



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Joseph Horwedel

**SUBJECT:** SEE BELOW

**DATE:** April 21, 2011

Approved

Date

5/4/11

**COUNCIL DISTRICT:** 4

**SNI AREA:** None

**SUBJECT: CP10-016 and ABC10-003. 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 an approximately 20,317 square-foot tenant space in a shopping center located at 2105 Morrill Avenue on a 13.2 gross-acre site.**

## **RECOMMENDATION**

The Director of Planning, Building and Code Enforcement recommends the City Council Uphold the Planning Commission's decision and deny the subject Conditional Use Permit and not grant a Determination of Public Convenience or Necessity by finding that the required findings for a Conditional Use Permit and 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 be able to consider 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 granting a Determination of Public Convenience or Necessity, it is compelled to deny both the request for a Determination of Public Convenience or Necessity and a Conditional Use Permit. Appeal of the Planning Commission's

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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 factual findings to consider granting a Determination of Public Convenience or Necessity in that the proposed subject use is within 150 feet of a residential use. Therefore, the Planning Commission was compelled to deny both the request for a Determination of Public Convenience or Necessity and Conditional Use Permit 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 March 23, 2011, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP10-016 & ABC10-003). The Director of Planning recommended denial of the Conditional Use Permit and request for a Determination of Public Convenience or Necessity because one of the mandatory 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.

The applicant's attorney, Dan Kramer, was present at the hearing and stated that there were inaccuracies and inconsistencies in the staff report that make the Planning Commission's task more difficult. For instance the staff report states that there are few barriers between the store and the residences within 150 feet. In fact, all residences within 150 feet of the store are surrounded by an eight-foot wall with no public access, and further separated by Amberwood Lane, another six-foot fence, and loading dock. In addition, Mr. Kramer stated that staff uses an overconcentration test coupled with whether the use provides, offsetting improvements to the welfare of persons residing in the area, to conclude that this use would adversely affect the peace and general welfare.

Mr. Kramer stated he reviewed every single staff report relating to the off-sale of alcohol for the past 18 months and this is not the test that was used with other applicants. Additionally, Mr.

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Kramer said the staff report indicates that the use will be detrimental to the general welfare because Walgreens is not a full service grocery store that serves meat and produce. Mr. Kramer noted that in reviewing the commission's decisions for the past 18 months this is not the criterion that was used for other applicants. Mr. Kramer cited approvals in the past 18 months that did not contain the requirement of fresh meat and produce including the following: Rotten Robbins on De Anza, which was approved even though this property was within 150 feet of residences, 500 feet of a daycare center, and within a short drive of Trader Joe's and Maxim Market, both of whom sell alcohol. He stated that over 60 people submitted a petition in protest of this use but it was nevertheless approved.

Mr. Kramer stated that there were five (5) off-sale proposals that were recently approved that were not in conjunction with a full service grocery store and did not include conditions for the sales of fresh meat and produce. In April 2010, the Planning Commission approved the off-sale of alcohol for a convenience store and a hotel. Additionally, the Planning Commission approved off-sale of alcohol for a 24-hour convenience store at 4156 Monterey Road, although no other off-sale establishments are within a thousand feet and the census tract is deemed high crime. Mr. Kramer added that in July 2010 the Planning Commission approved the off-sale of wine at Sherman Cellars at 40 Post Street. This business is located in an area deemed both high crime and over-concentrated with licenses. Both Safeway and Zanotto's Market are within 500 feet of the business, and both already sell alcohol. It was also noted that the Planning Commission approved the off-sale of alcohol at the Urban Public Market. This business is in a census tract over-concentrated with licenses. There were no conditions relating to fresh meat and produce.

Mr. Kramer said that over the past 18 months, only three applications have been denied by the commission and two of those applications were from Walgreens. Every other application over the past 18 months was approved regardless of use; since these other applications were approved there has been no change to the Municipal Code or the General Plan. Mr. Kramer said that while there are proposed changes to the General Plan at this point in time, they are just that: proposals. For this reason, Walgreens asked that the same rules and analysis be applied to this application as with prior applications that received your approval.

Mr. Kramer said that even if the draft Envision 2040 General Plan is taken into account, by approving this use, The Planning Commission is not detracting from the healthy community proposal. Mr. Kramer stated there are few companies in San José whose residents turn to more for their health and wellness needs than Walgreens and for this the City should be doing everything it can to support this company. In addition, Walgreens sells many products that are consistent with what the City is trying to promote. Mr. Kramer said that he knows that despite the fact that the proposal provides public convenience and necessity, the applicant understands that the Planning Commission is required not to make this finding due to the residences within 150 feet, but the applicant requests that the Planning Commission approve the Conditional Use Permit now, and make a recommendation to the City Council to make a finding of public convenience or necessity on appeal.

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### Public Testimony

Dan Kidson, District Manager with Walgreens, stated he oversees the store at 2500 Morrill as well as many other stores in the City of San José. He said Walgreens is not looking to become another liquor store. Rather, he said, at the request of customers Walgreens is trying to bring a product back that they carried for over seventy years. Mr. Kidson commented that Walgreens sells beer and wine in a number of stores that he oversees including some in San José. He stated that people like shopping for beer and wine at Walgreens because of the company's dedication to customer service, a well-lit, safe store, and convenient locations. They also like shopping at Walgreens because it is part of the community. He added that many Walgreens employees live in San José, and there are employees who have worked at this store for more than 25 years.

Walgreens is also active in the community and has been involved with health and wellness events. He said that while some people view Walgreens as just another large corporation, the truth is that each store has many of the same characteristics as a small community pharmacy. Just because there maybe a liquor store or grocery store nearby that also sells alcohol, in no way negates the convenience that would be provided to Walgreens if we also carried beer and wine. He said that this Walgreens serves thousands of customers each week, many of whom do not want to go to a liquor store, a Target, or grocery store. He stated that Safeway, Target, and other supermarkets now also have pharmacies and carry similar merchandise to Walgreens, and it is a huge impact on Walgreens when customers go to a Safeway, Target, CVS or Rite Aid to purchase alcohol and decide to buy their toothpaste or Tylenol there instead of from Walgreens.

Three residents stated that this Walgreens is very close to an elementary school and church, that they see small children by the subject store, they have sent their own children to pick up items from this store, and they have observed some criminal activity in the shopping center. For these reasons they don't think this store should sell beer and wine.

### Planning Commission Discussion

Chair Jensen asked staff to respond to the comments from the applicant and public. In response to the applicant's statements regarding approvals of off-sale in the last 18 months, staff explained that there were other noteworthy and beneficial factors that contributed to the off-sale approvals at other five (5) sites previously identified by Mr. Kramer. Staff noted that one of the reasons that the Rotten Robbie proposal on De Anza Boulevard was approved was that it also facilitated the construction of a new gas station facility, which substantially upgraded the site from one that was extremely blighted with the former gas station. The decision makers at that time viewed the associated site upgrade as a substantial public benefit.

Staff noted that the hotel that in North San José has a very limited amount of off-sale, and it was approved to be a benefit for the hotel guests and not expected to result in widespread sales for the surrounding neighborhood. The proposal on Monterey Road was for a convenience store that was not subject to a Determination of Public Convenience or Necessity because it was not within 150 feet of residential. The Sherman cellars proposal that was cited that was located downtown, and that was approved primarily because it was a very limited off-sale proposal, also in conjunction with an on-sale proposal that was deemed to be beneficial to promoting a variety of

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uses downtown that would be more attractive to a different demographic than most of the night clubs in the area. The urban public market project that was identified facilitated the restoration of historic buildings.

Staff further explained that because this site is located within an area that is over-concentrated, the applicant does have to go through the extra step of having a Determination of Public Convenience or Necessity, and there are four very specific findings that must be made to approve it. One of the key findings is that the proposed use is more than 150 feet away from residential uses. Unlike the more general alcohol related findings for a Conditional Use Permit there is no discussion within that particular finding about orientation, separation by some combination of sound walls, loading docks, or walking distance. It is based solely on the simply straight distance separation of the residential structure from the tenant space containing the off-site use.

Commissioner Cahan made a motion to deny the proposed Conditional Use Permit and not grant a Determination of Public Convenience or Necessity for the subject proposal, as recommended by staff. She added that the site is within 150 feet of residential, the area is already over-concentrated with off-sale establishments, and the community spoke very clearly and eloquently about their concerns regarding their children, and indicated they send their children to the subject store, specifically because it doesn't have alcohol.

The Planning Commission voted to deny the subject application 5-0-2 with Commissioners Platten and Kamkar absent.

### Appeal

On April 6, 2011, 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 Chapter 6.84 of the San Jose Municipal Code state that the Council can make a determination of Public Convenience or Necessity if the off-sale of alcohol is an ancillary use that provides for a more convenient shopping experience. They also note 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 March 23, 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 three 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 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 three 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 on the subject site creating a fourth 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 census tract in which the proposed outlet is located does not have a lower population density as compared to City average. The subject census tract (5044.10) has a population density of 16.1 persons per acre which is more than the City-wide census tract average of 14.3 persons per acre. However, with respect to the second part of this finding, the subject store would add a fourth establishment to the existing three 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 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, California Ranch located in the same shopping center. 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 three 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 uphold the Planning Commission's decision and deny the proposed Conditional Use Permit and not grant 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)**

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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 February 24, 2011, and no community members attended. 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.

**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:
Gabriel H Chiu, Trustee & Et Al, Chiu Family Trust 10898 Inspiration Circle Dublin, CA 94568	Daniel Kramer Haas Najarian, LLP 58 Maiden Lane, Floor 2 San Francisco, CA 94108	<ul style="list-style-type: none"><li>▪ Draft City Council Resolution</li><li>▪ Map identifying location of nearby off-sale establishments</li><li>▪ Planning Commission Staff Report &amp; Attachments</li><li>▪ Notice of Appeal</li><li>▪ Petition and letter from Dan Kramer, attorney for Walgreens</li></ul>

**STAFF REPORT**  
**PLANNING COMMISSION**

**FILE NO.:** CP10-016 & ABC10-003

**Submitted:** 06/04/2010

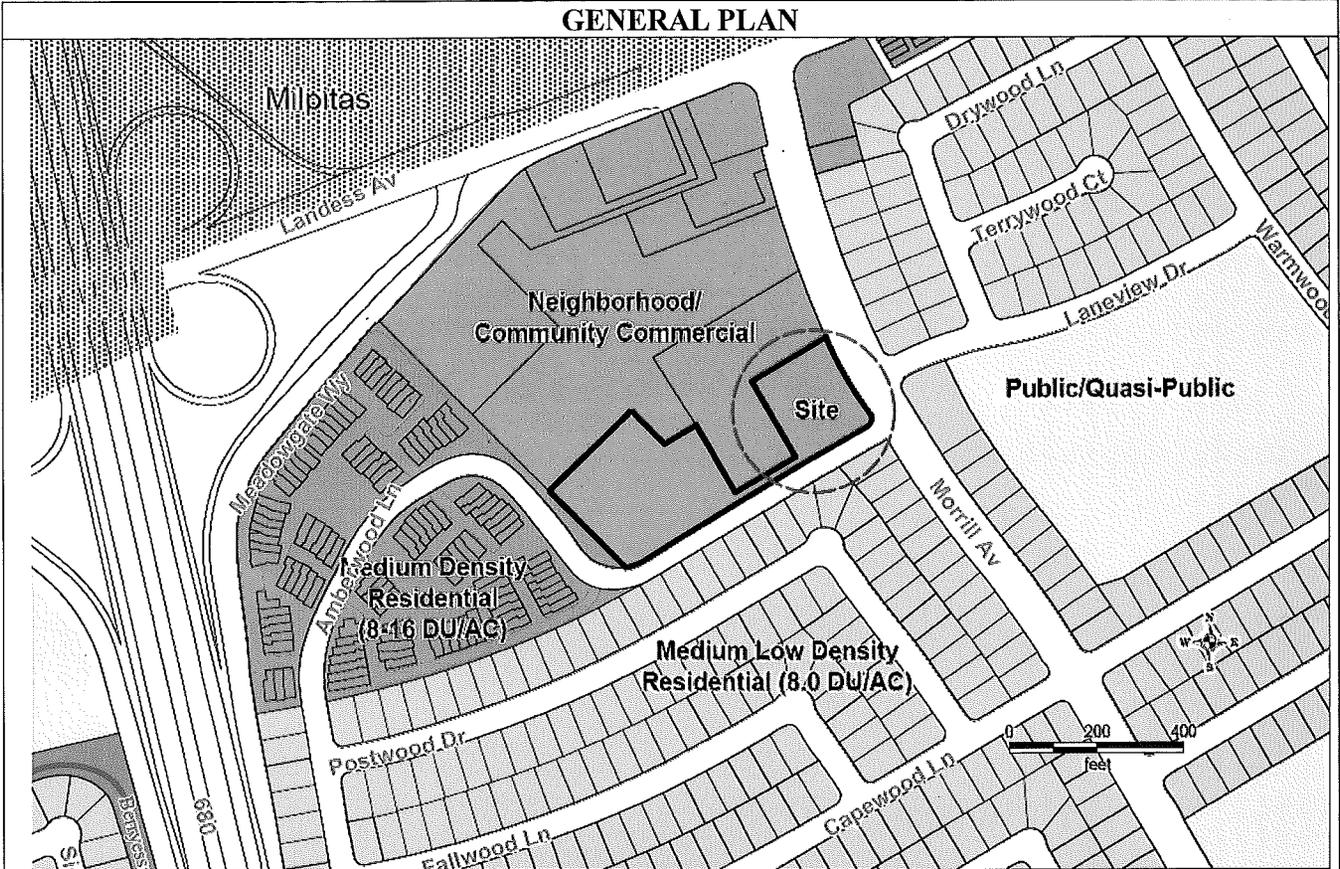
**PROJECT DESCRIPTION:** Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol for an existing general retail store/pharmacy in an existing approximately 20,317 square-foot tenant space in a shopping center on an approximately 13.2 gross-acre site.

**LOCATION:** Approximately 100 feet westerly of the northwest corner of Morrill Avenue and Amberwood Lane (2105 Morrill Avenue).

Existing Zoning	CG-Commercial General
Proposed Zoning	No change
General Plan	Neighborhood/Community Commercial
Council District	4
Annexation Date	June 23, 1960
SNI	None
Historic Resource	No
Redevelopment Area	None
Specific Plan	N/A



### GENERAL PLAN



### ZONING



## **RECOMMENDATION**

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

1. The proposed off-sale of alcohol at the subject site would lead to a grouping of four (4) off-sale establishments within a 500-foot radius of the subject site; and
2. The subject site is located within 150 feet of a residence; and
3. The proposed off-sale of alcohol will adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding areas; and
4. The off-sale of alcohol will not enhance or facilitate the vitality of an existing commercial area without presenting a significant impact on public health or safety.

## **BACKGROUND**

On June 4, 2010, Daniel Kramer, on behalf of Walgreens, requested a Conditional Use Permit (File No. CP10-016) to allow off-sale of alcoholic beverages (beer and wine) at an existing general retail store/pharmacy in an existing approximately 20,317 square-foot tenant space in a shopping center on an approximately 13.2 gross-acre site in the CG-Commercial General Zoning District.

Per data from the Department of Alcohol Beverage Control, the site is located in a census tract of over-concentration of off-sale establishments. For this reason a Determination of Public Convenience or Necessity (PCN) is required. The San José Municipal Code allows concurrent processing of a Conditional Use Permit application for off-sale with an application for a Determination for PCN (File No. ABC10-003). If the Planning Commission's decision is appealed, the concurrent applications would then be scheduled for a new public hearing with the City Council.

The subject site is located approximately 100 feet westerly of the northwest corner of Morrill Avenue and Amberwood Lane (2105 Morrill Avenue). It is accessed from Morrill Avenue. The subject tenant space is located within a shopping center that is surrounded by commercial uses to the north, and residential uses west, east and south.

### **Project Description**

The approximately 15,465 square-foot existing tenant space is part of a larger existing approximately 175,428 square-foot shopping center. The proposal is for off-sale of alcohol at an existing general retail store/pharmacy. The applicant has indicated that the retail store intends to add the off-sale of alcohol, limited to beer and wine, to the array of items for sale. The applicant's statement and plans show that the proposed alcohol sales area represents less than 5% of the total sales area. There is no proposed expansion of building area. The store does not currently operate past 12:00 midnight nor is it requesting to operate past midnight.

## Community Engagement

Notices for a community meeting on the project were sent out to property owners and tenants within a 1,000-foot radius of the subject site, and a community meeting was held on February 24, 2011 at the Berryessa Branch Library, San José. Planning staff and the applicant waited more than half-an hour beyond the scheduled start of the meeting time to ensure that those community members interested in discussing the project in person with the applicant and staff would have the opportunity to do so. However, no community members attended the meeting. Additionally, as of the date of writing this staff report, staff has not received any correspondence from community members on the subject proposal.

## ANALYSIS

In order for the existing retail store to be able to sell beer and wine at the subject location, the applicant needs to obtain a Conditional Use Permit and be granted a Determination of Public Convenience or Necessity. An approval of one without the other is of no value in ultimately facilitating the off-sale alcohol use. For this reason, this staff report links the two required applications together for concurrent consideration. The primary issues for this project include: 1) conformance with the Zoning Ordinance requirements for approval of a Conditional Use Permit and 2) requirements for a Determination of Public Convenience or Necessity. Additionally, the proposal is reviewed for conformance with the San José 2020 General Plan and the California Environmental Quality Act (CEQA).

### Zoning Ordinance Findings for the Off-Sale of Alcohol

A Conditional Use Permit may be issued pursuant to the applicable provisions of the Zoning Ordinance for the off-sale of any alcoholic beverages only if the decision-making body first makes the following three special findings applicable to the off-sale of alcoholic beverages:

1. For such use at a location closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, that the proposed location of the off-sale of alcoholic beverages use would not result in a total of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one-thousand (1,000) foot radius from the proposed location.

*Analysis of Required Finding.* There are three (3) other existing businesses located within 500 feet of the proposed use that provide alcoholic beverages for off-site consumption: California Ranch Supermarket, Ernie's Liquors, and Target. The proposed use together with existing facilities would result in a total of four (4) such establishments within a 1000-foot radius from the proposed location, but would not result in a total of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one-thousand (1,000) foot radius from the proposed location.

2. For such use at a location closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, where the proposed location of the off-sale of alcoholic beverages use would result in a total of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one thousand (1,000) foot radius from the proposed location, that the resulting excess concentration of such uses will not:
  - a. Adversely affect the peace, health, safety, morals, or welfare of persons residing or working in the surrounding area; or

- b. Impair the utility or value of property of other persons located in the vicinity of the area; or
- c. Be detrimental to public health, safety or general welfare.

*Analysis of Required Finding.* As stated above, the proposed use will not result in more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one thousand (1,000) foot radius of the proposed location, therefore this finding is not applicable.

3. For such a use at a location closer than five hundred (500) feet from any child care center, public park, social service agency, residential care facility, residential service facility, elementary school, secondary school, college or university, or closer than one hundred fifty (150) feet from any residentially zoned property, that the building in which the proposed use is to be located is situated and oriented in such a manner that would not adversely affect such residential, child care center, public park, social service agency, residential care facility, residential service facility and/or school use.

*Analysis of Required Finding.* The subject site 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 subject site is located within 150 feet of at least seven (7) residentially zoned properties. The closest residential parcel is approximately 80 feet from the building in which the retail store tenant space is located. The store entrance is approximately 200 feet from an existing residence across Morrill Avenue. Said entrance faces away from any residential and is oriented toward the parking lot of the center at the eastern end of the tenant space. The location of this entrance is situated and oriented that it should adversely affect the residential in the area.

#### Zoning Ordinance Findings for all Conditional Use / Planned Development Permits

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

1. The proposed use at the location requested will not:
  - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
  - b. Impair the utility or value of the property of other persons located within the vicinity of the site;  
or
  - c. Be detrimental to public health, safety or general welfare.

The proposed off-sale use would be detrimental to the welfare of persons residing or working in the surrounding area in that an additional off-sale of alcohol establishment on the subject site would add to the over-concentration in the subject census tract as well as adding a fourth off-sale establishment within a 500-foot radius of the subject site without providing any offsetting improvements to the welfare of persons residing or working in the surrounding area such as access to a full-service grocery store that sells fresh meat and produce.

Based on the above analysis of the three required findings for off-sale of alcohol an additional off-sale of alcohol establishment would contribute to the existing over-concentration of establishment by having at least four (4) within 500 feet of the subject site. Additionally, the subject site is located within 150 feet of residential zoned property and access to the site is within 150 feet with few barriers between the

residential homes and the subject site. Combined with the analysis of the findings for all conditional uses, staff has concluded that an additional off-sale establishment at the proposed location would adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area, and be detrimental to public health, safety or general welfare in that there are a sufficient number of alcohol outlets in the general area, more specifically three outlets within the shopping center, provided through general retailers, and not in the context of healthful food options or full-service grocery stores.

#### Finding of Public Convenience or Necessity

As of January 1995, the State of California Legislature implemented AB2897 by amending the Business and Professions Code (Section 23958) to require the Department of Alcohol Beverage Control (ABC) to deny an application for a liquor license "if issuance of that license would tend to create a law enforcement problem, or if the issuance would result in or add to an undue concentration of liquor licenses," unless the City makes a Determination of Public Convenience or Necessity. Undue concentration is defined as follows:

- a) The premises of the proposed license is are located in an area that has 20% more reported crimes than the average number of reported crimes for the City as a whole, or
- b) The premises of the proposed license are located in a census tract where the ratio of existing retail on-sale/retail off-sale licenses to population in the census tract exceeds the ratio in the County as a whole.

The attached Police Department memorandum indicates that the project site is not located within an area of high crime; however, per data from ABC, the census tract in which the subject site is located does have an over-concentration of off-sale licenses. For ABC to be able to issue a license for this off-sale use, the City must grant a Determination of Public Convenience or Necessity, (PCN). The analysis of the proposal is based on the required findings.

Title 6 of the San José Municipal Code specifies that the Planning Commission, or the City Council on appeal, may issue a PCN only after first making the four specified factual findings identified below:

1. The proposed use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the city for targeted neighborhood enhancement services or programs, or located within an area in which the chief of police has determined that the proposed use: (a) would be detrimental to the public health, safety, or welfare of persons located in the area, or (b) would increase the severity of existing law enforcement or public nuisance problems in the area.

*Analysis of Required Finding:* The proposed use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area. The Police Department did not state the subject property is located within an area where the proposed use would be detrimental to the public or increase the severity of public nuisance or existing law enforcement problems.

2. The proposed use would not lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use.

*Analysis of Required Finding:* The proposed use would not lead to a grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use.

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

*Analysis of Required Finding:* The proposed use is located within 150 feet of a residence, and therefore, not consistent with this required finding which must be made in order to grant a favorable determination.

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

*Analysis of Required Finding:* Less than a majority of the approximately 20,317 square-foot tenant space is proposed to be used for the off-sale of alcohol.

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

### General Plan Conformance

The subject site is designated Neighborhood/Community Commercial on the San José 2020 General Plan Land Use/Transportation Diagram. The site is developed as a retail commercial shopping center building. The proposed use is consistent with the General Plan land use designation in that commercial uses including uses associated with a pharmacy/convenience store in an existing retail tenant space promote commercial activity within the City of San José.

### Environmental Review (CEQA)

Under the provisions of Section 15301(a) (Existing Facilities) of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is found to be exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended. The project only involves minor interior improvements to the existing retail space. No physical expansion of the building is proposed by this permit application.

### CONCLUSION

The location of the proposed off-sale of alcohol is situated in an existing general retail store/pharmacy in a tenant space in a neighborhood shopping center. Within 150 feet of the subject tenant space there is one (1) existing off-sale of alcohol establishment, and there are two (2) additional existing off-sale establishments within 500 feet of the subject tenant space. All three (3) existing off-sale establishments and the proposed fourth (4<sup>th</sup>) off-sale establishment are within the same shopping center. The proposed off-sale establishment is within 150 feet of residences on Amberwood Lane, and within 150 feet of residences on Morrill Avenue. As was discussed above, relative to the required findings to support a Conditional Use Permit and Determination of Public Convenience or Necessity, given the existing concentration of off-sale establishments in the immediate area and the context in which the alcohol is being sold, general retail, convenience retail, or where a majority of the floor area is devoted to the sale of alcohol, staff concludes that the approval of this request would adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding areas well as add nothing to enhance or facilitate the vitality of an existing commercial area without presenting a significant impact on public health or safety.

**PUBLIC OUTREACH**

In addition to the community meeting held on February 24, 2011, per the provisions of City Council Policy 6-30: Public Outreach, notices of the public hearing for this project were sent to all property owners and tenants within 1,000 feet of the subject site. The Planning Commission Agenda is posted on the City of San José website, which includes a copy of the staff report, and staff has been available to discuss the project with members of the public.

**Project Manager:** Jenny Nusbaum    **Approved by:**     **Date:** 03/14/2011

Owner:	Applicant:	Attachments:
Gabriel H Chiu, Trustee & Et Al, Chiu Family Trust 10898 Inspiration Circle Dublin, CA 94568	Walgreens c/o Daniel Kramer Haas Najarian, LLP 58 Maiden Lane, Floor 2 San Francisco, CA 94108	Draft Resolution & legal description Map of off-sale establishments within 1,000 feet of subject tenant space San José Police Dept. Memorandum Plans

## **RESOLUTION NO. 11-\_\_\_\_**

Resolution of the Planning Commission of the City of San José denying a Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol, of any type, at an existing general retail store/pharmacy (Walgreens) in an existing approximately 20,317 square-foot tenant space in a shopping center on an approximately 13.2 gross-acre site.

### **FILE NOS. CP10-016 & ABC10-003**

BE IT RESOLVED BY THE PLANNING COMMISSION 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 June 4, 2010 applications (File Nos. CP10-016 & ABC10-003) were filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol, limited to beer and wine, at an existing general retail store/pharmacy, on that certain real property (hereinafter referred to as "subject property"), situate in the CG Commercial General Zoning District, located approximately 100 feet westerly of the northwest corner of Morrill Avenue and Amberwood Lane (2105 Morrill Avenue).

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 José Municipal Code, this Planning Commission conducted a hearing on said application, notice of which was duly given; and

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

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

WHEREAS, at said hearing, this Planning Commission received in evidence a plan for the subject property entitled, "Walgreens Store Morrill Avenue, San Jose, CA" dated August 14, 1996 and received June 4, 2010. 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 Planning Commission;

NOW, THEREFORE:

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

1. This site has a designation of Neighborhood/Community Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
2. The project site is located in the CG-Commercial General Zoning District.
3. Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is exempt from environmental review.
4. The project proposes the off-sale of alcohol, limited to beer and wine, at an approximately 20,317 square-foot existing general retail store/pharmacy located within an approximately 175,428 square-foot commercial building complex.
5. The project includes no exterior modifications to the existing building.
6. The subject tenant space is located within a shopping center that is surrounded by commercial uses to the north, and west, residential uses west of the shopping center, and residential uses east and south of the subject tenant space, across Morrill Avenue and Amberwood Lane respectively.
7. No increase in parking demand results from this proposed project.
8. The subject retail establishment currently closes at 10:00 p.m. but can be open until midnight as-of-right.
9. The subject store proposes to utilize no more than 5 percent of the floor area for the sale of beer and wine.
10. The Police Department memorandum indicates that the project site is not located within an area of high crime.
11. The proposed site *is* located within a census tract that has an overconcentration of off-sale licenses.
12. The proposed use would not lead to the grouping of more than four off-sale establishments within a one thousand-foot radius from the proposed use.

13. Due to the overconcentration 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.
14. 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.
15. The project site is not located within 500 feet of a school, day care center, public park, social services agency, or residential care or service facility.
16. The project building is located adjacent to and within 150 feet, of residentially zoned property to the west, south and east.
17. The above mentioned residential use to the south of the subject building is within 150 feet walking distance to the subject store with no major barriers between the residential and commercial uses.
18. There are three (3) other off-sale establishments within 1,000 feet of the subject site.

Based on the above stated facts, the Planning Commission concludes and finds that based on the four (4) required findings in the subsection below, the Planning Commission is not able to consider granting a determination of Public Convenience and Necessity for the subject liquor license in that:

1. The proposed use is not located within a Strong Neighborhoods Initiative 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
2. The proposed use would not lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use; and
3. 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 and is therefore not in conformance with the requirements of Title 6 of the SJMC.
4. Alcohol sales would not represent a majority of the proposed use.

Additionally, the Planning Commission 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 not result in a total of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one-thousand (1,000) foot radius from the proposed location; and

2. The use is not closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, where the proposed location of the off-sale of alcoholic beverages use would result in a total of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one thousand (1,000) foot radius from the proposed location, that the resulting excess concentration of such uses would:
  - 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 proposed use is situated and oriented in such a manner that should not adversely affect such residential use.

Finally, based on the above-stated findings, with respect to the Conditional Use Permit, the Planning Commission finds that:

1. The proposed use at the location requested 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 of value of the property of other persons located within the vicinity of the site; or
  - c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences parking, loading facilities, landscaping and other development features prescribed in this Title, or as is otherwise required in order to integrate said use with the surrounding area.
3. The proposed site is adequately served:
  - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quantity of traffic such use would generate; or by other forms of transit adequate to carry the kind and quantity of individuals such use would generate; and
  - b. By other public or private service facilities as are required.

Based on all of the above findings for both applications, this proposal for off-sale of beer and wine is hereby denied.

**DENIED** this 23<sup>rd</sup> day of March 2011, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

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Chairperson

ATTEST:

Joseph Horwedel, Secretary

Deputy

**NOTICE TO PARTIES**

*The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6.*

EXHIBIT "A"

LEGAL DESCRIPTION (STORE #900)

All that certain real property situated in the City of San Jose, County of Santa Clara, State of California, described as follows:

Parcel One:

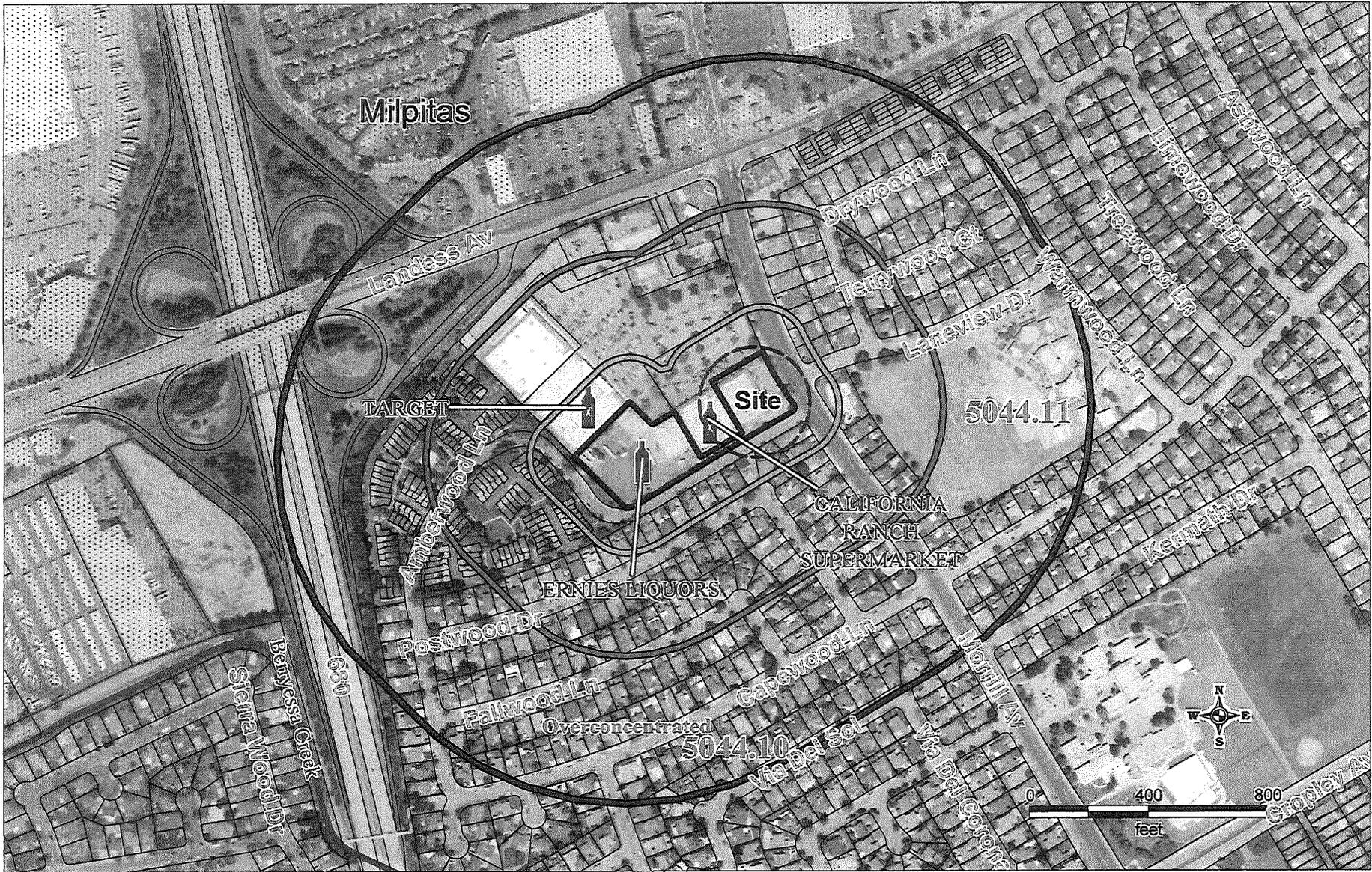
Parcel 1, as shown on that certain Parcel Map filed for record in the office of the Recorder of the County of Santa Clara, State of California on March 8, 1971, in book 279 of Maps page 49.

Parcel Two:

All easements, rights and privileges contained in that certain instrument entitled, "Declaration Establishing Covenants, Conditions and Restrictions and Granting Easements," dated March 4, 1971 by Sutter Hill Development Corporation, a California corporation, recorded March 8, 1971 in Book 9247, page 115, Official Records

Commonly known as 2105-2145 Morrill Avenue  
APN: 092-09-012

#900  
Morrill & Landess  
2105 Morrill Avenue  
San Jose, CA



File No: CP10-016, ABC10-003  
 District: 4

Nearby Alcohol Off-Sales



# Memorandum

**TO:** Jenny Nusbaum  
 Planning Department

**FROM:** Officer C. Zarate #3165  
 San Jose Police Vice Unit

**SUBJECT:** Walgreens  
 2105 Morrill Ave. CP10-016

**DATE:** August 2, 2010

Approved

Date

I have received your request for input regarding Walgreens Ave, San Jose, Ca. 95132. Walgreens is seeking a new Conditional Use Permit to allow the off sale of alcohol (beer and wine). They are applying for a Type 20 Off-Sale ABC license.

Per Business and Professions (B&P) Code Section 23958, the State of California Department of Alcohol Beverage Control shall deny an ABC Application for an ABC License if the issuance of that license would tend to create a law enforcement problem or if it would result in or add to an undue concentration of ABC Licenses, as described in B&P Sections 23958.4 (a)(1) and 23958.4 (a)(3). A location can be unduly concentrated because of its criminal statistics and/or it's proximity to other ABC Licenses. ABC can issue the license per B&P Sections 23958.4 (b)(1), and 23958.4 (b)(2) if the local governing body determines that the public convenience or necessity would be served. The City of San Jose Planning Department or the Planning Commission are the delegated authorities to grant these exceptions.

The location is not currently in a Strong Neighborhood Initiative area or a Neighborhood Revitalization area.

Walgreens is located in San Jose Police Beat W1. The reported crime statistics as defined by B&P Section 23958.4(c) **are not** over the 20% crime index thus the location **is not** considered unduly concentrated per B&P Section 23958.4 (a)(1).

### Police Beat Crime Statistics

Beat	Index Crimes	Arrests	Total	20% Above Average
W1 (2009)	425	235	660	No
City Average	327	256	583	

Department of Alcohol Beverage Control (ABC) records indicate Walgreens is in census tract 5044.10 Pursuant to B&P Section 23958.4 (a)(3) ... the ratio of off-sale retail licenses to population in census tract 5044.10 **does** exceed the ratio of off-sale retail licenses to population in the county in which the applicant premises are located.

**Authorized and Current ABC Licenses in Census Tract 5044.10**

Census Track	Authorized ABC Licenses as of January 2008		Current ABC Licenses as of May 18, 2010		Unduly Concentrated	
	On - Sale	Off - Sale	On - Sale	Off - Sale	On - Sale	Off - Sale
5044.10	6	3	4	5	No	Yes

The San Jose Police Department is neutral to the issuance of this permit. Please feel free to contact me at 277-4322 if you have any questions.

Officer Christine Zarate #3165  
Administrative Officer  
Special Investigations/Vice



