

DATE ISSUED: July 29, 2005 REPORT NO. PC-05-203

ATTENTION: Planning Commission, Agenda of August 4, 2005

SUBJECT: FLAMING SKEWER – APPEAL OF THE HEARING OFFICER’S  
DECISION – PROJECT NO. 59038. PROCESS THREE.

OWNER/ APPLICANT: Yusuf G. Arnitah, Applicant/Lessee  
Charles and Janine Jadallah, Property Owner/Lessor/Permittee  
(Attachment 10).

SUMMARY

Issue(s): Should the Planning Commission –

1. **GRANT** an APPEAL of the Hearing Officer’s decision to **APPROVE** Conditional Use Permit (CUP) No. 174199 to allow establishment of an Alcoholic Beverage Outlet utilizing a Type 20, “Off-Sale Beer and Wine” license, where a Type 21 “Off-Sale General Liquor” license is requested, within the Uptown Community Plan Area?

Staff Recommendation:

1. **GRANT** the Appeal; and **APPROVE** CUP No. 174199, utilizing a Type 21, “Off-Sale General” Liquor license, subject to modification of the project with an added condition restricting the sales of alcoholic beverages to beer and wine only, for consumption off the premises.

Community Planning Group Recommendation: On April 5, 2005, the Uptown Community Planning Group voted 14-0-1 to deny the application unless the City of San Diego Development Services Department approves on-site seating and alcohol is only served during business hours. These concerns have been addressed and are included in the draft Permit, Attachment 6, Condition Nos. 21 and 22. A copy of the minutes of this meeting is included as Attachment 9.a.

At the Uptown Planners meeting on June 7, 2005, subsequent to the decision of the Hearing Officer, the Uptown CPG unanimously passed a motion supporting the Hearing Officer's decision, and requests that the Planning Commission deny the appeal by the Applicant. A copy of this communication is included as Attachment 9.b.

Environmental Review: Staff has reviewed the application and determined that the project is exempt pursuant to Section 15303 (New Construction or Conversion of Small Structures), Article 19 of the California Environmental Quality Act (CEQA), and that there are no environmental issues.

Fiscal Impact Statement: All staff costs associated with processing this project are recovered from a separate deposit account provided and maintained by the Applicant.

Code Enforcement Impact: None with this action.

Housing Impact Statement: This project proposes to remodel an existing 2,000 sq. ft. commercial space to operate a restaurant. The land use designation allows for a mixture of residential and commercial uses. As such, the proposed use is part of an existing mixed-use building that incorporates additional ground-floor commercial space along with existing residential units on the second and third floors. No changes or impacts to the existing units are proposed with this project.

## BACKGROUND

The property is addressed as 3896-B Fifth Avenue and located on the west side of Fifth Avenue between University Avenue to the north and Robinson Avenue to the south, within the CN-1A (Commercial-Node) Zone of the Mid-City Communities Planned District, within the Uptown Community Plan Area (Attachment 3). The Uptown Community Plan designates the subject site for mixed-use commercial development (Attachment 2), and the proposed project implements this designation.

The subject property is comprised of four contiguous legal lots subdivided in 1890 and developed with a two- and three-story, mixed-use building, with residential apartments on the upper floors and commercial space on the ground floor. The project includes a CUP to accommodate an Alcoholic Beverage Outlet as an accessory use to an existing restaurant, located within a 2,000 sq. ft. portion of the commercial space.

Surrounding properties in the neighborhood are developed with a variety of residential, retail commercial and office uses, including restaurants.

## DISCUSSION

### Project Description

The core issue before the decisionmaker is what type of alcohol sales, if any, should be included with the CUP. A Type 20 license (Off-Sale Beer and Wine) allows the sale of beer and wine for consumption off-site. A Type 21 license (Off-Sale General) allows the sale of beer, wine and distilled spirits for consumption off-site. The Applicant currently possesses and seeks to maintain a Type 21 Off-Sale General license. Type 21, Off-Sale General licenses are typically associated with “liquor/package stores”. State of California Department of Alcoholic Beverage Control (ABC) regulations pertaining to Type 20 and 21 licenses do not allow consumption of alcoholic beverages on-site. The sales area of the Alcoholic Beverage Outlet is proposed to be limited as an accessory use to an approximate 100 sq. ft. portion of the restaurant.

Two types of ABC licenses provide for the sale and consumption of alcoholic beverages on-site, and are typically associated with a restaurant use. A Type 47 On-Sale General - Eating Place license (Restaurants) accommodates the sale of beer, wine and distilled spirits for consumption on-site. A Type 41 On-Sale Beer and Wine – Eating Place license (Restaurants) accommodates the sale of beer and wine for consumption on-site. Since Type 41 and Type 47 licenses are typically associated with restaurant uses, and not Type 20 or Type 21 licenses, they are not regulated as Alcoholic Beverage Outlets by the Municipal Code and do not require a CUP.

ABC regulations preclude the transfer or exchange of Type 21-Off-Sale General license with a Type 47 On-Sale General – Eating Place license. Acquisition of a new Type 47, On-Sale General – Eating Place license is accomplished through a lottery process. Acquisition of an existing Type 47, On-Sale General – Eating Place license must otherwise be obtained by purchase on the open market. The Applicant has indicated a desire to maintain the existing Type 21 Off-Sale General license to allow sales of beer, wine and distilled spirits as an accessory use to the existing restaurant.

### CUP - Alcoholic Beverage Outlet Regulations

Land Development Code (LDC) Section 141.0101 specifies the purpose of the Separately Regulated Use regulations, which are to provide for specific uses that may be desirable and appropriate in a particular zone, if limitations or conditions are placed on the development of those uses to minimize detrimental effects to neighboring properties or incompatibility with the permitted uses of the base zone.

LDC Section 141.0502 specifies that any establishment for which a Type 20, Off-Sale Beer and Wine License or a Type 21, Off-Sale General Liquor License has been obtained from, or for which an application has been submitted to, the California Department of Alcoholic Beverage Control (ABC) for permission to sell alcoholic beverages for off-site consumption shall be regulated as an Alcoholic Beverage Outlet. Alcoholic Beverage Outlets are permitted within the CN-1A Zone as limited uses subject to LDC regulations. The limited use regulations, pursuant

to LDC Section 141.0502(b) (1) do not permit alcoholic beverage outlets in any of the following locations:

1. Within a census tract, or within 600-feet of a census tract, where the general crime rate exceeds the city-wide average general crime rate by more than 20 percent.

The subject property is located within a census tract (3.00) where the general crime rate is noted as 121.9 percent above the city-wide average general crime rate.

2. Within a census tract, or within 600-feet of a census tract, where the ratio of Alcoholic Beverage Outlets exceeds the standards established by California Business and Professions Code Section 23958.4.

The subject property is located within a census tract (3.00) which permits a maximum of three (3) off-sale alcoholic beverage outlet. There are currently seven (7) existing off-sale alcoholic beverage outlets, and the granting of any additional alcoholic beverage outlets would further exceed the standards. The transfer of the license from Census Tract 4.00 to Census Tract 3.00 would represent an increase of one license in Census Tract 3.00 (and a decrease of one license in Census Tract 4.00).

3. In an adopted Redevelopment Project Area.

The subject property is not located within a redevelopment area.

4. 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.

The subject property is not located within 600-feet of a public or private accredited school, public park, playground or recreational area, church, hospital, or San Diego County welfare district office.

5. Within 100-feet of a residentially zoned property.

The subject property is not located within 100-feet of a residentially zoned property.

Alcoholic beverage outlets that do not comply with these regulations may nevertheless be permitted if a CUP is approved pursuant to LDC Section 141.0502(c). These regulations include provisions for a recommendation by the Police Department, off-street parking and conditions addressing issues related to on-premise activities, design of the area devoted to alcoholic beverage sales, hours-of-operation, security measures, and lighting, litter, graffiti or nuisance abatement, or other special requirements for the premises. Proposed conditions are included with the draft permit (Attachment 6).

With regard to 1 and 2 noted above, California Business and Professional Code Section 23958.4 provides that “the local governing body may issue a license if a determination is made that the public convenience and or necessity would be served by the issuance”. On November 14, 2000, the City council adopted Resolution No. R-294124 which delegates the authority to determine public convenience and necessity for alcoholic beverage licensing to the Police Department. On July 22, 2004, the Police Department determined that “public convenience and necessity” will be served by issuance of the license to accommodate the Alcoholic Beverage Outlet. A copy of this document is included as Attachment 13.

#### Hearing Officer Action

On April 13, 2005, the Hearing Officer heard public testimony regarding the proposed application. Testimony included opposition by community representatives based on concerns related to the scope of the ABC license allowing off-sale general liquor sales, inconsistency of the existing Type 21 license with the more applicable Type 47 license, high-crime rates and alcohol related crime in the area, and an over-concentration of licenses within the census tract. These concerns indicated a preference that if alcoholic beverage sales were to be allowed at this location, they be limited as an accessory use to the existing dine-in restaurant and limited in scope to restrict the type and configuration of alcoholic beverages.

The Hearing Officer determined that it was appropriate to approve the CUP with a restriction to allow a Type 20 “Off-Sale Beer and Wine” license, in lieu of the existing Type 21 “Off- Sale General” license. This would allow the sale of beer and wine only for consumption off-site. The Hearing Officer imposed conditions on the CUP limiting the Alcoholic Beverage Outlet to a Type 20 “Off-Sale Beer and Wine” license for a limited duration of one-year, after which time the CUP would be required to be renewed. This renewal would include a requirement for a recommendation from the community planning group and a public hearing. There would be no limitation on the seating within the restaurant or any off-street parking requirement. These Conditions have been added to the Permit, as approved by the Hearing Officer which is included as Attachment 15, Conditions 10, and 19 through 22. Copies of CUP Permit No. 174199, and approved Resolution No. 4981 are included as Attachments 15 and 16.

On April 27, 2005, ministerial building, plumbing, mechanical and electrical permits were issued to allow a tenant improvement to convert the former use of the premises as retail space to the intended restaurant use.

#### Community Plan Analysis

Although the Uptown Community Plan does not specifically address alcoholic beverage outlets, staff has determined that this proposed accessory retail use implements the policies and goals of the community plan and applicable regulations of the LDC. Therefore, staff can support the required findings for the requested actions, and included in the draft resolution as Attachment 7.

The Uptown Community Planners voted to recommend approval of the project provided that on-site seating is allowed and that alcohol is only served during dining hours. Condition No. 20 is included in the draft Permit which permits interior dining area and seating to accommodate the restaurant use. Because the State Department of ABC regulations for both Type 20 and Type 21 licenses do not allow the consumption or serving of alcoholic beverages on the premises where sold, Condition No. 19 is included in the draft Permit, which prohibits consumption of alcoholic beverages on-site, consistent with ABC regulations. Condition No. 21 has been added to the draft Permit, which allows the sale of beer and wine only, during dining hours.

### Appeal Issues

On April 26, 2005, the Applicant filed an appeal of the Hearing Officer's decision. The reasons for appeal as cited by the Applicant include a conflict with other matters and that the findings were not supported.

The Applicant's appeal indicates that the Type 21 License is conditionally supported by the ABC and various City departments, and by both the Hillcrest Association and the Uptown Community Planning Group. The appeal also asserts that the testimony provided by the Chair of the Uptown Planners at the Hearing Officer public hearing, in opposition to the Type 21 license, unduly influenced the Hearing Officer's decision (Attachment 8).

Staff has considered potential options and has determined that the CUP can be conditioned to allow the sale of beer and wine only, for consumption off-site consistent with a Type 20 license. This option allows the Applicant to retain the existing Type 21, Off-Sale General Liquor license as desired, and limits any sales to beer and wine within the scope of the CUP. Condition No. 20 has been added to the draft Permit to accommodate this alternative. Condition No. 10 has also been added which allows a ten-year duration for the CUP, with a five-year review period. This review will allow consideration of any adverse impacts of the limited use on the surrounding community. Should any adverse effects be demonstrated, potential remedies including revocation of the CUP could be considered.

### Conclusion

The intent of the CUP process is to review proposed uses on a case-by-case basis to determine whether, and under what conditions, a particular use may be approved at a given site. The proximity to the various community elements, the crime rate, and the ratio of alcoholic beverage outlets within the community are among a combination of factors which staff can consider to recommend approval of the proposed use at this site. Staff believes that the accessory use of the restaurant premises as an Alcoholic Beverage Outlet allowing the sale of beer and wine only, for consumption off the premises, as limited by proposed conditions of the draft Permit can be operated and maintained in an appropriate manner. This will allow the Applicant to retain the existing license while placing an appropriate limitation on the scope of activity allowed under the CUP, to minimize adverse impacts to the surrounding community. Staff can support the required findings in the draft resolution, included as Attachment 7.

ALTERNATIVES

1. Grant the appeal and approve CUP No. 174199, with modifications; or
2. Grant the appeal and deny CUP No. 174199, if the findings required to approve the project cannot be affirmed; or
3. Deny the appeal, affirming the decision of the Hearing Officer to approve CUP No. 174199 as conditioned.

Respectfully submitted,

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Marcela Escobar-Eck, Deputy Director  
Customer Support and Information Division  
Development Services Department

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Bill Tripp, Dev. Project Manager  
Customer Support and Information Division  
Development Services Department

ESCOBAR-ECK/WCT

Attachments:

1. Aerial Photograph
2. Community Plan Land Use Map
3. Project Location Map
4. Project Data Sheet
5. Project Plan(s)
6. Draft Permit with Conditions
7. Draft Resolution with Findings
8. C opy of Appeal
9. Community Planning Group Recommendation
10. Ownership Disclosure Statement
11. Project Chronology
12. Census Tract and License Distribution Information
13. Statement of Public Convenience and Necessity
14. ABC License Types
15. Hearing Officer Approved CUP No. 174199
16. Hearing Officer Resolution No. 4981