

STAFF REPORT
PLANNING COMMISSION

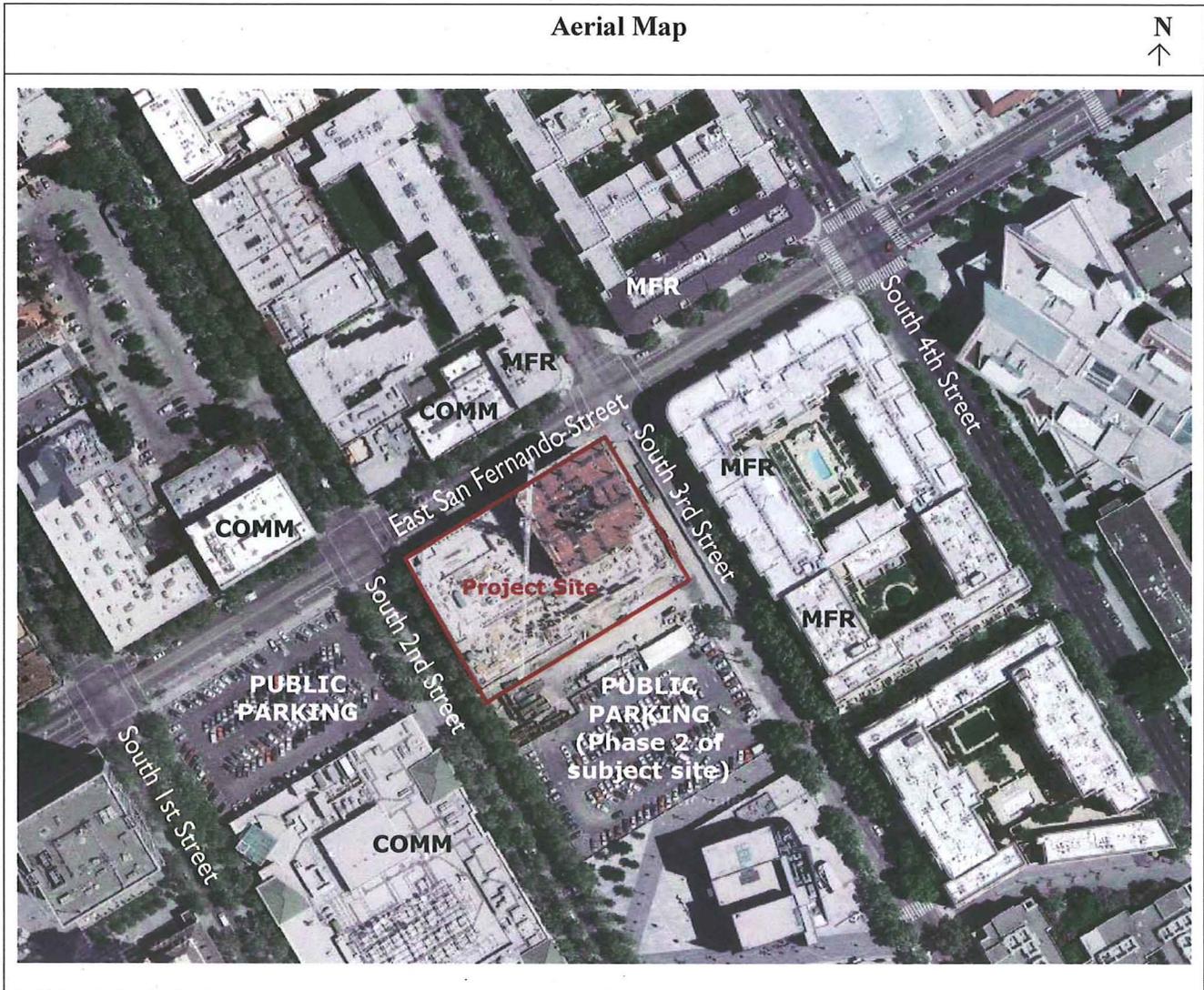
FILE NO.: CP08-056 & ABC08-007

Submitted: 06/18/08

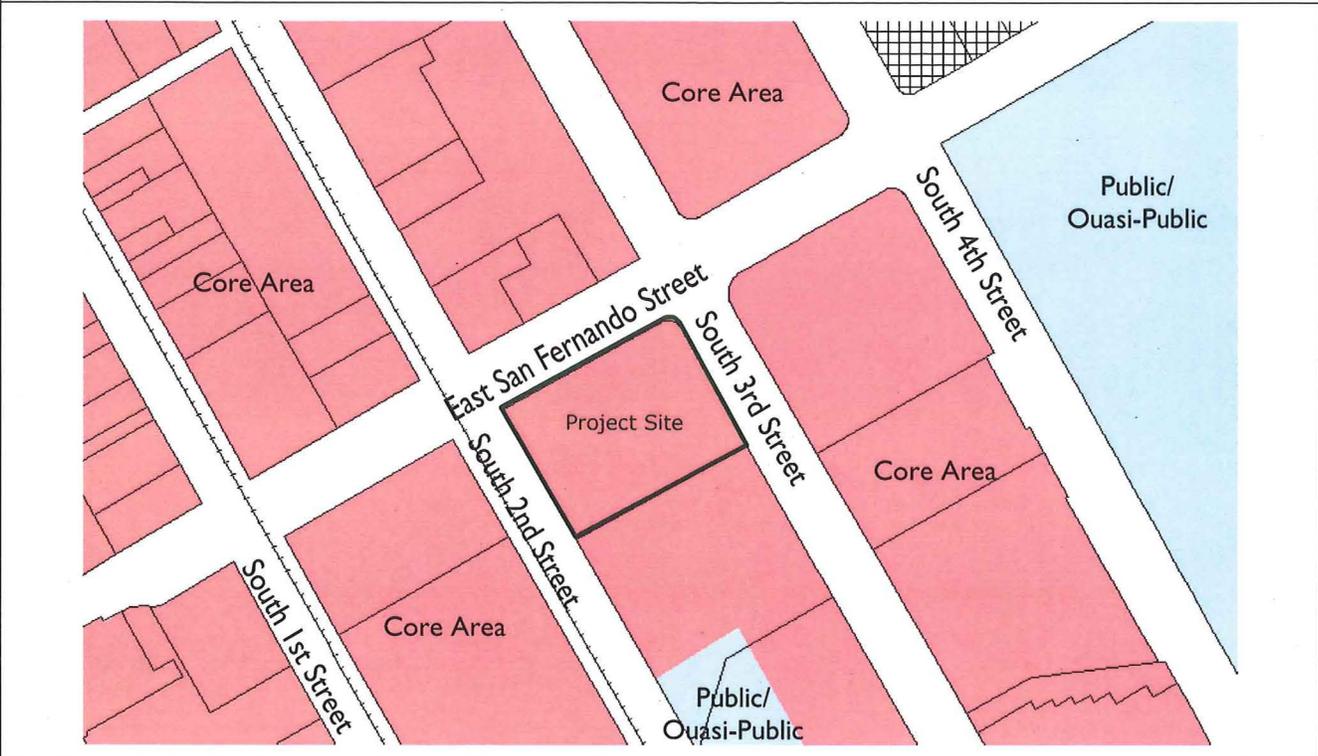
PROJECT DESCRIPTION: Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcoholic beverages as part of a full-service grocery store in an existing commercial retail space on a 1.33 gross acre site.

Existing Zoning	DC Downtown Primary Commercial
General Plan	Core Area
Council District	3
Annexation Date	3/27/1850 (Original City)
SNI	N/A
Historic Resource	No
Redevelopment Area	San Antonio Plaza
Specific Plan	N/A

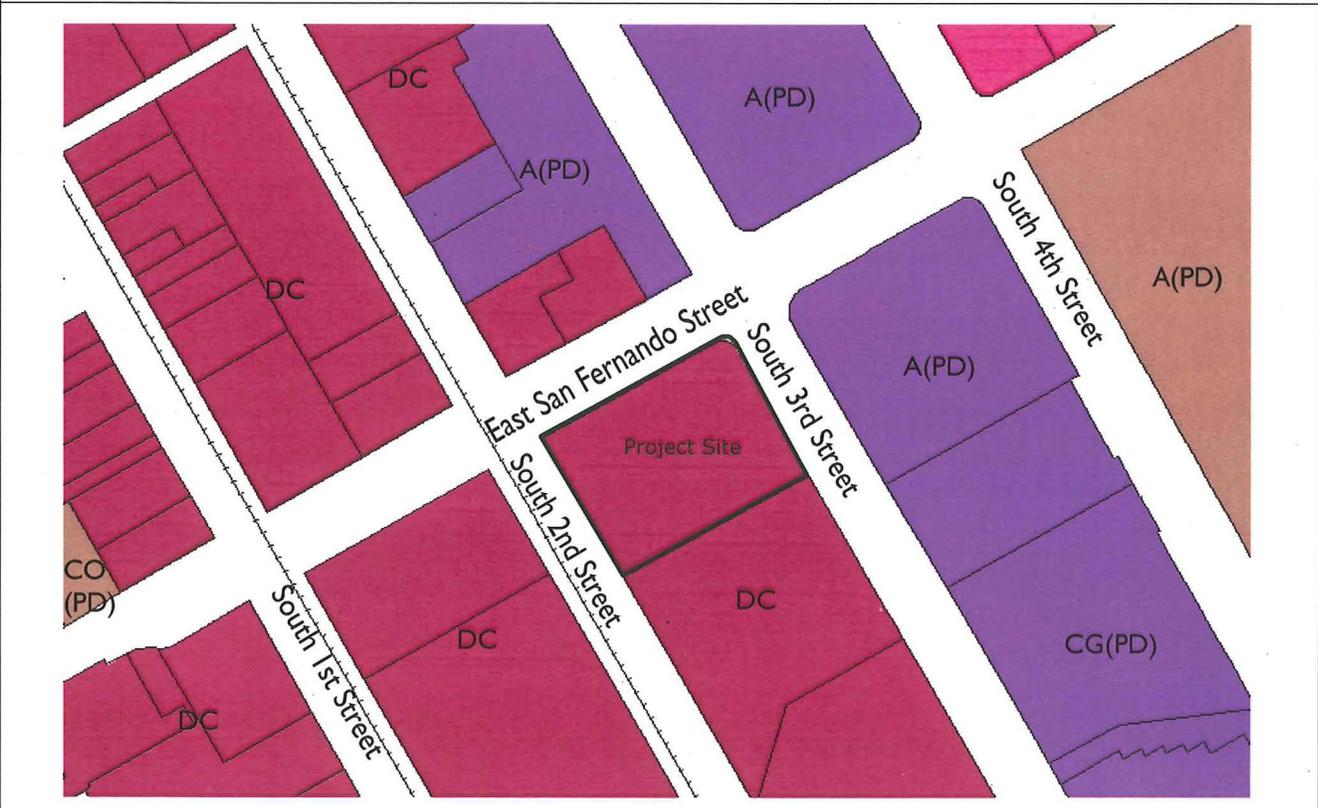
LOCATION: South side of East San Fernando Street between South 2nd and South 3rd Streets (88 East San Fernando Street)



GENERAL PLAN



ZONING



RECOMMENDATION

Planning staff recommends the Planning Commission deny the proposed Conditional Use Permit and not make a Determination of Public Convenience or Necessity for the following reasons:

1. The Planning Commission cannot make the mandatory findings from the San Jose Municipal Code required for a Determination of Public Convenience or Necessity.

BACKGROUND

On June 18, 2008, the applicant, Seth Bland of Block 3 Development Partners, filed a Conditional Use Permit and Determination of Public Convenience and Necessity to allow off-sale of alcohol beverages as part of a full-service grocery store in an existing commercial retail space on a 1.33 gross acre site located on the south side of East San Fernando Street between South 2nd and South 3rd Streets (88 East San Fernando Street).

The subject site is located within the DC Downtown Primary Commercial Zoning District. The Zoning Ordinance requires a Conditional Use Permit for off-sale of alcoholic beverages. A "Determination of Public Convenience or Necessity" is also required because the project is located within a census tract with a higher ratio of existing liquor licenses to population than is found in the County as a whole and because the premises of the proposed license is located in an area that has 20 percent more reported crimes than the average number of reported crimes for the City as a whole.

Project Description

The proposed project would allow off-sale of alcohol beverages as part of a full-service grocery store in the largest ground floor tenant space at Tower 88, a new mixed-use high-rise building located at 88 East San Fernando Street. The applicant is not proposing any exterior changes to the building at this time. The proposal includes a grocery store with a gross floor area of 23,620 square feet, and a net sales area of 18,213 square feet. The net proposed alcohol sales area is 1,065 square feet, which amounts to 5.85% of net sales area.

GENERAL PLAN CONFORMANCE

The subject site is designated Core Area on the San José 2020 General Plan Land Use/Transportation Diagram. The Core Area designation includes office, retail, service, residential, and entertainment uses in the Downtown Core Area. The proposed use is consistent with the Core Area designation in that the retail sale of food and beverages is an intended use under said designation. The proposed use also furthers the City's General Plan Downtown Revitalization Major Strategy because it encourages investment in and around the Downtown to create a prominent and attractive place with a vibrant mix of uses.

ENVIRONMENTAL REVIEW

Under the provisions of Section 15332 of the State Guidelines for Implementation of the California Environmental Quality Act, 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, in that the project is consistent with the applicable General Plan and Zoning criteria; the urban site is less than five acres; the site has no value for endangered, rare, or threatened species; approval of the project would not result in significant impacts related to traffic, noise,

air quality, or water quality; and the site can be adequately served by all required utilities and public services. No significant impacts are anticipated as a result of the project.

ANALYSIS

Zoning Code Requirements for Conditional Use Permits

A Conditional Use Permit may be issued pursuant to the applicable provisions of the Zoning Ordinance for the off-sale of any alcoholic beverages only if the decision-making body first makes the following three special findings applicable to the off-sale of alcoholic beverages:

1. For such use at a location closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, that 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.

Analysis of Required Finding. There are several existing businesses located within a 1,000 foot radius of the proposed use that provide alcoholic beverages, or are in the process of being permitted, for off-site consumption. These include Zanotto's Market located on South Second Street to the northwest, Gordon Biersch Restaurant and Brewery on San Fernando Street to the west, Sherman Cellars on Post Street to the northwest, and A Perfect Finish on Post Street to the northwest. In addition, the San José Repertory Theater, located to the south of the project site along Paseo de San Antonio, has an off-sale license currently pending. An attached map shows the location of each of the off-sale establishments within 1,000 feet of the site. The proposed use together with existing facilities would result in a total of more than four such establishments within a 1000-foot radius.

2. For such use at a location closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, where the proposed location of the off-sale of alcoholic beverages use would 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, that the resulting excess concentration of such uses 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 property of other persons located in the vicinity of the area; or
 - c. Be detrimental to public health, safety or general welfare.

Analysis of Required Finding. As stated above, the proposed use will result in more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one thousand (1,000) foot radius of the proposed location. Given that the off-sale use is proposed as part of a full-service grocer, Staff does not foresee an adverse effect on the surrounding area, an impairment of utility or property value to person in the vicinity, or a detriment to public health.

3. For such a use at a location closer than five hundred (500) feet from any child care center, public park, social service agency, residential care facility, residential service facility, elementary school, secondary school, college or university, or closer than one hundred fifty (150) feet from any residentially zoned property, that 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, child care center,

public park, social service agency, residential care facility, residential service facility and/or school use.

Analysis of Required Finding. The proposed use is located within 500 feet of San José State University and the Martin Luther King Library and is located in the DC Downtown Primary Commercial Zoning District, which allows residential uses in combination with retail, office, and many other commercial uses by right. Currently, residential units exist directly above the proposed tenant space in Tower 88, as well as across South 3rd Street to the east. Residential uses are proposed for another high-rise development directly to the south of the project site, as phase 2 of the subject site. Additional residential uses currently exist to the north, northeast, and east of the site. Because the applicant is proposing a full-service grocery store with off-sale of alcohol as an incidental use in the DC Downtown Primary Commercial Zoning District, staff does not anticipate that the use will adversely affect the adjacent residences.

Based on the above analysis, staff believes that the Zoning Code findings for approval of a Conditional Use Permit can be made for the proposed off-sale of alcohol use.

Finding of Public Convenience and Necessity

Unless the City makes a Determination of Public Convenience or Necessity, the State Department of Alcohol Beverage Control (ABC) will not issue a liquor license for off-sale of alcohol if the business is located in an area of high crime or an area of over concentration, defined as follows:

- a) The premises of the proposed license is located in an area that has 20% more reported crimes than the average number of reported crimes for the city as a whole, or
- b) The premises of the proposed license are located in a census tract where the ratio of existing retail on-sale/retail off-sale licenses to population in the census tract exceeds the ratio in the County as a whole.

The attached Police Department memorandum indicates that the project site is located within an area of high crime, and that the census tract does have an over-concentration of existing liquor licenses. For ABC to be able to issue a license for this off-sale use, the City must grant a "Determination of Public Convenience or Necessity." The analysis of the proposal is based on the required findings.

Title 6 of the San José Municipal Code specifies that the Planning Commission may issue a Determination of Public Convenience or Necessity only after making the four specified findings identified below:

1. 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: (a) would be detrimental to the public health, safety, or welfare of persons located in the area, or (b) would increase the severity of existing law enforcement or public nuisance problems in the area.

Analysis of Required Finding. The proposed full-service grocer is not located within a Strong Neighborhoods Initiative area or Neighborhood Revitalization area. Per their memo, "the Police Department is not opposed to a full-service grocery store at 88 E. San Fernando Street with an ABC off-sale retail license to sell alcohol as currently proposed by the Planning Department." Despite its location within a high-crime area, the Police have not indicated that the use, as proposed, would be detrimental to the public health, safety, or welfare of persons in the area, nor have they indicated that the use would

increase the severity of existing law enforcement or public nuisance problems. Therefore, staff believes that this required finding can be made.

2. The proposed use would lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use.

Analysis of Required Finding. As stated above, the proposed use would lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use. Therefore, this required finding cannot be made.

3. The proposed use would not be located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility, or within one hundred fifty feet of a residence.

Analysis of Required Finding. The proposed use is located within five hundred feet of a university and public library, and the proposed use is within 150 feet of residential properties. Therefore, the proposal is not consistent with this finding which must be made in order to grant a favorable determination. Unlike the findings required for the Conditional Use Permit, the orientation of the proposed use to the residences does not compensate for the close proximity. As a result, this required finding cannot be made due to the actual separation distances between the proposed off-sale use and San Jose State University, the Martin Luther King, Jr Main Library, and the adjacent residential uses.

4. Alcohol sales would not represent a majority of the proposed use.

Analysis of Required Finding. For the 18,213 net square-feet of retail floor area, only up to approximately 6% of the area would be dedicated to the sale of beer and wine. The alcohol sales would clearly be incidental to the sale of other grocery items. Should the Council consider approval of this permit on appeal, staff would propose to include a condition to limit the relative percentage of floor area dedicated to the sale of alcoholic beverages to ensure that the off-sale of alcohol remains an incidental component to the retail grocery use.

Two of the required findings for a Determination of Public Convenience and Necessity (PCN) above, Findings 2 and 3, cannot be made by the Planning Commission. Therefore, in accordance with the Municipal Code, the Planning Commission must deny the requested Determination of PCN.

PUBLIC OUTREACH

On July 7, 2008, a noticed community meeting was held to present the project to members of the community. Approximately 25 people were in attendance. 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 to the Conditional Use Permit for the off-sale of alcohol.

Public outreach was conducted in accordance with City Council Policy 6-30. A sign was posted on-site to notify neighbors of the proposed development. A notice of this Planning Commission public hearing was mailed to the owners and tenants of all properties located within 1,000 feet of the project site and posted on the City website. This staff report is also posted on the City's Website. Staff has been available to respond to questions from the public.

CONCLUSION

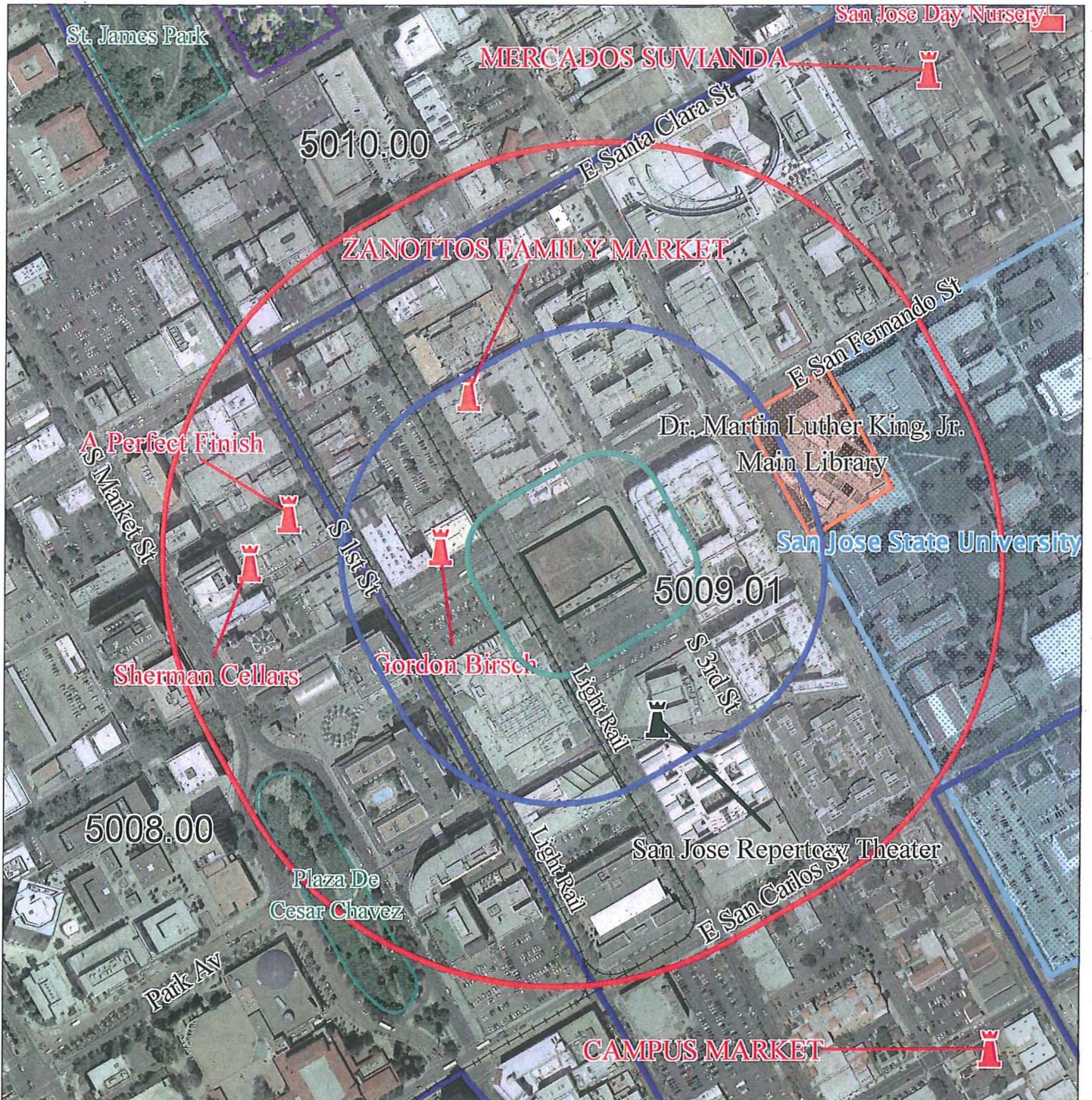
Based on the above analysis, staff concludes that the required findings can be made with regard to the Conditional Use Permit. However, staff is only able to make two of the four findings that are required in order for the Planning Commission to consider the approval of a Determination for Public Convenience or Necessity as required by Title 6 of the San Jose Municipal Code. Staff is unable to make the required findings #2 and #3 that the proposed use would result in more than four businesses with off-sale of alcohol licenses within 1000 feet and that the site is at least 500 feet from schools and libraries and 150 feet from a residential use. Therefore, staff is obliged to recommend denial of both proposals, as the Conditional Use Permit cannot be implemented without the Determination of Public Convenience or Necessity. In instances where not all of the findings can be made, Title 6 provides an opportunity upon appeal whereby the City Council can approve such a proposal. This can only be approved if the City Council identifies and finds that a significant and overriding public benefit or benefits will be served by the proposed use.

Project Manager: Licinia McMorrow **Approved by:**  **Date:** 7/28/08

Owner/Applicant: Seth Bland 4 Embarcadero Center, Suite 2200 San Francisco, CA 94111	Attachments: Draft Resolution Floor Plan Map of Off-Sale Establishments within 1000 Feet Police Department Memorandum Statement of Exemption
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CP08-056

Nearby Alcohol Off-Sales



Map Created On:
7/28/2008



Site



Nearby ABC Licence
Applications



Pending
Off-Sale Apps



150 Ft



500 Ft



1000 Ft



Memorandum

TO: Licinia McMorrow
Planning Department

FROM: Ofc. Jeff Enslen #3408
San Jose Police Vice Unit

SUBJECT: Full-Service Grocery Store
88 E. San Fernando St.

DATE: July 23, 2008

Approved

Date

I have received your request for input regarding a future, full-service grocery store proposed at 88 E. San Fernando Street in San Jose. The proposed location is currently a vacant space in a high-rise condominium complex. Per the Planning Department, the proposed use is for a full service grocery store, such as Safeway, Lucky's, Whole Foods, Save Mart or PW Supermarket, with an ABC Off-sale retail license to sell alcoholic beverages.

Per Business and Professions (B&P) Code Section 23958, the State of California Department of Alcohol Beverage Control shall deny an ABC Application for an ABC License if the issuance of that license would tend to create a law enforcement problem or if it would result in or add to an undue concentration of ABC Licenses, as described in B&P Sections 23958.4 (a)(1) and 23958.4(a)(3). A location can be unduly concentrated because of its criminal statistics and/or it's proximity to other ABC Licensees. ABC can issue the license per B&P Sections 23958.4 (b)(1), and 23958.4 (b)(2) if the local governing body determines that the public convenience or necessity would be served. The City of San Jose Planning Department and the Planning Commission are the delegated authorities to grant these exceptions.

The location is not currently in a Strong Neighborhood Initiative area or a Neighborhood Revitalization area.

88 E. San Fernando Street is located in San Jose Police Beat E3. The reported crime statistics as defined by B&P Section 23958.4(c) are over the 20% crime index and thus the location is considered unduly concentrated per B&P Section 23958.4 (a)(1), as shown below.

Police Beat Crime Statistics

Beat	Index Crimes	Arrests	Total	20% Above Average
E3 (2007)	334	1264	1598	Yes
City Average	341	330	671	

The Department of Alcohol Beverage Control (ABC) records indicate that 88 E. San Fernando Street is in census tract 5009.01. Pursuant to B&P Section 23958.4 (a)(3), the ratio of off-sale retail licenses to population in census tract 5009.01 does exceed the ratio of off-sale retail licenses to population in the county in which the applicant premises are located as shown below.

Authorized and Current ABC Licenses in Census Tract 5009.01

Census Tract	Authorized ABC Licenses as of August 2005		Current ABC Licenses as of April 22, 2008		Unduly Concentrated	
	On - Sale	Off - Sale	On - Sale	Off - Sale	On - Sale	Off - Sale
5009.01	4	2	56	4	Yes	Yes

The San Jose Police Department is not opposed to a full-service grocery store at 88 E. San Fernando Street with an ABC Off-sale retail license to sell alcohol as currently proposed by the Planning Department.

As with all applications for ABC licenses in San Jose, the Police Department will be asked to review the application and then provide input to the ABC regarding conditions under which the ABC license may be granted. The Police Department is asked to provide input on all applications for ABC licenses because of the potential negative impacts to the community and the effect that alcohol has on quality of life issues at the proposed location.

Please feel free to contact me at 277-4322 if you have any questions.

Ofc. Jeff Enslin #3408
 Administrative Officer
 Special Investigations/Vice



STATEMENT OF EXEMPTION

FILE NO. CP08-056
LOCATION OF PROPERTY south side of E. San Fernando Street between S. 2nd and South 3rd Streets (88 East San Fernando Street)
PROJECT DESCRIPTION Conditional Use Permit to allow off-sale of alcohol beverages in an existing commercial use on a 1.33 gross acre site
ASSESSOR'S PARCEL NUMBER 467-22-157

CERTIFICATION

Under the provisions of Section 15332 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.

15332. In-Fill Development Projects.

Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section.

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed developed occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

Joseph Horwedel, Director
Planning, Building and Code Enforcement

Date June 23, 2008


Deputy

Project Manager: Licinia McMorrow