



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Planning Commission

SUBJECT: SIDEWALK CAFÉ
ORDINANCE

DATE: April 14, 2008

COUNCIL DISTRICT: Citywide
SNI AREA: All

RECOMMENDATION

The Planning Commission voted to forward to the City Council to recommended approval with two modifications to the staff recommendation of the proposed ordinance (4-3-0; Campos, Kinman, and Platten Opposed). The recommended modifications to the proposed ordinance include:

- All Sidewalk cafes can operate during the hours of operation of the business establishment or up to 2:00 A.M., whichever is earlier; and
- Continuation Of Downtown Working Group between businesses, staff, and the police.

BACKGROUND

Staff made a brief staff report. Lt. David Hober, explained the Police Department perspective. The Planning Commission then asked questions of staff and Lt. Hober. In response to Commissioner Kinman, Lt. Hober explained that the Vice Unit investigated whether existing sidewalk cafés were selling alcohol without food. In response to Commissioner Kamkars questions related to the Police perspective on the proposed ordinance, Lt. Hober clarified that originally, draft of ordinance was to not allow sidewalk café to become extension of bar, and explained collaboration with Planning, Office of Economic Development and City Attorney to revise to allow 'some' food service instead of full food service. In response to Commissioner Plattens questions of Lt. Hober whether there was the evidence to present to the Commission to substantiate the Police findings that there were violations occurring at the sidewalk cafes, Lt. Hober responded no citations issued during Police investigation.

Dave Powell, the owner of San José Bar and Grill and Tres Gringos restaurants in downtown stated that his current Conditional Use Permit allowed the sidewalk café to be open until 2:00 a.m. and to serve alcohol. It was Mr. Powell's position that he should be able to continue to have a sidewald café during the time his business is allow to stay open. Commissioner Kalra stated police had valid concerns about loitering and keeping unobstructed access for pedestrians. Mr Powell highlighted his

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operation and security plan and noted his restaurant has been open for 6 years. Mr. Powell also explained that recent planning requirement for a management plan for new entertainment establishments is helpful to ensure good operation, and stated professionally-run facilities can band together to help all restaurant/bar/cafés be more successful, and suggested higher security requirements could be appropriate.

Commissioner Jensen asked if a deferral could be helpful to continue dialogue with police department and staff, and speaker concurred. In response to Commissioner Zito, Mr. Powell clarified that the proposed ordinance would require his sidewalk café to close at midnight instead of 2:00 a.m. as he has been operating, and was concerned that the Director of Planning would have power to revoke a permit. The speaker commented that the Planning Commission was the appropriate body to approve alcohol sales in sidewalk cafés. Mr. John Connelly of Britannia Arms spoke and explained that late night business really is 11:00 p.m. to 2:00 a.m. and currently his restaurant operates until 2:00 a.m. with lots of security in the sidewalk café, and ABC also regulates what happens related to alcohol in the sidewalk café. He explained police concerns are already the subject of CUP conditions. He explained the timing to bring ordinance forward was too quick and more time would be helpful. He stated his establishment was apparently not legal and he would like more time. In response to Commissioner Platten, he agreed that 60 days could be enough time. In response to Commissioner Kinman, he confirmed he had only recently heard about this issue coming before Commission.

A speaker representing the Downtown Association stated good move forward and that the City should let existing users continue to operate, but not curtail hours at this time. The Vice President of the Silicon Valley Chamber of Commerce stated City does need to support, not restrict, outdoor café operation consistent with operation of main use and City should consider it to be positive, and to let sidewalk cafés pull people into the downtown.

A speaker from CAE explained "small wonders" were things like sidewalk cafés, which encourage vibrancy and getting pedestrians engaged in the community. In response to Commissioner Platten, she stated excitement about future process to allow more sidewalk cafés and also stated would like more dialogue. Director Horwedel explained rest of process if a 60-day Commission deferral plus Council action, plus 45 days to effectuate ordinance would be mid-August to allow new cafés, and noted that what was before them was the Administrations recommendation and that the final decision is the City Council's, and the item should get to them shortly. Commissioner Platten indicated concern related to the amount of outreach done to date and which Director Horwedel explained this issue has been brought up at the Downtown Working Group, meetings related to the late soft closings for downtown entertainment and restaurant venues, etc. Commissioner Platten noted sensitivity to issues of outreach but moved approval so it could get to Council. Motion failed for lack of a second.

In response to Commissioner Zito regarding brief window of pilot program, staff explained that many applications are on hold and need to move forward, and explained alcohol, entertainment, and sidewalk café currently cannot be permitted but with proposed ordinance would be able to be permitted until midnight. Commissioner Zito stated he was okay with 2:00 a.m., but would move approval of staff recommendation to midnight only. Commissioner Zito stated his preference would be that Council considers 2:00 a.m. closing, instead of midnight. Commissioner Jensen stated she

had been ready to defer for a month, and that she's sensitive that police department is stretched, but is delighted that business owners care about other businesses, but has concerns that existing restaurants will have to end 2 hours earlier. She suggested requirements could be included for higher security. She offered a friendly amendment to the motion that staff reinstitutes a working group to continue a working dialogue. Director Horwedel noted the City Council could decide 2:00 a.m., but there are a number of other items coming with this item to Council on April 29th. Commissioner Zito accepted the friendly amendment. In response to Commissioner Jensen, staff clarified that a retail use like a gift shop with a museum, could have a sidewalk café, and that downtown restaurants can have hours coincident with their operating hours. Commissioner Campos stated he felt the Commission was being forced to make a fast decision. He stated City of San José should have vibrant Downtown, but stated would not support the motion and stated needed changes to Ordinance for more options on hours. Commissioner Kamkar asked Commissioner Zito whether he would amend motion to allow cafés to 2:00 a.m., and Commissioner Zito agreed, and the seconder Platten agreed. Commissioner Kinman stated not comfortable with pressure and felt no solid background to move forward yet, and that outreach started out well, but was not ongoing, she stated she would not support the motion.

Commissioner Platten stated strongly that it be made clear to the City Council that there is zero evidence that there are problems currently with the existing sidewalk café operations, no specific evidence has been presented – understanding that there are other existing problems downtown and stated he was torn on motion. Commissioner Jensen stated lack of comfort, but stated 2:00 a.m. recommendation addresses existing businesses; her primary concern. She strongly urged the Commission to support to move ordinance forward and Commissioner Zito concurred, so businesses will be able to go forward and get their permits. In response to Commissioner Platten, Counsel clarified current motion.

Commissioner Kalra explained motion balances concern that some businesses are being delayed and summer is coming and that ordinance should get to Council and dialogue should continue. He expressed that, in his opinion, general loitering created more problems than attendance at sidewalk cafés and clubs. Motion passed 4-3, Campos, Kinman, Platten opposed.

ANALYSIS

The original Planning Commission staff report for this item, dated April 3, 2008, provide a complete analysis of the proposed Sidewalk Café Ordinance and Policy Alternatives.

POLICY ALTERNATIVES

The alternative policy recommendations available to the Planning Commission in regard to the proposed sidewalk café ordinance include the following:

Alternative #1: Approve an ordinance allowing the Director of Planning the ability to approve a sidewalk café for establishments having been issue an Entertainment Permit but limit the duration the sidewalk café can be out to an earlier time in the evening, such as 10:00 p.m.

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Pros: Requiring a restaurant that has also been issued an Entertainment Permit to bring in their sidewalk café at 10:00 p.m. vs. midnight could ensure that the entertainment and drinking associated with the establishment would not bleed out onto the sidewalk.

Cons: Requiring a restaurant that has also been issued an Entertainment Permit to bring in their sidewalk café area at 10:00 p.m. vs. midnight would preclude the establishment from continuing to use the sidewalk area for the restaurant part of their business and cause them to be break down a portion of their use during a time where patrons would be in the primary restaurant area.

Reason for not recommending: The proposed ordinance with the prohibition on amplified sound and dancing in the sidewalk café as well as the limitation on occupancy to persons seated in chairs, coupled with the requirement that food service be available, is sufficient to control the activity on the sidewalk including overcrowding and utilization of the area for activity other than dining.

Alternative #2: Reinstate the sidewalk café ordinance provisions that sunsetted in October 2006, which allowed eating establishments with Entertainment Permits to operate their sidewalk cafes during their entire business hours.

Pros: Effectively, this would reinstate the previous provisions and require the least operational change for eating establishments that also have Entertainment Permits.

Cons: Many eating establishments with Entertainment Permits are open later than midnight. This alternative would create an inconsistent closing time for sidewalk cafes Downtown. In addition, safety benefits are anticipated from having the public right of way free of sidewalk cafes after midnight.

Reason for not recommending: Downtown can achieve the goal of activated, safe public sidewalks for dining and socializing by allowing the sidewalk cafes to be open until midnight, rather than later in the morning.

Alternative #3: Denial of the proposed ordinance allowing the Director of Planning the ability to approve a sidewalk café for establishments having been issue an Entertainment Permit.

Pros: Denial of the proposed ordinance would remove any concern that a restaurant that has been issued an Entertainment Permit and becomes a nightclub in the evening will have nightclub activity on the sidewalk.

Cons: Denial of the proposed ordinance would preclude establishments that have been issued an Entertainment Permit and operate as a restaurant during daytime and evening hours in addition to being a nightclub in the later evening from having a sidewalk café at any time during the day.

Reason for not recommending: Denial of the proposed ordinance would limit the City's ability to attain the vision of a lively active downtown, even during the daytime.

FISCAL/POLICY ALIGNMENT

The proposed Sidewalk Café ordinance would help implement the San Jose 2020 General Plan and its Downtown Strategy and the recently supported Small Wonders Workplan to create a vibrant downtown.

COST SUMMARY/IMPLICATIONS

(N/A)

PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater.
- ✓ **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.
- 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.

The proposed ordinance and associated memorandums have been posted on the Department's webpage and the public hearing has been published in the Mercury News. Staff has outreached to the Downtown Association and the Chamber of Commerce through various standing meeting related to the Downtown. Staff has been available to answer any questions.

COORDINATION

This project was coordinated with the Police Department, the Redevelopment Agency, the Office of Economic Development the City Manager's Office, and the City Attorney.

CEQA

The proposed sidewalk café ordinance is exempt pursuant to Section CEQA Guidelines Section 15061(b)(3).



JOSEPH HORWEDEL, SECRETARY
Planning Commission



Memorandum

TO: PLANNING COMMISSION

FROM: Joseph Horwedel
Paul Krutko

SUBJECT: SEE BELOW

DATE: April 3, 2008

COUNCIL DISTRICT: Citywide
SNI: All

SUBJECT: AN ORDINANCE OF THE CITY OF SAN JOSÉ AMENDING PART 12 OF CHAPTER 20.100 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE, THE PROVISIONS RELATED TO SIDEWALK CAFÉ PERMITS, TO ALLOW THE DIRECTOR OF PLANNING TO ISSUE A SIDEWALK CAFÉ PERMIT TO AN ESTABLISHMENT LOCATED IN THE DOWNTOWN THAT ALSO HAS AN ENTERTAINMENT PERMIT AND IS DESIGNATED A PUBLIC EATING ESTABLISHMENT PURSUANT TO THE PROVISIONS OF TITLE 6 OF THE SJMC, AND TO RETAIL ESTABLISHMENTS, TO REDUCE THE REQUIREMENT FOR FULL FOOD SERVICE, TO INCLUDE PROVISIONS RELATED TO THE REVOCATION OF SUCH PERMITS, AND TO CLARIFY THE DEFINITION OF A SIDEWALK CAFÉ

RECOMMENDATION

Staff recommends that the Planning Commission recommend that the City Council approve the proposed ordinance described above to amend existing sidewalk café regulations to allow downtown businesses that maintain a valid entertainment permit and are designated a public eating establishment the ability to obtain a sidewalk café permit, to allow retail establishments the ability to obtain a sidewalk café permit, to clarify the requirement that a restaurant maintain food service in order to obtain a sidewalk café permit, to clarify the revocation process for this permit, to clarify the definition of a sidewalk café and to make related clarifying or technical changes to the sidewalk café permit provisions contained in Title 20 of the San José Municipal Code.

OUTCOME

Approval of the proposed sidewalk café ordinance will allow the Director of Planning to approve a sidewalk café for restaurants in the downtown area that have also been issued an entertainment. All sidewalk cafes will be allowed to stay open until midnight and to offer a reduced menu if so desired. This ordinance supports the vision of a lively and active public realm downtown.

BACKGROUND

Encouraging active, safe sidewalks and outdoor café environment are important parts of San Jose's Downtown Strategy. The importance of encouraging outdoor urban venues for dining and socializing has been reinforced by the work of 1stACT Silicon Valley. Their vision of Downtown San Jose as "Silicon Valley's City Center" includes the opportunity for more sidewalk cafes as an extension of current dining and entertainment venues.

Title 20 of the San Jose Municipal Code (the Zoning Code) contains provisions for the Director of Planning to approve a Sidewalk Café Permit to allow for the extension of an "eating and/or drinking" establishment onto the public right-of-way. The current provisions in the Zoning Code related to Sidewalk Cafés do not allow for the Director of Planning to approve an application for a Sidewalk Café Permit for a Downtown establishment that also has an Entertainment Permit issued per the provisions of Title 6 of the San Jose Municipal Code.

In June 2005, the City Council, in an effort to expand opportunities for dining and entertainment venues during the 2005 inaugural San Jose Grand Prix, adopted an ordinance that allowed these Downtown businesses the ability to obtain a Sidewalk Café Permit and operate the sidewalk café during their business hours. The original ordinance was to sunset in July 2006, but was extended by Council until October 2006, at which time all Sidewalk Café Permits issued to venues with entertainment permits were to cease. Since October of 2006, there has not been the ability for the Director of Planning to issue a Sidewalk Café Permit to Downtown businesses that also hold an Entertainment Permit.

ANALYSIS

There are several businesses in Downtown San Jose that are primarily an eating establishment during the daytime and early evening hours and then evolve into primarily an entertainment establishment in the later evening hours.. The establishments that are primarily entertainment establishments in the evening are subject to the provisions of Title 6 of the San Jose Municipal Code and are required to obtain an Entertainment Permit from the Chief of Police. Since October of 2006, current zoning provisions do not give the Director of Planning the ability to approve a Sidewalk Café Permit for any such establishment that also has been issued an Entertainment Permit per Title 6. The proposed ordinance sets forth a structure that supports these establishments in the Downtown to have the ability to have a sidewalk café until midnight. (Under the ordinance that sunsetted in October 2006, these establishment could operate their sidewalk café during their entire business hours.)

Eating Establishment vs. Entertainment Establishment

As discussed above, several eating establishments also have the ability through a use permit to operate as an entertainment establishment. Typically, the eating establishment operates up through 9:00 p.m. and between 9:00 p.m. and 10:00 p.m. the establishment resets to become primarily an entertainment establishment. When the entertainment is no longer merely incidental to the eating establishment, an Entertainment Permit is required per Title 6 of the San Jose Municipal Code. The proposed ordinance contains provisions which allow for the Director of Planning to approve a Sidewalk Café Permit that would allow for the eating establishment that has an entertainment permit

to operate a sidewalk café until midnight with two conditions: a) food service must be available to patrons and b) occupancy of the sidewalk café would be limited to persons seated at chairs around the sidewalk café tables.

For eating establishments that have entertainment more as an incidental use and not as the primary draw for the establishment, and are not issued an Entertainment Permit by the City because their use continues to be primarily an eating establishment throughout the entire evening and they do not operate as a “nightclub” type of entertainment use, these uses would be able to have a sidewalk café for the duration of the hours that they are allowed to operate or until midnight, whichever is earlier. In this case there would be the assurance that food service would be continuing since the proposed ordinance requires that food service continue and that the sidewalk café shall not operate solely as a drinking establishment.

Maintenance of “Full” Food Service

The current zoning provisions require that the eating establishment maintain full food service which during the later evening hours may not be practical for the establishment or preferable by those patrons seeking lighter eating opportunities. Many times the post theater crowd may want to linger Downtown for a small bite to eat or have dessert and coffee, etc. By not requiring full food service, many of the eating establishments can program their hours and menus based on events and anticipated crowds from such events.

Sidewalk Cafes at Retail Establishments

The proposed ordinance presents a revision to the definition of a sidewalk café which now includes retail sales establishments. Currently, a sidewalk café is defined as an extension of an eating and/or drinking establishment. The proposed definition now eliminates drinking establishment and includes retail establishment, so that a sidewalk café is an extension of an eating or retail establishment. With the changing trends in retail food markets having delicatessens and offering sandwiches and salads, there is an opportunity to extend the sidewalk café opportunities to this type of use especially in our downtown and neighborhood business districts.

Revocation of Sidewalk Café Privilege

The proposed ordinance sets forth language that clarifies and makes it expressly known that the Director of Planning can revoke a Sidewalk Café Permit at any time. This permit is granting the privilege to use the public right-of-way and is not associated with, nor does it grant, any private property rights in the sidewalk. Different from when a permit is issued on private property, this ordinance recognizes the ability of the City to revoke a sidewalk café permit prior to providing a full public hearing on that revocation.

Conclusion

Again, San Jose’s vision is more opportunities to enliven the sidewalks and public realm Downtown, while maintaining our safe streets. The current provisions related to Sidewalk Cafés restrict a number of venues from extending on to the sidewalk because they either have an Entertainment Permit issued by the City or they would be required to maintain full food service throughout the

night. The proposed ordinance recognizes the dual programs of some businesses in Downtown San Jose, that of full service eating establishment and entertainment establishment, and allows the Director of Planning to approve a Sidewalk Café Permit for a venue that is both an eating establishment during the daytime and early evening hours and then becomes primarily an entertainment establishment in the late evening hours. Additionally, the proposed ordinance supports eating establishments that are not primarily entertainment establishments to continue their sidewalk café into the evening without having to maintain full food service.

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COORDINATION

This project was coordinated with the Police Department, the Redevelopment Agency, the Office of Economic Development the City Manager's Office, and the City Attorney.



PAUL KRUTKO
Chief Development Officer



JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

For questions please contact Jeannie Hamilton at 408-535-7850.

