



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: April 21, 2011

Approved

Date

5/4/11

COUNCIL DISTRICT: 5
SNI AREA: East Valley/
680 Communities

SUBJECT: CP11-017 and ABC11-003. 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 (full range) at an existing full-service grocery store in an existing 39,661 square-foot tenant space in a shopping center located at 1070 South White Road on a 14.1 gross-acre site.

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the City Council uphold the appeal of the of the Planning Commission's decision and approve the subject Conditional Use Permit and make a Determination of Public Convenience or Necessity by finding that the required findings for a Conditional Use Permit can be made and find there is a significant overriding public benefit served by the proposed off-sale of alcohol and grant a Determination of Public Convenience or Necessity.

OUTCOME

Should the City Council approve the proposed Conditional Use Permit, the proposed retail tenant space would continue to operate as an existing full-service grocery store with fresh meat and produce as it presently exists with the ability to acquire a State of California Alcoholic Beverage Control (ABC) license to allow the ability for the existing store to sell the full range of alcoholic beverages 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 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 making a Determination of Public Convenience or Necessity, it is compelled to deny both the request for a Determination of Public Convenience or Necessity as well as any associated Conditional Use Permit in that approval of one without the other is moot. Appeal of the Planning Commission's decision is heard by the

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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 in a Strong Neighborhoods Initiative (SNI) area (East Valley/680 Communities), within 150 feet of a residential use, within 500 feet of a school (National Hispanic University), 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 one 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 approve the request for a Conditional Use Permit and Determination of Public Convenience or Necessity.

BACKGROUND

Planning Commission Hearing

On April 6, 2011, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP11-017 & ABC11-003). The Director of Planning recommended mandatory denial of the Conditional Use Permit and request for a Determination of Public Convenience or Necessity because three 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 in a Strong Neighborhoods Initiative (SNI) Area, is not within 150 feet of a residential use or residentially zoned property and unable to find that the use is not within 500 feet of a school/college, and was unable to find that the proposed use would not lead to the grouping of more than four off-sale uses within a 1,000-foot radius from the proposed use.

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Public Testimony

Perla Rodriguez, Vice President of Public Affairs for Mi Pueblo Food Center, stated the applicant is a San José based company for 20 years, and that they have just celebrated their 20th store opening last week. The applicant opened this store last November, and is very delighted to be in this community. She expressed the importance of having this Conditional Use Permit for the convenience of customers: being able to purchase alcoholic beverages of any type is convenient when customers are doing their grocery shopping. Wanting to buy a bottle of wine and not being able to do that at your grocery store is a terrible inconvenience.

Ms. Rodriguez stated there were two retail off-sale outlets listed in the staff report that are no longer in business. One is the Big Lots that is in the same commercial shopping center and then the other is listed twice: SuperMercado Mexico, which went out of business four years ago and has been taken over by Santa Fe. They are both listed, but in reality it is just one.

Ms. Rodriguez also mentioned that the Mi Pueblo has an outstanding record in this community as being a clean, safe, responsible operator. She stated it has a great track record with ABC and with the Police Department. She stated they don't sell alcoholic beverages in single-serving containers, they don't sell malt liquor, they prohibit loitering, they have on-site security at all their store locations, and they go to great lengths to make sure that our stores are very family oriented.

Ms. Rodriguez also stated that she had reached out to the Lyndale Neighborhood Association. She offered to meet with them personally, and sent them a copy of the store's policy on the sale of alcoholic beverages, and she hoped to be able to have further discussions with them. She stated that she also had another letter of support to put on the record from the store's landlord, the White Road Partners. She explained that the previous grocery store's license lapsed after that store closed, and that is why Mi Pueblo wasn't able to secure it in time. The landlord's letter states that for the success of the entire shopping center that Mi Pueblo also must be a successful anchor tenant. She emphasized that the store is about 40,000 square feet, and off-sale of alcoholic beverages is less than 4% of sales that the store expects to generate from the sale of alcoholic beverages.

There were no speakers from the public.

Planning Commission Discussion

Commissioner Bit-Badal asked for clarification from the applicant regarding the two stores that are the same. The applicant stated that SuperMercado went out of business a number of years ago and the store is now Santa Fe Mercado.

Chair Jensen noted that per the staff report there are currently six off-sale facilities within the particular census tract and according to the State Department of Alcoholic Beverage Control (ABC) the authorization level is for four licenses.

The applicant stated that they are in contact with ABC and have a very good track record with them.

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Commissioner Bit-Badal asked the applicant if she attended the SNI Neighborhood Action Committee meeting that was mentioned in the report. The applicant responded that they were not invited to the meeting because the NAC already had a full agenda, but she is in contact with them.

Commissioner Jensen asked staff to respond to the applicant's comments. Staff stated that the off-sale establishment information came from ABC and that was what was used to generate the map that was provided in the packet, which identified the location of off-sale establishments within the 500 and 1000 foot radius areas within the census tract. Sometimes off-sale establishments go out of business, and it is important to know that another business with off-sale could go into such a tenant space and continue to operate under the legal nonconforming status or under an existing or new Conditional Use Permit. A new tenant can also privately negotiate to purchase an existing off-sale license if not in use. There are circumstances where, for example, a new tenant can either take over the legal nonconforming status or Conditional Use Permit, and then also buy the existing liquor license and not be subject to review by the Planning Commission.

Commissioner Kamkar asked staff for clarification regarding the criterion of 150-foot distance from residential for making findings of Public Convenience or Necessity. Staff explained that there are actually two different sets of findings that relate to 150 feet. There is the distance of 150 feet with respect to the finding for the Conditional Use Permit that addresses orientation of the use to nearby residential uses within 150 feet. That is a fairly flexible finding, in that the Commission can make a determination that because of the orientation of the business to the use within 150 feet that it doesn't constitute an issue. With respect to the Determination of Public Convenience or Necessity there is also a 150-foot dimension identified as part of the required findings. That finding simply states that if the project proposing the off-sale of alcohol is within 150 feet of residential that staff is obliged to recommend denial, and the Planning Commission would be obliged to deny the proposal, which is the situation for the subject proposal.

The Director of Planning noted that the City Council in February did prioritize a code change that would better address full service grocery stores and off-sale alcohol to eliminate the mandatory denial process. He suggested that the Planning Commission could put comments on the record that the Commission thinks are relevant for the Council to consider on this topic. The Director added that in this situation where we need to do a mandatory denial, the Commission can advise the applicant to file an appeal, essentially stating that there is no prejudice against the application, and to pursue moving forward to the City Council for action.

Commissioner Cahan made a motion to deny the Conditional Use Permit and Determination of Public Convenience or Necessity for the subject proposal. She clarified that she was only making this recommendation because the Commission is forced to make the recommendation, that she hoped that the applicant would appeal the decision to City Council, and that her intent is to not have any prejudice against this application. Chair Jensen stated that she would like to include a recommendation that the Council resolution have a requirement of less than 5% of the floor area.

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The Planning Commission voted unanimously to deny the subject application 7-0-0, and Chair Jensen stated that the Commission looked forward to hearing that the applicant has filed an appeal against the Commission's decision.

Appeal

On April 7, 2011, an appeal was filed by the applicant's representative, Perla Rodriguez (see attached Notice of Permit Appeal and letter supporting the Appeal). The applicant states in their appeal that their customers are requesting the same opportunity to purchase alcoholic beverages from a safe, clean, and reputable establishment as Whole Foods or Safeway, and that it is an inconvenience for their customers to go elsewhere for these items. The letter also reiterates the comments stated by Ms. Rodriguez at the public hearing with the Planning Commission held April 6, 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 approval of the Conditional Use Permit, and enabled the Commission to make only one of the four findings required to grant 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 subject use would be part of an existing full service grocery store at a neighborhood commercial shopping center which is well served by existing infrastructure, fronting on arterial public streets and surrounded by commercial uses. The sales area for alcoholic beverages is incidental to the larger sales of food products and would comprise only three percent (3%) of the store's net floor area. The Police Department has indicated that they are neutral to this proposal and that this site is not located in an area of high crime. The proposed use would occupy a commercial building with adequate parking, landscaping and trash and loading facilities that was developed consistent with the City's Commercial Design Guidelines. The addition of the off-sale uses would further the City's goals of economic development by contributing to the viability of conveniently located full-service grocery stores in the City of San José, and enhance opportunities for the provision of fresh

meat and produce in proximity to residents and workers in the City. Based on the above analysis, staff concludes that the above general findings related to the granting of a Determination of Public Convenience or Necessity can be made.

- 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. In fact, the subject census tract (5041.02) has a population density of 16.5 persons per acre, which is more than the City-wide census tract average of 14.3 persons per acre. With respect to the second part of this finding, the subject store would add at least a seventh such establishment to the existing at least six establishments that sell alcohol within a 1000-foot radius of the subject site; therefore the approval of this permit would add more off-sale establishments to the area. For the reasons stated above, this finding cannot be made.

- 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. As stated above, the Police Department has indicated that they are neutral to this proposal, although there was some public concern raised in writing prior to the Planning Commission Public hearing about the impacts of off-sale outlets on public safety. Based on the recent crime data provided by the Police and the conditions in the Draft Resolution, staff has concluded that the outlet would act as a convenience to an underserved portion of the community without presenting a significant impact on public health or safety. However, because the census tract is not unusually configured, this finding cannot be made.

- 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 existing store is an existing large full-service grocery store/supermarket that sells a complete array of food items including fresh produce and meat. The percentage of net floor area allowed for the off-sale of alcoholic beverages would not exceed 5% of the total floor area. Therefore, the proposed off-sale of alcoholic beverages is incidental and appurtenant to a larger retail use and the subject store does provide a more complete and convenient shopping experience.

Findings of Overriding Public Benefit

Staff has concluded that two of the four findings, described above, can be made to grant a Determination of Public Convenience or Necessity to allow off-sale of the full-range of alcoholic beverages at the subject store. Based on the analysis of the required findings, staff has concluded that there would be a significant or overriding public benefit served by the proposed use.

CONCLUSION

Based on the above analysis and the previous analysis provided in the attached Staff Report to the Planning Commission, staff concludes that all the required findings for issuance of a Conditional Use Permit for the full range of off-sale of alcoholic beverages can be made with regard to the proposal. Further, staff concludes that the findings specific to the granting of a Determination of Public Convenience or Necessity can be issued in the case of off-sale of the full range of alcoholic beverages. Given the ability to make all the relevant findings, staff recommends that the City Council uphold the appeal of the Planning Commission's decision and approve the subject Conditional Use Permit and grant a Determination of Public Convenience or Necessity for the full range of off-sale of alcohol in accordance with the facts, findings and conditions noted in the draft resolution.

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 the full range of alcoholic beverages at the existing full-service grocery 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 500 feet of the project site. 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:
White Road Partners, LLC 1448 15 th Street, Suite 100 Santa Monica, CA 90404	Mi Pueblo Food Center Attn: Alfonso Cervantes P.O. Box 3288 San José, CA 95156	<ul style="list-style-type: none">▪ Draft City Council Resolution▪ Map identifying location of nearby off-sale establishments▪ Planning Commission Staff Report and Attachments▪ Appellant's correspondence▪ Public correspondence

STAFF REPORT
PLANNING COMMISSION

FILE NO.: CP11-017 & ABC11-003

Submitted: 03/08/2011 & 01/31/2011

PROJECT DESCRIPTION: Conditional Use Permit and Determination of Public Convenience or Necessity to allow for the full range of off-sale of alcohol at a full-service grocery store in an existing approximately 39,661 square-foot tenant space in a shopping center on an approximately 14.10 gross-acre site.

Existing Zoning	CG
Proposed Zoning	No change
General Plan	General Commercial
Council District	5
Annexation Date	May 6, 1960
SNI	East Valley / 680 Communities
Historic Resource	No
Redevelopment Area	Yes
Specific Plan	N/A

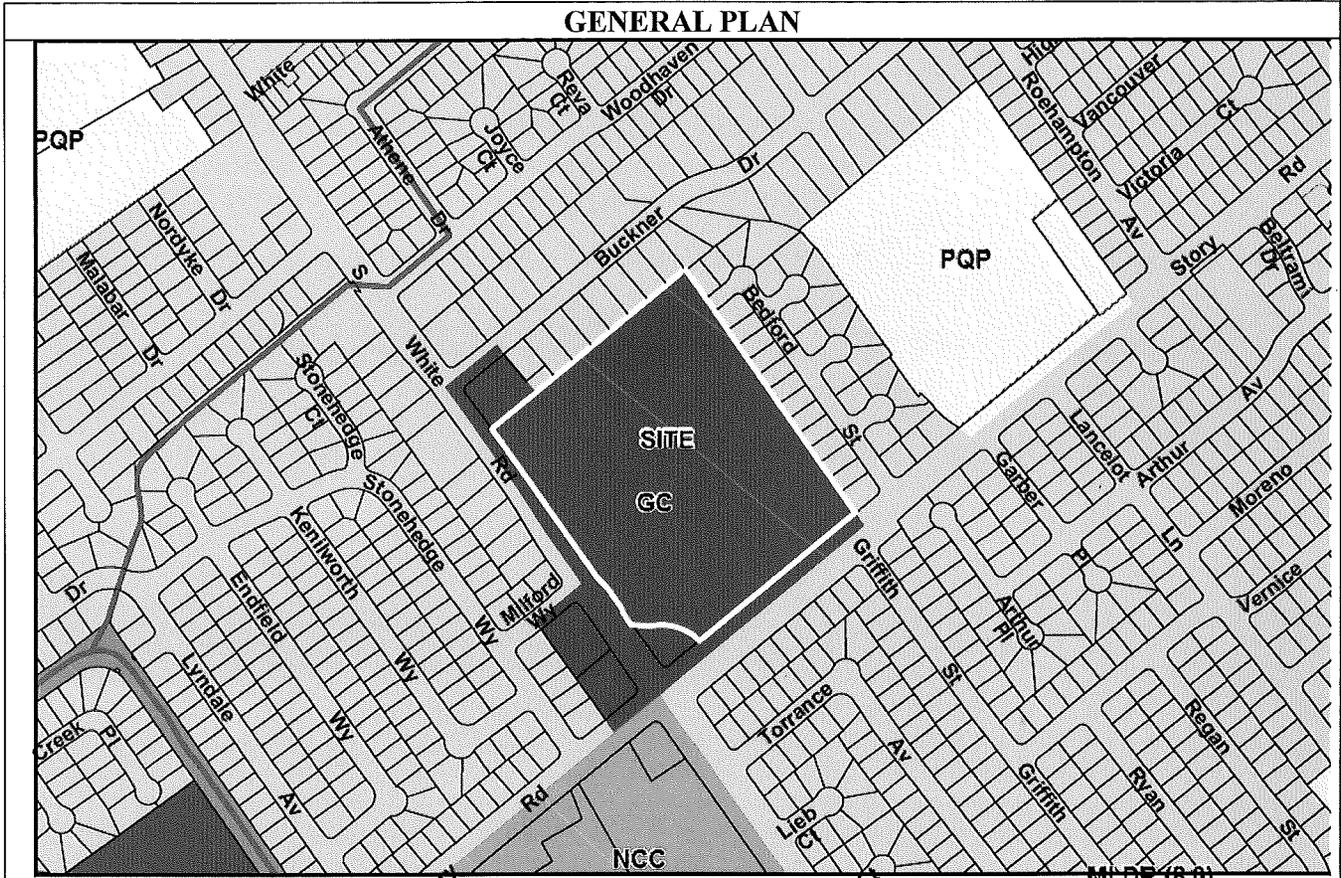
LOCATION: Northeast corner of South White Road and Story Road (1070 South White Road)

Aerial Map

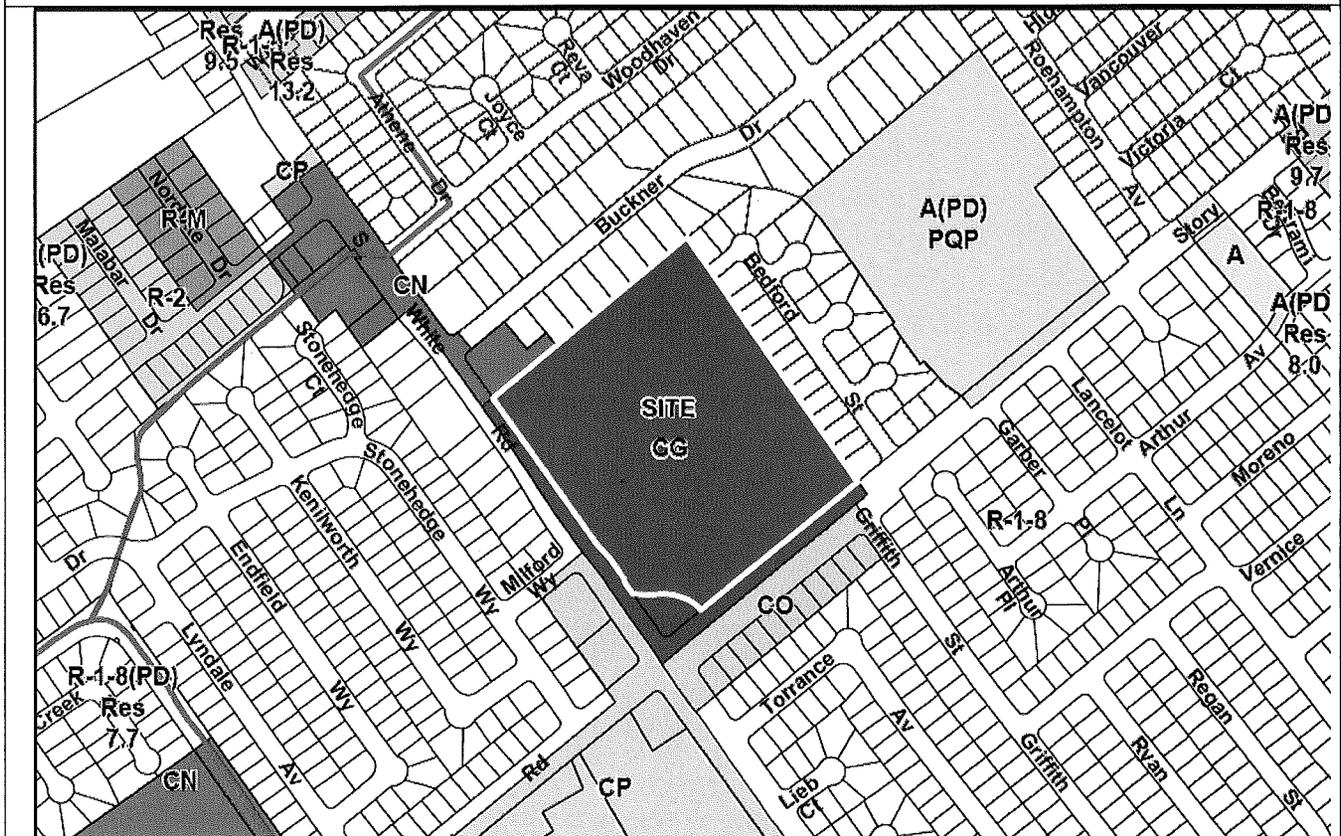
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GENERAL PLAN



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 subject site is located within 150 feet of a residence; and
2. The subject site is located within the East Valley/680 Communities Strong Neighborhoods Initiative Area.

BACKGROUND

On March 8, 2011, Mi Pueblo San José, requested a Conditional Use Permit (File No. CP11-017) to allow off-sale of alcoholic beverages (full-range) at an existing full-service grocery store in an existing approximately 39,661 square-foot tenant space in a shopping center on an approximately 14.1 gross-acre site in the CG-Commercial General Zoning District.

Per data and criteria from the State Department of Alcoholic 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 of PCN (File No. ABC11-003). 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 grocery store, previously operated by Su Vianda, sold alcohol for off-site consumption as a legal nonconforming use in that the sale of alcohol was established prior to the requirement for issuance of a Conditional Use Permit. However, Su Vianda ceased operating the store more than six months ago, and the operator did not pay the fees necessary to maintain the State of California Department of Alcoholic Beverage Control (ABC) license for off-sale for the subject tenant space, and the license lapsed. Any legal non-conforming use was also abandoned at that time. Any off-sale of alcohol is now subject to the current regulations. Because the previous license lapsed, the new operator is required by ABC to apply for a new license. The City of San José Zoning Ordinance currently requires a Conditional Use Permit for off-sale of alcohol. For these reasons, the current operator, Mi Pueblo Food Center, is required to obtain a Conditional Use Permit and Determination of PCN to allow off-sale of alcohol for the grocery store.

The site is located at the northeast corner of South White Road and Story Road (1070 South White Road), and it is accessed from both Story and White Roads. The subject tenant space is located within a shopping center that is surrounded by commercial uses and residential uses to the north, west, and south, and residential uses to the east.

Project Description

The approximately 39,661 square-foot existing tenant space is part of a larger existing approximately 169,000 square-foot shopping center. The applicant has indicated that the full-service grocery store intends to add the off-sale of the full-range of alcohol to the array of items for sale, and that the proposed alcohol sales area represents less than a majority 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 the Planning Commission Hearing on the project were sent out to property owners and tenants within a 500-foot radius of the subject site, and Planning staff notified the East Valley / 680 Communities Strong Neighborhoods Initiative Neighborhood Action Coalition (SNI NAC) about the proposal. Additionally, Planning staff requested that the applicant contact the SNI NAC directly to coordinate a presentation on the subject proposal. As of the writing of this staff report, Planning staff has received correspondence against the proposal from a member of the Lyndale Neighborhood Association Board stating that the neighborhood is already inundated with businesses that sell alcohol and that the subject grocery store is very near to liquor stores already selling alcohol (see attached public correspondence and aerial map of off-sale establishments within the vicinity of the subject site).

ANALYSIS

In order for the existing grocery store to be able to sell the full range of liquor at the subject location, the applicant needs to obtain a Conditional Use Permit and be granted a Determination of PCN. 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 PCN. 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 four (4) other existing businesses and one recently vacated tenant space equating to five (5) potential retail establishments located within 500 feet of the proposed use that are already licensed by State ABC to provide alcoholic beverages for off-site consumption including: Big Lots (recently vacated tenant space), Rite Aid, Grewal Discount Liquor, Super Mercado Mexico, and Santa Fe Mercado & Carniceria. The proposed use together with existing facilities would result in a total of nine (9) such establishments within a 1000-foot radius from the proposed location, and therefore 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.

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 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. The off-sale use was in operation less than a year ago in the subject tenant space. The recent history of the operation of a grocery store with off-sale of alcohol at this site with little concern from the community shows that the resulting excess concentration of such uses in the area will not adversely affect the peace, health, safety, morals, or welfare of persons residing or working in the surrounding area, or impair the utility or value of property of other persons located in the vicinity of the area, or be detrimental to public health, safety or general welfare. The proposed off-sale use will be incidental and a minor portion of an existing full-service grocery store that provides fresh meat and produce that can support public health and welfare. Therefore, the Planning Commission can make this required finding for approval of a Conditional Use Permit for off-sale of alcohol.

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 located closer than five hundred (500) feet from a college or university (National Hispanic University). The subject site is also located within 150 feet of at least ten (10) residentially zoned properties. The closest residential parcel is approximately 55 feet from the building in which the retail store tenant space is located. The store's publicly accessible entrance is approximately 340 feet from an existing residence on Bedford Street. Said entrance is oriented toward the parking lot of the center at the southeastern end of the tenant space. The minimum walking distance from an existing residence to the tenant space is approximately 340 feet to Bedford Street. Given these facts, the finding can be made that the building in which the proposed use is to be located is situated and oriented in such a manner that the use would not adversely affect residential, child care center, public park, social service agency, residential care facility, residential service facility and/or school uses.

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 excess concentration of establishments by having at least four (4) within 500 feet of the subject site. However, the long standing existence of a grocery store with off-sale of alcohol at this site with little impact on the surrounding community, the addition of off-sale as proposed would not adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area, or be detrimental to public health, safety or

general welfare. Additionally, although the subject site is located within 150 feet of residentially-zoned property, there are barriers between the residences and the subject site including an approximately eight-foot high wall reducing any impact the off-sale of alcohol could have on the residents in the area.

Zoning Ordinance Findings for all Conditional Use 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 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.

Analysis of Required Findings. The proposed use would occupy an existing grocery store tenant space in a commercial building in a shopping center with adequate parking, landscaping, and trash and loading facilities that was developed in 1985 with a grocery store use consistent with the City's requirements at the time of development per an approved Site Development Permit (File H85-05-114). The subject site is well served by existing infrastructure, fronting on arterial public streets, and surrounded by a mix of commercial and residential uses. The sales area for alcoholic beverages is incidental to the larger sales of food products and would comprise no more than five percent (5%) of the store's display floor area or net floor area, whichever is less. The Police Department has indicated that they are neutral to this proposal and that this site is not located in an area of high crime. The addition of the off-sale uses would further the City's goals of economic development by contributing to the viability of conveniently located full-service grocery stores in the City of San José, and enhance opportunities for the provision of fresh meat and produce in proximity to residents and workers in the City.

For the reasons stated above, staff has concluded that the proposed off-sale use would not be detrimental to the welfare of persons residing or working in the surrounding area. Moreover, the proposed use would help provide an improvement to the welfare of persons residing or working in the surrounding area by providing potentially more viability for operation of a full-service grocery store that sells fresh meat and produce. The grocery store use is already established on the subject site. Recent history of the grocery store operations with a minor percentage of display area for off-sale of alcohol by a previous tenant shows that the off-sale use in this specific context has not been detrimental to the welfare of nearby residents and workers.

2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in this Title, or as is otherwise required in order to integrate said use with the uses in the surrounding area; and

Analysis of Required Findings. The subject tenant space is part of an existing commercial shopping center on approximately 14 acres that was developed with an approved Site Development Permit in the City in 1985 with a grocery store use in compliance with City requirements for parking, loading, walls, fences, landscaping and other development features to integrate said use with the uses in the surrounding area. Therefore the site is such that the use can be integrated with uses in 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.

Analysis of Required Findings. The subject tenant space is part of an existing commercial shopping center that is well served by existing infrastructure, fronting on arterial public streets, with good access to a local street network, and surrounded by commercial and residential uses.

Based on the above analysis of required findings, staff concludes that the above general findings related to the approval of a Conditional Use Permit can be made.

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 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 State Department of ABC, the census tract in which the subject site is located does have an over-concentration of off-sale licenses as defined by State criteria. 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 located within the East Valley / 680 Communities Strong Neighborhoods Initiative 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 lead to a grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use. Therefore, the use is not consistent with this required finding which must be made in order to grant a favorable determination.

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 within 500 feet of a college. Therefore, the use is 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 39,661 square-foot tenant space is proposed to be used for the off-sale of alcohol.

Three of the required findings required to consider granting a Determination of Public Convenience and Necessity (PCN) above, Findings 1,2, and 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 PCN. Because a Conditional Use Permit is of no value if a required PCN cannot be approved, Planning Staff recommends that the Planning Commission deny the requested Conditional Use Permit application.

General Plan Conformance

The subject site is designated General 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 full-service grocery 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 full-service grocery store in a tenant space in a neighborhood shopping center. Within 500 feet of the subject tenant space there are five (5) existing licensed off-sale establishments with at least four (4) currently in use. Three (3) of the existing off-sale establishments and the proposed off-sale establishment are within the same shopping center. The proposed off-sale establishment is located in an SNI area, is within 150 feet of residences on Bedford Street, and is within 500 feet of National Hispanic University. Therefore, as discussed above,

findings for the Conditional Use Permit can be made, the required findings to support a Determination of PCN cannot be made. Because the applicant needs to be granted a Determination of PCN for the off-sale alcohol use and the Planning Commission cannot make the necessary findings for granting a PCN, the Planning Commission must deny the PCN and therefore should also deny the Conditional Use Permit.

PUBLIC OUTREACH

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 500 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:** 03/21/2011

Owner:	Applicant:	Attachments:
White Road Partners, LLC 1448 15 th Street, Suite 100 Santa Monica, CA 90404	Mi Pueblo Food Center Attn: Alfonso Cervantes P.O. Box 3288 San José, CA 95156	Draft Resolution & legal description Map of off-sale establishments within 1,000 feet of subject tenant space San José Police Dept. Memorandum Plans Public Correspondence

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 full-service grocery store in an existing approximately 39,661 square-foot tenant space in a shopping center on an approximately 14.1 gross-acre site.

FILE NOS. CP11-017 & ABC11-003

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 March 8, 2011 and January 31, 2011 respectively applications (File Nos. CP11-017 & ABC11-003) were filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol, of any type, at an existing full-service grocery store, on that certain real property (hereinafter referred to as “subject property”), situate in the CG Commercial General Zoning District, located on the northeast corner of South White Road and Story Road (1070 South White Road).

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, “Mi Pueblo Food Center, Store 22, 1070 S. White Road, San Jose, CA” dated March 21, 2011. 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 General 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, of any type, at an approximately 39,661 square-foot existing full-service grocery store located within an approximately 169,000 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 and residential uses to the north, west, and south, and residential uses to the east.
7. No increase in parking demand results from this proposed project.
8. The subject retail establishment currently opens at 6:00 a.m. and closes at midnight as-of-right.
9. The subject store proposes to utilize no more than 5 percent of the floor area for the sale of alcoholic beverages of any type.
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 as defined by the State of California Department of Alcoholic Beverage Control (ABC).
12. The proposed use would 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 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 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 north.
17. The above mentioned residential use to the north of the subject building is within 150 feet distance to the subject store.
18. There is a wall approximately eight feet in height between the residential and commercial uses that is a barrier to walking directly from the residential use to the subject store.
19. The public-serving entrance of the subject store is within approximately 340 feet of the residential building as measured by an unobstructed path of pedestrian travel.
20. There are eight (8) other off-sale establishments within 1,000 feet of the subject site.

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 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, 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 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.

Additionally, based on an analysis of the relevant facts, with respect to the Conditional Use Permit, the Planning Commission finds that:

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

Finally, 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 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 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 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.

Based on all of the above findings for both applications, this proposal for off-sale of any type of alcoholic beverages is hereby denied.

DENIED this 6th day of April 2011, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

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.



File No: CP11-017 & ABC11-003

District: 5

Nearby Alcohol Off-Sales



Prepared by the Department of Planning,
Building, and Code Enforcement
3/14/2011



Memorandum

TO: Leslie Xavier
Planning Department

FROM: Ofc. Christine Zarate #3165
San Jose Police Vice Unit

SUBJECT: Hunters
347/379 South First Street

DATE: March 15, 2011

Approved

Date

I have received your request for input regarding Brix Nightclub at 347 South First Street, San Jose, Ca. 95129. Brix is seeking to renew their Conditional Use Permit.

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, with certain exceptions as described in B&P Sections 23958.4 (a)(1) and 23958.4 (a)(2). 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.

Brix is located in San Jose Police Beat E4. The reported crime statistics as defined by B&P Section 23958.4(c) **are** over the 20% crime index thus the location is considered unduly concentrated per B&P Section 23958.4 (a)(1).

Police Beat Crime Statistics

Beat	Index Crimes	Arrests	Total	20% Above Average
E4 (2010)	225	467	692	YES
City Average	314	215	528	

Department of Alcohol Beverage Control (ABC) records indicate Hunters is in census tract 5008. Pursuant to B&P Section 23958.4 (a)(2) ... the ratio of on-sale retail licenses and off-sale retail licenses to population in census tract 5008 **does** exceed the ratio of on-sale retail licenses and off-sale retail licenses to population in the county in which the applicant premises are located.

Authorized and Current ABC Licenses in Census Track 5008

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
5008	3	2	68/4	4/1	Yes	Yes

The San Jose Police Department is neutral to the issuance of a Conditional Use Permit for Brix.

Please feel free to contact me at 277-4322 if you have any questions.

Ofr. Christine Zarate #3165
Administrative Officer
Special Investigations/Vice

Nusbaum, Jenny

From: Mary Ann Andrade [comet1966@yahoo.com]
Sent: Monday, March 21, 2011 2:02 AM
To: Nusbaum, Jenny
Subject: RE: Applicatylons for new alcogol llcenses in East San Jose

Jenny, we are already inundated with businesses selling alcohol. Each of these to grocery makrets are within a couple of doors of liquor stores already sell alcohol. How do we as neighborhoods protest these attempts to bring more alcohol sales int our neighborhoods?

Mary Ann Andrade
member of Lyndale Nighborhood Association Board

comet1966@yahoo.com

408-209-0858

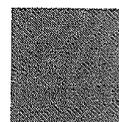
COLOR LEGEND



P1 1021 CRANSBERRY COLOR
BY PRATT & LAMBERT™



P2 1828 FLORIDA GOLD COLOR
BY PRATT & LAMBERT™



P3 784 BLUE MACAW COLOR
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