

CITY OF SAN JOSÉ, CALIFORNIA  
Department of Planning, Building and Code Enforcement  
801 North First Street, Room 400  
San José, California 95110-1795

Hearing Date/Agenda Number  
P.C. 9/10/03      Item: 3.c.

File Number  
CP03-052

Application Type  
Conditional Use Permit

Council District  
1

Planning Area  
West Valley

Assessor's Parcel Number(s)  
386-11-048

## STAFF REPORT

### PROJECT DESCRIPTION

Completed by: **Darren McBain**

Location: East side of Saratoga Avenue approximately 450 feet southerly of Lawrence Expressway (1822 Saratoga Avenue)

Gross Acreage: 0.5      Net Acreage: 0.5      Net Density: n/a

Existing Zoning: CP Commercial Pedestrian      Existing Use: Retail

Proposed Zoning: No change      Proposed Use: Sale of alcoholic beverages for off-site consumption

### GENERAL PLAN

Completed by: **DM**

Land Use/Transportation Diagram Designation  
General Commercial

Project Conformance:  
 Yes     No  
 See Analysis and Recommendations

### SURROUNDING LAND USES AND ZONING

Completed by: **DM**

North: Commercial      CP Commercial Pedestrian

East: Shopping center (El Paseo)      CG Commercial General

South: Commercial and offices      CP Commercial Pedestrian

West: Single-family detached residences      City of Saratoga

### ENVIRONMENTAL STATUS

Completed by: **DM**

Environmental Impact Report found complete  
 Negative Declaration circulated on  
 Negative Declaration adopted on

Exempt  
 Environmental Review Incomplete

### FILE HISTORY

Completed by: **DM**

Annexation Title: El Quito Park No. 1

Date: 6/8/1956

### PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

Approval  
 Approval with Conditions  
 Denial  
 Uphold Director's Decision

Date: \_\_\_\_\_

Approved by: \_\_\_\_\_  
 Action  
 Recommendation

### OWNER

Geoffrey Farrar  
P.O. Box 1701  
Chico, CA 95927

### APPLICANT

Edward MacKauf  
23593 Sky View Terrace  
Los Gatos, CA 95033

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**PUBLIC AGENCY COMMENTS RECEIVED**

Completed by: DM

Department of Public Works

None Received

Other Departments and Agencies

See attached memorandum from Police Department (Vice Unit), dated August 28, 2003.

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**GENERAL CORRESPONDENCE**

None received

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**ANALYSIS AND RECOMMENDATIONS****BACKGROUND**

The applicant, Edward MacKauf, is requesting a Conditional Use Permit (CUP) to allow sales of alcoholic beverages, for off-site consumption, at an existing commercial tenant space located on the east side of Saratoga Avenue approximately 450 feet southerly of Lawrence Expressway (1822 Saratoga Avenue). The Zoning Ordinance requires a CUP for off-sale of alcoholic beverages in the CP Commercial Pedestrian Zoning District. The California State Department of Alcoholic Beverage Control (ABC) and the San José Police Department have determined that a Liquor License Exception Permit is not required for this location; see Analysis section, below. However, the applicant will be required to obtain a Liquor License from the State prior to commencing operation of the business.

The proposed use is to be located in a tenant space in a small existing strip mall. Existing tenants include a Radio Shack, a pizza restaurant, and a liquor store. Other nearby development includes a commercial building to the north, El Paseo shopping center across Quito Road to the east, commercial and office uses to the south, and single-family residences across Saratoga Avenue to the west of the site.

**Project Description**

The applicant's stated intention is to sell wine by delivery through a business named Fine Wine Collector. The applicant intends to take retail orders and conduct retail business through the Internet, by telephone, and by mail. The applicant has stated that he does not intend to promote or encourage "typical" retail, over-the-counter sales. However, state laws (Department of Alcoholic Beverage Control regulations) require all retailers of wine to display their merchandise to the public for inspection and on-site purchase, regardless of whether or not a retailer wishes to conduct over-the-counter retail sales. See Section #27 on the attached excerpt from ABC regulations.

Under this CUP, the off-sale of alcoholic beverages would only be allowed for this specific tenant space and not for other tenants within the strip mall. No additional building square footage may be

constructed under this permit. The facility would continue to operate during normally allowed business hours. This permit does not include a request for extended hours of operation.

## **ENVIRONMENTAL REVIEW**

The Director of Planning has determined that this project is exempt from environmental review under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act. This section of the Guidelines provides an exemption for the operation, leasing, etc. of existing private structures with no significant expansion of use. The proposed use is for a tenant space in an existing commercial building. It is staff's opinion that the proposal adequately conforms to this section of the CEQA Guidelines.

## **GENERAL PLAN CONFORMANCE**

The proposed commercial use is consistent with the San José 2020 General Plan Land Use/Transportation Diagram designation of General Commercial.

## **ANALYSIS**

The key issues analyzed for the proposed project are: A) Conformance to the Zoning Ordinance regulations related to the off-sale of alcoholic beverages, and B) Neighborhood compatibility. As described in greater detail below, it is staff's opinion that the proposed project adequately conforms to the criteria related to these issues.

### Conformance to the Zoning Ordinance

The project includes off-sale of alcoholic beverages (i.e., the sale to consumers of alcoholic beverages in original, unopened packages for consumption off the premises where sold). The Zoning Ordinance requires a Conditional Use Permit for off-sale alcohol in the CP Commercial Pedestrian Zoning District. In accordance with Section 20.80.900, the Planning Commission may issue a Conditional Use Permit for off-sale of alcoholic beverages only upon making the following findings, where applicable:

1. *For such a use at a location closer than 500 feet from any other such use either within or outside the City that the proposed location of the off-sale alcohol use would not contribute to an excess concentration of establishments which sell alcoholic beverages.*

The proposed use is located within 500 feet of "any other such use," i.e., another off-sale premises. An existing liquor store is located in the same building as the tenant space that the applicant wishes to occupy. The City's process for reviewing off-sale alcohol sales does not identify any specific criteria for what would constitute "contribut(ing) to an excess concentration of establishments which sell alcoholic beverages." However, the memo from the Police Department's Vice Unit indicates that the subject location is not in a census tract that is "unduly concentrated" with liquor outlets, for purposes of determining whether or not a Liquor License Exception Permit is required for this application. It is Planning staff's opinion that the Vice memo's determination of "no undue concentration" adequately addresses criterion #1, above.

2. *For such a use at a location closer than 500 feet from any child care center, elementary school, secondary school, college or university, or 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 and/or school use.*

There are no schools or licensed day care centers within 500 feet of the site. The nearest residential properties are approximately 200 feet away, and back up to busy public streets (Saratoga Avenue and Quito Road). Therefore, the proposal conforms to criterion #2 of the Zoning code.

As noted above in the Background section, the applicant is not applying for a Liquor License Exception Permit and is not required to do so. A Liquor License Exception Permit is required for liquor license applicants when the ABC determines that a liquor license application would result in an undue concentration. An Exception is also required when the Police service investigative information (including, but not limited to site-specific neighborhood analysis of calls for service) indicates that the "Police beat" area in which the premises is located has had an unusually high number of service calls for certain types of crimes. Neither of these conditions is applicable for the current proposal. The attached memo from the Vice Unit indicates that an Exception is not required.

Other businesses in the nearby area that sell alcoholic beverages (or have recently received approval for alcohol sales) include the Trader Joe's and Smart and Final stores at Westgate West Shopping Center, a PW Supermarket at West Valley Shopping Center, and the Safeway and Target stores at Westgate Shopping Center. Some of the nearby businesses did require Exception permits. However, the ABC's data regarding the concentration of alcohol outlets is based on a Census tract level of analysis, and the businesses named above are located in tracts other than the one in which the subject site is located (5066.04). Should additional off-sale locations be approved in the same tract in the future, the Census tract in question may become "unduly" concentrated, in which case Exception permits would be required for additional off-sale locations.

### Neighborhood Compatibility

The proposed business is oriented toward delivery by mail and is expected to function much like an office or other similar type of low-intensity land use, with a minimal "retail" sales component. The applicant has indicated that retail sale of alcoholic beverages is only being included in the proposed business's operations in order to satisfy the ABC's requirement for sample merchandise to be available for inspection and sale by all alcohol retailers (including those who focus on shipment only). It is Planning staff's opinion that the proposed land use is not likely to generate any adverse impacts on the nearby residences or the adjacent commercial land uses.

Although the proposed CUP is anticipated to include minimal out-the-door retail sales, it should be noted that the CUP process and entitlements allow the off-sale of alcoholic beverages "categorically," and are not limited to what the applicant is currently proposing. The approval "runs" permanently with the premises and does not, for example, differentiate between an internet-oriented business and one that has much more of a retail presence (e.g., a convenience store or liquor store). Therefore, while staff does not anticipate this will be the case, the applicant or another subsequent tenant could conceivably expand the retail off-sale aspect of the business operation at this premises without further Planning approval or additional permits. However, it should also be noted that convenience stores and the like are legal and are allowed as conditional uses in the CP Zoning District.

## Conclusion

The proposal conforms to the requirements of the Zoning Ordinance. The building in which the proposed use is to be located is situated such that business activities associated with this proposal would not adversely affect the nearby residences or other nearby land uses. The off-sale of alcohol at this location is not expected to prove detrimental to the neighborhood.

## RECOMMENDATION

The Planning staff recommends that the Planning Commission approve the requested Conditional Use Permit and include the following findings and conditions in its Resolution.

The Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. The project site is located on the east side of Saratoga Avenue approximately 450 feet southerly of Lawrence Expressway (1822 Saratoga Avenue) in a small existing strip mall.
2. The 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 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 will not have a significant adverse effect on the environment.
5. The subject site is generally surrounded by commercial land uses.
6. The project proposes the sale of alcoholic beverages for off-site consumption.
7. The Zoning Ordinance requires a Conditional Use Permit for off-sale alcohol in the CP Commercial Pedestrian Zoning District.
8. A Conditional Use Permit may be issued for the off-sale of alcoholic beverages if the Planning Commission makes the findings required by San José Municipal Code Sections 20.80.900 and 20.100.720.
9. The project consists of the off-sale of alcoholic beverages in an existing commercial building.
10. The proposed use is located within 500 feet of another establishment that sells alcoholic beverages.
11. The proposed use is not located within 150 feet of a residential land use.
12. The proposed use is not located within 500 feet of a licensed childcare center or school.

13. The project site is located within Census Tract 5064.04.
14. The subject site is not located in one of the Census Tracts identified by the City Council as problematic areas for such uses.
15. The Police Department Special Investigation/Vice unit confirmed that the shopping center is not located within any Project Crackdown, Weed and Seed, or Strong Neighborhood Initiative (SNI) Area, and is not located in an area with over a 20% crime index.
16. The Police Department is of the opinion that granting this Conditional Use Permit would not pose a detriment to the immediate neighborhood and would not generate additional law enforcement problems.

This Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project is consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram of the City of San José.
2. The proposed project complies with all applicable provisions of the Zoning Ordinance.
3. The proposed project is in compliance with the California Environmental Quality Act.

Finally, based upon the above-stated findings and subject to the conditions set forth below, 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 property of other persons located in 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 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 areas; and
3. The proposed site is adequately served:
  - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic 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. This Planning Commission 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 PRECEDENT**

This Conditional Use Permit and Liquor License Exception 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 shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Acceptance and Payment of Recording Fees.** The "Acceptance of Permit and Conditions" form shall be **signed, notarized, and returned** to the Department of City Planning within **60 days** from the date of issuance of the resolution granting the permit. *Failure to do so will result in this permit automatically expiring regardless of any other expiration date contained in this permit.* Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara must be submitted along with the Acceptance Form.

### **CONCURRENT CONDITIONS**

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

1. **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.
2. **No New Construction.** No additional construction or development is approved under this permit.
3. **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.
4. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
5. **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.
6. **Off-Sale of Alcoholic Beverages.** This permit allows the sale of alcoholic beverages for off-site consumption.

7. **Alcoholic Beverage Control.** The off-sale of alcoholic beverages is allowed in conformance with the requirements of the Department of Alcohol Beverage Control (ABC). The applicant shall obtain all necessary permits maintain full compliance and in good standing with the Department of Alcoholic Beverage Control.

## CONDITIONS SUBSEQUENT

1. **Permit Expiration.** This Conditional Use Permit/Liquor License Exception Permit shall automatically expire two years from and after the date of adoption of the Resolution by the Planning Commission, or by the City Council on appeal, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit/Liquor License Exception Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit/Liquor License Exception Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit for a period of up to two years. The Permit Adjustment must be approved prior to the expiration of this Permit.
2. **Revocation, Suspension, Modification.** This Conditional Use Permit/Liquor License Exception 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/Liquor License Exception 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.

### Attachments:

- ✍ Police memo
- ✍ Photos
- ✍ Excerpt from ABC regulations