



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: August 18, 2008

Approved

Date

8/20/09

COUNCIL DISTRICT: 3
SNI AREA: None

SUBJECT: CP08-056 & ABC08-007. 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 ALCOHOLIC BEVERAGES IN A PROPOSED FULL-SERVICE GROCERY STORE ON A 1.33 GROSS ACRES SITE LOCATED ON THE SOUTH SIDE OF EAST SAN FERNANDO STREET BETWEEN SOUTH 2ND AND SOUTH 3RD STREETS (88 EAST SAN FERNANDO STREET).

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council adopt a resolution making the appropriate findings to approve the subject Conditional Use Permit and make a Determination of Public Convenience or Necessity.

OUTCOME

Should the City Council approve the subject Conditional Use Permit and Determination of Public Convenience or Necessity, a full-service grocery store would be allowed to sell alcoholic beverages for off-site consumption in a proposed 23,620 square foot retail space with a net sales area of 18,213 square feet in an existing mixed-use high-rise tower known as The 88. Should the City Council deny the subject requests, the full-service grocer would not be able to sell alcohol.

BACKGROUND

On August 6, 2008, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP08-056 and ABC08-007). 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 four findings required by the Municipal Code 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 one hundred and fifty (150) feet of a residential use or residentially zoned property or that the off-sale use would not result in more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one thousand (1,000) foot radius.

Commission Discussion

After a brief presentation on the design of the proposed market by the applicant, Commissioner Kalra asked if all prospective grocery tenants require full off-sale of alcohol. The applicant confirmed that off-sale of alcohol is a critical, but ancillary use to all prospective tenants. Commissioner Zito asked the applicant what percentage of the store would be dedicated to alcohol sales; the applicant responded that approximately 6% of the floor area would be alcohol sales. Commissioner Platten commended the applicant for pursuing a chain grocer and for investing in downtown San Jose. No one from the public spoke on the project. The Commission closed public hearing and had no questions for staff. Commissioner Campos moved that the Planning Commission deny the application because the Code-required findings of Public Convenience or Necessity could not be made, commented that this project is a prime example of good mixed-use development downtown, and added a strong recommendation to City Council to approve the project. Commissioner Jensen seconded the motion. Commissioners Platten and Kamkar noted that they would be opposing the motion in support of the applicant's request. The Planning Commission denied the proposed project by a vote of 5-2-0, with Commissioners Platten and Kamkar opposed.

Appeal

On August 7, 2008, the applicant appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal and associated letter from Seth Bland, representative for Wilson Meany Sullivan and Block 8 Development Partners). The Permit Appeal requests that the City Council find that the proposed off-sale of alcohol proposal at the proposed full-service grocery store would provide overriding public benefits and that the Council could make a Determination of Public Convenience or 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, as well as 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 findings required for the Conditional Use Permit are outlined in staff's report to Planning Commission, and staff believes that these findings are pertinent and applicable to the proposed project. With respect to the Determination of Public Convenience or Necessity, the Planning Commission was unable to make the required finding that the subject use was more than 150 feet from a residential property and 500 feet from a school property and that the off-sale use would not result in more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one thousand (1,000) foot radius. 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.” The City Council would also be required to make at least **one** of the four special findings listed 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 - Findings A and D

The proposed project would facilitate the potential to secure a full-service grocery store as the anchor tenant in The 88, which is a recently built mixed-use high-rise project.

Staff believes that Finding A is applicable because the prospective grocer will be located in downtown San Jose, which is an existing commercial area. As grocery stores provide basic goods and services to nearby residents, they are necessary components of neighborhoods. When offered in conjunction with a full-service grocer, Planning staff believes that the off-sale of alcoholic beverages would not present a negative impact on public health or safety. In addition, the San Jose Police Department has indicated that they are not opposed to the project.

Staff believes the Finding D can be made that 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. Of the 18,213 net square-foot retail space, only approximately 6% of the grocery store will be dedicated to sales of alcoholic beverages, a percentage that is incidental to the overall use. A condition has been added to the draft resolution which limits the relative percentage of floor area dedicated to the sale of alcoholic beverages to 8% to allow for some limited flexibility in floor area usage and opportunities for promotional events in the future store. Planning staff believes that an 8% cap still ensures that the off-sale of alcohol remains an incidental component to the existing retail use, and that the required findings can still be made.

The applicants are in contract negotiations with several prospective grocery store tenants, all of whom indicate that the ability to sell alcohol for off-sale consumption is an ancillary, but necessary, element in their business plans.

Findings of Overriding Public Benefit - Findings B and C

Since Findings A and D can clearly be made in this case, there is no need for the Council to make any other finding. Staff does not believe that either of the other two findings described on Page 4 of this report can be made in regards to the proposed off-sale of alcohol. The census tract in which the proposed outlet is located has a much higher population density in relation to other census tracts in the city and is not unusually configured in such a way that this area is underserved.

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.

POLICY ALTERNATIVES

Not applicable.

PUBLIC OUTREACH

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

Although this item does not meet any of the above criteria, public outreach was conducted in accordance with City Council Policy 6-30. Approximately twenty-five members of the public attended the community meeting held for this project at the Martin Luther King, Jr Main Library on July 7, 2008. The major concerns raised included whether a liquor store would be allowed, parking issues for the proposed grocery store, what kind of grocery store might occupy the space, as well as several issues on The 88 project itself, not pertaining the subject Conditional Use Permit.

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The applicant has posted a notification sign at the site to notify neighbors of the proposed project. Notices of the public hearing were distributed to the owners and tenants of all properties located within 1,000 feet of the project site. The Planning Commission's agenda is posted on the City of San Jose's website along with the Planning Commission staff report. Staff has been available to answer questions and discuss the proposal with members of public. Additionally, prior to the appeal public hearing, an electronic on-line version of this staff report has been made available, accessible from the City Council agenda on the City's website.

COORDINATION

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

FISCAL/POLICY ALIGNMENT

This project is consistent with applicable General Plan policies and City Council approved design guidelines as further discussed in attached staff report.

COST SUMMARY/IMPLICATIONS

Approval or denial of the project would not result in direct costs to the City. Approval would promote investment in downtown San Jose and would further the Economic Development and Downtown Revitalization Major Strategies of the San Jose 2020 General Plan.

BUDGET REFERENCE

Not applicable.

CEQA

Exempt.


for JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

Attachments:

- Location Maps
- Planning Commission Staff Report & Attachments
- Notice of Appeal
- Draft Resolution
- Plans and Associated Letter

cc: Applicant/Appellant