination would be to motion that in reference to 17.52.695 the non conforming use by determination of evidence in 17.52.695 had been abandoned.

Member Pexioto said based on preponderance of the evidence: The fact that FEMA and insurance interaction was required to complete building repairs, consideration of testimony from County Counsel and Board Members the applicant, he believed that the applicant had not lost the non-conforming status of the alcohol sales business. Therefore a CUP was not needed. Member Pexioto then motioned to uphold the staff recommendation. The motion died due to lack of second.

Member Clark commented that the building had been red tagged in July of 2004. The license was surrendered in October, 2004. Repairs were started in September, 2005. The building was purchased in December, 2005. It would appear this might constitute abandonment.

Member Friedman believed Member Clark's made a point. Repairs took from October, 2004 to December, 2005. There was a lack of supporting evidence via a copy of the lease or testimony from the landlord. As to what the original intent of the parties was is unknown. What the Board did have was the material before them, and the outcome. Therefore he believed the nonconforming use had been discontinued or abandoned for an excessive period of time.

Member Friedman motioned there had been a break in continuous operation per Ordinance Section 17.52.695, therefore a loss of the nonconforming use allowing alcoholic beverage sales on the property. Member Clark seconded the motion. The Chair; Members Friedman, and Clark were in agreement with the motion. Member Pexioto was not in agreement. Motion carried 3/1/1. Member Spalding was excused.

8. **LUIS ROBLES/GURCHARAN DHALIWAL, VARIANCE, V-11995** – Application to allow construction of a second dwelling providing a 10 foot wide driveway where 12 feet is the minimum and a zero foot setback between a driveway and a dwelling, and a dwelling and dwelling wall, in an R-S-D-35 (Suburban Residence, 3,500 square feet Minimum Building Site Area per Dwelling Unit) District, located at 167 Blossom Way, south side, approximately, 300 feet east of Meekland Avenue, unincorporated Cherryland area of Alameda County, designated Assessor's Parcel Number: 0429-0032-017-00. (Continued from April 12, 2006).

Moved from the Consent Calendar per the request of Mr. Luis Robles. Staff informed the Board that the applicant had submitted revised plans. The request is for a June 14, 2006 hearing as opposed to July 26, 2006. Staff said that the June 14th Calendar was full due to the number of agenda items that had already been scheduled for that date. June 28, 2006 was recommended as an alternate. The Chair asked the Board if there was consensus on June 28, 2006. All present were in agreement.

APPROVAL OF MINUTES: April 12 and 26, and May 10, 2006.

Member Pexioto motioned to approve the Minutes of April 12, 2006 with submitted corrections. Member Clark seconded the motion. Motion carried 4/0. Member Spalding was excused.

Member Friedman motioned to approve the Minutes of April 26, 2006 with submitted corrections. Member Pexioto seconded the motion. Motion carried 4/0. Member Spalding was excused.

Member Friedman motioned to approve the Minutes of May 10, 2006 with submitted corrections. Member Clark seconded the motion. Motion carried 4/0. Member Spalding was excused.

STAFF COMMENTS & CORRESPONDENCE: There were no staff comments.

CHAIR'S REPORT: No Chair's Report was submitted.

BOARD'S ANNOUNCEMENTS, COMMENTS AND REPORTS: The Board had no remarks.

ADJOURNMENT:

There being no further business, the hearing adjourned at 4:41 p.m.

CHRIS BAZAR - SECRETARY
WEST COUNTY BOARD OF ZONING ADJUSTMENTS