



COUNCIL AGENDA: June 13, 2006

ITEM: 11.2

# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Joseph Horwedel

**SUBJECT:** SEE BELOW

**DATE:** May 25, 2006

COUNCIL DISTRICT: 6

SNI AREA: None

**SUBJECT: CP05-068 & ABC06-004. APPEAL OF THE PLANNING COMMISSION'S DECISION TO DENY A CONDITIONAL USE PERMIT AND DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO ALLOW THE OFF-SALE OF BEER, WINE AND LIQUOR AND A PUBLIC DRINKING ESTABLISHMENT (BEER AND WINE TASTING) AT AN EXISTING VACANT RETAIL ESTABLISHMENT LOCATED IN THE LINCOLN AVENUE NEIGHBORHOOD BUSINESS DISTRICT AT 1133 LINCOLN AVENUE (WEST SIDE OF LINCOLN AVENUE, APPROXIMATELY 300 FEET SOUTHERLY OF WILLOW STREET).**

## RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council approve the subject Conditional Use Permit and make a Determination of Public Convenience or Necessity by finding that the required findings for a Determination of Public Convenience or Necessity can be made and that there is a significant overriding public benefit served by the proposed off-sale of alcohol.

## OUTCOME

Should the City Council approve the subject Conditional Use Permit and Determination of Public Convenience or Necessity, the retail store "Beverages and more!" would be allowed to sell liquor, beer and wine for off-site consumption and offer wine tasting in an existing retail space located in a multi-tenant commercial building with off-site parking arrangements in the Lincoln Avenue Neighborhood Business District (NBD). Should the City Council deny the subject requests, the retail store that specializes in selling unique alcoholic beverages, would not be able to sell alcohol and would not locate a business on the subject site.

## EXECUTIVE SUMMARY

On February 1, 2006, City Council-adopted regulations affecting establishments that sell prepackaged alcohol for off-site consumption ("off-sale alcohol") became effective. The updated regulations revise the approval process and include enhanced findings for approval of a Conditional Use Permit, and new mandatory findings for a Determination of Public Convenience

or Necessity (previously referred to as a Liquor License Exception), when such a determination is required by the State Department of Alcohol Beverage Control (ABC).

The enhanced findings for a Conditional Use Permit include a provision to address the proliferation of establishments in close proximity to existing off-sale uses by generally limiting the number of establishments to four (4) within a 1,000-foot radius. Additionally, the existing finding that addresses the location of such establishments proximate to sensitive uses such as schools and residences, has been augmented to add public parks, child care centers, social service agencies, and residential care and service facilities to the list of sensitive uses. If a new "off-sale alcohol" establishment is to be located within 150 feet of a residential use or residentially zoned property, or within 500 feet of one of the other specified sensitive uses, it must be determined that the proposed establishment is situated and oriented such that it would not adversely affect the sensitive use/s.

The Department of Alcohol Beverage Control (ABC), prior to licensing of a new "off-sale alcohol" establishment in an area of undue concentration or high crime [as defined by State law], requires business operators to obtain a Determination of Public Convenience or Necessity from the local jurisdiction. In the early 1990's, the City of San Jose developed the Liquor License Exception process to provide for consideration of requests for such a determination. With the new regulations, the process has been renamed consistent with the State terminology. All applications for a Determination of Public Convenience or Necessity are considered by the Planning Commission in conjunction with any associated application for a Conditional Use Permit. The revised regulations include factual findings the Planning Commission is required to make in order to approve a request for a Determination of Public Convenience or Necessity. The four findings are as follows:

- The proposed use is not located within a targeted law enforcement area; and
- Approval of the proposed use would not result in a grouping of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one thousand (1,000) foot radius from the proposed use; and
- The proposed use would not be located within five hundred (500) feet of a school site, day care center site, public park, social services agency site, residential care facility site or residential service facility site, or within 150 feet of a site upon which a residential use is conducted or that is residentially zoned; and
- Alcohol sales would not represent a majority of sales, stock or shelving space of the proposed use.

Should the Planning Commission find that the above conditions exist, further consideration of the request is subject to discretionary findings. If the Planning Commission is unable to make all necessary findings in order to consider making a Determination of Public Convenience or Necessity, it is compelled to deny both the request for a Conditional Use Permit and Determination of Public Convenience or Necessity. Appeal of the Planning Commission's decision is heard by the City Council. One of the changes made to the ordinance was to include the opportunity for the City Council to make a finding of overriding public benefit should one of the mandatory factual findings not be met. The City Council is the only body that can make the finding of greater public benefit.

This report, along with the Planning Commission staff report, includes a discussion of the project and whether the required findings can be made in both the case of the Conditional Use Permit and in the Determination of Public Convenience or Necessity. The Planning Commission was unable to make all necessary findings for a Determination of Public Convenience or Necessity; therefore, the Commission was compelled to deny both the request for a Conditional Use Permit and Determination of Public Convenience or Necessity as discussed below. The applicant subsequently appealed the Commission's decision to deny these applications to the City Council. Based on an analysis of the findings required for the City Council to approve the Conditional Use Permit and Determination of Public Convenience and Necessity in the face of negative factual findings by the Planning Commission, staff believes that the Council can make the find that the *proposed outlet for the off-sale of alcoholic beverages would enhance and facilitate the vitality of an existing commercial area without presenting a significant impact on public health or safety.*

## **BACKGROUND**

### **Planning Commission Hearing**

On April 26, 2006, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP05-068 and ABC06-006). The Director of Planning recommended denial of the Conditional Use Permit and request for a Determination of Public Convenience or Necessity because two of the required four findings for the Determination of Public Convenience and Necessity could not be made. As stated in the original staff report (see attached), staff was unable to find that the proposed off-sale use is not located within five hundred (500) feet of a school site, is not within one hundred and fifty (150) feet of a residential use or residentially zoned property or that alcohol sales would not represent a majority of the sales, stock or shelving space of the proposed use.

### **Public Testimony**

Steve McLaren, representing Beverages and More!, explained the nature of the proposed off-sale business. Six (6) members of the community and the spokesperson for the Willow Glen Business and Professional Association (Norma Ruiz) spoke in favor of the proposal. Ms. Ruiz stated that the proposed business would help to generate a continuous retail frontage along Lincoln Avenue that would lead to increased patronage of existing businesses in the Business District. She stated that retail uses would be more beneficial to the vitality of the Business District than offices. Commission Levy asked if she perceived a parking shortage and a problem with trucks loading and unloading in front of the subject site. Ms. Ruiz indicated that parking is adequate and that she was not aware of a problem with the loading areas.

Those supporting the proposal stated that the proposed use is appropriate in the Neighborhood Business District, that it is a quality retail establishment, that the store would promote economic growth in downtown Willow Glen, that the market should decide what businesses locate in the area, that a Beverages and more! in San Jose would eliminate the need for local residents to drive to the Camden store (which is located in a County pocket), and that the perceived 'over concentration' concern is a neighborhood issue that shouldn't discourage the opening of the store.

Ed Rast from the Willow Glen Neighborhood Association and Harvey Darnell of the North Willow Glen Neighborhood Association both stated that their organizations were neutral on the

proposal because their memberships were fairly equally-divided in regard to support or opposition of the proposal. Each expressed concern that resistance to the proposal might send a message that it is difficult to start a new business in downtown Willow Glen and that the market should determine what businesses locate in the area. They indicated support for maintaining retail uses at the subject site. Commissioner Levy asked Harvey Darnell if the shopping carts would create a problem. Mr. Darnell suggested that the applicant create a 'loading area' at the rear of the site for the carts. Commissioner Dhillon rhetorically asked each of them if a land use decision should be based on principles or if decisions should be made by a vote of the residents. Neither of the speakers responded.

Ten (10) members from the public, including the owner of Willow Glen Liquors and two residents who live within the Business District, spoke in opposition to the proposal. Those in opposition expressed concern that there are already too many alcohol outlets in the Willow Glen area, that Beverages and more! generates too much activity to be located next to residential uses, that low-volume retail stores would be more appropriate in the Business District, that the need for alcohol products is met by existing businesses, that Beverages and more! will drive out the existing 'locally owned' businesses, that the business is not pedestrian friendly, that a tasting room is not an appropriate use, that the use will exacerbate the current truck unloading of inventory, and that former alcohol uses located in prior clubs, restaurants and bars in the area generated problems that this use would re-instate.

During closing remarks, the representative for Beverages and more! restated that in his experience at other locations, no stores in close proximity have closed as a result of his business and that Lincoln Avenue is a good location for a new store. He emphasized that the products sold at Beverages and more! are different than the products sold at other nearby alcohol outlets and that his store would be complimentary to the existing businesses. The Planning Commission then closed the Public Hearing.

#### Commission Discussion

Commissioner Levy acknowledged that the Commission had no choice but to deny the Conditional Use Permit and the request for a Determination of Public Convenience and Necessity due to the inability to make the required findings. He said he felt that everyone except the competitors were supportive of the proposal. He expressed concern regarding the amount of parking, and the use and location of shopping carts, but chose to vote to recommend approval to the City Council.

Commissioner Zito stated he mirrored Commissioner Levy's concerns and recommended the neighborhood work with the owner of the building to resolve the community's concerns. He recommended approval to the City Council.

Commission Platten stated that the community had articulated their concerns reasonably and that the business would be out of context with the character of Lincoln Avenue.

The Planning Commission denied the proposed project by a vote of 6-0-0.

#### Appeal

On May 4, 2006, the applicant appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal and associated letter from Steve McLaren, cofounder of Beverages and more!). The Permit Appeal requests that the City Council find that the proposed

Beverages and more! would provide an overriding public benefits, or benefits and that the Council make a Determination of Public Convenience and Necessity to allow the issuance of the ABC licenses required to operate the proposed business.

### **ANALYSIS**

The original staff report (see attached) provides a full analysis of this project with respect to the findings required to be made by the Planning Commission to approve a Conditional Use Permit (CUP) and to make a Determination of Public Convenience or Necessity (PCN). In summary, Planning staff's review provided the Planning Commission with information enabling that body to make the required findings for the Conditional Use Permit, but enabling them to only make two of the four findings required to make a Determination of Public Convenience or Necessity (PCN). In this case, approval of both a CUP and PCN is necessary in order for a Liquor License to be issued by the State of California.

The Planning Commission was unable to make the required finding that the subject use was more than 150 feet from a residential property. Upon an appeal, per Title 6 of the San Jose Municipal Code, where the four required findings cannot be made, the City Council may still make a Determination of Public Convenience or Necessity if it finds that that a "significant or overriding public benefit or benefits will be served by the proposed use", and makes **one** of four special findings list below:

- A. *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.*
- B. *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.*
- C. *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.*
- D. *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.*

### **Finding of Overriding Public Benefit A**

Staff believes that it is possible to make Finding A in regard to this proposal. Based on the analysis below, staff concludes that the proposed outlet for off-sale of alcohol would enhance the economic vitality of the Lincoln Avenue Business District and would not result in public health or safety impacts.

### **Economic Vitality**

Staff believes that the substantial evidence exists that the proposed Beverages and more! will enhance the economic vitality of the Lincoln Avenue Business District. As discussed below,

Beverages and more! is a thriving business with strong local support that has made a significant effort to fit into the context of Lincoln Avenue and whose potential economic benefits to the NBD are not diminished by the fact that the business is a “chain” with a stores in other California communities.

#### *Strong Local Support*

Beverages and more! was recently named “reader’s choice” in the “Liquor/Wine Store” category of the 2006 Mercury News “Best of Silicon Valley” list and was included in the list’s “Hall of Fame” as a business achieving that distinction for three years or more. Steve McLaren, co-founder of Beverages and more!, has indicated that 11,593 households that are regular customers of his stores reside within a 3-mile drive time of the proposed Lincoln Avenue location and that members of these households have shopped in a Beverages and more! store 44,314 times in the past year. He has also indicated that 4,448 customer households reside in the Willow Glen zip code in which the store is proposed to be located (95125). The closest existing Beverages and more! facility is located at the southeast corner of Camden and Union Avenues, in a unincorporated area of Santa Clara County. The public correspondence for this project includes numerous comments from existing customers who indicate that the proposed Lincoln Avenue store would be more convenient as a shopping location than the existing Camden store. Based on this information, staff concludes that there appears to be strong local support for Beverages and more! as an alcohol retailer.

#### *Sensitivity to Local Context*

Beverages and more! has made a significant effort to fit into the Neighborhood Business District setting. Although the Beverages and more! is a “retail chain”, the company has shown an unusual willingness to adjust its operation to fit local conditions. The “boutique” store is proposed to be located in an existing vacant tenant space that reflects the scale of the existing Business District; the 4,865 square foot space is between one half and one third the size of the typical Beverages and more! (10,000-12,000 square feet). Unlike other retailers who approach site selection with fairly rigid requirements that often eliminate Lincoln Avenue as an option, Beverages and more! has shown a willingness to invest in this location despite difficulties associated with limited space, shared parking and the need to provide dual customer entrances at opposite sides of the store. The Office of Economic Development and numerous members of the community have expressed that it is not advisable to turn away retailers willing to work within the existing NBD setting, that it could send the wrong message to other prospective tenants and discourage future investment.

#### *Economic Benefits*

The Office of Economic Development has indicated that the Lincoln Avenue Business District (NBD) has recently lost several retail tenants to offices or personal service uses, that vacancies have increased and that strong new retailers like Beverages and more! are needed. They have advised that a well-known retailer like Beverages and more! has the potential to increase the visibility of the NBD through its marketing campaign, attract new customers to the Business District, generate the foot traffic that drives sales for existing businesses eliminate the potential for yet another office tenant in the wrong spot, and increase investment by others. The Willow Glen Business and Professional Association, in a letter from its Executive Director, Norma Ruiz (see attached), has indicated that the proposed Beverages and more! is in alignment with the Association’s strategic vision for the Business District. The letter points out that the tenant space

in question has been difficult to lease, that the District has been slowly losing prime retail space to service businesses and that retail uses of this type are needed to create “an economically strong pedestrian-friendly business district”.

### *Chain vs. Locally-Owned Business*

Much discussion of the current proposal has focused around the value of “chain” stores versus locally-owned businesses and the threat of “big box retail”. The fact that Beverages and more! is not locally-owned, does not diminish its potential for enhancing the vitality of the Lincoln Avenue Neighborhood Business District. The City’s Economic Development staff have pointed out that a mix of “chains” and locally-owned businesses is positive for the overall vitality of the Lincoln Avenue Business District. They point to Downtown Los Gatos as an example of a vital shopping district that includes a mix of national chains and locally-owned businesses and to Los Altos and Saratoga, as examples of much less vigorous business districts that consist entirely of local businesses. In regard to competition with existing businesses, Economic Development staff have indicated that Beverages and more! has a history of working well with other beverage stores. They have reviewed data that suggests Beverages and more! tends to expand the market and gives other businesses the opportunity for building market niches.

Spencer Horowitz, a Willow Glen resident, small business owner and chair of the Small Business Development Commission, points out in an editorial piece for the Willow Glen Resident that Beverages and more! is pursuing the opposite of a big box retail chain strategy. He notes that Beverages and more! has abandoned the proven model of locating a large-format store in a conventional shopping center near a freeway on-ramp – the type of strategy that sucks the life out of traditional business districts like Lincoln Avenue -- and has downsized its typical store to fit into a traditional business district. In doing so, he points out that Beverages and more! will be filling an empty store front, encouraging property owners to risk property improvements, and increasing the foot traffic that benefits the Business District as a whole. .

### *Summary*

Based on this analysis, staff concludes that strong evidence exists to support a finding by the City Council that the proposed off-sale outlet would enhance the economic vitality of the Lincoln Avenue Neighborhood Business District.

### Public Health and Safety

The primary issues for this proposal in regard to public health and safety center around the potential for Beverages and more! to result in nuisance or other impacts on surrounding land uses and on potential traffic and parking impacts. These issues are discussed below.

### *Potential for Land Use Impacts*

The Beverages and more! retail store is proposed to operate differently than a traditional liquor/convenience store and is not expected to result in the types of impacts typically associated with a liquor store. At 4,865 square feet, the proposed retail space is not significantly larger than the traditional liquor store; however, unlike most liquor stores, Beverages and more! specializes in selling unique and difficult to find spirits/liquors, wines and beers, as well as gourmet foods and accessories. Unlike traditional liquor stores, Beverages and more! prohibits the sale of cigarettes and alcohol products that are often problematic, such as 40-ounce malt liquor, low-priced screw-top

fortified wines, and pints or half-pints of spirits. Company policy also prohibits items and facilities that encourage loitering or attract minors, such as video or pinball games, pornographic videos and magazines, pay telephones, lottery tickets, and newspaper stands. Customers under 21 years of age are not allowed in the store unless accompanied by an adult. The store proposes to operate Monday through Friday from 10:00 a.m. until 9:00 p.m., from 9:00 a.m. to 9:00 p.m. on Saturday and on Sundays from 10:00 a.m. until 7:00 p.m. Extended hours are proposed to be implemented during the holiday season, but in no case would the facility operate past midnight. Given the market focus and operational characteristics of the proposed use, staff believes that Beverages and more! is unlikely to attract the usual liquor store problems of loitering, vagrancy, and crime and is likely to operate much in the same manner as other retail establishments in the area.

The project site is located within 500 feet (approximately 480 feet) of River Glen Elementary School. The school site is fenced and separated from the project site by intervening commercial buildings, Willow Street, and Lincoln Avenue (both of which are busy four-lane streets). The school's nearest pedestrian and vehicular access is located approximately 1,200 feet from the proposed use. Based on the significant physical separations between the subject site and the school, and the fact that children are not allowed in the proposed store without an adult, the use is not expected to disturb the school or attract unattended school children. Based on this analysis, staff concludes that the proposed use will not adversely affect the school.

The Beverages and more! facility will share a parking lot with other commercial uses on the project site. Residential uses are located immediately adjacent to this parking lot: an apartment building is located to the west adjacent to the rear property line and a legal non-conforming Victorian-era, single-family house is sandwiched between commercial buildings to the north of the project site. Buffering between the commercial parking lot and the adjacent apartment building includes four feet of landscaping and a masonry wall. The Victorian is not well-buffered from the existing Business District uses because it is located within the Business District. The project site, with its buildings oriented to Lincoln Avenue and its rear parking lot, has accommodated commercial uses for decades. In recent years, the site has included some of the most successful businesses on Lincoln Avenue and the parking lot is bustling during peak business hours. With recent approval of the Farmer's Market, the parking area has become a hub of activity on Saturday mornings as well. Given the operational characteristics of the proposed use, the orientation of the existing on-site facilities and the existing level of commercial activity on the project site, staff does not believe that adding the proposed Beverages and more! will make a noticeable difference to adjacent residents and that the proposed use will not adversely affect proximate residential uses. Staff has included conditions in the Draft Permit Resolution requiring the applicant to submit a shopping cart management plan to the satisfaction of the Director of Planning prior to commencement of the proposed use, to ensure that shopping carts are adequately controlled, and to limit loading at the rear of the site to between the hours of 6:00 a.m. and 10:00 p.m.

### *Parking and Traffic*

Staff does not believe that the proposed project will result in parking or traffic impacts. The off-sale facility is proposed to be located in a relatively small-scale tenant space in an existing building within Lincoln Avenue Neighborhood Business District. The proposal meets the parking requirements of the Zoning Code (see discussion in attached Planning Commission staff report) and involves a change of tenants in an existing retail space that is not expected to result in new traffic impacts. The tenant space in question could be occupied by a retail use that does not include alcohol sales with no discretionary approval. The intent of the significant process for approval of off-sale

uses is to allow ample public input and City Council discretion in addressing issues that are unique to the sale of liquor for off-site consumption. The traffic generation or parking demand associated with the proposed use is not unique to the sale of alcohol and would be expected to result from any successful retail business that locates in this existing tenant space.

### *Summary*

Based on the above analysis, staff concludes that the proposed Beverages and more! will not significantly impact public health or safety.

### **Findings of Overriding Public Benefit B, C and D**

Staff does not believe that any of these other findings, described on Page 5 of this report, can be made in regard to the proposed Beverages and more! The census tract in which the proposed outlet is located does not have a low population density in relation to other census tracts in the city and is not unusually configured. The proposed sale of alcoholic beverages is not incidental to a larger retail use.

### **ALTERNATIVES**

The City Council in their review of the project can take the following actions:

1. Find that one of the four mandatory findings for a making a Determination of Public Convenience or Necessity can be made and that there is a significant overriding public benefit served by the proposed off-sale of alcohol, and adopt a resolution approving the subject Conditional Use Permit and making the Determination of Public Convenience or Necessity; or
2. Find that there is no overriding public benefit served by the proposed off-sale of alcohol and uphold the Planning Commission's decision to deny the subject Conditional Use Permit, and not make a Determination of Public Convenience or Necessity.

### **PUBLIC OUTREACH**

Approximately 100 people attended the community meeting held for this project at the Willow Glen Elementary School on March 2, 2006. A majority of those in attendance indicated opposition to the proposed alcohol use, expressing concern regarding the negative effect of additional alcohol sales on the surrounding neighborhood, the existing saturation of alcohol sales establishments in the area, the negative effect a chain store would have on existing wine and liquor businesses on Lincoln Avenue, increases in traffic and parking problems in the area, and the non-pedestrian character of the proposed use. Those who spoke in favor of the project emphasized the appropriateness of the proposed use and the increased vitality it would bring to the Business District, expressed concern that rejection of this use might discourage other desirable companies from considering Lincoln Avenue as a viable business location, expressed concern regarding existing vacant tenant spaces in the area, and indicated a desire to shop at the proposed Beverages and more! store.

Notices for the public hearings for the project and for this appeal were mailed to the owners and tenants of all properties located within 1,000 feet of the project site. Additionally, prior to the public hearing, an electronic on-line version of the staff report has been made available, accessible from the City Council agenda on the City's website. Staff has been available to discuss the proposal with members of the public.

HONORABLE MAYOR AND CITY COUNCIL

May 25, 2006

**Subject: CP05-068 & ABC06-004 Appeal**

Page 10

Subsequent to the Planning Commission Hearing, staff received 152 pieces of correspondence (letters and emails) regarding the proposed project. Of these, 152 were in support of the project and 47 were in opposition.

### COORDINATION

Preparation of this memorandum has been coordinated with the City Attorney's office.

### CEQA

Under the provisions of Section 15301(a), 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. Approval of the project would not result in any significant effects relating to traffic, noise, air quality or water quality.

  
JOSEPH HORWEDEL, ACTING DIRECTOR  
Planning, Building and Code Enforcement

#### Attachments:

- Location Maps
- Planning Commission Staff Report & Attachments
- Notice of Appeal and Associated Letter
- Correspondence received subsequent to the Planning Commission Hearing
- Draft Resolution
- Plans

cc: Applicant/Appellant

**DRAFT RESOLUTION NO.**

Resolution of the City Council of the City of San Jose approving a Conditional Use Permit and 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 vacant retail establishment located in the Lincoln Avenue Neighborhood Business District.

**FILE NO. CP05-068 & ABC06-004**

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 Jose Municipal Code, on December 1, 2005, an application (File No. CP05-068) was filed for a Conditional Use Permit and on January 27, 2006 a request for a Determination of Public Convenience or Necessity (ABC06-004) for the purpose of the off-sale of liquor, beer and wine and establishing a public drinking establishment (beer and wine tasting), on that certain real property (hereinafter referred to as "subject property"), situate in the CP Commercial Pedestrian and the R-M Residence Zoning Districts, located at 1133 Lincoln Avenue, 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 April 26, 2006, the Planning Commission denied the application, from which decision the property owner has 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, 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, "Beverages & more!" dated November 28, 2005 last revised January 18, 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 City Council;

NOW, THEREFORE:

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

1. The subject site is located within the CP Commercial Pedestrian and R-M Residence Zoning Districts.
2. This site has a designation of General Commercial and Medium Low Density Residential (8.0 DU/AC) on the adopted San José 2020 General Plan Land Use/Transportation Diagram. Commercial uses such as the proposed retail store are consistent with the General Commercial designation. The parking lot is located within the area designated as Medium Low Density Residential (8.0 DU/AC). General Plan policy specifically indicates that any developed parcel of two acres or less is deemed to be in conformance with the General Plan regardless of its land use designation. The subject property is less than a half an acre in size and is fully developed. No physical expansion of the existing structure is proposed.
3. Under the provisions of Section 15332, In-Fill Development, 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. The proposal is consistent with the General Plan and Zoning District. The subject site is less than five acres and is surrounded by urban uses. Approval of the project would not result in any significant effects relating to traffic, noise, air quality or water quality. The site can be adequately served by all required utilities and public services.
4. The subject site consists of two parcels. Combined, the two parcels comprise 1.12 gross acres.
5. The subject site is located within the Lincoln Avenue Neighborhood Business District, a commercial district with a mix of retail, personal service, restaurant/food service, home improvement and office uses that draws customers from the surrounding neighborhood and the greater San Jose area.
6. Access to the site's parking is provided through the adjacent properties, from Willow Street via a full-access driveway and from Lincoln and Meredith Avenues via one-way, in-only driveways.
7. Non-commercial uses adjacent to the site include a two-story apartment complex to the west and a Victorian-era, single-family house, now entirely surrounded by the Business District, located adjacent to the site to the north.
8. The project site is developed with an approximately 20,500 square-foot commercial building oriented to the Lincoln Avenue street frontage. This multi-tenant building houses a Subway Restaurant, Aqui Restaurant, Blockbuster Video and second-floor office uses.

9. A 61-space parking lot located behind the building is integrated with the adjacent parking lot to the south, but separated by fencing from the commercial lot to the north. The lot is bordered on the west by landscaping and a masonry wall and on the north by metal fencing. The southerly edge of the parking lot is integrated with the parking lot for the adjacent Garden Theatre site.
10. A seasonal Farmer's Market, approved by the Director of Planning in 2005 (Special Use Permit File No. SP05-029) is held in the rear parking lot of the subject site on Saturday mornings between 7:00 a.m. and 1:30 pm.
11. Beverages & more! proposes a 4,865-foot retail store for the sale of liquor, wine, beer, gourmet food and accessories. The applicant has indicated that this will be a 'boutique' store that will specialize in selling unique and 'difficult to find' spirits/liquors, wines and beers. Company policy prohibits the sale of cigarettes and products more readily abused, such as 40-ounce malt liquor, low-priced screw-top fortified wines, and pints or half pints of spirits. Company policy also prohibits items and facilities that encourage loitering or attract minors such as video or pinball games, pornographic videos and magazines, pay telephones, lottery tickets, and newspaper stands.
12. In order to assist customers in selecting beer and wines for purchase, the applicant is proposing a 74 square-foot enclosed tasting area. Tasters will be limited to a small number of one-ounce samples. Only adults 21 years or older will be permitted within the enclosed tasting area.
13. The tenant space includes doors at both the front and rear of the building. Customers will be able to enter and exit the store from the pedestrian sidewalk on Lincoln Avenue or from the rear parking lot. No additional building square footage is proposed, but modifications are proposed to the front and rear façades. These include a new exit door at the front of the building and removal of store front windows and doors at the rear of the building and installation of a new roll-up loading door.
14. The store proposes to operate Monday through Friday from 10:00 a.m. until 9:00 p.m., from 9:00 a.m. to 9:00 p.m. on Saturday and on Sundays from 10:00 a.m. until 7:00 pm. Extended hours would be implemented during the holiday season, but in no case would the facility operate past midnight.
15. Section 20.90.210 of the Zoning Code specifies that no building or use instituted prior to November 10, 1965 is required to meet current parking requirements, unless a substantial change in the structure, land or use has occurred. The Code defines "substantial change" as a forty percent difference in the amount of parking spaces required, under current regulations, for the uses that existed on the site in 1965 and the amount of parking spaces required for the all uses proposed today. The existing building was implemented on the site prior to 1965, and the site is considered legal non-conforming for parking. In 1965, the site included retail, personal service and office uses with a parking requirement (by today's Zoning Code standards) of 82 spaces. Over the years, changes in use have occurred as restaurants were added to the site. At this point, the existing uses, together with the current proposal for retail sales with wine tasting, result in a total parking requirement for the site of 129 spaces. This change is less than 40

percent (36 percent) based on the formula prescribed in the Zoning Code; consequently, a substantial change has not occurred on the site and no additional parking spaces are required (see attached parking analysis).

16. An alternate parking arrangement is required because a portion of the existing parking facilities is situated on a separate parcel that adjoins the parking lot.
17. 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.
18. The project site is located approximately 480 feet from the River Glen Elementary School site. The school site is fenced and separated from the project site by intervening commercial buildings, Willow Street, and Lincoln Avenue (both of which are busy four-lane streets). The school's nearest pedestrian and vehicular access is located approximately 1,200 feet from the proposed use.
19. The Police Department memorandum indicates that the project site is not located within an area of high crime, but that the area does have an over-concentration of existing liquor licenses.
20. 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 because the site is located in an over concentrated area.
21. The site is not located in an area with a high number of calls for police service or a high crime rate. The site is not located in an existing Project Crackdown /Weed and Seed Area. 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.
22. The proposed use would not lead to the grouping of four locations that have off-sale liquor licenses.
23. The proposed use is located within five hundred feet of a school and is within 150 feet of residentially zoned properties
24. The majority of the proposed use on the site would be alcohol sales.
25. Upon an appeal, Title 6 allows the City Council to make a Determination of Public Convenience or Necessity for a proposal that does not meet all of the required factual findings, if the Council makes a finding of significant and overriding public benefit.
26. Beverages and more! was recently named "reader's choice" in the "Liquor/Wine Store" category of the 2006 Mercury News "Best of Silicon Valley" list and was included in the list's "Hall of Fame" as a businesses achieving that distinction for three years or more. Steve McLaren, co-founder of Beverages and more!, has indicated that 11,593 households that are regular customers of his stores reside within a 3-mile drive time of the proposed Lincoln Avenue location and that members of these households have shopped in a Beverages and more! store 44,314 times in the past year. He has also indicated that 4,448 customer households reside in the Willow Glen zip code in which the store is proposed to be located (95125). The closest

existing Beverages and more! facility is located at the southeast corner of Camden and Union Avenues, in a unincorporated area of Santa Clara County. The public correspondence for this project includes numerous comments from existing customers who indicate that the proposed Lincoln Avenue store would be more convenient as a shopping location than the existing Camden store.

27. Beverages and more! has shown an unusual willingness to adjust its operation to fit local conditions. The “boutique” store is proposed to be located in an existing vacant tenant space that reflects the scale of the existing Business District; the 4,865 square foot space is between one half and one third the size of the typical Beverages and more! (10,000-12,000 square feet). Unlike other retailers who approach site selection with fairly rigid requirements that often eliminate Lincoln Avenue as an option, Beverages and more! has shown a willingness to invest in this location despite difficulties associated with limited space, shared parking and the need to provide dual customers entrances at opposite sides of the store.
28. The Office of Economic Development and numerous members of the community have expressed that it is not advisable to turn away retailers willing to work within the existing NBD setting, that it could send the wrong message to other prospective tenants and discourage future investment.
29. The Office of Economic Development has indicated that the Lincoln Avenue Business District (NBD) has recently lost several retail tenants to offices or personal service uses, that vacancies have increased and that strong new retailers like Beverages and more! are needed. They have advised that a well-known retailer like Beverages and more! has the potential to increase the visibility of the NBD through its marketing campaign, attract new customers to the Business District, generate the foot traffic that drives sales for existing businesses, eliminate the potential for yet another office tenant in the wrong spot, and increase investment by others. The Willow Glen Business and Professional Association, in a letter from its Executive Director, Norma Ruiz (see attached), has indicated that the proposed Beverages and more! is in alignment with the Association’s strategic vision for the Business District. The letter points out that the tenant space in question has been difficult to lease, that the District has been slowly losing prime retail space to service businesses and that retail uses of this type are needed to create “an economically strong pedestrian-friendly business district”.
30. The fact that Beverages and more! is not locally-owned, does not diminish its potential for enhancing the vitality of the Lincoln Avenue Neighborhood Business District. The City’s Economic Development staff have pointed out that a mix of “chains” and locally-owned businesses is positive for the overall vitality of the Lincoln Avenue Business District. They point to Downtown Los Gatos as an example of a vital shopping district that includes a mix of national chains and locally-owned businesses, and to Los Altos and Saratoga, as examples of much less vigorous business districts that consist entirely of local businesses. In regard to competition with existing businesses, Economic Development staff have indicated that Beverages and more! has a history of working well with other beverage stores. They have reviewed data that suggests Beverages and more! tends to expand the market and gives other businesses the opportunity for building market niches.

31. Spencer Horowitz, a Willow Glen resident, small business owner and chair of the Small Business Development Commission, points out in an editorial piece for the Willow Glen Resident that Beverages and more! is pursuing the opposite of a big box retail chain strategy. He notes that Beverages and more! has abandoned the proven model of locating a large-format store in a conventional shopping center near a freeway on-ramp -- the type of strategy that sucks the life out of traditional business districts like Lincoln Avenue -- and has downsized its typical store to fit into a traditional business district. In doing so, he points out that Beverages and more! will be filling an empty store front, encouraging property owners to risk property improvements, and increasing the foot traffic that benefits the Business District as a whole.
32. The Beverages and more! retail store is proposed to operate differently than a traditional liquor/convenience store and is not expected to result in the types of impacts typically associated with a liquor store. At 4,865 square feet, the proposed retail space is not significantly larger than the traditional liquor store; however, unlike most liquor stores, Beverages and more! specializes in selling unique and difficult to find spirits/liquors, wines and beers, as well as gourmet foods and accessories. Unlike traditional liquor stores, Beverages and more! prohibits the sale of cigarettes and alcohol products that are often problematic, such as 40-ounce malt liquor, low-priced screw-top fortified wines, and pints or half-pints of spirits. Company policy also prohibits items and facilities that encourage loitering or attract minors, such as video or pinball games, pornographic videos and magazines, pay telephones, lottery tickets, and newspaper stands. Customers under 21 years of age are not allowed in the store unless accompanied by an adult. The store proposes to operate Monday through Friday from 10:00 a.m. until 9:00 p.m., from 9:00 a.m. to 9:00 p.m. on Saturday and on Sundays from 10:00 a.m. until 7:00 p.m. Extended hours are proposed to be implemented during the holiday season, but in no case would the facility operate past midnight. Given the market focus and operational characteristics of the proposed use, staff believes that Beverages and more! is unlikely to attract the usual liquor store problems of loitering, vagrancy, and crime and is likely to operate much in the same manner as other retail establishments in the area.
33. The project site is located within 500 feet (approximately 480 feet) of River Glen Elementary School. The school site is fenced and separated from the project site by intervening commercial buildings, Willow Street, and Lincoln Avenue (both of which are busy four-lane streets). The school's nearest pedestrian and vehicular access is located approximately 1,200 feet from the proposed use. Based on the significant physical separations between the subject site and the school, and the fact that children are not allowed in the proposed store without an adult, the use is not expected to disturb the school or attract unattended school children.
34. The Beverages and more! facility will share a parking lot with other commercial uses on the project site. Residential uses are located immediately adjacent to this parking lot: an apartment building is located to the west adjacent to the rear property line and a legal non-conforming Victorian-era, single-family house is sandwiched between commercial buildings to the north of the project site. Buffering between the commercial parking lot and the adjacent apartment building includes four feet of landscaping and a masonry wall. The Victorian is not well-buffered from the existing Business District uses because it is located within the Business District. The project site, with its buildings oriented to Lincoln Avenue and its rear parking lot, has accommodated commercial uses for decades. In recent years, the site has included some of

the most successful businesses on Lincoln Avenue and the parking lot is bustling during peak business hours. With recent approval of the Farmer's Market, the parking area has become a hub of activity on Saturday mornings as well. Given the operational characteristics of the proposed use, the orientation of the existing on-site facilities and the existing level of commercial activity on the project site, staff does not believe that adding the proposed Beverages and more! will make a noticeable difference to adjacent residents and that the proposed use will not adversely affect proximate residential uses.

35. Conditions in this Resolution require the applicant to submit a shopping cart management plan to the satisfaction of the Director of Planning prior to commencement of the proposed use to ensure that shopping carts are adequately controlled and to limit loading at the rear of the site to between the hours of 6:00 a.m. and 10:00 p.m.
36. The off-sale facility is proposed to be located in a relatively small-scale tenant space in an existing building within Lincoln Avenue Neighborhood Business District. The proposal meets the parking requirements of the Zoning Code (see discussion in attached Planning Commission staff report) and involves a change of tenants in an existing retail space that is not expected to result in new traffic impacts. The tenant space in question could be occupied by a retail use that does not include alcohol with no discretionary approval. The intent of the significant process for approval of off-sale uses is to allow ample public input and City Council discretion in addressing issues that are unique to the sale of liquor for off-site consumption. The traffic generation or parking demand associated with the proposed use is not unique to the sale of alcohol and would be expected to result from any successful retail business that locates in this existing tenant space.
37. The census tract in which the proposed outlet is located does not have a low population density in relation to other census tracts in the city.
38. The census tract is not unusually configured.
39. The proposed sale of alcoholic beverages is not incidental to a larger retail use.

Based on the above stated facts, the City Council concludes and finds:

1. Based on the findings in the subsection below, the City Council hereby makes a Determination of Public Convenience and 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 would be located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility, and the proposed use is within one hundred fifty feet of an existing residence and residentially zoned property.
  - d. Alcohol sales would represent a majority of the proposed use.
  - e. 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.
2. The City Council concludes and finds, based on the analysis of the above facts in regard to the Conditional Use Permit, that:
- a. For this use is located closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, the proposed location of the off-sale of alcoholic beverages use would not result in a total of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one-thousand (1,000) foot radius from the proposed location; and
  - b. The use is located closer than five hundred (500) feet from an elementary school and is closer than one hundred fifty (150) feet from residentially zoned property; however, the building in which the proposed use is to be located is situated and oriented in such a manner that would not adversely affect such residential and school use.

The City Council finds, based on the analysis of the above facts in regards to the Alternative Parking Arrangement, that:

1. The number of off-street parking spaces provided in such parking facilities adequately meets the parking requirements of the individual buildings and uses as specified in this Chapter 20.90 of Title 20;
2. It is reasonably certain that the parking facility shall continue to be provided and maintained at the same location for the service of the building or use for which such facility is required, during the life of the building or use; and
3. The parking facility is reasonably convenient and accessible to the buildings or uses to be served.

Finally, based on the above-stated findings and subject to the conditions set forth below, the City Council finds that:

1. The proposed use at the location requested will not:
  - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
  - b. Impair the utility or value of the property of other persons located within the vicinity of the site; or

- c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences parking, loading facilities, landscaping and other development features prescribed in this Title, or as is otherwise required in order to integrate said use with the surrounding area.
3. The proposed site is adequately served:
  - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quantity of traffic such use would generate; or by other forms of transit adequate to carry the kind and quantity of individuals such use would generate; and
  - b. By other public or private service facilities as are required.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth are hereby granted. This City Council expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

## CONDITIONS

1. This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until this Resolution has been recorded with the County Recorder.
  - a. **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, but must be submitted prior to issuance of a Building Permit. **Submittal of the recording fee less than one week prior to issuance of a Building Permit will delay the Building Permit issuance** for up to one week to allow for recordation of the permit with the County Recorder. This Permit 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. **Building Permit/Certificate of Occupancy.** Procurement of a Building Permit and/or Certificate of Occupancy from the Building Official for the structures described or contemplated under this permit shall be deemed acceptance of all conditions specified in this permit and the applicant's agreement to fully comply with all of said conditions. No change in the character of occupancy or change to a different group of occupancies as described by the "Building Code" shall be made without first obtaining a Certificate of Occupancy from the Building Official, as required under San Jose Municipal Code Section 24.02.610, and any such change in occupancy must comply with all other applicable local and state laws.
4. **ABC Permit.** Obtainment of an ABC License is evidence of acceptance of all conditions specified in this document and the applicant's intent to fully comply with said conditions.
5. **Revocation.** This Planned Development Permit is subject to revocation for violation of any of its provisions or conditions.
6. **Conformance with Plans.** Construction and development shall conform to approved plans entitled, 'Beverages & more!', dated November 28, 2005, last revised on January 18, 2006, on file with the Department of Planning, Building and Code Enforcement and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
7. **Fire Department.** Compliance with all applicable fire and building codes and standards relating to fire and panic safety shall be verified by the Fire Department during the Building Permit process, including but not limited to;
  - a. The owner/tenant is responsible to insure that the Certificate of Occupancy matches the use of the space as defined in Chapter 3 and Table 3A of the 2001 California Building Code. The owner/tenant is responsible to post the Certificate of Occupancy in a conspicuous place in accordance with California Building Code 109.5.
8. **Off-Sale of Alcohol.** This Conditional Use Permit includes approval for the off-sale of alcohol, including beer, wine and liquor. Off-sale of alcohol shall conform to approved Department of Alcohol Beverage Control permit(s).
9. **Alcohol Consumption.** The sale of alcohol for on-site consumption shall be limited to beer and wine tasting only in conformance with the approved plans. On-site alcohol consumption shall conform to an approved California Department of Alcohol Beverage Control permit.
10. **Tasting Area.** The beer and wine tasting area shall be limited to 75 square feet, as shown on the approved plan set. No minors shall be allowed in the tasting area. Only adults of 21 years of age (or older) shall be allowed in the tasting area.
11. **Compliance With Local and State Laws.** The subject use shall be conducted in full compliance with all local and state laws. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code. The Permit shall be subject to revocation if the subject use is conducted in such a manner as to cause a nuisance.

12. **Operations Plan.** Loitering is prohibited on or around the premises or the area under the control of the applicant (licensee(s)). No alcoholic beverages shall be consumed on any property adjacent to the premises over which the project developer/applicant has control. The project developer/applicant shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control.
13. **Loading.** Loading from the rear of the store shall be limited to between the hours of 6:00 a.m. and 10:00 p.m.
14. **Stop Program.** The proposed use shall maintain a liaison with the San Jose Police Department and shall participate in the STOP program.
15. **Liability.** The Provider shall identify and hold harmless the City and any officers and employees thereof against and from all claims, loss, liability, damages, judgments, decrees, costs, and expenditures which the City of such officer or employee may suffer, or which may be recovered from or obtainable against the City of such officer or employee, proximately caused by and growing out of or resulting from the exercise of the Permit.
16. **Noise.** Noise levels associated with this use shall not exceed 55 db DNL at the adjacent residential property line.
17. **Hours.** This facility shall be limited to operation between the hours of 6:00 am to Midnight, seven days a week, unless the City approves a Conditional Use Permit for other hours of operation.
18. **Noise.** Noise generated by the use approved in this permit shall not exceed 55 db DNL at the nearest residential property line.
19. **Signs.** No signs are approved at this time. All proposed signage will be reviewed under a separate Sign Permit.
20. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
21. **Tree Removals.** No tree larger than 56 inches in circumference, at a height of 24 inches above the natural grade slope, shall be removed without a Tree Removal Permit issued by the Director of Planning.
22. **Roof Equipment.** All roof equipment shall be screened from view.
23. **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 unless designated on the approved plan set. Trash areas shall be maintained in a manner to discourage illegal dumping.

24. **Outside Storage.** No outside storage is permitted.
25. **Lighting.** On-site lighting shall use Low-Pressure Sodium fixtures.
26. **Storm Water Stenciling.** All drain inlets shall be labeled “No Dumping—Flows to Bay.” Please contact the City of San Jose, Department of Public Works, at (408) 277-5161 to obtain free stencils.
27. **Off-site, Alternating Parking.** This proposed use is allowed based on the off-site parking shown on the project plans. The applicant shall notify the Director of Planning should this off-site parking become unavailable to serve the use proposed in this Permit and shall establish that adequate parking is available to meet the Zoning Code Parking requirements or shall cease the proposed use.
28. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
29. **Permit Expiration.** This Conditional Use Permit shall automatically expire two years from and after the date of adoption of the Resolution by the Planning Commission, or by the City Council on appeal, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment in accordance with Title 20 to extend the validity of this Permit for a period of up to but not exceeding one (1) year; provided, however, that no more than two (2) such term extensions are approved. The Permit Adjustment must be approved prior to the expiration of this Permit.
30. **Revocation, Suspension, Modification.** This Conditional Use Permit 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 Conditional Use Permit 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.

In accordance with the findings set forth above, a Conditional Use permit to use the subject property for said purpose specified above is hereby **approved** and a Determination of Public Convenience or Necessity **can** be made.

PASSED FOR PUBLICATION of title this 13<sup>th</sup> day of June 2006, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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RON GONZALES  
Mayor

ATTEST:

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LEE PRICE, MMC  
City Clerk