



ARLINGTON COUNTY, VIRGINIA

County Board Agenda Item Meeting of November 17, 2012

DATE: November 9, 2012

SUBJECT: U-3297-11-1 USE PERMIT REVIEW AND AMENDMENT to renew live entertainment use permit and to amend the use permit to permit amplified live entertainment on all days live entertainment is permitted, for Westover Market, located at 5841-5877 Washington Blvd., (RPC# 10-027-013).

Applicant:
Devin Hicks

By:
William B. Lawson, Jr., Esq.
Lawson, Tarter & Charvet P.C.
6045 Wilson Blvd., Suite 100
Arlington, Virginia. 22205

C.M. RECOMMENDATION:

Renew the use permit for live entertainment, subject to all previously approved conditions with an amended Condition #8 and deleting Condition #14, and with a County Board review in July 2013.

ISSUES: This is a request for a use permit renewal and amendment to the use permit conditions to permit amplified live entertainment three (3) nights per week. One neighbor has expressed concerns regarding the proposed expansion of the outdoor live entertainment.

SUMMARY: This is a request for a use permit renewal and amendment to the use permit conditions to permit amplified live entertainment three (3) nights per week. The applicant also requests a condition permitting the Beer Garden to be open year round. The applicant has been compliant with the conditions of the live entertainment approval, and no formal complaints have been made to the Zoning or Code Enforcement Offices since amplified entertainment was started one (1) night per week in June 2012. Staff has received informal complaints and concerns by one (1) neighborhood resident. However, the applicant has been found upon investigation by

County Manager:

BMD/GA

County Attorney:

[Signature] *[Signature]*

Staff: Peter Schulz, DCPHD, Planning Division

PLA-6303

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staff to be compliant with the Noise Ordinance, and compliant with all conditions of approval. Therefore, staff can support the expansion of amplified live entertainment to two (2) nights per week, Fridays and Saturdays. Staff recommends a mid-year review of the use permit to monitor performance. Staff cannot address the applicant's request to have his by-right outdoor café be open year round. It is a by-right use not subject to a use permit, and is therefore regulated by the Zoning Ordinance. Only a Zoning Ordinance amendment can permit the applicant's outdoor café to be open more than seasonally. Therefore, staff recommends renewal of the use permit for live entertainment, subject to all previous conditions of approval, with amended Condition #8 and deleted Condition #14, and with a County Board review in July 2013.

BACKGROUND: A use permit for unamplified outdoor live entertainment three (3) nights per week from April through October at the Westover Beer Garden in the Westover Shopping Center was originally approved by the County Board on [May 17, 2011](#), subject to numerous conditions. The applicant was not able to have live entertainment in the 2011 season. A review of the use permit was scheduled for the February 2012 County Board meeting. On [February 11, 2012](#), the County Board renewed the use permit for unamplified live music, revised several conditions for noise monitoring, and approved an amendment to the use permit to permit the applicant to have amplified live entertainment no sooner than June 2012, one (1) night per week (Saturday), subject to a favorable administrative review by County staff in June 2012 and the County Manager's approval. An administrative review in June 2012 found that the applicant was compliant with all conditions of approval, and random unannounced noise tests by County staff found no violation of the [Noise Ordinance](#). There have been no formal complaints to the Code Enforcement or Zoning Enforcement offices since amplified music has been permitted one (1) night per week. Staff has received informal complaints and concerns by one neighborhood resident. However, the applicant has been found upon investigation by staff to be compliant with the Noise Ordinance, and compliant with all conditions of approval.

The following provides additional information about the site and location:

Site: The "Beer Garden" or outdoor café is located in a paved area between the Westover Post Office branch and the Westover Market in the Westover Shopping Center. To the north is the shopping center parking lot (zoned partly "C-1" and partly "R-6") and the rear yards of single-family homes that are zoned "R-6". To the west is the Westover Library and Reed School Complex, zoned "S-3A". To the south, across Washington Boulevard, are one-story retail uses zoned "C-1" and garden apartments zoned "RA14-26". To the east are garden apartments zoned "RA14-26"



Zoning: The site is split-zoned “C-1” Local Commercial Districts and “R-6” One-Family Dwelling Districts.

Land Use: The site is designated on the General Land Use Plan (GLUP) as “Service Commercial.” The back part of the shopping center’s parking lot is designated “Low Residential (1-10 du/acre).”

Neighborhood: The site is located within the Westover Village Civic Association. The Civic Association was informed by staff of the amendment request. The president of the Civic Association expressed no concerns about the use. Staff has been in contact with an immediate neighbor who has expressed opposition to any expansion of the live entertainment use.

DISCUSSION: The applicant is requesting two amendments to the use permit: 1) An amendment to permit amplified live entertainment on all of the nights the applicant is currently permitted live entertainment (Wednesday, Friday and Saturday), and 2) permission for the outdoor beer garden to be open more than seasonally. The applicant is only requesting year-round use of the beer garden, not year-round live entertainment. Live entertainment is currently only permitted April 1 to October 31 and will remain so.

The applicant is currently permitted live entertainment on three (3) nights per week, April 1 through October 31: Wednesdays from 6-8 p.m.; Fridays 6-10 p.m.; and Saturdays 5-9 p.m. Only Saturday nights are permitted to have amplified entertainment. On the other two (2) nights the entertainment must not be amplified.

The applicant has been compliant with the conditions of the live entertainment use permit. The required monthly sound tests by the applicant's third party acoustical expert have shown no violations of the County Noise Ordinance. Furthermore, County staff made an unannounced visit on October 20, 2012 during a time when the applicant was offering amplified entertainment and found no violation of the Noise Ordinance by music at the site. Staff, therefore, believes it can support the applicant's ability to have two (2) nights of amplified music per week, more specifically on Fridays and Saturdays. Staff believes that because the live entertainment is occurring outdoors, in close proximity to single-family homes, and in a generally quiet, low-density, low-traffic neighborhood that any amplified entertainment should be confined to weekends.

The applicant has also requested permission to operate the Beer Garden year round, and to not have to close seasonally. The Beer Garden is located on private property, and is permitted by-right by the Zoning Ordinance, and is not subject to a use permit. Therefore, the applicant is subject to the regulations of the Zoning Ordinance. The seasonal nature of outdoor cafes cannot be addressed by this use permit, which is a use permit for live entertainment.

CONCLUSION: The applicant has been compliant with the conditions of the live entertainment approval, and while neighbors still have concerns, no formal complaints have been made to the Zoning or Code Enforcement Offices since amplified entertainment was started one (1) night per week in June 2012. The applicant has also been found by staff to be compliant with the Noise Ordinance. Therefore, staff can support the expansion of amplified live entertainment to two (2) nights per week, Fridays and Saturdays. Staff recommends a mid-year review of the use permit to monitor performance. Therefore, staff recommends renewal of the use permit for live entertainment, subject to all previous conditions of approval, with amended Condition #8 and deleted Condition #14, with a County Board review in July 2013.

Revised and Deleted Conditions:

8. The applicant agrees that live entertainment is permitted only from April 1 to October 31 three days a week: on Wednesdays from 6 p.m. to 8 p.m.; and Fridays from 6 p.m. to 10 p.m., Saturdays from 5 p.m. to 9 p.m., and at no other times. Live entertainment shall not be amplified and shall not consist of electric or electronic instruments except on Fridays and Saturdays, except as permitted in Condition #14. The applicant agrees that Westover Market shall provide the amplification equipment, including speakers, mixing board and any equipment that controls volume. Volume shall always be controlled by a Westover Market employee. Performers shall not be permitted to control the volume.

~~14. The use permit shall be subject to an administrative review in June 2012.~~

~~Upon completion of the administrative review, and provided the County Manager determines that the applicant has complied with all conditions of the use permit up to the time of the review, the applicant shall be permitted to have live entertainment using amplified musical instruments and related equipment including, but not limited to,~~

~~speakers, a mixing board, and sound control equipment, on Saturday evenings only until the end of the 2012 season on October 31, 2012, and no further unless this use permit is further amended by the County Board, at the County Board's discretion, when the use permit is reviewed in November 2012. In accordance with the sound management plan, the applicant agrees to install a compression limiter or similar device that will automatically limit the decibels received at the nearest residential property line. Such device shall be installed before commencing amplified live entertainment performances. All other conditions of the use permits shall remain in effect. The County shall notify the Westover Village Civic Association and nearest neighbors identified in Condition #3 once a decision is made to allow the applicant to have live entertainment using amplified musical instruments.~~

PREVIOUS COUNTY BOARD ACTIONS:

- June 23, 1956 Approved use permit (U-1222-56-1) for a parking lot as a transitional use, subject to conditions.
- September 14, 1957 Amended use permit (U-1222-56-1) for a parking lot as a transitional use to eliminate the requirement for fencing in a portion of the rear yard, at the discretion of the Zoning Administrator.
- June 7, 1958 Adopted a master plan for the Westover Shopping Area.
- June 13, 1992 Approved a use permit (U-2741-92-1) for construction and operation of a United States Post Office and associated parking, subject to conditions and a review one year after issuance of the certificate of occupancy.
- June 5, 1993 Renewed a use permit (U-2741-92-1) for construction and operation of a United States Post Office and associated parking, subject to all previous conditions and a review one year after issuance of the certificate of occupancy.
- May 17, 2011 Approved a use permit (U-3297-11-1) for live entertainment in an existing restaurant outdoors, subject to conditions and a County Board review in February 2012.
- February 11, 2012 Approved a use permit amendment (U-3297-11-1) to amend conditions #6, 8, and 14 to permit continued live entertainment and amplified entertainment after an administrative review, with an administrative review in June 2012 and a County Board review in November 2012.

Approved Conditions:

1. This live entertainment use permit shall apply solely to the restaurant located at 5863 Washington Boulevard and shall not apply to any other restaurant in the Westover Shopping Center. The applicant agrees that live entertainment shall be permitted only within the confines of the area for which a Certificate of Occupancy has been issued for an Outdoor Café at the Westover Market.
2. The applicant agrees that no live entertainment shall be permitted until a permanent certificate of occupancy for an indoor restaurant in the building that now houses the Westover Market has been obtained by the applicant, and all construction work under building permit #B1002423 has passed final inspection.
3. The applicant agrees to designate a neighborhood liaison who will be present at the Westover Market during business hours to communicate with nearby residents and neighbors to address concerns which may be related to the live entertainment, and to have an on-site liaison who shall be available during the hours of live entertainment to receive and respond to community concerns regarding the live entertainment. The applicant agrees that the designated on-site liaison shall be present on site at all times during the hours of live entertainment.

The applicant further agrees that the name and telephone number of such liaison(s) shall be submitted to the Zoning Administrator, the Westover Village, Tara-Leeway Heights and Highland Park-Overlee Knolls Civic Association Presidents and the residents of all houses on the 1600 block of North Longfellow Street and the 5800 block of 18th Street North before issuance of the Certificate of Occupancy for the indoor restaurant within the market. The applicant shall submit to the Zoning Administrator proof that contact information has been shared with the above-mentioned residents and the civic associations before issuance of the certificate of occupancy for the indoor restaurant within the market. In the event the designated liaisons change, such information shall be immediately forwarded to the Zoning Administrator and the above-named residents and Civic Associations.

4. The applicant agrees that there shall be no dancing by patrons or performers unless and until the applicant has applied for and obtained a Dance Hall Permit.
5. The applicant agrees that the area designated for the live performers shall be generally as shown on the exhibit entitled "Café at Westover" and dated 3/14/2011. The applicant shall ensure that performers shall always be set up so they are performing facing Washington Boulevard.
6. The applicant agrees to retain an acoustical engineer or similar expert acceptable to the County Manager to develop a sound management plan that conforms to this condition, submit to and obtain approval from the County Manager for the plan, and implement and thereafter maintain such plan throughout the life of the use permit. The sound management plan shall ensure that the sound emitted from the live entertainment shall not exceed the limits of the Noise Control Ordinance or the limits specified hereinafter, whichever is less.

The approved sound management plan shall be implemented beginning at or before commencement of live entertainment at the site. The applicant agrees that if a test involving live entertainment is necessary for the acoustical engineer to properly assess the feasibility of the sound management plan, the applicant agrees to request approval of such test from the Zoning Administrator at least 72 hours before commencement of the test. The applicant when making such a request shall submit the name and phone number of the acoustical engineer that will be on site conducting the test, the proposed schedule of said test, and the nature of the music being performed during said test. The applicant further agrees to inform the Westover Village Civic Association and nearest neighbors identified in Condition #3 at least 24 hours before commencing such test, if said test is approved by the Zoning Administrator. The applicant agrees that only one (1) test shall be approved by the Zoning Administrator.

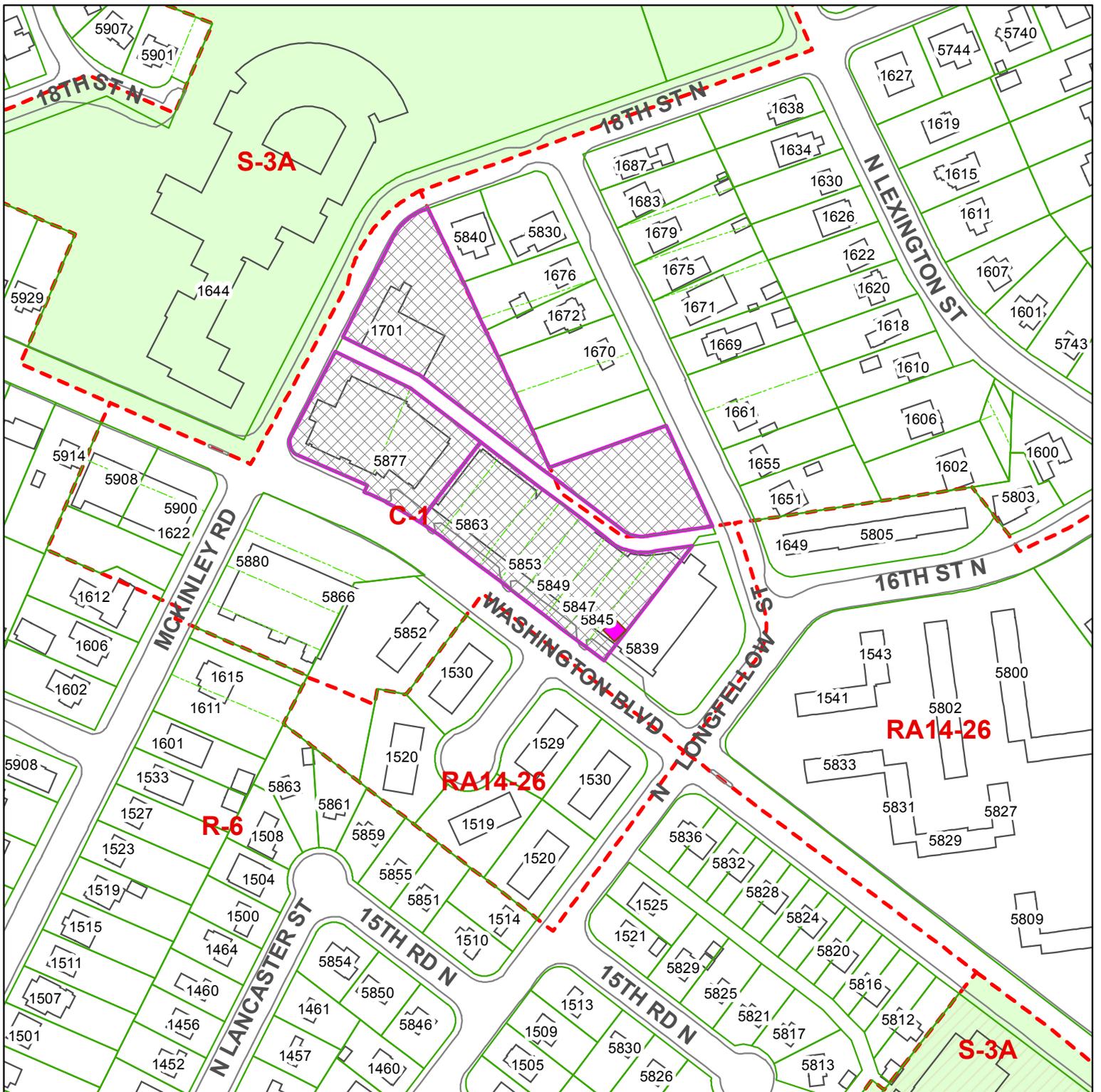
During the live entertainment the decibels measured shall at no time exceed 60 dB before 9 p.m. and 55 dB after 9 p.m., or the limits of the County Noise Ordinance, whichever is less, the sound management plan making an accounting for environmental noise, e.g. vehicular traffic, aircraft, etc.

The applicant agrees that he will cause the acoustical engineer, or a similar expert acceptable to the County Manager, to conduct random unannounced checks of the noise level and the management of the sound at least once per month while the live entertainment is occurring. The tests shall be conducted in accordance with the procedures in the County Noise Control Ordinance from, at a minimum, two (2) locations including from the nearest residential property line. The acoustical engineer or expert shall also submit a monthly written report of the results of such tests to the applicant, the Arlington County Zoning Administrator, the neighbors identified in Condition #3, and the President of the Westover Village Civic Association. Results that show any noise levels above those referenced in this condition shall, without limitation as to the bases for revocation, be grounds for revocation of the use permit for live entertainment.

7. The applicant shall comply with the Arlington County Noise Ordinance as well as all other County and State Ordinances and the regulatory requirements of the Environmental Health Bureau, the Fire Marshal, the Police Department and the Virginia Department of Alcohol Beverage Control. The applicant agrees that the live entertainment and/or amplification shall not cause vibrations on adjacent properties.
8. The applicant agrees that live entertainment is permitted only from April 1 to October 31 three days a week: on Wednesdays from 6 p.m. to 8 p.m.; and Fridays from 6 p.m. to 10 p.m., Saturdays from 5 p.m. to 9 p.m., and at no other times. Live entertainment shall not be amplified and shall not consist of electric or electronic instruments, except as permitted in Condition #14. The applicant agrees that Westover Market shall provide the amplification equipment, including speakers, mixing board and any equipment that controls volume. Volume shall always be controlled by a Westover Market employee. Performers shall not be permitted to control the volume.

9. During the season that the outdoor café /Beer Garden is closed, the tables, chairs and outdoor bar shall be completely removed. The outdoor café shall not be open when the restaurant is not open for business.
10. The applicant agrees that maximum capacity of the outdoor café/Beer Garden shall be 29 seats when live entertainment is not occurring. No more than 29 seats and 69 persons standing shall be permitted during live entertainment. The applicant agrees that the total capacity during live entertainment events shall not exceed 98, consistent with the certificate of occupancy.
11. The applicant agrees to cooperate with the Arlington County Police Department when responding to complaints related to the outdoor café and live entertainment, and to ensure that all restaurant staff serving alcohol shall complete the State Training Intervention Procedures (TIPS) program.
12. The applicant agrees to notify the County Manager at any time when a change of ownership is contemplated; upon a change of ownership of the Westover Market, the use permit shall be scheduled for a County Board review.
13. The applicant agrees that radio, recorded, or “piped-in” music shall not be played in the outdoor café/Beer Garden on evenings (6 p.m. to closing time) that live music is not played.
14. The use permit shall be subject to an administrative review in June 2012.

Upon completion of the administrative review, and provided the County Manager determines that the applicant has complied with all conditions of the use permit up to the time of the review, the applicant shall be permitted to have live entertainment using amplified musical instruments and related equipment including, but not limited to, speakers, a mixing board, and sound control equipment, on Saturday evenings only until the end of the 2012 season on October 31, 2012, and no further unless this use permit is further amended by the County Board, at the County Board’s discretion, when the use permit is reviewed in November 2012. In accordance with the sound management plan, the applicant agrees to install a compression limiter or similar device that will automatically limit the decibels received at the nearest residential property line. Such device shall be installed before commencing amplified live entertainment performances. All other conditions of the use permits shall remain in effect. The County shall notify the Westover Village Civic Association and nearest neighbors identified in Condition #3 once a decision is made to allow the applicant to have live entertainment using amplified musical instruments.



U-3297-11-1

5841, 5853, and 5877 N. Washington Boulevard

RPC: 10-027-012 & -013



 Case Location(s)
 Scale: 1:2,000

Note: These maps are for property location assistance only. They may not represent the latest survey and other information.