



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: November 24, 2008

Approved

Paul Keith

Date

12/1/08

COUNCIL DISTRICT: 9
SNI AREA: N/A

SUBJECT: CP08-050. APPEAL OF THE PLANNING COMMISSION'S DECISION TO DENY A CONDITIONAL USE PERMIT TO ALLOW THE OFF-SALE OF ALCOHOL (BEER, WINE AND LIQUOR) AT AN EXISTING RETAIL STORE WITHIN A SHOPPING CENTER ON A 0.92 GROSS ACRE SITE IN THE CP -COMMERCIAL PEDESTRIAN ZONING DISTRICT LOCATED ON THE NORTHEAST CORNER OF MERIDIAN AVENUE AND BRANHAM LANE.

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council uphold the Planning Commission's decision to deny the subject Conditional Use Permit.

OUTCOME

Should the City Council deny the proposed Conditional Use Permit, the subject retail tenant space will remain a standard retail store. Should the City Council approve the subject request, the site would be permitted to acquire an ABC license to allow the off-sale of beer, wine and liquor.

EXECUTIVE SUMMARY OF OFF-SALE APPROVAL PROCESS

On May 18, 1990, the City Council adopted an ordinance in Title 20 that made the off-sale of alcoholic beverages subject to a Conditional Use Permit. This ordinance (as amended in 2006) established specific findings that the Code requires to be made to issue a Conditional Use Permit for off-sale use in addition to the standard findings that need to be made for any Conditional Use Permit. These findings are as follows:

20.80.900.A (*For off-sale use*)

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.

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.
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.

In addition, all Conditional Use Permits must also meet the following findings:

20.100.720.A (*For all CUPs*)

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 property of other persons located in 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 and loading facilities, landscaping and other development features prescribed in this Title, or as is otherwise required in order to integrate said use with the uses in the surrounding area; and
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.

The subject Conditional Use Permit, to allow the off-sale of alcohol at an existing specialty retailer (Discount Cigarettes), was reviewed by staff. As indicated in the original staff report (attached), staff found that the required specific findings for off-sale use could be made; however staff recommended denial of the proposal based on the inability to make the standard Conditional

Use Permit findings. A public hearing was conducted by the Planning Commission, which considered the staff recommendation and public testimony. The Planning Commission also recommended denial of the project. An appeal of this decision was filed by the applicant requesting the Commission's decision to deny be overturned, and the CUP approved.

BACKGROUND

Planning Commission Hearing

On October 22, 2008, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit (File No. CP08-050). The Director of Planning recommended denial of the Conditional Use Permit. As stated in the original staff report (see attached), staff concluded that although the special findings for off-sale could be made in this case, the standard findings for a Conditional Use Permit could not be made, and that the proposal would lead to an excessive number of alcohol sales facilities within one shopping center.

Commission Discussion

Greg Hays spoke on behalf of the applicant at the hearing. He stated that all the special CUP findings in regards to the off-sale of alcohol could be made for this project. He specifically cited an initial response letter from Planning that made this same statement. Two members of the public spoke on the proposal. One store customer spoke in support of the project, stating that it is a well run business. One neighbor spoke in opposition to the project, citing the proximity to Branham High School as a concern, as well as a general concern with crime in the area. The store owner, Behroz Niaza, noted that he was not aware of any CC & Rs that would prevent him from selling alcohol on the site, in response to a question from Commissioner Kamkar regarding a letter from a representative of the Lunardi's Supermarket, also located in the shopping center. Mr. Niaza also noted that the store would carry some food and grocery items in addition to alcohol and cigarettes. In response to Commissioner Campos's question, the applicant stated that his store does not sell meat or produce which would be indicative of a more full-service grocery store. When questioned, the applicant also noted that single-serving containers of alcohol would not be sold. The public hearing was then closed.

Commissioner Campos made a motion (which was seconded) to deny the Conditional Use Permit, stating that he was concerned that alcohol sales is not incidental to the proposed use and that the proposal would lead to an overconcentration of alcohol licenses. Commissioner Jensen noted that she supported the denial. Commissioner Zito asked staff why this specific proposal meets the grounds for denial. Staff responded that its proximity to the high school, the fact that it would be the third off-sale (general) license in the same shopping center, and a negative recommendation in the memorandum from the police department, were the reasons the proposal was recommended by staff for denial. Commissioner Kamkar stated that the project site was not visible from the high school, and although he was concerned with the large percentage of floor area dedicated to alcohol sales and the sales of cigarettes, he stated that he thought the store operator has a past good track record with no code issues and that he wouldn't support the motion to deny.

The Planning Commission denied the proposed project by a vote of 4-2-1, with Commissioners Zito and Kamkar opposed and Commissioner Platten absent.

Appeal

On November 3, 2008, the applicant, Behroz Niaza, appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal and associated documentation). The appellant cited the reason for the appeal that the Planning Commission incorrectly denied the proposal based on the project's failure to meet finding 20.80.900.A.2; however, this Code section actually did not apply to this project due to the fact that the project is not located within 1,000 feet of four other locations that currently provide off-sale of alcohol. The appellant also stated that the stated residential care facilities were further than 500 feet from the project site.

ANALYSIS

The original staff report (see attached) provides a full analysis of this project with respect to meeting the findings required for the off-sale of alcohol, as well as the standard Conditional Use Permit findings.

As identified in the section above, the appellant cited a few specific reasons for his appeal. Provided below is a summarized statement (in italics) identifying the concern by the appellant followed by a response from staff.

The site is not within 500 feet of any residential care facilities.

The appellant provided attached Yahoo! maps showing the distance to residential care facilities. However, these maps did not show direct distances but rather showed distances via streets and from the street frontage of the site. The project site itself is actually well east of the street frontage on the site and the Code finding is based on distance "as the crow flies," not via streets. According to the City's data, two residential care facilities were located within 500 feet of the site using standard City methodology. However, since they were not oriented to the site, staff did not use this finding as a reason for recommending denial of the project, so this argument is irrelevant.

The initial response letter from Planning stated that all the off-sale of alcohol findings could be made.

As specifically stated in the letter, the summary contained in the letter does not constitute a final review. In addition, staff did not (and typically does not) identify whether the general Conditional Use Permits findings can be made without completing full review. As also stated in the letter to the applicant, Planning staff was awaiting a response from the Police Department. The negative recommendation by the police department was a major determinant in the planning staff recommendation for denial. At the time of the letter, the community meeting had also not been held. Although the meeting was very lightly attended, the only neighbor feedback received on the project was negative.

Finding 20.80.900.A.2 from the off-sale of alcoholic beverages section of the Zoning Ordinance does not apply because this project is not within 1,000 feet of more than three other existing establishments. The Planning Commission mistakenly denied this project based on this finding. As detailed in the staff report, planning staff agrees that finding 20.90.900.A.2 does not apply in this case. However, Finding 20.100.720.A.1, which applies to all Conditional Use Permits is actually the same Finding, and this is the finding the Commission determined could not be made and based upon which the Planning Commission denied this project. As stated in the initial staff report, because of the proximity to the school and the over-concentration of off-sale uses within the same shopping center, staff feels this proposal would be detrimental to the area and the standard Conditional Use Permit findings cannot be made.

CONCLUSION

Based on the above analysis and the analysis provided in the original staff report, staff concludes that the findings for a Conditional Use Permit to allow off-sale cannot be made and the proposal for off-sale at this location should be denied.

ALTERNATIVES

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

1. Uphold the Planning Commission's decision to deny the subject Conditional Use Permit and have the retail store continue to operate as is, or
2. Approve the project as suggested by the appellant and allow a third location to be permitted for off-sale (general) of alcohol in the same shopping center.

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, staff followed Council Policy 6-30: Public Outreach Policy. A community meeting was held for this project at the Camden Community Center on August 11, 2008. One local resident showed up at the meeting and spoke in opposition to the project, citing concerns about litter, public drunkenness and proximity to the high school.

The applicant has posted a notification sign at the site in conformance with the Public Outreach Council Policy. Notices of the public hearing were distributed to the owners and tenants of all properties located within 500 feet of the project site. The Planning Commission's agenda is posted on the City of San Jose's website along with this 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 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.

COORDINATION

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

HONORABLE MAYOR AND CITY COUNCIL

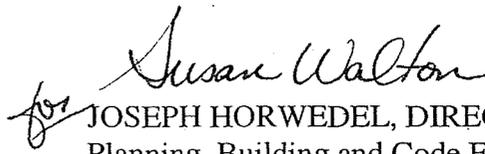
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CEQA

Under the provisions of Section 15301(a) (Existing Facilities) of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), 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 project only involves an interior remodel to the store.


for JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

For questions please contact Susan Walton at 408-535-7800.

Attachments:

- Draft City Council Resolution
- Planning Commission Staff Report & Attachments
- Notice of Appeal and Associated Letter.
- Plans

cc: Applicant/Appellant