



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: November 10, 2011

Approved

Date

11-21-11

COUNCIL DISTRICT: 3

SNI AREA: 13th Street

SUBJECT: CP11-040 and ABC11-008. 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, at a full-service grocery store in an approximately 17,587-square-foot tenant space in an approximately 35,000-square-foot retail building in a shopping center on an approximately 2.3-gross-acre site at the southwest corner of of East Santa Clara Street and South 7th Street (272 East Santa Clara Street).

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 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 residence, the subject site is in a Strong Neighborhoods Initiative Area, and the subject site is within 500 feet of a school (Horace Mann Elementary School). 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. CP11-040 & ABC11-008). 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, unable to find that proposed off-sale of alcohol at the subject site is not in a Strong Neighborhoods Initiative Area, and unable to find that the subject site is not within 500 feet of a school (Horace Mann Elementary School). Staff provided an update to the Planning Commission regarding the change of position that the Police had taken on the proposed use as summarized in the revised Police Memo (see attachment). Staff noted that the Police are neutral to the proposal now and have stated that it would not be detrimental to public health or

safety or further degrade an area. Staff added that the Police did recommend that certain conditions be included in an approval, such as just allowing beer and wine, and restricting beer to be sold in six packs.

Public Testimony

The applicant's representative, Steve Khroyan, stated that the proposed market would be a great addition to the neighborhood, and that Fresh & Easy is very excited to move into to this location because it is right across the street from City Hall, it is in an underserved neighborhood, and this building has been vacant for a while. Mr. Khroyan stated that he had spoken with the Council District office and with the Horace Mann neighborhood association about the proposal.

Commissioner Platten thanked the applicant for understanding the need for denial from the Planning Commission and wished the applicant luck in front of the Council. The Commissioner added that he happened to be a member of the extended neighborhood, and he looked forward to the applicant's operation coming in and filling a real desperate need for this part of the city. Commissioner Bit-Badal also thanked the applicant for coming into downtown. No one else from the public spoke on the item. The Planning Commission 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, Jeff Herbst (see attached Notice of Permit Appeal). The applicant states in their appeal that the proposed use is compatible with and will provide an invaluable service to the community.

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 5% of the store's net floor area. The Police Department has indicated that they are neutral to this proposal with conditions included in the permit that are recommended by the Police. 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 development standards. 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. Adding the off-sale of alcohol for the proposed project would contribute to a concentration in the absolute numbers of outlets for the off-sale of alcoholic beverages in the area, but there are no other off-sale establishments within a 1,000-foot radius of the subject site.

- 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 (5009.01) is regularly shaped as depicted on the attached map.

- 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 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 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)**

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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

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

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, AT A FULL-SERVICE GROCERY STORE IN AN EXISTING APPROXIMATELY 17,587-SQUARE-FOOT TENANT SPACE IN AN APPROXIMATELY 35,000-SQUARE-FOOT RETAIL BUILDING IN A SHOPPING CENTER ON AN APPROXIMATELY 2.3-GROSS-ACRE SITE AT THE SOUTHWEST CORNER OF OF EAST SANTA CLARA STREET AND SOUTH 7TH STREET (272 EAST SANTA CLARA STREET).

FILE NOS. CP11-040 & ABC11-008

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on June 9, 2011 applications (File Nos. CP11-040 & ABC11-008) 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, at a full-service grocery store in an existing approximately 17,587-square-foot tenant space in an approximately 35,000-square-foot building in a shopping center on an approximately 2.3-gross-acre site, on that certain real property (hereinafter referred to as "subject property"), situate in the CG-Commercial General Zoning District, located at the southwest corner of of East Santa Clara Street and South 7th Street (272 East Santa Clara Street);
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 José 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, "fresh & easy Neighborhood Market,

San José, CA, S 7th St. & E Santa Clara St.," dated June 9, 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 José Municipal Code and the rules of this City Council.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN JOSÉ 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 General Commercial with Neighborhood Business District Overlay 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, at a full-service grocery store in an existing approximately 17,587-square-foot tenant space in an approximately 35,000-square-foot building in a shopping center on an approximately 2.3-gross-acre site 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/retail uses, public/quasi-public uses (Horace Mann Elementary School and San José City Hall), to the north and west, commercial and residential uses to the east, and residential uses to the south.
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 provided that the following conditions are included in an approved Conditional Use Permit for the subject use:

- a. The permit allows for the off-sale of beer and wine only. No distilled spirits, wine coolers, or malt liquors shall be sold.
 - b. Beer will be sold in six-pack minimum, no single-can or bottle sales.
 - c. Hours of operation and alcohol sales shall cease at 12:00am midnight.
 - d. Uniformed security shall be present during the hours of 8:00pm and 12:00am.
 - e. The sale of alcohol shall be allowed in conjunction with a full-service grocery store use only.
 - f. No more than 5% of total sales floor space shall be dedicated to alcoholic beverage sales.
 - g. Due to the self-check-out lanes, registers must be equipped with a system that requires employees to contact the customer and verify their age or the transaction will not be completed.
 - h. The premises shall be operated in a manner that does not create a public or private nuisance.
10. 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.
 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 within a Strong Neighborhood Initiative area.
 13. The subject site is located within 150 feet of residentially zoned property.
 14. The subject site is within 500 feet of a school (Horace Mann Elementary School).
 15. There are no other off-sale establishments or licenses issued within 500 feet of the subject site per data from the State Department of Alcoholic Beverage Control.
 16. The approval of this permit would add more off-sale establishments to the area.
 17. The proposed sales of alcoholic beverages are incidental to a larger retail use.
 18. The full-service grocery store will sell a complete array of food items including fresh produce and meat.
 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, and is located closer than 500 feet from an elementary school (Horace Mann), 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 or school 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 located within a Strong Neighborhoods Initiative or Neighborhood Revitalization area or other area designated by the City for targeted neighborhood enhancement services or programs, but not 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 not 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, secondary school, college or university. The proposed use is within 500 feet of an elementary school (Horace Mann) and is within one hundred fifty (150) 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 José 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 to be implemented only in conjunction with a full-service grocery store on the property.
3. **Conformance with Plans.** The use of this property shall conform to approved plans entitled "fresh & easy Neighborhood Market, San José, CA, S 7th St. & E Santa Clara St.," dated June 9, 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:

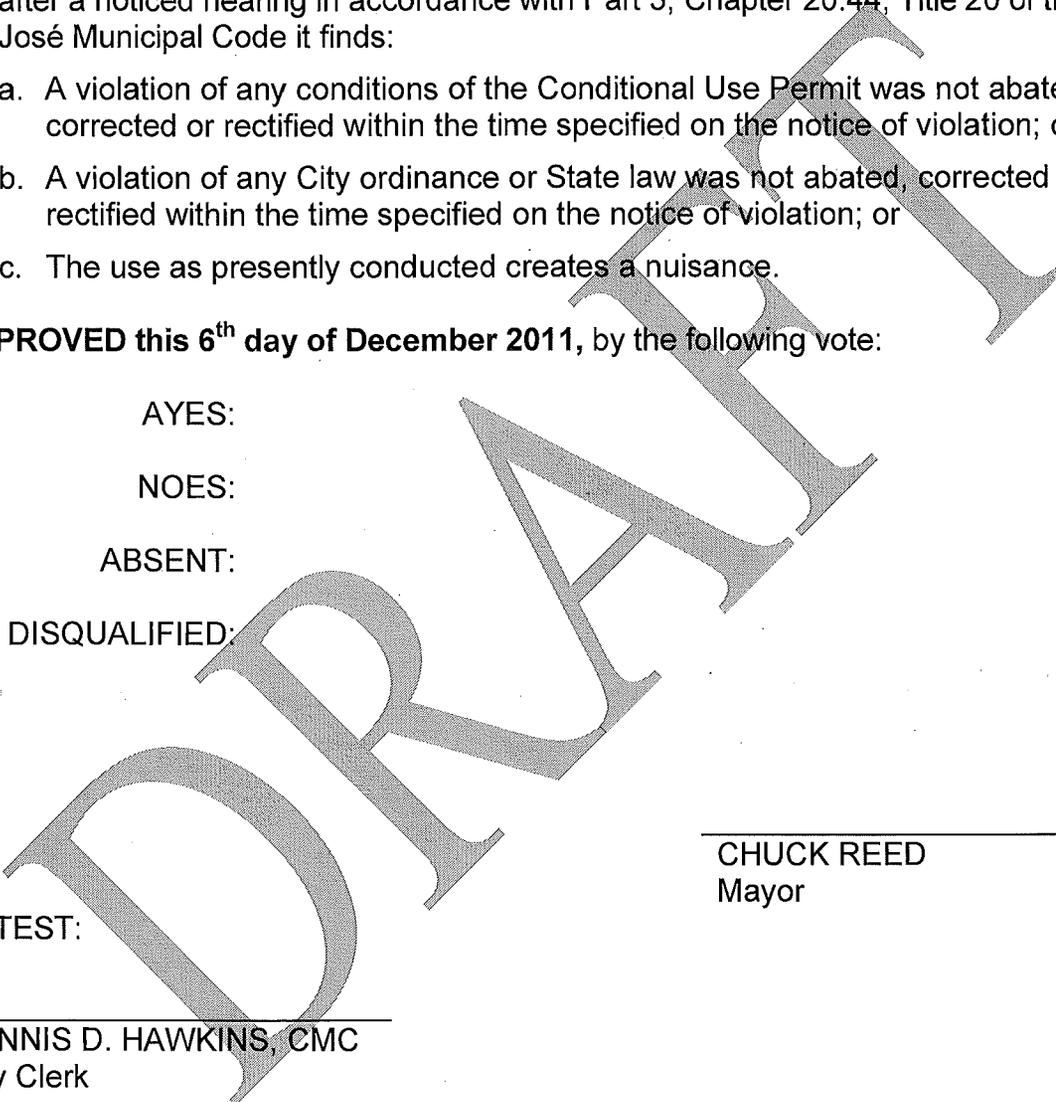
ABSENT:

DISQUALIFIED:

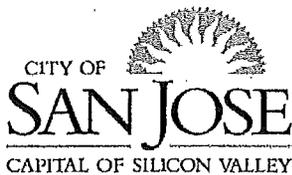
ATTEST:

DENNIS D. HAWKINS, CMC
City Clerk

CHUCK REED
Mayor



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



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>CP11-040</i>	RECEIPT # _____
PROJECT LOCATION <i>CP11-040</i>	AMOUNT _____
	DATE <i>10/28/11</i>
	BY _____

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:

272 E Santa Clara St., San Jose, CA 95112

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 Grocery Store 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 Jeff Herbst	DAYTIME TELEPHONE (562) 863-1981
ADDRESS 12631 East Imperial Highway, Suite E-111	CITY Santa Fe Springs
	STATE CA
	ZIP CODE 90670
SIGNATURE <i>Jeff Herbst</i>	DATE 10-26-11
RELATIONSHIP TO SUBJECT SITE: (e.g., adjacent property owner, property owner within one thousand (1,000) feet) <i>Applicant's representative</i>	

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 David K. Small, Kimomex Santa Clara, LLC/Kimball Small Properties	DATE 10-26-11
ADDRESS 50 West San Fernando St., Suite 320	CITY San Jose
	STATE CA
	ZIP CODE 95113

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

STAFF REPORT
PLANNING COMMISSION

FILE NO.: CP11-040 & ABC11-008

Submitted: 06/09/2011

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 approximately 17,587 square-foot tenant space in an approximately 35,000 square-foot retail building in a shopping center on an approximately 2.3 gross-acre site.

LOCATION: The southwest corner of of East Santa Clara Street and South 7th Street (272 East Santa Clara Street)

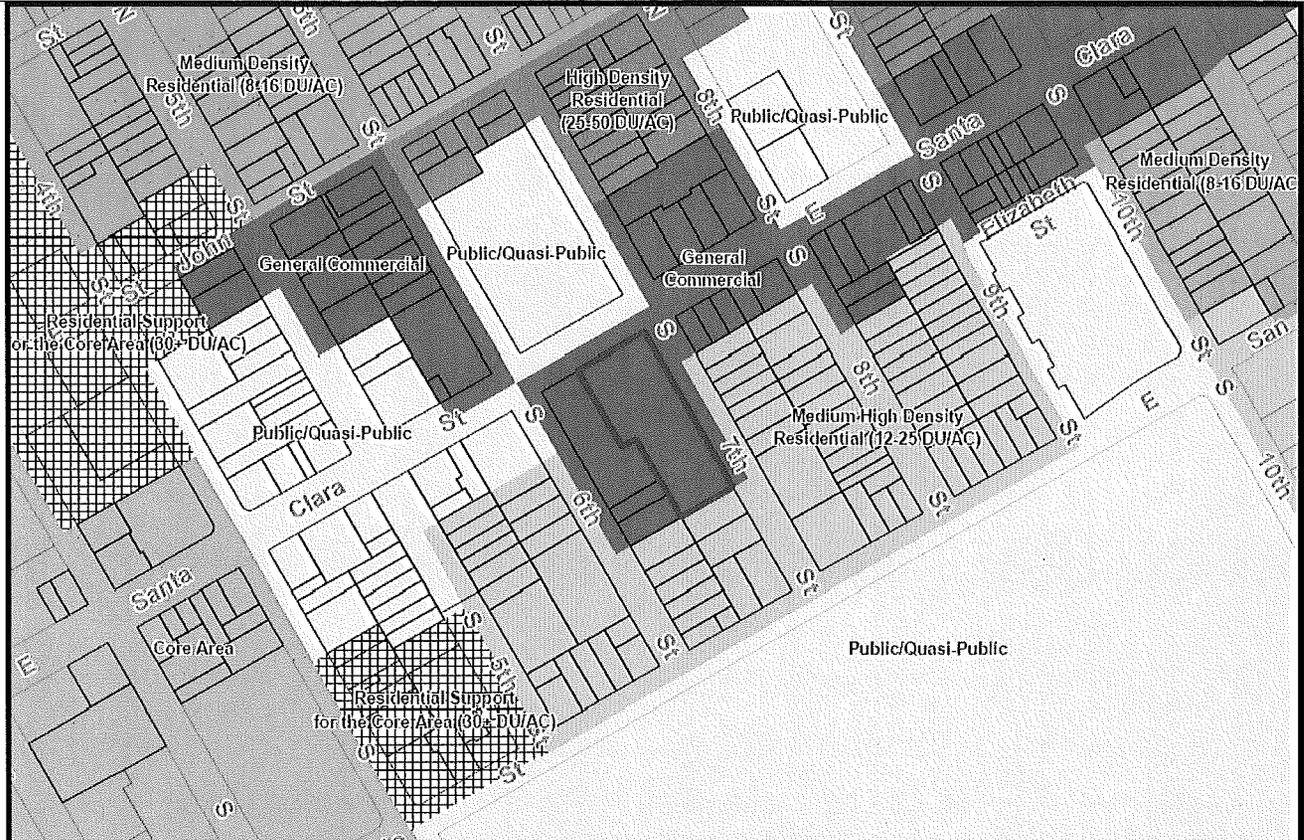
Existing Zoning	CG-Commercial General
Proposed Zoning	No change
General Plan	General Commercial with Neighborhood Business District Overlay
Council District	3
Annexation Date	Original City
SNI	13 th Street
Historic Resource	No
Redevelopment Area	Civic Plaza
Specific Plan	No

Aerial Map

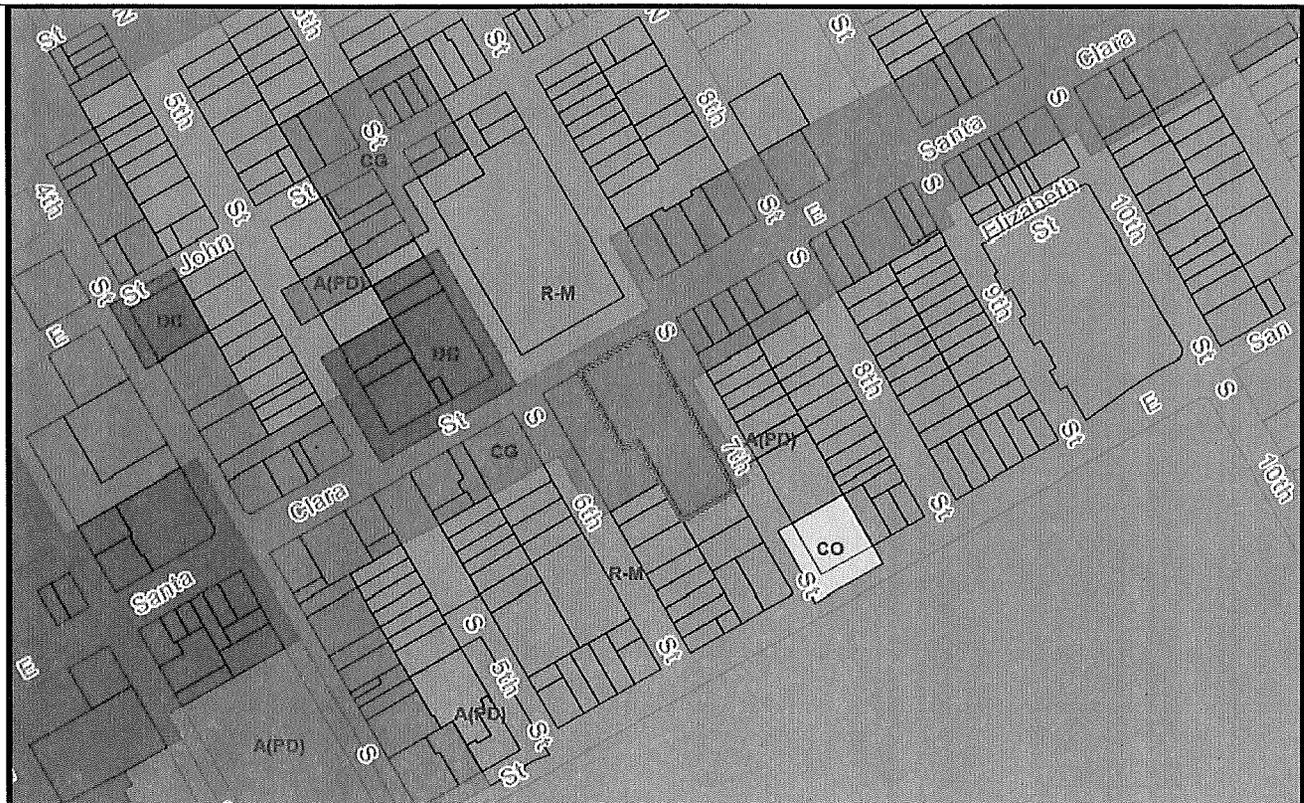
N



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 in a Strong Neighborhoods Initiative Area;
2. The subject site is within 150 feet of a residence;
3. The subject site is within 500 feet of a school (Horace Mann Elementary School); and
4. The subject site is in an area 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

BACKGROUND

On June 9, 2011, Fresh & Easy Neighborhood Market requested a Conditional Use Permit (File No. CP11-040) to allow off-sale of alcoholic beverages, limited to beer and wine, at a full-service grocery store in an approximately 17,587 square-foot tenant space in an approximately 35,000 square-foot retail building in a shopping center on an approximately 2.3 gross-acre site in the CG-Commercial General Zoning District. The site is located at the southwest corner of East Santa Clara Street and South 7th Street (272 East Santa Clara Street). The subject tenant space, most recently occupied by Su Vianda, is surrounded by commercial/retail uses, public/quasi-public uses (Horace Mann Elementary School and San José City Hall), to the north, and west, commercial and residential uses to the east, and residential uses to the south.

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. ABC11-008). 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 tenant space was occupied by a supermarket since 1966 when the commercial retail building was originally constructed. When last occupied by Su Vianda, the off-sale of alcohol was a legal non-conforming use; however, because Su Vianda ceased operation for more than six months, the legal non-conforming status for the off-sale of alcohol was lost and a Conditional Use Permit is now required to allow for it in the subject tenant space.

Project Description

The applicant has indicated that the proposed 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 5% of the total sales 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 is are no other business establishments located within 500 feet of the proposed use that are licensed by State ABC to sell alcoholic beverages for off-site consumption.

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. This finding is not applicable because the proposed use is not located within 500 feet of another off-sale establishment.

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 an elementary school (Horace Mann Elementary School). The subject site is also located within 150 feet of at least one (1) residentially zoned property. The closest residential parcel is approximately 70 feet from the building in which the retail store tenant space is located. The store's publicly accessible entrance is approximately 155 feet from residential property on South 7th Street. The publicly accessible grocery store entrance is oriented toward the parking lot of the shopping center at the northeastern side of the subject building. The minimum walking distance to the nearest point of the Horace Mann Elementary School campus is approximately 310 feet from the store entrance. The subject shopping center is located across Santa Clara Street which is a four lane arterial. Activity from the shopping center is concentrated across the street from the school. The school itself requires all visitors to the campus to sign in at the front office and attain a visitor's badge.

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 or school uses nearby.

Based on the above analysis of the applicable required finding for off-sale of alcohol, staff concludes that the addition of the off-sale of alcohol in conjunction with a full service grocery store as proposed would not adversely affect nearby residential area or school population as the store's publicly accessible entrance is oriented away from the residence and towards the shopping center's parking lot, reducing impacts the off-sale of alcohol could have on the residents in the area. The shopping center and its activity are located across a four lane major arterial thus separating it from the elementary school across the street.

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 built in 1966 with retail uses consistent with the City's requirements at the time of development per an approved building permit and expanded in 1985 per an approved Site Development Permit (H84-014). The subject site is well served by existing infrastructure, fronting on arterial public streets, and surrounded by a mix of commercial, public/quasi-public, 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, and no more than 7% of the store's linear display area.

Although this site is not located in an area of high crime, the Police stated in their memo that they are **strongly opposed** due to impact on the neighborhood and police resources because the downtown area has a high number of establishments that have been licensed by the ABC for both on-sale and off-sale which create a significant draw to the area. Problems associated with alcohol sales in the downtown area include disturbances, public intoxication, fights, traffic control, loitering, etc. The Police state further that the premises are located within an area in which the San José Police Department has determined that the proposed use would be detrimental to the public health, safety, or welfare of persons located in the area, or would increase the severity of existing law enforcement or public nuisance problems in the area.

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 in a residential area in the City of San José, and create a greater opportunity for a balanced commercial center.

Although the Police indicated their opposition to the proposal, for the other 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 because, the proposed use would provide an improvement to the welfare of persons residing or working in the surrounding area by supporting the reestablishment of a full service grocery store in the area that will sell 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 2.3 acres that was expanded with an approved Site Development Permit in the City in 1985 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. 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, but 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 a Strong Neighborhoods Initiative area. The Police stated in their memo that they are **strongly opposed** due to the proposed off-sale of alcohol due to the impact on the neighborhood and police resources because the downtown area has a high number of establishments that have been licensed by the ABC for both on-sale and off-sale which create a significant draw to the area. Problems associated with alcohol sales in the downtown area include disturbances, public intoxication, fights, traffic control, loitering, etc. The Police state further that the premises are located within an area in which the Chief of Police has determined that the proposed use would be detrimental to the public health, safety, and welfare of persons located in the area, or would increase the severity of existing law enforcement or public nuisance problems in the area.

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 be the only off-sale establishment within a 1,000 foot radius of the site, thus would not 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 consistent with this required finding which must be made in order to consider granting a PCN.

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 school. Therefore, the use is not consistent with this required finding which must be made in order to consider granting a PCN.

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

Analysis of Required Finding: The proposed use includes no more than 5% of the sales floor area of the approximately 17,587 square-foot tenant space 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, numbers 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 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)

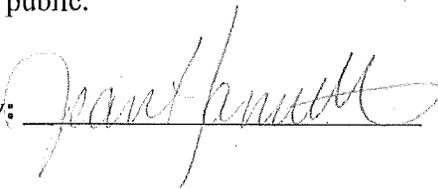
Under the provisions of Section 15301(a) (Existing Facilities) of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is found to be exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California 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 a full-service grocery store in an existing tenant space in a neighborhood shopping center. There are no existing licensed off-sale establishments within 500 feet of the subject tenant space. The proposed off-sale establishment is located within 150 feet of residences on 7th Street, and is within 500 feet of Horace Mann Elementary School. Therefore, as discussed above, although the findings for the Conditional Use Permit can be made, the required findings to support a Determination of Public Convenience or Necessity 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.

Project Manager: Jenny Nusbaum **Approved by:**  **Date:** 10/012/2011

Owner:	Applicant/Developer:	Attachments:
Carlos Oropeza Legorreta 1016 63 rd Street Oakland, CA 94608	Scott Whitney Fresh & Easy Neighborhood Market 2120 Park Pl, Suite 200 Elk Segundo, CA 90245	Draft Resolution Map of off-sale establishments San José Police Dept. Memorandum Plans

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, limited to beer and wine, at a full-service grocery store in an existing approximately 17,587 square-foot tenant space in an approximately 35,000 square-foot retail building in a shopping center on an approximately 2.3 gross-acre site.

FILE NOS. CP11-040 & ABC11-008

BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF SAN JOSÉ:

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on June 9, 2011 applications (File Nos. CP11-040 & ABC11-008) were filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow off-sale of alcohol, limited to beer and wine 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 southwest corner of East Santa Clara Street and South 7th Street (272 E Santa Clara Street).

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, "fresh & easy Neighborhood Market, San Jose, CA, S 7th St. & E Santa Clara St.," dated June 9, 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, limited to beer and wine only, in an approximately 17,587 square-foot full-service grocery store located within an existing approximately 35,000 square-foot retail building.
5. The subject tenant space is located within a shopping center that is surrounded by commercial/retail and public/quasi-public uses (Horace Mann Elementary School and San Jose City Hall) to the north and west, commercial and residential uses to the east, and residential uses to the south.
6. The subject retail establishment is allowed to open at 6:00 a.m. and close at midnight as-of-right.
7. The subject store would utilize no more than five percent (5%) of the store's sales floor area, for the sale of alcoholic beverages, beer and wine only.
8. The Police Department memorandum indicates that the project site is not located within an area of high crime but that the Police are strongly opposed to the proposal due to impact on the neighborhood and police resources. The Police memo states that the downtown area has a high number of establishments that have been licenced by the ABC for both on-sale and off-sale which create a significant draw to the area. Problems associated with alcohol sales in the downtown area include disturbances, public intoxication, fights, traffic control, loitering, etc.
9. The Police memo states further that due to reduced police staffing and overconcentration, the police department cannot absorb the impact of additional police duties related to increased alcohol sales.

10. The Police memo also states that the premises are 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 would increase the severity of existing law enforcement or public nuisance problems in the area.
11. 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).
12. The proposed use is not located within 500 feet of another off-sale establishment.
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 within a Strong Neighborhood Initiative area or other area designated by the city for targeted neighborhood enhancement services or programs.
15. The proposed use would not lead to the grouping of more than four off-sale establishments within a one thousand-foot radius from the proposed use.
16. The project site is located within 500 feet of a school (Horace Mann Elementary School).
17. The project building is located adjacent to and within 150 feet of residentially zoned property to the east.
18. The public-serving entrance of the subject store is within approximately 150 feet of the residential building as measured by an unobstructed path of pedestrian travel.
19. There are no 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. The use is not 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.
2. 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, 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 elementary school or 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 or value of the property of other persons located within the vicinity of the site; or
 - c. Be detrimental to public health, safety or general welfare; 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 located within a Strong Neighborhoods Initiative area or other area designated by the city for targeted neighborhood enhancement services or programs, and located within an area in which the Chief of Police has determined that the proposed use would be detrimental to the public health, safety, or welfare of persons located in the area, or increase the severity of existing law enforcement or public nuisance problems in the area; and
2. The proposed use would not lead to the grouping of more than four off-sale uses within a one thousand-foot radius from the proposed use; and
3. The proposed use would 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.



Memorandum

TO: Jenny Nusbaum
Planning Department

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

SUBJECT: Fresh & Easy-CP11-040 (REVISED)
272 East Santa Clara

DATE: October 18, 2011

Approved

Date

I have received your request for input regarding the Fresh and Easy located at 272 East Santa Clara Street, San Jose, Ca. 95112. Fresh and Easy is seeking a Conditional Use Permit to allow off sale of beer and wine for a full service market at a portion of an existing building.

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 its 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.

272 East Santa Clara Street is located in San Jose Police Beat K1. 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
K1 (2010)	96	117	213	No
City Average	314	215	528	

A crime analysis search indicated a total of 2,151 calls for service and self-initiated events occurred within a 1000 foot radius of 272 E Santa Clara Street in a 12 months period (June 1, 2010 to May 31, 2011). Some of the calls are listed in the following table:

Crime Analysis

Number	Nature of Call
362	Disturbances
35	Narcotics related incidents
2	Robbery
11	Drunk in Public
21	Assaults / Fights
19	Driving Under the Influence
20	Burglary
16	Theft related incidents
7	Sexual assaults
18	Weapon related calls

Department of Alcohol Beverage Control (ABC) records indicate that 272 E. Santa Clara Street is in census tract 5009.01. Pursuant to B&P Section 23958.4 (a)(2), the ratio of off-sale retail licenses population in census tract 5009.01 does exceed the ratio off-sale retail licenses to population in the county in which the applicant premises are located.

Authorized and Current ABC Licenses in Census Tract 5009.01

Census Tract	Authorized ABC Licenses as of January 1, 2008		Current ABC Licenses as of May 18, 2010		Unduly Concentrated	
	On - Sale	Off - Sale	On - Sale	Off - Sale	On - Sale	Off - Sale
5009.01	4	2	55/3	5/1	Yes	Yes

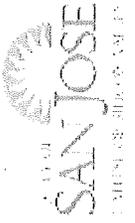
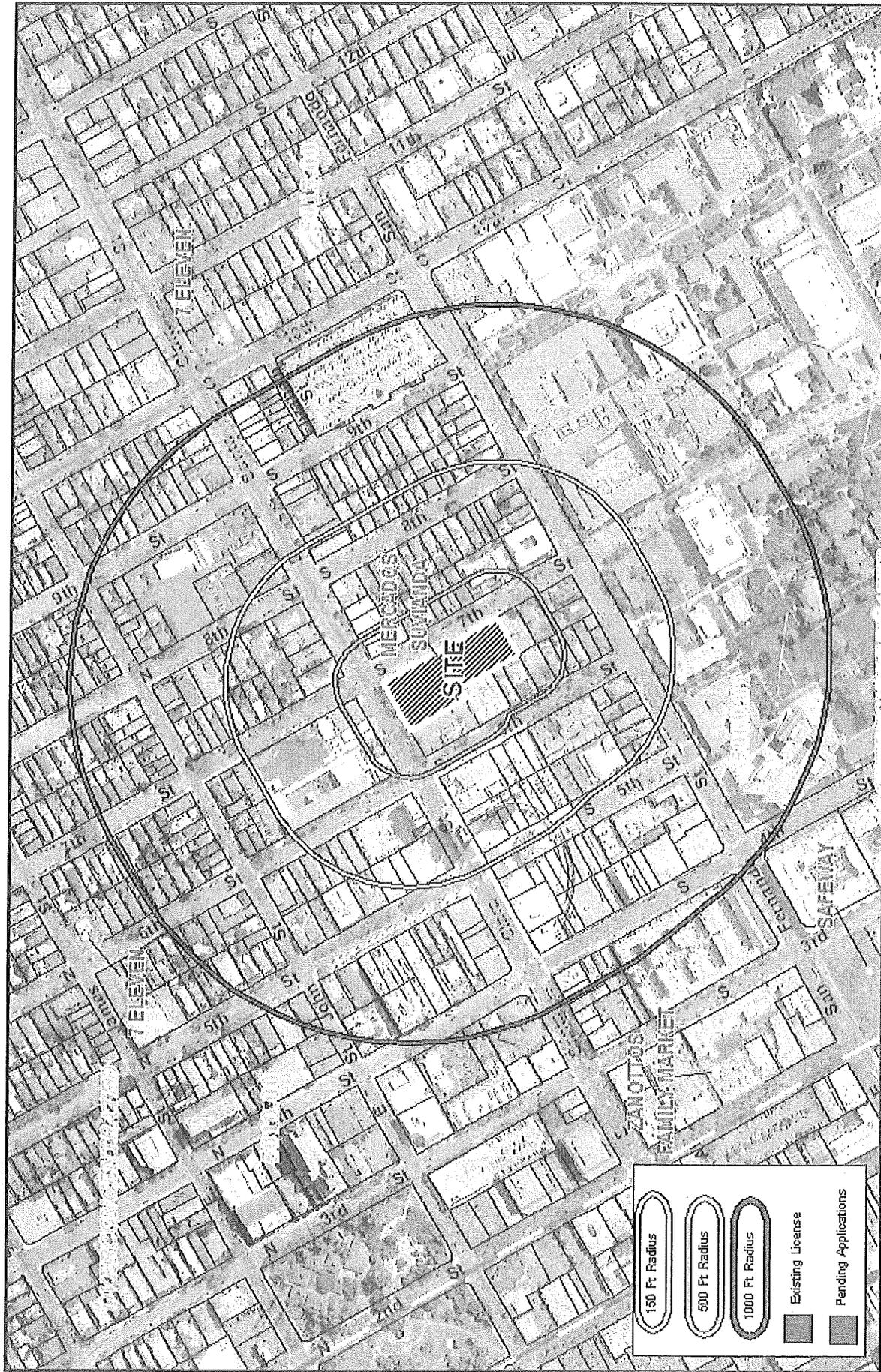
The San Jose Police is neutral to the issuance of a Conditional Use Permit to allow off-sale of beer and wine at a full service market as long as the following conditions are included:

- The permit allows for the off-sale of beer and wine only. No distilled spirits, wine coolers, or malt liquors shall be sold.
- Beer will be sold in six pack minimum, no single can or bottle sales.
- Hours of operation and alcohol sales shall cease at 12:00am midnight.
- Uniformed security shall be present during the hours of 8:00pm and 12:00am.
- The sale of alcohol shall be allowed in conjunction with a full service grocery store use only.
- No more than 5% of total sales floor space shall be dedicated to alcoholic beverage sales.
- Due to the self check out lanes, registers must be equipped with a system that requires employees to contact the customer and verify their age or the transaction will not be completed.
- The premise shall be operated in a manner that does not create a public or private nuisance.

If these conditions are included, then the San Jose Police Department has determined that the proposed use would not be detrimental to the public health, safety, or welfare of persons located in the area, or would not increase the severity of existing law enforcement or public nuisance problems in the area.

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

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



Prepared by the Department of Planning,
 Building and Code Enforcement
 06/31/2011

File No: CP11-040 & ABC11-008

District: 3

Nearby Alcohol Off-Sales

	150 Ft Radius
	500 Ft Radius
	1000 Ft Radius
	Existing License
	Pending Applications

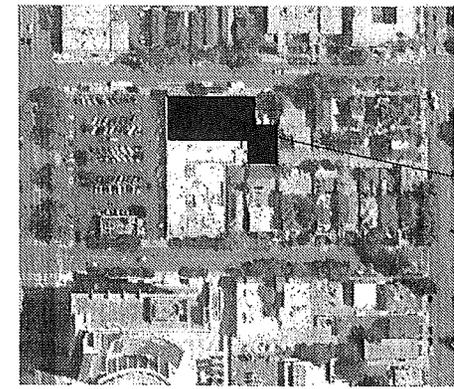


SAN JOSE, CA
S. 7TH ST. &
E SANTA CLARA ST.

Pre-CD - SITE PLAN

PROTOTYPE
FIG. 10-1A
STONE NUMBER
PROJECT NUMBER
REVISED

A0.1

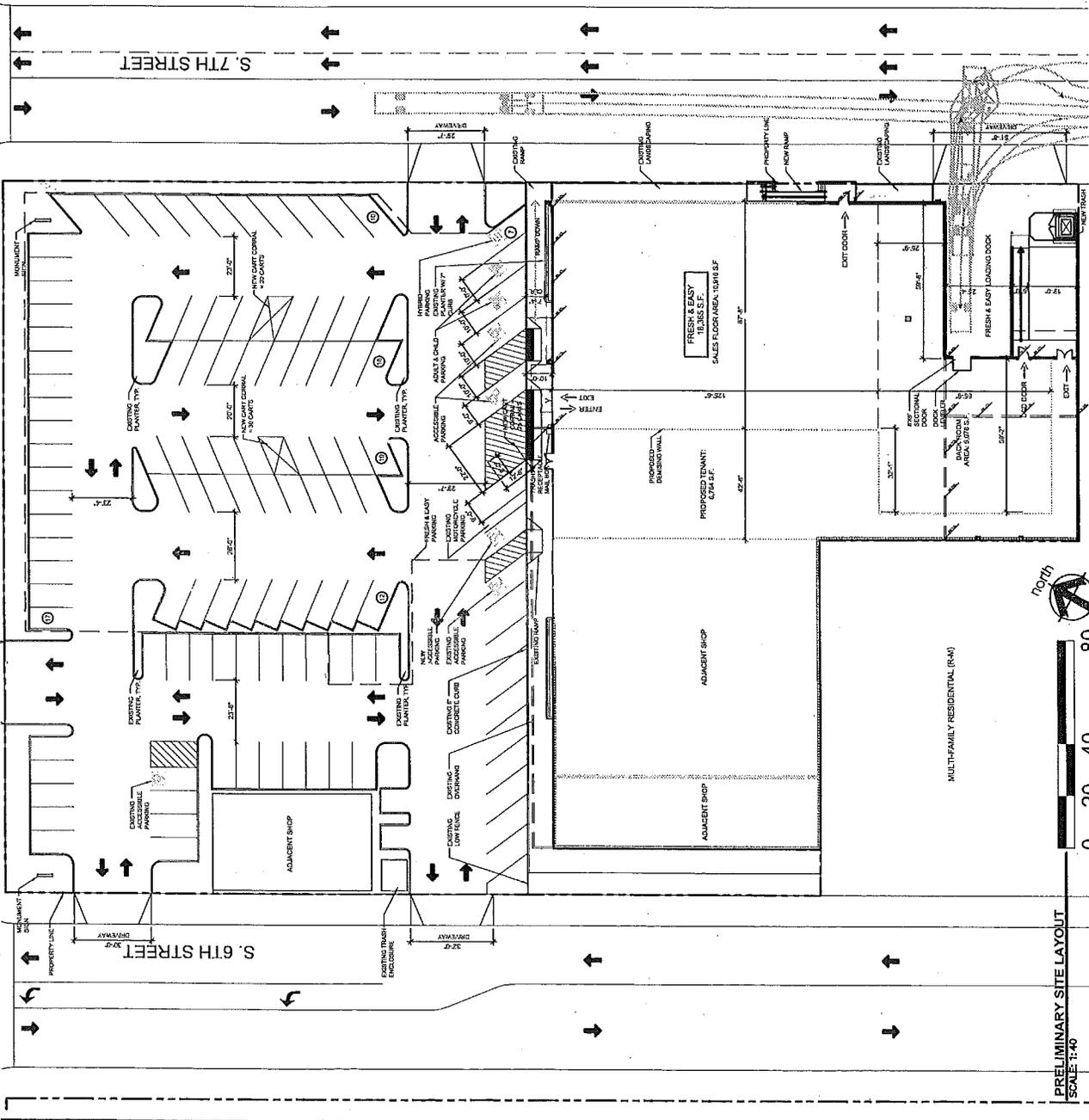


TENANT LOCATION

KEY SITE PLAN

SITE SUMMARY

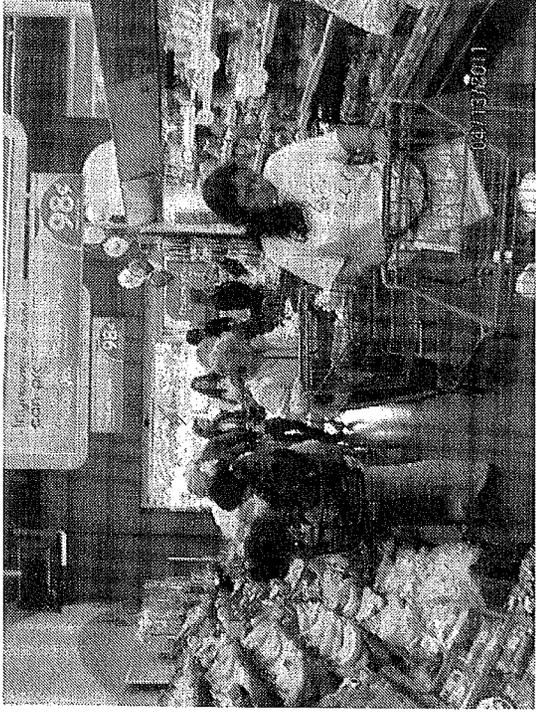
ZONING: GROCERY STORE
 PROPOSED USE: ± 100,190 S.F. (2.30 ACRES)
 SITE ACREAGE: 83 STALLS
 PARKING SUMMARY FOR FRESH & EASY: 83 STALLS
 REQUIRED (1 PER 200 S.F.):
 PROVIDED:
 80 PARKING SPACES + 3 ACCESSIBLE PARKING SPACES =
 83 PARKING SPACES TOTAL ON SITE
 BUILDING DATA FOR FRESH & EASY - F10 FORMAT:
 TOTAL FRESH & EASY AREA:
 SALES AREA:
 BACKROOM AREA:
 TRUCK TRAILER SIZE:
 16,694 S.F.
 10,916 S.F.
 5,678 S.F.
 53'



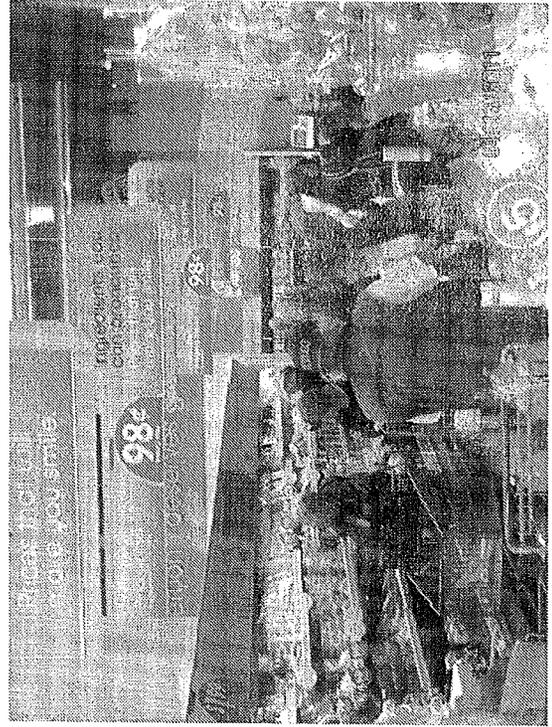
PRELIMINARY SITE LAYOUT
SCALE: 1" = 40'



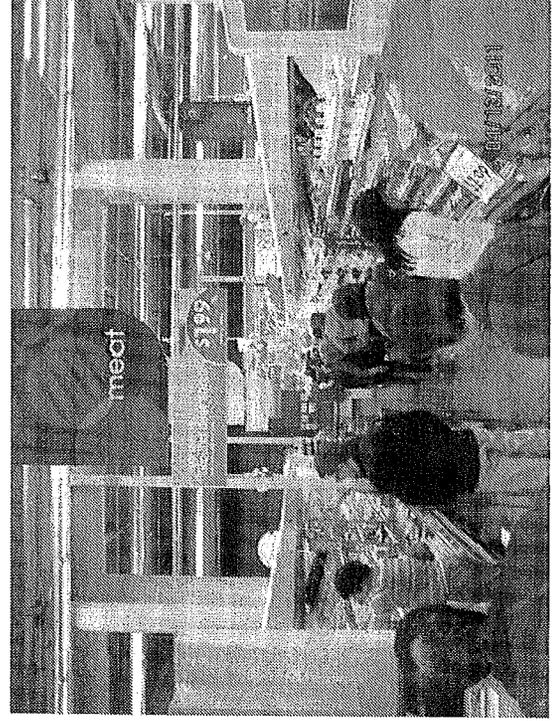
BAKERY



PRODUCE



PRODUCE



MEAT