



COUNCIL AGENDA: February 6, 2007

ITEM: H.2 11.3

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: January 18, 2007

Approved:

Date:

1/25/07

COUNCIL DISTRICT: 5

SNI: None

SUBJECT: ABC06-002. APPEAL OF THE PLANNING COMMISSION'S DECISION TO DENY A DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO ALLOW OFF-SALE OF ALCOHOLIC BEVERAGES AT A SUPERMARKET LOCATED ON THE NORTH SIDE OF MCKEE ROAD APPROXIMATELY 320 FEET WESTERLY OF WHITE ROAD ON A 5.0 GROSS ACRE SITE IN THE CP COMMERCIAL PEDESTRIAN ZONING DISTRICT

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends that the City Council override the Planning Commission's decision to deny a Determination of Public Convenience or Necessity (File No. ABC06-002) to allow the off-sale of alcoholic beverages at a supermarket.

OUTCOME

If the City Council adopts a resolution approving the subject Determination of Public Convenience or Necessity, the applicant will be able to sell beer and wine for off-site consumption in conjunction with the operation of a full-service supermarket.

BACKGROUND

Eel McKee, LLC is requesting a Determination of Public Convenience or Necessity to allow the retail store "Seafood City" to sell beer and wine only for off-site consumption in an existing retail space located in a shopping center.

The site is located within a Police Beat area where the crime rate is over the 20% crime index compared to the rest of the city. It is also located within a census tract with a higher ratio of existing liquor licenses to population than is found in the County as a whole. The State Department of Alcohol Beverage Control (ABC) will not approve a liquor license for off-sale of alcoholic beverage within this census tract unless the City makes a determination of public convenience or necessity for the use.

This shopping center includes a Rite-Aid, Seafood City, Happi House Teriyaki, and 10 small shops. An Arco Service Station is located at the corner of the shopping center but it is not considered a part of the shopping center.

The alcohol sales section of the grocery store is proposed to be on two shelves bordering the rear wall of the building (see attached plan). The shelves represent less than 10% of the store's floor plan. The layout of the store will also allow the store employees to monitor alcohol sales because the customer entrances to the supermarket are on the front of the building.

The proposed project received no objections from neighboring businesses or residents.

Planning Commission Hearing

At the hearing, staff clarified that the site does not have an "over concentration" of liquor licenses, but is in an area of higher than average crime and located within a census tract with a higher ratio of existing liquor licenses. Staff clarified further that solely because the crime rate in the surrounding Police Beat area is 20% over the crime index of the rest of the City, a Determination of Public Convenience or Necessity is required.

The applicant made a brief statement that the sale of alcohol in conjunction with the full-service supermarket is for the benefit of his customers. He stated that alcohol sales will only be an incidental element of the overall merchandise mix and will be located at the rear of the store. The applicant requested that the Planning Commission override the staff recommendation to deny the application. Commissioner Zito explained that City ordinances require the Planning Commission to automatically deny the Determination of Public Convenience or Necessity in this circumstance, but commented the Commission could add comments about the project to the record which could later be considered by the City Council on appeal.

Commissioner Kalra asked which type of alcohol would be sold. The applicant responded that only beer and wine would be sold, and that no hard liquor would be a part of the inventory.

Commissioner Dhillon asked why the applicant is now requesting a Determination of Public Convenience or Necessity when a Conditional Use Permit to sell alcohol on the site was approved in 1991 (File No. CP90-072). The applicant clarified that no previous liquor license has yet been approved for the site, although the CUP approved in 1991 is still valid.

Commissioner Kalra commented that this is an appropriate location for the off-sale of alcohol and recommended that the City Council, on appeal, override the Planning Commission's decision to allow only beer and wine to be sold on site.

Commissioner Kamkar asked how other existing off-sale facilities could sell alcohol near residential uses. Staff commented that those uses might predate the changes to Title 6 of the Municipal Code pertaining to Determination of Public Convenience or Necessity that came into effect recently.

Chair Campos recommended that the City Council approve the request for a Determination of Public Convenience or Necessity and stated that it is unfortunate that rules have changed and the applicant

for alcohol sales at a grocery store now has to appeal the Planning Commission's denial to City Council.

The Planning Commission then denied the proposed project by a vote of 5-0-1; Platten absent. The Planning Commission's resolution is attached.

Appeal

Subsequent to the Planning Commission hearing, on December 14, 2006, Elewin Rebaya, a representative for Seafood City, appealed the Planning Commission's decision to deny the request for the Determination of Public Convenience and Necessity.

ANALYSIS

The Permit Appeal submitted by the appellant (see attached) states that Seafood City Supermarket is a full service grocery store that needs to be able to sell beer and wine to complete the merchandise mix within the store. The applicant stated his belief that there will not be a direct impact on the adjacent residential properties within the area if alcoholic beverages become part of the supermarket's vast variety of merchandise. The applicant believes Seafood City supermarket employees can easily monitor alcohol sales because the front entrance to the supermarket is the only entry and exit for all customers.

Findings of Public Convenience or Necessity

The attached Police Department memorandum indicates that the project site is located within an area of high crime, but the census tract does not have an over-concentration of existing liquor licenses. The City must grant a "Determination of Public Convenience or Necessity" before ABC can issue a license for the off-sale of alcohol. Title 6 of the San Jose Municipal Code requires four findings to be made before the issuance of a Determination of Public Convenience or Necessity. Staff was able to make the findings that:

1. The proposed use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the City for targeted neighborhood enhancement services or programs.
2. The proposed use would not lead to the grouping of more than four off-sale uses within one thousand-foot radius of the proposed use.
3. The proposed use would not represent a majority of the proposed use since the proposed alcohol sales would be on only two shelves and would represent less than 10% of the store's floor plan.

However, staff and the Planning Commission could not make the finding that the proposed use would not be located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility, or within one hundred fifty feet of a residence because the Seafood City supermarket is located within one hundred fifty feet of a residence.

Title 6 allows the City Council to issue a Determination of Public Convenience or Necessity in connection with an application for a license from the California Department of Alcoholic Beverage Control for the off-sale of alcoholic beverages where the City Council identifies and finds that a significant and overriding public benefit or benefits will be served by the proposed use and after first finding at least one of the following, that:

1. The census tract in which the proposed outlet for the off-sale of alcoholic beverages is located is unusually configured and the proposed outlet would act as a convenience to an underserved portion of the community without presenting a significant impact on public health or safety; or
2. The proposed outlet for the off-sale of alcoholic beverages would enhance or facilitate the vitality of an existing commercial area without presenting a significant impact on public health or safety; or
3. The census tract in which the proposed outlet is located has a low population density in relation to other census tracts in the city, and the proposed outlet would not contribute to an over-concentration in the absolute numbers of outlets for the off-sale of alcoholic beverages in the area; or
4. The proposed off-sale of alcoholic beverages is incidental and appurtenant to a larger retail use and provides for a more complete and convenient shopping experience.

As the appellant stated in the Notice of Permit Appeal, the off-sale of alcohol would be incidental and appurtenant to the retail use within the supermarket. The sale of alcohol would be minor when compared to the size and the variety of merchandise within the supermarket. If the City Council grants a Determination of Public Convenience or Necessity to the applicant, Seafood City supermarket would be able to provide a more complete range of products to their customers and make local residents' shopping experience more pleasant and convenient.

Conclusion

Although the supermarket is located within one hundred and fifty feet of residential properties and located within an area with higher than normal crime rate, the proposed plan for the off-sale of alcohol will not heavily impact the surrounding neighborhood. The alcoholic beverages will be concealed from view from the front of the store. The applicant has indicated that all store employees will be trained to monitor the sale of alcohol to make sure the store complies with all alcohol related laws. Staff believes that if a Determination of Public Convenience or Necessity is granted, it will benefit the local residents that shop for groceries at Seafood City supermarket. The Planning staff recommends that the City Council uphold the appeal and approve the applicant's request for a Determination of Public Convenience or Necessity and include the facts, findings, and conditions as included in the attached Resolution.

POLICY ALTERNATIVES

Not applicable.

PUBLIC OUTREACH

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Although this item does not meet any of the above criteria, staff followed Council Policy 6-30: Public Outreach Policy. Notices for the public hearings for the project and for this appeal were mailed to the owners and tenants of all properties located within 500 feet of the project site. Additionally, prior to the public hearing, an electronic version of the staff report has been made available online, accessible from the City Council agenda, on the City's website. Staff has been available to discuss the proposal with members of the public.

COORDINATION

Not applicable.

FISCAL/POLICY ALIGNMENT

Not applicable.

COST SUMMARY/IMPLICATIONS

Not applicable.

BUDGET REFERENCE

Not applicable.

ENVIRONMENTAL REVIEW

This project is exempt from environmental review under the provisions of Section 15301 of the California Environmental Quality Act (CEQA) as the use involves negligible or no expansion of use beyond that existing at the time of the lead agency's determination.


Joseph Horwedel, Director
Planning, Building and Code Enforcement

For questions, please contact Susan Walton at (408) 535-7847.

HONORABLE MAYOR AND CITY COUNCIL

January 18, 2007

Subject: ABC06-002 Appeal

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Attachments:

- Draft City Council Resolution
- Appeal Application
- Planning Commission Staff Report & Attachments

cc: Applicant/Appellant

RESOLUTION NO. _____

Resolution of the City Council of the City of San Jose approving a request for a Determination of Public Convenience or Necessity to use certain real property described herein for the purpose of off-sale of alcohol at an existing grocery store located on the north side of McKee Road, approximately 320 feet westerly of White Road

FILE NO. ABC06-002

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSE:

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on June 27, 2005, an application (File No. **ABC06-002**) was filed for a Conditional Use Permit of the off-sale of beer and wine on that certain real property (hereinafter referred to as "subject property"), situate in the CP Commercial Pedestrian, located at 3065 McKee Road, San Jose, and;

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, on December 6, 2006, the Planning Commission denied the application, from which decision Seafood City have appealed to this City Council; and

WHEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San Jose Municipal Code, this City Council conducted a hearing on said application on February 9, 2006, notice of which was duly given; and

WHEREAS, at said hearing, this City Council gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this City Council received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this City Council received in evidence a development plan for the subject property entitled, "Seafood City," dated June of 2006. Said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

CC Agenda: 02-06-07

Item #:

WHEREAS, said hearing was conducted in all respects as required by the San Jose Municipal Code and the rules of this City Council;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSE:

After considering evidence presented at the Public Hearing, the Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. The subject site is located within the CP Commercial Pedestrian Zoning District.
2. This site has a designation of Neighborhood/Community Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram. Commercial uses such as the proposed retail store are consistent with the Neighborhood Community Commercial designation. No physical expansion of the existing structure is proposed.
3. Under the provisions of Section 15301, Existing Facilities, of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) as stated below, this project is found to be exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970.
4. The site has 287 parking spaces in conformance with the parking requirement for the retail center set forth in Title 20.
5. Non-commercial uses adjacent to the site include single-family residential properties to the north behind the shopping center, and to the south, across McKee Road.
6. The project site is developed with an approximately 66,890 square-foot commercial building oriented to the McKee Road including a Thrifty Drugstore, Seafood City, a bank, 3 small shops, and an Arco Service Station.
7. Access to Seafood City is via doors at the front of the building facing the parking lot.
8. The store operates from 8:00 a.m. to 9:00 p.m. daily. Different, likely shortened, hours would be implemented during the holidays, but in no case would the facility operate past 10:00 p.m.
9. The Zoning Ordinance requires a Conditional Use Permit for the off-sale of alcoholic beverages and for a public drinking establishment in the CP Commercial Pedestrian Zoning District. The applicant obtained a Conditional Use Permit for the off-sale of alcoholic beverages in 1991 (File No. CP 90-072). The permit was not time conditioned and is still valid.

10. The Police Department memorandum indicates that the project site is not currently in a Strong Neighborhood Initiative area.
11. Seafood City is located in San Jose Police Beat W4. The reported crime statistics as defined by B&P Section 23958.4(c) are over the 20% crime index thus the location is considered unduly concentrated per B&P Section 23958.4 (a)(1).
12. Department of Alcohol Beverage Control (ABC) records indicate Seafood City is in census track 5038.04. Pursuant to B&P Section 23958.4 (a)(3) ...the ratio of on-sale retail licenses and off-sale retail licenses to population in census track 5038.4 does not exceed the ratio of on-sale retail licenses and off-sale retail licenses to population in the county in which the applicant premises are located.
13. For the Department of Alcohol Beverage Control (ABC) to be able to issue a liquor license for the proposed uses, the City must grant a Determination of Public Convenience or Necessity.
14. The proposed use would not lead to the grouping of more than four off-sale uses with a 1,000-foot radius from the proposed use.
15. The proposed use is not located within five hundred feet of a school but it is located within 150 feet of a residence.

Based on the above facts and conditions, and subject to the conditions specified below, the City Council finds that:

1. The proposed project is in conformance with the San Jose 2020 General Plan.
2. The project conforms to the requirements of the California Environmental Quality Act.
3. The project complies with provisions of Title 6.

Based on the findings in the subsection below, the City Council is able to make a Determination of Public Convenience or Necessity for the subject liquor license:

- a) The proposed use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the city for targeted neighborhood enhancement services or programs, or located within an area in which the chief of police has determined that the proposed use would be detrimental to the public health, safety, or welfare of persons located in the area, or increase the severity of existing law enforcement or public nuisance problems in the area; and
- b) The proposed use would not lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use; and

- c) The proposed use is not located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility but it is within 150 feet of an existing residence.
- d) Alcohol sales would not represent a majority of the proposed use.
- e) The alcohol sale will be appurtenant and incidental to the use of the site; therefore, it is in conformance with the requirements of Title 6 of the SJMC.

CONDITIONS PRECEDENT

This Determination of Public Convenience or Necessity shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Payment of Recording Fees.** Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara should be submitted to the Director of Planning within 30 days of approval of this permit. This Determination of Public Convenience or Necessity shall be effective at such time when recordation with the County of Santa Clara occurs.
2. **Acceptance of Permit.** Per Section 20.100.290(B), should the applicant fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the applicant shall be deemed to constitute all of the following on behalf of the applicant:
 - a. Acceptance of the Permit by the applicant; and
 - b. Agreement by the applicant to be bound by, to comply with, and to do all things required of or by the applicant pursuant to all of the terms, provisions, and conditions of this permit or other approval and the provisions of Title 20 applicable to such Permit.
3. **Permit Expiration.** This Determination of Public Convenience or Necessity shall automatically expire two years from and after the date of approval by the City Council on appeal, granting this Determination of Public Convenience or Necessity, if within such two-year period, the use of the site has not been implemented, pursuant to and in accordance with the provisions of this Determination of Public Convenience or Necessity, the Director of Planning may approve a Permit Adjustment/Amendment to extend the validity of this Permit in accordance with Title 20. The Permit Adjustment/Amendment must be approved prior to the expiration of this Permit.

CONCURRENT CONDITIONS

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Nuisance.** This use shall be operated in a manner, which does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
2. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
3. **Outside Storage.** No outside storage is permitted.
4. **Refuse.** All trash areas shall be effectively screened from view and covered and maintained in an orderly state to prevent water from entering into the garbage container. No outdoor storage is allowed/permitted. Trash areas shall be maintained in a manner to discourage illegal dumping.

CONDITIONS SUBSEQUENT

1. **Revocation, Suspension, Modification.** This Determination of Public Convenience or Necessity may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:
 - a. A violation of any conditions of the Determination of Public Convenience or Necessity was not abated, corrected or rectified within the time specified on the notice of violation; or
 - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
 - c. The use as presently conducted creates a nuisance.

Based on the above findings, the City Council **grants** the request for the Determination of Public Convenience or Necessity.

PASSED FOR PUBLICATION of title this _____ day of _____ 2007, by
the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk

NOTICE TO PARTIES

The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6.

NOTICE OF PERMIT APPEAL

TO BE COMPLETED BY PLANNING STAFF

FILE NUMBER ABC06-002	RECEIPT # _____
PROJECT LOCATION N side of McKee rd, approx. 320' W. of White rd.	AMOUNT \$2960.00
	DATE 12/14/06
	BY R. ORNDUNA

TO BE COMPLETED BY PERSON FILING APPEAL

PLEASE REFER TO PERMIT APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.

THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE PROPERTY WHICH IS LOCATED AT:

3065 MCKEE ROAD, SAN JOSE, CA 95127

REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.):

PLEASE SEE ATTACHED.

PERSON FILING APPEAL

NAME ELEWIN REBAYA	DAYTIME TELEPHONE (909) 573-2478
ADDRESS 2883 SURVEYOR ST.	CITY POMONA
	STATE CA
	ZIP CODE 91765
SIGNATURE <i>[Signature]</i>	DATE 12.12.06
RELATIONSHIP TO SUBJECT SITE: (e.g., adjacent property owner, property owner within one thousand (1,000) feet) CONTROLLER	

**CONTACT PERSON
 (IF DIFFERENT FROM PERSON FILING APPEAL)**

NAME			
ADDRESS	CITY	STATE	ZIP CODE
DAYTIME TELEPHONE ()	FAX NUMBER ()	E-MAIL ADDRESS	

PROPERTY OWNER

NAME EEL MCKEE, LLC	DATE 12.12.06
ADDRESS P.O. BOX 309	CITY PAICINES
	STATE CA
	ZIP CODE 95043

**PLEASE SUBMIT THIS APPLICATION IN PERSON TO THE 2ND FLOOR OF THE
 DEVELOPMENT SERVICES CENTER, CITY HALL.**

REASONS FOR APPEAL

This is to formally appeal the recommendation of the Planning Commission to deny the application for Public Convenience or Necessity of Seafood City Supermarket .

Seafood City Supermarket, being a full service store needs alcohol (beer and wine) to complete it's merchandise mix for it's sophisticated customers who will have a complete food and beverage assortment available to them. We don't believe that making it available will have a direct impact on the adjacent residential properties within the area.

The building where Seafood City is situated has a front entrance which serves as the ONLY entry and exit for all customers. It is located in the front area of the building facing Mckee Rd. This single entrance and exit will make it easier for the staff to monitor all alcohol (beer and wine) sales to the customers.

On both this basis, Seafood City Supermarket humbly requests that the decision be reversed in favor of Seafood City Supermarket.

CITY OF SAN JOSÉ, CALIFORNIA
Department of Planning, Building and Code Enforcement
200 East Santa Clara Street
San José, California 95113

Hearing Date/Agenda Number
PC 12/6/06 Item #: *4a*

File Number
ABC06-002

Application Type:
Determination of Public Convenience or
Necessity

Council District: 5

Planning Area: Alum Rock

Assessor's Parcel Numbers:
592-16-004

STAFF REPORT

PROJECT DESCRIPTION

Completed by: *Hadasa Lev*

Location: North side of McKee Road, approximately 320 feet westerly of White Road

Gross Acreage: 5.0

Net Acreage: N/A

Net Density: N/A

Existing Zoning: CP Commercial Pedestrian

Existing Use: Retail (Small)

Proposed Zoning: No change

Proposed Use: Sale of alcohol for off-site consumption
within an existing retail building

GENERAL PLAN

Land Use/Transportation Diagram Designation
Neighborhood Community Commercial

Project Conformance:
 Yes No
 See Analysis and Recommendations

SURROUNDING LAND USES AND ZONING

North: Single Family Detached Residential

Unincorporated County

East: Commercial/Retail

CP Commercial Pedestrian

South: Single Family Detached Residential

R-1-8 Residence District

West: Commercial/Retail

CP Commercial Pedestrian

ENVIRONMENTAL STATUS

Environmental Impact Report
 Negative Declaration circulated on
 Negative Declaration adopted on

Exempt
 Environmental Review Incomplete

FILE HISTORY

Annexation Title: McKee No. 18

Date: November 8, 1961

PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

Approval
 Approval with Conditions
 Denial
 Uphold Director's Decision

Date:
November 28, 2006

Approved by: *Susan Walton*
 Action
 Recommendation

APPLICANT/OWNER

Eel McKee, LLC.
P.O. Box 309
Paicines, CA 95043

CONTACT PERSON/ DEVELOPER

Reynaldo Lacson
2883 Surveyor Street.
Pomona, CA 91768
Elewih Rebaya
Seafood City Supermarket
2883 Surveyor Street
Pomona, CA 91768

Completed by: HLev

Department of Public Works: None received.

Other Departments and Agencies See attached memorandum from the Police Department

GENERAL CORRESPONDENCE

None received

ANALYSIS AND RECOMMENDATIONS

BACKGROUND

The applicant, Eel McKee, LLC., is requesting a Determination of Public Convenience or Necessity to allow the retail store "Seafood City" to sell beer and wine only for off-site consumption in an existing retail space located in a shopping center on the north side of McKee Road, approximately 320 feet westerly of White Road. The owner has previously obtained a Conditional Use Permit in 1991 (File No. CP90-072) for the sale of alcohol for off-site consumption. The Conditional Use Permit was not time conditioned and it is still valid.

The site is located within a Police Beat area where the crime rate is over the 20% crime index compared to the rest of the city. Six hundred arrests were made in this area in a 12-month period (February 1, 2005 – January 31, 2006). The location is considered unduly concentrated per Business and Professions Code (B&P) Section 23958.4 (a)(1).

The site is also located within a census tract with a higher ratio of existing liquor licenses to population than is found in the County as a whole. The State Department of Alcohol Beverage Control (ABC) will not approve a liquor license for off-sale of alcoholic beverages within this census tract unless the City makes a determination of public convenience or necessity for the use.

Site Conditions and Context

The project site is developed with an approximately 66,890 square-foot commercial building within a 241,407 square-foot shopping center on the northeast corner of McKee Road and White Road. This shopping center includes a Thrifty Drugstore, Seafood City, a bank, three small shops, and an Arco Service Station. The building Seafood City is occupying is located near the middle of the shopping center, oriented towards the McKee Road street frontage. The uses in the shopping center are served by 287 parking spaces consistent with Zoning Code parking requirements. Staff has visited the site and the shopping center is well maintained.

PROJECT DESCRIPTION

Seafood City is proposing to use a portion of their existing retail tenant space for the sale of alcohol, exclusively wine and beer. The alcohol sales section is proposed to be on two shelves bordering the rear wall of the building (see attached plan). According to the applicant, Seafood City's company policy requires cashiers to "card" customers purchasing alcohol, and training is provided to ensure employees are able to identify fake identification cards, and/or refuse service to a customer who is under the legal drinking age. The store layout allows the store to monitor their alcohol sales as the only entrances to the Seafood City building are on the front of the building. Customers wishing to

purchase alcohol have to walk through two aisles of products before reaching the alcohol section, then exit from "check out" through the same door. The store operates typically from 8:00 a.m. to 9:00 p.m. daily. Different, likely shortened hours would be implemented during the holidays, but in no case would the facility operate after 10:00 p.m.

PUBLIC OUTREACH

A community meeting was held for this project on October 23, 2006. Two people attended the meeting, including the owner of a competing liquor store (Econo Liquors) across White Road, and a Field Representative for California State Assembly, 23rd District. They did not oppose the project. Staff has not received any public correspondence on this project since January 2006.

The applicant has posted a notification sign at the site in conformance with the Council's Public Outreach Policy. Notices of the community meeting and public hearing were distributed to the owners and tenants of all properties located within 1,000 feet of the project site. The Planning Commission's agenda is posted on the City of San Jose's website along with this staff report. Staff has been available to answer questions and discuss the proposal with members of public.

ENVIRONMENTAL REVIEW

Under the provisions of Section 15301, Existing Facilities, of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) as stated below, this project is found to be exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended in that, 1) The use involves negligible or no expansion of use beyond that existing at the time of the lead agency's determination.

GENERAL PLAN CONFORMANCE

The project site has a General Plan designation of Neighborhood/Community Commercial. This is a non-specialized commercial designation intended to permit a range of commercial uses. Within this designation, residential and commercial uses, together with related parking facilities are seen to be complementary uses. Commercial uses such as the existing retail store with proposed off-sale of alcohol are consistent with this designation.

ANALYSIS

As the project has previously obtained an approved Conditional Use Permit for the off-sale of alcohol, the primary issue for this project is conformance with the requirements for a Determination of Public Convenience or Necessity. This issue is discussed below.

Findings of Public Convenience and Necessity

The purpose for making a formal Determination of Public Convenience or Necessity is to provide appropriate feedback to the State of California regarding the issuance of licenses for the off-sale of alcoholic beverages by the State's Department of Alcoholic Beverage Control in areas that are deemed to be over-concentrated with off-sale outlets or in areas that are considered high crime areas.

Unless the City makes a Determination of Public Convenience or Necessity, the State Department of Alcohol Beverage Control (ABC) will not issue a liquor license for off-sale of alcohol if the business is located in an area of high crime or an area of over-concentration, defined as follows:

- a) The premises of the proposed license is located in an area that has 20% more reported crimes than the average number of reported crimes for the city as a whole, or
- b) The premises of the proposed license is located in a census tract where the ratio of existing retail on-sale/retail off-sale licenses to population in the census tract exceeds the ratio in the County as a whole.

The attached Police Department memorandum indicates that the project site is located within an area of high crime; however, the census tract does not have an over-concentration of existing liquor licenses. For ABC to be able to issue a license for this use, the City must grant a "Determination of Public Convenience or Necessity." Title 6 of the San Jose Municipal Code specifies that the Planning Commission may issue a Determination of Public Convenience or Necessity only after making the all four specified findings identified below:

1. The proposed use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the City for targeted neighborhood enhancement services or programs, or located within an area in which the Chief of Police has determined that the proposed use: (a) would be detrimental to the public health, safety, or welfare of persons located in the area, or (b) would increase the severity of existing law enforcement or public nuisance problems in the area.

Analysis of Required Finding. The Police Department memorandum indicates that the proposed use is not within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the City for targeted neighborhood enhancement services or programs.

2. The proposed use would not lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use.

Analysis of Required Finding. The proposed use would be the fourth off-sale use within a thousand-foot radius of the project site and would not lead to the grouping of more than four off-sale uses within a one thousand-foot radius of the proposed use.

3. The proposed use would not be located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility, or within one hundred fifty feet of a residence.

Analysis of Required Finding. The proposed use is not located within five hundred feet of a school but it is within 150 feet of a residence; therefore, the Commission cannot make this required finding.

4. Alcohol sales would not represent a majority of the proposed use.

Analysis of Required Finding. Alcohol sales would not represent a majority of the proposed use since alcohol sales would be restricted to two shelves at the rear of the store, which represents less than 10% of the store's floor plan.

CONCLUSION

Based on the above analysis, staff concludes that it would not be possible for the Planning Commission to make all four of the findings required for a Determination of Public Convenience or

Necessity for this proposal. As result, the Planning Commission may not approve the proposed Determination of Public Convenience or Necessity.

The City Council may on appeal, in the case where all of the above findings cannot be made, issue a determination of public convenience or necessity in connection with an application for a license from the California Department of Alcoholic Beverage Control for the off-sale of alcoholic beverages where the City Council identifies and finds that a significant and overriding public benefit or benefits will be served by the proposed use and after first finding at least one of the following, that:

1. The census tract in which the proposed outlet for the off-sale of alcoholic beverages is located is unusually configured and the proposed outlet would act as a convenience to an underserved portion of the community without presenting a significant impact on public health or safety; or
2. The proposed outlet for the off-sale of alcoholic beverages would enhance or facilitate the vitality of an existing commercial area without presenting a significant impact on public health or safety; or
3. The census tract in which the proposed outlet is located has a low population density in relation to other census tracts in the city, and the proposed outlet would not contribute to an over-concentration in the absolute numbers of outlets for the off-sale of alcoholic beverages in the area; or
4. The proposed off-sale of alcoholic beverages is incidental and appurtenant to a larger retail use and provides for a more complete and convenient shopping experience.

Based on the information and analysis in this report, staff believes that on appeal, the City Council could likely make Finding 4 above, in that the proposed project would allow off-sale of beer and wine only as incidental to an existing grocery store.

RECOMMENDATION

Planning staff recommends that the Planning Commission deny the applicant's request for a Determination of Public Convenience or Necessity and include the facts, findings, and conditions as included in the attached Resolution.

Attachments:

Draft Resolution

Location Map

Map of Alcohol Licenses

Police Memo

Proposed Plan

Set Floor Plan

RESOLUTION NO. 05-158

Resolution of the Planning Commission of the City of San Jose to deny a request for a Determination of Public Convenience or Necessity to use certain real property described herein for the purpose of off-sale of alcohol at an existing retail establishment located on the north side of McKee Road, approximately 320 feet westerly of White Road.

FILE NO. ABC06-002

BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF SAN JOSE:

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San Jose Municipal Code, on January 5, 2006, an application (File No. ABC06-002) was filed for a request to make a Determination of Public Convenience or Necessity for the purpose of the off-sale of beer and wine on that certain real property (hereinafter referred to as "subject property"), situate in the CP Commercial Pedestrian, located at 3065 McKee Road, San Jose, and

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San Jose Municipal Code, this Planning Commission conducted a hearing on said application, notice of which was duly given; and

WHEREAS, at said hearing, this Planning Commission gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this Planning Commission received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this Planning Commission received in evidence a development plan for the subject property entitled, "Seafood City," dated June of 2006. Said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, said hearing was conducted in all respects as required by the San Jose Municipal Code and the rules of this Planning Commission;

NOW, THEREFORE:

After considering evidence presented at the Public Hearing, the Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. The subject site is located within the CP Commercial Pedestrian Zoning District.
2. This site has a designation of Neighborhood/Community Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram. Commercial uses such as the proposed retail store are consistent with the Neighborhood Community Commercial designation. No physical expansion of the existing structure is proposed.
3. Under the provisions of Section 15301, Existing Facilities, of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) as stated below, this project is found to be exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970.
4. The site has 287 parking spaces in conformance with the parking requirement for the retail center set forth in Title 20.
5. Non-commercial uses adjacent to the site include single-family residential properties to the north behind the shopping center, and to the south, across McKee Road.
6. The project site is developed with an approximately 66,890 square-foot commercial building oriented to the McKee Road including a Thrifty Drugstore, Seafood City, a bank, 3 small shops, and an Arco Service Station.
7. Access to Seafood City is via doors at the front of the building facing the parking lot. Customers will have to walk down two aisles to the rear of the store to reach the proposed alcohol sales section.
8. The store operates from 8:00 a.m. to 9:00 p.m. daily. Different, likely shortened hours would be implemented during the holidays, but in no case would the facility operate past 10:00 p.m.
9. The Zoning Ordinance requires a Conditional Use Permit for the off-sale of alcoholic beverages and for a public drinking establishment in the CP Commercial Pedestrian Zoning District. The applicant obtained a Conditional Use Permit for the off-sale of alcoholic beverages in 1991 (File No. CP 90-072). The permit was not time conditioned and is still valid.
10. The Police Department memorandum indicates that the project site is not currently in a Strong Neighborhood Initiative area.
11. Seafood City is located in San Jose Police Beat W4. The reported crime statistics as defined by B&P Section 23958.4(c) are over the 20% crime index thus the location is considered unduly concentrated per B&P Section 23958.4 (a)(1).

12. Department of Alcohol Beverage Control (ABC) records indicate Seafood City is in census track 5038.04. Pursuant to B&P Section 23958.4 (a)(3) ...the ratio of on-sale retail licenses and off-sale retail licenses to population in census track 5038.4 does not exceed the ratio of on-sale retail licenses and off-sale retail licenses to population in the county in which the applicant premises are located.
13. For the Department of Alcohol Beverage Control (ABC) to be able to issue a liquor license for the proposed uses, the City must grant a Determination of Public Convenience or Necessity.
14. The proposed use would not lead to the grouping of more than four off-sale uses with a 1,000-foot radius from the proposed use.
15. The proposed use is not located within five hundred feet of a school but it is located within 150 feet of a residence.

Based on the above stated facts, the Planning Commission concludes and finds:

1. The proposed project is in conformance with the San Jose 2020 General Plan.
2. The project conforms to the requirements of the California Environmental Quality Act.
3. The project does not comply with provisions of Title 6.

Based on the findings in the subsection below, the Planning Commission is not able to make a Determination of Public Convenience or Necessity for the subject liquor license:

- a) The proposed use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the city for targeted neighborhood enhancement services or programs, or located within an area in which the chief of police has determined that the proposed use would be detrimental to the public health, safety, or welfare of persons located in the area, or increase the severity of existing law enforcement or public nuisance problems in the area; and
- b) The proposed use would not lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use; and
- c) The proposed use is not located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility but it is within 150 feet of an existing residence; therefore, it is not in conformance with the requirements of Title 6 of the SJMC.
- d) Alcohol sales would not represent a majority of the proposed use.

Based on the above findings, the Planning Commission **cannot** make the Determination of Public Convenience or Necessity.

DENIED this 6th day of December 2006, by the following vote:

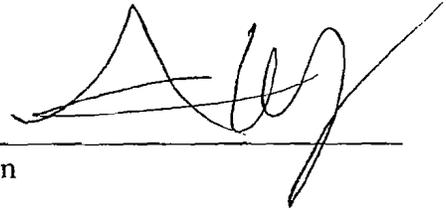
AYES: CAMPOS, DHILLON, KALRA, KAMKAR, ZITO.

NOES: NONE

ABSENT: PLATTEN.

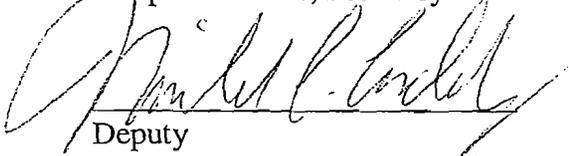
DISQUALIFIED: NONE

Chairperson



ATTEST:

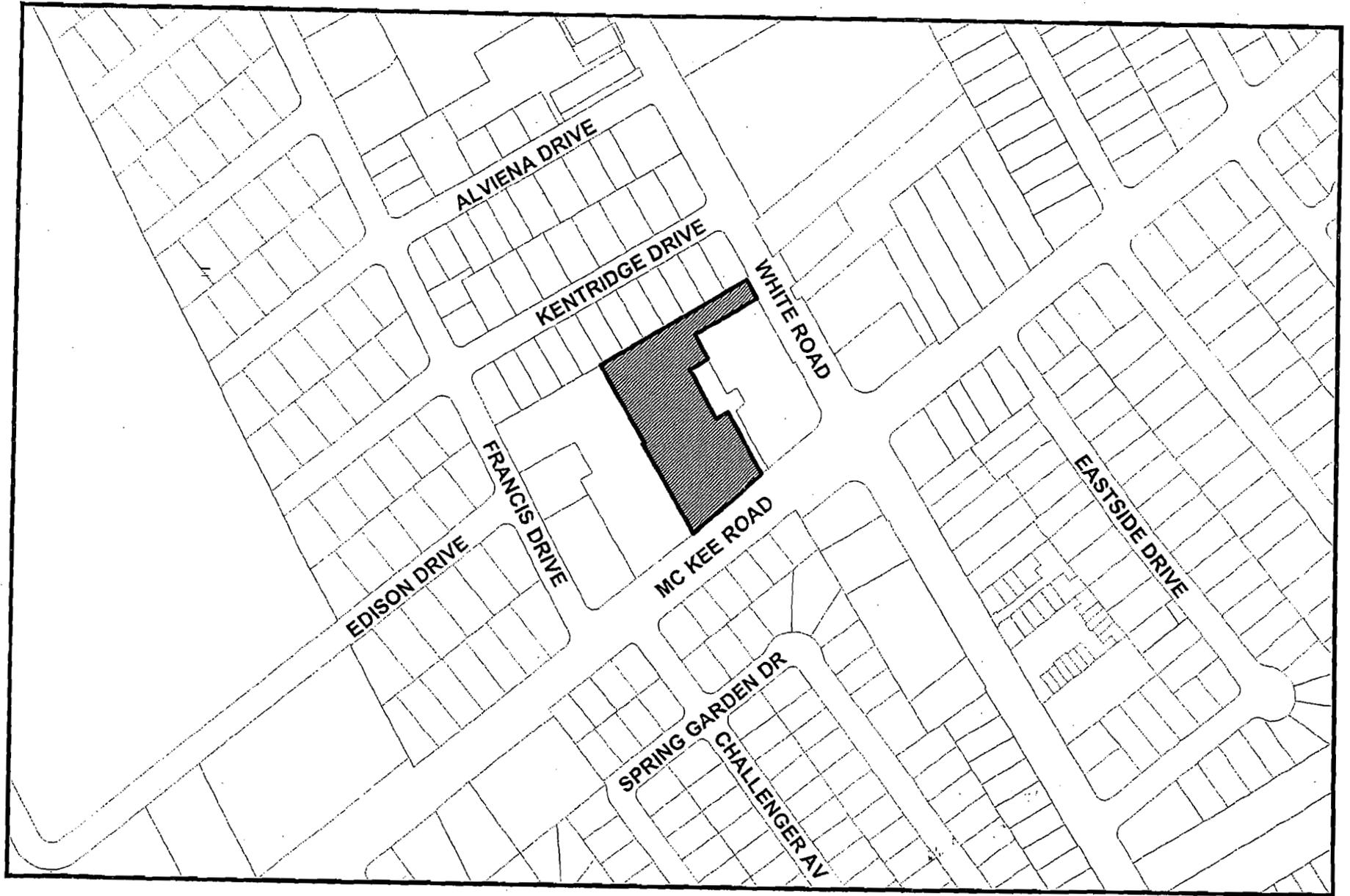
Joseph Horwedel, Secretary



Deputy

NOTICE TO PARTIES

The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6.



Scale: 1"= 300'

Map Created On: 01/06/2006

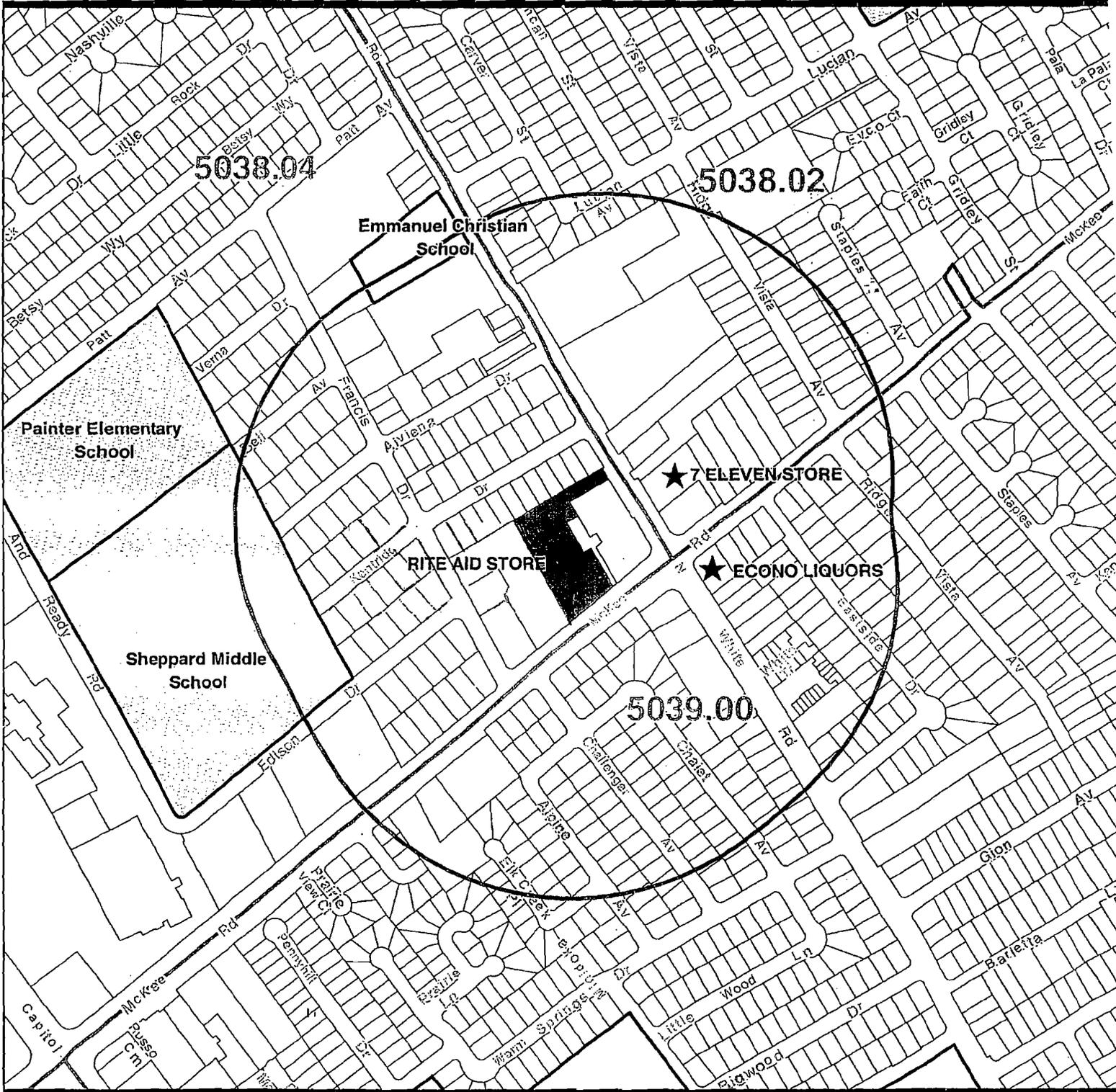
Noticing Radius: 500 feet

File No: ABC06-002

District: 5

Quad No: 52

ABC06-002



-  Application Location
-  Schools

-  Existing ABC Licenses
-  1000-foot Radius



Scale: 1-inch = 500 feet

Memorandum

TO: Hadasa Lev
Planning Department

FROM: Ofr. Rick Galea #3495
San Jose Police Vice Unit

SUBJECT: Seafood City
3065 Mckee Road

DATE: March 1, 2006

Approved

Date

I have received your request for input regarding Seafood City, 3065 Mckee Road, San Jose, Ca. 95127. Seafood City is seeking an ABC License Type 20 – Off-Sale Beer and Wine.

Per Business and Professions (B&P) Code Section 23958, the State of California Department of Alcohol Beverage Control shall deny an ABC Application for an ABC License if the issuance of that license would tend to create a law enforcement problem or if it would result in or add to an undue concentration of ABC Licenses, with certain exceptions as described in B&P Sections 23958.4 (a)(1) and 23958.4 (b)(3). A location can be unduly concentrated because of its criminal statistics and/or it's proximity to other ABC Licenses. ABC can issue the license per B&P Sections 23958.4 (b)(1), and 23958.4 (b)(2) if the local governing body determines that the public convenience or necessity would be served. The City of San Jose Planning Department or the Planning Commission are the delegated authorities to grant these exceptions.

The location is not currently in a Strong Neighborhood Initiative area.

Seafood City is located in San Jose Police Beat W4. The reported crime statistics as defined by B&P Section 23958.4(c) are over the 20% crime index thus the location is considered unduly concentrated per B&P Section 23958.4 (a)(1).

Police Beat Crime Statistics

Beat	Index Crimes	Arrests	Total	20% Above Average
W4 (2005)	415	600	1015	Yes
City Average	317	345	661	

A crime analysis indicated a total of 893 calls for service and self- initiated events occurred within a 1000 ft radius¹ of 3065 Mckee Road in a 12 month period (February 1, 2005 – January 31, 2006). Some of the calls are listed in the table below.

Crime Analysis

Number	Nature of Call
50	Accidents / Hit and Run
49	Disturbances
10	Assaults / Assaults with a Deadly Weapon
9	Drunk in Public
5	Driving Under the Influence
5	Vandalism
5	Fights

Department of Alcohol Beverage Control (ABC) records indicate Seafood City is in census track 5038.04. Pursuant to B&P Section 23958.4 (a)(3) ... the ratio of on-sale retail licenses and off-sale retail licenses to population in census tract 5038.04 **does not** exceed the ratio of on-sale retail licenses and off-sale retail licenses to population in the county in which the applicant premises are located.

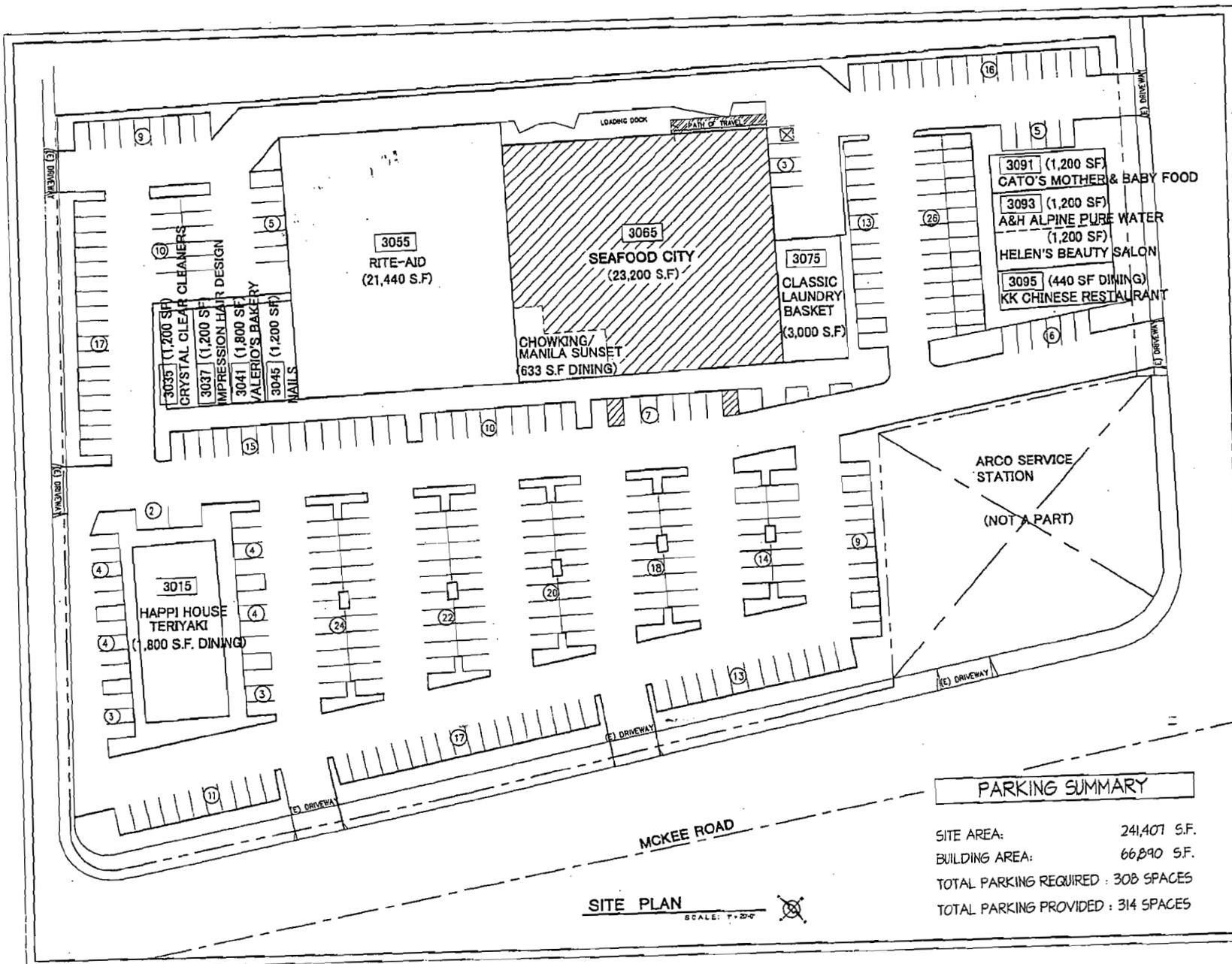
Authorized and Current ABC Licenses in Census Track 5038.04

Census Track	Authorized ABC Licenses as of August 2005		Current ABC Licenses as of December 1, 2005		Unduly Concentrated	
	On - Sale	Off - Sale	On - Sale	Off - Sale	On - Sale	Off - Sale
5038.04	7	3	5/1	3/0	NO	NO

An exception would have to be granted for ABC to issue this license. The police department remains neutral to the issuance of the exception permit.

Please feel free to contact me at 277-4322 if you have any questions.

Ofr. Rick Galea #3495
Administrative Officer
Special Investigations/Vice



SITE PLAN

SCALE: 1" = 20'-0"

PARKING SUMMARY

SITE AREA:	241,407 S.F.
BUILDING AREA:	66,890 S.F.
TOTAL PARKING REQUIRED:	308 SPACES
TOTAL PARKING PROVIDED:	314 SPACES



SHEET TITLE

SITE PLAN

PROJECT

SEAFOOD CITY • SAN JOSE
 3085 MCKEE ROAD
 SAN JOSE, CA 95127

REVISION

DATE	REVISION

STAMP

DATE	
BY	
CHECKED BY	
SCALE	
SHEET NO.	

T-5

