

RESOLUTION NO. 73638

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN JOSE APPROVING A REQUEST FOR A DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO USE CERTAIN REAL PROPERTY DESCRIBED HEREIN FOR THE PURPOSE OF OFF-SALE OF ALCOHOL AT AN EXISTING GROCERY STORE LOCATED ON THE NORTH SIDE OF MCKEE ROAD, APPROXIMATELY 320 FEET WESTERLY OF WHITE ROAD

FILE NO. ABC06-002

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on June 27, 2005, an application (File No. **ABC06-002**) was filed for a Conditional Use Permit of the off-sale of beer and wine on that certain real property (hereinafter referred to as "subject property"), situate in the CP Commercial Pedestrian, located at **3065 McKee Road**, San Jose; and

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

WHEREAS, on December 6, 2006, the Planning Commission denied the application, from which decision Seafood City has appealed to this City Council; 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 on February 9, 2006, 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 the Planning Commission; and

WHEREAS, at said hearing, this City Council received in evidence a development plan for the subject property entitled, "Seafood City," dated June of 2006, 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:

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

1. The subject site is located within the CP Commercial Pedestrian Zoning District.
2. This site has a designation of Neighborhood/Community Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram. Commercial uses such as the proposed retail store are consistent with the Neighborhood Community Commercial designation. No physical expansion of the existing structure is proposed.
3. Under the provisions of Section 15301, Existing Facilities, of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) as stated below, 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.
4. The site has 287 parking spaces in conformance with the parking requirement for the retail center set forth in Title 20.
5. Non-commercial uses adjacent to the site include single-family residential properties to the north behind the shopping center, and to the south, across McKee Road.
6. The project site is developed with an approximately 66,890 square-foot commercial building oriented towards McKee Road, and away from the residential units to the north of the subject property, which building currently includes a Thrifty Drugstore, Seafood City, a bank, 3 small shops, and an Arco Service Station.
7. Access to Seafood City is via doors at the front of the building facing the parking lot.
8. The store operates from 8:00 a.m. to 9:00 p.m. daily. Different, likely shortened, hours would be implemented during the holidays, but in no case would the facility operate past 10:00 p.m.
9. The Zoning Ordinance requires a Conditional Use Permit for the off-sale of alcoholic beverages and for a public drinking establishment in the CP Commercial Pedestrian Zoning District. The applicant obtained a Conditional Use Permit for the off-sale of alcoholic beverages in 1991 (File No. CP 90-072). The permit was not time conditioned and is still valid.

10. The Police Department memorandum indicates that the project site is not currently in a Strong Neighborhood Initiative area.
11. Seafood City is located in San Jose Police Beat W4. The reported crime statistics as defined by B&P Section 23958.4(c) are over the 20% crime index thus the location is considered unduly concentrated per B&P Section 23958.4 (a)(1).
12. Department of Alcohol Beverage Control (ABC) records indicate Seafood City is in census track 5038.04. Pursuant to B&P Section 23958.4 (a)(3) the ratio of on-sale retail licenses and off-sale retail licenses to population in census track 5038.4 does not exceed the ratio of on-sale retail licenses and off-sale retail licenses to population in the county in which the applicant premises are located.
13. For the Department of Alcohol Beverage Control (ABC) to be able to issue a liquor license for the proposed uses, the City must grant a Determination of Public Convenience or Necessity.
14. The proposed use would not lead to the grouping of more than four off-sale uses with a 1,000-foot radius from the proposed use.
15. The proposed use is not located within five hundred feet of a school but it is located within 150 feet of a residence.
16. The proposed use is for a full service grocery store of which only a maximum of ten percent of the floor space is proposed to be utilized for the display and sale of alcoholic beverages.

Based on the above facts and conditions, and subject to the conditions specified below, the City Council finds that:

1. The proposed project is in conformance with the San Jose 2020 General Plan.
2. The project conforms to the requirements of the California Environmental Quality Act.
3. The project complies with provisions of Title 6.

Based on the findings in the subsection below, the City Council is able to make a Determination of Public Convenience or Necessity for the subject liquor license:

- 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 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 is not located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility, but it is located within 150 feet of existing residences located to the north of the subject property, although - as noted above – the existing building is oriented away from such residences.
- d) Alcohol sales would not represent a majority of the proposed use.
- e) The off-site sale of alcoholic beverages will be appurtenant and incidental to the use of the particular store on the site for a full service grocery store, and is intended to allow the grocery store to provide a more complete range of products and provide customers with a more complete and convenient shopping experience; therefore, it is in conformance with the requirements of Title 6 of the SJMC.

CONDITIONS PRECEDENT

This Determination of Public Convenience or Necessity 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 shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Payment of Recording Fees.** Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara should be submitted to the Director of Planning within 30 days of approval of this permit. This Determination of Public Convenience or Necessity shall be effective at such time when recordation with the County of Santa Clara occurs.
2. **Acceptance of Permit.** Per Section 20.100.290(B), should the applicant fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the applicant shall be deemed to constitute all of the following on behalf of the applicant:
 - a. Acceptance of the Permit by the applicant; and
 - b. Agreement by the applicant to be bound by, to comply with, and to do all things required of or by the applicant 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.
3. **Permit Expiration.** This Determination of Public Convenience or Necessity shall automatically expire two years from and after the date of approval by the City

Council on appeal, granting this Determination of Public Convenience or Necessity, if within such two-year period, the use of the site has not been implemented, pursuant to and in accordance with the provisions of this Determination of Public Convenience or Necessity, the Director of Planning may approve a Permit Adjustment/Amendment to extend the validity of this Permit in accordance with Title 20. The Permit Adjustment/Amendment must be approved prior to the expiration of this Permit.

CONCURRENT CONDITIONS

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Nuisance.** This use shall be operated in a manner, which does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
2. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
3. **Outside Storage.** No outside storage is permitted.
4. **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. Trash areas shall be maintained in a manner to discourage illegal dumping.

CONDITIONS SUBSEQUENT

1. **Revocation, Suspension, Modification.** This Determination of Public Convenience or Necessity 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 Determination of Public Convenience or Necessity 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.

Based on the above findings, the City Council hereby determines that there exists a significant and overriding public benefit in this instance for allowing the existing grocery store use to add a limited amount of off-sale of alcoholic beverages and **grants** the request for the Determination of Public Convenience or Necessity.

ADOPTED this 6th day of February , 2007, by the following vote:

AYES: CAMPOS, CHIRCO, CONSTANT, CORTESE, NGUYEN,
PYLE, WILLIAMS; REED

NOES: NONE

ABSENT: LICCARDO

VACANT: NONE

DISQUALIFIED: DISTRICT 4, DISSTRIC 6

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk

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.