

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 11/10/04 Item: 3d

File Number

CP04-081

Application Type

Conditional Use Permit

Council District

3

Planning Area

Central

Assessor's Parcel Number(s)

259-35-051

## STAFF REPORT

### PROJECT DESCRIPTION

Completed by: Lesley Xavier

Location: East side of Almaden Avenue, approximately 170 feet south of West St. John Street

Gross Acreage: 0.61

Net Acreage: 0.61

Net Density: n/a

Existing Zoning: DC Downtown  
Primary Commercial District

Existing Use: Public eating, drinking, and entertainment establishment.

Proposed Zoning: No change

Proposed Use: Conditional Use Permit for (1) entertainment and drinking establishment,  
and (2) late night use hours of operation until 2:00 am.

### GENERAL PLAN

Completed by: LX

Land Use/Transportation Diagram Designation  
Core Area

Project Conformance:  
 Yes  No

### SURROUNDING LAND USES AND ZONING

Completed by: LX

North: Restaurant/bar

DC Downtown Primary Commercial

East: Restaurant/bar

DC Downtown Primary Commercial

South: Restaurant/bar

DC Downtown Primary Commercial

West: Office, parking lot

DC Downtown Primary Commercial

### ENVIRONMENTAL STATUS

Completed by: LX

Environmental Impact Report adopted  
 Negative Declaration circulated on

Exempt  
 Environmental Review Incomplete

### FILE HISTORY

Completed by: LX

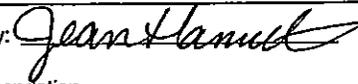
Annexation Title: Original City

Date: March 27, 1850

### PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

Approval  
 Approval with Conditions  
 Denial

Date: 11-10-04

Approved by:   
 Action  
 Recommendation

### CONTACT/APPLICANT

Aimee Escobar  
386 Jackson Street  
San José, CA 95112

### OWNER

Cucuzza Family Partnership  
Attn: Frank Cucuzza Jr.  
1309 Glen Eyrie Avenue  
San José, CA 95125

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**PUBLIC AGENCY COMMENTS RECEIVED**

Completed by: LX

## Department of Public Works

- See attached.

## Other Departments and Agencies

- San Jose Fire Department and Environmental Services Department

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**GENERAL CORRESPONDENCE**

- None.

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

The applicant, Fanny and Alexander, is requesting a Conditional Use Permit (CUP) to allow for an entertainment and drinking establishment which includes a cocktail lounge, dancing, live music, and DJ, all with late-night use hours of operation between 12:00 midnight and 2:00 am. The subject site is located within the DC Downtown Primary Commercial Zoning District. According to the Zoning Ordinance, a CUP is required for both a drinking and an entertainment establishment, and late night uses. Fanny and Alexander's is an existing restaurant and nightclub/bar, which had an approved Conditional Use Permit for a nightclub/bar and entertainment uses that expired.

**Site Conditions and Context**

The subject site is located in a multi-tenant commercial building located at 72 North Almaden Avenue on 0.61 gross acres. The site is surrounded with a mixture of restaurant, nightclub, and entertainment uses. San Pedro Square is located to the east of the site. The Opus West office building and surface parking are located to the west, and restaurant and bar uses are located to the north and south including Tied House and 71 St. Peter.

**Project Description**

The restaurant, drinking and entertainment establishment, Fanny and Alexander's, is located in one tenant space of a multi-tenant commercial building located on the east side of Almaden Avenue, approximately 170 feet southerly of West St. John Street. The establishment would include a cocktail lounge, which is considered a drinking establishment pursuant to the Zoning Code, dancing, live music, and a DJ. The establishment proposes to be open from 11:00 a.m. to 2:00 a.m. Thursday through Saturday, 11:00 a.m. to 10:00 p.m. on Sundays, and 11:00 a.m. to 11:00 p.m. Monday through Wednesday. The commercial building that Fanny and Alexander's is located in is a structure that is listed as a contributing structure on the City of San Jose's Historic Resource Inventory. The applicant is not proposing any exterior changes to the structure with this Conditional Use Permit.

The subject site is also located in the Downtown Parking Management Zone. This Zone establishes the minimum number of off-street parking spaces required for uses conducted within the Zone. For both a drinking and entertainment establishment use there is no parking required.

## **GENERAL PLAN CONFORMANCE**

The existing and proposed use of the commercial building is consistent with the San José General Plan Land Use/ Transportation Diagram designation of Core Area in that entertainment uses are an intended use under the designation. The proposed use also furthers the City's General Plan Downtown Revitalization Major Strategy. This Major Strategy encourages new investment in and around the Downtown to create a prominent and attractive place with a vibrant mix of uses. Fanny and Alexander is an existing restaurant with a nightclub/bar. The continuance of the use will encourage investment in Downtown by keeping tenant spaces occupied so that there is a vibrant mix of uses.

## **ENVIRONMENTAL REVIEW**

The Director of Planning, Building, and Code Enforcement has determined that this project is exempt from environmental review requirements under Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act (CEQA). Pursuant to Section 15301 of the CEQA Guidelines, permitting of existing private facilities involving negligible or no expansion of use are exempt from further environmental review. The proposed project qualifies for this exemption in that the project involves the permitting of an existing drinking and entertainment establishment in an existing tenant space in an existing commercial building.

## **ANALYSIS**

The primary policies applicable for the review and analysis of this project are City Council Policy 6-27 for the Evaluation of 24 Hour Uses, City Council Policy 6-23 for the Evaluation of Nightclubs and Bars, and Criteria for Review of a Liquor License Exception. The analysis of each of these issues is discussed below.

### **City Council Policy 6-27: Evaluation of 24 Hour Uses**

The City Council Policy, Evaluation of 24-Hour Uses, is intended to assure compatibility of uses operating between 12:00 midnight and 6:00 a.m. with surrounding land uses. In regard to nightclubs/bars, the Policy states that uses under this category should meet the City Council Policy on the Guidelines for Evaluation of Nightclubs and Bars. Please see the discussion below.

### **City Council Policy 6-23: Guidelines for Evaluation of Nightclubs and Bars**

The City Council Policy, Guidelines for Evaluation of Nightclubs and Bars, was written to facilitate the evaluation process for individual permit applications by identifying the needed project characteristics that are necessary for approval.

Key issues identified in the policy that are relevant to this proposal include land use compatibility and noise. The subject site is located in the Downtown and is adjacent to commercial, nightclub, and restaurant uses. These adjacent uses are similar hence compatible with the proposed nightclub/bar. As a part of this Conditional Use Permit, the project will be required to meet City noise standards.

In addition, the area immediately surrounding the proposed nightclub/bar is designated for Core Area in the General Plan. The Core Area designation intends for a mix of office, retail, service, high density

residential, and entertainment uses in the Downtown Core Area to facilitate a vibrant urban environment. The proposed use furthers this intent. Based on the analysis, staff concludes that the proposed drinking and entertainment use is consistent with the intent of the Council Policy.

## **PUBLIC OUTREACH**

Notices of the public hearing for this project were sent to all property owners within 500 feet of the subject property. The Planning Commission Agenda is posted on the City of San José website, which includes a copy of the staff report. Staff has been available to discuss the project with members of the public.

## **RECOMMENDATION**

The Planning staff recommends that the Planning Commission approve the requested Conditional Use Permit and Liquor License Exception 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. This site has a designation of Core Area on the adopted San José 2020 General Plan Land Use/Transportation Diagram. The proposed use is consistent with this designation.
2. The site is zoned currently zoned DC Downtown Primary Commercial.
3. The site is 0.61 gross acres in size.
4. The site consists of a two-story multi-tenant commercial building, and the subject tenant space in the building is 5,318 square feet.
5. The area immediately surrounding the site is designated Core Area on the San José 2020 General Plan Land Use/Transportation Diagram and is located in the DC Downtown Primary Commercial zoning district.
6. Uses surrounding the site include restaurant and bar uses to the north, east, and south, and office and surface parking to the west.
7. The proposed project consists of a public eating establishment and a drinking and entertainment establishment which includes a cocktail lounge, dancing, live music, and DJ, all with late night use hours of operation between 12:00 midnight and 2:00 a.m.
8. A Conditional Use Permit is required to allow the drinking and entertainment establishment and late night use hour in the DC Downtown Commercial Zoning District.
9. Council Policy 6-23 specifies that the Chief of Police evaluate all bar and nightclub proposals and recommend conditions necessary to ensure the safety of patrons and citizens. The nightclub/bar is required to obtain a public entertainment permit from the Police Department and an amusement device permit from the Treasury Department.
10. The subject site is located in the Downtown Core/Entertainment District.

11. Alcohol service and entertainment will cease at 1:30 a.m. daily.
12. The subject site is located in the Downtown Parking Management Zone. Within this Zone, there is no parking required for a drinking or entertainment establishment use.
13. Under the provisions of Section 15303 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.

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

1. The proposed project conforms to the City's General Plan.
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 in this title, or as 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.
4. Under the Downtown Parking Management Zone no parking is required for the nightclub/bar use. 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 is 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 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.
2. **Conformance with Plans.** Construction and development shall conform to approved development plans entitled, "Fanny & Alexander" dated October 11, 2004, on file with the Department of Planning, Building and Code Enforcement.
3. **Building Clearance for Issuing Permits.** Prior to the issuance of a Building Permit, the following requirements must be met to the satisfaction of the Chief Building Official:
  - a. *Construction Plans.* This permit file number, CP04-081, shall be printed on all construction plans submitted to the Building Division.
4. **Fire Safety.** The applicant shall meet all requirements of the Fire Department at the Building Permit stage.
5. **Additional Permits.** Obtain all applicable permits required per the San José Municipal Code including but not limited to a public entertainment permit from the Police Department and an amusement device permit from the Treasury Department.

### CONCURRENT CONDITIONS

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

1. **Nuisance.** This use shall be operated in a manner that does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
2. **Noise.** The sound level generated on this site shall not exceed 55 dba DNL at any property line adjacent to a property used for residential purposes and shall not exceed 60 dba DNL at any adjacent property line of property used for commercial purposes.

3. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings, fences, and wall surfaces within 48 hours of defacement.
4. **Anti Litter.** The site and surrounding area shall be maintained free of litter, refuse, and debris.
  - a. Cleaning shall include keeping all publicly used areas free of litter, trash, cigarette butts and garbage and shall include daily damp washing of all exterior walls and sidewalks along the project's frontage.
  - b. Mechanical equipment used for outside maintenance, including blowers and street sweepers shall not be used between 10:00 p.m. and 6:00 a.m. daily.
  - c. The facility operator shall provide adequate ashtrays along the business frontage to accommodate patrons who wish to smoke outdoors. Patrons smoking outdoors shall not impede pedestrian traffic along the adjacent rights-of-way, nor create a nuisance for adjoining businesses.
5. **Hours of Operation.** Hours of operation are as follows:  
Monday through Wednesday, 11:00 a.m. to 11:00 p.m..  
Thursday through Saturday, 11:00 a.m. to 2:00 a.m.  
Sunday, 11:00 a.m. to 10:00 p.m.
6. **Alcohol Service.** Alcohol service shall cease at 1:30 a.m.
7. **Entertainment.** All entertainment shall cease at 1:30 a.m.
8. **Use Limitations.** Admittance to the establishment from 10:00 p.m. to 2:00 a.m. is restricted to patrons 21 years of age and older. Additionally, any other time that the facility is operating as an entertainment establishment where entertainment is not incidental to the primary public eating establishment use, no patrons under the age of 21 years old shall be allowed within the establishment.
9. **Queuing.** The nightclub operator shall use stanchions to contain the queuing line for its entire length. The queuing operation for the facility shall not disrupt pedestrian movements on the sidewalk, and shall allow for 8 feet of clear pedestrian movement at all times. The queuing operation shall utilize the frontage of the subject site before utilizing adjacent business frontage.
10. **Patron Parking.** The project operator shall identify and publicize to its patrons the location and availability of parking facilities within the vicinity of the project site.
11. **Lighting.** This permit allows no new on-site lighting.
12. **Sign Approval.** No signs are approved at this time. All proposed signs shall be subject to approval by the Director of Planning.

## CONDITIONS SUBSEQUENT

1. **Permit Expiration.** This Conditional Use 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 has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit in accordance with Title 20. The Permit Adjustment must be approved prior to the expiration of this Permit.

2. **Time Limit.** This Conditional Use Permit expires and has no further force or effect five years from the date of its approval.

Please note that this conditional use permit has been granted for a period of 5 year(s) only. You are being specifically and separately advised of this time limitation so that you will consider this time limitation in your decision to accept this permit or as you make any investment decision related to this property.

3. **Renewal.** The permit holder may seek renewal of a time-conditioned Conditional Use Permit by filing a timely renewal Conditional Use Permit application. In order to be timely, an application for renewal must be filed more than ninety (90) calendar days but less than one hundred eighty (180) calendar days prior to the expiration of the Conditional Use Permit. Once a renewal application has been filed in a timely manner, the expiration date of the Conditional Use Permit is automatically extended until either the issuance or denial of the application for renewal has become final.
4. **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

# Memorandum

**TO:** Lesley Xavier  
Planning Department

**FROM:** Ofcr. Dave Kirkendall #1749  
San Jose Police Vice Unit

**SUBJECT:** CP 04-081

**DATE:** November 3, 2004

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Approved

Date

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I have received your November 1, 2004 request for input regarding the renewal of a Conditional Use Permit (CUP) for late night use and bar/nightclub use at an existing restaurant previously known as Fanny and Alexander's, 72 North Almaden Blvd, San Jose, CA. The location is currently know as Cuccini Restaurant and Lounge and has a Type 47 On-Sale General Eating Place Alcohol Beverage Control (ABC) License which allows the sale of beer, wine and distilled spirits. In addition they currently have a valid Public Entertainment Permit pursuant to San Jose Municipal Code (SJMC) 6.60.040.

Per Business and Professions (B&P) Code Section 23958, the State of California Department of Alcohol Beverage Control shall deny an ABC Application for an ABC License if the issuance of that license would tend to create a law enforcement problem or if it would result in or add to an undue concentration of ABC Licenses, with certain exceptions as described in B&P Section 23958 (b)(1). A location can be unduly concentrated because of its criminal statistics and/or it's proximity to other ABC Licenses. ABC can issue the license per B&P Section 23958 (b)(2) if the local governing body determines that the public convenience or necessity would be served. The City of San Jose Planning Department or the Planning Commission are the delegated authorities to grant these exceptions.

The location is not in a Project Crackdown or Weed and Seed Area. The location is in the Saint James Square Strong Neighborhood Initiative Area (SNI). I would recommend contacting Richard Keit; City of San Jose Neighborhood Action Team at 794-1160 to address neighborhood concerns.

Business and Professions Code Section 23958.4(c)(1) defines a reporting district as a geographical area within the boundaries of a single government entity (city or the unincorporated area of the county), that are identified by the local law enforcement agency in the compilation and maintenance of statistical information on reported crimes and arrests. In the City of San Jose that geographical area is a police beat.

Business and Professions Code Section 23958.4(c)(2) defines reported crimes as the most recent yearly compilation by the local law enforcement agency of reported offences of criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny theft, and vehicle theft, combined with all arrests for other crimes, both felonies and misdemeanors, except traffic citations. These crimes are often referred to as Part 1 or Index Crimes, which are the more serious crimes, tracked.

Cuccini's is located in San Jose Police Beat E2. The reported crime statistics as defined by B&P Section 23958.4(c) **are significantly** over the 20% crime index thus the location **is** considered unduly concentrated per B&P Section 23958.4 (a)(1).

## Fiscal Year 2003-2004 Police District E Crime Statistics

Beat	Index Crimes	Arrests	Total	20% Above Average
E1	128	302	430	NO
E2	267	798	1065	YES
E3	298	755	1053	YES
E4	189	324	513	NO
City Average	317	293	610	NO
Average + 20%	380	352	732	YES

The police beats in District E are below the city average of indexed crimes. The arrests in Police Beat E2 are 172% and E3 are 158% over the average arrest rate for the city. Resources are often redirected to handle the over load of calls in those impacted Police Beats. These heavy arrest rates in relation to their low index crime numbers indicate that there is a significant number of non-indexed crime arrests and even more contacts that do not result in arrests.

The reported crime statistics as defined by B&P Section 23958.4(c)(2) only takes into account the seven major reported Index Crimes and does not reflect the multitude of other reported crimes that actually are received in any given reporting district. Reported crimes such as drunk in public, disturbances, crowd control, fights, traffic control and many others actually take up a significant amount of police resources and time. These are typical types of crimes associated with entertainment establishments. Granted some of these crimes would be reflected in the arrest statistics but in a majority of these types of crimes no arrest are made so they would not be reflected in the Index Crimes figures.

The downtown entertainment area (Police District E) has an extremely high concentration of ABC establishments, which primarily focus on food service and/or entertainment. These businesses create a significant draw to the downtown area. Problems associated with these types of businesses such as drunk in public, disturbances, crowd control, fights, traffic control, etc. create a significant policing problem. When the Entertainment District was created funds were established to address the some of the additional anticipated police costs created by this influx.

A supervising Sergeant was assigned to oversee the primary entertainment evenings of Wednesday thru Saturday. A limited number of officers were assigned to the Sergeant on overtime bases to support him. Budget limitations have reduced these additional funds resulting in a decrease in the number of officers and hours they are allowed to work.

The decrease in manpower shifts more responsibility to the assigned beat officers in the police district. The entertainment district has four police beats and normally no more than one officer per beat is assigned and a supervisor. When incidents occur at these establishments multiple unit response is normally required. This results in units being pulled from adjoining police beats. This happens on a fairly regular basis in the downtown area.

There is overlap of the swing and midnight units throughout the city between approximately 10:00 PM and 12:30 AM. This enables the department to have resources to cover the busiest hours of the day. After approximately 12:30 AM the midnight shift solely responsible for the city. The entertainment district does have additional officers on Wednesday thru Saturday evenings until approximately 2:30 AM to monitor the crowds during the closing of the entertainment businesses. After 12:30 AM Monday through Wednesday and after 2:30 AM the rest of the week there are no additional resources to call upon.

Department of Alcohol Beverage Control (ABC) records indicate Cuccini's is in census track 5008. Pursuant to B&P Section 23958.4 (a)(2) ...the ratio of on-sale retail licenses to population in census tract 5008 does exceed the ratio of on-sale retail licenses to population in the county in which the applicant premises are located.

## Authorized and Current ABC Licenses in Downtown Census Tracks

Census Tracks	Authorized ABC Licenses As of January 2003		Current ABC Licenses As of September 3, 2004		Unduly Concentrated	
	On - Sale	Off - Sale	On - Sale	Off - Sale	On - Sale	Off - Sale
5002.00	7	4	7	5	NO	YES
5003.00	3	2	12 + 2 pending	5 + 1 pending	YES	YES
5008.00	3	2	60 + 4 pending	4	YES	YES
5009.01	4	2	50 + 7 pending	6 + 1 pending	YES	YES
5009.02	5	3	2	1	NO	NO
5010.00	8	4	7	2	NO	NO
5011.00	11	5	20	9	YES	YES
5012.00	7	3	5	6	NO	YES
5013.00	6	3	3	2	NO	NO
5016.00	10	5	6 + 1 pending	5	NO	NO
5017.00	8	4	12	5 + 1 pending	YES	YES
5019.00	5	2	10 + 1 pending	8	YES	YES

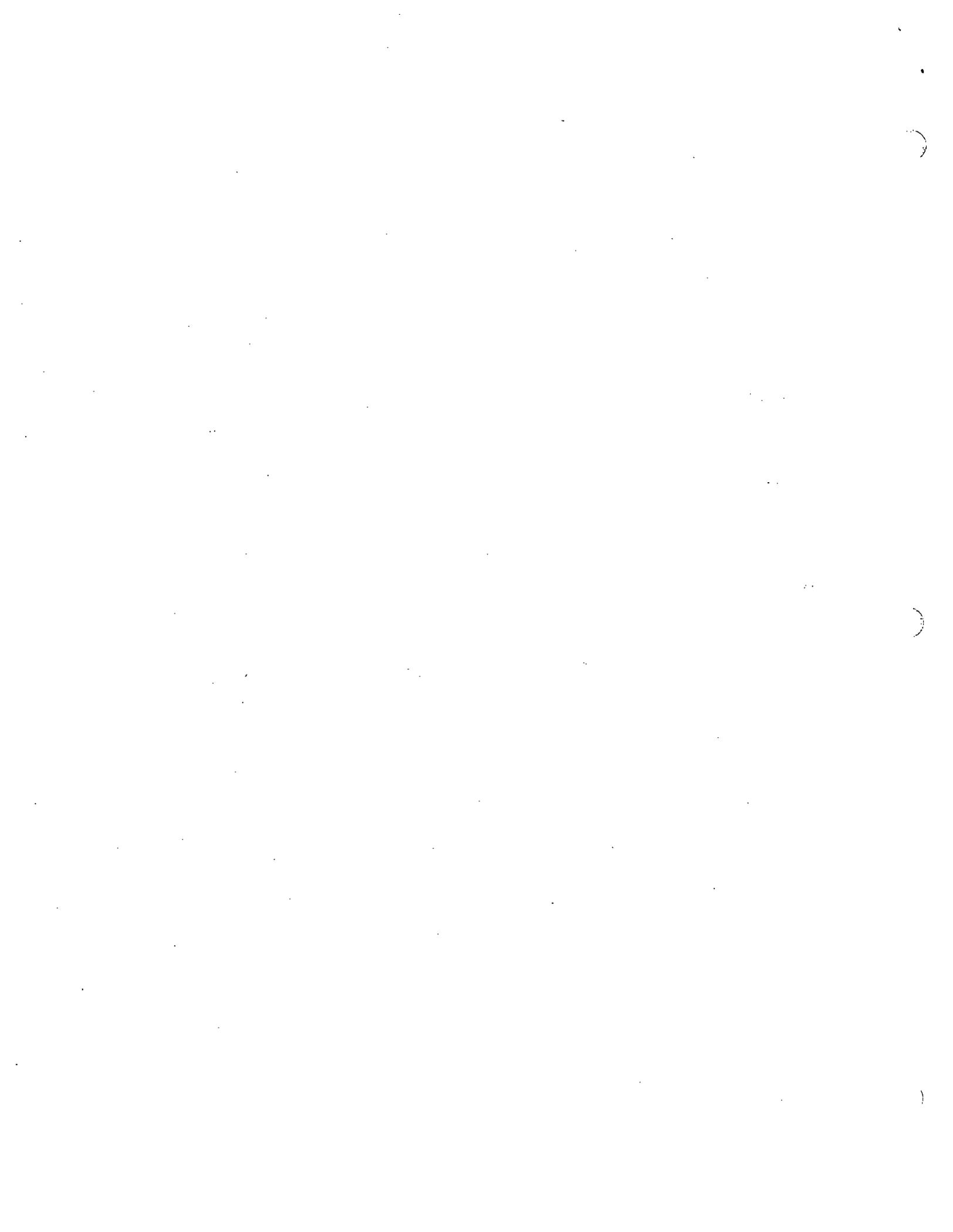
B&P Section 23598.4 (b)(1) states that ABC may issue a license to a retail on-sale bona fide eating place, if the applicant shows ABC that public convenience or necessity would be served by the issuance. An exception permit is not needed for this location, as it is a bona fide eating place.

In a previous discussion, the owner of Cuccini's had expressed an interest in allowing under 21 patrons to allow them to enjoy the entertainment with their families. I advised the owner that no one under twenty-one was allowed once the non-incident entertainment began. The San Jose Police Department is adamant in its objection to this mixing of under 21 with regular nightclub patrons in an adult oriented entertainment district. **We would recommend an additional condition on the CUP, which addresses this concern. Example: No patrons under 21 once the non-incident entertainment begins.** This or a similar condition should be in CUP's that are proposing entertainment in conjunction with alcohol service and late night use.

The Police Department is concerned about the ever-increasing concentration of ABC and Entertainment Establishments in such a compressed area. This concern is even more important as staffing issues are making it more difficult to adequately provide adequate support for these businesses. The Police Department is well aware of the importance of the business community to the City. Because of this and because this is an existing business and the police contacts at the previous business at this location were minimal (3 contacts in the last year), the Police Department has no objections to the renewal of the CUP.

Please feel free to contact me at 277-4322 if you have any questions.

Dave Kirkendall #1749  
Administrative Officer  
Special Investigations/Vice



## **RESOLUTION NO.**

Resolution of the Planning Commission of the City of San José granting, subject to conditions, a Planned Development Permit Amendment to use certain real property described herein for the purpose of allowing the removal of one, approximately 76-inch in circumference Aleppo Pine tree.

## **FILE NO. PDA 84-046-01**

**BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF SAN JOSE:**

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San Jose Municipal Code, on March 3, 2004, an application (File No. PDA 84-046-01) was filed for a Planned Development Permit Amendment for the purpose of allowing the removal of one, approximately 76-inch in circumference Aleppo Pine tree, on that certain real property (hereinafter referred to as "subject property"), situate in the R-1-8 (PD) Planned Development Zoning District, located at the southerly side of Via Primavera Court, approximately 250 feet easterly of Via Primavera Drive, San Jose, 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, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San Jose Municipal Code, the Director of Planning, Building and Code Enforcement conducted a hearing on said application; and

WHEREAS, on June 18, 2004, the Director of Planning, Building and Code Enforcement approved the application, from which decision a neighboring property owner has appealed to this Planning Commission; and

WHEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San Jose Municipal Code, this Planning Commission conducted a hearing on said application, notice of which was duly given; and

WHEREAS, at said hearing, this Planning Commission gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this Planning Commission received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this Planning Commission received in evidence a development plan for the subject property entitled, "Pine Tree Behind 596 and 598 Via Primavera Court – San Jose," dated March 3, 2004. Said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, 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 Planning Commission;

NOW, THEREFORE:

After considering evidence presented at the Public Hearing, the Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. This site has a designation of Medium Low Density Residential (8 DU/AC) on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
2. The project site and surrounding properties are in the R-1-8 (PD) Planned Development Zoning District.
3. The tree in question is located in a portion of the common area for a single-family detached residential condominium project.
4. The project is exempt from environmental review under the California Environmental Quality Act, Section 15301, pertaining to minor alteration of vegetation.
5. The Permit would allow the removal of one, approximately 76-inch circumference Aleppo Pine tree.
6. A large leader/portion of the trunk broke off or was removed from the tree.
7. The applicant submitted evaluations of the tree prepared by two different arborists (Lucy Leeburg, dated February 18, 2004 and Deborah Ellis, dated February 27, 2004). Both of these reports indicate that the tree is in good health, but recommend its removal based on concern that the tree presents a hazard to an adjacent residence. The reports note the tree's location on a steep slope with a house on its downhill side and the loss of a large leader/portion of the trunk resulting in an imbalanced tree heavily weighted on the downhill side. An arborist report prepared by Greta Complin, dated June 16, 2004 concludes that the tree is in good health, that it need not be removed, and that the current imbalance can be corrected by crown thinning and restoration techniques.
8. The City Arborist inspected the tree and recommended its removal based on the fact that Aleppo Pines are prone to poor structure and limb failure and that the size and location of the tree represent a potential hazard to the adjacent residence.

9. The appellant submitted a response to the staff report dated October 25, 2004, with additional information regarding the condition of the tree.
10. The Permit includes conditions requiring that the stump and roots of the tree be left in place to minimize erosion and that four replacement trees be planted in the same general area as the tree proposed for removal for removal.

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

1. That the tree affected is of a size, type and condition, and is in such a location in such surroundings, that its removal would not significantly frustrate the purposes of this chapter as set forth in Section 13.32.010.
2. The project is consistent with the site's designation of Medium Low Density Residential (8 DU/AC) on the San Jose 2020 General Plan Land Use/Transportation Diagram.
3. The proposed project is in conformance with the requirements of the California Environmental Quality Act.

**APPROVED SUBJECT TO THE FOLLOWING CONDITIONS:**

1. **Permit Expiration.** This Planned Development Permit Amendment shall automatically expire two years from and after the date of issuance hereof by said Director, if within such two-year period, the proposed use of this site or construction of buildings is not commenced, pursuant to and in accordance with the provisions of this Planned Development Permit Amendment. The date of issuance is the date this Permit is approved by the Director of Planning. 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. **Conformance with Plans.** Construction and development shall conform to approved Planned Development plans entitled, "Pine Tree Behind 596 & 598 Via Primavera Court – San José," dated March 3, 2004, last revised in conformance with Condition Number 7 of this Planned Development Permit Amendment on file with the Department of City Planning and Building and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
3. **Revocation.** This Planned Development Permit Amendment is subject to revocation for violation of any of its provisions or conditions.
4. **Conformance with Municipal Code.** No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code.

5. **Acceptance.** The "Acceptance of Permit and Conditions" form shall be **signed, notarized, and returned** to the Department of City Planning and Building within **60 days** from the date of issuance of permit. *Failure to do so will result in this permit automatically expiring regardless of any other expiration date contained in this permit.*
6. **Approved PD Permit.** This Planned Development Permit Amendment can only be implemented in conjunction with the full and complete implementation of the previously approved Planned Development Permit, File No. PD 84-046.
7. **Plan Revisions.** Within 30 days of the issuance of this Permit and prior to recordation and issuance of a building permit, the applicant shall acquire an approved adjustment to the project plans to include the item(s) listed below to the satisfaction of the Director of Planning. All adjusted items shall be implemented. Failure to secure said adjustment with the following revisions within 30 days shall render this permit null and void:
  - a. The applicant/ homeowner's association must revise the project plans to include a revised Landscape Plan (including planting details and provisions for irrigation) prepared by a Landscape Architect, showing the location of the new replacement trees required in Condition Number 8.
8. **Replacement Trees.** The applicant shall replace the tree with (10) ten 24-inch box specimen trees (appropriate for the soil type and condition, such as Saratoga Laurel) planted in the same general location as the tree that is removed (four trees along the upper portion of the common area, and six trees along the lower portion of the common area).

The (10) ten new trees must be planted a minimum of (6) six months prior to the removal of the Aleppo Pine Tree. The applicant must submit written proof of the installation of the (10) ten new trees to the Director of Planning, within 10 days of their installation indicating the date of installation. When the Pine tree is removed, the stump and roots shall be left in place to minimize erosion, and the area around the tree that is removed shall be mulched.
9. **Previous Conditions.** All of the conditions of the previously approved Planned Development Permit Amendment shall remain unchanged and in full force and effect unless such conditions are specifically modified or deleted by this Amendment. The plans approved with File Number PD 84-046 shall remain in effect except as modified in Condition Numbers 7 and 8 of this Permit Amendment.

**ADOPTED** and issued this **10<sup>th</sup> day of November, 2004**, by the following vote:

In accordance with the findings set forth above, a permit to use the subject property for said purpose specified above is hereby denied.

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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Chairperson

ATTEST:

Stephen M. Haase, Secretary

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Deputy

**NOTICE TO PARTIES**

The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6.

