



COUNCIL AGENDA: 03-10-09
ITEM: 4.5

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Lee Price, MMC
City Clerk

SUBJECT: SIDEWALK CAFÉ UPDATE

DATE: 02-26-09

RECOMMENDATION

As referred by the Community and Economic Development Committee of February 23, 2009 and outlined in the attached memo previously submitted to the Community and Economic Development Committee, accept the status report and consider eliminating any automatic expiration dates for the sidewalk café permits enacted after the adoption of the most recent ordinance revision that took effect on May 30, 2008.





Memorandum

TO: COMMUNITY AND ECONOMIC
DEVELOPMENT COMMITTEE

FROM: Joseph Horwedel

SUBJECT: SIDEWALK CAFÉ UPDATE

DATE: February 6, 2009

Approved

Date

2/10/09

COUNCIL DISTRICT: Citywide
SNI AREA: All

RECOMMENDATION

Staff recommends that the Community and Economic Development Committee accept the status report and recommend that the City Council eliminate any automatic expiration dates for the sidewalk café permits enacted after the adoption of the most recent ordinance revision that took effect on May 30, 2008.

OUTCOME

The current direction from Council is for all Sidewalk Café Permits benefitting from the new regulations related to hours and entertainment to expire on November 30, 2009. By rescinding said direction, the sidewalk cafés could remain in operation after November 30, 2009.

BACKGROUND

On April 29, 2008, the City Council approved an ordinance that revised the sidewalk café regulations in Title 20 of the San Jose Municipal Code. The updated regulations allow sidewalk cafés to remain open until 2 a.m. (assuming the host business was open until this time); allow businesses in the Downtown Core that have an Entertainment Permit from the Police to have a sidewalk café (businesses outside the Downtown Core with an Entertainment Permit from the Police are still prohibited from having a sidewalk café); and clarifies regulations related to alcohol sales, licensing, and operational conditions. The Council's approval specified that any Sidewalk Café Permits benefitting from the new regulations related to hours and entertainment would expire within 18 months of the Council's approval (November 30, 2009), and it requested that staff return to Council with a status report 12 months after the enactment of the new provisions.

On the same Council agenda, the City Council accepted the Soft Closing Pilot Program Report and directed the City Manager's Office to create a "downtown liaison" position charged with

February 6, 2009

Subject: Sidewalk Café Update

Page 2

coordinating with downtown businesses in an effort to improve downtown safety and enhance the downtown environment. Other directives were also given with the Council's action; however, this memo only addresses the sidewalk café 12-month status report requested by the Council.

ANALYSIS

As of February 5, 2009, 13 new Sidewalk Café Permits have been approved since the updated sidewalk café regulations took effect (see attached maps). Another four Sidewalk Café Permits are pending approval, and the San Jose Redevelopment Agency is currently working with at least five other businesses to submit applications for sidewalk cafés to the Planning Division. A list of the businesses with approved Sidewalk Café Permits is attached.

Planning staff asked the Police Department for their feedback related to the new sidewalk café provisions and whether they have experienced any policing impacts as a result of the new regulations and cafés. The Police Department has responded with the following statement:

At this time, the Police Department does not have enough information for definitive comments on the Sidewalk Café Ordinance of April 2008. That said, we are concerned about how the ordinance can impact us in the future, especially at venues (for example, Tres Gringos, San Jose Bar and Grill) where "eating establishments" operate more like nightclubs.

Planning staff recognizes the concerns of the Police Department. A standard condition contained with Sidewalk Café Permits (where alcohol is sold) notes that "no sidewalk café may function as a drinking establishment." Additional standard conditions require that the sidewalk café "maintain food service and operate as a public eating establishment at all times that it is in operation." Other standard conditions limit activities (no dancing or amplified music, for example) and the number of occupants. A recent permit is attached to provide an example of all standard conditions. Sidewalk Café Permits do not constitute a deed or grant of an easement, and they are revocable at any time by the City. Should a business operate outside of the required conditions, revocation of the Sidewalk Café Permit could occur immediately. To do so, the Director of Planning would simply need to provide written notification of such termination to the affected business. Given this ability, Planning staff believes that the concerns from the Police Department can be sufficiently addressed through appropriate enforcement of any violations.

The permitting of 13 new sidewalk cafés in the past 10 months has significantly contributed to larger successes in implementing General Plan strategies to activate Downtown. The San Jose Redevelopment Agency has indicated that additional interest in sidewalk café permitting has spiked recently. Sidewalk cafés allow businesses to take advantage of San Jose's excellent weather, improve citizen surveillance by increasing the number of people on the street, and provide visual interest and activity to the streetscapes.

Because of the benefits provided by sidewalk cafés and because of their revocable nature, staff recommends that the City Council rescind the 18-month time limit on the new sidewalk café permits and regulations related to hours, food service, occupancy, and entertainment, thereby making the

February 6, 2009

Subject: Sidewalk Café Update

Page 3

current provisions permanent. Should conditions change in the future, staff would approach the Council with recommended revisions to the current regulations.

POLICY ALTERNATIVES

Should the City Council choose to maintain the 18-month time limit on the sidewalk cafés, staff would enact their power of revocation and eliminate those sidewalk cafés that have been permitted since the updated ordinance was approved. Businesses could be impacted by decreased revenue, and activity and visual interest on public streets would decrease. No immediate benefits are apparent.

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)**

Prior to the Council's April 29, 2008 action, the proposed ordinance and associated memoranda were posted on the Department's webpage, and the public hearing was published in the Mercury News. Staff conducted outreach to the Downtown Association and the Chamber of Commerce through various standing meetings related to the Downtown. No additional outreach occurred for this update to Council, though staff has continued to be available to answer any questions.

COORDINATION

This memo has been coordinated with the Police Department, the Redevelopment Agency, and the City Manager's Office.

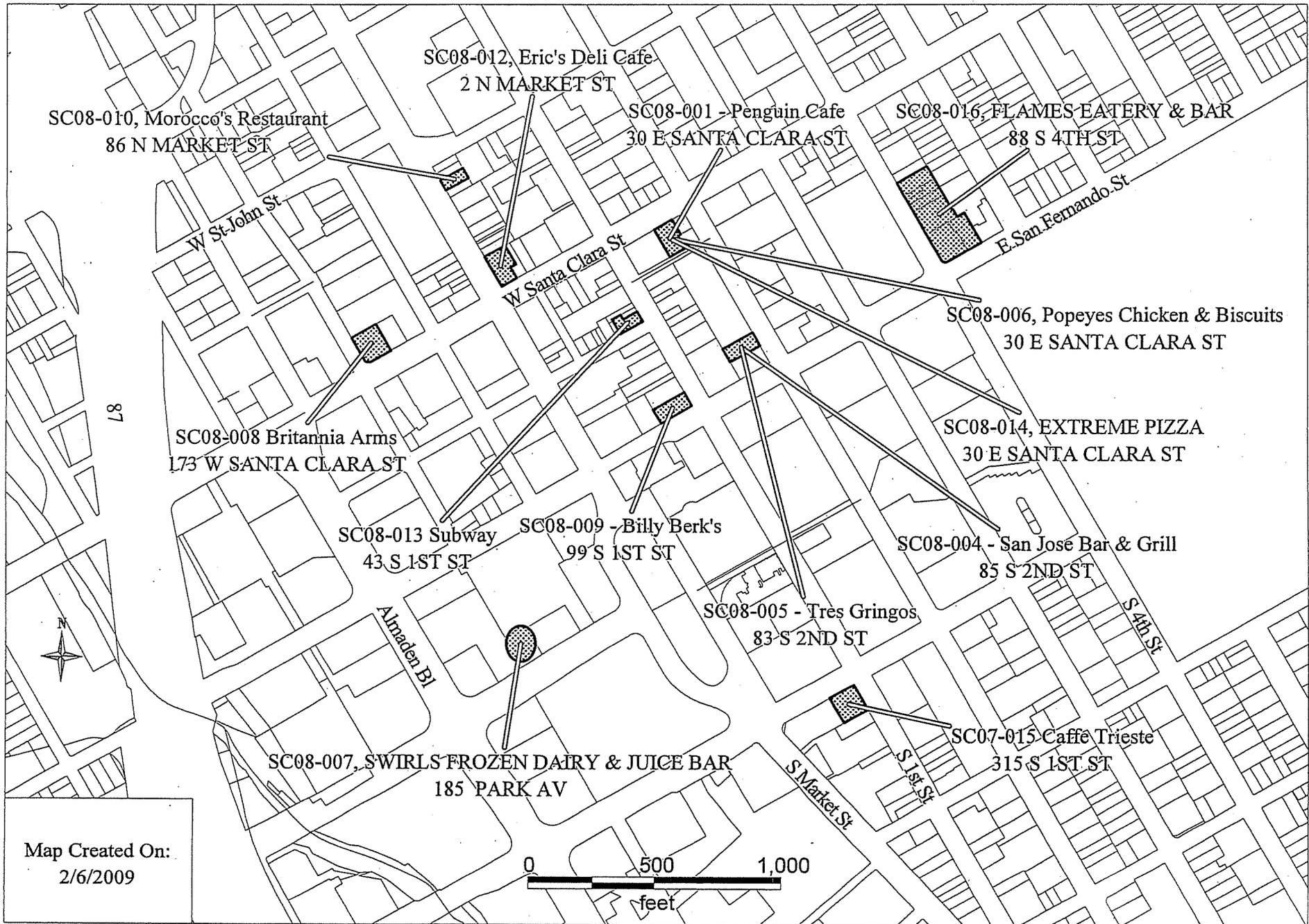
CEQA

CEQA: Exempt - 15061(b)(3)



JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

Sidewalk Cafe Permits Approved Since May 30, 2008



Map Created On:
2/6/2009

SIDEWALK CAFÉ PERMIT

FILE NO.	SC08-014
LOCATION OF PROPERTY	South side of East Santa Clara Street, approximately 100 feet westerly of 2nd Street (30 E. Santa Clara St., #130)
ZONING DISTRICT	DC Downtown Primary Commercial
GENERAL PLAN DESIGNATION	Core Area
PROPOSED USE	Sidewalk Café Permit to allow outdoor seating for the consumption of food and alcoholic drinks in the public right-of-way along East Santa Clara Street.
ENVIRONMENTAL STATUS	Exempt
APPLICANT/ADDRESS	Extreme Pizza Attn: Ellen Hui P.O. Box 1408 Union City, CA 954587

FACTS

The Director of Planning, Building and Code Enforcement finds that the following are the relevant facts regarding this proposed project:

1. On October 31, 2008, the applicant, Ellen Hui of Extreme Pizza, applied for a Sidewalk Café Permit to allow outdoor seating for the consumption of food and alcoholic drinks in the public right-of-way along East Santa Clara Street.
2. A maximum of five tables and twenty chairs will be placed in front of the building frontage on East Santa Clara Street on either side of the restaurant entrance in two areas that measure approximately 7 feet by 9 feet and 7 feet by 5 feet, for an approximate total area of 98 square feet.
3. No table will be placed in front of the door, and an aisle, of a minimum width of 5 feet, will be maintained at all times.
4. The sidewalk café area would be divided from the pedestrian way by moveable post and rope divider system.
5. On East Santa Clara Street a minimum of 9 linear feet of sidewalk would remain open and unobstructed for pedestrians.
6. The subject site is designated Core Area on the San José 2020 General Plan Land Use/Transportation Diagram. It is zoned DC Downtown Primary Commercial Zoning District.
7. Under the provisions of San José Municipal Code Section 20.100.1420, a sidewalk café may be permitted upon issuance of a Sidewalk Café Permit.

8. The hours of operation for the sidewalk café shall be limited to the hours of operation of the associated public eating establishment, except that a sidewalk café shall not be open during the hours of 2:00 a.m. and 6:00 a.m.
9. The California State Department of Alcoholic Beverage Control has licensed the applicant as a Bona Fide Public Eating Place.
10. The restaurant is a bona fide public eating establishment as defined in the California Business and Professions Code Section 23038.
11. Under the provisions the California Environmental Quality Act (CEQA) Guidelines Section 15301, the Director of Planning, Building and Code Enforcement has determined the proposed project 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 (CEQA), as amended.
12. The applicant signed an Indemnity and Release Agreement between the City of San José and the sidewalk café Permittee on October 30, 2008.
13. The surrounding area is characterized by commercial uses, including other restaurants with sidewalk cafés.
14. The San José Downtown Streetscape Master Plan strongly encourages sidewalk cafés on Urban Structure Streets, such as Santa Clara Street, if (1) such cafés are located within the building zone or the curb zone, (2) a minimum five-foot pedestrian through zone is maintained (3) the sidewalk café does not interfere with access to any building (4) café divider systems such as railing are movable and not permanently attached to paving.

FINDINGS

The Director of Planning, Building and Code Enforcement concludes and finds, based on the analysis of the above facts, that:

1. The proposed sidewalk café:
 - a. Would not create a nuisance; and
 - b. Would preserve or enhance the character of the surrounding area; and
 - c. Would adequately preserve and protect the convenience and safety of pedestrians, property owners, occupants, customers, residents or tenants of offices, stores, shops or dwellings in the vicinity of the premises; and
 - d. Would not result in any significant adverse land use impacts; and
 - e. Would comply with the Conditions & Restrictions set forth in this Part.

The Director of Planning, Building and Code Enforcement further finds with respect to the service of alcohol, that:

1. The use located on the Premises does not function solely as a Drinking Establishment as that use is defined in Section 20.200.311.0 of the San José Municipal Code.
2. The owner or operator of the Public Eating Establishment desiring to extend its business operations into a Sidewalk Café holds a current and valid liquor license issued by the California Department of Alcoholic Beverage Control allowing its Public Eating Establishment to operate as a Bona Fide Public Eating Place under State law.

3. The licensee under the liquor license issued by the California Department of Alcoholic Beverage control is in full compliance with all conditions and restrictions of his or her liquor license.
4. No Dance Hall Permit has been approved for this establishment.
5. The applicant for the Sidewalk Café Permit or the Public Eating Establishment to which the proposed Sidewalk Café would be appurtenant, and the site upon which the public Eating Establishment is located are all in full compliance with all provisions of this Code and would continue to be in full compliance if and after a Sidewalk Café Permit is issued; and
6. The issuance of the Sidewalk Café Permit would not result in any significant adverse land use impacts based on all the information known by and/or submitted to the Director related to the Sidewalk Café Permit.

APPROVED SUBJECT TO THE FOLLOWING 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. **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 to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water 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.
3. **Conformance with Plans.** Placement of the outdoor furniture shall conform to the approved plan set within File No. SC08-014, entitled "Extreme Pizza" dated October 30, 2008 on file with the Department of Planning, Building and Code Enforcement.
4. **Revocation.** The Permit does not constitute a deed or grant of an easement by the City and is revocable at any time.
5. **Conformance with Municipal Code.** No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code.
6. **Nuisance.** The permittee shall operate in a manner such that the sidewalk café does not create a public or private nuisance.
7. **Occupancy.** The permittee must comply with the building occupancy as determined by the Fire Department. The maximum number of persons allowed to occupy the sidewalk café area shall be limited to the maximum number of seats in the sidewalk café area, in accordance with the approved plans for this permit.

8. **Outdoor Seating Furniture.** Umbrellas, tables, chairs, and other portable appurtenances shall be confined to the area shown on the approved Permit plan set.
9. **Equipment.** Equipment for the service of customers, including but not limited to, trays or carts, eating or drinking utensils, linens, and cooking appliances may not be placed or maintained on any portion of the sidewalk.
10. **Removal of Portable Appurtenances.** All umbrellas, tables, chairs and other portable appurtenances shall be removed from the area at the end of each business day at the hour specified in this Permit.
11. **Trash Container.** At least one covered outdoor trash container on Santa Clara Street shall be provided in the sidewalk café area during the hours of operation and shall be maintained in a clean and sanitary condition.
12. **Maintenance.** The Premises shall be maintained in a clean and sanitary condition at all times.
13. **Obstructions.** The portion of the sidewalk area not permitted to be occupied by umbrellas, tables, chairs, and other portable appurtenances shall be kept free of obstructions at all times, so that a pedestrian through zone is maintained, at minimum, five feet in width.
14. **Tables & Chairs Required.** The Sidewalk Café area shall contain tables and chairs and shall operate as a café and shall not operate in a "standing only" manner in any way or in any portion of the Sidewalk Café area.
15. **Hours of Operation.** The hours of operation for the sidewalk café shall be limited at a maximum to the hours of operation of the associated Public Eating Establishment. In accordance with Section 20.100.1480 of the San José Municipal Code, as amended, the subject Sidewalk Café shall not operate between the hours of 2:00 a.m. and 6:00 a.m.
16. **Amplified Music Prohibited.** No amplified sound may be used within a sidewalk café. At no time shall any music originating from any part of the Premises create a nuisance.
17. **Dancing Prohibited.** Dancing shall not be allowed in the sidewalk café.
18. **Alcoholic Beverage Operations.** The permittee must at all times comply or cause the compliance with all federal, state, and local laws regarding the sale, service, and consumption of alcoholic beverages and the operation of the premises.
19. **Liability Agreement.** The Applicant shall adhere to the signed agreement, submitted to the City's Risk Manager and approved by the City Attorney, to defend, indemnify, save, and hold harmless the City and all of its officers, agents, or employees from any liability for damages resulting from any and all operations under a permit granted pursuant to San José Municipal Code Chapter 20.100 to the satisfaction of the Director of Finance.
20. **Insurance Coverage.** Each permittee shall, at his or her own cost and expense, obtain and maintain in full force and effect all of the necessary insurance coverage for the full term of the Sidewalk Café Permit or any renewal thereof. The level of coverage shall be in the amount determined by the City's Risk Manager or the City Manager's designee to perform the functions of the Risk Manager.
21. **Annual Renewal of Insurance Coverage.** On or before January 15th of each calendar year, the applicant shall submit proof of insurance coverage to the City of San José Risk Manager clearly labeled with the City File No. SC08-014 to the satisfaction of the Director of Finance.
22. **Business Tax License.** Prior to the implementation of the sidewalk café use, the applicant shall provide proof to the Director of Finance of a current Business Tax License issued by the Treasury Division of the Department of Finance.

23. **Transferability.** This permit may not be transferred or assigned.
24. **Alterations to Area.** The sidewalk shall not be painted, landscaped or altered in any way without prior written approval by the City's Director of Transportation.
25. **Easement.** The Permit does not constitute a deed or grant of an easement by the City and is revocable at any time.
26. **Conformance with ABC Criteria.** The Permittee shall remain, and shall cause the premises to remain, in full compliance with all provisions and conditions of any liquor license or other authorization issued for the Permittee's premises by the California Department of Alcoholic Beverage Control.
27. **Alcohol Service in Sidewalk Café.** No person shall serve alcoholic beverages at a Sidewalk Café unless and until both the Sidewalk Café Permit and the liquor license issued by the California Department of Alcoholic Beverage Control specifically authorize the service of alcoholic beverages, which authorization from the California Department of Alcoholic Beverage Control may require a license that includes a sidewalk café or may require a premises expansion authorization.
28. **Consumption of Alcohol on Premises Only.** Alcoholic beverages may be consumed only on the Permittee's premises. The permittee shall not allow patrons to leave the confines of the premises with any alcoholic beverage. The permittee shall not allow patrons to give or sell alcoholic beverages to any person outside the premises.
29. **Food Service.** A Sidewalk Café appurtenant to a Public Eating Establishment shall maintain food service and operate as a Public Eating Establishment at all times that it is in operation.
30. **Restriction of Operation as a Drinking Establishment.** No Sidewalk Café may function as a Drinking Establishment as defined in Section 20.200.300 of the San José Municipal Code.

APPROVED and issued this 30th day of January, 2009.

Joseph Horwedel, Director
Planning, Building and Code Enforcement

Deputy