

**RESOLUTION NO. 74319**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN JOSE APPROVING A CONDITIONAL USE PERMIT AND A REQUEST FOR A DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO USE CERTAIN REAL PROPERTY DESCRIBED HEREIN FOR THE PURPOSE OF A PROPOSED EXPANSION OF THE RETAIL PORTION OF A GAS STATION TO 1,647 SQUARE FEET AND TO ALLOW THE OFF-SALE OF ALCOHOLIC BEVERAGES AT AN EXISTING GASOLINE SERVICE STATION'S MINI-MART ON A 0.35 GROSS ACRE SITE LOCATED AT THE NORTHWEST CORNER OF SOUTH BASCOM AND CAMDEN AVENUES**

**FILE NO. CP07-001 & ABC07-001**

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San Jose on January 17, 2007, an application (File No. **CP07-001 & ABC07-001**) was filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow the expansion of the retail portion of a gas station to 1,647 square feet and allow sale of beer and wine for off-site consumption, at an existing gasoline service station on a 0.35 gross acre site on that certain real property (hereinafter referred to as "subject property"), situate in the CP Commercial Pedestrian Zoning District, located at the northwest corner of South Bascom and Camden Avenues, San José; 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 5, 2007, the Planning Commission denied the application, from which decision the property owner 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, 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 Planning Commission; and

WHEREAS, at said hearing, this City Council received in evidence a development plan for the subject property entitled "Proposed Site Plan, Ed Hadad 76," dated June 22, 2007, which plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested therein, 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 finds that the following are the relevant facts regarding this proposed project:

1. The subject site is located at the northwest corner of South Bascom and Camden Avenues (3145 S. Bascom Avenue).
2. The subject site is located within CP Commercial Pedestrian Zoning District.
3. This site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
4. 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, as amended.
5. The site is 0.35 gross acre site.
6. The applicant is requesting a Conditional Use Permit (CUP) and a Determination of Public Convenience or Necessity (ABC) to allow expansion of the existing mini-mart to 1,647 square feet and allow off-sale of alcoholic beverages (beer and wine) for off-site consumption in connection with the gas station and mini-mart use located at the northwest corner of South Bascom Avenue and Camden Avenue (3145 S. Bascom Avenue).

7. There are 8 (eight) parking spaces provided in the service station.
8. The subject site is currently surrounded by commercial uses on three sides and a church parking lot on one side.
9. Per Table 20-140 of the San Jose Municipal Code, a Conditional Use Permit is required for off-sale of alcoholic beverages in the CP Commercial Pedestrian Zoning District.
10. The Police Department has submitted written correspondence indicating that they are opposed to the proposed off-sale of alcohol beverages due to over concentration in the census tract.
11. The crime statistics are not over the 20 percent crime index.
12. There are a total of seven (7) off-sale licenses in the census tract.
13. There are no off-sale licenses within 1,000 feet radius of the proposed use.
14. The premises are not located within 500 feet of a school, day care center, public park, social services agency, or residential care or service facility or within one hundred fifty feet of an existing residence.
15. The project site is not located within 150 feet of residentially zoned property.
16. The project is subject to the requirements for Determination of Public Convenience or Necessity for a liquor license for the off-sale of alcohol beverages. The granting of such a determination requires that four specific findings be made as prescribed by Title 6 of the SJMC.
17. The site is not located in an area with a high number of calls for police service or a high crime rate.
18. The site is not located in an existing Project Crackdown /Weed and Seed Area.
19. The proposed use is within a Strong Neighborhoods Initiative area or other area designated by the city for targeted neighborhood enhancement services or programs.
20. The applicant proposed that the use be limited to 15 percent (15%) of the floor area of the retail store for display of alcoholic beverages.
21. The proposed use would not include late night operation. The retail sales of beer and wine (Type 20) would be in conjunction with a convenience store at a gas station.

22. The convenience store operates between the hours of 6:00 a.m. to 12:00 midnight.
23. The Police Department memorandum indicates that the project site is not within an area of high crime, but that the area does have an over-concentration of existing liquor licenses. For ABC to be able to issue a liquor license for this use, the City must grant a "determination of public convenience or necessity".
24. On December 5, 2007, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP07-001 and ABC07-001). The Director of Planning recommended approval of the Conditional Use Permit and request for a denial by the Planning Commission of the Determination of Public Convenience or Necessity because all of the required four findings for the Determination of Public Convenience and Necessity could not be made by the Planning Commission.
25. Commissioner Kamkar commended the applicant for a well run business and felt that the applicant was a responsible operator. In response to this comment, the applicant indicated that he sends his staff to regular ABC trainings.
26. Commissioner Jensen stated that ABC regulations would limit number of off-sale locations in the census tract to only three, and that currently seven licenses exist in the census tract.
27. Commissioner Platten commented that the applicant has a clean record and no known history of problems/issues and it is not a moral defect to sell alcoholic beverages as a business.
28. Commissioner Zito made the comment that the proposed use would be detrimental to public, health and safety, although he stated he concurred with the staff report that the findings for Public Convenience or Necessity could be made in this case by the City Council.
29. On December 21, 2007, the applicant appealed the Planning Commission decision to deny the subject proposal (see Notice of Appeal and associated letter from James Barrett, representative for Hedia Petroleum, provided to City Council by the Director of Planning as a part of the record for this Resolution). The Permit Appeal requests that the City Council find that the proposed off-sale of alcohol proposal at the proposed expanded retail mini-mart at the gasoline service station would provide an overriding public benefit and that the Council make a Determination of Public Convenience and Necessity to allow the issuance of the ABC licenses required to operate the proposed business insofar that the mini-mart provides beer and wine sales only in conjunction will a retail store.

30. The proposed off-sale of alcoholic beverages at the proposed expanded and remodeled retail store provides for a more complete and convenient shopping experience.

Based on the above stated facts, the City Council concludes and finds:

1. Based on the findings in the subsection below, the City Council hereby makes a Determination of Public Convenience and 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 within one hundred fifty feet of an existing residence and residentially zoned property and is not within five hundred feet of an existing school site.
  - d. Alcohol sales would not represent a majority of the proposed use.
  - e. Significant and overriding public benefits will be served by the proposed use, as noted in Items 29 and 30 in the Facts section above.
  - f. 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.
2. The City Council concludes and finds, based on the analysis of the above facts in regard to the Conditional Use Permit, that:
  - a. That the use is not located within five hundred (500) feet of any other use involving the off-sale of alcoholic beverages; and
  - b. 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 not located closer than one hundred fifty (150) feet from residentially used and zoned property.
3. The City Council has considered all of the following criteria in evaluating the proposed expansion and remodel of the mini-mart.

Finally, based on the above-stated findings and subject to the conditions set forth below, the City Council 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.

In accordance with the findings set forth above, a Conditional Use Permit 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. Further, in accordance with the findings set forth above, the City Council makes a Determination of Public Convenience or Necessity in conjunction with the proposed off-sale of alcoholic beverages. This City Council expressly declares that it would not have granted this permit 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

1. **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.
2. **Recordation.** 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 this Resolution has been recorded with the County Recorder.
3. **Building Permit/Certificate of Occupancy.** Procurement of a Building Permit and/or Certificate of Occupancy from the Building Official for the structures described or contemplated under this permit shall be deemed acceptance of all conditions specified in this permit and the applicant's agreement to fully comply with all of said conditions. No change in the character of occupancy or change to a different group of occupancies as described by the "Building Code" shall be made without first obtaining a Certificate of Occupancy from the Building Official, as required under San Jose Municipal Code Section 24.02.610, and any such change in occupancy must comply with all other applicable local and state laws.
4. **ABC Permit.** Obtainment and maintenance of an ABC License is evidence of acceptance of all conditions specified in this document and the applicant's intent to fully comply with said conditions. The permittee shall at all times be and remain in compliance with the ABC licensing and shall cause any occupants of the subject site to be and remain in compliance with the ABC licensing.
5. **Conformance with Plans.** The use development shall conform to approved plans entitled, "Proposed Site Plan, Ed Hadad 76" dated June 22, 2007 on file with the Department of Planning, Building and Code Enforcement and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
8. **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.
9. **Hours of Operation.** The use shall not operate between the hours of 12:00 midnight and 6:00 a.m.
10. **Construction Impact Mitigation Measures.** The applicant shall ensure that the following construction impact mitigation measures are fully implemented throughout the duration of construction activities associated with this project. For the purposes of this Permit, "construction" shall mean all on-site activities including site clearing, grading, and construction. Failure to comply with these conditions by the applicant,

project contractors or subcontractors shall be cause for shutdown of the project site until compliance with the following conditions can be ensured by the City.

- a. **Construction Hours.** Construction shall be limited to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday for any onsite or offsite work within 500 feet of any residential unit so as to avoid the more sensitive evening, nighttime and weekend hours.
  - b. **Plans.** The construction hours shall be printed on all plans for the project used to construct the project.
  - c. **Fencing.** The site shall be wholly enclosed by security fencing. The gates to the project site shall remain locked during all other times, except for a fifteen-minute period immediately preceding and following the above hours of construction.
  - d. **Construction Employees.** Construction workers shall not arrive to the site until the opening of the project gates. The applicant shall designate a location without adjacent residential units for workers to wait prior to the opening of the project gates.
  - e. **Construction Activities.** Construction equipment, materials, and workers shall not be staged on any area of the site within 50 feet of an adjoining property used for residential purposes unless the Director of Planning approves a Permit Adjustment authorizing such activity. The construction staging area shall not create a public or private nuisance.
11. **Operations Plan.** Loitering is prohibited on or around the premises or the area under the control of the applicant licensee(s). No alcoholic beverages shall be consumed on any property adjacent to the premises over which the project developer/applicant has control. The project developer/applicant shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control.
    - a. Apply water three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas during
  12. **Floor Area.** The maximum floor area devoted to the sale of alcohol shall be 15% of the overall retail space.
  13. **Signs.** No signs are approved at this time. All proposed signage will be reviewed under a separate Sign Permit.
  14. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
  15. **Roof Equipment.** No roof equipment is permitted with this permit.
  16. **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.

17. **Recycling.** Scrap construction material should be recycled. Integrated Waste Management staff at 277-5533 can provide assistance on how to recycle construction debris from the project, including information on available haulers and processors.
18. **Outside Storage.** No outside storage is permitted except in areas designated on the approved plan set.
19. **Cultural Resources.** Pursuant to Section 7050.5 of the Health and Safety Code, and Section 5097.94 of the Public Resources Code of the State of California in the event of the discovery of human remains during construction, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains. The Santa Clara County Coroner shall be notified and shall make a determination as to whether the remains are Native American. If the Coroner determines that the remains are not subject to his authority, he shall notify the Native American Heritage Commission who shall attempt to identify descendants of the deceased Native American. If no satisfactory agreement can be reached as to the disposition of the remains pursuant to this State law, then the land owner shall re-inter the human remains and items associated with Native American burials on the property in a location not subject to further subsurface disturbance.
20. **Fire Clearance.** A Fire Clearance shall be obtained from Fire Chief ((408) 535-3555) prior to the issuance of a building permit.
21. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
22. **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.

In accordance with the findings set forth above, a Conditional Use permit to use the subject property for said purpose specified above is hereby **approved** and a Determination of Public Convenience or Necessity **is** made.

**ADOPTED** this **8th** day of **April**, 2008, by the following vote:

AYES: CAMPOS, CHIRCO, CHU, CONSTANT, PYLE, WILLIAMS; REED.

NOES: LICCARDO, NGUYEN, OLIVERIO.

ABSENT: CORTESE.

DISQUALIFIED: NONE.

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CHUCK REED  
Mayor

ATTEST:

\_\_\_\_\_  
LEE PRICE, MMC  
City Clerk