



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Stephen M. Haase

SUBJECT: SEE BELOW

DATE: September 16, 2004

Approved: _____

Date: _____

9/17/04

COUNCIL DISTRICT: 5

SUBJECT: CP04-046. APPEAL OF THE PLANNING COMMISSION'S DECISION TO APPROVE A CONDITIONAL USE PERMIT IN CONJUNCTION WITH AN ALCOHOL BEVERAGE CONTROL EXCEPTION TO ALLOW FOR THE OFF-SALE OF ALCOHOL AS AN ANCILLARY USE TO A FULL SERVICE GROCERY STORE LOCATED ON THE NORTH EAST CORNER OF JACKSON AVENUE AND MCKEE ROAD.

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council uphold the Planning Commission's approved Conditional Use Permit (CUP) and ABC Exception to allow the off-sale of alcoholic beverages as an ancillary use to a full service grocery store.

BACKGROUND

The applicant, Chavez Super Market, filed a Conditional Use Permit (CUP) application on May 17, 2004, to allow the off-sale of alcoholic beverages as an ancillary use to a full service grocery store. The proposed site is located in the CG General Commercial Zoning District which allows retail sales of goods and merchandise by right. However, the proposed ancillary sale of alcoholic beverages requires the approval of a Conditional Use Permit.

The Planning Commission approved the subjected Conditional Use Permit on July 14, 2004 with a vote of 4-1-1 (Pham opposed, James absent, Dhillon abstained). The Commission noted that the convenience for these grocery store customers of the ancillary sale of alcohol would outweigh the slight additional risk of new off-sale venue, but that the permit conditions regarding limited alcohol sales area would help ensure the use stays ancillary, and that a new supermarket for the Latino community would be a tremendous benefit for the surrounding neighborhood. The

Commission's approval of the permit included a recommendation to consider modifying the current Council Policy to increase the required distance from schools to new off-sale locations from 500 feet as indicated in the current Policy to 1,000 feet, in that a greater distance would generally be more appropriate to address concerns regarding youth alcohol issues.

Testimony was provided at the public hearing by four opponents to the proposed use, which included the testimony from Mr. Bill Kugler, Deputy Superintendent for the East Side Union High School District, and Sheriff Laurie Smith of the Santa Clara County Sheriff's Department. Concerns addressed by the above opponents regarding the off-sale of alcohol, as an ancillary use to a full service grocery store, included; issues with alcohol use by students at Independence High School, potential increase of crime, and the over concentration of existing off-sale venues in the area. One resident of the surrounding neighborhood, Mr. Greg Miller, also spoke against the proposed use, citing the aforementioned concerns of Mr. Kugler and Sheriff Smith.

On July 21, 2004, Dan Trinh, representing McKee Oriental Market, appealed the Commission's decision. The issues raised in the appeal are addressed in the Analysis section, below. Subsequent to the Planning Commission's decision and the appeal of the Conditional Use Permit, the Police Department has reconsidered its previous comment that off-sale of alcohol as an incidental use at this full-service market would not result in any significant additional law enforcement issues, generally in response to community protest. In a letter dated July 29, 2004, addressed to the California Department of Alcoholic Beverage Control (ABC), the Police Department indicates it is filing a formal protest against the issuance of an ABC license to the Chavez Market for off-sale of alcohol, specifically citing the number of letters received in opposition to the project.

A subsequent memorandum from the Police Department, dated, August 31, 2004, states that the original statistical analysis is correct and that the protest to the ABC was in response to the unusual number of protest letters that were received. The memorandum also states that, and indicated by staff below, at the Planning Commission hearing only four people spoke in opposition to the use and indicates that the apparent strong community opposition may not justify the prior Police Department protest to the ABC and they are now taking a neutral position on the issue. Representatives from the Police Department will be present at the City Council hearing to address their new concerns regarding the proposed use.

Project Description

The project site is located at the northeast corner of Jackson Avenue and McKee Road at 2327 McKee Road. The site is currently developed with various commercial uses and a surface parking lot. Under this permit, the off-site sale of alcoholic beverages would be a new use allowed only for the subject grocery store (Chavez Super Market) and not for other tenants within the surrounding retail center without existing ABC permits. The existing Oriental Market on-site is currently permitted for off-sale of alcohol. No additional building square footage may be constructed as part of this project, and no extended hours of operation are included in this proposal.

GENERAL PLAN CONFORMANCE

The proposed commercial use, including the sale of alcohol, is consistent with the San José 2020 General Plan Land Use/Transportation Diagram designation of Neighborhood/Community Commercial. The site is currently developed with a commercial shopping center which has been designed to be compatible with existing and nearby residences.

ENVIRONMENTAL REVIEW

The Director of Planning has determined that this project is exempt from environmental review under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act in that the use is to locate in an existing building/facility and no new construction or expansion is proposed.

PUBLIC OUTREACH

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.

The Chavez family, held a community meeting on September 9, 2004, at which approximately 25-30 people attended, expressing support for the proposed full service market. No one attended who expressed any opposition at the community meeting.

ANALYSIS

The analysis section of this report focuses solely on the specific issues identified for the appeal. Please see the original staff report (attached) for a more complete discussion of the proposal.

In accordance with Section 20.100.280 of the San Jose Municipal Code, the City Council hearing on the appeal is a *de novo* hearing. The Council may deny or approve the application; or modify or revisit any of the conditions of approval that the Planning Commission put in place. The Council may attach any additional conditions or modifications to the project that it deems appropriate.

- 1 **Appeal:** *"The crime index for the area is nearly twice that of the City average.*

Staff Response: A memorandum dated July 2, 2004, from the Police Department staff determined that the subject site is located in an area with an above average rate of reported index crimes. However, the Police Department memorandum notes that there have been just 4 police contacts since June 2003, and that the Department does not object to the issuance of the Exception. In addition, staff believes that the renovation of a large portion of the site occurring through the Kohl's project will have a beneficial impact in the vicinity and that

sale of alcohol at this full-service grocery store will not generate additional law enforcement problems. The Police Department on July 29, 2004, has submitted a protest letter on the issuance of a new off-sale liquor license at this location to the Department of Alcoholic Beverage Control, citing the numerous protest letters received. However, the protest letter contains the same Census Tract and Police Beat statistics indicating 4 police contacts from this site in the past year, during which time the McKee Oriental Market was in operation.

- 7 **Appeal:** *“Of the 253 properties in the 500’ radius, over 150 have protested against the alcohol coming into the neighborhood and over 80% of the tenants at the center have protested against the permit.”*

Staff Response: Staff’s analysis and report to the Planning Commission with recommendations for approval was finalized and distributed on July 8, 2004. Planning staff received a flyer that was distributed to the surrounding neighborhood accompanied by several protest letters in opposition to the Conditional Use Permit and Liquor License Exception on July 9, 2004. The flyer distributed by the protestant requested help from the community to stop crime, violence, gangs and alcohol in the neighborhood. The subject protest letters were distributed to the Planning Commissioners at the July 14, 2004 hearing for their review and consideration. Copies of the protest letters are attached to this memorandum as supplemental information (see appellant’s opposition packet). Copies of an additional set of protest letters addressed to the California Department of Alcohol Beverage Control (ABC) dated generally between August 10 and August 12, 2004, have also been received. Many of these form protest letters headed “Protest Against Alcoholic Beverage License Application” contain repetitive identical statements and seem to reflect a misconception among many who signed that the Chavez Market proposal is for a bar and/or liquor store.

Staff has also received a large number of letters and petitions (over 150) in support of the Chavez Market’s efforts. One letter dated August 17, 2004, from the local dentist’s office of Roberto J Sepulveda, notes that he did sign the petition in support of appealing the Planning Commission decision, but was confused as to the type of store selling the alcohol. He notes that he had previously believed the proposal to be for a liquor store. Once he found out it is to be part of a full service grocery store he is now in support of the requested use by the Chavez family. A letter from the on-site McDonald’s Restaurant was also submitted which noted that they do not object to the Chavez Market. A letter from Jim Cunneen, the president and CEO for the San Jose Chamber of Commerce supporting the Chavez Supermarket is also attached.

Additional letters have been recently submitted which reference and support the responsible and courteous operation of the other three Chavez Supermarkets in the Bay area from the San Mateo County Sheriff’s Department, The San Mateo County Clerk – Recorder, and a parish priest in Menlo Park (see applicant’s supporting packet).

3. **Appeal:** *“While staff report indicated there are only four (4) alcohol venues in the area, in actuality, there are near 4 TIMES that (15 altogether).”*

Staff Response: There are currently two on-sale and two off-sale licenses within the subject census tract, which the project is located. An additional off-sale license was issued for a property directly across McKee Road from the subject site, in a different census tract. Therefore, there are a total of five licenses within the immediate vicinity of the proposed grocery store location. Staff notes there are an additional seven licenses issued for off-sale within a half mile of the subject site. However, the closest of these is in excess of one-quarter mile from the subject site.

Staff recognizes that there are other licenses issued within the larger vicinity of the proposed site. However, the previous analysis conducted by staff, which ultimately resulted in a recommendation of approval, determined that an additional facility to sell alcohol for consumption off site as an ancillary use to a full-service grocery store would not result in any significant change in law enforcement activity. Despite the submitted materials and information regarding other such uses within the greater vicinity of the site, staff has determined that the findings required to recommend approval of the proposed use can be upheld, in that such off-sale use, ancillary to a full service grocery store and the inherent control measures proposed by the applicant as are used in operation of other Chavez Markets in the Bay Area to prevent sales to minors and deter loitering, would not pose a detriment to the surrounding neighborhood.

4. **Appeal:** *“District 5 and this census tract is considered by San Jose City Council Resolution 67681 as “unduly concentrated.”*

Staff Response: As indicated in staff’s report to the Planning Commission the proposed use is within 500 feet of two other businesses with existing off-sale licenses (Stop N Save and McKee Oriental Market) within an existing commercial shopping center located on a 9.5 gross acre site. Additionally, there are two restaurants on site which have licenses for on-site sale of alcoholic beverages only. Planning staff has determined that allowing an additional market to sell alcohol for consumption off-site as an ancillary use to a full-service grocery store located on a large commercial site would not significantly contribute to an excess concentration of such establishments in the area and would not have an adverse effect on the nearby residential uses.

Additionally, the previously mentioned memorandum from the Police Department states that the subject site is located in Census Tract 5037.08 for which the ratio of off-sale retail licenses to population does not currently exceed the ratio of off-sale retail licenses to population in the county in which the premises is located, although, as explained in the staff report to the Planning Commission, the original census tract was one of those identified as “unduly concentrated.” The Council Policy does provide that off-sale of alcohol may still be found to be appropriate and to serve the public interest in the context of a full-service grocery store. The Chavez Super Market is proposed as a 20,000 square foot full-service market with limitations on shelf area within the store which can display alcohol.

5. **Appeal:** *“Independence High School is 520' from the center (instead of 500' as required by the city...however, ABC uses a 600' standard.) Furthermore, the principal of the high school has protested against the alcohol permit. Additionally, Mr. Kugler, Assistant Superintendent of the East Side Union High School District protested and testified that alcohol contributes to 30% of the disciplinary problems at Independence High School.”*

Staff Response: Although the subject site is located approximately 520 feet from the nearby Independence High School, “as the crow flies”, walking distance from the nearby school to the store front of the proposed location for the Chavez Super Market is in excess of 1,500 feet. Therefore, staff finds that the subject grocery store location, distance and building orientation from the nearby high school are compatible with the Council Policy and that off-sale of alcohol at the proposed location would not adversely affect students and activity at the school.

Although testimony at the Planning Commission hearing indicated that 30% of disciplinary problems at Independence High School were related to alcohol use, in response to questions posed by several Commissioners, no evidence was provided that suggested or confirmed that the existing off-sale uses, including McKee Oriental Market, located within and surrounding the subject shopping center were contributors to the sale of alcohol to minors, or that school discipline concerns could be linked to student alcohol purchase at the site. Commissioners Platten and Campos commented that the community should focus concern for availability of alcohol to youth on venues which are more likely to target youth, like mini-markets and liquor stores. Commissioner Zito expressed that the applicant’s sense of responsibility of off-sale of alcohol and that information about the store’s ID and birthdate recordation policies and staff training program for responsible alcohol sale was a key element for the Commission’s decision to approve the requested use.

6. **Appeal:** *“The unprecedented appearance and protest from Sheriff Laurie Smith to the detrimental nature of more alcohol to this neighborhood.”*

Staff Response: Testimony was recorded from Sheriff Laurie Smith at the July 14, 2004, public hearing and was taken under consideration by the Planning Commission prior to their vote to approve the requested Conditional Use Permit and Liquor License Exception.

7. **Appeal:** *“There is a playground at McDonald's which is 60' from the front door of the proposed market.”*

Staff Response: As noted above there is an existing off-sale establishment (McKee Oriental Market) located in the same shopping center and on the same lot, adjacent to the proposed location of the future Chavez Super Market. The Police Department memorandum of July 2, 2004 cited that the existing off-sale use and the additional ancillary sale of alcohol for off site consumption as part of a full service grocery store has not been and is not expected to be a law enforcement problem at this location.

The subject McDonald's is located in excess of 200 feet from the front entrance to the proposed location of the new grocery store, and the associated play area is situated on the opposite side of the McDonald's establishment and oriented away from the other commercial uses on the subject site. Staff believes that a full-service grocery store with ancillary off-sale of alcoholic beverages would not pose a detriment to these existing uses on the site or the surrounding neighborhood.

Additionally, as noted above, the McDonald's restaurant sent a letter taking a neutral position on the Chavez Supermarket and the pending permit.

8. **Appeal:** *"The neighborhood to the north of the property is 70' away from the property line."/*
"The neighborhood to the east shares the same property as the center."

Staff Response: The residential neighborhood to the north of the subject property is separated from the site by a 90 foot public right-of-way (street) and separated from the single-family attached residential development to the east by a 6 foot tall masonry wall. Although the use is located in close proximity to residentially-zoned properties, as stated previously, the site is designed in a manner in which the entrances to the site and proposed grocery store are not oriented towards the adjacent residences. The site is not directly accessible by the adjacent residential properties, with the walking distance from the proposed store entrance to the nearest residence in excess of 600 feet. Therefore, staff has determined that the proposed off-sale use at an additional grocery store would not be detrimental to adjoining residential areas, and is an appropriate addition to this larger commercial site.

9. **Appeal:** *"There are numerous medical facilities to the South that have protested this as well."*

Staff Response: The subject protest letters were distributed to the Planning Commission at the July 14, 2004 hearing for their review and consideration. Copies of the protest letters are attached as supplemental information for the Council's review.

10. **Appeal:** *"Even with a modest sales projection of \$20 million annually, 15% of sales equates to \$3 million of alcohol sales to the neighborhood. This number is horrific! However, if Chavez Supermarket is representing that it only represents 1% of gross sales (which is still approximately \$200,000 annually,) then let's "conditioned" or stipulate the sales of alcohol not to exceed \$200,000 annually. I can guarantee you they will NEVER agree to this as they know that the sales of alcohol will generate millions of dollars to the store!"*

Staff Response: The subject Conditional Use Permit has been conditioned to limit the amount of self space devoted to alcoholic products to 15%, and the applicant has indicated that likely shelf area would be even less. Staff has determined that limiting the amount of self space to 15% for alcoholic beverages will ensure the subject location does not become a liquor store, which will limit problems typically associated with a full liquor store.

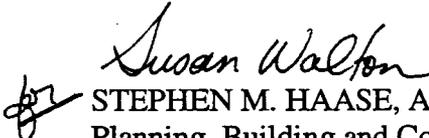
The amount of revenue generated from retail sales of goods and merchandise is not considered a land use issue analyzed through staff's planning and Council Policy review for use permits as required by the City of San José Municipal Code.

COORDINATION

Planning staff's review of the proposed use was coordinated with the, Police Department, and the City Attorney.

CONCLUSION

Planning staff recommends that the City Council uphold the Planning Commission's approval of the subject Conditional Use Permit and Liquor License Exception, based upon staff's analysis of the project and response to the appeal, with the findings discussed above and within the attached staff report dated July 14, 2004.


STEPHEN M. HAASE, AICP DIRECTOR
Planning, Building and Code Enforcement

Attachments:

- Planning Commission Resolution No. 04-065.
- Planning Commission Staff Report for July 14 hearing
- Police Department Memorandum of July 2, 2004
- Police Department letter of Protest to ABC dated July 29, 2004
- Police Department Memorandum of August 31, 2004
- Location map
- Appellant's Opposition Packet
- Applicant's Supporting Packet

cc: Mr. Humberto Chavez, 1157 Tennyson Road, Hayward CA 94544
Mr. Ryan Habris, 144 Third Street, San Jose CA 95112