



City of Culver City

Mike Balkman Council
Chambers
9770 Culver Blvd.
Culver City, CA 90232

Staff Report

File #: 24-195, **Version:** 1

Item #: A-2.

CC - ACTION ITEM: (1) Discussion of a Potential Urgency Ordinance on Transfers of All Legal Non-Conforming Uses (or on Transfer of Legal Nonconforming Firearms Uses); (2) (If Desired) Creation of an Ad Hoc City Council Subcommittee and Appointment of Two Council Members thereto; and (3) Direction to City Manager as Deemed Appropriate.

Meeting Date: August 28, 2023

Contact Person/Dept.: Jesse Mays, Assistant City Manager
Heather Baker, City Attorney
Lisa Vidra, Assistant City Attorney

Phone Number: City Manager's Office - (310) 253-6000

Fiscal Impact: Yes ☐ No ☒ **General Fund:** Yes ☐ No ☒

Attachments: Yes ☐ No ☒

Public Notification: (E-Mail) Meetings and Agendas - City Council (08/23/2023)

Department Approval: John Nachbar, City Manager (08/22/2023)

RECOMMENDATION

Staff recommends the City Council (1) discuss a potential urgency ordinance prohibiting transfers of legal non-conforming uses (or transfers of legal nonconforming firearms uses); and (2) (if desired) creation of an Ad Hoc City Council Subcommittee and appointment of two Council Members thereto; and (3) provide direction to the City Manager as desired.

BACKGROUND

At its meeting on August 14, 2023, members of the public submitted public comment (written and oral), stating that one of the firearms dealers in the City with a legal nonconforming location announced the retirement of the owners and requesting the City Council agendize a discussion of an emergency moratorium. The City Council obtained consensus to agendize a discussion of an emergency moratorium on the transfer of nonconforming uses.

Legal Nonconforming Uses

Under longstanding California case law, a legal nonconforming use is a lawful use existing on the effective date of a local zoning restriction and continuing since that time in nonconformance with the zoning code. Consistent with state law, the Culver City Municipal Code (CCMC) Section 17.610.010.E.1 establishes that “any use existing at the time of adoption of this Title, in a zoning district that allows the use subject to the granting of an Administrative Use Permit or Conditional Use Permit, shall be deemed a legal nonconforming use, and may only continue to the same extent that it previously existed”.

Further, CCMC Section 17.610.010, entitled “Nonconforming Uses” establishes that “any nonconforming use...may be maintained and continued, provided that there is no increase or enlargement of the area, space, or volume occupied by or devoted to the nonconforming use. Alterations that do not increase or enlarge a nonconforming use may be approved.” (CCMC 17.610.010.A). Assuming a nonconforming use meets the criteria of Subsection A, its status may continue unless: (1) the nonconforming use has been abandoned or discontinued for a period of one year (CCMC 17.610.010.B); or (2) the nonconforming use is changed to, or replaced by, a conforming use, (CCMC 17.610.010.C).

Moratorium

A moratorium is a temporary suspension of an activity or law for a temporary period. California law governs the City’s ability to adopt temporary moratorium ordinances. The California Government Code provides for the procedures and requirements for the adoption of an urgency ordinance.

Most moratoria are adopted under a complex process set forth in Government Code Section 65858 pertaining to zoning code urgency ordinances, which allows a city to impose stringent temporary land use controls based on documented health, safety and welfare concerns. These moratorium ordinances are adopted by the City in the form of an urgency ordinance that may go into effect immediately, upon a 4/5 vote of the City Council.

Urgency Ordinance

Actions to prohibit the transfer of legal nonconforming uses (or transfers of legal nonconforming firearms uses) would not fall under a land use moratorium. Rather, the more applicable procedural process would fall under Government Code Section 36937, which allows for the adoption of an urgency ordinance, upon a 4/5 vote, provided findings can be made that the ordinance is required for the immediate preservation of the public peace, health or safety; and, the ordinance contains a declaration of facts constituting the urgency. Such an ordinance would go into effect immediately. It should be noted, California courts have held that “inquiries, requests and meetings” do not constitute a current and immediate threat warranting an urgency ordinance that would institute a moratorium.

Firearms Dealers

Under CCMC, Section 17.400.050, there is a distancing requirement for firearms sales; that section provides that “[A] minimum linear distance of 1,000 feet shall be required to separate all establishments that offer firearms for sale from all other establishments that offer firearms for sale, and from parks, playgrounds, and primary and/or secondary schools.” Additionally, CCMC Section

17.220.015 provides that a Conditional Use Permit (CUP) issued by the Planning Commission is required for firearms dealers to operate in the City. These provisions as to firearms sales were part of the comprehensive Zoning Code adopted by the City in 2005.

A firearms dealer that was established prior to the requirement of an approved CUP, or prior to the distancing requirements from the sensitives uses described in Section 17.400.050, is considered a legal nonconforming use. As discussed in City Council meetings on August 22, 2022 and November 14, 2022, there are two firearms dealers in Culver City: Martin B. Retting, and Big 5. Each of these establishments pre-date the 2005 Zoning Code changes and are legal nonconforming as to the requirement for a CUP. Additionally, the Martin B. Retting location is legal nonconforming as to the distancing requirements in CCMC Section 17.400.050. Both of these establishments met the requirements for, and in July 2023 were issued, a Culver City regulatory permit for firearms dealers as required by CCMC Chapter 11.19.

DISCUSSION

To adopt an interim urgency ordinance prohibiting the transfer of legal nonconforming uses, the City must adopt legislative findings that the transfer of legal nonconforming uses would result in a current and immediate threat to the public health, safety, or welfare. However, legal nonconforming use law pertains to the use on the property, and not to the ownership or operator of the use. Absent an immediate threat to the public health, safety, or welfare, there is no legal precedent to prevent the lawful sale, lease or other transfer of a business or property with a legal nonconforming use on site. Even with such a threat, it is questionable whether a city can prevent the transfer of a property or business through an urgency ordinance. Typically, when a currently operating business presents an imminent health and safety risk, other tools are used to abate such a threat, such as an emergency abatement or a temporary restraining order and preliminary injunction.

Additionally, a blanket prohibition of all transfers would pertain to all legal nonconforming uses and would have unintended consequences to numerous businesses and properties in the City.

Should the City Council wish to adopt an interim urgency ordinance, the City Council should discuss and give direction to staff on what legislative findings it desires to make, related to the current and immediate threat to the public health, safety, or welfare and the facts to support such urgency. Staff has included an option for the City Council to create an ad hoc subcommittee for this purpose, if desired.

Legal Issues

The City would likely face legal challenges to the adoption of an urgency ordinance and/or any of the above actions as it pertains to issuing permits or licenses. There are many types of businesses in Culver City that are legal nonconforming uses. Placing a moratorium on transfer of all legal nonconforming uses could have negative consequences on these businesses, such as decreasing their value or preventing their sale. The City would most likely face legal challenges to this action.

Placing a moratorium on the transfer of legal nonconforming status for only one type of business such as firearms dealers would also likely result in legal challenge, under land use and constitutional laws, including the Second and Fifth Amendments. Particularly, with regard to the Second

Amendment, the U.S. Supreme Court has established that it protects the right of law-abiding citizens to possess handguns for self-defense. Courts have held the right conferred by the Second Amendment is a fundamental right, and is on the same footing as the First Amendment right to free speech or the Fourth Amendment right to be free of unreasonable governmental searches and seizures. A regulation that has the effect of prohibiting the retail sale of firearms within a city will be reviewed by courts with the same skepticism and criticism as a regulation that prohibits citizens from protesting in a public park.

As recently as 2022, the Ninth Circuit affirmed that “the right to keep and bear arms includes the right to purchase them.” Consistent with a 2022 US Supreme Court case out of New York, courts have continued to limit local attempts to prohibit the sale of firearms in a jurisdiction.

Members of the public raised the issue of the 2022 moratorium on firearms dealer permits adopted by the City of Burbank as legal support for a moratorium in Culver City. In that urgency ordinance, Burbank cited the fact that there are 14 firearms retailers located in Burbank, with a number of them clustered together in the same area. The Burbank findings in the moratorium state that they have the most firearms retailers per capita in the surrounding area, at a rate of one firearm retail store per every 7,386 residents. Culver City does not have similar facts to support such an action. There are only two firearms dealers in Culver City, and one of them (Big 5) only sells “sporting guns” (primarily hunting rifles and shotguns, not handguns). Further, there are no other similar firearms retailers in close proximity to Culver City. Challenges to an urgency ordinance turn on the specific facts of the individual case; therefore, the actions and/or outcomes in one city are not determinative of the results of a challenge in another case with significantly different facts.

A court would very likely conclude that an action by the City to prevent the sale, lease or transfer of the long-standing firearms business and its legal nonconforming status would violate the Second Amendment right of access to handguns for self-defense.

FISCAL ANALYSIS

There is no fiscal impact from discussion of this item. Depending on City Council direction, there could be associated fiscal impacts with future items, which would be discussed when such items return to City Council.

ATTACHMENTS

None

MOTIONS

That the City Council:

1. Discuss an urgency ordinance on transfers of legal non-conforming uses, including required findings; and

2. (If desired) create an ad hoc City Council subcommittee and appoint two Council Members thereto; and
3. Provide direction to the City Manager as desired.