



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: January 24, 2011

Approved

Date

2/3/11

COUNCIL DISTRICT: 6
SNI AREA: None

SUBJECT: CP10-022 and ABC10-011. Appeal of the Planning Commission's decision to deny a Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol (beer and wine) at an existing general retail store/pharmacy in a 15,465 square-foot tenant space in a shopping center on a 7.2 gross-acre site at the southwest corner of Meridian Avenue and Hamilton Avenue (1615 Meridian Avenue).

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council deny the subject Conditional Use Permit and not make a Determination of Public Convenience or Necessity by finding that the required findings for a Determination of Public Convenience or Necessity cannot be made and that there is not 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 would continue to operate as a existing general retail store/pharmacy as it presently exists without the ability to sell beer or wine for off-site consumption. Should the City Council approve the subject request, the site would be permitted to acquire a State of California Alcoholic Beverage Control (ABC) license to allow the ability for the existing store to sell beer and wine for off-site consumption.

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 mandatory findings for a Determination of Public Convenience or Necessity, when such a determination is required by the State Department of Alcoholic Beverage Control.

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 requiring additional findings when the number of establishments are more than 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, childcare 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 State Department of Alcohol Beverage Control, 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. 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 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 proposed subject use is within 150 feet of a residential use and would lead to a grouping of more than four off-sale establishments within 1000 feet of the proposed use. Therefore, the Planning 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 or Necessity in the face of negative factual findings by the Planning Commission, staff concludes that none of the necessary findings can be made to determine that a "significant or overriding public benefit or benefits will be served by the proposed use." For these reasons, staff recommends that the City Council deny the request for a Conditional Use Permit and Determination of Public Convenience or Necessity.

BACKGROUND

Planning Commission Hearing

On December 1, 2010, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP10-022 & ABC10-011). The Director of Planning recommended 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 150 feet of a residential use or residentially zoned property and was unable to find that the proposed use would not lead to the grouping of more than four off-sale uses within a 1000-foot radius from the proposed use.

The applicant's attorney, Dan Kramer, was present at the hearing and stated that Walgreen's intends to put just one 10-foot cooler of beer and 18 linear feet of shelf space of wine in the store, and that there would be closed-circuit TV cameras and public view monitors on site to assist store employees with loss prevention. Mr. Kramer said that all the employees will undergo a responsible alcohol assessment training program, and customers who appear to be under the

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age of 40 will have identification checked. He stated that Walgreens is a company whom people have trusted to handle controlled substances for over 100 years, a company who has sold alcohol in its stores throughout the country since the end of prohibition and a company with strict safety, security and training guidelines in place. He asked where the evidence was that supported a finding that the sale of beer and wine at Walgreens will adversely affect the peace, health, safety, morals, and general welfare of persons residing or working in the surrounding area, and he noted that the San José Police Department were neutral to the proposal. He stated that Walgreens had an impeccable legal compliance record when it sold alcohol at many of its stores in San José in the past. He noted that 775 Walgreens customers signed a petition stating that it would increase the convenience of their shopping experience, if beer and wine was sold at Walgreens, and that the letter from the Willow Glen neighborhood association was in support of this use. He stated that he was puzzled that the Planning Department suggests in its staff report that a grocery store that sells alcohol provides a benefit to the community but a pharmacy and general retailer that also sells fruit, meat, cheese, milk, bread, crackers, chips, candy, and hundreds of other products similar to a grocery store would somehow harm the community. He commented that every other major pharmacy chain in San José sells alcohol, and that the request is that Walgreens be provided with a level playing field that will allow the store to sell beer and wine.

There were two speakers from the public that spoke on the proposal. Jeff Gordon, a resident at 420 Shepherd Avenue stated that he resides literally across the street from the property in question. He said that a good analysis has been done of some of the key concerns of the neighborhood relative to safety, health and overall welfare in the context of the existing abundance of off-sale establishments in this vicinity and that there is not a need for another opportunity for people to purchase liquor.

Richard Zappelli, Board Secretary representing the Willow Glen Neighborhood Association (WGNA), stated that when Walgreens made their presentation to WGNA there were no objections to Walgreens applying for a liquor license. He stated that it is the WGNA's hope that Walgreens will appeal this decision, and WGNA will support that appeal. He pointed out that Walgreens is very active in the community and this is a location that is competing with a nearby CVS that is in the City of Campbell on Hamilton Avenue and Bascom. He said that when San José residents and Walgreens customers go to CVS the sales tax dollars go to Campbell, not to San José. He also stated that Walgreens is a good employer.

In response to public testimony, Planning staff noted that the Safeway on Hamilton Avenue in San Jose across the street from the subject site is convenient for shopping, and it is a full-service grocery store that sells beer and wine. Staff stated that there are limited off-sale licenses available, and the legislation regarding overconcentration of off-sale establishments within an area is intended to support public health and safety.

Vice Chair Cahan stated that due to the overconcentration of off-sale establishments in this area, it behooves the Commission to deny the proposal. She added that there are residences that are very close to the subject store, and that it would be very easy to walk with a six pack to one of the nearby houses and leave garbage in one of the front yards. She stated that while it is good to keep our tax dollars in San José, there is both a Safeway and a Rite Aid right across the street

from the subject site in the City of San Jose where buyers can purchase beer and wine instead of driving a longer distance to the CVS in Campbell.

The Planning Commission voted to deny the subject application 5-0-1-1 with Commissioner Platten abstaining and Commissioner Kamkar absent.

Appeal

On December 13, 2010, an appeal was filed by the applicant's attorney, Daniel Kramer (see attached Notice of Permit Appeal and letter supporting the Appeal from Daniel Kramer/HaasNajarian, LLP). The applicant states in their appeal that they have widespread community support for this use, which indicates that the sale of beer and wine at the property will serve public convenience or necessity. The letter also reiterates the comments stated by Mr. Kramer at the public hearing with the Planning Commission held December 1, 2011.

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 and to make a Determination of Public Convenience or Necessity. In summary, staff's review provided the Planning Commission with information that enabled that body to make required findings for denial of the Conditional Use Permit, and enabled the Commission to make only two of the four findings required to make a Determination of Public Convenience or Necessity. For the subject application, approval of both a Conditional Use Permit and Public Convenience or Necessity is necessary in order for a Liquor License to be issued by the State of California.

Upon an appeal, per Title 6 of the San José 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." In addition, the City Council would also be required to make at least one of the four special findings as listed below in italics. Following the description of the finding, staff has provided analysis of the finding.

- 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.*

The area is already well served by off-sale establishments. There are five existing such uses located within 1000 feet of the subject site. The proposal would not add a new business to the existing commercial area, but rather add off-sale of beer and wine to the existing subject site creating a sixth off-sale use, and creating additional overconcentration in an already overconcentrated census tract. Therefore, the proposed outlet would not 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.

The first part of this finding can be made in that the census tract in which the proposed outlet is located does have a lower population density as compared to City average. In fact, the subject census tract (5026.01) has a population density of 7.3 persons per acre which is slightly more than half as much as the City-wide census tract average of 13.9 persons per acre. However, with respect to the second part of this finding, the subject store would add a sixth establishment to the existing five establishments that sell beer and wine within a 1000-foot radius of the subject site, therefore the approval of this permit would add more off-sale establishments to 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.*

The shape of the subject census tract is similar to surrounding census tracts with no unusual appendages. The neighborhood located in the vicinity of the subject proposal is not underserved by off-sale establishments. Although the Police Department has indicated that they are neutral to this proposal, there was public concern raised in writing and with testimony and discussion at the Planning Commission Public hearing about the impacts of off-sale outlets on public 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.*

The current use is primarily a pharmacy and general retail store that sells pre-packaged food and snack items. The store does not sell a complete array of food items such as fresh produce or meat as would be the case with a grocery store. There is a full-service supermarket, Safeway, is located in the shopping center directly across Meridian Avenue to the east. Therefore, the subject store does not provide a more complete and convenient shopping experience.

Findings of Overriding Public Benefit

Staff has concluded that none of the four findings, described above, can be made to approve the proposed Conditional Use Permit and make a Determination of Public Convenience or Necessity to allow off-sale of beer and wine at the subject store. Based on the analysis of the required findings, staff has concluded that there would not be a significant or overriding public benefit served by the proposed use. This overall area is already well served by off-sale establishments. There are five such uses located within a 1000-foot radius of the subject site (see attached map).

CONCLUSION

Based on the proximity of residences within 150 feet of the subject site and the high number of existing off-sale establishments within 1000 feet of the subject site, as well as testimony provided at the Planning Commission hearing, and discussion by the Planning Commission, staff and the Planning Commission have concluded that this area is already well served by off-sale establishments. For these reasons and based on an analysis of the required findings, staff recommends that the City Council deny the proposed Conditional Use Permit and not make a Determination of Public Convenience or Necessity to allow off-sale of beer and wine at the subject store.

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

PUBLIC OUTREACH

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 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)**
- Criterion 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 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 1000 feet of the project site. A sign has been posted on the project site. A community meeting was held on October 18, 2010. Seven community members attended the meeting. Councilmember Oliverio also was in attendance at the beginning of the meeting and welcomed community members. Planning staff and the applicant presented the application and the City's public hearing process to the attendees. Most of the attendees at the community meeting did not indicate strong opposition to the proposed off-sale use: they were either neutral or mildly opposed to the proposal. This memorandum and the staff report to the Planning Commission are posted on the City website. Staff has been available to discuss the proposal with members of the public.

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COORDINATION

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

CEQA

Exempt.

/s

JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

For questions please contact Mike Enderby at 408-535-7843

Owner:	Applicant:	Attachments:
Filice Lansford Development Corporation Attn: Al Filice, President/CEO 2644 Spring Street Redwood City, CA 94063-3522	Daniel Kramer Haas Najarian, LLP 58 Maiden Lane, Floor 2 San Francisco, CA 94108	<ul style="list-style-type: none">▪ Draft City Council Resolution▪ Map identifying location of nearby off-sale establishments▪ Planning Commission Staff Report & Attachments▪ establishments▪ Notice of Appeal▪ Petition and letter from Dan Kramer, attorney for Walgreens

RESOLUTION NO. _____

Resolution of the City Council of the City of San Jose denying a Conditional Use Permit and a request for a Determination of Public Convenience or Necessity to use certain real property described herein to allow off-sale of alcohol (beer and wine) at an existing retail store/pharmacy in a 15,465 square-foot tenant space at a shopping center on a 7.2 gross-acre site at the southwest corner of Meridian Avenue and Hamilton Avenue (1615 Meridian Avenue).

FILE NO. CP10-022 & ABC10-011

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

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San Jose Municipal Code, on May 24, 2010, an application (File No. CP10-022) was filed for a Conditional Use Permit and a request for a Determination of Public Convenience or Necessity (ABC10-011) for the purpose of allowing off-sale of beer and wine at an existing general retail store/pharmacy in an existing approximately 15,465 square-foot tenant space in a shopping center on an approximately 7.2 gross-acre site on that certain real property (hereinafter referred to as "subject property"), situate in the CN Commercial Neighborhood Zoning District, located at the southwest corner of Meridian Avenue and Hamilton Avenue (1601, 1613, and 1615 Meridian Avenue) San Jose, 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, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San Jose Municipal Code, this City Council conducted a hearing on said application, 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, "Walgreens Store 1613 Meridian Ave, San Jose, CA", dated October 21, 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 Jose 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. 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 CN Commercial Neighborhood 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 current use is a general retail store/pharmacy in an existing approximately 15,465 square-foot tenant space.
5. The project includes no exterior modifications to the existing building.
6. The site is surrounded by commercial uses to the north, and east, across Hamilton Avenue and Meridian Avenue respectively, to the south across Willowhurst Avenue, and by office and residential to the west.
7. No increase in parking demand results from this proposed project.
8. The subject establishment is a general retail/pharmacy store that closes at 10:00 p.m., and is permitted to stay open until midnight.
9. The Police Department memorandum indicates that the project site is not located within an area of high crime, however is within a census tract that has an over-concentration of off-sale licenses.
10. The Police Department has indicated that they are neutral to the issue of off-sale of alcohol in conjunction with the pharmacy store at this location.
11. The proposed use would lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use.
12. Due to the over-concentration of off-sale licenses, 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.
13. 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.

14. The project site is not located within 500 feet of a school.
15. The project site is located within 150 feet of residentially zoned property.
16. There are five other off-sale establishments within 1000 feet of the subject site.
17. The approval of this permit would add more off-sale establishments to the area.
18. The proposed sales of alcoholic beverages are incidental to a larger retail use.
19. The subject census tract (5026.01) has a population density of 7.3 persons per acre which is less than the City-wide census tract average of 13.9 persons per acre.
20. The store does not sell a complete array of food items such as fresh produce or meat as would be the case with a grocery store.
21. There is a full service grocery store located within the shopping center across the street.
22. The shape of the subject census tract has a configuration similar to surrounding census tracts with no unusual appendages.
23. At the Planning Commission public hearing, the Planning Commission and neighboring residents raised concerns about the impacts of off-sale of alcohol at the subject site to adversely affect the peace, health, safety, morals, or welfare of persons residing in the surrounding area;
24. The two permits are linked together; without the Determination of Public Convenience or Necessity, the Conditional Use Permit cannot be effectuated.
25. The Planning Commission denied the proposed request for the off-sale of alcohol on December 1, 2010.
26. The applicant appealed the Planning Commission decision on December 13, 2010.

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

1. For the 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, that 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; and
2. The use is 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, such that the resulting excess concentration of such uses will:
 - a. Adversely affect the peace, health, safety, morals, or welfare of persons residing

- or working in the surrounding area; or
- b. Impair the utility or value of property of other persons located in the vicinity of the area; or
 - c. Be detrimental to public health, safety or general welfare.
3. The use is not located closer than five hundred (500) feet from any child care center, public park, social service agency, residential care facility, residential service facility, elementary school, secondary school, college or university. The use **is** located closer than one hundred fifty (150) feet from a residentially zoned property and the building is situated and oriented in such a manner such that the off-sale establishment would affect such residential use.

Based on the above stated facts, the City Council concludes and finds with regard to the findings for a Determination of Public Convenience and Necessity that:

- 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 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 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 would not be located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility. The proposed use is within one hundred fifty feet of an existing residence.
- d) Alcohol sales would not represent a majority of the proposed use.

Further, with respect the additional findings for a Determination of Public Convenience and Necessity to be considered as part of an appeal, the City Council concludes and finds that:

1. The proposed outlet for the off-sale of alcoholic beverages would not enhance or facilitate the vitality of an existing commercial area.
2. The census tract in which the proposed outlet is located does have a lower population density in relation to other census tracts in the City and the proposed outlet would contribute to an over-concentration in the absolute numbers of outlets for the off-sale of alcoholic beverages in the area.
3. The census tract in which the proposed outlet for the off-sale of alcoholic beverages is located is not unusually configured.
4. The proposed off-sale of alcoholic beverages is incidental and appurtenant to a larger retail use but does not provide for a more complete and convenient shopping experience.

Finally, the City Council finds and concludes, based on the all of the above facts and findings, that that there would not be a significant or overriding public benefit served by the proposed use.

Based on all of the above findings for both applications, this project for off-sale of alcohol is hereby denied.

DENIED this 15th day of February 2011, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

VACANT:

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk



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 CP10-022; ABC10-011	RECEIPT # _____
PROJECT LOCATION 1615 Meridian Ave., San Jose, CA 95125	AMOUNT <u>2252-</u>
	DATE <u>12-13-2010</u>
	BY <u>MMENA</u>

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:

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

Applicant has widespread community support for this use which indicates that the sale of beer and wine at the property will serve public convenience or necessity.

PERSON FILING APPEAL

NAME Walgreen Co.	DAYTIME TELEPHONE (415) 365-4004
ADDRESS c/o HaasNajarian, LLP; Attn Daniel Kramer, 58 Maiden Lane, 2nd Floor	CITY San Francisco
	STATE CA
	ZIP CODE 94109
SIGNATURE <i>Attorney for Applicant</i>	DATE 12/8/2010
RELATIONSHIP TO SUBJECT SITE: (e.g., adjacent property owner, property owner within one thousand (1,000) feet) <u>Applicant</u>	

CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)

NAME Daniel Kramer			
ADDRESS c/o HaasNajarian, LLP; Attn Daniel Kramer, 58 Maiden Lane, 2nd Floor		CITY San Francisco	
DAYTIME TELEPHONE (415) 365-4004		STATE CA	
FAX NUMBER (415) 391-0555		ZIP CODE 94109	
E-MAIL ADDRESS dkramer@hnattorneys.com			

PROPERTY OWNER

NAME Filice Lansford Development Corporation	DATE 12/8/2010
ADDRESS 2644 Spring St.	CITY Redwood City
	STATE CA
	ZIP CODE 94063

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.



58 Maiden Lane
2nd Floor
San Francisco
California
94108

December 10, 2010

T 415.788.6330
F 415.391.0555

5641/479

San Jose City Council
c/o San Jose Planning Department
200 East Santa Clara St.
San Jose, CA 95113
Attn: Ms. Jenny Nussbaum

Re: Appeal of Planning Commission Resolution No. 10-050 denying a CUP and determination of PCN relating to the sale of beer and wine at the Walgreens located at 1615 Meridian (the "Store"); File No. CP10-022 & ABC10-011

Honorable Councilmembers:

On behalf of Walgreen Co. ("Walgreens"), we hereby appeal on the following grounds the decision by the Planning Commission to deny a Conditional Use Permit and Determination of Public Convenience or Necessity:

I. Despite the existence of other off-sale outlets within 1000 feet from the Store, there is no evidence that the sale of beer and wine by Walgreens will adversely affect the peace, health, safety or welfare of persons residing or working in the surrounding area.

Within 1000 feet of Walgreens, beer and wine is sold by Safeway and Rite Aid - both responsible national retailers with strong compliance records, and the following small business owners with no record of ABC Act violations: RV & RS Corp (Meridian Valero), Ron Lam (Lucky Liquors), Singh Gurmail, and Marie Parker (D'Annas - which happens to be a flower and gift basket shop). The fact that some of these retailers were granted liquor licenses even when the census tract/area was deemed overconcentrated indicates that the City determined that the sale of beer at these six locations does not adversely affect the peace, health, safety, or welfare of persons residing or working in the

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surrounding area.

Walgreens is a company with an impeccable safety and legal compliance record in connection with the sale of beer and wine at over 180 of its stores throughout California, including at two stores in San Jose. Therefore, to suggest that the addition of another responsible retailer to the area will create a detriment to public health, safety or general welfare does not seem logical – nor is this assertion supported by any evidence. In fact this assertion is contrary to the evidence that was presented to the Planning Commission.

According to the Memorandum prepared by the San Jose Police Department on August 2, 2010, crime in this census tract is significantly below the City average. If the San Jose Police Department believed that the issuance of a beer and wine license to Walgreens would lead to a significant increase in crime or adversely affect the peace or safety of the surrounding community, they would have objected to the issuance of the CUP. However, the SJPD did not object, and great deference must be given to law enforcement's assessment of the use as they possess far more expertise in this field than the Planning Commission.

In addition, Walgreens has employed the following safety and security guidelines at all of its stores that sell beer and wine in California:

- All employees undergo extensive training prior to being allowed to sell beer & wine.
- Beer & wine is not sold by any clerk under the age of 21.
- Registers prompt the clerks to request photo ID and enter the customer's age if the customer appears under the age of 40.
- 7 CCTV cameras as well as a public view monitor record and monitor activity throughout the store.
- Product displays are located towards the rear of the store.

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- Alpha Caps are placed on wine and champagne bottles upon request by local government. These caps provide a strong visual deterrent and require a key to unlock prior to purchase/consumption.

With these training and safety guidelines in place, Walgreens has maintained an impeccable safety and legal compliance record selling beer and wine in over 180 of its stores throughout California, and there is no indication that the sale of beer and wine at this Store will result in anything but a safe, positive and convenient experience.

Lastly, as the Store is only open until 10:00 p.m. Monday – Saturday, and 9:00 p.m. on Sundays, and Walgreens only intends to sell a product mix that consists of California varietals in the \$8 - \$20 range, and beer in 6 packs, 12-packs (no spirits, malt liquor, fortified wine, and beer in single bottles or cans will be sold), this Store clearly will not become a liquor store frequented by vagrants or people making late-night beer runs, but rather a safe and convenient location for people to take care of their retail and pharmacy needs while being able to purchase a bottle of wine for dinner or beer for the home.

II. The proposed off-sale of beer and wine by Walgreens serves public convenience or necessity because it provides for a more complete and convenient shopping experience.

Every major national pharmacy chain in California sells alcohol, and consumers have come to expect that a company like Walgreens will carry alcohol as well. Almost 600 customers walk through the doors of this Store on a daily basis, and virtually every day, the Store's employees are asked by its customers why the Store does not carry alcohol. In fact, in a period of just six days, from October 13th – October 18th, 775 people signed a petition stating that the sale of beer and wine at the Store would increase the convenience of their shopping experience if beer and wine was sold at Walgreens.

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Furthermore, the sale of beer and wine at the Store is supported by the Willow Glen Neighborhood Association as well as the North Willow Glen Neighborhood Association. The fact that the general public and the neighborhood associations believe that the sale of beer and wine by Walgreens will provide a convenience is highly determinative if not conclusive evidence that this proposed use warrants a determination of public convenience or necessity.

III. The proposed off-sale of beer and wine is incidental and appurtenant to a larger retail use, and will have little effect on the quiet enjoyment of residents of the surrounding properties.

The Store contains approximately 15,465 square feet. Walgreens intends to stock just one ten-foot cooler of beer and 18 feet of shelf space of wine. Therefore the proposed area dedicated to the sale of beer and wine is less than 5% of the total sales area and incidental to the larger retail use.

Walgreens has not requested additional parking, a change in hours of operation, nor the right to make exterior modifications to the existing building in connection with the sale of beer and wine. In addition, due to the limited proposed offering, the number of deliveries to the store will not increase significantly. Accordingly, even though there are residents within 150 feet of the Store, there will be little, if any, change experienced by the these residents as a result of Walgreens' sale of beer and wine.

IV. The fact that Walgreens is not a "grocery store" does not diminish the convenience that the sale of beer and wine will provide.

In its staff report, the Planning Department indicates that a grocery store that sells alcohol provides a benefit to the community, but a pharmacy and general retailer who also

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sells fruit, meat, cheese, milk, bread, crackers, chips, candy and hundreds of other products that grocery stores carry would somehow harm the community. There is absolutely no rational basis to suggest that a pharmacy and general retailer who sells beer and wine as an ancillary use provides any less of a convenience to the community than a grocery store simply because it doesn't carry each and every product that a grocery store carries.

V. Conclusion.

Walgreens has safely and responsibly sold alcohol throughout the country since the end of Prohibition. The suggestion that the sale of beer and wine at the Store will lead to an adverse affect on the peace, health, safety, morals, or general welfare of persons residing or working in the surrounding area is not supported by any evidence. A failure to find that this use will serve public convenience or necessity negates the overwhelming support that this proposed use has received. Accordingly, we respectfully request that you overturn the Planning Commission's decision.

Very truly yours,
HAAS NAJARIAN, LLP

A handwritten signature in cursive script that reads "Daniel Kramer". The signature is written in black ink and includes a long horizontal flourish extending to the right.

Daniel J. Kramer, Esq.



File No: CP10-022
 District: 6

Nearby Alcohol Off-Sales



Prepared by the Department of Planning,
 Building, and Code Enforcement
 5/26/2010