



Memorandum

TO: PLANNING COMMISSION

FROM: Stephen M. Haase

SUBJECT: SEE BELOW

DATE: September 28, 2005

COUNCIL DISTRICT: Citywide
SNI AREAS: All

UPDATED

SUBJECT: AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING SECTION 20.40.100 OF CHAPTER 20.40, SECTION 20.70.100 OF CHAPTER 20.70, AND SECTIONS 20.80.550 AND 20.80.900 CHAPTER 20.80 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE, RESCINDING SECTION 20.80.550 OF CHAPTER 20.80 OF TITLE 20 OF THE SAN JOSE MUNICIPAL CODE, AND ADDING A NEW CHAPTER 6.84 TO TITLE 6 OF THE SAN JOSE MUNICIPAL CODE TO MODIFY THE PROVISIONS FOR THE OFF SALE OF ALCOHOLIC BEVERAGES.

RECOMMENDATION

Staff recommends that the Planning Commission forward to the City Council a recommendation to approve the proposed ordinance amending Title 20 of the San Jose Municipal Code, modifying provisions related to the off-sale of alcoholic beverages, and rescinding the prohibition on the concurrent sale of gasoline and alcohol.

Staff is also recommending that the Planning Commission forward to the City Council a recommendation to rescind Council Resolution No. 67881, which in 1997 identified certain census tracts of "special concern about Alcoholic Beverage Licenses", and instead consider all areas equal relative to the need for a Determination of Public Convenience or Necessity as required by AB 2897, the Caldera legislation.

BACKGROUND

A policy discussion related to the concurrent sale of food and alcohol at gasoline service stations began at the April 28, 2003 Driving a Strong Economy Committee meeting. Subsequent to that meeting, the City Council continued the policy discussion in June of 2003.

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Staff, in response to memoranda from various Councilmembers, facilitated discussions with the service station industry to better understand their needs, and researched the licensing process with the Department of Alcohol Beverage Control (ABC), all in an effort to provide additional information to the City Council to aid in establishing a definitive direction to staff relative to an ordinance amending the current provisions on the concurrent sale of food and alcohol at gasoline service stations.

Most recently, staff prepared an information memorandum to the City Council on May 18, 2005 to solicit direction from the Council on the issue of alcohol and food sales at service stations. The City Council, at the June 14, 2005 meeting, directed staff to bring a Zoning Ordinance amendment back to Council aimed at providing a clearer process for granting Liquor License Exceptions; more definite locational criteria for the approval of Conditional Use Permits for the off sale of alcohol; a rescission of the current prohibition on the concurrent sale of food and alcohol at gasoline service stations, and clear expectations of responsible operators, enforcement techniques for those operators who do not run their businesses responsibly, and ways to better coordinate with Alcohol Beverage Control staff in areas of license issuance.

ANALYSIS

In response to direction from the City Council, staff has prepared a proposed package of actions including codifying the current Liquor License Exception process in the Municipal Code, including criteria for the granting of an exception; enumerating off-sale of alcohol in two categories, beer and wine, and the full range of alcohol; rescinding the prohibition on the concurrent sale of food or alcohol and gasoline; including more definitive criteria for the location of off-sale establishments in relation to potentially incompatible land uses; and exploring an administrative citation process for off-sale operators in violation of their permit.

Liquor License Exception Process

As a result of the Caldera Bill that went into effect January 1995, the Department of Alcohol Beverage Control (ABC) may deny a liquor license for off-sale of alcohol should the business be located in an area of high crime or an area of over concentration both as defined by the Business and Professions Code Section 23958 as follows:

The premises of the proposed license is located in an area that has 20% more reported crimes than the average number of reported crimes for the city as a whole, or

The premises of the proposed license is located in a census tract where the ratio of existing retain on-sale/retail off-sale licenses to population in the census tract exceeds the ration of retain on-sale/retail off-sale licenses to population in the County of the proposed premise.

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For ABC to be able to issue a license in the above instances, an applicant must be granted by the local jurisdiction a “determination of public convenience or necessity.” The state is silent on what is meant by public convenience or necessity and leaves it to the local jurisdictions to establish criteria for such determination.

The City of San Jose created the Liquor License Exception Permit process to respond to the requests for a determination of public convenience or necessity. Said process is currently not codified in any part of the Municipal Code. It is a process administered by the Department of Planning, Building and Code Enforcement and is acted on by the Director of Planning, or Planning Commission on appeal. Should an Exception be included in the decision on a Conditional Use Permit by the Planning Commission, the City Council would hear it on appeal.

Staff is proposing to modify the Exception process in a few ways. The first would be to change the name to align with the State legislation and call it a determination of Public Convenience and Necessity (PCN). This would eliminate any confusion with this process and any other permit processes referred to as exceptions or permits. Additionally, staff proposes that all PCN’s be acted on by the Planning Commission or City Council on appeal. This change aligns the process more closely to the Conditional Use Permit process for off-sale of alcohol.

Staff is also proposing a number of mandatory criteria for the approval of a determination of Public Convenience or Necessity. If the proposed off-sale use could not meet these mandatory criteria, it would be rejected from consideration. Staff is proposing the following mandatory criteria:

- a. The proposed use is not located within a target law enforcement area; and
- b. The proposed use would not lead to the grouping of more than four off-sale uses within a 1,000 foot radius from the proposed use; and
- c. The proposed use would not be located within 500 feet of a school, day care center, social services agency, or residential care or service facility, or within 150 feet of a residence; and
- d. Alcohol sales would not represent a majority of the proposed use.

If the application for Public Convenience or Necessity is not rejected on the basis of the mandatory criteria, then the application would be looked at in relation to a series of discretionary criteria. These discretionary criteria are expressed as findings that the Planning Commission, or Council on appeal would have to make. Staff is proposing the following findings for off-sale uses in census tracts subject to the Public Convenience or Necessity process:

- a. The census tract is unusually configured and the proposed off sale outlet would act as a convenience to an underserved portion of the community; or

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- b. The proposed off-sale outlet would enhance the vitality of an existing commercial area;
or
- c. The census tract has a low population in relation to other census tracts in the City, and the proposed off-sale outlet would not contribute to an over concentration in the absolute numbers of off-sale outlets in the area; or
- d. The proposed off-sale use is appurtenant to a larger retail use and provides the public with a more convenient shopping experience.

City Council Resolution No. 67681.

In 1997, the City Council Passed Resolution No. 67681 which identified 24 census tracts of special concern related to the off-sale of alcohol. These 24 census tracts spanned across Council District Five, Seven and Eight (see attached). This resolution was never intended to include all the census tracts covered by the Caldera Legislation and in fact has does not reflect the current census tract boundaries with the 2000 Census. For that reason, staff is recommending that the Planning Commission recommend to the Council rescission of that Resolution. It is staff's opinion that all areas of the City be treated equally relative to issue of off-sale of alcohol and that with appropriate findings for both land use permits and determinations of public convenience or necessity, there is no need for said resolution.

Enumeration of Off-Sale of Alcohol

Currently, the off-sale of alcohol is enumerated with no distinction between beer and wine, or distilled liquors. The ABC does distinguish between types of alcohol, and therefore staff is proposing to separately enumerate the off-sale of distilled liquor separately from the off-sale of beer and wine. This distinction would allow the City to re-evaluate the performance of existing beer and wine off-sale establishments when they apply for an ABC license for the full range of alcohol. Historical experience in this City indicates that a change from an off-sale beer and wine license to an off-sale general license represents an intensification of use, most often expressed as an increase in the total amount of shelf space devoted to alcohol sales. It is staff's opinion that it is appropriate to examine land use impacts resulting from that intensification of use through the Conditional Use Permit process, including noise, traffic, and on-site circulation issues. The separate enumeration would also give the City a way of requiring a permit when existing legal non-conforming establishments change ABC license types. By going from one enumerated use to another, it would be considered a change in use of a legal nonconforming use. Under the current legal nonconforming provisions, this change of use would require a Conditional Use Permit.

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Elimination of the Prohibition on Concurrent Sale of Food or Alcohol and Gasoline

One of the major impetuses for the review of the City's regulations relating to the off-sale of alcohol was the current prohibition on the concurrent sale of gasoline and alcohol. Over the past two years, staff has reviewed the issue, and looked into the likelihood of increased crime from the concurrent sale of gasoline and alcohol. Based on Council direction on June 14, 2005, staff is recommending the rescission of the current prohibition on concurrent sale of gasoline and food or alcohol. The Zoning Ordinance provisions related to the prohibition on concurrent sale of food or alcohol and gasoline were approved in 1985, six years prior to the requirement for a Conditional Use Permit for the off-sale of alcoholic beverages, and eight years prior to the State's creation of the liquor license exception process. With the existence of the Conditional Use Permit requirement and the need for a determination of Public Convenience or Necessity in some instances, along with the augmentation of findings needed to support both, it is staff's opinion that there are adequate regulatory tools in place to regulate the location of off-sale outlets citywide, and that a specific prohibition against the sale of food and alcohol at gas stations only serves to penalize one segment of the market. Staff proposes to eliminate the current prohibition on concurrent sale, and treat the off-sale of alcohol at a gasoline station or on the sale parcel as a gasoline station the same as all other off-sale establishments.

However, as the Chief of Police has sent a memorandum to the Director of Planning indicating their concerns regarding the concurrent sale of food or alcohol and gasoline. The Police Department is concerned about the possibility of increased crime at gas stations that sell alcohol, and have expressed their desire to maintain the existing prohibition on the concurrent sale of gasoline and food or alcohol. That memo is attached, and a portion of it is excerpted below:

The Department's Crime Analysis Unit (CAU) conducted an analysis for fiscal years 1995 through 2005. The results of that analysis revealed that when calculating the average number of reported incidents for all gasoline station addresses by premise type (889), each address had an average of 3 reported incidents during the 10-year time period. When calculating the average number of reported incidents for the gasoline station premise type addresses with ABC permits (29), these addresses had an average of 13 reported incidents during the same time periods. With this information in mind, a citizen or a business is more likely to be a victim of a crime at a location that sells alcohol than at one that does not.

Criteria for the Location of Off-sale Establishments

Staff is also proposing more definitive criteria related to the approval of off-sale establishments in relationship to potentially incompatible land uses. In order to approve a Conditional Use Permit for off-sale under the proposed ordinance, the Planning Commission would have to find that if the proposed off-sale outlet were within 500 feet of another off-sale outlet, the use would not result in a total of more than four off-sale outlets within a 1,000 foot radius of the proposed location. If the four other off-sale outlets were located within a 1,000 foot radius of the proposed

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outlet then the Planning Commission, or City Council on appeal, would have to make a special finding acknowledging an excess concentration of outlets in the area, and explain why such concentration would not create an adverse impact on public health and safety.

As a part of the required findings for a Conditional Use Permit, the Planning Commission also must analyze the proposed off-sale outlet's location and orientation in relation to other potentially incompatible land uses, including childcare centers and schools within 500 feet, and residential uses within 150 feet. Staff is proposing to add social service agencies, and residential care and service facilities within 500 feet of the proposed use to that list. These changes would provide greater clarity about the appropriate location of off-sale outlets in relation to such potentially incompatible uses.

Public Outreach Policy

The current City Council Public Outreach Policy includes varying levels of outreach based on typed of project. Staff is proposing that all off-sale permit applications be considered a proposal of Significant Community Interest under the Council's Public Outreach Policy. This differentiation would allow for earlier notification of neighborhood groups, and would require: noticing of any public hearing 21 days in advance instead of the standard 14 days; noticing over a 1,000 foot radius instead of the standard 500 foot radius; and a mandatory community meeting prior to a public hearing.

Enforcement Tools and Standard Conditions

Code Enforcement is the lead enforcement agency for investigating complaints involving violations of a Conditional Use Permit (CUP), although permit conditions may be enforced by the Police Department, as well. Complaints may be made by telephoning Code Enforcement during normal working hours, contacting the Call Center during nonworking hours or by registering the complaint using the complaint form on the Code Enforcement website. In addition, residents may register complaints by calling the Police non-emergency line 311.

Currently, CUP permit condition violations are corrected through the administrative remedies process as defined in Chapter 1.14 of the Municipal Code. Once the complaint is verified, Code Enforcement Inspectors issue a Compliance Order to the business and/or property owner citing the specific permit condition being violated. The business and/or property owner will be afforded a reasonable period of time to correct the violation. Failure to correct the violation(s) within the time period proscribed may result in the imposition of administrative penalties, by the San Jose Appeals Hearing Board (Board), up to the amount of \$2,500 per day, per violation, and up to a maximum of \$100,000.

In an effort to address CUP permit condition violations in a timelier manner, Code Enforcement in partnership with the City Attorney, is examining the possibility of utilizing the administrative citation process to address permit condition violations similarly to the administrative citation fine

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developed to address *Violations of Construction Hours*. The administrative citation process is intended for violations that are considered transient in nature.

In addition to the administrative remedies and administrative citation processes the Zoning Ordinance delineates two parallel enforcement tools for dealing with businesses that either create a nuisance by their operation, or are not in compliance with the conditions of their permit.

For legally permitted uses, the process is the Notice of Non-compliance / Order to Show Cause process, in Chapter 20.100 of Title 20, the Zoning Ordinance. A Notice of Non-compliance can be issued to any permit holder that fails to abide by any of the conditions in their permit. If the noncompliance is not corrected within the timeframe specified on the notice, then the Director of Planning may issue an Order to Show Cause why the permit shall not be revoked, suspended, or modified. The Order to Show Cause is heard before the Planning Commission, and the Planning Commission has the ability to revoke suspend, or modify any permit upon finding that the violation of any condition of the permit, City ordinance or state law was not corrected within the specified timeframe, or upon finding that the use as presently conducted creates a nuisance.

In a similar way, 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 Averse Public Impact section of the Zoning Ordinance (Chapter 20.150 of Title 20), the Director of Planning has the ability to issue an Order to Show Cause to a legal nonconforming use creating an adverse public impact. The Order to Show Cause process is identical to the process for legal uses, and can result in termination of the legal non-conforming 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.

The Zoning Ordinance and the Sign Ordinance (Title 23 of the Municipal Code) have provisions that address the appearance of businesses generally, and aid law enforcement by requiring windows to be easy to see through, increasing natural surveillance and reducing the opportunity for crime. Zoning Ordinance Section 20.100.435 requires first floor windows to be constructed of clear glass. The Sign Ordinance, in Section 23.02.1060, allows window signs up to a maximum of 25% of the window area, keeping the great majority of window area transparent. These provisions also have the benefit of improving the overall look and perception of safety in commercial districts.

One other enforcement mechanism available to address permit condition violations is the Administrative Nuisance Abatement. Any City Department may refer a condition wherein a public nuisance exists to the City Attorney with a request that a *Notice to Cease and Desist* be issued. This process is outlined in Chapter 1.13 of the San Jose Municipal Code was designed and intended to be used to address and correct the more egregious violations.

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CEQA

The proposed ordinance is exempt under CEQA guidelines section 15305, minor alterations to land use limitations, because the proposed project does not fundamentally change the Conditional Use Permit process, but modifies the provisions, and makes the exception process and findings clearer.

COORDINATION

Preparation of this memorandum has been coordinated with the City Attorney's Office and the Police Department.

STEPHEN M. HAASE, DIRECTOR
Planning, Building, and Code Enforcement

Alcohol revisions PC SR.doc
PBCE003/Zoning/zoning/new ord/gasoline combined uses
SMH;jmh