



AGENDA REPORT

City Council

MEETING DATE: February 9, 2022

PREPARED BY: Andrew Maynard, Senior Planner

DEPT. DIRECTOR: Roy Sapa'u

DEPARTMENT: Development Services

CITY MANAGER: Pamela Antil

SUBJECT:

Public Hearing to consider a timely-filed appeal of the Planning Commission's denial of a Planning Commission Interpretation for the conversion of a fast-food restaurant with a drive through to a coffee shop with a drive through use.

CASE NUMBER: MULTI-003587-2020, DR-003589-2020 & BADJ-003588-2020; **APPLICANT:** Jack in the Box Properties, LLC.; **APPELLANT:** Jack in the Box Properties, LLC.; **LOCATION:** 1967 San Elijo Avenue (APN: 260-351-23).

RECOMMENDED ACTION:

Deny the appeal and uphold the decision of the Planning Commission and adopt attached draft City Council Resolution No. 2022-01 (**Attachment CC-1**).

Alternative Options:

The following alternative options are available for the City Council to consider:

Option A: Affirm the applicant's appeal, set aside the decision of the Planning Commission, and direct staff to return with a Resolution, with findings reached by the City Council, to determine that the change of use to a coffee shop with a drive through use is consistent with the Encinitas Municipal Code nonconformity provisions.

Option B: Request additional information from the appellant to substantiate and support arguments and continue the matter to a future hearing date.

STRATEGIC PLAN:

The action before the City Council is to consider an appeal of the Planning Commission's denial of a Planning Commission Interpretation for a nonconforming drive through within the Cardiff-by-the-Sea Specific Plan, which coincides with the Community Planning Focus Area of the City's Strategic Plan.

FISCAL CONSIDERATIONS:

There is no fiscal impact associated with the staff recommendation. The appellant paid the applicable appeal fee of \$330.

BACKGROUND:

According to a Commercial Building Record from the San Diego County Recorder's Office, the subject site was developed in 1969, with additions approved in 1970 and 1978 (**see Attachment CC-4**), all prior to City incorporation in 1986. At the time of construction, the site was within the County Zone C-36 (General Commercial) Zone, which allowed for a restaurant with a drive through use. A variance (V77-47) was issued by the County of San Diego in 1977 when the restaurant was constructed, which allowed a front-yard setback encroachment from 50-feet to 35-feet from the centerline of San Elijo Avenue.

Case No. 92-110 ADP (Resolution No. C-92-90) was approved on December 21, 1992 for a Design Review Permit by the Cardiff Community Advisory Board to allow the repairing of the existing roof, painting of building and site structures, removal and installation of new sign faces, repaint of existing fascia, and installation of exposed neon lighting on the parapet cap. An appeal of that decision was filed on behalf of nearby residents on January 5, 1993. The Planning Commission considered the project on January 15, 1993. No ultimate approval was granted for the project.

The property is currently located within the Cardiff-by-the-Sea Specific Plan C-GC-1 Zone. Section 3.2.5A (Permitted, Conditionally Permitted and Prohibited Uses) states:

"Only those uses listed in Table 3-1 shall be permitted in the zones identified. Uses are designated as permitted, conditionally permitted (a minor or major use permit may be required) or as secondary, ancillary, or accessory to a principal use... All other uses not listed in Table 3-1 are expressly prohibited. Except however, in the event a use is not specifically permitted within a zone but is similar in character to a use which is listed, a determination of allowable use may be applied for as per Municipal Code Section 30.01.030".

The City of Encinitas ("City") issued a Service Request letter on April 8, 2020 for a zoning compliance determination. The letter documented the current zoning, use and conformance, termination of nonconformity and previous entitlements (**see Attachment CC-4**).

The City also processed the several Building Permits (93-163, 97-1583, 04-1040, 04-2110, 05-951-15-1220) on the site which included miscellaneous electrical upgrades, undergrounding of utilities, ADA accessibility upgrades and a mechanical air conditioning replacement.

A Staff Advisory Committee (SAC) meeting was held on April 8, 2020 regarding the following requested improvements at the project site: 1) relocate the ADA stall from northwest corner of the property to a new location adjacent to the building; 2) relocation of an existing menu-board and a new menu board; 3) new directional signage and clearance bar at the drive-thru; 3) add bike rack; 3) add trash enclosure screen around the existing dumpster; 4) remove four parking stalls on the eastern portion of the property to create a drive aisle, and add striping for a drive-thru lane for better circulation around the site; and, 5) potential future exterior improvements could include painting and slightly modifying roof of the structure. The existing outdoor dining area was proposed to remain. The SAC notes and conceptual plans provided for the meeting are attached herein as **Attachment CC-4**.

Project Description

The applicant/appellant requested a Planning Commission Interpretation to determine if the change of use from a restaurant with a drive through to a coffee shop with a drive through with the proposed improvements identified below is consistent with the nonconformity regulations of the Cardiff-by-the-Sea Specific Plan and Encinitas Municipal Code Chapter 30.76 and if they would be considered an intensification of the existing nonconformity.

The applicant is proposing the following improvements:

- Access on the Birmingham Drive driveway will be closed off with temporary bollards.
- The installation of a curb with associated striping on the easterly side of the drive through. Parking along the easterly side of the lot would be eliminated, and only one-way access to the north side of the property and parking area is proposed.
- Parking spaces along the north side of the site would be reconfigured and increased from eight to 12 parking spaces by removing one ADA space and associated striping, relocating parking spaces and reducing the area access adjacent to the dumpster for EDCO access.
- Removal of two existing menu boards, and replace with two menu boards, including a five-panel menu board and an ordering screen. The new menu board is proposed between the location of the previous menu boards and the new ordering screen is south of the existing signage towards the entrance to the drive through.
- Installation of a lid or roof over the existing trash enclosure
- Elimination of one parking stall on the east side of the existing building and installation of an ADA parking space with associated required striping.
- Replacement of a monument sign in same location of the existing sign, with no increase in total panel square footage.
- Façade improvements, painting, signage and other rebranding.

Planning Commission Action

On November 4, 2021, the Planning Commission considered the staff report with attachments, a memorandum from staff to the Planning Commission correcting errors with discrepancies of the square footage on the applicant's plans, a second-story element for the existing building and nonconformities related to height, the City's Municipal Code Sections 30.760.050 through 30.760.090 (related to improvements of non-conforming uses), the General Plan, Cardiff-by-the-Sea Specific Plan, Calbay and Jack In the Box legal representative letters, and past case history with similar uses, and determined that the change of use from Jack In the Box with drive through to a coffee shop with a drive through with the proposed improvements was considered to be inconsistent with the nonconformity regulations of the Cardiff-by-the-Sea Specific Plan and Encinitas Municipal Code Chapter 30.76. The Planning Commission voted 3-1 to approve staff's recommendation with modifications to the draft resolution, and to return date certain on November 18, 2021 to adopt the revised resolution.

At the November 18, 2021 hearing, the Planning Commission considered a letter received from Cynthia L. Eldred representing the applicant (Jack in the Box Properties, Inc.). The applicant was not present at the November 18, 2021 hearing. The Planning Commission pulled this item from the consent calendar, considered the letter, made minor modifications to the draft resolution and adopted Planning Commission Resolution No. PC-2021-45 attached hereto as **Attachment CC-3**.

Appeal Filed

The City of Encinitas received a timely-filed appeal on December 2, 2021 from (Jack in the Box Properties, LLC. (applicant). The appeal is attached as part of **Attachment CC-2**. The appeal details objections to the Planning Commission's denial. Staff's responses to the objections are provided in the "Analysis" section below.

Public Participation

The Planning Commission's Interpretation is not subject to the Citizen's Participation Plan (CPP) requirements.

ANALYSIS:

The following is an overview of the appellant's positions and concerns, along with staff's responses to each concern:

Appellant

1a. Appellant

"Jack in the Box Properties, LLC appeals the determination of the Planning Commission as reflected in Resolution No. PC-2021-45, adopted on November 18, 2021. The Planning Commission did not proceed in the manner required by law. The findings of the resolution are not supported by facts presented orally and in writing at the Commission's November 4, 2021 and November 18, 2021 meetings. The Commission's determination violates constitutional rights and legal principles that govern the vested, legal non-conforming use that runs with the land, a drive-in/drive-through restaurant entitles to continue as-of-right. The Commission's determination is arbitrary and capricious and a prejudicial abuse of discretion. Further, if upheld, the determination would constitute the taking of a fundamental vested right and interest in real property which compensation must be paid. Copies of the following evidence are submitted with this appeal: (1) Jack in the Box's May 2021 application to the Commission as resubmitted August 2021 as staff's request; (2) Calbay Development LLC's November 4, 2021 letter to the Commission; (3) Jack in the Box's November 18, 2021 letter to the Commission; and (4) certified transcripts of the Commission's November 4, 2021 and November 18, 2021 proceedings on Jack in the Box's application."

1b. Staff response

The subject site was developed with a restaurant and a drive through use prior to City incorporation in 1969. At the time of construction, the site was within the County Zone C-36 (General Commercial) Zone, which allowed for a restaurant with a drive through use.

This property is currently located within the Cardiff-by-the-Sea Specific Plan C-GC-1 Zone. Section 3.2.5A (Permitted, Conditionally Permitted and Prohibited Uses) states:

"Only those uses listed in Table 3-1 shall be permitted in the zones identified. Uses are designated as permitted, conditionally permitted (a minor or major use permit may be required) or as secondary, ancillary, or accessory to a principal use... All other uses not listed in Table 3-1 are expressly prohibited. Except however, in the event a use is not specifically permitted within a zone but is similar in character to a use which is listed, a determination of allowable use may be applied for as per Municipal Code Section 30.01.030".

A new drive through use is specifically not listed, and therefore could not be constructed. The subject use does not meet the definition of a "Restaurant No Alcohol Sales" or Restaurant- With Alcohol" sales as listed in the CSP Use Matrix.

Encinitas Municipal Code Section 30.76.050 (Limit on Utilizing Nonconformity- General) states the following:

- A. It is unlawful for any person to enlarge, extend, expand or in any other manner change a nonconforming use or a structural nonconformity so as to increase its inconsistency with the zoning regulations of this chapter.
- B. A nonconforming use may be replaced with the same or a similar use so long as the subsequent use does not enlarge, extend, expand or in any other manner increase the inconsistency with the regulations of this title.

- C. Repairs and maintenance may be performed on structural nonconformities so long as the nonconformity is not enlarged, relocated or increased in intensity, unless permitted by this chapter.

The proposed conversion represents an increased intensity of use, as well as an expansion of the legal non-conforming use. The Applicant through their legal representatives argue that the proposed conversion of the Jack in the Box restaurant is a “rebranding” of the Jack in the Box, and as such is not an expansion of a legal non-conforming use. Rebranding is a marketing strategy where a new name or symbol is created for an established product and is then described as something new. Here, the term “rebranding” is not an accurate description because the proposal is to replace the Jack in the Box restaurant with a Starbucks coffee shop which is an entirely different use of the site.

The proposed changes that Calbay proposes: the relocation and striping of the parking lot, the closing off Birmingham Drive, and the signage directing cars to the walk-up window if the queuing of cars becomes too large, all point to the fact that a Starbucks at this location will not only increase the intensity of use, but it will also expand the inconsistencies with current zoning ordinances. Therefore, the proposed Starbucks at this location if approved would be inconsistent with Municipal Code Section 30.76.050.

Calbay cites cases from the 1950's as authority to justify their proposed modifications to the Jack in the Box restaurant. Both in their letters and at the Planning Commission meeting they cited *Ricciardi v. Los Angeles County* (1953) 115 Cal.App.2nd 569. Ricciardi was the owner of a non-conforming 1922 slaughterhouse in Los Angeles which included a meat processing, packing, and refrigeration plant. Ricciardi applied for a permit to make alterations to better the slaughterhouse sanitary system. The court held that alterations made were to preserve the owner's original property rights. The changes to the non-conforming use involved updating the connections to the sanitary sewer systems to comply with State health laws and were for the benefit of public health and safety. The *Ricciardi* case is not an appropriate analogy to this case.

A more appropriate analogy would be to *Town Council of Las Gatos vs. State Bd. Of Equalization* (1956) 141 Cal. App. 2nd 344 where the court concluded that a restaurant proposing to sell hard liquor when the previous non-conforming store only sold beer and wine constituted an intensity of use as it resulted in a substantial change in the character of the business.

Starbucks proposes to give permanency to the current non-conforming use. Jack in the Box has operated for more than 54 years in its present location and the approval of a Starbucks would add new life to a half century old Jack in the Box restaurant structure. The whole purpose and intent of the City's non-conforming use ordinances are to allow the non-conforming use to remain until their useful life has been extinguished.

Vested Rights:

Calbay argues that should the City deny the Starbucks conversion it would be an unlawful taking under the Fifth Amendment to U.S. Constitutional and thus would require the City to pay just compensation for its taking. They argue that they have a lawful right to convert the Jack in the Box into a Starbucks because it is the same or similar business as the existing use. This position, however, is contrary to established case law. It is well recognized that a zoning ordinance or land use regulation which operates prospectively and denies the owner the opportunity to exploit an interest in the property that the owner believed would be available for future development, or diminishes the value of the property, is not valid and does not bring about a compensable taking unless all beneficial use of the property is denied. Here, the Jack in the Box restaurant will still have ongoing economic value even if the Starbucks conversion is

denied. The half century of use has allowed the owner Jack in the Box to fully realize the benefits of their investment.

The applicant has indicated that the proposed use will be converted from a fast-food restaurant (Jack In the Box) with drive through to a coffee shop (Starbucks) with a drive through. The applicant is proposing the below listed improvements for the proposed use to function onsite:

- Access on the Birmingham Drive driveway is proposed to be closed off with temporary bollards.
- The installation of a curb with associated striping on the easterly side of the drive through. Parking along the easterly side of the lot would be eliminated, and only one-way access to the north side of the property and parking area is proposed.
- Parking spaces along the north side of the site would be reconfigured and increased from eight to 12 parking spaces by removing one ADA space and associated striping, relocating parking spaces and reducing the area access adjacent to the dumpster for EDCO access.
- The applicant is proposing the removal of two existing menu boards, and replacement with two menu boards, including a five-panel menu board and an ordering screen. The new menu board is proposed between the location of the previous menu boards and the new ordering screen is south of the existing signage towards the entrance to the drive through.
- Installation of a lid or roof over the existing trash enclosure
- Elimination of one parking stall on the east side of the existing building and installation of an ADA parking space with associated required striping.
- Replacement of a monument sign in same location of the existing sign, with no increase in total panel square footage.
- Façade improvements, painting, signage and other rebranding.

The Cardiff-by-the-Sea Specific Plan and Encinitas Municipal Code nonconformity standards were analyzed as part of the interpretation request of the proposed change of use and improvements. The current use as a Jack in the Box restaurant with a drive through is not a permitted use, nor does the Cardiff-by-the-Sea Specific Plan have provisions to obtain a conditional use permit to make modifications to such a use.

The Cardiff-by-the-Sea (CSP) Specific Plan has the following nonconforming provision in Chapter 7.1.6 and 7.1.6.D below. The CSP does not have a definition of a drive through, but Encinitas Municipal Code (EMC) Section 30.04.010 does define it as stated below.

- 7.1.6: Except as provided for in this Specific Plan, any non-conforming use or structural non-conformity shall be subject to the provisions of Chapter 30.76 of the Encinitas Municipal Code.
- 7.1.6.D: Any commercial building with a structural nonconformity that is damaged up to 100% (by accident or voluntary) of its valuation can be reconstructed with the continuation of the structural nonconformities provided such nonconformities are not increased in density or intensity.
- EMC 30.04.010- DRIVE IN OR DRIVE THROUGH RESTAURANT shall mean a place of business which sells food products and/or beverages and which:
 - A. Delivers such food products and/or beverages to customers immediately outside of the building from which they are sold by means of service, a window, counter, or similar method or device, or
 - B. Delivers such food products and/or beverages to customers within a building which is designed in such a manner that a majority of the customers will remove such food products and/or beverages from the building for consumption either on the premises or in the immediate vicinity.

As referenced in CSP Section 7.1.6, provisions of Chapter 30.76 shall apply. In accordance with EMC Section 30.76.050 (Limit on Utilizing Nonconformity – General) it states:

- A. It is unlawful for any person to enlarge, extend, expand or in any other manner change a nonconforming use or a structural nonconformity so as to increase its inconsistency with the zoning regulations of this chapter.
- B. A nonconforming use may be replaced with the same or a similar use so long as the subsequent use does not enlarge, extend, expand or in any other manner increase the inconsistency with the regulations of this title.
- C. Repairs and maintenance may be performed on structural nonconformities so long as the nonconformity is not enlarged, relocated or increased in intensity, unless permitted by this chapter.

The applicant is proposing the change of an operator from a fast-food restaurant with drive through to a coffee shop with drive through with necessary changes for a legal, nonconforming drive through.

The Planning Commission in reviewing all information from the staff reports, public input, letters from Jack In the Box representatives or counsel determined converting the 1968 constructed Jack In the Box to a Starbucks Coffee Shop with a drive through will intensify the use nonconformity. The change of operation from a fast food with drive through with a primarily afternoon use to a coffee shop with a drive through primarily morning and weekend use that generates significant queuing and/or trip generation is considered an intensification of use and increases the inconsistency with the nonconformity regulations.

Based upon the above stated regulations and analysis below, the applicant is changing the intensity of use with the following:

1. Queuing:

The Planning Commission at the November 4, 2021 hearing references several coffee shop locations including El Camino Real and Orpheus in the City of Encinitas. Case No. 16-133 MIN/ADR/CDP was approved on June 21, 2018 for a change of use from a KFC to a Starbucks for a site located on 266 North El Camino Real located in the General Commercial (GC) Zone, with similar indoor and outdoor square footages to the proposed Cardiff location. Drive throughs in the GC Zone can be permitted with a use permit, whereas the Cardiff Specific Plan strictly prohibits new drive throughs. A detailed onsite circulation study as well as a queuing analysis was performed by LOS Engineering on behalf of the applicant to address any potential safety issues to the nearby intersection at North El Camino Real and Mountain Vista Drive. The study analyzed three locations (two in Oceanside and one in Encinitas) and ultimately concluded that at least a nine-space queue with 20 feet/vehicle would be required for the site. The study by LOS Engineering also indicated additional storage area must be provided in instances where the queuing would exceed these numbers. Based upon the Figure 1 below, the approximate layout of vehicles at the project site would provide for eight vehicles. Any additional vehicles would spill into the driveway apron on San Elijo Avenue, which is 20 feet from the intersection of San Elijo Avenue and Birmingham Drive. The site has no queuing storage capacity. The El Camino Real coffee shop with drive through location identified a total queue in the drive through of 10 cars plus an additional 17 parking spaces located onsite. The applicant has not provided any evidence to address queuing and safety impacts to nearby intersection.

Encinitas Municipal Code Section 30.76.010.D (Purpose) states:

“Nothing in this chapter shall preclude the City from declaring a building, structure, improvement or use to constitute a danger to the safety, health or welfare of the public and to take lawful action to remedy that danger.”

	Weekday 7:00 am to 9:00 am Avg vehicle trip generation rate per 1,000 GFA	Weekday 4:00 pm to 6:00 pm Avg vehicle trip generation rate per 1,000 GFA	Weekend (Saturday) - Peak Hour Generator Avg rate per 1,000 GFA
Coffee/Donut Shop with Drive Through Window	88.99	43.38	87.70
Fast-Food with Drive Through Window	40.19	32.67	54.86

* Coffee/Donut Shop with Drive Through Window 7:00 am to 9:00 am (61 studies)

* Fast Food with Drive Through Window 7:00 am to 9:00 am (111 studies)

* Coffee Shop Peak Hour Generator (11 studies)

* Fast Food Peak Hour Generator (54 studies)

On weekdays between 7:00 a.m. to 9:00 a.m. the average vehicle trips from the ITE Manual shows an increase of peak hour trips within the peak period as 66.7 trips (88.99 - 40.10 = 48.89 (1,365 square feet of existing Starbucks /1,000 GFA)), and weekdays 4:00 p.m. to 6:00 p.m. shows an increase of 14.62 peak hour trips (43.38 - 32.67 = 10.71 (1,365 square feet of existing Starbucks /1,000 GFA)) within the peak period and on weekends (Saturday) the peak generation hour trips increases to 44.83 trips (87.70 - 54.86 = 32.84 (1,365 square feet of existing Starbucks/1,000 GFA)).

The change in use from a fast-food restaurant with a drive through (i.e. Jack in the Box) to a Coffee Shop with Drive Through Window (Starbucks) would be considered a change of use and intensity within the nonconformity regulations.

3. Parking:

At the November 14, 2021 hearing, the Planning Commission considered the structural nonconformities. The project plans prepared by GreenbergFarrow state the square footage of the building as 1,365 square feet. This only accounts for the first-floor square footage. The second floor is approximately 738 square feet (actual to be verified by licensed professional). Therefore, the total square footage is 2,103 square feet for the building (first and second floor) and approximately 270 square feet for the outside patio for a total of 2,373 square feet.

The applicant is proposing removing the easterly parking spaces and restriping of parking spaces located on the north side of the lot from currently eight parking spaces (7 standard and 1 ADA parking space) to 12 parking spaces. This includes restriping all spaces, the modification of an ADA parking space to standard spaces and the addition of parking spaces. The ultimate depth of the parking spaces as shown would not comply with the standard of 18 feet and the resulting parking spaces would not comply with the 24-foot backup space requirement. Additionally, the spaces would need to be double striped causing potential additional conflicts. EMC 30.54.020.D requires that "no existing land or structure shall be deemed to be nonconforming solely for the lack of parking; however, the facilities being used for off-street parking on the effective date of the ordinance shall not be reduced in capacity to less than the minimum standards prescribed in the chapter".

The resulting relocated, reconfigured parking spaces would not comply with the minimum standards as prescribed in the Municipal Code and Off-Street Parking Design Manual.

Additionally, five existing parking spaces located on the south side of the lot are proposed to be dedicated to employees. In accordance with EMC 30.54.020.F all required off-street parking spaces shall be fully usable to all parties. These five parking spaces are located almost entirely within the ultimate future right-of-way. If a dedication was triggered with the scope of work, the owner would be required to dedicate to the City of Encinitas a fifteen-foot (15-foot) wide Easement for Public Street Right-of-Way subject to the terms and conditions set forth in the City of Encinitas Resolution No. 2009-52 adopted October 28, 2009 (Adopting terms and conditions relative to a grant of easement for public street rights-of-way).

As a result of the drive through modification, one-way access is shown for parking. The southern four parking spaces are located in the area where queuing would occur. The accessibility of these parking spaces is unclear. The Planning Commission did not consider these to be an intensification but did add a finding that the applicant would need to demonstrate to the City that the project would need to comply with parking requirements.

PUBLIC NOTICE

Notice of this appeal hearing was mailed on January 20, 2022, to all property owners and occupants within 500 feet of the project site and to anyone who requested such notice in writing, in compliance with Government Code Sections 65090, 65091 and 65092, as applicable. Additionally, as a courtesy, the notice was posted at City Hall and on the Development Services Department's Internet site under "Public Notices".

ENVIRONMENTAL CONSIDERATIONS:

The project is exempt from environmental review under Government Code Section 65583.2(i) as a "by right" local government review would not constitute a "project" for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code. If the project is denied, it will also be exempt from environmental review pursuant to California Environmental Quality Act (CEQA) Guidelines Section 15270, which exempts from CEQA projects that are rejected or disapproved by a public agency.

CONCLUSION:

Staff recommends that the City Council deny the appeal and uphold the Planning Commission's decision to deny the Planning Commission Interpretation. Draft Resolutions are attached hereto as **Attachment CC-1**.

ATTACHMENTS:

Attachment CC-1	Draft City Council Resolutions No. 2021-01
Attachment CC-2	Appeal and Supplemental Information filed by Jack In the Box Properties, LLC.
Attachment CC-3	Planning Commission Resolution No. PC 2021-45
Attachment CC-4	November 11, 2021 Planning Commission Agenda Report
Attachment CC-5	November 18, 2021 Planning Commission Agenda Report
Attachment CC-6	Public Comments Received by Agenda Posting
Attachment CC-7	Applicant Information Submitted February 2, 2022

RESOLUTION NO. 2022-01

A RESOLUTION OF THE CITY OF ENCINITAS CITY COUNCIL DENYING THE APPEAL FILED BY JACK IN THE BOX PROPERTIES, INC, AND UPHOLDING THE DECISION OF THE PLANNING COMMISSION INTERPRETATION DETERMINING THAT THE PROPOSED CHANGE OF USE IS AN INTENSIFICATION OF A NONCONFORMITY USE AND IS INCONSISTENT WITH THE CARDIFF-BY-THE-SEA SPECIFIC PLAN AND MUNICIPAL CODE NONCONFORMITY REGULATIONS, FOR THE PROPERTY LOCATED AT 1967 SAN ELIJO AVENUE.

(CASE NO. INTRP-004738-2021; APN: 260-351-23)

WHEREAS, Jack In the Box Properties, LLC. submitted an application for a Planning Commission Interpretation to determine that the proposed change of use with improvements is an intensification of a nonconforming use and consistent with the Cardiff-by-the-Sea Specific Plan and Municipal Code nonconformity regulations, for the property located at 1967 San Elijo Avenue, legally described as follows;

Lots "A" and "B" in Block Seventy-One of Cardiff Villa Tract, in the County of San Diego, State of California, according to Map thereof No. 1469, filed in the Office of the County Recorder of San Diego County, August 10, 1912.

Also, that portion of the westerly half of Birmingham Drive, formally Rossini Drive West adjoining said lots on the east as closed to the public use on January 16, 1928 by order of the Board of Supervisors of San Diego County.

WHEREAS, the Planning Commission conducted duly and properly noticed public hearings on November 4, 2021 and November 18, 2021;

WHEREAS, on November 4, 2021, the Planning Commission of the City of Encinitas considered the staff report with attachments and memorandum, the City's Municipal Code Section 30.760.050-30.760.090 (related to improvements of non-conforming uses), the General Plan, Cardiff-by-the-Sea Specific Plan, Calbay and Jack In the Box legal representative letters, and all other oral and written testimony received during and before the hearing, and determined that the proposed change of use from queuing within the nonconforming drive through and trip generation data from the Institute of Transportation Engineer's (ITE) Manual a.m. trips will result in an intensification of a nonconformity use of the Cardiff-by-the-Sea Specific Plan and Municipal Code of the real property described as 1967 San Elijo Avenue (APN: 260-351-23) and inconsistent with the goals and policies of the General Plan;

WHEREAS, the Planning Commission denied Case No. INTRP-004738-2021 on November 18, 2021;

WHEREAS, Jack In the Box Properties, LLC. appeal was received by the City of Encinitas on December 2, 2021;

WHEREAS, the City Council conducted a duly and properly noticed public hearing on February 9, 2022 to consider the appeal;

WHEREAS, the City Council has duly considered all evidence submitted into the record, including but not limited to public testimony and the evaluation, maps and exhibits, and recommendations by staff, presented at said hearings;

WHEREAS, the proposed improvements more specifically involve: (1) Replacement of the Monument Sign to rebrand the Jack in the Box to the Starbucks brand, (2) the replacement of the two existing menu boards with a single board, (3) the relocating of an ADA parking space by restriping, (4) changing the curb cut to an “enter only” entrance, (5) designating four parking spots near the entrance for “employee only” parking, and (6) the installation of an informational sign directing customers to the walk-up window if the queuing of cars becomes too great allows for a greater intensity of use when compared to the existing non-conforming use;

WHEREAS, drive throughs uses are not an allowed use within the Cardiff-by-the-Sea Specific Plan; and

WHEREAS, the City of Encinitas Municipal Code Section 30.76.050-30.76.090 prohibits nonconforming uses from being expanded, enlarged or in any other manner increase its inconsistency with municipal code regulations or Cardiff-by-the- Sea Specific Plan.

NOW, THEREFORE, BE IT RESOLVED that the Encinitas City Council hereby DENIES the appeal filed by Jack In the Box Properties, LLC. and DENIES the project, and upholds the Planning Commission’s decision to DENY Case No. INTRP-004738-2021; based on the following Environmental Determination and Findings:

Section 1:

1. Converting the 1968 constructed Jack In the Box to a Starbucks Coffee Shop with a drive through will intensify the existing legal use nonconformity. The change of operation from a fast food with drive through use to a coffee shop with a drive through that generates significant queuing and/or trip generation is considered an intensification of use and increases the inconsistency with the nonconformity regulations.
2. Structural nonconformities would be further considered through a separate review action from the City for conformance with those specific nonconformity regulations.
3. No mechanism (i.e. Use Permit) is available for a prohibited drive through use in the Cardiff-by-the-Sea Specific Plan to address impacts from the increase of the intensity of use with the nonconforming use.
4. The increase of queuing from the nonconforming drive through along with data from the Institute of Transportation Engineer’s (ITE) Manual a.m. trip generation counts 7:00 a.m. to 9:00 a.m. shows a substantial increase in the number of trips from a fast-food restaurant with drive through use versus a coffee shop with drive through use impacting the intersection of San Elijo Avenue and Birmingham Drive, and thereby intensifying the use nonconformity onsite.

The project is exempt from environmental review under the California Environmental Quality Act (CEQA) as provided in Government Code Section 65583.2(i). The project has also been determined to be exempt from environmental review pursuant to CEQA Guidelines Section 15270, which exempts projects that are rejected or disapproved by a public agency.

Section 4. Recitals.

The recitals above are each incorporated by reference and adopted as findings by the City Council.

PASSED AND ADOPTED this 9th day of February 2022 by the following vote, by the City Council of the City of Encinitas, State of California.

Catherine S. Blakespear, Mayor

ATTEST:

Kathy Hollywood, City Clerk

APPROVED AS TO FORM:

Leslie E. Devaney, City Attorney

CERTIFICATION: I, Kathy Hollywood, City Clerk of the City of Encinitas, California, do hereby certify under penalty of perjury that the foregoing Resolution was duly adopted at a regular meeting of the City Council on the 9th day of February, 2022 by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Kathy Hollywood, City Clerk

NOTE: This action is subject to Chapter 1.04 of the Municipal Code, which specifies time limits for legal challenges.