

Case File Number PLN22037-A01

August 3, 2022

Location:	1721 Brush Street (See map on the reverse)
Assessor's Parcel Number:	003 005500602
Proposal:	Proposal for a video game sales business in the rear of the property in an existing commercial structure
Applicant:	Rebecca Friedberg / 415-948-0613
Owner:	Kathy Zhang and Taylor Grimes
Appellant:	Nicola Smith
Case File Number:	PLN22037-A01
Original Case File Number:	PLN22037
Planning Permits Required:	Conditional Use Permit for a Retail Store in a RM-2 zoning district
General Plan:	Mixed Housing Type Residential
Zoning:	RM-2 Zoning
Environmental Determination:	15301 – Existing Facilities; and 15183 – Projects Consistent with a Community Plan, General Plan, or Zoning
Historic Status:	Local Register (C2+)/Area of Secondary Importance (Curtis and Williams Tract)
City Council District:	3
Status:	The Zoning Decision Letter was mailed on June 6, 2022, and the Project was appealed on June 13, 2022.
Staff Recommendation:	Deny the Appeal and uphold the Zoning Manager's decision.
Finality of Decision:	The decision of the Planning Commission is final.
For Further Information:	Contact case Planner Heather Klein at (510) 238-3659 or hklein@oaklandca.gov

SUMMARY

The Project Applicant submitted a Planning application on February 24, 2022 to operate a video game retail sales business within an existing commercial building (*Attachment A*) at the rear of an existing single-family home. The Project was publicly noticed on May 13, 2022 and public comment ended on May 23, 2022. On June 6, 2022, the Zoning Manager issued an approval of the Project (*Attachment B*).

The 10-day appeal period ended on June 16, 2022 at 4:00 PM, and a timely Appeal was filed of the Zoning Manager's decision by Nicola Smith of M/C Properties for (Appellant) (*Attachment C*).¹ The basis of the Appeal is that the Zoning Manager abused his discretion and made a decision not based on substantial evidence, and the application should be denied. Specifically, the Appellant notes that:

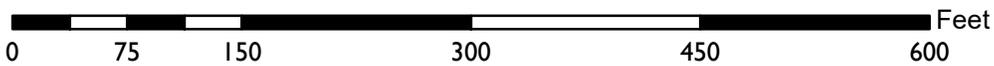
- (1) The Applicant failed to engage with the neighborhood affected, and
- (2) Staff cannot make the Conditional Use Permit (CUP) Findings A, B or C.

The Appellant's specific arguments are discussed and responded to in detail in the *Basis of the Appeals* section of the report below, along with City staff's response to each argument.

Per Section 17.132.020 of the City of Oakland Planning Code, the Appellant must state where an error or abuse of discretion was made by the Zoning Manager or where the Zoning Manager's decision is not

¹ Note that Exhibits to the Appeal were hand delivered to the City. However, these documents were not submitted in accordance with the City Administrator's Emergency Ordinance and staff did not receive them until after the appeal deadline when they were received by the Bureau of Building on July 21, 2022. As such, they are not being considered as part of the Appeal.

CITY OF OAKLAND PLANNING COMMISSION



Case File: PLN22037-A01
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Address: 1721 Brush Street
Zone: RM-2/S-20

supported by evidence in the record. As detailed in this report, the Appellant has not demonstrated an error or abuse in discretion by the Zoning Manager. Therefore, staff recommends the Planning Commission deny the Appeal, thereby, upholding the Zoning Manager’s decision based on the Findings and Conditions of Approval.

PROPERTY AND SURROUNDING AREA DESCRIPTION

The Project site is a 4,400 square-foot lot located at 1721 Brush Street. The parcel contains an existing existing, one-story single-family home, a one-story accessory building at the rear of the property, and a shed. The single-family was built in the late 1800s, is of Italianate style, and is a Potentially Designated Historic Property (PDHP) located in the Curtis and Williams Tract) Area of Secondary Importance (ASI) with an Oakland Cultural Heritage Survey Rating of C2+. The rear, accessory brick building is 895 square-feet, was built in the 1940s, and per the Sanborn maps of the 1950s, was used as a commercial printing press shop.

Brush Street includes both on and off-ramps for Interstate 980 within a block and Interstate 980 is across Brush Street. Next door to the Project site at 1729 Brush Street is a single-family home which is also in the ASI. On the other side, at 1715 Brush Street, is a multi-family building. Behind, the Project site are also multi-family buildings.

PROJECT DESCRIPTION

The Project is to operate a video game retail sales business within the detached commercial building at the rear of an existing single-family home (*Attachment A*). The Project would also demolish an attached shed and conduct tenant improvements to the building.

The use would be operated by the occupants of the single-family home with one potential additional employee. Hours of operation would be Tuesday through Sunday from 11:00 AM to 8:00 PM.

GENERAL PLAN ANALYSIS

The Project site is in the Mixed Housing Type Residential land use classification of the City of Oakland’s Land Use and Transportation Element (LUTE) of the General Plan. The Mixed Housing Type Residential classification is intended to create, maintain, and enhance residential areas typically located near the City’s major arterials and characterized by a mix of single-family homes, townhouse, small multi-unit buildings, and neighborhood businesses where appropriate.²

Future development within this classification should be primarily residential in character, with live-work types of development, small commercial enterprises, schools, and other small scale, compatible civic uses possible in appropriate locations. The Project also meets the following LUTE goals and policies:

Policy N1.5 Designing Commercial Development

Commercial development should be designed in a manner that is sensitive to surrounding residential uses.

Policy N5.3 Supporting Live-Work Development

² Note: The description in the decision letter of the Mixed Housing Type Residential General Plan classification was incorrect. However, the decision letter did describe the desired use and desired character correctly.

The city should support and encourage residents desiring to live and work at the same location where neither the residential use nor the work occupation adversely affects nearby properties or the character of the surrounding area.

The occupants of the single-family home would operate a small, niche-market commercial use within a rear commercial building. The existing single-family home would remain as a residential use.

ZONING ANALYSIS

The site is in the Mixed Housing Type Residential - 2 (RM-2) Zone which is intended to create, maintain, and enhance residential areas characterized by a mix of single -family homes, duplexes, townhouses, small multi-unit buildings, and neighborhood businesses where appropriate.

The operation of a video game store is considered a General Retail Sales Commercial Activity. Per Section 17.17.030 of the Planning Code, a General Retail Sales Commercial Activity requires a Minor CUP. Staff made the required Findings in the June 6, 2022 decision letter.

ENVIRONMENTAL DETERMINATION

Staff evaluated the Project pursuant to the California Environmental Quality Act (CEQA). The CEQA Guidelines lists projects that qualify as Categorical Exemptions from further environmental review. The proposed Project is categorically exempt from the environmental review requirements pursuant Section 15301 which states: "Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use. The business will be located and operated within an existing structure.

As separate and independent basis, staff also found that the Project was consistent with CEQA Guidelines Section 15183 (Projects Consistent with a Community Plan, General Plan or Zoning) as noted in the *General Plan Analysis* and *Zoning Analysis* section above.

BASIS OF THE APPEALS

The Appellant filed a timely Appeal. The following is a summary of the Appeal allegations **in bold type**, with the exact language found in *Attachment C*. Staff's response to each point is in normal type.

- 1. The Applicant failed to engage the neighborhood and conduct community outreach. Residents were only made aware of the proposal when the public notice was posted and the manager received the mailed notice. Furthermore, this was six days from the close of the comment period. The permit application was in process with the Bureau of Planning for six months. This unwillingness to conduct outreach suggests the bare minimum of compliance and argues for their own awareness of the problematic nature of the proposal.**

Staff Response

The above allegations generally contend that the Applicant did not engage the residents; notice was not mailed; the comment period was too short; and by not engaging the community, the Applicant knew that the use would be problematic.

The Applicant is not required to conduct community outreach to neighbors per the Planning Code although that is advisable.

Per Section 17.134.040(B)(1) of the Planning Code, notice of the Project is provided to all persons shown on the last available equalized assessment roll as owning real property in the City within 300 feet of the property. Tenants are not mailed notices. The purpose of the notice sign is to make neighbors, including tenants, aware of the proposal. Per the City Administrator's Emergency Order No. 3, which is still in effect and has been since May 13, 2020, the noticing period is 10 days. Both the posting and noticing were completed correctly, and proof of posting and mailing was provided to staff at the start of the public comment period on May 13, 2022.

The application was submitted in February 2022, and, due to significant staff attrition and workload, was reviewed later in the Spring. The lack of outreach does not suggest suppressed problems with the Project. Both the Applicant and staff did not, and do not, anticipate any adverse impacts associated with the Project. The Project would take an existing, vacant commercial structure behind a single-family home located in a rear yard and put it back into productive use.

2. **Staff cannot make Finding A. The proposed video game store will not be compatible with and will adversely affect the livability of abutting properties. The video game store is proposed to be located in an existing accessory structure behind the primary home. This space cannot be observed from the street and can only be accessed via a narrow corridor located on the north side of the main structure. The space is too close to surrounding residences and too isolated to operate as a traditional retail establishment that relies on visibility, easy access and proximity to other retail stores. The applicant has not submitted material showing where the three employees and customers will park or which structures in the backyard will be retained and which, if any, will be demolished.**

Staff Response

The above allegations generally contend that the use will not be compatible and will adversely affect abutting properties. The use is not visible from the street, can only be accessed via a small side area, is too close to residents, is not near other retail, and materials were not submitted showing the parking or what structures would be retained or demolished.

Staff disagrees. The Zoning Manager did not err in finding that the proposed video game store would be compatible with and would not adversely affect the livability or appropriate development of adjacent properties. This property is unique in that it contains both residential and non-residential uses. The previous use was as a printing shop and the Project will put a small commercial building back into productive use. The store would be accessed via the walkway that is adjacent to 1729 Brush Street not the Appellant's building. The use as a video game store is a niche market in that most people do not regularly purchase this type of product. The store does not need to have other retail stores in proximity or rely on extensive pedestrian pass-by activity for sales, as video games are not your typical "impulse buy" products but only for enthusiasts. As such, the use is not expected to generate extensive customer pedestrian or vehicular traffic, especially given the small size and location behind the single-family home. The operation will need to comply with the Noise Ordinance and Condition of Approval #26 related to operational noise. Per the Planning Code, due to the small size of the building, parking is not required.

The plans clearly show that an attached shed would be demolished, and the commercial building would be retained (*Attachment A*). These documents were available through the Oakland Citizen Access permitting website and could have been obtained if requested.

3. **Staff cannot make Finding A. The store would be in an existing building, and the exterior changes to that building may not be inconsistent in scale, bulk and density with its**

surroundings. Rather, its harmful effect is in adding a retail use, with its demands for parking, policing, etc., to an already congested, solely residential, location that has changed since the back building's use many years ago as a commercial print facility. There may be a significant traffic impact and the surrounding streets don't have the capacity to accommodate a sudden increase in demand for parking.

The store would require three employees, if two of the three drive to work, all existing off-street parking would be occupied leaving customers to find parking elsewhere (but most likely on adjacent private parking space dedicated to the neighboring apartment building which would inevitably lead to conflicts between residents, employees and customers).

There is no parking on the east side of the street because of I-980. Thus, there are only five parking spaces on the block to serve all residents and visitors on the block. The adjacent 1715 building was approved with only six parking spaces for 10 units at a time before I-980 when there were residences and parking on both sides of the street. Parking is difficult in the area and there are already disagreements regarding parking.

Staff Response

The above allegations generally contend that the exterior changes would not be consistent with the scale, bulk or mass of the surroundings; that adding a retail use will be harmful in its demands for parking and policing; the area is solely residential; that the surrounding streets don't have the capacity to accommodate the demand for parking which is already an issue on the block given the lack of parking on the other side of Brush Street and lack of one-to-one parking at 1715 Brush Street.

The commercial building will be retained, and exterior changes are limited to demolition of the shed, door and window changes, and tenant improvements. The scale, bulk and massing will not change. Furthermore, this is a one-story building 11' in height. The surrounding buildings are two-three-stories tall making the Project building much smaller than neighboring buildings in terms of scale, bulk and mass.

A retail store, behind a single-family home owned and operated by the residential owners will not require additional policing. The Applicant does note that there would be approximately 10-15 vehicle trips a day. Again, given the small scale of the business and the fact that the total building occupancy is only 14 people, it is likely that there will be one customer or only a couple at a time meaning the need for a large amount of parking would be unnecessary. While staff appreciates the fact that there is limited parking on the neighboring lot and in the area due to the historic area homes, the freeway frontage road, and proximity to Downtown, street parking is for the public at large on a first come first serve basis and not for particular properties.

4. **Staff cannot make Finding B. The proposed location of the video game store will not provide a functional living, working and shopping environment and will affect the residential environment. The store, located behind a single-family home and the site constraints make it impractical for use as a retail store because it has no visibility, challenging access (customers must walk a narrow, dark corridor between houses in order to reach the location) no secondary access for receiving inventory, and no way to manage disposal of packaging. The space would not be a safe working environment because employees would have no way to escape in case of problems with intruders.**

Furthermore, there will be noise issues associated with the opportunity to test run the games

they intend to purchase which will disturb residents. Video game stores located in shopping malls are often sources of game related noise that is intended to attract customers.

A video games store in a residential area will not have benefits that outweigh the negatives. There is no discussion in the findings on the size of video sale shops generally or neighborhood video sale shops in particular. Industry information indicates that sales only video shops can be less than 300 ft². Yet the average size for shops with game space is 1000 ft². The building's 900 ft²., therefore, calls into question whether the proposed sales use, while supposedly not an arcade, is nonetheless meant to operate as a destination gaming location.

Staff Response

The above allegations generally contend that the store will not provide a functional living, working or shopping environment as it is located behind an existing single-family home with no visibility challenging access, inventory loading area, or packaging disposal. The space is not safe for employees. In addition, there will be noise associated with testing or trying the machines which will disturb residents. Finally, based on anecdotal evidence, video games shops can be as small as 300 square-feet or as large as 1,000' square-feet. At 900 square feet, the issue of an arcade use, not retail sales, is a question along with the use as a gaming destination.

The Zoning Manager did not err in finding that the Project will provide a functional living, working, shopping environment. The current owners and operators of the business will live in the single-family home and then work in the commercial structure. This is convenient. Furthermore, as stated above, a video game retail store is a niche market. The store does not need to have other retail stores in proximity or rely on pedestrian pass-by activity for sales as video games are not your typical "impulse buy" products. A customer would need to search this type of product out as they are not just found on a typical retail street unlike a clothing store which is a more prevalent. Customers and any employees will need to walk down the walkway next to a single-family home, but this is no different than any residential side setback in Oakland and should not be considered or deemed unsafe in and of itself. The single-family homeowners will be on the premises as this is their business and their residential property. Given the nature of the products which are vintage and hard to find, there will not be more deliveries than a typical residence. Furthermore, the Applicants generally locate and bring these products home themselves. Packaging, if any, is expected to be minimal and can be dealt with as part of the existing waste and recycling services offered to the residence.

Customers will be able to test and try the video games. However, this is highly unlikely to generate substantial noise as the video game store largely will cater to hand-held devices which are played on a television or monitor. This is small business and not intended to attract pedestrian traffic into the rear building unlike an arcade in a shopping mall. The business, as stated above, will need to comply with the Noise Ordinance for operations as noted in Condition #26. Finally, it should be noted that the Project is located along a major frontage road with on and off-ramps to I-980 and I-980 right across the street. The area is already located in a noisy environment.

Staff does not see any negatives to this business. Parking and traffic issues will be minimal given the business type and small space. Noise will be minimal, if any, and addressed through the existing Ordinances and Condition of Approval. The hours are limited, and the owners of the house own the business. Again, the business largely caters to hand-held devices. Staff confirmed with the Applicant that this is not intended an arcade or gaming destination. Such a use would be in a different land use classification (Mechanical or Electronic Games Commercial Activities) which was not approved. A 14-person maximum occupancy including the accessory spaces such as stock rooms and bathrooms, would not be a gaming destination. This would be a Group Assembly Commercial Activity which was also not approved. This is purely a retail store.

5. **Staff cannot make Finding C. The proposed video game store will not "enhance the surrounding area" nor does it "provide an essential service for the community or region". Successful video game stores rely on heavy pedestrian traffic normally found in large shopping malls and established retail districts. "Essential neighborhood services" typically include grocers, cafes, dry cleaners, medical offices and small shops etc. all of which must be easily accessed from the sidewalk.**

A video game store's operation, offering the space for onsite playing of video games, will not maintain a quiet environment for surrounding residential neighbors. The proposed shop's features: a place to meet up, spend time, and the amenities such as bathrooms, snack service, etc. to support its sales and gaming use in a secluded location.

The project will not protect neighborhood character. The area already struggles with traffic problems, parking problems, itinerants and the exposure to criminal activity associated with these circumstances. The use will create a nuisance. Oakland Police Department should be consulted in order to determine if video game stores in general and this site specifically, pose special challenges to public safety. The Fire Department should evaluate the risks associated with establishing a retail business at this constrained location.

In addition to game sales, there will be on-site gaming (and its risk of internet gambling), and the competitions and disputes that go with such activity. This situation does not suggest a desired neighborhood vitality, but heightened negative activity complicating the area's existing challenges.

Staff Response

The above allegations generally contend that the Project will not enhance the area or provide an essential service to the community or region.; video game sales should be established retail areas or shopping malls; the shop's features will not make a quiet environment for residents; the project will not protect neighborhood character will be a nuisance and other departments should have been consulted; and the Project will not improve neighborhood vitality.

Most of these allegations regarding where video games sales should be located, traffic, parking, noise, and nuisances were addressed in the above responses.

Finding C states: "That the proposed development will enhance the successful operation of the surrounding area in its basic community functions or will provide an essential service to the community or region." The Zoning Manager's decision noted that the store would meet this Finding by improving an existing site and revitalizing a past commercial use that has been vacant and unused for the past 40 years.

"Basic community functions" are not defined in the CUP criteria; however, a community needs both places to live and work, receive services, and lead healthy lives among other important functions. The Project will allow a single-family homeowner family to pursue an occupation on the same property, revitalizing a vacant structure for a purpose.

Essential services, per the CUP Finding, are not defined. The uses in the Appellant's argument such as grocers, cafes, dry cleaners, medical offices are not considered Essential Service Activities as defined in Planning Code Section 17.10.140. All of the Appellant's listed uses are Commercial Activities such as General Food Sales, Limited-Service Restaurant and Café, Medical Service, or

Consumer Service. The Appellant is simply listing uses that they believe are “essential” based on their own notion. Though it should be noted that the Appellant did include “small shops” in their definition and the Project is a small shop. In this Finding, “essential” takes on a different meaning-providing a service that is needed to the community and/or region. The Zoning Manager’s decision noted that the video game store will provide an “essential service” as it is a niche product. The sale of this product is unique in that not many persons are in the market for a hand-held video game, making difficult to come by, and for those interested in this product, an “essential service or business”.

Staff did not consult with the Oakland Police Department (OPD) on the proposal since this is for the sale of vintage video games, the owners of the residence are the operators of the business, and many Oakland residents run small businesses from accessory buildings in the rear of their homes. This is consistent with existing practice, as typically OPD only seeks to be involved on applications involving alcohol sales, nightclubs, cannabis and similar activities that have traditionally been associated with vice and/or criminal activity. The OPD prefers buildings be restored, maintained, occupied and used as opposed to remaining vacant. It is unreasonable that such a store would be used for criminal activity based on the floor plans and location behind someone’s home. This building will meet all building and occupancy codes. This is not a constrained site, but one easily accessible on a highway frontage road with access from surrounding streets and I-980.

The Project floor plans (*See Attachment A, Sheet A2.1*) show merchandise shelves, a point of sales counter, bathroom and storage. There is not a meet up or open area or congregating, or snack service. Bathrooms would largely be for the owners, one employee, and possibly customers if permitted. It would not be a place that random persons not associated with the store would use. There will not be on-site gaming competitions, or internet gambling, and nothing in the plans or proposal would suggest or even imply this. The floor plans suggest solely a small retail store.

- 6. The location and the circumstances reveal that issuing the permit would give Applicant a right never exercised before in that space, and would burden the neighborhood with a use that that would benefit a population that does not live there.**

Staff Response

The above allegations and conclusion generally contend that Project would give the Applicant a right that has not existed before and does not benefit the neighborhood.

The previous use of the rear building was as a printing shop that was established in the 1940s before the current Zoning Code. Based on historical records, the single-family home was also converted to the printer shop use and was required to return to its former residential use in the 1970s. The property was never used as a retail sales business, and so this CUP would give the Applicant a “right” that has not existed before. However, there was a commercial business in that building, it was permitted under the Zoning at the time. The overall use and occupancy of the building (commercial) will be retained.

CONCLUSION

The Appellant has not demonstrated an error or abuse in discretion by the Zoning Manager, thus City staff believes that the Decision is valid, accurate, and reasonable, and supported by substantial evidence in the entire record. There is no reasonable basis for overturning staff’s determination, as reflected in the Findings for and Conditions of Approval. As such, staff recommends that the Planning Commission uphold the Zoning Manager’s decisions and deny the Appeals.

However, to address neighbor concerns, staff is proposing that the following additional Condition of Approval.

1. Any use other than the video game retail sales proposed shall require the application and approval of a separate CUP.

RECOMMENDATIONS:

1. Affirm staff's environmental determination, and
2. Uphold the Zoning Manager's decision and CEQA determination based on the Findings and Conditions of Approval.

Prepared by:



HEATHER KLEIN
Planner IV

Reviewed by:



ROBERT MERKAMP
Zoning Manager

Approved for forwarding to the
City Planning Commission:



EDWARD MANASSE
Deputy Director
Bureau of Planning

ATTACHMENTS:

- A. Project Plans
- B. Zoning Manager's Approval Letter
- C. Appeal Documents

LEGAL NOTICE:

ANY PARTY SEEKING TO CHALLENGE THIS DECISION IN COURT MUST DO SO WITHIN NINETY (90) DAYS OF THE ANNOUNCEMENT OF A FINAL DECISION, PURSUANT TO THE CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1094.6, UNLESS A SHORTER PERIOD APPLIES.

CITY OF OAKLAND



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Sent Via Email

June 6, 2022

Rebecca Friedberg
Synapse Design Studio
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Oakland, CA 94610
rebecca@synapsedesignstudio.com

RE: Case File No. PLN22037; 1721 Brush St.; APN: 003 005500602

Dear Ms. Friedberg:

Your application, as described below, has been **APPROVED** for the reasons stated in Attachment A, which contains the findings required to support this decision. Attachment B contains the Conditions of Approval for the project. This decision is effective ten (10) days after the date of this letter unless appealed pursuant to the procedures set forth below.

The following table summarizes the proposed project:

Proposal:	Proposed Retail Store (Video Game Sales) in the rear of the property in an Existing commercial structure
Planning Permits Required:	Conditional Use Permit for a Retail Store in a RM-2 zoning district
General Plan:	Mixed Housing Type Residential
Zoning:	RM-2
Environmental Determination:	15301 – Existing Facilities; and 15183 – Projects Consistent with a Community Plan, General Plan, or Zoning
Historic Status:	Local Register (C2+)/Area of Secondary Importance (Curtis and Williams Tract)
City Council District:	3

If you, or any interested party, seeks to challenge this decision, an appeal **must** be filed by no later than ten (10) calendar days from the date of this letter, by **4:00 p.m. on June 16, 2022**. An appeal shall be on a form provided by the Bureau of Planning of the Planning and Building Department, and submitted via email to: (1) **Rebecca Wysong, Planner I**, at rwysong@oaklandca.gov, (2) **Robert Merkamp, Zoning Manager**, at Rmerkamp@oaklandca.gov, and (3) Catherine Payne, Development Planning Manager, at Cpayne@oaklandca.gov. The appeal form is available online at <https://www.oaklandca.gov/documents/appeal-application-form>. The appeal shall state specifically wherein it is claimed there was error or abuse of discretion by the Zoning Manager or decision-making body or wherein the decision is not supported by substantial evidence. Applicable appeal fees in the amount of **\$2476.31** in accordance with the City of Oakland Master Fee Schedule must be paid within five (5) calendar days (**June 21, 2022**) of filing the appeal.

If the fifth (5th) calendar day falls on a weekend or City holiday, appellant will have until the end of the following City business day to pay the appeal fee. Failure to timely appeal (or to timely pay all appeal fees) will preclude you, or any

interested party, from challenging the City's decision in court. The appeal itself must raise each and every issue that is contested, along with all the arguments and evidence in the record which supports the basis of the appeal; failure to do so may preclude you, or any interested party, from raising such issues during the appeal and/or in court. However, the appeal will be limited to issues and/or evidence presented to the Zoning Manager prior to the close of the previously noticed public comment period on the matter. For further information, see the attached Interim City Administrator Emergency Order No. 3 and Interim Procedures for Appeals of City Planning Bureau Decisions for Development Projects.

If the ten (10) day appeal period expires without an appeal, you are expected to contact **Rebecca Wysong, Planner I** in order to receive the signed Notice of Exemption (NOE) certifying that the project has been found to be exempt from CEQA review. It is your responsibility to record the NOE and the Environmental Declaration at the Alameda County Clerk's office at 1106 Madison Street, Oakland, CA 94612, at a cost of **\$50.00** made payable to the Alameda County Clerk. Please bring the original NOE related documents and five copies to the Alameda County Clerk, and return one date stamped copy to the Bureau of Planning, to the attention of **Rebecca Wysong, Planner I** Pursuant to Section 15062(d) of the California Environmental Quality Act (CEQA) Guidelines, recordation of the NOE starts a 35-day statute of limitations on court challenges to the approval under CEQA. The NOE will also be posted on the City website at <https://aca.accela.com/OAKLAND/Welcome.aspx>.

If you have any questions, please contact the case planner, **Rebecca Wysong, Planner I** at (510) 238-3123 or rwysong@oaklandca.gov, however, this does not substitute for filing of an appeal as described above.

Very Truly Yours,



ROBERT D. MERKAMP
Zoning Manager

cc: Nicola Smith nicesmith@msn.com
Kari Kleist kkleist@outlook.com
Bradford Smith bradsimpson321@gmail.com

Attachments:

- A. Findings
- B. Conditions of Approval, including Standard Conditions of Approvals
- C. Interim City Administrator Emergency Order No. 3 and Interim Procedures for Appeals of City Planning Bureau Decisions for Development Projects

ATTACHMENT A: FINDINGS

This proposal meets all the required findings under the **General Conditional Use Permit Criteria (OMC Sec. 17.134.050)** of the Oakland Planning Code (OMC Title 17) as set forth below and which are required to approve your application. Required findings are shown in **bold** type; reasons your proposal satisfies them are shown in normal type.

General Conditional Use Permit Criteria (OMC Sec. 17.134.050):

- A. That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development.**

The proposed video game store will be compatible with and will not adversely affect the livability or appropriate development of abutting properties. The structure that is proposed to be used for the video game store had been previously used as a commercial facility, as cited on the Sanborn map and will not be expanded or changed in the exterior. The scale, bulk, coverage and density within the neighborhood will be maintained as the building is not being changed. There will be minimal generation of traffic and the capacity of the surrounding streets will be maintained as the applicant states that the store will only generate around 10-15 trips a day. The desirable neighborhood characters will be maintained as the store will revitalize an existing underutilized structure with little impact to the neighboring properties as it is a business run by the owners of the property with a minimal expectation of number of customers as it is a niche use.

- B. That the location, design, and site planning of the proposed development will provide a convenient and functional living, working, shopping, or civic environment, and will be as attractive as the nature of the use and its location and setting warrant.**

The location of the proposed video game store will provide a functional living, working and shopping environment. The street frontage will not be changed, maintaining the residential nature of the neighborhood. The shopping and working environment will be minimal and not affect the residential environment of the neighborhood as the video game studio is not expected to generate much traffic or customers as a niche use. The use will be attractive as the nature of the use with its location and setting as it is an existing structure that is being revitalized into a new use.

- C. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region.**

The proposed video game store will enhance the successful operation of the surrounding area in its basic community function as it will improve an existing site by revitalizing an existing commercial use that has been vacant and unused for the past 40 years. The video game store will provide an essential service as it is a niche use that will support people who have an interest in video games.

- D. That the proposal conforms to all applicable design review criteria set forth in the design review procedure at Section 17.136.070.**

The proposed video game store will maintain the existing structure and not touch the existing house in the front of the property and will maintain the dynamics and character of the street. Any exterior alterations would be subject to the Small Project Design Review process.

- E. That the proposal conforms in all significant respects with the Oakland Comprehensive Plan and with any other applicable plan or development control map which has been adopted by the City Council.**

The proposed use is allowed within the RM-2 (Mixed Residential Housing) zoning district with a Conditional Use Permit and complies with all other applicable provisions of the zoning code. The site conforms to the Mixed Housing Type Residential designation of the Land Use and Transportation Element (LUTE) of the General Plan which should be primarily residential in character, with live-work types of development, small commercial enterprises, schools, and other small scale, compatible civil uses possible in appropriate locations:

Policy N1.5 Designing Commercial Development

Commercial development should be designed in a manner that is sensitive to surrounding residential uses.

Policy N5.3 Supporting Live-Work Development

The city should support and encourage residents desiring to live and work at the same location where neither the residential use nor the work occupation adversely affects nearby properties or the character of the surrounding area.

ATTACHMENT B: CONDITIONS OF APPROVAL

The proposal is hereby approved subject to the following Conditions of Approval:

1. Approved Use

The project shall be constructed and operated in accordance with the authorized use as described in the approved application materials, and the approved plans **received March 1, 2022** as amended by the following conditions of approval and mitigation measures, if applicable (“Conditions of Approval” or “Conditions”).

2. Effective Date, Expiration, Extensions and Extinguishment

This Approval shall become effective immediately, unless the Approval is appealable, in which case the Approval shall become effective in ten (10) calendar days unless an appeal is filed. Unless a different termination date is prescribed, this Approval shall expire **two years** from the Approval date, or from the date of the final decision in the event of an appeal, unless within such period a complete building permit application has been filed with the Bureau of Building and diligently pursued towards completion, or the authorized activities have commenced in the case of a permit not involving construction or alteration. Upon written request and payment of appropriate fees submitted no later than the expiration date of this Approval, the Director of City Planning or designee may grant a one-year extension of this date, with additional extensions subject to approval by the approving body. Expiration of any necessary building permit or other construction-related permit for this project may invalidate this Approval if said Approval has also expired. If litigation is filed challenging this Approval, or its implementation, then the time period stated above for obtaining necessary permits for construction or alteration and/or commencement of authorized activities is automatically extended for the duration of the litigation.

3. Compliance with Other Requirements

The project applicant shall comply with all other applicable federal, state, regional, and local laws/codes, requirements, regulations, and guidelines, including but not limited to those imposed by the City’s Bureau of Building, Fire Marshal, Department of Transportation, and Public Works Department. Compliance with other applicable requirements may require changes to the approved use and/or plans. These changes shall be processed in accordance with the procedures contained in Condition #4.

4. Minor and Major Changes

- a. Minor changes to the approved project, plans, Conditions, facilities, or use may be approved administratively by the Director of City Planning
- b. Major changes to the approved project, plans, Conditions, facilities, or use shall be reviewed by the Director of City Planning to determine whether such changes require submittal and approval of a revision to the Approval by the original approving body or a new independent permit/approval. Major revisions shall be reviewed in accordance with the procedures required for the original permit/approval. A new independent permit/approval shall be reviewed in accordance with the procedures required for the new permit/approval.

5. Compliance with Conditions of Approval

- a. The project applicant and property owner, including successors, (collectively referred to hereafter as the “project applicant” or “applicant”) shall be responsible for compliance with all the Conditions of Approval and any recommendations contained in any submitted and approved technical report at his/her sole cost and expense, subject to review and approval by the City of Oakland.
- b. The City of Oakland reserves the right at any time during construction to require certification by a licensed professional at the project applicant’s expense that the as-built project conforms to all applicable requirements, including but not limited to, approved maximum heights and minimum setbacks. Failure to construct the project in accordance with the Approval may result in remedial reconstruction, permit revocation, permit modification, stop work, permit suspension, or other corrective action.
- c. Violation of any term, Condition, or project description relating to the Approval is unlawful, prohibited, and a violation of the Oakland Municipal Code. The City of Oakland reserves the right to initiate civil and/or criminal

enforcement and/or abatement proceedings, or after notice and public hearing, to revoke the Approval or alter these Conditions if it is found that there is violation of any of the Conditions or the provisions of the Planning Code or Municipal Code, or the project operates as or causes a public nuisance. This provision is not intended to, nor does it, limit in any manner whatsoever the ability of the City to take appropriate enforcement actions. The project applicant shall be responsible for paying fees in accordance with the City's Master Fee Schedule for inspections conducted by the City or a City-designated third-party to investigate alleged violations of the Approval or Conditions.

6. Signed Copy of the Approval/Conditions

A copy of the Approval letter and Conditions shall be signed by the project applicant, attached to each set of permit plans submitted to the appropriate City agency for the project, and made available for review at the project job site at all times.

7. Blight/Nuisances

The project site shall be kept in a blight/nuisance-free condition. Any existing blight or nuisance shall be abated within sixty (60) days of approval, unless an earlier date is specified elsewhere.

8. Indemnification

- a. To the maximum extent permitted by law, the project applicant shall defend (with counsel acceptable to the City), indemnify, and hold harmless the City of Oakland, the Oakland City Council, the Oakland Redevelopment Successor Agency, the Oakland City Planning Commission, and their respective agents, officers, employees, and volunteers (hereafter collectively called "City") from any liability, damages, claim, judgment, loss (direct or indirect), action, causes of action, or proceeding (including legal costs, attorneys' fees, expert witness or consultant fees, City Attorney or staff time, expenses or costs) (collectively called "Action") against the City to attack, set aside, void or annul this Approval or implementation of this Approval. The City may elect, in its sole discretion, to participate in the defense of said Action and the project applicant shall reimburse the City for its reasonable legal costs and attorneys' fees.
- b. Within ten (10) calendar days of the filing of any Action as specified in subsection (a) above, the project applicant shall execute a Joint Defense Letter of Agreement with the City, acceptable to the Office of the City Attorney, which memorializes the above obligations. These obligations and the Joint Defense Letter of Agreement shall survive termination, extinguishment, or invalidation of the Approval. Failure to timely execute the Letter of Agreement does not relieve the project applicant of any of the obligations contained in this Condition or other requirements or Conditions of Approval that may be imposed by the City.

9. Severability

The Approval would not have been granted but for the applicability and validity of each and every one of the specified Conditions, and if one or more of such Conditions is found to be invalid by a court of competent jurisdiction this Approval would not have been granted without requiring other valid Conditions consistent with achieving the same purpose and intent of such Approval.

10. Special Inspector/Inspections, Independent Technical Review, Project Coordination and Monitoring

The project applicant may be required to cover the full costs of independent third-party technical review and City monitoring and inspection, including without limitation, special inspector(s)/inspection(s) during times of extensive or specialized plan-check review or construction, and inspections of potential violations of the Conditions of Approval. The project applicant shall establish a deposit with Engineering Services and/or the Bureau of Building, if directed by the Director of Public Works, Building Official, Director of City Planning, Director of Transportation, or designee, prior to the issuance of a construction-related permit and on an ongoing as-needed basis.

11. Public Improvements

The project applicant shall obtain all necessary permits/approvals, such as encroachment permits, obstruction permits, curb/gutter/sidewalk permits, and public improvement (“p-job”) permits from the City for work in the public right-of-way, including but not limited to, streets, curbs, gutters, sidewalks, utilities, and fire hydrants. Prior to any work in the public right-of-way, the applicant shall submit plans for review and approval by the Bureau of Planning, the Bureau of Building, Engineering Services, Department of Transportation, and other City departments as required. Public improvements shall be designed and installed to the satisfaction of the City.

12. Trash and Blight Removal

Requirement: The project applicant and his/her successors shall maintain the property free of blight, as defined in chapter 8.24 of the Oakland Municipal Code. For nonresidential and multi-family residential projects, the project applicant shall install and maintain trash receptacles near public entryways as needed to provide sufficient capacity for building users.

When Required: Ongoing

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

13. Graffiti Control

Requirement:

- a. During construction and operation of the project, the project applicant shall incorporate best management practices reasonably related to the control of graffiti and/or the mitigation of the impacts of graffiti. Such best management practices may include, without limitation:
 - i. Installation and maintenance of landscaping to discourage defacement of and/or protect likely graffiti-attracting surfaces.
 - ii. Installation and maintenance of lighting to protect likely graffiti-attracting surfaces.
 - iii. Use of paint with anti-graffiti coating.
 - iv. Incorporation of architectural or design elements or features to discourage graffiti defacement in accordance with the principles of Crime Prevention Through Environmental Design (CPTED).
 - v. Other practices approved by the City to deter, protect, or reduce the potential for graffiti defacement.
- b. The project applicant shall remove graffiti by appropriate means within seventy-two (72) hours. Appropriate means include the following:
 - i. Removal through scrubbing, washing, sanding, and/or scraping (or similar method) without damaging the surface and without discharging wash water or cleaning detergents into the City storm drain system.
 - ii. Covering with new paint to match the color of the surrounding surface.
 - iii. Replacing with new surfacing (with City permits if required).

When Required: Ongoing

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

14. Lighting

Requirement: Proposed new exterior lighting fixtures shall be adequately shielded to a point below the light bulb and reflector to prevent unnecessary glare onto adjacent properties.

When Required: Prior to building permit final

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

15. Dust Controls – Construction Related

Requirement: The project applicant shall implement all of the following applicable dust control measures during construction of the project:

- a. Water all exposed surfaces of active construction areas at least twice daily. Watering should be sufficient to prevent airborne dust from leaving the site. Increased watering frequency may be necessary whenever wind speeds exceed 15 miles per hour. Reclaimed water should be used whenever feasible.
- b. Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least two feet of freeboard (i.e., the minimum required space between the top of the load and the top of the trailer).
- c. All visible mud or dirt track-out onto adjacent public roads shall be removed using wet power vacuum street sweepers at least once per day. The use of dry power sweeping is prohibited.
- d. Limit vehicle speeds on unpaved roads to 15 miles per hour.
- e. All demolition activities (if any) shall be suspended when average wind speeds exceed 20 mph.
- f. All trucks and equipment, including tires, shall be washed off prior to leaving the site.
- g. Site accesses to a distance of 100 feet from the paved road shall be treated with a 6 to 12 inch compacted layer of wood chips, mulch, or gravel.

When Required: During construction

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

16. Criteria Air Pollutant Controls - Construction Related

Requirement: The project applicant shall implement all of the following applicable basic control measures for criteria air pollutants during construction of the project as applicable:

- a. Idling times on all diesel-fueled commercial vehicles over 10,000 lbs. shall be minimized either by shutting equipment off when not in use or reducing the maximum idling time to two minutes (as required by the California airborne toxics control measure Title 13, Section 2485, of the California Code of Regulations). Clear signage to this effect shall be provided for construction workers at all access points.
- b. Idling times on all diesel-fueled off-road vehicles over 25 horsepower shall be minimized either by shutting equipment off when not in use or reducing the maximum idling time to two minutes and fleet operators must develop a written policy as required by Title 23, Section 2449, of the California Code of Regulations (“California Air Resources Board Off-Road Diesel Regulations”).
- c. All construction equipment shall be maintained and properly tuned in accordance with the manufacturer’s specifications. All equipment shall be checked by a certified mechanic and determined to be running in proper condition prior to operation. Equipment check documentation should be kept at the construction site and be available for review by the City and the Bay Area Air Quality District as needed.
- d. Portable equipment shall be powered by grid electricity if available. If electricity is not available, propane or natural gas generators shall be used if feasible. Diesel engines shall only be used if grid electricity is not available and propane or natural gas generators cannot meet the electrical demand.
- e. Low VOC (i.e., ROG) coatings shall be used that comply with BAAQMD Regulation 8, Rule 3: Architectural Coatings.
- f. All equipment to be used on the construction site shall comply with the requirements of Title 13, Section 2449, of the California Code of Regulations (“California Air Resources Board Off-Road Diesel Regulations”) and upon request by the City (and the Air District if specifically requested), the project applicant shall provide written documentation that fleet requirements have been met.

When Required: During construction

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

17. Asbestos in Structures

Requirement: The project applicant shall comply with all applicable laws and regulations regarding demolition and renovation of Asbestos Containing Materials (ACM), including but not limited to California Code of Regulations, Title 8; California Business and Professions Code, Division 3; California Health and Safety Code sections 25915-25919.7; and Bay Area Air Quality Management District, Regulation 11, Rule 2, as may be amended. Evidence of compliance shall be submitted to the City upon request.

When Required: Prior to approval of construction-related permit

Initial Approval: Applicable regulatory agency with jurisdiction

Monitoring/Inspection: Applicable regulatory agency with jurisdiction

18. Archaeological and Paleontological Resources – Discovery During Construction

Requirement: Pursuant to CEQA Guidelines section 15064.5(f), in the event that any historic or prehistoric subsurface cultural resources are discovered during ground disturbing activities, all work within 50 feet of the resources shall be halted and the project applicant shall notify the City and consult with a qualified archaeologist or paleontologist, as applicable, to assess the significance of the find. In the case of discovery of paleontological resources, the assessment shall be done in accordance with the Society of Vertebrate Paleontology standards. If any find is determined to be significant, appropriate avoidance measures recommended by the consultant and approved by the City must be followed unless avoidance is determined unnecessary or infeasible by the City. Feasibility of avoidance shall be determined with consideration of factors such as the nature of the find, project design, costs, and other considerations. If avoidance is unnecessary or infeasible, other appropriate measures (e.g., data recovery, excavation) shall be instituted. Work may proceed on other parts of the project site while measures for the cultural resources are implemented.

In the event of data recovery of archaeological resources, the project applicant shall submit an Archaeological Research Design and Treatment Plan (ARDTP) prepared by a qualified archaeologist for review and approval by the City. The ARDTP is required to identify how the proposed data recovery program would preserve the significant information the archaeological resource is expected to contain. The ARDTP shall identify the scientific/historic research questions applicable to the expected resource, the data classes the resource is expected to possess, and how the expected data classes would address the applicable research questions. The ARDTP shall include the analysis and specify the curation and storage methods. Data recovery, in general, shall be limited to the portions of the archaeological resource that could be impacted by the proposed project. Destructive data recovery methods shall not be applied to portions of the archaeological resources if nondestructive methods are practicable. Because the intent of the ARDTP is to save as much of the archaeological resource as possible, including moving the resource, if feasible, preparation and implementation of the ARDTP would reduce the potential adverse impact to less than significant. The project applicant shall implement the ARDTP at his/her expense.

In the event of excavation of paleontological resources, the project applicant shall submit an excavation plan prepared by a qualified paleontologist to the City for review and approval. All significant cultural materials recovered shall be subject to scientific analysis, professional museum curation, and/or a report prepared by a qualified paleontologist, as appropriate, according to current professional standards and at the expense of the project applicant.

When Required: During construction

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

19. Human Remains – Discovery During Construction

Requirement: Pursuant to CEQA Guidelines section 15064.5(e)(1), in the event that human skeletal remains are uncovered at the project site during construction activities, all work shall immediately halt and the project applicant shall notify the City and the Alameda County Coroner. If the County Coroner determines that an investigation of the cause of death is required or that the remains are Native American, all work shall cease within 50 feet of the remains until appropriate arrangements are made. In the event that the remains are Native American, the City shall contact the California Native American Heritage Commission (NAHC), pursuant to subdivision (c) of section 7050.5 of the California Health and Safety Code. If the agencies determine that avoidance is not feasible, then an alternative plan

shall be prepared with specific steps and timeframe required to resume construction activities. Monitoring, data recovery, determination of significance, and avoidance measures (if applicable) shall be completed expeditiously and at the expense of the project applicant.

When Required: During construction

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

20. Construction-Related Permit(s)

Requirement: The project applicant shall obtain all required construction-related permits/approvals from the City. The project shall comply with all standards, requirements and conditions contained in construction-related codes, including but not limited to the Oakland Building Code and the Oakland Grading Regulations, to ensure structural integrity and safe construction.

When Required: Prior to approval of construction-related permit

Initial Approval: Bureau of Building

Monitoring/Inspection: Bureau of Building

21. Hazardous Materials Related to Construction

Requirement: The project applicant shall ensure that Best Management Practices (BMPs) are implemented by the contractor during construction to minimize potential negative effects on groundwater, soils, and human health. These shall include, at a minimum, the following:

- a. Follow manufacture's recommendations for use, storage, and disposal of chemical products used in construction;
- b. Avoid overtopping construction equipment fuel gas tanks;
- c. During routine maintenance of construction equipment, properly contain and remove grease and oils;
- d. Properly dispose of discarded containers of fuels and other chemicals;
- e. Implement lead-safe work practices and comply with all local, regional, state, and federal requirements concerning lead (for more information refer to the Alameda County Lead Poisoning Prevention Program); and
- f. If soil, groundwater, or other environmental medium with suspected contamination is encountered unexpectedly during construction activities (e.g., identified by odor or visual staining, or if any underground storage tanks, abandoned drums or other hazardous materials or wastes are encountered), the project applicant shall cease work in the vicinity of the suspect material, the area shall be secured as necessary, and the applicant shall take all appropriate measures to protect human health and the environment. Appropriate measures shall include notifying the City and applicable regulatory agency(ies) and implementation of the actions described in the City's Standard Conditions of Approval, as necessary, to identify the nature and extent of contamination. Work shall not resume in the area(s) affected until the measures have been implemented under the oversight of the City or regulatory agency, as appropriate.

When Required: During construction

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

22. Site Design Measures to Reduce Stormwater Runoff

Requirement: Pursuant to Provision C.3 of the Municipal Regional Stormwater Permit issued under the National Pollutant Discharge Elimination System (NPDES), the project applicant is encouraged to incorporate appropriate site design measures into the project to reduce the amount of stormwater runoff. These measures may include, but are not limited to, the following:

- a. Minimize impervious surfaces, especially directly connected impervious surfaces and surface parking areas;
- b. Utilize permeable paving in place of impervious paving where appropriate;
- c. Cluster structures;

- d. Direct roof runoff to vegetated areas;
- e. Preserve quality open space; and
- f. Establish vegetated buffer areas.

When Required: Ongoing

Initial Approval: N/A

Monitoring/Inspection: N/A

23. Source Control Measures to Limit Stormwater Pollution

Requirement: Pursuant to Provision C.3 of the Municipal Regional Stormwater Permit issued under the National Pollutant Discharge Elimination System (NPDES), the project applicant is encouraged to incorporate appropriate source control measures to limit pollution in stormwater runoff. These measures may include, but are not limited to, the following:

- a. Stencil storm drain inlets “No Dumping – Drains to Bay;”
- b. Minimize the use of pesticides and fertilizers;
- c. Cover outdoor material storage areas, loading docks, repair/maintenance bays and fueling areas;
- d. Cover trash, food waste, and compactor enclosures; and
- e. Plumb the following discharges to the sanitary sewer system, subject to City approval:
 - i. Discharges from indoor floor mats, equipment, hood filter, wash racks, and, covered outdoor wash racks for restaurants;
 - ii. Dumpster drips from covered trash, food waste, and compactor enclosures;
 - iii. Discharges from outdoor covered wash areas for vehicles, equipment, and accessories;
 - iv. Swimming pool water, if discharge to on-site vegetated areas is not feasible; and
 - v. Fire sprinkler test water, if discharge to on-site vegetated areas is not feasible.

When Required: Ongoing

Initial Approval: N/A

Monitoring/Inspection: N/A

24. Construction Days/Hours

Requirement: The project applicant shall comply with the following restrictions concerning construction days and hours:

- a. Construction activities are limited to between 7:00 a.m. and 7:00 p.m. Monday through Friday, except that pier drilling and/or other extreme noise generating activities greater than 90 dBA shall be limited to between 8:00 a.m. and 4:00 p.m.
- b. Construction activities are limited to between 9:00 a.m. and 5:00 p.m. on Saturday. In residential zones and within 300 feet of a residential zone, construction activities are allowed from 9:00 a.m. to 5:00 p.m. only within the interior of the building with the doors and windows closed. No pier drilling or other extreme noise generating activities greater than 90 dBA are allowed on Saturday.
- c. No construction is allowed on Sunday or federal holidays.

Construction activities include, but are not limited to, truck idling, moving equipment (including trucks, elevators, etc.) or materials, deliveries, and construction meetings held on-site in a non-enclosed area.

Any construction activity proposed outside of the above days and hours for special activities (such as concrete pouring which may require more continuous amounts of time) shall be evaluated on a case-by-case basis by the City, with criteria including the urgency/emergency nature of the work, the proximity of residential or other sensitive uses, and a consideration of nearby residents'/occupants' preferences. The project applicant shall notify property owners and occupants located within 300 feet at least 14 calendar days prior to construction activity proposed outside of the above days/hours. When submitting a request to the City to allow construction activity outside of the above days/hours, the project applicant shall submit information concerning the type and duration of proposed construction activity and the draft public notice for City review and approval prior to distribution of the public notice.

When Required: During construction

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

25. Construction Noise

Requirement: The project applicant shall implement noise reduction measures to reduce noise impacts due to construction. Noise reduction measures include, but are not limited to, the following:

- a. Equipment and trucks used for project construction shall utilize the best available noise control techniques (e.g., improved mufflers, equipment redesign, use of intake silencers, ducts, engine enclosures and acoustically-attenuating shields or shrouds) wherever feasible.
- b. Except as provided herein, impact tools (e.g., jack hammers, pavement breakers, and rock drills) used for project construction shall be hydraulically or electrically powered to avoid noise associated with compressed air exhaust from pneumatically powered tools. However, where use of pneumatic tools is unavoidable, an exhaust muffler on the compressed air exhaust shall be used; this muffler can lower noise levels from the exhaust by up to about 10 dBA. External jackets on the tools themselves shall be used, if such jackets are commercially available, and this could achieve a reduction of 5 dBA. Quieter procedures shall be used, such as drills rather than impact equipment, whenever such procedures are available and consistent with construction procedures.
- c. Applicant shall use temporary power poles instead of generators where feasible.
- d. Stationary noise sources shall be located as far from adjacent properties as possible, and they shall be muffled and enclosed within temporary sheds, incorporate insulation barriers, or use other measures as determined by the City to provide equivalent noise reduction.
- e. The noisiest phases of construction shall be limited to less than 10 days at a time. Exceptions may be allowed if the City determines an extension is necessary and all available noise reduction controls are implemented.

When Required: During construction

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

26. Operational Noise

Requirement: Noise levels from the project site after completion of the project (i.e., during project operation) shall comply with the performance standards of chapter 17.120 of the Oakland Planning Code and chapter 8.18 of the Oakland Municipal Code. If noise levels exceed these standards, the activity causing the noise shall be abated until appropriate noise reduction measures have been installed and compliance verified by the City.

When Required: Ongoing

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

27. Construction Activity in the Public Right-of-Way

a. Obstruction Permit Required

Requirement: The project applicant shall obtain an obstruction permit from the City prior to placing any temporary construction-related obstruction in the public right-of-way, including City streets, sidewalks, bicycle facilities, and bus stops.

When Required: Prior to approval of construction-related permit

Initial Approval: Department of Transportation

Monitoring/Inspection: Department of Transportation

b. Traffic Control Plan Required

Requirement: In the event of obstructions to vehicle or bicycle travel lanes, bus stops, or sidewalks, the project applicant shall submit a Traffic Control Plan to the City for review and approval prior to obtaining

an obstruction permit. The project applicant shall submit evidence of City approval of the Traffic Control Plan with the application for an obstruction permit. The Traffic Control Plan shall contain a set of comprehensive traffic control measures for auto, transit, bicycle, and pedestrian accommodations (or detours, if accommodations are not feasible), including detour signs if required, lane closure procedures, signs, cones for drivers, and designated construction access routes. The Traffic Control Plan shall be in conformance with the City's Supplemental Design Guidance for Accommodating Pedestrians, Bicyclists, and Bus Facilities in Construction Zones. The project applicant shall implement the approved Plan during construction.

Initial Approval: Department of Transportation

Monitoring/Inspection: Department of Transportation

c. Repair of City Streets

Requirement: The project applicant shall repair any damage to the public right-of way, including streets and sidewalks, caused by project construction at his/her expense within one week of the occurrence of the damage (or excessive wear), unless further damage/excessive wear may continue; in such case, repair shall occur prior to approval of the final inspection of the construction-related permit. All damage that is a threat to public health or safety shall be repaired immediately.

When Required: Prior to building permit final

Initial Approval: N/A

Monitoring/Inspection: Department of Transportation

28. Construction and Demolition Waste Reduction and Recycling

Requirement: The project applicant shall comply with the City of Oakland Construction and Demolition Waste Reduction and Recycling Ordinance (chapter 15.34 of the Oakland Municipal Code) by submitting a Construction and Demolition Waste Reduction and Recycling Plan (WRRP) for City review and approval, and shall implement the approved WRRP. Projects subject to these requirements include all new construction, renovations/alterations/modifications with construction values of \$50,000 or more (except R-3 type construction), and all demolition (including soft demolition) except demolition of type R-3 construction. The WRRP must specify the methods by which the project will divert construction and demolition debris waste from landfill disposal in accordance with current City requirements. The WRRP may be submitted electronically at www.greenhalosystems.com or manually at the City's Green Building Resource Center. Current standards, FAQs, and forms are available on the City's website and in the Green Building Resource Center.

When Required: Prior to approval of construction-related permit

Initial Approval: Public Works Department, Environmental Services Division

Monitoring/Inspection: Public Works Department, Environmental Services Division

29. Underground Utilities

Requirement: The project applicant shall place underground all new utilities serving the project and under the control of the project applicant and the City, including all new gas, electric, cable, and telephone facilities, fire alarm conduits, street light wiring, and other wiring, conduits, and similar facilities. The new facilities shall be placed underground along the project's street frontage and from the project structures to the point of service. Utilities under the control of other agencies, such as PG&E, shall be placed underground if feasible. All utilities shall be installed in accordance with standard specifications of the serving utilities.

When Required: During construction

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

30. Employee Rights

Requirement: The project applicant and business owners in the project shall comply with all state and federal laws regarding employees’ right to organize and bargain collectively with employers and shall comply with the City of Oakland Minimum Wage Ordinance (chapter 5.92 of the Oakland Municipal Code).

When Required: Ongoing

Initial Approval: N/A

Monitoring/Inspection: N/A

31. Hours of Operation

Requirement: The hours of operation for the proposed activity shall be limited to Tuesday – Sunday from 11AM – 8PM.

Any change in hours and days of operation will be subject to review and approval of the Bureau of Planning.

When Required: Ongoing

Initial Approval: Bureau of Planning

Monitoring/Inspection: Bureau of Building

32. Signage

Requirement: The project applicant shall obtain approval for business signage. The permit shall identify, at a minimum, sign sizes, materials, colors, placement, construction, method of lighting, and other related sign requirements.

When Required: Prior to a Final Inspection

Initial Approval: Bureau of Building

Monitoring/Inspection: N/A

Applicant Statement

I have read and accept responsibility for the Conditions of Approval. I agree to abide by and conform to the Conditions of Approval, as well as to all provisions of the Oakland Planning Code and Oakland Municipal Code pertaining to the project.

Name of Project Applicant

Signature of Project Applicant

Date

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) 17.134.05D GENERAL CUP

FOR ANY APPEAL: 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 City Administrator, other administrative decisionmaker or Commission (Advisory Agency) or wherein the appeal 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. The appeal must be accompanied by the required fee pursuant to the Master Fee Schedule.

You must raise each and every issue you wish to appeal on this Appeal Form (or attached additional sheets). You may provide supporting documentation along with this Appeal Form, may preclude you from raising such issues in court. However, the appeal will be limited to issues and/or evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.

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

PLEASE SEE THE ACCOMPANYING DOCUMENTS

Supporting Evidence or Documents Attached. *(The appellant must submit all supporting evidence along with this Form; however, the appeal will be limited to evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.)*

PROJECT INFORMATION

Case No. of Appealed Project: PLN 22037
Project Address of Appealed Project: 1721 BRUSH
Assigned Case Planner/City Staff: R. WYSONG

APPELLANT INFORMATION:

Printed Name: NICOLA E. SMITH Phone Number: (510) 525-265
Mailing Address: m/c PROPERTIES P.O. BOX 1133 Alternate Contact Number: (510) 599-39
City/Zip Code: BERKELEY, CA 94701-1133 Representing: m/c PROPERTIES @
Email: nicesmith@msn.com 1715 BRUSH ST

An appeal is hereby submitted on:

AN ADMINISTRATIVE DECISION (APPEALABLE TO THE CITY COMMISSION OR HEARING OFFICER)

YOU MUST INDICATE ALL THAT APPLY:

- Approving an application on an Administrative Decision
- Denying an application for an Administrative Decision
- Administrative Determination or Interpretation by the Zoning Administrator
- Other (please specify) APPEALING A DECISION

Please identify the specific Administrative Decision/Determination Upon Which Based Pursuant to the Oakland Municipal and Planning Codes

- 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)
- City Planner's determination regarding a revocation hearing (OPC Sec. 17.152.08)
- Hearing Officer's revocation/impose or amend conditions (OPC Sec. 17.152.150 &/or 17.156.160)
- Other (please specify) 17.134.050 GENERAL CUP

Nola E. Smith, m/c PROPERTIES
Signature of Appellant or Representative of
Appealing Organization

6/16/22@.
Date

TO BE COMPLETED BY STAFF BASED ON APPEAL TYPE AND APPLICABLE FEE

APPEAL FEE: \$ _____

Fees are subject to change without prior notice. The fees charged will be those that are in effect at the time of application sub
due at submittal of application.

Date/Time Received Stamp Below:

Below For Staff Use Only

Cashier's Receipt

m/c Properties P.O Box 1133 Berkeley, CA 94701-1133 (510) 525-2652

Re: PLN22037 – Appeal

This document is presented in support of our appeal of the Zoning Manager’s decision to grant the conditional use permit (CUP) for a video game store to be located in a backyard accessory structure located at 1721 Brush Street.

As the adjacent neighbor, (1715 Brush Street), it is our understanding that a conditional use permit by its nature is not a matter of right but of reasonable administrative discretion. As well as meeting applicable zoning and design review requirements, Applicant may only receive the permit if the proposed use is otherwise in accordance with all the neighborhood impact standards.

In this regard, pursuant to section 17.134.050, there must be positive findings supported by the evidence on all five standards for a CUP to be issued. In opposing the permit, 1715 Brush particularly objects to the following findings — “compatible with the neighborhood”, “asset for the neighborhood”, and “enhances the area” — and to how the application has been pursued by Applicant. In these respects, the residents and owners of 1715 Brush contest the sufficiency, appropriateness and fairness of issuance.

Failure to Engage with the Neighborhood Affected

There has been no community outreach from the Applicant. Residents at 1715 Brush were made aware of proposed changes at 1721 Brush only when the Planning Department notice was posted. Owners were apprised only when the notice was received by the manager, m/c Properties, in the office only six days before the close of the application response period. It appears that the Applicant was in consultation on the permit for at least six months, yet at no time was there any effort made to inform the adjacent residents or owners who would be most impacted that a non-customary use of the property was be pursued.

This unwillingness to engage in any outreach to those likely to be most affected suggests an intent by the Applicant to secure approval through the bare minimum of compliance. It also argues for their own awareness of the problematic nature of the proposed use and suggests a wish to distract from or minimize its unsuitability. The problematic nature of the proposed use is evident in the required CUP findings where the substantial evidence contradicts an affirmative conclusion on the specific standards.

FINDING A:

Zoning Manager

“The proposed video game store will be compatible with and will not adversely affect the livability or appropriate development of the neighborhood”

Appeal: The proposed video game store will not be compatible with and will adversely affect the livability of abutting properties. The video game store is proposed to be located in an existing accessory structure behind the primary home. This space cannot be observed from the

street and can only be accessed via a narrow corridor located on the north side of the main structure. The space is too close to surrounding residences and too isolated to operate as a traditional retail establishment that relies on visibility, easy access and proximity to other retail stores. The applicant has not submitted material showing where the three employees and customers will park or which structures in the backyard will be retained and which, if any, will be demolished.

Zoning Manager: *"There will be minimal generation of traffic and the capacity of the surrounding streets will be maintained as the applicant states that the store will only generate around 10-15 trips per day".*

Appeal: As the finding notes, the store would be in an existing building, and the exterior changes to that building may not be inconsistent in scale, bulk and density with its surroundings. Rather, its harmful effect is in adding a retail use, with its demands for parking, policing, etc., to an already congested, solely residential, location that has changed since the back building's use many years ago as a commercial print facility.

Moreover, in the absence of information other than the Applicant's estimates, there may be significant traffic impacts and the surrounding streets don't have the capacity to accommodate a sudden increase in demand for parking. According to Applicant, the store would require three employees, if two of the three drive to work, all existing off-street parking would be occupied leaving customers to find parking elsewhere (but most likely on adjacent private parking space dedicated to the neighboring apartment building which would inevitably lead to conflicts between residents, employees and customers).

Indeed, there is no parking on the east side of the street because there are only traffic lanes next to 980. Thus, there are only five parking spaces on the block to serve all residents and visitors on the block. The adjacent 1715 building was approved with only six parking spaces for 10 units at a time before 980 when there were residences and parking on both sides of the street. Residents, in their statements, are clear that parking has been difficult on the block, especially since 980's construction. Their documents support that there are already disagreements and disputes between residents, visitors and BART users over the minimal parking.

FINDING B:

Zoning Manager: *"That the location, design, and site planning of the proposed video game store will provide a convenient and functional living, working and shopping environment*

Appeal: The proposed location of the video game store will not provide a functional living, working and shopping environment and will affect the residential environment. As stated previously, the proposed store would be located in an accessory structure behind the primary home. Site constraints make it impractical for use as a retail store because it has no visibility, challenging access (customers must walk a narrow, dark corridor between houses in order to reach the location) no secondary access for receiving inventory, and no way to manage disposal

of packaging. The space would not be a safe working environment because employees would have no way to escape in case of problems with intruders.

Potential noise: In the absence of statements to the contrary, it must be assumed that the video game retailer will offer customers the opportunity to test run the games they intend to purchase. Video game stores located in shopping malls are often sources of game related noise that is intended to attract customers. On-site testing in the proposed location could generate significant noise that will disturb surrounding residences.

With respect to the proposed video sales use itself, as raised elsewhere in the documents accompanying this filing, the finding mentions no studies, evidence, as having been offered to support that video games stores in residential areas have benefits that outweigh the negatives. Nor is there the evidence or a discussion in the findings on the size of video sale shops generally or neighborhood video sale shops in particular. Industry information indicates that sales only video shops can be less than 300 ft.² Yet the average size for shops with game space is 1000 ft. The building's 900 ft.², therefore, calls into question whether the proposed sales use, while supposedly not an arcade, is nonetheless meant to operate as a destination gaming location.

FINDING C:

Zoning Manager: *"The proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region. ...by revitalizing an existing commercial use that has been vacant and unused for the past 40 years. The video game store will provide an essential service as it is a niche use that will support people who have an interest in video games"*

Appeal: The proposed video game store will not "enhance the surrounding area" nor does it "provide an essential service for the community or region". Successful video game stores rely on heavy pedestrian traffic normally found in large shopping malls and established retail districts. "Essential neighborhood services" typically include grocers, cafes, dry cleaners, medical offices and small shops etc. all of which must be easily accessed from the sidewalk.

A video game store's operation, offering the space for onsite playing of video games, is not by its nature conducive to maintaining a quiet environment for surrounding residential neighbors while bringing vitality to the area.

This optimistic assertion is further refuted by the proposed shop's features: a place to meet up, spend time, and the amenities such as bathrooms, snack service, etc. to support its sales and gaming use in a secluded location behind a house and garden and accessible only by a narrow walkway. Such a business and the vitality it brings are not helpful to an area that is striving to protect and project its neighborhood character in a location that struggles with traffic problems, parking problems, itinerants and the exposure to criminal activity associated with these circumstances.

Indeed, the use risks creating a neighborhood nuisance. Also, when as here, the business is not visible from the street but operates behind a house and garden, the likelihood of its on-site game

space attracting itinerant persons needing a place to hang out as well as the player competition that causes its share of disruption, makes the fact that there are no policing impact studies of the use doubly a matter of concern to abutting residents. Especially so where, as here, in addition to game sales, there will be on-site gaming (and its risk of internet gambling), and the competitions and disputes that go with such activity. This situation does not suggest a desired neighborhood vitality, but heightened negative activity complicating the area's existing challenges.

While the site may have accommodated a commercial use in the past, physical constraints make it unlikely, if not impossible for it to accommodate the proposed use without unwanted impacts to its neighbors. These same physical constraints should be evaluated before any final approval can be considered. The Oakland Police Department should be consulted in order to determine if video game stores in general and this site specifically, pose special challenges to public safety. The Fire Department should evaluate the risks associated with establishing a retail business at this constrained location

Conclusion: The Department's approval of the CUP is in error and not supported by substantial evidence.

Approval of this CUP would require the deciding body to accept as true, all Applicant's assurances about the area since there has been minimal opportunity for the studies or for contrary information that would settle many of the questions raised here. Further evaluation of this information, the location and the circumstances would reveal that issuing the permit would give Applicant a right never exercised before in that space, and would burden the neighborhood with a use that that would benefit a population that does not live there.

Thus, with what is presented in this appeal, appellant states that approval of this use is in error or, at best, premature. Far from revitalizing a historical use, the video sales shop would introduce a retail business where its abandonment has allowed a synergy that has established these blocks as a residential enclave. The lack of full information about the use, from the police, the fire department, about industry standards and the area, has resulted in an approval erroneously granted.