COUNCIL AGENDA: 02-24-09
ITEM: 11.2

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: February 2, 2009

Approved Deanna Santana Date 2/5/09

COUNCIL DISTRICT: 3
SNI AREA: N/A

SUBJECT: CP08-035 & ABC08-005. APPEAL OF THE PLANNING COMMISSION'S DECISION TO DENY, AS MANDATED BY THE MUNICIPAL CODE, A CONDITIONAL USE PERMIT AND DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO ALLOW THE OFF-SALE OF BEER, WINE AT A PROPOSED CONVENIENCE STORE LOCATED ON THE SOUTHEAST CORNER OF NORTH KING ROAD AND MABURY ROAD.

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council approve the subject Conditional Use Permit and make a Determination of Public Convenience or Necessity by finding that the required findings for 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.

OUTCOME

Should the City Council deny the proposed Conditional Use Permit, the proposed retail tenant space could operate as a standard convenience store, although the applicant indicates the store may potentially not open if not allowed to also sell alcoholic beverages. 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 and wine.

EXECUTIVE SUMMARY OF OFF-SALE APPROVAL PROCESS

On February 1, 2006, City Council-adopted regulations affecting establishments that sell prepackaged alcohol for off-site consumption ("off-sale alcohol") became effective. The updated regulations revise the approval process and include enhanced findings for approval of an off-sale proposal as part of a Conditional Use Permit, and new mandatory findings for a Determination of Public Convenience or Necessity (previously referred to as a Liquor License Exception), when such a determination is required by the State Department of Alcohol Beverage Control (ABC).

The enhanced findings for a Conditional Use Permit include a provision to address the proliferation of establishments in close proximity to existing off-sale uses by generally limiting the number of establishments to four (4) within a 1,000-foot radius. Additionally, the existing finding that addresses the location of such establishments proximate to sensitive uses such as schools and residences, has been augmented to add public parks, child care centers, social service agencies, and residential care and service facilities to the list of sensitive uses. If a new off-sale alcohol establishment is to be located within 150 feet of a residential use or residentially zoned property, or within 500 feet of one of the other specified sensitive uses, it must be determined that the proposed establishment is situated and oriented such that it would not adversely affect the sensitive use(s).

The Department of Alcohol Beverage Control (ABC), prior to licensing of a new off-sale alcohol establishment in an area of undue concentration or high crime (as defined by State law), requires business operators to obtain a Determination of Public Convenience or Necessity from the local jurisdiction. In the early 1990's, the City of San Jose developed the Liquor License Exception process to provide for consideration of requests for such a determination. With the new regulations, the process has been renamed consistent with the State terminology. All applications for a Determination of Public Convenience or Necessity are considered by the Planning Commission in conjunction with any associated application for a Conditional Use Permit. The revised regulations include factual findings the Planning Commission is required to make in order to approve a request for a Determination of Public Convenience or Necessity. The four findings are as follows:

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; and

2. Approval of the proposed use would not result in a grouping 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 use; and

3. The proposed use would not be located within five hundred (500) feet of a school site, day care center site, public park, social services agency site, residential care facility site or residential service facility site, or within 150 feet of a site upon which a residential use is conducted or that is residentially zoned; and

4. Alcohol sales would not represent a majority of sales, stock or shelving space of the proposed use.

Should the Planning Commission find that the above conditions exist, further consideration of the request is subject to discretionary findings. If the Planning Commission is unable to make all necessary findings noted above in order to consider making a Determination of Public Convenience or Necessity, it is compelled to deny both the request for a Conditional Use Permit and Determination of Public Convenience or Necessity. Appeal of the Planning Commission's decision is heard by the City Council. One of the changes made to the ordinance was to include the opportunity for the City Council to make a finding of overriding public benefit should one of the mandatory factual findings not be met. The City Council is the only decision-making body that can make the finding of greater public benefit.

This report, along with the Planning Commission staff report, includes a discussion of the project and whether the required findings can be made in both the case of the Conditional Use Permit and in the Determination of Public Convenience or Necessity. The Planning Commission was unable to make all necessary findings for a Determination of Public Convenience or Necessity in that the subject use is within 150 feet of a residential use and 500 feet of a school site. Therefore, the Commission was compelled to deny both the request for a Conditional Use Permit and Determination of Public Convenience or Necessity as discussed below. The applicant subsequently appealed the Commission's decision to deny these applications to the City Council. Based on an analysis of the findings required for the City Council to approve the Conditional Use Permit and Determination of Public Convenience and Necessity in the face of negative factual findings by the Planning Commission, staff believes that the City Council can make the findings 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.

BACKGROUND

Planning Commission Hearing

On December 10, 2008, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP08-035 & ABC08-005). The Director of Planning recommended the mandatory denial of the Conditional Use Permit and request for a Determination of Public Convenience or Necessity because two of the required four findings 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.

Commission Discussion

After brief testimony by the applicant (Barinder Nijar) to make minor corrections to the staff report and stating the store was proposed to operate from 6:00 a.m. until midnight, with no more than 5% of the floor area dedicated to alcohol sales, the public hearing was closed. No one from the public spoke on the project. After staff indicated that there were no issues with the changes noted by the applicant, Commissioner Campos moved to deny the CUP and Determination of Public Convenience or Necessity as mandated by the Municipal Code, which was seconded by Commissioner Jensen. There was no further discussion on the item.

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

Appeal

On December 16, 2008, the applicant appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal and associated letter from Barinder Nijar, the applicant). The Permit Appeal requests that the City Council find that the proposed off-sale of alcohol proposal at the proposed convenience 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 with respect to 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, staff's review provided the Planning Commission with information enabling that body to make all the required findings for the Conditional Use Permit, but enabling them to make only three 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 Planning Commission was unable to make the required finding that the subject use was more than 150 feet from a residential property. 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 - Finding D

Staff believes that 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 2,379-square-foot retail space, the applicant is requesting that only approximately 7-10% of the convenience store be dedicated to sales of beer and wine, a percentage that is incidental to the overall use. Staff has included a condition in the draft Permit Resolution which limits the relative percentage of floor area dedicated to the sale of alcoholic beverages to a maximum of 10% to ensure that the off-sale of alcohol remains an incidental component of the existing retail use. The proposed retail use is also located in an area that is underserved by retail uses with no other proximate off-sale use (see attached map).

Findings of Overriding Public Benefit - Findings A, B and C

Since staff believes Finding D can be made in this case, there is no need for the Council to make any other finding. Staff does not believe that any of the other three findings, described above, can be made in regard to the proposed off-sale of alcohol. The census tract in which the proposed outlet is located has a much higher population density (29.3 persons per acre in this census tract versus 13.9 persons per acre as the City average) in relation to other census tracts in the city, and is not unusually configured in such a way that this area is underserved.

CONCLUSION

Based on the above analysis and the analysis provided in the original staff report, staff concludes that a finding for overriding public benefit Finding D, can be made by the City Council and recommends that a Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale as an incidental use at this location be approved.

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 Determination of Public Convenience or Necessity and have the retail store operate without the sale of alcohol (or potentially not begin operating), or

2. Approve the project as suggested by the applicant/appellant and permit the off-sale of beer and wine at the new convenience store.

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 on July 23, 2008. A notice for the community meeting was sent to the owners and tenants of all properties located within 500 feet of the project site. Three members of the public attended the community meeting. One attendee expressed concern over alcohol being sold and stated it could potentially lead to more litter and crime in the area. One attendee was in favor of the convenience of a retailer at this location. The third attendee was concerned with the possible impact a new ABC license would have on his business (a distiller) and seem unconcerned when he realized it would have no impact.

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.

CEQA

Exempt

for Susan Walton
JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

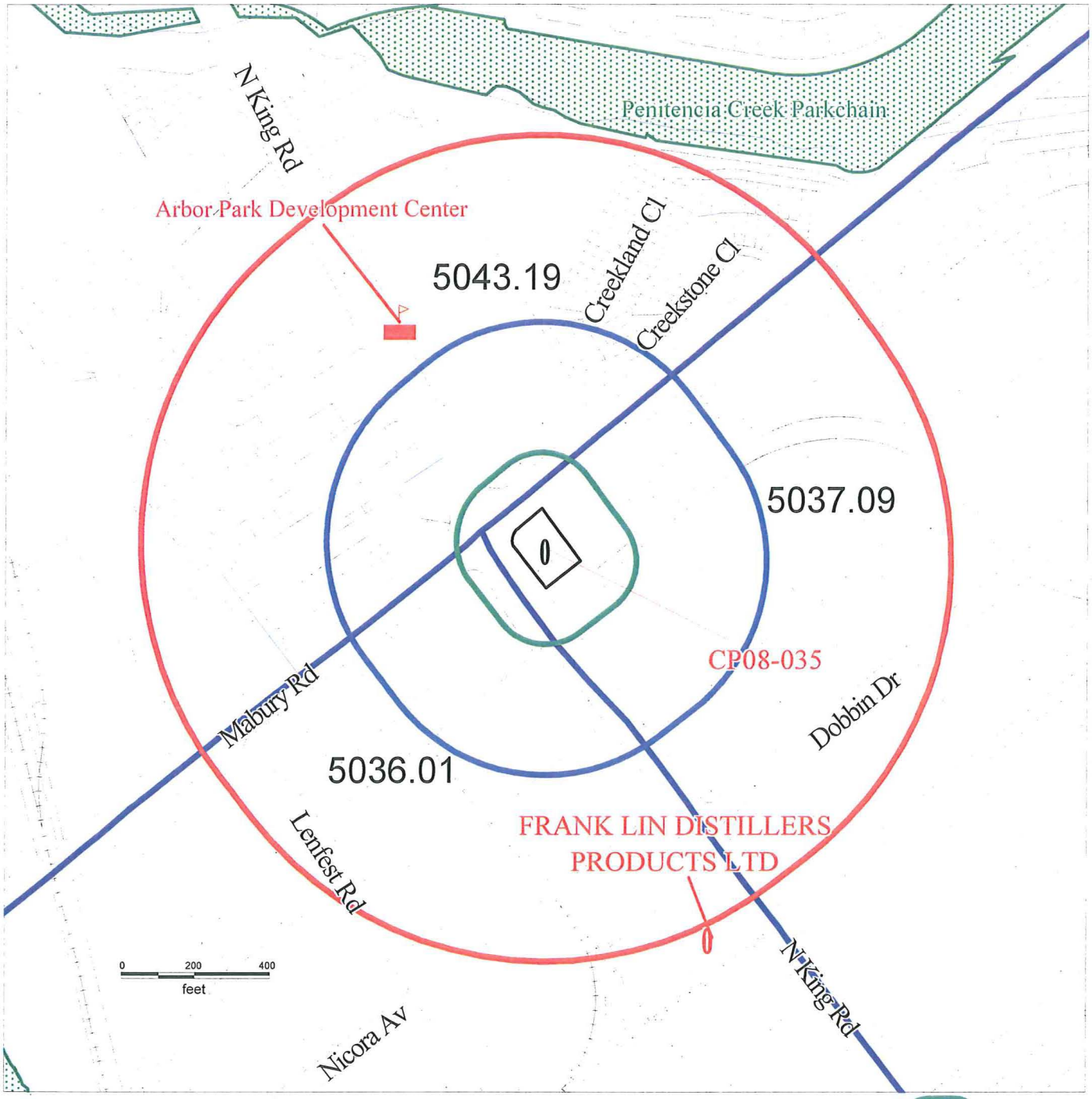
For questions please contact Susan Walton at 408-535-7800

Attachments:
- Map of Nearby Off-Sale Locations
- Draft City Council Resolution
- Planning Commission Staff Report & Attachments
- Notice of Appeal and Associated Letter.
- Plans

cc: Applicant/Appellant

ABC08-005

Nearby Alcohol Off-Sales



CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

N W E S

Map Created On:
6/18/2008

Site

Nearby ABC Licence Applications

Pending CP, CPA, PD, PDA Off-Sale Apps

150 Ft

500 Ft

1000 Ft

RESOLUTION NO.

A Resolution of the City Council of the City of San José approving a Conditional Use Permit and Determination of Public Convenience or Necessity to use certain real property described herein for the purpose of allowing the sale of beer and wine for off-site consumption located at 788 N. King Road.

FILE NO. CP08-035 & ABC08-005

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on April 17, 2008 and June 17, 2008, an application (File Nos. CP08-059 & ABC08-006) was filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow the sale of beer and wine for off-site consumption, on that certain real property (hereinafter referred to as "subject property"), situate in the CP Commercial Pedestrian Zoning District, located at the southeast corner of Mabury Road and North King Road (788 North King Road) and

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, on December 10, 2008, the Planning Commission denied the application, from which decision the property owner has appealed to this City Council; and

WEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code, this City Council conducted a hearing on said application on February 24, 2009, notice of which was duly given; and

WHEREAS, at said hearing, this City Council gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this City Council received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this City Council received in evidence a development plan for the subject property entitled "Off-Site Alcoholic and Beverage Conditional Use Permit," which plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested therein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, said hearing was conducted in all respects as required by the San José Municipal Code and the rules of this City Council.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSÉ:

After considering evidence presented at the Public Hearing, the City Council finds that the following are the relevant facts regarding this proposed project:

1. This site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
2. The project site is located in the CP Commercial Pedestrian Zoning District.
3. Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is exempt from environmental review.
4. The project proposes incidental off-sale of beer and wine at a 2,379 square foot convenience store located within an existing 5,500 square foot commercial building under construction.
5. The project includes no exterior modifications to the existing building.
6. The site is bordered by multi-family residences to the north. A vacant lot and single-family residences are located to the east of the site. Industrial uses are located to the west and south of the site, with the area to the south having been recently rezoned for future residential uses.
7. The number of parking spaces provided meets the requirements of the Zoning Ordinance.
8. The subject retail establishment is a grocery store that proposes to close at 12:00 midnight.
9. The proposed convenience store proposes to utilize no more than 7-10 percent of the floor area to the sales of alcoholic beverages.
10. The Police Department memorandum indicates that the project site *is* located within an area of high crime. The Police Department has indicated that they are opposed to the issue of off-sale of alcohol in conjunction with the convenience store proposed at this location.
11. Due to a higher than average crime rate, the project is subject to the requirements for a Determination of Public Convenience or Necessity for a liquor license for the off-sale of alcoholic beverages. The granting of such a determination requires that four specific findings be made as prescribed by Title 6 of the San José Municipal Code.
12. The proposed use is not within a Strong Neighborhood Initiative area or other area designated by the city for targeted neighborhood enhancement services or programs.
13. The project site is not located within 500 feet of a school.
14. The project site <u>is</u> located adjacent to and within 150 feet of residentially zoned property to the east and south.
15. The above mentioned residential use is oriented in a manner that the front of the houses are not oriented towards the use.
16. The project site is not located in a census tract with an existing over-concentration of liquor licenses, and there are no other off-sale establishments within 1000' of the subject site.

17. The proposed use does not include late night operation. The retail sales of beer and wine is intended to be in conjunction with the retail sale of food and beverages.
18. On December 10, 2008, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP08-035 and ABC08-005). The Director of Planning recommended denial of the Conditional Use Permit and request for a Determination of Public Convenience or Necessity because one of the required four findings for the Determination of Public Convenience and Necessity could not be made.
19. On December 16, 2008, the applicant appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal). The Permit Appeal requests that the City Council find that the proposed off-sale of alcohol proposal provides an overriding public benefits and that the Council make a Determination of Public Convenience and Necessity to allow the issuance of the ABC licenses required to operate the proposed business insofar that the convenience store provides beer and wine sales only in conjunction with a full-service convenience store.
20. 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. For the 2,379 square-foot proposed retail space, a maximum of 10% of the floor area may be dedicated to the sale of beer and wine, which is incidental to the overall convenience store use. A condition has been added to the resolution which limits the relative percentage of floor area dedicated to the off-sale of alcoholic beverages to ensure that the off-sale of alcohol remains an incidental component to the existing retail use.
21. Upon an appeal, Title 6 allows the City Council to make a Determination of Public Convenience or Necessity for a proposal that does not meet all of the required factual findings, if the Council makes a finding of significant and overriding public benefit.
22. The proposed sale of alcoholic beverages is incidental to a larger retail use.

Based on the above stated facts, the City Council concludes and finds:

1. Based on the findings in the subsection below, the City Council hereby makes a Determination of Public Convenience and Necessity for the subject liquor license:
   a. 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 would not be detrimental to the public health, safety, or welfare of persons located in the area, or increase the severity of existing law enforcement or public nuisance problems in the area; and
   b. The proposed use would not lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use; and
   c. The proposed use <u>is</u> within one hundred fifty feet of an existing residence and residentially zoned property.

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

e. Significant and overriding public benefits will be served by the proposed use, as noted in Item 20 in the Facts section above.

f. 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.

2. The City Council concludes and finds, based on the analysis of the above facts in regard to the Conditional Use Permit, that:

   a. For this use located closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, the proposed location of the off-sale of alcoholic beverages use <u>would not</u> 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; and

   b. The use is closer than one hundred fifty (150) feet from residentially used and zoned property; however, 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 use.

Finally, based on the above-stated findings and subject to the conditions set forth below, the City Council finds that:

1. The proposed use at the location requested <u>will not</u>:

   a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or

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

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.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby granted. Further, in accordance with the findings set forth above, the City Council makes a Determination of Public Convenience or Necessity in conjunction with the proposed off-sale of alcoholic beverages. This City Council expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of

which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS

1. **Acceptance of Permit.** Per Section 20.100.290(B), should the applicant fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the applicant shall be deemed to constitute all of the following on behalf of the applicant:
   a. Acceptance of the Permit by the applicant; and
   b. Agreement by the applicant to be bound by, to comply with, and to do all things required of or by the applicant pursuant to all of the terms, provisions, and conditions of this permit or other approval and the provisions of Title 20 applicable to such Permit.
2. **Recordation.** This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until this Resolution has been recorded with the County Recorder.
3. **Building Permit/Certificate of Occupancy.** Procurement of a Building Permit and/or Certificate of Occupancy from the Building Official for the structures described or contemplated to be built under this permit shall be deemed acceptance of all conditions specified in this permit and the applicant's agreement to fully comply with all of said conditions. No change in the character of occupancy or change to a different group of occupancies as described by the "Building Code" shall be made without first obtaining a Certificate of Occupancy from the Building Official, as required under San José Municipal Code Section 24.02.610, and any such change in occupancy must comply with all other applicable local and state laws.
4. **ABC Permit.** Obtainment and maintenance of an ABC License is evidence of acceptance of all conditions specified in this document and the applicant's intent to fully comply with said conditions. The permittee shall at all times be and remain in compliance with the ABC licensing and shall cause any occupants of the subject site to be and remain in compliance with the ABC licensing.
5. **Conformance with Plans.** The use development shall conform to approved plans entitled, 'Off-Site Alcoholic and Beverage Conditional Use Permit', February 24, 2009, on file with the Department of Planning, Building and Code Enforcement and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
8. **Compliance with Local and State Laws.** The subject use shall be conducted in full compliance with all local and state laws. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code. The Permit shall be subject to revocation if the subject use is conducted in such a manner as to cause a nuisance.
9. **Hours of Operation.** The use shall not operate between the hours of 12:00 midnight and 6:00 a.m.

10. **Operations Plan.** Loitering is prohibited on or around the premises or the area under the control of the applicant licensee(s). No alcoholic beverages shall be consumed on any property adjacent to the premises over which the project developer/applicant has control. The project developer/applicant shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control.
11. **Floor Area.** The maximum floor area devoted to the sale of alcohol shall be a maximum of 10% of the overall tenant space.
12. **Signs.** No new signs are approved with this Permit at this time.
13. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
14. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:
    a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
    b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
    c. The use as presently conducted creates a nuisance.

In accordance with the findings set forth above, a Conditional Use permit to use the subject property for said purpose specified above is hereby **approved** and a Determination of Public Convenience or Necessity **is** made.

ADOPTED this **24th day of February 2009**, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

VACANT:

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

CITY OF SAN JOSE
Planning, Building and Code Enforcement
200 East Santa Clara Street
San José, CA 95113-1905
tel (408) 535-3555 fax (408) 292-6055
Website: www.sanjoseca.gov/planning

NOTICE OF PERMIT APPEAL

TO BE COMPLETED BY PLANNING STAFF

FILE NUMBER: CP08-035

RECEIPT #

PROJECT LOCATION

AMOUNT

DATE

BY

TO BE COMPLETED BY PERSON FILING APPEAL

PLEASE REFER TO PERMIT APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE. THIS FORM MUST BE ACCOMPANIED BY THE APPROPRIATE FILING FEE.

THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE PROPERTY WHICH IS LOCATED AT:

788 N. KING ROAD, SAN JOSE CA

REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.):

See attached Letter

PERSON FILING APPEAL

NAME	DAYTIME TELEPHONE
BARINDER S. NIJJAR	(408) 348-0303

ADDRESS	CITY	STATE	ZIP CODE
3455 OUTLOOK COURT	SAN JOSE	CA	95132

SIGNATURE	DATE
[signature]	12/17/08

RELATIONSHIP TO SUBJECT SITE: (e.g., adjacent property owner, property owner within one thousand (1,000) feet)

CONTACT PERSON
(IF DIFFERENT FROM PERSON FILING APPEAL)

NAME: BARINDER S. NIJJAR

ADDRESS	CITY	STATE	ZIP CODE
3455 OUTLOOK CT.	SAN JOSE	CA	95132

DAYTIME TELEPHONE	FAX NUMBER	E-MAIL ADDRESS
(408) 348-0303	( )	BSNIJJAR@SBCGLOBAL.net

PROPERTY OWNER

NAME	DATE
CARMELO & LETICIA ROSADO	

ADDRESS	CITY	STATE	ZIP CODE
2679 BATON ROUGE DR.	SAN JOSE	CA	95133

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.
THIS APPLICATION APPOINTMENT IS LOCATED ON THE 3RD FLOOR OF CITY HALL.

Barinder S. Nijjar
3455 Outlook Court
San Jose, CA. 95132

December 17, 2008

San Jose City Council
City of San Jose
200 East Santa Clara Street
San Jose, CA. 95113

RE: CP08-035 & ABC08-005,
788 North King Road at Southeast corner of Mabury Road and North King Road.

Honorable Sam Liccardo:

I am writing to you to urge you to approve my appeal regarding the sale of Beer and Wine beverages for off-sale consumption at King and Mabury. Public Convenience and necessity is demonstrated by the petition signed by neighbors. This is a convenience store because there are no stores within a mile in both directions on Mabury Road and on King Road they are .5 - 1.0 miles away in either direction. Unfortunately, I will not be able to remain competitive as a store if I am not able to provide Beer and Wine products for my customers so I will not open the store at the location. This will then deter any tenants from leasing the other three spaces because my market will be the anchor tenant that attracts customers to the location. Please support my appeal so that we can operate a viable and needed corner marketplace where it is badly needed due to the growth of the neighborhood.

Sale of Beer and Wines is going to occupy only 7-10% of shelf space. Staff was able to find 3 out of the four required findings to consider approval of a Determination for Public Convenience or Necessity as required by Title 6 of the San Jose Municipal Code. However in a Zoning area where mixed use is encourage the proposed use happens to be within 150 feet from residential use.

Title 6 provides an opportunity, upon appeal, whereby the City Council can approve such a proposal if the City Council identifies and finds a significant and overriding public benefit or benefits will be served by the proposed use. Planning Commissioner Platten voted against the Commission's decision to deny.

We urge you to approve our appeal because it will benefit neighbors and make our convenience store a full fledged convenience market center for the neighborhood.

Thank you.

Sincerely,

Barinder S. Nijjar

Attachment

Mabury/King Convenience Market Support Letter
788 N. King Road suite 300

We the undersigned neighbors support the opening of the neighborhood market with all the convenience items including the off sale of Beer and wine only.

Signature	Address
[illegible]	718 Creekland Cir
[illegible]	733 Creekland Circle.
Trang Huynh	745 Creekland CIR.
Hoa Nguyen	749 Creekland Cir.
Josefina Rivas	719 Creekland Cir
Don Fernandez	12340 Mabury Rd.
Mohan Bethur	1692 Pala Ranch Cir.
[illegible]	1680 Pala Ranch Cir
[illegible]	1681 Pala Ranch Cir
Glyn O. Harding	732 Creekland Cir.

PC Agenda: 12/10/2008
Item No. 3.b.

STAFF REPORT
PLANNING COMMISSION

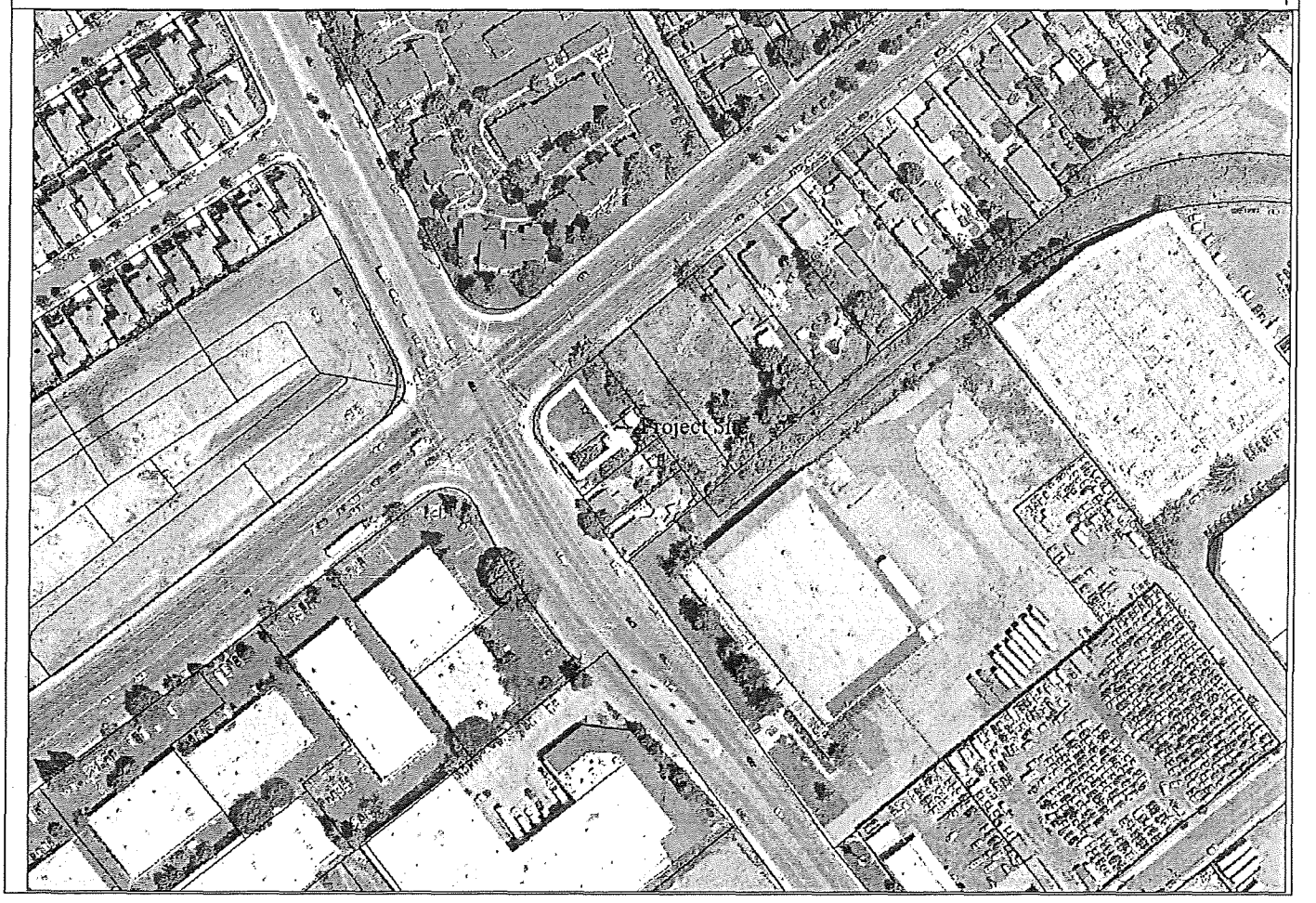
FILE NO.: CP08-035 & ABC08-005 **Submitted: 4/17/08 & 6/17/08**

PROJECT DESCRIPTION: Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol at a new 2,379 square foot convenience store on a 0.53 gross acre site.

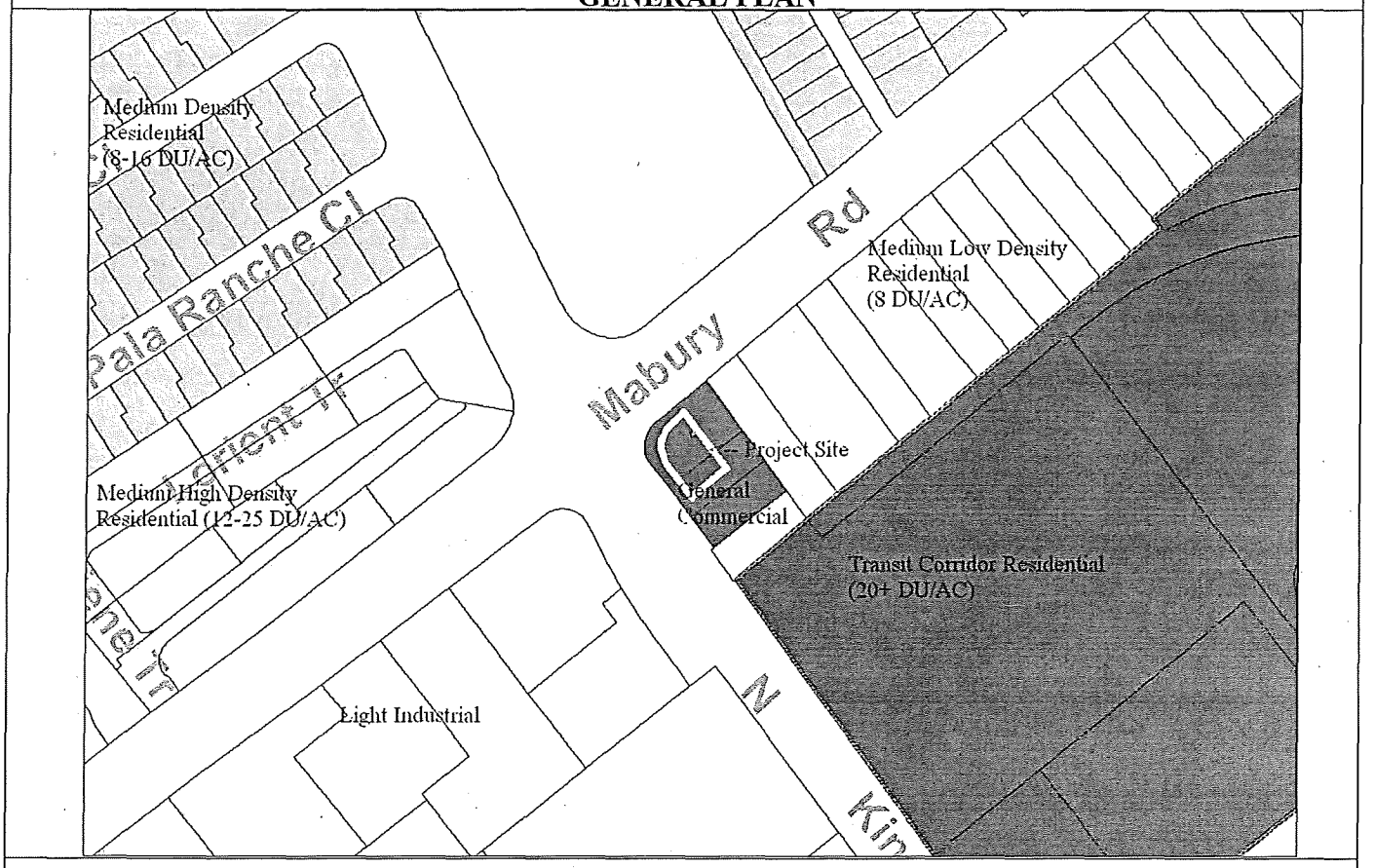
LOCATION: Southeast corner of Mabury Road and North King Road (788 North King Road).

Existing Zoning	CP Commercial Pedestrian
Proposed Zoning	No change
General Plan	General Commercial
Council District	3
Annexation Date	03/06/1967
SNI	None
Historic Resource	No
Redevelopment Area	No
Specific Plan	N/A

Aerial Map N



GENERAL PLAN



ZONING

RECOMMENDATION

Planning staff recommends that the Planning Commission deny the requested Conditional Use Permit and not make a Determination of Public Convenience or Necessity, as mandated by the Municipal Code, and include the facts and findings as included in the attached Resolution.

BACKGROUND & DESCRIPTION

The applicant, Barinder Nijjar, is requesting a Conditional Use Permit and Determination of Public Convenience or Necessity to allow the sale of beer and wine for off-site consumption for a proposed convenience store. The approximately 2,379 square foot grocery store will be located within an existing 5,500 square foot commercial building that includes unrelated tenant spaces.

A Conditional Use Permit is required for the sale of alcohol for off-site consumption (off-sale) in the CP Commercial Pedestrian Zoning District. A "Determination of Public Convenience and Necessity" is also required because the project is located within an area with a crime index that is greater than 20 percent.

A Site Development Permit (File No. H04-047) was approved on March 25, 2005 to construct the 5,500 square foot commercial building and associated site improvements, which is nearing completion. Therefore, the subject Conditional Use Permit is solely for consideration of the off-sale of alcoholic beverages.

The site is bordered by multi-family residences to the north. A vacant lot and single-family residences are located to the east of the site. Industrial uses are located to the west and south of the site, with the area to the south having been recently rezoned for future residential uses.

Project Description

The applicant has indicated that the proposed store proposes to sell beer and wine for off-site consumption, and that the sale of alcohol will be incidental to the products provided in the full convenience store. The store is proposed to operate seven days a week from 6:00 a.m. until 12 midnight (operating hours between 6:00 a.m. and 12:00 midnight are permitted by right in the CP Commercial Pedestrian Zoning District).

GENERAL PLAN CONFORMANCE

The project site has a designation of General Commercial on the San José 2020 General Plan Land Use/Transportation Diagram. The proposed commercial use is in conformance with the General Plan in that commercial uses, such as the subject retail sales of groceries, are supported by the General Commercial designation.

ENVIRONMENTAL REVIEW

Under the provisions of Section 15301 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 no significant change in the existing use is proposed. Under this section, proposals that involve only minor modifications to existing facilities can be found to be exempt.

ANALYSIS

In order for the convenience store to be able to sell alcoholic beverages for off-site consumption, the applicant needs to secure both a Conditional Use Permit and a Determination of Public Convenience or Necessity. An approval of one without the other is of no value in ultimately facilitating the off-sale alcohol use. For this reason, this staff report links these two required applications together for concurrent consideration. The primary issues for this project include 1) conformance with the Zoning Code requirements for approval of a Conditional Use Permit, and 2) requirements for a Determination of Public Convenience or Necessity.

Zoning Code Requirements for Conditional Use Permits for Off-Sale of Alcohol

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: Within a 1,000 foot radius of the proposed use, there no other existing licenses for off-sale of alcoholic beverages. The proposed use together with the existing uses would not 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 not 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. Therefore, the specific finding under this section is not applicable to the consideration of approval of the subject proposal.

3. For such a use at a location closer than five hundred (500) feet from any childcare 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 not located within 500 feet from a childcare center, public park, social service agency, residential care facility, residential service facility, elementary school, secondary school, college, or university. However, the proposed use is located within 150 feet of residentially zoned properties. There is residentially zoned property directly to the east of the site, as well as a single-family residence to the south of the site. The proposed convenience store is oriented towards the corner of Mabury Road and North King Road and not towards the residences. Based on the layout and orientation of the existing site, staff does not anticipate that the off-sale use will adversely affect the adjacent residences and meets the intent of this requirement.

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.

Required findings Under the Zoning Code for All Conditional Use Permits

To approve a Conditional Use Permit the Planning Commission must also make the following findings applicable to all CUPs. They are as follows:

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 of value of the property of other persons located within the vicinity of the site; or
    c. Be detrimental to public health, safety or general welfare.

The proposed off-sale use would be a convenience store in an area that is lacking in retail providers. The subject site abuts major streets, with residential uses oriented away from it. With respects to these general findings, staff feels that this proposal would not be detrimental to the health, safety, and welfare of the surrounding area. That said, it should be noted that the Police Department is opposed to the off-sale of alcohol in this area.

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 is 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, but that the ratio of existing retail on-sale/retail off-sale licenses to population in the census tract does not exceed the ratio of existing retail on-sale/retail off-sale licenses to population in the County as a whole. 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 and 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 use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area. Although the Police Department expressed opposition to the proposal, they did not state the subject property is located within an area where the proposed use would be detrimental to the public or increase the severity of public nuisance or existing law enforcement problems.

2. The proposed use would not 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: The proposed use would be the only off-sale use within a one thousand-foot radius from the proposed use.

3. The proposed use would not be located within 500 feet of a school, day care center, public park, social services agency, or residential care or service facility, or within 150 feet of a residence.

Analysis of Required Finding: The proposed use is not located within 500 feet from a childcare center, public park, social service agency, residential care facility, residential service facility, elementary school, secondary school, college, or university. However, the proposed use is located within 150 feet of residentially zoned properties, and therefore, not consistent with this required 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 can not be recognized as a compensating measure for the close proximity under the Code findings for a Determination of Public Convenience or Necessity. As a result, this required finding cannot be made due to the actual separation distances between the proposed off-sale use and the existing or planned residences along Mabury or King Road.

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

Analysis of Required Finding: For the 2,379 square-foot retail space, only about 20 percent of the floor area is proposed to be dedicated to the sale of beer and wine, and incidental to the sale of the full range of grocery/convenience items. Should the City 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.

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

PUBLIC OUTREACH

A notice of the public hearing was published, posted on the City's web site, and distributed to the owners and tenants of all properties located within 500 feet of the project site. A sign has been posted on the project site. A community meeting was held on July 23, 2008. A notice for the community meeting was sent to the owners and tenants of all properties located within 500 feet of the project site. Three members of the public attended the community meeting. One attendee expressed concern over alcohol being sold and stated it could potentially lead to more litter and crime in the area. One attendee was in favor of the convenience of a retailer at this location. The third attendee was concerned with the possible impact a new ABC license would have on his business (a distiller) and seem unconcerned when he realized it would have no impact. Copies of this staff report have also been posted on the City website. Staff has been available to discuss the proposal with members of the public.

CONCLUSION

Based on the above analysis, staff concludes that all the required findings can be made with regard to the Conditional Use Permit. However, staff believes the only three of the four required findings can be made 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 José Municipal Code. Required Finding #3, that the proposed use is at least 150 feet from a residential use, cannot be made. Therefore, staff is obliged to recommend that the Planning Commission deny the project. The Police Department has indicated that it is opposed to the issuance of an off-sale of alcohol license for this store at this location. In instances where not all of the findings for Public Convenience and Necessity can be made by the Planning Commission, Title 6 provides an opportunity, upon appeal, whereby the City Council can approve such a proposal 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: Ed Schreiner **Report Approved by:** Susan Walton **Date:** 12/1/2008

Owner:	Applicant:	Attachments:
Leticia & Carmelo Rosado 2679 Baton Rouge Drive San José, CA 95133	Barinder Nijjar 3455 Outlook Court San José, CA 95132	Draft Resolution Location Map SJPD Memorandum Plans