



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: February 20, 2009

Approved

Date

COUNCIL DISTRICT: 5
SNI AREA: Mayfair

SUBJECT: ABC08-012. APPEAL OF THE PLANNING COMMISSION'S DECISION TO DENY, AS MANDATED BY THE MUNICIPAL CODE, A DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO ALLOW THE OFF-SALE OF BEER, WINE AND LIQUOR AT AN EXISTING GROCERY STORE (REGION SUPERMARKET) LOCATED ON THE SOUTHEASTERLY CORNER OF VOLLMER WAY AND S. KING ROAD (400 SOUTH KING ROAD).

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council make a Determination of Public Convenience or Necessity by determining that the required findings can be made and that there is a significant overriding public benefit served by the proposed off-sale of alcohol in a full-service grocery store.

OUTCOME

Should the City Council approve the subject Determination of Public Convenience or Necessity, the grocery store, Region Supermarket, would be allowed to sell beer, wine and liquor for off-site consumption in the existing 9,200 square foot retail space within a commercial center. Should the City Council deny the subject request, the Region Supermarket would not be able to sell alcohol in addition to other grocery items.

EXECUTIVE SUMMARY

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 revised the approval process and included 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 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 José 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. In this case, the land use was legal non-conforming and a Conditional Use Permit was not required. 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:

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

Should the Planning Commission find that all the above conditions exist, further consideration of the request is subject to additional discretionary findings. If the Planning Commission is unable to make all necessary findings in order to consider making a Determination of Public Convenience or Necessity, it is compelled under the Municipal Code to deny the Determination of Public Convenience or Necessity. Appeal of the Planning Commission's decision is heard by the City Council, where the Council may make a finding of overriding public benefit should one of the above mandatory factual findings not be met. The City Council is the only 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 for this grocery store in the case of the Determination of Public Convenience or Necessity. The Planning Commission was unable to make all necessary factual findings to approve 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 park site and is within a Strong Neighborhood Initiative area. Therefore, the Commission was compelled to deny the request for a Determination of Public Convenience or Necessity as discussed below. The applicant subsequently appealed the Commission's decision to deny this application to the City Council. Based on an analysis of the findings required for the City Council to approve the Determination of Public Convenience or 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 February 11, 2009, the Planning Commission held a public hearing to consider the Determination of Public Convenience or Necessity (File No. ABC08-012). The Director of Planning recommended denial of the request for a Determination of Public Convenience or Necessity, as mandated by the Municipal Code, because two of the required four findings for the Determination of Public Convenience or Necessity could not be made by the Commission. As stated in the original staff report (see attached), staff's analysis could not support a finding that the proposed off-sale use is not located within one hundred and fifty (150) feet of a residential use and or residentially zoned property, and within 500 feet of a park site, or that the off-sale 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.

Commission Discussion

Gerry Houlihan, representative for the property owner and Jose Manzo, manager of the store, spoke on behalf on the proposal. Mr. Manzo stated that the issuance of an ABC license was vital to keeping the store in business. He stated he believed that some people shopped elsewhere for groceries because they were not able to buy beer, wine or liquor at his store. Five members of the public (including community residents and employees of the store) spoke in favor of the project, citing the benefit the store provides to the community in terms of both jobs and services and the necessity for the store to sell alcohol to continue to stay viable and profitable. The store employees stated that business has been declining and some workers dismissed. They requested that the matter be brought forward to the City Council for action as quickly as possible so that the store could move quickly to include alcohol for purchase by patrons. Staff explained that they had been in close discussion with the applicant on the fastest appeal process to the Council permissible under the Code, and that the City also has an interest in maintaining a vital active grocery store at this location.

After the public hearing was closed, Commissioner Campos made a motion to deny the Determination of Public Convenience or Necessity as mandated by the Municipal Code. Commissioner Kamkar asked counsel what would happen if the Commission were to approve a Determination of Public Convenience or Necessity. Counsel explained that there are clear findings that need to be made and that approval by the Commission in this case would be in violation of San José Municipal Code. Staff commented that revisions to the Code were currently being developed to help improve the off-sale approval process for full-service grocery stores. Commissioners Campos, Jensen, Kamkar and Zito all urged the City Council to overturn their decision to deny as mandated by the Municipal Code.

The Planning Commission denied the proposed Determination of Public Convenience or Necessity by a vote of 7-0-0.

Appeal

On February 13, 2009, the applicant appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal from Gerry Houlihan, representative for the property owner). The Permit Appeal requests that the City Council find that the proposed off-sale of alcohol proposal at the Region Supermarket would provide overriding public benefits and that the Council make a Determination of Public Convenience or Necessity to allow the issuance of the ABC licenses required to allow the sale of the full range of alcoholic beverages in conjunction with this grocery store.

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 make a Determination of Public Convenience or Necessity (PCN). In summary, staff's review provided the Planning Commission with information enabling them to only make two of the four findings required to make a Determination of Public Convenience or Necessity.

The Planning Commission was unable to make the required finding that the subject use was more than 150 feet from a residential property and 500 feet from a park site and that the off-sale 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. Upon an Appeal, per Title 6 of the San José Municipal Code, where the four required findings cannot be made by the decision making body, 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 the finding, 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 9,200 square-foot retail space, less than 10% of the grocery store floor area will be dedicated to sales of beer, wine and liquor, a percentage that is incidental to the overall use. A condition has been added to the draft Resolution (see attached) which limits 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 existing retail use.

Region Supermarket is a grocery retailer that specializes in Hispanic foods and goods. There is wide cross section of clientele that shop at Region Supermarket, and a significant number of customers are expected to purchase alcohol along with other grocery items if made available at the store, reducing the need for patrons to go to a separate liquor or other store.

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

Since staff believes Finding D can clearly be made in this case, there is no need for the Council to make any other finding. However, staff notes that a case could also be made for Finding A, as a more successful grocery store, which the applicant indicates would be the case if off-sale of alcohol is allowed, will enhance the existing shopping center, which has struggled in the past without a strong anchor tenant. Staff does not believe that either of the other two findings, Findings B or C, 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 higher population density (22.1 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.

ALTERNATIVES

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

1. Find that one of the four mandatory findings for a making a Determination of Public Convenience or Necessity can be made, specifically Finding D, and that there is a significant overriding public benefit served by the proposed off-sale of alcohol in conjunction with an existing full-service grocery store, and adopt a resolution making the Determination of Public Convenience or Necessity; or

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2. Find that there is no overriding public benefit served by the proposed off-sale of alcohol and uphold the Planning Commission's decision to deny the subject Determination of Public Convenience or Necessity.

PUBLIC OUTREACH

Approximately 60 members of the public attended a community meeting held for this project in conjunction with the Mayfair NAC at the cafeteria of Cesar Chavez Middle School on January 22, 2009. Those in attendance unanimously supported the proposal, citing the increased convenience in providing alcohol for sale along with a full variety of grocery items, as well as expressing appreciation for the many services that the supermarket provides. Staff noted that the community currently has a very positive impression with how the store is operated. The Mayfair NAC also voted unanimously to support the project.

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 and City Council agendas are posted on the City of San José'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

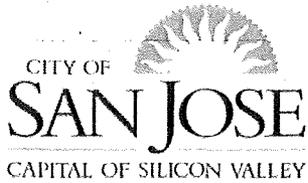
Exempt.


 JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

Attachments:

- Planning Commission Staff Report & Attachments
- Notice of Appeal
- Draft Resolution

cc: Applicant/Appellant



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 <i>ABC08-012</i>	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:
 400 South King Road, San Jose, CA (Letter of Public Convenience and Necessity)

REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.):
 The premises house a supermarket and is located within an SNI area and only the City Council can approve this request according to the Municipal Code.

PERSON FILING APPEAL

NAME Gerald Houlihan, Attorney at Law	DAYTIME TELEPHONE (408) 293-4300
ADDRESS 848 The Alameda, San Jose, CA 95126	CITY STATE ZIP CODE
SIGNATURE <i>[Signature]</i>	DATE 2/13/2009
RELATIONSHIP TO SUBJECT SITE: (e.g., adjacent property owner, property owner within one thousand (1,000) feet)	Owner's Representative

**CONTACT PERSON
(IF DIFFERENT FROM PERSON FILING APPEAL)**

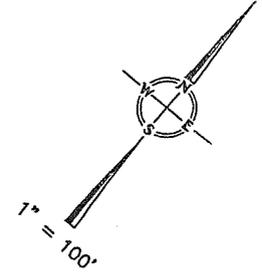
NAME			
ADDRESS	CITY	STATE	ZIP CODE
DAYTIME TELEPHONE ()	FAX NUMBER ()	E-MAIL ADDRESS	

PROPERTY OWNER

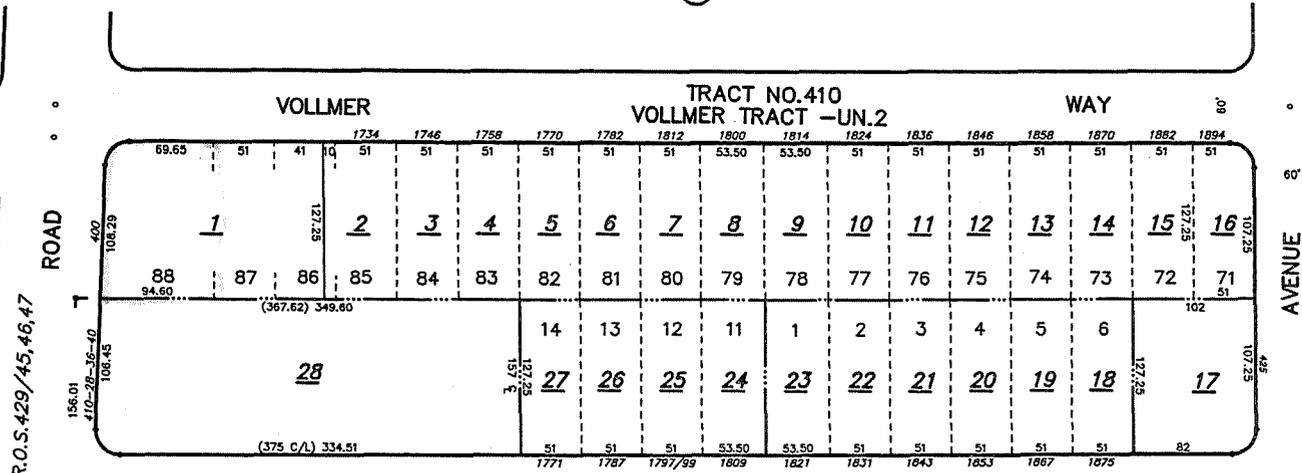
NAME Peter Haramis	DATE 2/13/2009
ADDRESS 90 Santa Paula Avenue, San Francisco, CA 94127	CITY STATE ZIP CODE

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.

(28)

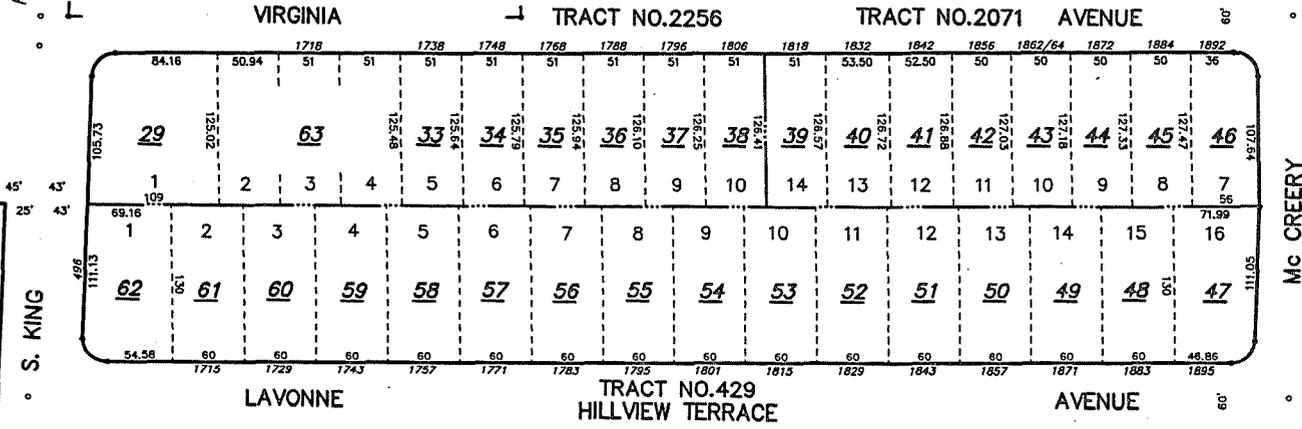


(44)



(29)

(39)



(41)

DET. 124
LAWRENCE E. STONE — ASSESSOR
Cadastral map for assessment purposes only.
Compiled under R. & T. Code, Sec. 327.
Effective Roll Year 2008-2009

RESOLUTION NO.

A resolution of the City Council of the City of San José approving a Determination of Public Convenience or Necessity to use certain real property described herein for the purpose of allowing the sale of beer, wine and liquor for off-site consumption located on the southeasterly corner of Vollmer Way and South King Road.

FILE NO. ABC08-012

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSÉ:

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on November 10, 2008, an application (File No. **ABC08-012**) was filed for a Determination of Public Convenience or Necessity to allow the sale of beer, wine and liquor for off-site consumption, on that certain real property (hereinafter referred to as "subject property"), situate in the CP Commercial Pedestrian Zoning District, located on the southeasterly corner of Vollmer Way and S. King Road (400 South King Road), San José, 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 February 11, 2009, the Planning Commission denied the application; from which decision the property owner has appealed to this City Council; and

WHEREAS, 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 March 10, 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, "Region Supermarket," dated February 2, 2009. Said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, 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:

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

1. The subject site is located on the southeasterly corner of Vollmer Way and S. King Road (400 South King Road).
2. The subject site is located within CP Commercial Pedestrian Zoning District with a small portion of the site in the R-1-8 Single-Family Residence Zoning District.
3. This site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
4. 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 minor interior improvements to the previously approved retail space.
5. The existing grocery store is 9,200 square feet and is part of a larger neighborhood shopping center.
6. The existing building and off-sale of alcohol use is legal non-conforming, therefore a Conditional Use Permit is not required.
7. The subject retail establishment is a grocery store that closes at 10:00 p.m.
8. The existing grocery store proposes to use no more than ten percent of the floor area for the sales of alcoholic beverages.
9. The project site is located in a census tract with an existing over-concentration of liquor licenses, but there are no other off-sale establishments within 1000' of the subject site.
10. Due to over-concentration as noted above, 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.
11. The site is not located in an area with a high number of calls for police service or a high crime rate.
12. The site is not located in an existing Project Crackdown /Weed and Seed Area.
13. The proposed use is within a Strong Neighborhood Initiative area or other area designated by the city for targeted neighborhood enhancement services or programs.
14. The project site is located within 500 feet of a public park to the southwest.
15. The project site is located adjacent to and within 150 feet of residentially zoned property to the east.
16. The Police Department memorandum indicates that the project site is not located within an area of high crime, but that the area does have an over-concentration of existing liquor licenses. For ABC to be able to issue a liquor license for this use, the City must grant a "determination of public convenience or necessity".
17. The Police Department has indicated that they are neutral to the issue of off-sale of alcohol in conjunction with the existing Region Supermarket proposed at this location.
18. The proposed use does not include late night operation. The retail sales of beer and wine is to be in conjunction with the retail of a full range of food and goods.

19. The proposed grocery store proposes to utilize less than 10 percent of the floor area to the sales of alcoholic beverages.
20. On February 11, 2009, the Planning Commission held a public hearing to consider the proposed Determination of Public Convenience or Necessity (File No. ABC08-012). The Director of Planning recommended denial of the request for a Determination of Public Convenience or Necessity because two of the required four findings could not be made.
21. On February 13, 2009, the applicant appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal from Gerry Houlihan, representative for the property owner). The Permit Appeal requests that the City Council find that the proposed off-sale of alcohol proposal at the Region Supermarket would provide 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 Region Supermarket provides beer, wine and liquor sales only in conjunction with a full-service grocery store.
22. 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 9,200 square-foot proposed retail space, less than 10% is to be dedicated to the sale of beer, wine and liquor, which is incidental to the overall grocery 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.
23. 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.
24. 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 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 is within one hundred fifty feet of an existing residence and residentially zoned property and is within five hundred feet of an existing park site.
 - 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 Items 22 and 24 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.

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. **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.
3. **Conformance with Plans.** The use development shall conform to approved plans entitled, 'Region Supermarket, 400 S. King Road, San Jose CA 95116', dated January 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).
4. **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.
5. **Hours of Operation.** The use shall not operate between the hours of 12:00 midnight and 6:00 a.m.
6. **Floor Area.** The maximum floor area devoted to the sale of alcohol shall be 10% of the overall tenant space.
7. **Signs.** No new signs are approved with this Permit at this time.

In accordance with the findings set forth above, a Determination of Public Convenience or Necessity is made.

ADOPTED this 10th day of March 2009, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

VACANT:

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk