



Memorandum

TO: NEIGHBORHOOD SERVICES
AND EDUCATION COMMITTEE

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: October 22, 2007

Approved

Date

10/26/07

COUNCIL DISTRICTS: Citywide
SNI AREAS: All

**SUBJECT: REPORT ON THE OFF-SALE OF ALCOHOLIC BEVERAGE
ESTABLISHMENTS INSPECTION PROGRAM AND THE STATUS OF
LEGAL NONCONFORMING OFF-SALE OF ALCOHOLIC BEVERAGE
ESTABLISHMENTS**

RECOMMENDATION

Staff recommends that the Committee accept the report and direct staff to continue existing enforcement mechanisms to address concerns with legal nonconforming off-sale of alcoholic beverage establishments.

BACKGROUND

On December 6, 2005, the City Council adopted an Ordinance amending Titles 6 and 20 of the San Jose Municipal Code modifying the provisions for the off-sale of alcoholic beverages to codify requirements for a determination of public convenience and necessity, provide operating regulations and performance standards for all off-sale of alcoholic beverage establishments, establish an inspection program for off-sale of alcoholic beverage establishments, and rescind the prohibition on the concurrent sale of gasoline and alcohol. At that time, the Council directed staff to report on the results of the inspection program within one year and to explore amortizing existing legal nonconforming off-sale of alcoholic beverage establishments. This memorandum summarizes the results of the Off-Sale of Alcoholic Beverage Inspection Program since its launch in May of 2006, discusses other programs and mechanisms for monitoring off-sale of alcoholic beverage establishments, and assesses amortization as an option for ensuring that existing legal nonconforming off-sale of alcoholic beverage businesses do not negatively impact the surrounding community.

OUTCOME

Based on Council direction, staff would continue to use existing enforcement mechanisms to ensure that the off-sale of alcoholic beverage establishments do not result in negative impacts on surrounding neighborhoods.

ANALYSIS

Off-Sale of Alcoholic Beverage Establishments Inspection Program

The Off-Sale of Alcoholic Beverage Establishments Inspection Program was established to provide comprehensive inspections of all off-sale of alcoholic beverage businesses on an annual basis. The inspections are intended to assess compliance with the Conditional Use Permit (if one has been approved for the site); provisions of the San Jose Municipal Code that apply specifically to off-sale of alcoholic beverage businesses; and a broad range of other Municipal Code requirements regarding such issues as graffiti, signage, lighting, pay telephones, posting of licenses, cigarettes access, fire exits, building permits and garbage. The full scope of the on-site inspection is outlined in the attached Inspection Guide. A dedicated Code Enforcement Inspector for the program is funded through an annual \$287 inspection fee billed to the property owner prior to the inspection and a reinspection fee of \$70.52 if a follow-up inspection is necessary. In addition to scheduled inspections, the Inspector assigned to the program responds to citizen complaints regarding off-sale of alcoholic beverage establishments, triggering additional inspections as appropriate. Should a violation be found, the Inspector would work with the business to address/eliminate the violation.

The program began by focusing on alcoholic beverage establishments proximate to residential neighborhoods. Code Enforcement made inquiries with representatives of the Police Department and the SNI Neighborhood Advisory Committees (NACs) in an effort to identify any current off-sale of alcoholic beverage establishments that were creating or causing a public nuisance and thus warranting an immediate site inspection. Further, in an effort to increase resident awareness the Off-Sale of Alcoholic Beverage Establishments Inspection Program, it was highlighted in the SNI Code Enforcement News, an electronic mailing sent to all SNI NACs.

From May 2006 to September 30, 2007, staff had completed inspections of 195 of the 420 off-sale of alcoholic beverage establishments. Prior to visiting a site, the Code Enforcement Inspector verifies the status of the establishment's Alcohol Beverage Control (ABC) License and the Business License, and researches the zoning and permit history. Of the total businesses that have received inspections, 147 have been determined to be legal nonconforming in that they were implemented legally prior to May of 1990 when the City first required off-sale of alcoholic beverage establishments to obtain a Conditional Use Permit.

Inspections of Off-Sale of Alcoholic Beverage (OSA) Establishments as of 9/30/07

Total OSA Establishments	420
Total Inspections Completed	195
Inspections of Legal Nonconforming OSA	147
Inspections Recording No Violations	49

The most common violation identified through the program has involved signage, primarily excessive window signage. Other frequently encountered violations include graffiti, refuse management and litter. Where hazardous conditions were identified at the time of inspection, such conditions were required to be resolved immediately. This included blocking and locked emergency exits. Overall, 95% of the inspected businesses have been brought into compliance for all identified violations within 60 days. Administrative fines, ranging between \$50 and \$500, provide an effective tool to encourage compliance and, as a result, business owners have resolved the identified violations without the need to issue citations. The inspections have not indicated a higher incidence of violations for legal nonconforming off-sale of alcoholic beverage facilities as compared to off-sale of alcoholic beverage establishments as a whole.

Existing Methods for Addressing Legal Nonconforming Off-Sale of Alcohol Establishments

For the Committee's information, the exact number of legal nonconforming off-sale of alcoholic beverage establishments in San Jose has not yet been determined. Code Enforcement is undertaking this research as part of the inspection program and will have a definitive count when the first cycle of inspections has been completed (expected December 2008). Of those establishments inspected thus far, approximately 75% have been determined to be legal nonconforming; the overall percentage is expected to be somewhat lower as the initial inspections focused on liquor stores, many of which are older businesses that predate the Conditional Use Permit requirement for off-sale of alcoholic beverage establishments. Assuming these establishments were implemented legally, they are considered legal nonconforming. Some additional number of off-sale of alcoholic beverage establishments are located in Commercial Zoning Districts where such uses are allowed with a Conditional Use Permit, but are legal nonconforming since they were implemented prior to the Conditional Use Permit requirement. Although the exact count is not yet known, a significant portion of the off-sale of alcoholic beverage establishments in San Jose is expected to be legal nonconforming.

In addition to the Off-Sale of Alcoholic Beverage Establishments Inspection Program, current Zoning Code requirements and City processes provide a broad range of methods for monitoring legal nonconforming off-sale of alcoholic beverage establishments and addressing problem businesses that negatively impact the community. These methods are summarized below:

Conditional Use Permit Requirement for Change in ABC License

In 2005, the City Council adopted an ordinance amending the Zoning Code to separately enumerate the sale of beer and wine, and the sale of a full range of alcohol, including distilled spirits. As a result, legal nonconforming establishments are now required to obtain a Conditional Use Permit if the establishment changes from a Type 20 ABC license (beer and wine) to a Type 21 (general,

including all liquors). Since adoption of the ordinance, no Conditional Use Permit applications have been filed involving a legal nonconforming off-sale of alcoholic beverage establishment seeking to change from beer and wine to the full range of liquors.

The department believes that existing enforcement tools have proven effective in addressing code violations for businesses that engage in the off-sale of alcoholic beverages. The following represents a brief overview of the various enforcement tools, ranging from administrative citations to the adverse public impact process, which may result in an off-sale of alcoholic beverage establishment losing its legal nonconforming status.

Administrative Citations

The administrative citation was adopted by the City Council in order to address and correct violations that were deemed discreet and transitory in nature. A property owner can easily rectify certain nuisance conditions such as litter, graffiti, disturbance of the peace, or overflowing dumpsters. Code Enforcement often provides the property owner with a verbal and/or written warning and a reasonable period of time to correct the transitory violation, although a warning is not required for the issuance of an administrative citation. If the property owner fails to remove or cause the removal of the transitory nuisance condition within a reasonable period of time, the property owner is subject to an administrative citation as enumerated in the current Administrative Citation Fine Schedule. Additional administrative citations may be issued on a daily basis without warning, and in some cases will result in escalating fines for second and third violations. This enforcement tool has been very effective in correcting violations that are deemed transient in nature.

Administrative Remedies

The administrative remedies process was adopted by the City Council to address and correct continuing violations that pertain to building, plumbing, electrical, or other structural or zoning issues. Examples of these conditions include construction without a building permit or non-transient land use violations. Upon confirming a violation, Code Enforcement will issue a compliance order to the property owner and/or responsible party. The time period for compliance is dependent upon the nature of the violation and its impact on the community. For example, if a business establishment violates land-use regulations and creates a significant negative impact to the community, the business may be ordered to immediately cease any illegal operations. Generally, the property owner and/or responsible party is provided a reasonable period of time in which to correct the violation. If the property owner and/or responsible party makes a good faith effort to comply, but delays occur which are not within their control, Code Enforcement may grant an extension. If the property owner fails to correct the violation within the time period proscribed, the case is scheduled for a Public Hearing before the San Jose Appeals Hearing Board (Board).

If the Board determines that a violation has occurred, the Board will issue an administrative order specifying the required corrective actions, and a time period for compliance. The Board also has the authority to award the City administrative costs and may impose an administrative penalty from the compliance date until compliance is achieved, up to \$100,000.

Administrative Nuisance Abatement

The administrative nuisance abatement process addresses public nuisance issues that do not necessarily involve the violation of a specific provision of the San Jose Municipal Code. It defines a public nuisance to mean not only “the maintenance or use of property in the City in a manner that jeopardizes or endangers the health, safety or welfare of persons on the premises or in the surrounding area,” but it also includes as nuisance activity some of the most egregious public nuisance issues such as public drunkenness, drinking alcoholic beverages in public, harassment of passersby, illegal gambling, prostitution, sale of stolen goods, acts of violence, public urination, acts of vandalism, acts of lewd conduct, excessive littering, and maintenance or use of property in the City in a manner that violates any provision of the San Jose Municipal Code, or any other City, State, or Federal law or regulation. In these situations, any City department may request the assistance of the City Attorney for the possible issuance of a nuisance abatement cease and desist order. If the City Attorney determines that the public nuisance has not ceased by the compliance date, then the matter is scheduled for a nuisance abatement hearing before the San Jose Appeals Hearing Board. The Board may also issue a nuisance abatement order and assess administrative costs and administrative penalties.

City Review of ABC License Applications

The Vice Unit of the San Jose Police Department currently responds to all ABC License applications referred to the City by the State Department of Alcoholic Beverage Control (ABC). In response to prior Council direction, the Vice Unit of the Police Department now coordinates with the Planning and Code Enforcement Divisions of the Department of Planning, Building and Code Enforcement prior to responding to an ABC License referral. The ABC clearly has the ability to place conditions on a license affecting sales of fortified wines/liquors and single can/bottle sales when factual circumstances exist, including but not limited to loitering and public drunkenness, that warrant placing such conditions on the license. This provides the City with an additional means of influencing the operation of an off-sale alcoholic beverage establishment that is not subject to a Conditional Use Permit.

Adverse Public Impact

In addition to the administrative remedies and administrative citation processes, the Zoning Ordinance delineates an enforcement tool for dealing with legal nonconforming businesses that create a nuisance by their operation. The Adverse Public Impact process is the tool for abating legal nonconforming uses that either present a nuisance or are not in compliance with any City ordinance, law, or prior permits. Under the Adverse Public Impact provision of the Zoning Ordinance (Chapter 20.150 of Title 20), the Director of Planning has the ability to issue an Order to Show Cause for a legal nonconforming use that is creating an adverse public impact. The Order to Show Cause process can result in the termination of the legal nonconforming use, the requirement to obtain a Conditional Use Permit containing conditions of approval designed to prevent the adverse public impact, or the permission to continue as a legal nonconforming use. This enforcement tool allows the City to remedy situations where legal nonconforming businesses have resulted in serious impacts to the surrounding community.

Another Possible Approach

Another potential approach to legal nonconforming businesses is amortization. Amortization of all legal nonconforming off-sale of alcoholic beverage establishments, within a specified time period, would mean that these businesses would need to come into conformance with all of the City's requirements or cease the off-sale of alcoholic beverage use prior to the end of the amortization period. Businesses seeking to continue operation after the amortization period would need to apply for and obtain a Conditional Use Permit.

Amortization is a potential tool that could be used to bring existing off-sale of alcoholic beverage establishments into conformance with current land use requirements; however, it is a tool with a broad sweep that would capture legal nonconforming establishments regardless of their operating record and impose new hurdles on a significant number of small businesses. The latter consequence of such a program raises concerns in regard to the City's goal of supporting small businesses. An amortization program that targets a specific subset of legal nonconforming off-sale of alcoholic beverage establishments could reduce the number of affected businesses, but would still impact establishments that have no record of serious violations or adverse impacts. For these reasons, staff does not recommend this approach

POLICY ALTERNATIVE

The following is an alternative action available to the Committee, in addition to the staff recommendation to continue existing enforcement mechanisms to address legal nonconforming off-sale of alcoholic beverage businesses:

Alternative: Pursue an ordinance with appropriate public outreach, amortizing legal nonconforming off-sale of alcoholic beverage establishments.

Pros: This alternative would allow staff to further explore an amortization process that would bring legal nonconforming off-sale of alcoholic beverage establishments into conformance with current Zoning Code requirements, resulting in consistent standards for all such businesses.

Cons: (1) An amortization program would require legal nonconforming businesses that sell alcohol for off-site consumption to conform to current zoning district regulations that would include the requirement that they obtain a Conditional Use Permit; (2) an amortization process may result in the business closures if they cannot conform to current zoning requirements; and (3) an amortization program would require significant staff time to enforce and/or oversee the permitting process for legal nonconforming businesses required to obtain a Conditional Use Permit.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**

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- 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)**

This report does not trigger the Public Outreach criteria mentioned above, however, it will be posted on the City's website. In addition, the public is welcome to address the Committee on this topic.

EVALUATION AND FOLLOW-UP

N/A

COORDINATION

This report has been coordinated with the City Attorney's Office.

FISCAL/POLICY ALIGNMENT

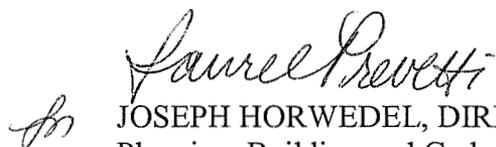
N/A

BUDGET REFERENCE

N/A

CEQA

Not a project.


JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

For questions, please contact Code Enforcement Official Michael Hannon, at (408) 277-4703.

Attachment

City of San Jose
Off-Sale Alcohol Inspection Program
Inspection Guide



The following Inspection Guide is provided to assist you in having a successful inspection. It also can be used for you to conduct a pre-inspection evaluation for conditions / issues that may need correction. We have divided this guide into exterior and interior inspection components for your convenience. We hope this information is useful.

Exterior Conditions:

Municipal Code State Code	Description	What will we be looking for?
6.86.230(A)(B) 25612.5(5) B&P	Inadequate removal & disposal of trash, litter debris, etc	Condition and management of solid waste areas for sanitation and containment. Trash, litter, rubbish and debris needs to be properly removed and stored at the end of each business day. Cardboard boxes need to be broken down or placed in approved cardboard recycling bin.
6.86.230(D) 25612.5(5) B&P	Deteriorated parking lot, sidewalks, roads	Driveways, sidewalks, park-strips, fire access roads and streets on or adjacent to the premises are clear and clean;
6.86.230(E) 25612.5(4) B&P	Inadequate Lighting	Lighting on the premises is adequate to ensure the safety of the public and the employees of the off-sale alcoholic beverage establishment
6.86.230 (C) 9.57.300 25612.5(6) B&P 25601 B&P	Graffiti	Ensure any graffiti placed upon the premises is removed within forty-eight (48) hours of its occurrence.
9.10.530 25612.5(5) B&P 25601 B&P	Inadequate solid waste and/or recycling	Condition of the refuse and recycling containers and area for adequacy and sanitation. Is the bin overflowing and service adequate to ensure the adequate removal of waste.
9.10.540 25612.5(5) B&P 25601 B&P	Dangerous accumulation of Solid waste	All accumulations of waste and recycling materials must be properly contained. Conditions that create a fire hazard, attraction for vectors, or other unhealthful condition will be addressed.
9.10.1390 25612.5(5) B&P 25601 B&P	Inadequate maintenance of garbage containers	Containers need to meet the requirements for construction and sanitation. Only approved containers are considered adequate.
13.18	News racks	This only applies to properties that have newsracks placed on the property. The racks, if present, cannot create an obstruction and need to be in good working order and condition. They cannot be used for display or exhibit of sexually explicit materials.
17.72.525(B)	Landscaping	That the property complies with applicable development permits requirements if applicable.
17.72.520(C)	Broken/deteriorated fence	Fences are not broken, deteriorated or unsafe. No barbed or razor wire may be installed on the top of the fence.
20.10.030	Un-permitted alterations/modifications	All modifications done to the interior or exterior of the building are done with the proper Planning permits.
20.150.300 25612.5(8) B&P	Non-permitted Payphones	All payphones be located inside a building or attached to the wall of the building outside of free-standing within 1' of the outside wall, no greater than 25' from the primary entrance to the building and on no other wall other than that containing the primary entrance. All outside phones allow for a minimum of 5' pedestrian access between the payphone and the edge of the sidewalk or private property line, which ever is closer. No more than two (2) exterior pay phones per building. Lighting is limited to the payphone fixture. Signage is limited to the payphone fixture and not to exceed one square foot.
23.02.820(A) 25612.5(7) B&P	Un-permitted Signage	All signage has the proper permits and meets all requirements of the sign ordinance. Only 25% of window space can be covered with signage. No banners, flags, or A-frame signs are allowed

Interior Conditions – Performance Standards

Municipal Code Section	Description	What will we be looking for?
4.76.310	City of San Jose Business License Posting Required	The business license shall be posted in a conspicuous place and in plain public view in the business.
6.08.020	Amusement Device license required	A license may be required for amusement game devices.
6.72.020 25612.5(C)(9) B&P 313 & 313.1 PC	Sexually explicit material improperly place-Display prohibited	Sexually explicit material is displayed in such a manner that is not visible to the public.
6.74.020(A)	Markers/spray paint accessible to public prohibited	Markers/spray paint are not accessible to the public without employee assistance.
6.86.240(C) 1 23790.5(d) B&P	Beer/wine displayed within 5ft. of cash register/front door*	* Gas Stations Only: That no beer or wine be displayed within five feet of the cash register or the front door unless it is in a permanently affixed cooler as of January 1, 1988.
6.86.240(C) 2 23790.5(d) B&P	Advertisement of alcoholic beverage displayed at the fuel island*	* Gas Stations Only: No advertisement of alcoholic beverage be displayed at motor fuel islands.
6.86.240(C) 3 23790.5(d) B&P	Sale of Alcoholic Beverage at a drive up window*	* Gas Stations Only: No sale of alcoholic beverage be made from a drive-in window.
6.86.240(C) 4 23790.5(d) B&P	Display/sale of beer or wine in an ice tub*	* Gas Stations Only: That no display or sale of beer or wine be made from an ice tub.
6.86.240(C) 5 23790.5(d) B&P	NO Self-illuminating advertisement of beer or wine on building or window*	* Gas Stations Only: No self-illuminated advertising of beer or wine shall be located on buildings or windows.
6.86.240(C) 6	Employee on duty between 10:00pm- 2:00am under 21 years of age*	* Gas Stations Only: Employees on duty between the hours of 10:00 p.m. and 2:00 a.m. who sell beer or wine be at least 21 years of age to sell beer and wine.
9.45.100(A)	Cigarettes accessible to public prohibited	All tobacco products are displayed in an area that is not accessible to the public without vendor assistance.
24.01.130	Un-permitted construction/alterations prohibited	All modifications done to the interior or exterior of the building are done with the proper Building permits.
UFC 12.104	Obstruction of Emergency Exits prohibited	Obstructions are not placed in the required width of the exit.
UFC 12.114	Emergency Exit Identification Required	Exit signs are installed at required exit doorways.
B & P 24046	California ABC License Posting Required	That the California ABC license be posted in a conspicuous location upon the premises.