

RESOLUTION NO. 74745

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 OFF-SALE OF ALCOHOLIC BEVERAGES AT A GROCERY STORE LOCATED AT THE SOUTHEAST CORNER OF SARATOGA AVENUE AND PAYNE AVENUE

FILE NO. CP08-059 & ABC08-006

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San Jose on July 2, 2008, an application (File No. **CP08-059 & ABC08-006**) was filed for a Conditional Use Permit and Determination of Public Convenience or Necessity to allow the sale of beer and wine for off-site consumption on that certain real property (hereinafter referred to as "subject property"), situate in the CP Commercial Pedestrian Zoning District, located at the southeast corner of Saratoga Avenue and Payne Avenue, 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 November 5, 2008, the Planning Commission denied the application with a recommendation that the Council support the application, from which denial 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 on December 16, 2008, 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

WHEREAS, at said hearing, this City Council received in evidence a development plan for the subject property entitled "Fresh & Easy," dated October 1,

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 southeast corner of Saratoga Avenue and Payne Avenue (1328 Saratoga Avenue).
2. This site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
3. The project site is located in the CP Commercial Pedestrian Zoning District.
4. 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.
5. The project proposes incidental off-sale of beer and wine at a 13,969 square-foot grocery store located within an existing building in an approximately 77,000 square-foot neighborhood shopping center.
6. The project includes no exterior modifications to the existing building.
7. The project site is bordered by multi-family residences to the west and north. Single-family residences are located behind the shopping center to the east and south.
8. The number of parking spaces provided meets the requirements of the Zoning Ordinance.
9. The existing grocery store proposes to utilize less than 10 percent of the gross floor area to the sales of alcoholic beverages.
10. Due to over-concentration as noted above, 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.
11. The proposed use is not within a Strong Neighborhood Initiative area or other area designated by the city for targeted neighborhood enhancement services or programs.
12. The project site is not located within 500 feet of a school to the west.

13. The project site is located adjacent to and within 150 feet of residentially zoned property to the east.
14. The above mentioned residential use is oriented in a manner that the front of the single-family house on the residentially zoned property to the east faces the rear of the commercial structure, with a two-lane street in between.
15. Based on the orientation of the retail use to residential areas, there is a 350-foot minimum walking distance to the nearest residence on Southwood Drive.
16. The Police Department memorandum indicates that the project site is not located within an area of high crime. The Police Department has indicated that they are neutral to the issue of off-sale of alcohol in conjunction with a Fresh & Easy proposed at this location.
17. The project site is located in a census tract with an existing over-concentration of liquor licenses, and there are two other off-sale establishments within 1000' of the subject site. For ABC to be able to issue a liquor license for this use, the City must grant a "determination of public convenience or necessity".
18. On November 5, 2008, the Planning Commission held a public hearing to consider the proposed Conditional Use Permit and Determination of Public Convenience or Necessity (File Nos. CP08-059 and ABC08-006). The Director of Planning recommended denial of the Conditional Use Permit and request for a Determination of Public Convenience or Necessity because one of the required four findings for the Determination of Public Convenience and Necessity could not be made.
19. On November 6, 2008, the applicant appealed the Planning Commission decision to deny the subject proposal (see attached Notice of Appeal and associated statement from Alex Eagle of the Bergman Companies, representing Fresh & Easy). The Permit Appeal requests that the City Council find that the proposed off-sale of alcohol proposal at the Fresh & Easy would provide overriding public benefits 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 Fresh & Easy provides beer and wine sales only in conjunction with a full-service grocery store.
20. 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. For the 13,969 square-foot proposed retail space, less than 10% of the gross floor area is to be dedicated to the sale of beer and wine, which is incidental to the overall grocery store use. A condition has been added to the resolution which limits the relative percentage of gross floor area dedicated to the off-sale of alcoholic beverages to ensure that the off-sale of alcohol remains an incidental component to the existing retail use.
21. Upon an appeal, Title 6 allows the City Council to make a Determination of Public Convenience or Necessity for a proposal that does not meet all of the required factual findings, if the Council makes a finding of significant and overriding public benefit.
22. The proposed sale of alcoholic beverages is incidental to a larger retail use.

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 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 would not be located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility. The proposed use is within one hundred fifty feet of an existing residence and is therefore not in conformance with the requirements of Title 6 of the SJMC.
 - 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 19 and 20 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. For the use located closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situate either within or outside the City, that the proposed location of the off-sale of alcoholic beverages use would 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; and
 - b. The use is no 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:
 - i. Adversely affect the peace, health, safety, morals, or welfare of persons residing or working in the surrounding area; or
 - ii. Impair the utility or value of property of other persons located in the vicinity of the area; or

- iii. Be detrimental to public health, safety or general welfare.
- iv. 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. The use is located closer than one hundred fifty (150) feet from a residentially zoned property, but the proposed use is situated and oriented in such a manner that would not adversely affect such residential use in that the building entrance faces west, and the physical walking distance between the store and the residential property line is approximately 350 feet, which is a sufficient separation to avoid adverse impacts.

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 to be built 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, "Fresh & Easy," dated October 1, 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).
6. **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.
7. **Hours of Operation.** The use shall not operate between the hours of 12:00 midnight and 6:00 a.m.
8. **Operations.** 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.

9. **Floor Area.** The maximum floor area devoted to the sale of alcohol shall be 10% of the gross tenant space.
10. **Signs.** No new signs are approved with this Permit at this time.
11. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
12. **Roof Equipment.** All new roof equipment shall be screened from view.
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. **Outside Storage.** No outside storage is permitted except in areas designated on the approved plan set.
15. **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.
16. **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.

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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 16th day of December 2008, by the following vote:

AYES: CAMPOS, CHIRCO, CHU, CONSTANT, LICCARDO,
NGUYEN, OLIVERIO, PYLE, WILLIAMS, REED.

NOES: NONE.

ABSENT: CORTESE.

DISQUALIFIED: NONE.



CHUCK REED
Mayor

ATTEST:



LEE PRICE, MMC
City Clerk

LEGAL DESCRIPTION

All that land situated in the City of San Jose, in the County of Santa Clara, in the State of California, described as follows:

PARCEL 3, as said PARCEL is shown on that certain PARCEL MAP titled "Parcel Map, Consisting of One (1) Sheet, Being All of Lots 9 Thru 27 and All of Villa Circle Previously Abandoned of Tract No. 664, Colombo Gardens, As Recorded in Book 24 of Maps, Pages 48 & 49, Santa Clara County Records", San Jose, Santa Clara County, California", as said PARCEL MAP is recorded on Page 24 in Book 347 of the Parcel Maps in Official Records of said County.

Containing 2.977 acres, more or less.

