



THE CITY OF SAN DIEGO

## REPORT TO THE PLANNING COMMISSION

**DATE ISSUED:**

**REPORT NO. PC-14-025**

**ATTENTION:** Planning Commission, Agenda of March 13, 2014

**SUBJECT:** Workshop: Alcoholic Beverage Outlets (Off-Site Consumption) and Conditional Use Permit Process

**SUMMARY** THIS IS AN INFORMATION ITEM ONLY. NO ACTION IS REQUIRED.

### **BACKGROUND**

In 1985, the City of San Diego initiated discussions on the issues associated with alcohol sales and the potential need to regulate the sales of alcohol within the Municipal Code. The genesis of the alcohol regulations was the earlier creation of the Automobile Service Station Guidelines which included a new land use trend of the mini-mart. The idea that gas stations with a retail component could sell alcohol by right was a troublesome issue and a determination to require a special permit for service stations was adopted soon thereafter. The concept of conditioning the sale of alcohol quickly expanded to cover all other alcoholic beverages outlets leading to the current Conditional Use Permit Process (CUP). While the California Department of Alcohol Beverage Control (ABC) issues the liquor license, the City exercises zoning authority.

On September 23, 1986, the City Council adopted the first Alcohol Beverage Establishment regulations and applied it to a "Demonstration Area" that generally covered communities south of University Avenue and extended east and south to the city limits. The 1986 ordinance and demonstration CUP area assigned permit authority to the Zoning Administrator and was originally applied to all alcoholic beverage outlets including restaurants and bars where consumption occurred on site.

In 1995 and again in 1996, the ordinance was amended to apply citywide and only to traditional retail establishments where alcohol was purchased for off-site consumption under ABC Type 20 and Type 21 licenses. The subsequent amendments also transferred the permit authority to the City Manager and ultimately to the Development Services Director, in the form of today's Process Three Hearing Officer as the decision maker. Each version of the ordinance established location criteria that recognized the sale of alcoholic beverages may be inappropriate when in proximity to other types of incompatible land uses. As is the case today, these uses include churches, schools, parks and certain types of social services. Also, similar to today, the original regulations were an attempt to diminish social issues associated with alcohol such as increased



crime, underage drinking, and general misbehavior.

Over the last decade the proliferation of alcoholic beverage outlets, especially within specific communities, has caused a higher level of interest and concern on the part of both community planning groups (asked to provide a recommendation to decision makers), as well as citizens, as to how the City reviews and permits alcoholic beverage outlets. Correspondingly, the number of Hearing Officer Decisions that are appealed to the Planning Commission has increased steadily each year. The Planning Commission is being asked with greater frequency to render decisions that balance the needs and concerns of the community with the rights of individual land owners and businesses. It is that responsibility and the authority to approve, conditionally approve or deny alcohol CUP's that is the basis for this workshop.

## DISCUSSION

As previously stated, the motivation for creating an ordinance to regulate alcohol sales was an attempt to address the potential negative social issues that tend to be associated with the sale and consumption of alcohol. In 1986, the primary issues involved higher crime rates, especially violent crimes, and the proliferation of alcohol outlets in a given area. However, other issues were also identified, including easy accessibility leading to underage drinking, drug dealing and misdemeanor crimes such as loitering, littering and graffiti. It was assumed that conditioning alcoholic beverage outlets with various restrictions would allow for local enforcement through Neighborhood Code Compliance and the Police Department, which in turn would lead to a more compatible land use within the communities.

However, there is a growing concern voiced by drug and alcohol prevention coalitions, anti-alcohol groups and community members that the CUP process is not adequately addressing the problems associated with alcohol sales. Although the larger community issues may involve on-sale outlets, especially in high intensity entertainment areas such as the Gaslamp Quarter, Pacific Beach and North Park, there remain concerns regarding off-sale outlets and over saturation in several San Diego communities.

Questions have been raised as to whether the current regulations are inadequate or does the problem lie with the way in which the regulations are interpreted and applied? Would additional, more restrictive conditions address the problem? Or, should decision makers deny an application by more readily rejecting the findings of facts necessary to approve an alcoholic beverage outlet? And, perhaps as a starting point, should it be generally acknowledged that there are societal impacts inherent to this particular land use that simply cannot be addressed through the land use regulatory process? While such an acknowledgement may be indisputable, it would not relieve local authority from the responsibility to review the current alcoholic beverage outlet regulations and permit process and make improvements where feasible. The following discussion focuses on the City's procedures and current review process, breaking it down to the critical steps along the way.

### Application and Review of Alcohol Beverage Outlets Generally

The San Diego Municipal Code places Alcoholic Beverage Outlets in the retail sales category and identifies such establishments as prohibited, a "Limited Use" or a Conditional Use. A limited use is required to meet certain criteria to be allowed by right. "By right" means the proposed outlet either meets the location criteria or qualifies as an exemption in the Land Development



Code. The most common example of an exemption is a retail outlet greater than 15,000 square-foot and is intended to provide regulatory relief to larger full service retail supermarkets.

A CUP is required for any sized outlet that is:

- Within a census tract, or within 600 feet of a census tract, where the general crime rate exceeds the citywide average general crime rate by more than 20 percent; or
- Within a census tract, or within 600 feet of a census tract, where the ratio of alcohol beverage outlets exceeds the standards established by California Business and Professions Code section 23958.4; or
- In an adopted Redevelopment Project Area;
- Within 600 feet of a public or private accredited *school*, a *public park*, a playground or recreational area, a *church*, a hospital, or a San Diego County welfare district office; or
- Within 100 feet of a residentially zoned property.

Pursuant to the California Constitution, the state has the exclusive authority to regulate the “manufacture, sale, purchase, possession and transportation of alcoholic beverages.” Cal. Const. art. XX, § 22. The California Department of Alcohol Beverage Control is the State agency with sole authority to issue an alcohol license, however local municipalities have authority pursuant to their police powers to create zoning regulations for alcoholic beverage outlets.

Section 23958 of the Business and Professions Code mandates that the ABC “shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if the issuance would result in, or add to, an undue concentration of licenses, except as provided in Section 23958.4 ”. Business and Professions Code section 23958.4 allows ABC to issue a licenses in spite of a law enforcement problem or an undue concentration, if the local authority determines that public convenience or necessity (PC&N) would be served by that issuance.

The ABC defers to local governments to determine whether an application would comply with local zoning requirements. The City of San Diego Conditional Use Permit process includes review by both the San Diego Police Department (Vice Unit) and the Development Services Department, and usually a recommendation by the local community planning group. Currently, an application for an Alcohol Outlet CUP may involve a multi-stepped process beginning with a determination of PCN by the SDPD, and a subsequent submittal for a Conditional Use Permit, a public review and recommendation, a public hearing to approve or deny the CUP, and a protest of the ABC license by the Police Department to include the locally recommended conditions on the Type 20 or Type 21 license. Following is a breakdown of those steps within the process.

#### Public Convenience or Necessity

As noted above, in certain circumstances, the ABC cannot issue a liquor license without a finding that the license would provide a public convenience or necessity. The ABC makes the PC&N finding for most license types, but Business and Professions Code section 23958.4 allows local municipalities 90 days to make the PC&N determination for type 20 and type 21 off-sale licenses before ABC proceeds with its issuance of the license. In San Diego, the San Diego Police Department – Vice Unit has the sole authority to make or deny a PC&N determination. Should the SDPD fail to determine that the public convenience or necessity would be served by the permit’s issuance; there is an appeals process where the matter is heard by the City Manager or designee. Once an applicant has obtained a PC&N determination, they may apply for a



Conditional Use Permit.

### Project Review for Conditional Use Permits

Upon application for a Conditional Use Permit, the project review is initiated. Plans prepared by the applicant are distributed to various reviewers to measure compliance with the applicable development regulations. Distribution includes various City departments, such as disciplines from planning, engineering, environmental, and the SDPD vice unit, as well as the community planning group. Each discipline applies their area of expertise and provides comments to the applicant. Project issues are identified and resolved to the satisfaction of the staff prior to the matter being scheduled for a public hearing. The Development Services Department, Police Department and the Planning Group are all tasked with providing a recommendation to the decision maker as a part of the review process. It should be noted that the initial PC&N determination is not a full review of the merits of the project, therefore, the police department may recommend an application be denied even if a positive finding of public convenience or necessity was made by them in the earlier stage of the process. Once the reviews are complete, DSD provides the decision maker with a written report including a draft of the CUP with conditions and a resolution with findings either approving or denying the application.

### Conditional Use Permit Findings

In order to approve a Conditional Use Permit, a decision maker must affirm a set of findings contained in the Land Development Code. The findings generally determine that the proposed use would not adversely affect the applicable land use plan, would not be detrimental to the public health, safety or welfare, would comply with the applicable development regulations and finally, would be an appropriate use at the proposed location.

The applicable land use plan is the adopted community plan for the area in which the CUP is requested and would include the City's General Plan as well. However, with the exception of the Southeastern San Diego Community Plan, none of the City's other 53 community plans specifically address the sale of alcohol. Therefore, it is not difficult for a decision maker to make the particular finding that the proposed use would not adversely affect the applicable land use plan.

Likewise, the finding that "the proposed use would comply with the applicable sections of the land development code" is not challenging to a decision maker in that the subject of the finding is a "use" rather than a development and is therefore unlikely to include a deviation or variance from the zoning requirements. Additionally, the act of obtaining a CUP for the proposed use is in and of itself complying with the requirements of the code.

The finding addressing the public's health, safety and welfare may seem to be more subjective than the previous two findings. However, when citing how an alcoholic beverage outlet would be detrimental to the public health, safety or welfare, or when determining that any other finding cannot be made, specific examples should be provided for the record. Generally speaking, the addition of alcohol sales to a new or existing retail operation does not present any injury or disadvantage to the public unless it can be proven that crime will go up as a direct result of the additional outlet. This is particularly difficult to prove in high crime and high concentration areas because the crime rate and licenses existed prior to the proposed outlet. In fact, permit conditions that would provide additional securities such as lighting, cameras, security guards, graffiti removal and transparency that heretofore were not a part of a neighborhood could be seen as a



positive effect on the community and a means to improve the public health safety and welfare. Therefore, like the previous two findings, it is challenging to establish a nexus between the proposed sale of alcohol and the perceived detriment to the public health, safety, or welfare.

The last required finding is the crux of a Conditional Use Permit and provides the decision maker with the most subjective avenue to deny or severely restrict alcohol sales if that is the desire and intent. That the proposed use is appropriate at the proposed location is a finding singular to a Conditional Use Permit. While all of the previous findings are included in all other discretionary entitlements, only the CUP includes a finding that the "use" is appropriate at the location at which it is proposed. Therefore, this is the finding that decision makers should give the most weight and gravitas. This finding also could be considered to allow a broad interpretation as to the meaning conveyed by the word "appropriate" when rendering a decision. Alternative definitions could include suitable, proper or desirable.

Regardless of the context, the appropriateness of alcohol sales in an area with high crime, over concentrations and other undesirable aspects can be properly addressed with this finding. For example, as previously noted, where there may not be a direct link between high crime and alcohol sales or over concentration when addressing the public health, safety and welfare, an outlet could be considered inappropriate and undesirable *because* it is proposed in an area with high crime or over concentration. In other words, it is those existing conditions that may render the use inappropriate in the location it is proposed.

#### Permit Conditions

The decision maker has the authority to include permit conditions on any use which are reasonably intended to diminish the negative effect of the use at the proposed location and adjacent neighborhood. The Development Services staff provides draft permit conditions for the decision maker to consider that are based on land use and zoning principles. Typically land use conditions would limit the hours of operation or the display area that can be dedicated to alcohol products. Additional restrictions may include limiting advertising displays to maintain transparency into a store or a prohibition on pay phones and arcade games to discourage loitering. Conditions may also be a requirement for the provision of security lighting, security cameras and security guards. Permit conditions within a CUP are enforceable by various City officials, typically the San Diego Police Department and the Neighborhood Code Compliance Department.

Additional conditions, limitation, restrictions or prohibitions that pertain to the alcohol product are under the purview of the ABC and are typically included in the CUP only as recommendations for inclusion on the ABC license. These recommendations include limiting the proof of alcohol for sale, limiting the packaging to multi-container packages, prohibiting the sale of single cans or bottles under a certain sized container. These are listed as recommendations rather than conditions because there is a limit as to what the City has the power to enforce in terms of CUP conditions under its land use police powers, and what the City is preempted from regulating in terms of the State license conditions.

#### Conclusion:

The City of San Diego established regulatory authority for alcoholic beverage outlets nearly thirty years ago to mitigate the negative aspects associated with the sale of alcoholic beverages. When a Conditional Use Permit is required for the retail sale of alcohol, conditions are applied to

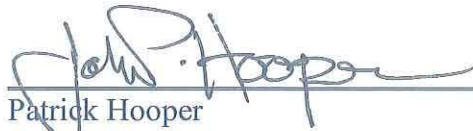
the permit that are intended to limit over concentration, reduce crime and make the outlet a compatible land use in the community. After nearly three decades this approach has not created a universal remedy as some of the same social issues identified in 1985 when the ordinance was initiated are still issues in many of San Diego's communities today. However, that's not to say the current CUP process has been unsuccessful. Statistically, there were 397 Type 20 and 441 Type 21 ABC licenses operating within the City of San Diego's jurisdiction as of June 30, 2012. Of those 838 off-sale licenses, none operating with an approved CUP has been revoked in the last five years. Also, since June 30, 2012, the City has acted on 38 applications for a new or upgraded liquor license. Of the 38 CUP's approved by the Hearing Officer only eight were appealed to the Planning Commission. The Planning Commission denied five of the appeals and granted the Conditional Use Permit. Two appeals were approved and the CUP's denied, and on one occasion, the project was withdrawn prior to a decision.

Respectfully submitted,



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WESTLAKE/JPH

Attachment: Process Flow Chart





## Review Process for Type 20/21 ABC Licenses

