SUPPLEMENTAL

COUNCIL AGENDA: 12/18/07
ITEM: 9.2

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR, CITY COUNCIL, AND REDEVELOPMENT AGENCY BOARD

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: December 6, 2007

Approved

Date 12/7/07

COUNCIL DISTRICT: Citywide
SNI AREA: All

SUPPLEMENTAL MEMORANDUM

SUBJECT: CURRENT PROCESS AND PRACTICE INVOLVED IN THE PERMITTING OF ENTERTAINMENT AND DRINKING ESTABLISHMENTS

BACKGROUND

On November 14, 2007, Councilmembers Liccardo and Williams presented a memorandum to the Rules Committee requesting to add to the Council agenda an item related to a Zoning Overlay in Downtown (see Attachment 1, memorandum dated 11/14/2007). As a result of the discussion, staff was directed prepare a memorandum with information on the following items:

1. The current process for the consideration of Conditional Use Permits for entertainment uses and drinking establishments;
2. The current process for the renewal of Conditional Use Permits for entertainment uses and drinking establishments;
3. Staff's current efforts related to the implementation of Council Policy 6-23, Guidelines for Evaluation of Nightclubs and Bars (see Attachment 2); and
4. The current process for the review and issuance of entertainment business permits and entertainment ownership/management licenses.

This memorandum is intended to provide backup information for the Council in their consideration of the item related to a Zoning Overlay in the Downtown presented in a separate memorandum.

ANALYSIS

Currently, there are two processes which control the establishment of entertainment and drinking establishments. The first is a Conditional Use Permit process, which is administered by the Department of Planning, Building and Code Enforcement. The second is an Entertainment Permit process, which is administered by the Police Department. The following sections outline each of these processes.

Current Process for Conditional Use Permits for Entertainment and Drinking Establishments

The current land use regulations for entertainment establishments and drinking establishments, typically referred to by many as nightclubs and bars respectively, require that the business be located in one of the following four commercial zoning districts, CP-Commercial Pedestrian, CN-Commercial Neighborhood, CG-Commercial General, or DC-Downtown Primary Commercial, and have a Conditional Use Permit (i.e. land use permit) approved by the Director of Planning. As a point of clarification, entertainment establishments include more than just nightclubs per the definition included in Title 20[1]. The Conditional Use Permit process involves an application submitted to the Department of Planning, Building and Code Enforcement along with applicable fees to cover the processing of said applications, typically between $5,000-$6,000.

Given the nature of the projects and potential impact on surrounding uses, the City Council Policy on Public Outreach, Policy 6-30 has identified these types of project as one requiring a community meeting as well as a mailing to parties within 1,000 foot radius of the site. In addition to the community meeting, a sign is posted on the site informing the public of the application on file giving them basic information as well as contact information for City staff. In addition to the public outreach to the community through a meeting and site sign, all Conditional Use Permits are heard at a public hearing before the Planning Commission which is the decision making body for such permits. Any appeal of the Planning Commission's decision is heard by the City Council at a de novo hearing.

All applications for Conditional Use Permits for entertainment and drinking establishments go through an internal review by the several City departments/divisions, including Police, Fire, Building, Environmental Services, Transportation, Public Works, and the Redevelopment Agency. Planning staff refers the project to the aforementioned City departments/divisions when the application is submitted and the respective departments/divisions have up to 30 days from

[1] Section 20.200.350 of Title 20 defines Entertainment Establishment as "any establishment (indoors or outdoors) where entertainment, either passive or active, is provided for the pleasure of the patrons, either independent or in conjunction with any other use. Such entertainment includes but is not limited to, vocal and instrumental music, dancing, karaoke, comedy and acting.

application submittal to respond to Planning with comments. With respect to those who typically have comments on these types of applications, including Police and Fire, staff has developed a close working relationship with staff from those Departments to discuss both the project and potential conditions to be imposed on the project to address concerns.

Although it is not a requirement of the Conditional Use Permit application process, it has been the practice of staff to require a Management Plan for the proposed entertainment establishment to get a better sense of how the applicant proposes to operate the business. There currently is no standard form for how a management plan should be submitted or what at a minimum it should contain. This is something that could be discussed further as to whether it is useful to have such a plan and through what process it is most appropriate, the land use permit or the entertainment business permit.

Once the comments have been submitted back to Planning staff and the community input has been received through the community meeting and any other form such as e-mail, phone, etc., staff then fully analyzes the proposal in light of the comments, input and, applicable policies (in this case Council Policy 6-23), and develops a recommendation to the Planning Commission. The Planning Commission then holds a public hearing on the application and considers Planning Staff's recommendation as well as any input at the hearing by the applicant and other interested parties and acts on the application by either approving, denying, or deferring for further discussion before a final decision.

Police Department Referral/Review Process Related to Entertainment Uses

Planning staff requests input from the Police Department in regard to an application for a Conditional Use Permit for any entertainment land use. The Police Department reviews the application, conducting an analysis and review of the property's history in regard to crime or entertainment related issues. The Police Department also checks with the Department of Alcoholic Beverage Control ("ABC") to determine the number of ABC licenses currently issued in the area of the proposed Conditional Use Permit as well as the ABC licenses that were previously used at the applicant's address, paying specific attention to any significant criminal history.

In offering comments to Planning staff, the Police Department also weighs in on how new entertainment uses would impact Police Department resources in the downtown core due to the high number of already existing entertainment venues. To have a better assessment of the impact, the Police Department will meet with the owners of a new venue to clarify the specifics on how the entertainment use will actually occur in terms of time, place and manner. In the end, any concerns of the Police Department are memorialized in a memorandum which is sent by the Police Department to Planning staff. Planning staff will then work with the Police Department and the applicant in an effort to include terms in the Conditional Use Permit that will respond to the needs and concerns of both.

When requested to review an application for renewal of a Conditional Use Permit, the review by the Police Department goes through a very similar process; however, its position can vary based

upon the history of criminal activity at the venue and the current conditions of Police Department resources. For example, in situations where there has been a history of criminal activity associated with the venue which has gone unaddressed by the applicant, the Police Department may oppose the issuance of the renewal. In most instances, this opposition only comes following numerous attempts by the Police Department to abate the criminal activity which have been unsuccessful, including: meetings with the applicant; meetings with the business owner (if not the same as the applicant); issuance of administrative citations to the business owner; issuance of criminal citations to the business owner; reporting violations to ABC; and working with the City Attorney's Office to bring a nuisance abatement action and Unfair Business Practice action against the property owner and/or the business owner.

Current Process with Related to Renewal Of Conditional Use Permits for Entertainment and Drinking Establishments

There has been a long standing practice of including as a condition of approval in a Conditional Use Permit for entertainment or drinking uses a term of five (5) years in order to provide the ability to review the impacts, if any, of the operations, revise the conditions of the CUP accordingly, and renew said permit. The requirements for renewal state that an application must be submitted in a "timely manner" which means no sooner than 180 days or later than 90 days before the permit expiration. Should the application for renewal be submitted in a timely manner, the term of the Conditional Use Permit for which the renewal is for is automatically extended through the date of final action on the application for renewal. Should an application for renewal be submitted less than 90 days prior to the expiration of Conditional Use Permit, Section 20.100.740 of Title 20 specifies that it shall be deemed to be an application for a new Conditional Use Permit and that continuation of the use beyond the expiration of the Conditional Use Permit shall be a violation of Title 20. However, it has been the practice of staff to consider it as an application submitted in good faith and considered it in the same manner as an application submitted in a "timely manner" especially in light of the rebuttable presumption discussion below.

All that being said, the intent of the condition related to the term of the permit is not to cause the original permit to arbitrarily go away or give the City the ability to cause the use to go away without reason, but rather to check in on the use and ensure that the operation has been operating in a manner that has not created a nuisance and continues to be in harmony with the surrounding uses. This position correlates with Section 20.100.750 Renewal Findings, in Title 20, that consideration of a renewal application shall be based on a rebuttable presumption that the use as permitted by the Conditional Use Permit meets the findings required for a Conditional Use Permit including that the use will not "adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or impair the utility or value of property of other persons located in the vicinity of the site; or be detrimental to public health, safety or general welfare…"

Section 20.100.750 of Title 20 goes on to say that "the presumption shall be rebutted by any evidence of noncompliance with any condition of any prior permit or law or ordinance, or by evidence of any changed condition in the neighborhood, or by evidence that the continued use

creates a nuisance as defined in this Title (Title 20), or any impairment of public peace, health, safety, morals or welfare." Should the presumption be rebutted, the Conditional Use Permit shall not be renewed, unless the required findings for a Conditional Use Permit have been made.

Staff's current efforts related to the implementation of Council Policy 6-23, Guidelines for Evaluation of Nightclubs and Bars

City Council Policy 6-23, Guidelines for Evaluation of Nightclubs and Bars (see Attachment 2), is the policy Planning staff uses when reviewing any application for an entertainment or drinking establishment citywide. This policy was first effective in June of 1991, and revised in February of 1993. Although the policy has not been revisited for over 14 years, the purpose and guidelines for review are still relevant. The purpose of the policy is to ensure that "the use conforms to City requirements and is compatible with its surrounding neighborhood. The guidelines include the following areas for review: land use compatibility, noise, parking, and garbage and litter. Additionally, the policy also includes typical use restrictions including but not limited to age restrictions, hours of operation, occupancy limitations, noise restrictions, and term limits.

Planning staff reviews each proposal against the current policy and includes a discussion of conformance with the policy and the various guidelines (see an example of a Planning Commission report contained in Attachment 3). The discussion presents the guidelines, and describes how the proposal is or is not consistent with the policy. If the proposal is not consistent, the discussion identifies how the proposal, through conditions, can be determined to be consistent with the guidelines. Additionally, it has been the practice of staff to attach a copy of the policy to all the staff reports prepared for a project involving an entertainment or drinking establishment (e.g., nightclub or bar).

Current Process for issuance of Entertainment Business Permits and Entertainment Ownership/Management Licenses

Chapter 6.60 of Title 6 of the San Jose Municipal Code requires businesses, which provide or allow certain types of entertainment (dancing, singing, audience participation in the entertainment, or live entertainment) in conjunction with alcohol, to have an entertainment business permit issued by the Chief of Police. Chapter 6.60 also requires every individual that has an ownership interest in the business and every manager engaging in management duties for the business to each have an entertainment ownership/management license, also issued by the Chief of Police. The process to obtain an entertainment business permit or ownership/management license is initiated after approval of a Conditional Use Permit or Planned Development Permit by the Director of Planning allowing for the land to be used for entertainment purposes.

Typically, the owner will apply for an entertainment business permit and ownership/management license after approval of the Conditional Use Permit or Planned Development Permit. Occasionally, the ownership/management license is handled separately from the application for the entertainment business permit usually due to the appointment of a new manager or change in

business ownership. However, the Police Department's review process is the same. Upon application to the Police Department, the Police Department conducts an investigation into the applicant's background to determine if the individual should be issued a business permit or ownership/management license. The Police Department can only deny an applicant based on specific criteria found in Chapter 6.02 which includes, but is not limited to: felony convictions within the last five years; conviction of crimes related to the qualifications of the trade; and, revocation or suspension of the same type of permit within the last five years. If the application is denied by the Police Department's Permits Unit, the applicant is entitled to a hearing first by the Chief of Police or his delegate. If the applicant is still not satisfied, he can appeal to the Appeals Hearing Board. All hearings are open to the public.

Because, at this point, an entitlement for land use (i.e. the Conditional Use Permit) has already been approved, the focus of the entertainment permit is on the operation of an establishment, not whether or not it should be allowed. A license for an owner or manager can be denied only for specific reasons outlined in Title 6. It should also be understood that once the land use is approved for entertainment, the business ownership can change without triggering a new public hearing for a new land use consideration. Thus, unless there is a specific reason for denial of an entertainment business permit or ownership/management license under Title 6 the permit or license will be approved and issued by the Police Department.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office, the Police Department and the Redevelopment Agency.

Laurel Prevetti
for JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

For questions please contact Jeannie Hamilton in Planning, Building and Code Enforcement at 408-535-7850.

Attachments:

1. Rules Committee Memorandum, November 14, 2007, Item G2
2. City Council Policy 6-23, Guidelines for Evaluation of Nightclubs and Bars
3. Planning Commission Staff Report for CP06-024, Voodoo Lounge