



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: November 10, 2011

Approved

Date

11-21-11

COUNCIL DISTRICT: 1

SNI AREA: No

SUBJECT: CP11-054 and ABC11-013. 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 limited to beer and wine with incidental instruction tastings per a Type 86 license, at a full-service grocery store in an existing approximately 33,000-square-foot tenant space that is a portion of a 43,000-square-foot building in a shopping center on an approximately 6.48-gross-acre site at the northwest corner of Prospect Road and Saratoga Avenue (5205 Prospect Road, Suite 153, West Valley Shopping Center).

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the Council uphold the appeal 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 Council approve the proposed Conditional Use Permit and Determination of Public Convenience or Necessity, the proposed full-service grocery store would be allowed the ability to acquire a State of California Alcoholic Beverage Control (ABC) license to allow the ability to sell alcoholic beverages limited to beer and wine for off-site consumption.

EXECUTIVE SUMMARY OF OFF-SALE APPROVAL PROCESS

On February 1, 2006, Council-adopted regulations affecting establishments that sell prepackaged alcohol for off-site consumption ("off-sale alcohol") became effective. The updated regulations

November 10, 2011

Subject: CP11-054 / ABC11-013

Page 2

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 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 Alcoholic 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 establishments that provide alcoholic beverages for off-site consumption within a 1,000 foot radius from the proposed use; and
3. The proposed use would not be located within 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 Council. One of the changes made to the ordinance was to include the opportunity for the Council to make a finding of

overriding public benefit should one of the mandatory factual findings not be met. The Council is the only decision-making body that can make the finding of greater public benefit.

This report, along with the Planning Commission staff report, includes a discussion of the project and whether the required findings can be made in both the case of the Conditional Use Permit and in the Determination of Public Convenience or Necessity. The Planning Commission was unable to make all necessary findings for a Determination of Public Convenience or Necessity in that the proposed subject use is within 150 feet of a residential use and the proposed off-sale of alcohol at the subject site would lead to a grouping of six off-sale establishments within a 500-foot radius of the subject site. 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 Council.

Based on an analysis of the findings required for the 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 Council approve the request for a Conditional Use Permit and Determination of Public Convenience or Necessity.

BACKGROUND

Planning Commission Hearing

On October 26, 2011, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP11-054 & ABC11-013). The Director of Planning recommended mandatory denial of the Conditional Use Permit and request for a Determination of Public Convenience or Necessity because two of the required four findings for the Determination of Public Convenience and Necessity could not be made. As stated in the original staff report (see attached), staff was unable to find that the proposed off-sale use is not within 150 feet of a residential use or residentially zoned property and unable to find that proposed off-sale of alcohol at the subject site would not lead to a grouping of more than four off-sale establishments within a 1,000-foot radius of the subject site.

Public Testimony

The applicant's representative, Steve Khroyan, stated that the proposed market would be a great addition to the neighborhood, and that the market is intended to provide to the neighborhood groceries that are organic and natural-food based, at very affordable prices. He stated that the sale of beer and wine is ancillary and complementary to the sale of a wide range of grocery products. No one else from the public spoke on the item. The applicant has indicated that they may pursue an Instructions Tasting License, Type 86, through the Department of Alcohol Beverage Control. A Type 86 license has a number of restrictions as part of it which makes it more or an incidental use to a larger format establishment with off-sale of alcohol. The following are the general restrictions for this type of license:

November 10, 2011

Subject: CP11-054 / ABC11-013

Page 4

Instructional tasting can be allowed only by certain **off-sale** licensees as follows:

- Generally **cannot be allowed where motor vehicle fuel is sold** (unless there is a fully enclosed off-sale retail area encompassing at least 10,000 sf)
- Generally **cannot be allowed at off-sale locations of less than 5,000 sf** of interior retail space
- **PCN doesn't apply** to these licenses
- They **can't charge for tastes** (and the size and number of tastes are limited)
- Instructional tasting can occur **only between 10:am and 9:pm.**
- **No on-sale retail sales to consumers** attending a tasting event are allowed.
- The **tasting area has to be separate** from the remaining off-sale premises ~ at least by a rope/cord ~ and no one under 21 is allowed in that area.

Because of the nature of these restrictions, staff has concluded that this is more of an incidental use to the larger off-sale and does not constitute a larger drinking establishment and therefore supports the inclusion of this within the context of the off-sale.

Planning Commission Action

Commissioner Abelite requested that comments be transmitted to Council to relay that he would be supportive of this application going forward and being approved, particularly in light of information received during a Planning Commission study session about four weeks ago in which Federal Realty testified to the Planning Commission that there was approximately \$11 billion of household income within a three-mile radius of this particular location, and that therefore the Commissioner did not think six locations within such a small concentrated area would cannibalize sales from each other. The Planning Commission then voted to deny the subject application as mandated by Title 6, 6-0-1 (Kamkar absent).

Appeal

On October 27, 2011, an appeal was filed by the applicant's representative, John Reimann of West Valley Shopping Center Inc. (see attached Notice of Permit Appeal). The applicant states in their appeal that they believe that the proposed use is compatible with the community and will provide an invaluable service.

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 two 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 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 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 a full-service grocery store at a neighborhood-serving shopping center that 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 no more than five percent of the store's net floor area. The Police Department has indicated that they are neutral to this proposal. 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 is not a low population density tract in relation to other tracts in San José. Given the fact that there are four existing businesses within 500 feet of the proposed project and six within 1,000 feet, adding the off-sale of alcohol for the proposed project would contribute to an overconcentration because it would exceed four establishments within 1,000 feet (see attached map).

- 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 census tract (5062.02) is regularly shaped as depicted on the attached map. The proposed project is located at the edge of where four census tracts meet and there are six existing establishments that sell alcohol, as discussed above.

- 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 proposal for off-sale of alcoholic beverages limited to beer and wine only is incidental to a large full-service grocery store/supermarket that would sell 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 will 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 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 off-sale of alcoholic beverages limited to beer and wine only, with incidental instruction tastings per a Type 86 license, 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 alcoholic beverages limited to beer and wine. Given the ability to make all the relevant findings, staff recommends that the 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 off-sale of alcohol limited to beer and wine in accordance with the facts, findings and conditions noted in the draft resolution.

ALTERNATIVES

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

1. Uphold the appeal and approve the project as proposed by the applicant/appellant and permit the off-sale of alcoholic beverages limited to beer and wine at the proposed full-service grocery store; or
2. Uphold the Planning Commission's decision to deny the subject Conditional Use Permit and Determination of Public Convenience or Necessity.

PUBLIC OUTREACH

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Although this item does not meet any of the above criteria, staff followed Council Policy 6-30: Public Outreach Policy. A notice of the public hearing was published, posted on the City's web site, and distributed to the owners and tenants of all properties located within 1,000 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

Attachments:

- Draft Council Resolution
- Map identifying location of nearby off-sale establishments
- Planning Commission Staff Report and Attachments
- Appellant's correspondence

For questions please contact Mike Enderby at 408 535-7843

(This Resolution reflects the recommendation of the Director of Planning)

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN JOSÉ APPROVING A CONDITIONAL USE PERMIT AND GRANTING A DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO ALLOW OFF-SALE OF ALCOHOL LIMITED TO BEER AND WINE ONLY, WITH INCIDENTAL INSTRUCTIONAL TASTING PER A TYPE 86 LICENSE, AT A FULL-SERVICE GROCERY STORE IN AN EXISTING APPROXIMATELY 33,000-SQUARE-FOOT TENANT SPACE IN AN APPROXIMATELY 43,000-SQUARE-FOOT BUILDING IN A SHOPPING CENTER ON AN APPROXIMATELY 6.48 GROSS-ACRE SITE AT THE NORTHWEST CORNER OF PROSPECT ROAD AND SARATOGA AVENUE (5205 PROSPECT ROAD, SUITE 153, WEST VALLEY SHOPPING CENTER).

FILE NOS. CP11-054 & ABC11-013

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San Jose Municipal Code, on August 24, 2011 applications (File Nos. CP11-054 & ABC11-013) were filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow the off-sale of alcohol limited to beer and wine only, with incidental instructional tasting per a type 86 license, at a full-service grocery store in an existing approximately 33,000-square-foot tenant space in an approximately 43,000-square-foot building in a shopping center on an approximately 6.48 gross-acre site, on that certain real property (hereinafter referred to as "subject property"), situate in the CG-Commercial General Zoning District, located on the northwest corner of Prospect Road and Saratoga Avenue (5205 Prospect Road, Suite 153, West Valley Shopping Center); and

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San Jose Municipal Code, this City Council conducted a hearing on said application, notice of which was duly given; and

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

WHEREAS, at said hearing this City Council received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and development plan for the subject property entitled, "Sunflower Farmer's Market TI, Conditional Use Permit Submittal, 5205 Prospect Road, Suite B, San Jose, CA 95129" dated August 22, 2011, and said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, said hearing was conducted in all respects as required by the San Jose Municipal Code and the rules of this City Council.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSE AS FOLLOWS:

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

1. This site has a designation of 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), the Director of Planning has determined pursuant to the provisions of CEQA as well as the provisions of Title 21 of the San José Municipal Code that this project is exempt from environmental review.
4. The project proposes the off-sale of alcohol limited to beer and wine only, with incidental instructional tasting per a type 86 license, at a full-service grocery store in an existing approximately 33,000-square-foot tenant space in an approximately 43,000-square-foot building in a shopping center on an approximately 6.48-gross-acre site, on the northwest corner of Prospect Road and Saratoga Avenue (5205 Prospect Road, Suite 153, West Valley Shopping Center), for off-site consumption as a minor part of the overall sales area of the full-service grocery store, not to exceed five percent (5%) of the net floor area; such that alcohol sales would not represent a majority of the proposed full-service grocery store use.
5. The subject tenant space is located within a shopping center that is surrounded by commercial uses to the north, west, east and south, and a multi-family residential development to the northeast.
6. No increase in parking demand results from this proposed project.
7. The subject retail establishment can operate at 6:00 a.m. and close at midnight as-of-right.

8. The Police Department memorandum indicates that the project site is not located within an area of high crime, but is within a census tract that has an over-concentration of off-sale licenses.
9. The Police Department has indicated that they are neutral to the issue of off-sale of alcohol in conjunction with the full-service grocery store at this location.
10. 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.
11. Due to the undue concentration of off-sale licenses, the project is subject to the requirements for a Determination of Public Convenience or Necessity for a liquor license for the off-sale of alcoholic beverages. The granting of such a determination requires that four specific factual findings be made as prescribed by Title 6 of the San José Municipal Code in order to consider granting a Determination of Public Convenience or Necessity.
12. 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.
13. The project site is located within 150 feet of residentially zoned property.
14. There are five (5) other off-sale establishments or licenses issued within 500 feet of the subject site per data from the State Department of Alcoholic Beverage Control.
15. The approval of this permit would add more off-sale establishments to the area.
16. The proposed sales of alcoholic beverages are incidental to a larger retail use.
17. The full-service grocery store will sell a complete array of food items including fresh produce and meat.
18. Members of the public stated support for the proposal prior to the Planning Commission hearing.
19. No member of the public other than the applicant's representative spoke on the proposal at the Planning Commission hearing.
20. Without the granting of a Determination of Public Convenience or Necessity, the Conditional Use Permit cannot be effectuated.
21. The Planning Commission denied the proposed request for the off-sale of alcohol on October 26, 2011 because it could not make all four (4) of the mandated findings set forth in the San José Municipal Code in order to consider granting a Determination of Public Convenience or Necessity.
22. The applicant appealed the Planning Commission decision on October 27, 2011.

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

1. 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, and is located closer than one hundred fifty (150) feet from a residentially zoned property; however, the

proposed use is situated and oriented in such a manner that should not adversely affect such residential use.

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

- a) The proposed use is not located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the City for targeted neighborhood enhancement services or programs, or located within an area in which the chief of police has determined that the proposed use would be detrimental to the public health, safety, or welfare of persons located in the area, or increase the severity of existing law enforcement or public nuisance problems in the area; and
- b) The proposed use would lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use; and
- c) The proposed use would not be located within five hundred (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 proposed use is within one hundred fifty feet of an existing residence.
- d) Alcohol sales would not represent a majority of the proposed use.

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

1. The proposed outlet for the off-sale of alcoholic beverages would enhance or facilitate the vitality of an existing commercial area.
2. 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.

Finally, the City Council finds and concludes, based on all of the above facts and findings, that that there would be a significant or overriding public benefit served by the proposed use.

In accordance with the findings set forth above, a Conditional Use Permit and a Determination of Public Convenience and Necessity to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth are hereby **granted**. This City Council expressly declares that it would not have granted this permit and determination except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS

This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions and all of the requirements set forth in San Jose Municipal Code Section 20.100.290.D shall have been fully performed or caused to be fully performed.

1. **Acceptance of Permit.** Per Section 20.430.290(B), should the permittee fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the permittee shall be deemed to constitute all of the following on behalf of the applicant:
 - a. Acceptance of the Permit by the permittee; and
 - b. Agreement by the permittee to be bound by, to comply with, and to do all things required of or by the permittee pursuant to all of the terms, provisions, and conditions of this permit or other approval and the provisions of Title 20 applicable to such Permit.
2. **Permit Expiration.** This Conditional Use Permit shall automatically expire two years from and after the date of adoption of the Resolution by the City Council, granting this Permit, if within such two-year period, the proposed use of this site has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the City Council. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit pursuant to Title 20 of the San José Municipal Code.
 - a. **Use Authorization.** This Conditional Use Permit authorizes the off-sale of alcoholic beverages limited to beer and wine, with incidental instructional tasting per a type 86 license, to be implemented only in conjunction with a full-service grocery store on the property subject to the terms of this permit.
3. **Conformance with Plans.** The use of this property shall conform to approved plans entitled "Sunflower Farmer's Market TI, Conditional Use Permit Submittal, 5205 Prospect Road, Suite B, San Jose, CA 95219" dated August 22, 2011, on file with the Department of Planning, Building and Code Enforcement.
4. **Limitation on Sales Area of Off-Sale Alcohol.** The sale and display of alcohol shall be limited to no more than five percent (5%) of the net floor area of the full-service grocery store.
5. **Conformance with Municipal Code.** No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code.
6. **Nuisance.** This use shall be operated in a manner that does not create a public or private nuisance. Nor shall the use 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. Any such nuisance must be abated immediately upon notice by the City.

7. **Anti-Litter.** The site and surrounding area shall be maintained free of litter, refuse, and debris.
8. **Lighting.** This permit allows no new exterior lighting except as designated on the approved plans.
9. **Waste Discharge.** The proposed facility shall conform to the City of San José industrial waste discharge regulations. Any non-domestic wastewater discharge into the sanitary sewer system shall require Source Control Staff to review and approve the final plans. Contact Environmental Engineering Staff at (408) 945-3000 with any questions.
10. **Permittee Responsibility.** The permittee shall ensure that the use authorized by this Permit is implemented in conformance with all of the provisions of this Permit.
11. **Discretionary Review.** The Director of Planning maintains the right of discretionary review of requests to alter or amend structures, conditions or restrictions of this Conditional Use Permit incorporated by reference in this Permit in accordance with the San José Municipal Code.
12. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
13. **Refuse.** All trash areas shall be effectively screened from view and covered and maintained in an orderly state to prevent water from entering into the garbage container. No outdoor storage is allowed / permitted unless designated on the approved plan set. Trash areas shall be maintained in a manner to discourage illegal dumping.
14. **Compliance with Other Permits.** The developer shall comply with all terms and conditions of the previously approved permits on the site.
15. **Alcoholic Beverage Control.** The off-sale of alcoholic beverages is allowed in conformance with the requirements of the Department of Alcoholic Beverage Control (ABC). The applicant shall maintain full compliance and in good standing with the Department of Alcoholic Beverage Control.
16. **Compliance with Local and State Laws.** The subject use shall be conducted in full compliance with all local and state laws. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code. The Permit shall be subject to revocation if the subject use is conducted in such a manner as to cause a nuisance, as defined above.
17. **Sign Approval.** No signs are approved at this time. All proposed signs shall be subject to approval by the Director of Planning.
18. **Store Operator Point of Contact.** Store operator shall post in a visible location on the store premises a phone number, and other applicable contact information for the public to address questions and comments regarding management and maintenance of the subject store and store frontage.

19. Revocation, Suspension, Modification. This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:

- a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
- b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
- c. The use as presently conducted creates a nuisance.

APPROVED this 6th day of December 2011, by the following vote:

AYES:

NOES:

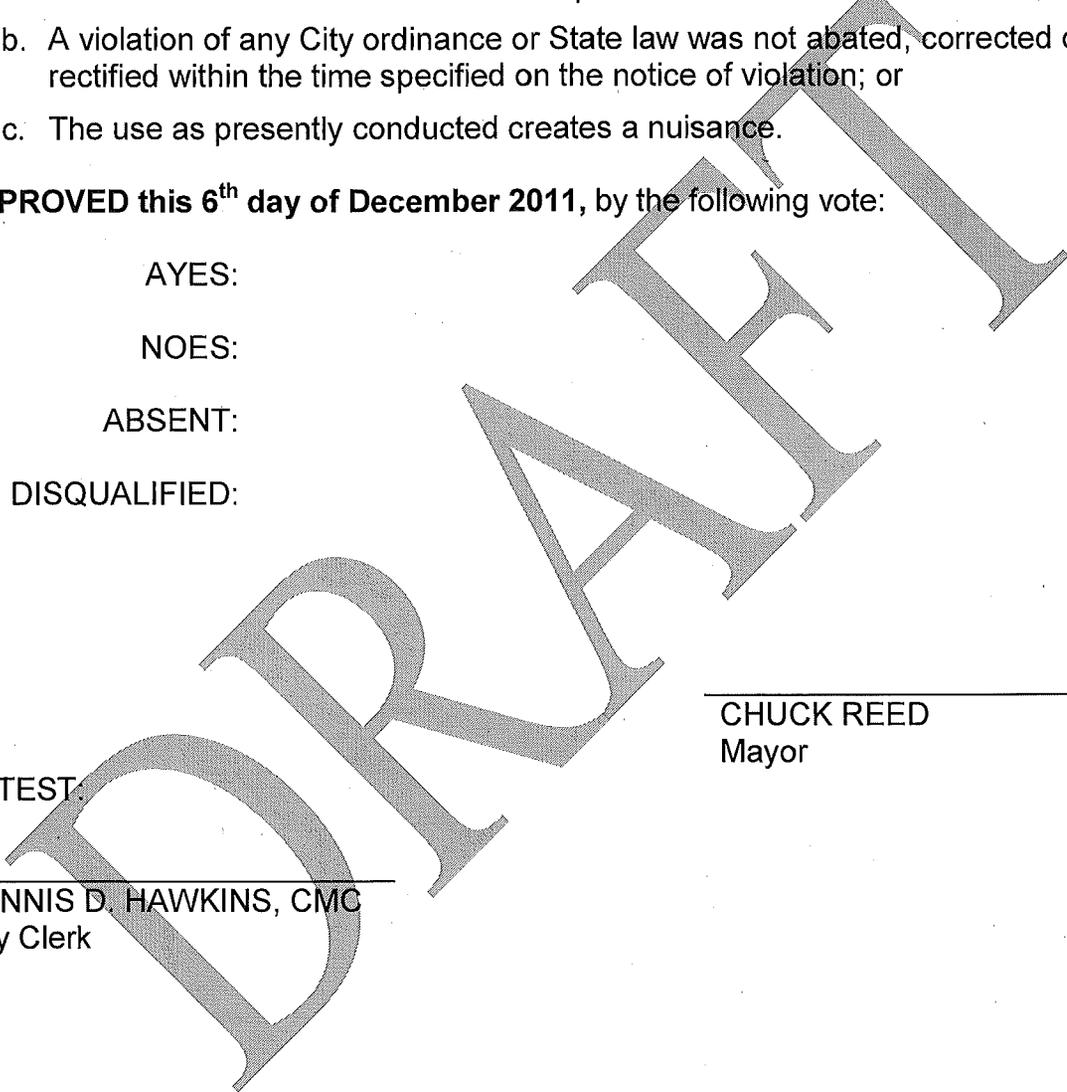
ABSENT:

DISQUALIFIED:

ATTEST:

DENNIS D. HAWKINS, CMC
City Clerk

CHUCK REED
Mayor





Rec'd 10/27/11 S. B. Wulsh

CITY OF SAN JOSE
 Planning, Building and Code Enforcement
 200 East Santa Clara Street
 San José, CA 95113-1905
 tel (408) 535-3555 fax (408) 292-6055
 Website: www.sanjoseca.gov/planning

NOTICE OF PERMIT APPEAL

TO BE COMPLETED BY PLANNING STAFF

FILE NUMBER <i>CP11-054</i>	RECEIPT # _____
PROJECT LOCATION	AMOUNT _____
	DATE <i>10/27/11</i>
	BY <i>Sullivan</i>

TO BE COMPLETED BY PERSON FILING APPEAL

PLEASE REFER TO PERMIT APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE. THIS FORM MUST BE ACCOMPANIED BY THE APPROPRIATE FILING FEE.

THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE PROPERTY WHICH IS LOCATED AT:

5205 Prospect Rd Suite 153, San Jose, CA 95129

(CP11-054 + associated ABC File)

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

The applicant requests an appeal for the mandatory denial by Planning Commission for its Conditional Use Application and Public Convenience and Necessity finding for the proposed natural food market proposed with off-sale of alcoholic beverages. The applicant believes that the proposed use is compatible with and will provide an invaluable service to the community.

PERSON FILING APPEAL

NAME John Reimann, West Valley Shopping Center Inc.		DAYTIME TELEPHONE (408) 251-0708	
ADDRESS 10850 Miguelita Rd.	CITY San Jose	STATE CA	ZIP CODE 95127
SIGNATURE <i>[Signature]</i>		DATE 10-26-11	
RELATIONSHIP TO SUBJECT SITE: (e.g., adjacent property owner, property owner within one thousand (1,000) feet) Property Owner			

CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)

NAME Steve Khroyan			
ADDRESS 17237 Martha St.	CITY Encino	STATE CA	ZIP CODE 91316
DAYTIME TELEPHONE (818) 457-4770	FAX NUMBER ()	E-MAIL ADDRESS skhroyan@landfusionconsulting.com	

PROPERTY OWNER

NAME John Reimann, West Valley Shopping Center Inc.		DATE 10-26-11	
ADDRESS 10850 Miguelita Rd.	CITY San Jose	STATE CA	ZIP CODE 95127

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

STAFF REPORT
PLANNING COMMISSION

FILE NO.: CP11-054 & ABC11-013

Submitted: 08/24/2011

PROJECT DESCRIPTION: Conditional Use Permit and Determination of Public Convenience or Necessity to allow the off-sale of alcohol limited to beer and wine at a full-service grocery store in an existing approximately 33,000-square foot tenant space that is a portion of a 43,000-square foot building in a shopping center on an approximately 6.48 gross-acre site.

Existing Zoning	CG-Commercial General
General Plan	Neighborhood/Community Commercial
Council District	1
Annexation Date	May 5, 1955
SNI	None
Historic Resource	No
Redevelopment Area	None
Specific Plan	N/A
Existing Zoning	CG-Commercial General

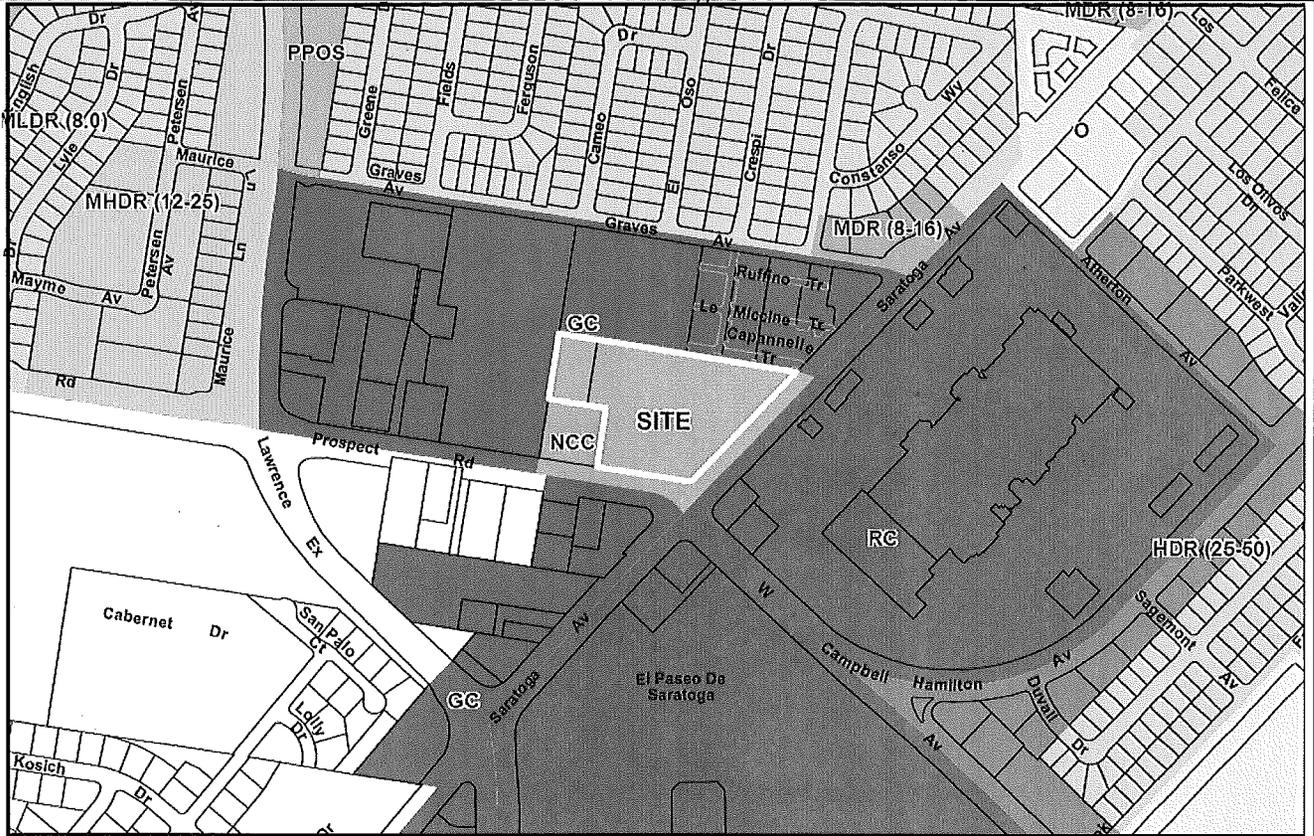
LOCATION: The northwest corner of Prospect Road and Saratoga Avenue (5205 Prospect Road, Suite 153)(West Valley Shopping Center)

Aerial Map

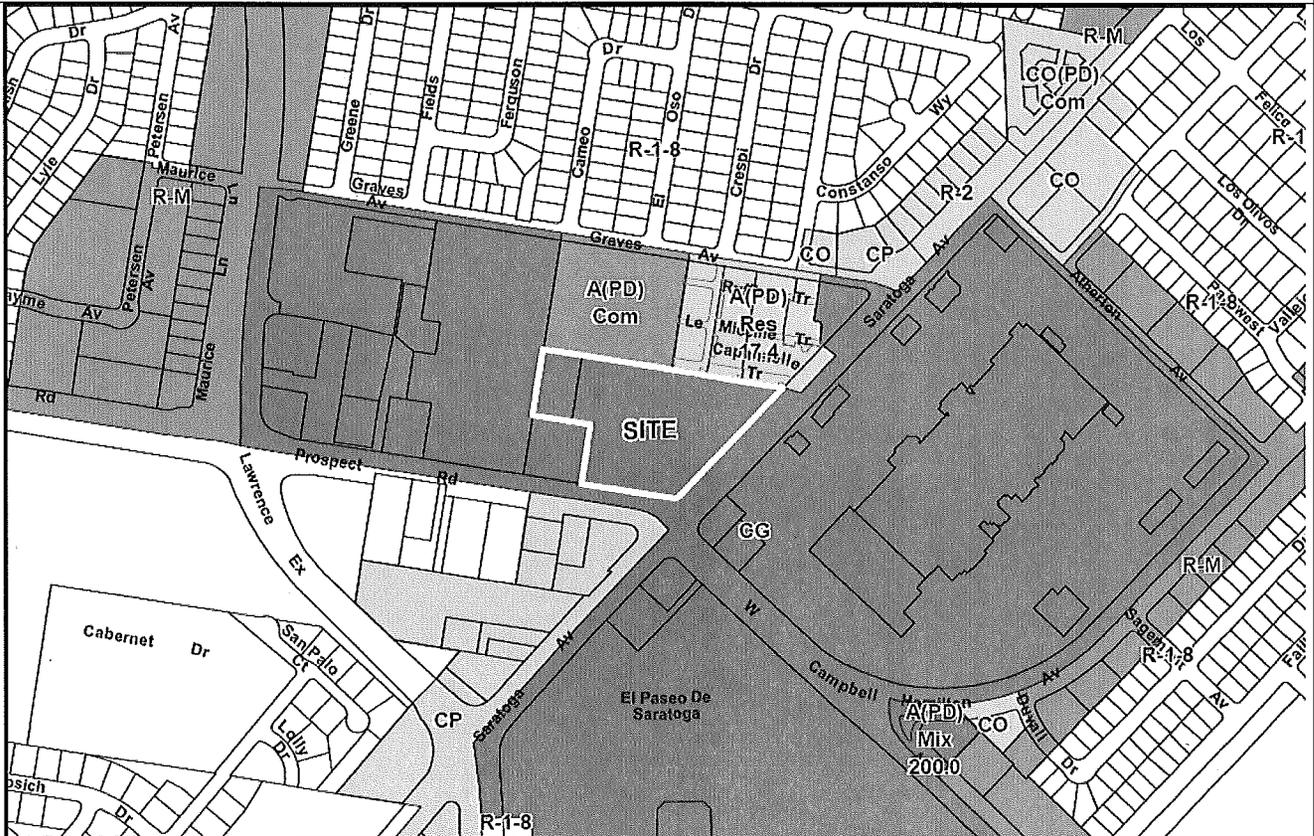
N



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 proposed off-sale of alcohol at the subject site would lead to a grouping of six (6) off-sale establishments within a 500-foot radius of the subject site.

BACKGROUND

On August 24, 2011, Sunflower Farmers Market, requested a Conditional Use Permit (File No. CP11-054) to allow off-sale of alcoholic beverages, limited to beer and wine at a full-service grocery store in an existing approximately 33,000 square-foot tenant space in a shopping center on an approximately 6.48 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 with an undue 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. ABC11-013). 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 site is located on the northwest corner of Prospect Road and Saratoga Avenue (5205 Prospect Road, Suite 153). It is accessed from Prospect Road and Saratoga Avenue. The subject tenant space is located within a shopping center (West Valley Shopping Center) that is surrounded by commercial uses to the north, west, east and south, and a multi-family residential development to the northeast. There are seven (7) licenses for off-sale establishments within 1,000 feet of the subject store (the license for PW Markets was sold and transferred to BevMo!, which recently had a Conditional Use Permit approved by the City of San Jose for an off-sale establishment). Of these, five (5) are located within 500 feet of the proposed use, including BevMo!, which is adjacent to the proposed use.

Project Description

The applicant has indicated that the proposed 33,000-square foot full-service grocery store intends to add the off-sale of alcohol limited to beer and wine to the array of items for sale, and that the proposed alcohol sales area represents no more than five percent (5%) of the of the store's display floor area. There is no proposed expansion of building area. The store is not requesting to operate past midnight.

ANALYSIS

In order for the full-service grocery store to be able to sell off-sale of 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 (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 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 five (5) other businesses licensed as off-sale establishments located within 500 feet of the proposed use: CVS pharmacy, Trader Joes, Smart and Final, Rotten Robbie, and BevMo!. Additionally, the proposed use together with existing facilities would result in a total of seven (7) such establishments (including the recently approved BevMo!) within a 1000-foot radius from the proposed location for off-site consumption. Therefore, this finding cannot be made.

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 proposed off-sale use will be incidental and a minor portion of a full-service grocery store that provides fresh meat and produce that can support public health and welfare. The neutral position of the Police regarding the off-sale of alcohol at this site (see attached memo), as well as the healthful food options offered in conjunction with the proposed use suggests that the resulting concentration of such uses in the area in the context of a full-service grocery store 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. 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 store's publicly accessible entrance is approximately 250 feet from residential property on Capannelle Terrace, and there are carports and drives between the residential property line and residential buildings that increase this distance to approximately 320 feet. The publicly accessible grocery store entrance is oriented toward the parking lot of the shopping center at the southeastern side of the tenant space. The subject store entrance is approximately 465 feet from an existing residence on Campanelle Terrace and Saratoga Avenue. The minimum walking distance to a residential building with an unobstructed path of travel is more than 670 feet from the store's publicly accessible entrance. 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 uses. The subject site is located within 150 feet of at least one (1) residentially zoned property. The closest residential parcel is approximately 40 feet from the building in which the retail store tenant space is located.

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 an excess concentration of establishments by having more than four (4) off-sale establishments within 1,000 feet of the subject site. 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 in that although the subject site is located within 150 feet of residentially-zoned property there are barriers between the residences and the subject site including walls and buildings 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 tenant space in a commercial building in a shopping center with adequate parking, landscaping, and trash and loading facilities that was expanded in 2000 with retail uses consistent with the City's requirements at the time of development per an approved Site Development Permit (File H00-037). 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. The addition of the off-sale of alcohol use would further the City's goals of economic development by contributing to the viability of a conveniently located full-service grocery store adjacent to a residential area in the City of San José, and create a greater opportunity for a balanced commercial center.

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 the full array of food options, including but not limited to fresh meat and produce.

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 6.48 acres that was expanded with an approved Site Development Permit in the City in 2000 with retail uses 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. Previously, the tenant space was occupied by another full-service grocery store (PW Market). 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 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. 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 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.

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. 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 five percent (5%) of the approximately 33,000 square-foot tenant space is proposed to be used for the off-sale of alcohol.

Two of the findings required to consider granting a Determination of Public Convenience and Necessity (PCN) above, Findings No. 1 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 Neighborhood/Community Commercial on the San José 2020 General Plan Land Use/Transportation Diagram. The site is developed with a retail building in a commercial shopping center. 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 proposed off-sale of alcohol is within a proposed full-service grocery store in an existing tenant space in a shopping center. There are five (5) other businesses licensed as off-sale establishments located within 500 feet of the proposed use: CVS pharmacy, Trader Joes, Smart and Final, Rotten Robbie, and BevMo!. The proposed off-sale establishment is located within 150 feet of residences on Campannelle Terrace.

Therefore, as discussed above, although the 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, a sign was posted on-site to notify the public of the proposed development, and 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. Correspondence from residents is attached, expressing support of the proposal.

Project Manager: Jenny Nusbaum **Approved by:** Laurel Prevetti **Date:** 10/12/2011

Owner: West Valley Center, Inc. Attn: John Reimann 10850 Miguelito Road San Jose, CA 95127-2714	Applicant/Developer: Scott Litchard Sunflower Farmers Market 13801 East 33rd Place Aurora, CO 80011	Attachments: Draft Resolution Map of off-sale establishments San José Police Dept. Memorandum Public Correspondence Plans
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RESOLUTION NO. _____

Resolution of the Planning Commission of the City of San José denying a Conditional Use Permit and not granting a Determination of Public Convenience or Necessity to allow off-sale of alcohol, beer and wine only, at a full-service grocery store in an existing approximately 33,000 square-foot tenant space that is a portion of a 43,000 square-foot building in a shopping center on an approximately 6.48 gross-acre site.

FILE NOS. CP11-054 & ABC11-013

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 August 24, 2011 applications (File Nos. CP11-054 & ABC11-013) were filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol, beer and wine only, at a 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 northwest corner of Prospect Road and Saratoga Avenue (5205 Prospect Road, Suite 153)(West Valley Shopping Center);

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, "Sunflower Farmer's Market TI, Conditional Use Permit Submittal 5205 Prospect Road, Suite B, San Jose, CA 95219" dated August 22, 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 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, beer and wine only, at an approximately 33,000 square-foot full-service grocery store located within an approximately 43,000 square-foot shopping center.
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, west, east and south, and a multi-family residential development to the northeast.
7. No increase in parking demand results from this proposed project.
8. The subject retail establishment is allowed to open at 6:00 a.m. and close at midnight as-of-right.
9. The subject store would utilize no more than five percent (5%) of the store's display floor area for the sale of alcoholic beverages, beer and wine only.
10. The proposed site *is* located within a census tract that has an undue concentration of off-sale licenses as defined by the State of California Department of Alcoholic Beverage Control (ABC).
11. The Police Department memorandum indicates that the Police are neutral to the proposal.
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 undue concentration of off-sale licenses, the project is subject to the requirements for a Determination of Public Convenience or Necessity for a liquor license for the off-sale of

alcoholic beverages. The granting of such a determination requires that four specific findings be made as prescribed by Title 6 of the San José Municipal Code.

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 northeast.
17. The above mentioned residential use to the northeast of the subject building is within 150 feet distance to the subject store.
18. There are walls and buildings between the residential and commercial uses that are barriers to walking directly from the residential use to the subject store.
19. The public-serving entrance of the subject store is within approximately 670 feet of the residential building as measured by an unobstructed path of pedestrian travel.
20. There are seven (7) other establishments licensed by the State Department of Alcoholic Beverage Control 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, 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 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.
2. 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, and is located closer than one hundred fifty (150) feet from a residentially zoned property; however, 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 or 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 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 San Jose Municipal Code.
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 26th day of October 2011, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Chairperson

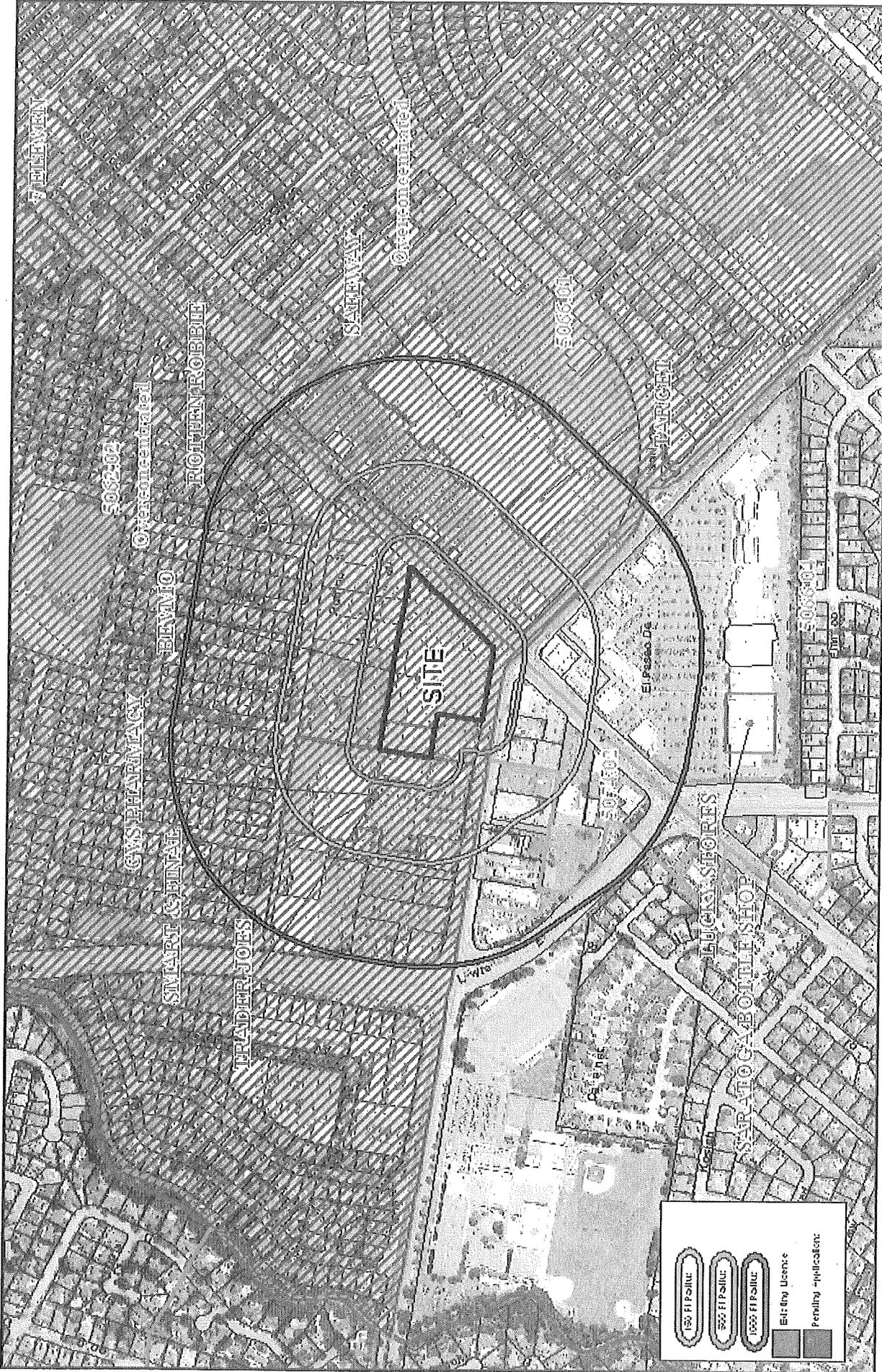
ATTEST:

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.

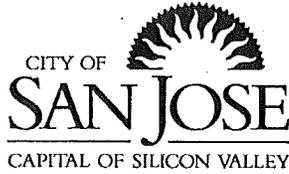


File No: CP11-054 & ABC11-013

District: 1

Nearby Alcohol Off-Sales





Memorandum

TO: Jenny Nusbaum
Planning Department

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

SUBJECT: Sunflower Market CP11-054
5205 Prospect Ave.

DATE: September 13, 2011

Approved

Date

I have received your request for input regarding Sunflower Market, located at 5205 Prospect Ave, San Jose, Ca. Sunflower Market is seeking a Conditional Use Permit for off-sale of alcohol at a full service grocery store. Sunflower Market is also seeking a Determination of Public Convenience or Necessity to allow off-sale of beer and wine.

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)(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 or a Neighborhood Revitalization area.

The 5205 Prospect Ave. is located in San Jose Police Beat N6. 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
N6 (2010)	317	92	409	No
City Average	314	215	528	

Department of Alcohol Beverage Control (ABC) records indicate that 5205 Prospect Ave is in census tract 5062.02. Pursuant to B&P Section 23958.4 (a)(2), the ratio of off-sale retail licenses population in census tract 5062.02 **does** exceed the ratio of off-sale retail licenses retail licenses to population in the county in which the applicant premises are located.

Authorized and Current ABC Licenses in Census Tract 5062.02

Census Tract	Authorized ABC Licenses as of January 2008		Current ABC Licenses as of May 2010		Unduly Concentrated	
	On - Sale	Off - Sale	On - Sale	Off - Sale	On - Sale	Off - Sale
5062.02	9	4	3/0	6/0	No	Yes

The San Jose Police Department is **neutral** to the issuance of a Conditional Use Permit for a off-sale of alcohol at a full service grocery store and **neutral** to the Determination of Public Convenience or Necessity to allow off-sale of beer and wine.

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

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

Nusbaum, Jenny

From: lyman taylor [lymannjmae@gmail.com]

Sent: Friday, September 09, 2011 4:16 PM

To: Nusbaum, Jenny

Subject: NO on BevMo in Sunflower Market space, Saratoga Ave and Prospect

Dear Jenny,

I live on Lassen Ave near Saratoga Ave & Prospect Rd.

I DO NOT want another liquor store in our neighborhood. Just in general, the more liquor stores a neighborhood has, the crummier it becomes.

Smart & Final serves all local needs for beverages and liquor already.

I strongly recommend DENIAL of the BevMo permit.

I hope Sunflower market can make a profit using all the space vacated by PW Supermarket. If not, I'd hope they can lease as much space as they can use, and let the owner lease the rest to something more suitable for the neighborhood.

Sunflower will be good for us. But our neighborhood doesn't need another liquor store.

Thanks,

Lyman Taylor

10/6/2011

Nusbaum, Jenny

From: June Luo [juneluo@gmail.com]
Sent: Friday, September 02, 2011 8:33 AM
To: Nusbaum, Jenny
Subject: No BevMo!

Dear Ms. Nusbaum,

I live in the neighborhood of Saratoga ave & Prospect Rd.
I DO NOT want another liquor store in our neighborhood.

Smart & Final serves all local needs for beverages and liquor already.

I strongly recommend DENIAL of the BevMo permit.

I would support Sunflower market occupying all the space vacated by PW Supermarket.
Please encourage Sunflower to either use 100% of that space or find a more suitable tenant for the space not occupied by the store,

The last thing the neighborhood needs is another liquor store.

Thank you,
June Luo

10/6/2011

Nusbaum, Jenny

From: Wendy Tharp [tharp_wendy@yahoo.com]
Sent: Friday, September 02, 2011 8:27 AM
To: Nusbaum, Jenny
Subject: BevMo / Sunflower Market

Hey, Jenny.

I was overjoyed to read in our neighborhood group that both Sunflower Market & BevMo have applied for space in the old PW location on Saratoga Avenue. I feel our neighborhood would benefit from the addition of both of these retail stores.

In the neighborhood news group there was a letter presented which asks us to email you to request denial of the BevMo permit based on the fact that "we don't need another liquor store in this neighborhood". I strongly disagree with this statement which categorizes BevMo as a standard liquor store. BevMo offers high end products (which cannot be purchased at Smart & Final) in a clean, professional, friendly atmosphere. This is not a store that teenagers hang out in front of, but a high-end retail establishment. I was overjoyed to see the posting for the liquor license when it was taped to the window.

Also, love that the majority of the space will be a grocery store. If I can't have a Whole Foods with their all inclusive wine selection, a combo Sunflower/BevMo is the next best thing!

Thanks a ton,
Wendy Tharp
Resident of the Country Lane neighborhood

Nusbaum, Jenny

From: lyman taylor [lymannjmae@gmail.com]
Sent: Thursday, September 01, 2011 8:39 PM
To: Nusbaum, Jenny
Subject: PW Market replacement

Dear Jenny,

We don't need another liquor store at Westgate West. Sunflower Foods would be great.

J.Mae Taylor

10/6/2011

Nusbaum, Jenny

From: Aviananda Family [aviananda@gmail.com]
Sent: Thursday, September 01, 2011 8:09 PM
To: Nusbaum, Jenny
Subject: Permit for another liquor store in my neighborhood

Dear Jenny,

I got your contact address from my neighbor. I live in the neighborhood of Saratoga ave & Prospect Rd. I DO NOT want another liquor store in our neighborhood.

I strongly recommend DENIAL of the BevMo permit.

I would support for another grocery store occupying all the space vacated by PW Supermarket.

Thank you for your attention.

Sincerely,
Aviananda Family
Teresita Dr, San Jose, CA 95129

10/6/2011

Nusbaum, Jenny

From: Karen [gokaren@sbcglobal.net]
Sent: Thursday, September 01, 2011 7:25 PM
To: Nusbaum, Jenny
Subject: No bevmo

Please do not approve another liquor store in west San Jose. We welcome a grocery store or other retail. But not a liquor store. Smart and final and trader joes and CVS offer plenty of options for one corner.

Karen Whipple
Englewood drive
san Jose 95129

Sent from my iPhone... Sorry for any typos.

Nusbaum, Jenny

From: ramesh-shop [rameshbemail-shop2@yahoo.com]
Sent: Thursday, September 01, 2011 5:26 PM
To: Nusbaum, Jenny
Subject: Fw: 5205 prospect rd BEVMO permit -request for DENIAL

Hi Jenny,

Thank you for letting me know that BevMo is mostly a liquor store - I was not very familiar with that chain - I thought it was mostly non alcoholic beverages

I DO NOT want another liquor store in our neighborhood.

Smart/Final serves all local needs for beverages and liquor already.

I strongly recommend DENIAL of the BevMo permit.

Thanks also for letting me know the proposal is to have two tenants (Sunflower & BevMo).
I reject that idea.

I would support Sunflower taking 100% of that space.

A small Sunflower adjunct cafe would be acceptable.

Please encourage Sunflower to either use 100% of that space or find a SUITABLE adjunct tenant.

The last thing the neighborhood needs is another liquor store.

thanks

Ramesh

408 853 3569

10/6/2011

Nusbaum, Jenny

From: ramesh-shop [rameshbemail-shop2@yahoo.com]
Sent: Thursday, September 01, 2011 4:21 PM
To: Nusbaum, Jenny
Cc: cloughr@bevmo.com; rameshbemail-shop2@yahoo.com
Subject: 5205 prospect rd BEVMO permit -request for CONDITIONS
Attachments: Document.pdf

Hi Jenny & Rocio,

I am sorry I missed the meeting on Monday.

I live nearby and have strong input:

1. Delivery trucks to never use Graves ave - to get in or exit.
2. No delivery trucks between 9pm to 7 am.
3. Business to be closed between 9 pm to 8 am.

Please let me know if the above is already codified as part of the permit requirements.

I am NOT looking for honor system - I am looking for actual codification in the permit - so that a violation would result in penalties. Sorry - but from experience I know honor system cannot be trusted - only the threat of financial penalties works with business.

Otherwise I will come to the city council meeting in Sept and make sure they are factored as conditions for approval.

thanks
Ramesh
408 853 3569

10/6/2011

GENERAL NOTES

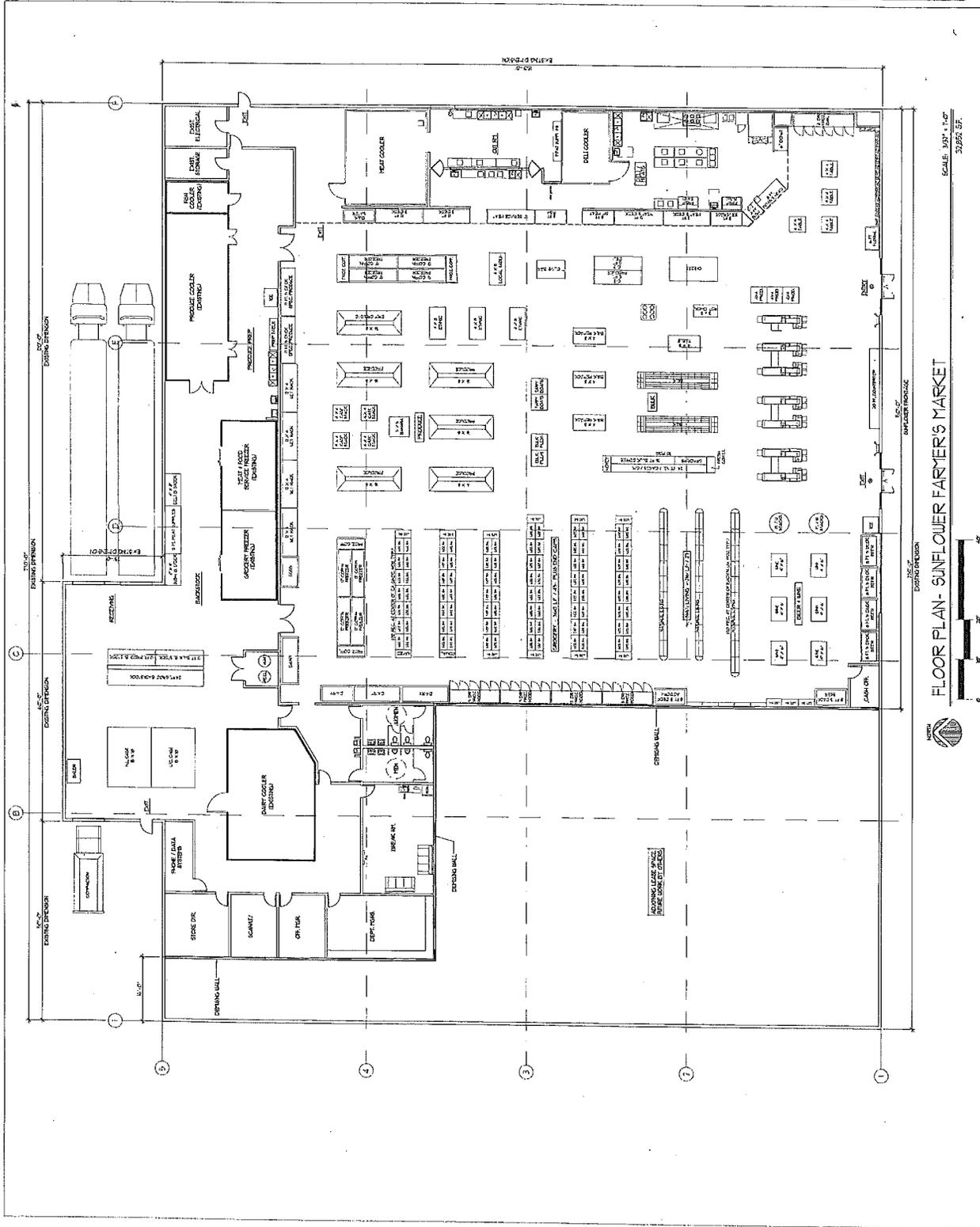
KEYED NOTES

SUNFLOWER MARKET
TENANT IMPROVEMENT
5585 PROSPECT ROAD SUN LOSE, CA

JOHN TANSEY ARCHITECT
474 N. MAIN STREET, SUITE 100
SUN LOSE, CA 94586

DATE: 08-15-15
REV. 1

A2



FLOOR PLAN - SUNFLOWER FARMER'S MARKET

SCALE: 3/8" = 1'-0"
3/8" = 3/8" = 3/8"

