February 5, 2008

City of Milpitas City Council
455 E. Calaveras Blvd.
Milpitas, CA 95035

Re: Agenda Item 2/5/08 Six-month Permit Review PR08-001; Jerry's Market

Jerry's does not have the permanent Alcoholic Beverage Control Board #21 license to sell hard liquor as stated on the 1/18/2008 Planning Division memo (attachment 1). It was not issued on October 22, 2007 and is still pending (attachment 2, ABC report). Why have a review for an interim license during this period when Jerry's has to stay on its best behavior until a permanent license is granted?

Attachment 3 is pictures of the new and exaggerated damage done to the Pines' Woodland Ct. playground which resumed when word got around last summer that Jerry's had the permanent license. At the playground there were broken brandy bottles instead of just broken beer bottles. The graffiti was all over the wall instead of just on the bench. Also, all day long people were driving up to the store with their car stereos booming. There was much unnecessary shouting on the front sidewalk. This may have been from Jerry's hard liquor supporters being vindictive, but they stopped again, temporarily I believe, a few weeks after the ABC August hearing and while waiting for a permanent license. As people have been misled to believe Jerry's has a permanent license, you will probably hear from some of them that all is well, when it has not been proven to be true.

This is to let you know what to expect in the way of numerous complaints to the City Council if the ABC permanent license is issued. With 1200 new condos and apartments coming on-line in the immediate area of Jerry's to add to the old problems, you should know that this liquor store will always be a thorn in the City's side. Please consider doing what you can to get it moved across the street where the other nuisance hard liquor outlets are.

The conditions are meaningless, as owners of businesses and their lawyers can appeal to the City Council and/or the ABC Appeals Board to have them modified or eliminated. When all is said and done we will end up with the Jerry's Liquor Store being open to 2 a.m. and with 3000 new customers from the new condos and apartments, making the Pines uninhabitable.

Replacing the wall on the south side of Jerry's is for cosmetic reasons only. People do not still go over that wall since a previous owner of Jerry's raised the height. Where a higher wall is needed is at the Greentree Way/Woodland Ct. greenbelt area. That is where the young people go over the wall to Jerry's and will resume congregating there when the license is issued. See attachment 4. Also, what good are the video images of the inside of the store, looking for shoplifters, to the adjacent neighbors? Attachment 5 is a picture of the owner standing next to the "Good Neighbor" signs and new graffiti. And, it is not likely the store continues to call the police, like they used to, when there are problems, since having numerous police reports works against them. Further, reportedly after the interim license was issued, many non-liquor goods were removed. Now they have been put back to the effect that at inspection by Planning, the report states only 10% of the customer floor area is for alcohol--further manipulative behavior by the owner.

Sincerely,

Mr. and Mrs. Novotny
36 Greentree Way
Milpitas, CA 95035

MEMORANDUM

Planning Division

Date: January 18, 2008

To: Tom Williams, City Manager

Through: James Lindsay, Planning and Neighborhood Services Director

From: Cindy Hom, Junior Planner

Subject: Permit Review No. PR08-0001: Six-Month Review for Jerry's Market located at 1491 S. Main Street.

COMPLIANCE WITH CONDITIONS

Special Condition (SC) 1: EFFECTIVE DATE OF THESE CONDITIONS: The following conditions become effective when the applicant obtains its Type 21 Off-Sale General license from the California Department of Alcoholic Beverage Control (ABC). The applicant shall submit evidence of ABC license issuance no later than 10 days of the ABC license approval. (CC)

Comment: Complies. The Department of Alcoholic Beverage Control (ABC) issued an interim license on May 15, 2007. Based on the Certificate of Decision, the ABC permit was permanently issued and became operative as of October 22, 2007.

SC2: HOURS OF OPERATION: The store's hours of operation may be from 6:00 a.m. until 11:00 p.m., seven days a week every night. (P)

Comment: Complies. The display sign for Store hours indicate 6:00AM to 11:00PM Monday through Friday.

SC3: CLOSING ACCESS TO REAR PARKING LOT: The applicant will close off vehicle access to the rear parking lot from 10:00 p.m. until 6:00 a.m., seven days a week. Plans and details of the proposed driveway gates shall be submitted for Planning Division review and approval. (P)

Comment: Complies. See photos 5 and 6.

SC4: "GOOD NEIGHBOR" SIGNS: The applicant shall maintain the "Good Neighbor" signs already installed in its parking lot reminding customers to avoid loud noise and music that might disturb our nearby neighbors. (P)

Comment: Complies. See Photo 1 and 2.

SC5: LITTER AND GRAFFITI PREVENTION: On its property, the applicant will pick up litter twice a day and paint over graffiti within one day. (P)

Comment: Staff conducted a site visit and did not identify any issues of concern.

Attachment 1

Attachment 2

California Department of Alcoholic Beverage Control

License Query System Summary as of 1/29/2008

License Information
License Number: 395084 **Status:** ACTIVE
Primary Owner: ALI ASLAM HUSSAIN
ABC Office of Application: SAN JOSE
Business Name
Doing Business As: JERRYS MARKET
Business Address
Address: 1491 S MAIN ST **Census Tract:** 5045.05
City: MILPITAS **County:** SANTA CLARA
State: CA **Zip Code:** 95035-6203
Licensee Information
Licensee: ALI ASLAM HUSSAIN
License Types
1) License Type: 20 - OFF-SALE BEER AND WINE
License Type Status: ACTIVE
Status Date: 25-NOV-2002 **Term:** Month(s)
Original Issue Date: 25-NOV-2002 **Expiration Date:** 31-AUG-2008
Master: Y **Duplicate:** 0 **Fee Code:** NA
License Type was Transferred On: **From:** 367431
2) License Type: 21 - OFF-SALE GENERAL
License Type Status: PENDING
Status Date: 03-JAN-2006 **Term:** Month(s)
Original Issue Date: **Expiration Date:**
Master: Y **Duplicate:** 0 **Fee Code:** NA
Current Disciplinary Action
. . . No Active Disciplinary Action found . . .
Disciplinary History
. . . No Disciplinary History found . . .
Hold Information
Hold Date: **Type:** FORM 220
Hold Date: 14-FEB-2006 **Type:** H & L PROTEST
Hold Date: 18-APR-2007 **Type:** H & L PROTEST
Escrow
. . . No Escrow found . . .

Woodland Ct. - The Pines

Attachment 3

↓54 Woodyan ct.

walkway to Greentree

8-25-07 Brandy Bottles

Att. 3

Attachment 4 North Wall Woodland/Greentree to Jerry's

Attachment 5
Jerry's Mar Kat

Jerry's

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

Post-It™ brand fax transmittal memo 7671	# of pages ▸ 9
To Richard Warren	From Dept of ABC
Co.	Co. Judy Carlton
Dept.	Phone #
Fax #	Fax #

FILE : 21 - 395084
REG. : 07065621

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Administrative Hearing Office, adopted said proposed decision as its decision in the case therein described on September 5, 2007.

THIS DECISION SHALL BECOME OPERATIVE OCTOBER 22, 2007.

Sacramento, California

Dated: September 5, 2007

Judy Carlton

Judy Carlton
Supervisor, Hearing and Legal Unit

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9 of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capital Mall, Suite 1245, Sacramento, CA 95814.

RECEIVED
AUG 22 2007
Alcoholic Beverage Control
Legal Unit

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE PROTEST OF:

Fe Aurelia V. Doyle, et al
80 Lone Tree Court
Milpitas, CA 95035

Against the Issuance of an Off-Sale General License to:

Aslam Hussain Ali
DBA: Jerry's Market
1791 South Main Street
Milpitas, CA 95035

FILE: 21-395084

REG: 07 065 621

LICENSE TYPE: 21

PAGES: 180

REPORTER: Denise Wheeler

Atkinson-Baker Court Reporters

PROPOSED DECISION

This matter was heard by Administrative Law Judge John W. Lewis at San Jose, California, on August 2, 2007.

Staff Counsel Nicholas Loehr represented the Department of Alcoholic Beverage Control.

Richard Warren, attorney at law, represented Applicant Aslam Hussain Ali. Aslam Hussain Ali was present at the hearing.

Protestants Michael Novotny, Sally Novotny, and Loren Plumb were present at the hearing and did testify.

Protestant Fe Aurelia V. Doyle withdrew her protest prior to the hearing. Protestant Irene Johnson failed to appear at the hearing. Her protest is deemed withdrawn pursuant to Section 24015(g).

Oral and documentary evidence on the record was received at the hearing and the matter was argued and submitted for decision on August 2, 2007.

ISSUES RAISED BY PROTESTANTS

Will operation of Applicant's business with the license sought interfere with quiet enjoyment of nearby residential property because of:

1. Undue concentration of licenses.

2. Consideration points (school, church, hospital, and playground).

3. Law enforcement problem.

4. High crime.

5. Loitering.

6. Residential quiet enjoyment.

FINDINGS OF FACT

1. The Applicant has held a Type 20 license (Off-Sale Beer & Wine) at this premises since June, 2000. The Applicant is seeking to upgrade this license to a Type 21 (Off-Sale General) which will permit him to sell distilled spirits in addition to beer and wine. This upgrade request is the result of a priority drawing held for Santa Clara County in 2005. If this application is approved and the Type 21 license is issued, the Type 20 will be canceled. (See Exhibit 3).

2. The premises is located on a triangular shaped lot. The front of the building faces Main Street. There is off-street parking available. There are residences which border the premises to the sides and rear. They are separated by a block wall and wood fencing. These residences are part of the non-gated residential community known as "The Pines". The residents of The Pines belong to a homeowners association. The area across Main Street from the premises is commercial.

3. The census tract in which the premises is located, #5045.05, permits three off-sale licenses. The Type 20 license currently held by the Applicant is the only off-sale license within this census tract. This Type 20 license will cancel if the Type 21 license were to issue. In other words, the number of off-sale licenses will remain the same. The issuance of this license would not create an undue concentration of off-sale licenses.

4. The premises is located within the City of Milpitas and is policed by the Milpitas Police Department. The Milpitas Police Department does not maintain crime statistics in accordance with Section 23958.4. There was no evidence presented which would indicate that this business is a law enforcement problem for the Milpitas Police Department.

5. The Milpitas Police Department was informed of this application and the request to upgrade the license. The Chief of Police submitted a letter opposing the upgrade. (Exhibit 3, Attachment 4). This opposition by the Police Department was subsequently withdrawn based upon the issuance of a Conditional Use Permit to the Applicant by the Milpitas City Council. (Exhibit 3, Attachment 4).

6. There are no churches within 600 feet of the premises.

7. There are no hospitals within 600 feet of the premises.

8. Pearl Zanker Elementary School is located approximately 500 feet from the premises. They are separated by a wall and several residences. Principal Katherine Doi was contacted regarding this application. Principal Doi neither supports nor opposes the application.

9. There is a small park/playground area immediately behind the rear wall of the premises. This area is controlled by "The Pines" Homeowners Association. There was no evidence presented indicating that there were any problems in the past due to Applicant's store. Nor was any evidence presented that would indicate that issuance of the applied for license would create any problems in this park/playground area. There is no direct access to this park/playground area from the premises.

10. There are thirteen residences within 100 feet of the premises. They are all within "The Pines" community. Some are separated from the premises by a block wall and wooden fence at a minimum. Others do not border the premises property and have other residences separating them.

11. The Milpitas City Council reviewed this application and upgrade. The City Council did grant a Conditional Use Permit to the Applicant. (See Exhibit A). The Conditional Use Permit contains 14 Special Conditions that are similar to the conditions on the Petition For Conditional License. (See Exhibit 5, Attachment 5).

12. The applicant has agreed to and signed a Petition For Conditional License. This Conditional License prohibits loitering on or around the premises, prohibits sales of "singles", restricts the hours during which alcoholic beverages may be sold, prohibits coin operated games and machines, and requires the Applicant to close off the rear parking area between the hours of 10:00 p.m. and 6:00 a.m., among other things. These conditions were designed to minimize or eliminate any negative impact this license may have on residents in the immediate area. (See Exhibit 2.)

LEGAL CONCLUSIONS

1. Article XX, Section 22 of the California Constitution delegates to the Department of Alcoholic Beverage Control the exclusive power to license the sale of alcoholic beverages in this State.

2. Section 23958 requires the Department to conduct an investigation to determine if, among other things, "the premises for which a license is applied qualify for a license, . . . the provisions of [the ABC Act] have been complied with, . . . [or if there are] any matters connected therewith which may affect the public welfare and morals." It provides, in part, that "[t]he department shall deny an application for a license . . . if . . . the premises for which a license is applied do[es] not qualify for a license under the [Act]. * * * The department further shall deny an application for a license . . . if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4."

3. In a protest matter the burden of establishing entitlement to the agency action sought is ultimately upon the Applicant.

4. Section 23958.4 defines "undue concentration" of licenses. There is both a "high crime" definition contained in Section 23958.4(a)(1) and a "high count" definition pertaining to off-sale retail licenses contained in Section 23958.4(a)(3). Coming within either definition *requires* denial of an application unless an exception exists.

5. It was established that undue concentration of licenses, as defined in Section 23958.4(a)(2), does not apply at the Proposed Premises. (Findings of Fact, ¶ 3.)

6. It was established that undue concentration of licenses, as defined in Section 23958.4(a)(1), does not exist due to high crime. (Findings of Fact, ¶ 4.)

7. The Milpitas City Council reviewed this application and upgrade. The City Council did grant a Conditional Use Permit to the Applicant. (See Exhibit A). The Conditional Use Permit contains 14 Special Conditions that are similar to the conditions on the Petition For Conditional License. (See Exhibit 5, Attachment 5).

8. Section 25750 provides that "[t]he department shall make and prescribe those reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the California Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section or by . . . [the ABC Act], not inconsistent with any statute of this state. . . ."

9. Pursuant to Section 25750, the Department promulgated the following rule: "No original issuance of a retail license . . . shall be approved for premises . . . [where] (a) [t]he premises are located within 100 feet of a residence. . . . [or] (b) [t]he parking lot or parking area which is maintained for the benefit of patrons of the premises, or operated in conjunction with the premises, is located within 100 feet of a residence. ***
Notwithstanding the provisions of this rule, the department may issue an original retail license . . . where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents." (Section 61.4. title 4, California Code of Regulations [Rule 61.4].)

10. Rule 61.4 residences exist. (Findings of Fact, ¶ 10.) Grounds to deny issuance of the requested license exist.

11. Applicant did establish that operation of his business with the conditional license sought would not result in any significant negative impact on the residential quiet enjoyment of the nearby residents. (Findings of Fact, ¶¶ 12.) Much to the contrary, it was established that if this application were denied, Applicant would then revert to his Type 20 License which contains no conditions. Applicant could then sell alcoholic beverages (with the exception of distilled spirits) between the hours of 6:00 a.m. and 2:00 a.m. Applicant, by agreeing with the Exhibit 2 Petition for Conditional License, established that operation of its business would not interfere with quiet enjoyment of their property by any nearby resident. Although Protestants may believe otherwise, their efforts have undoubtedly led to the Applicant agreeing to these very restrictive conditions. These conditions will surely result in providing the Protestants with what they really want: quiet enjoyment of their property.

12. Applicant, by agreeing with the Exhibit 2 Petition for Conditional License, established that operation of his business would not interfere with the quiet

enjoyment of the nearby residents. The applicant has agreed to conditions which prohibit amusement machines or video games, restricts its hours of operation, prohibits sales of single cans or bottles of alcoholic beverages and prohibits loitering.

13. The evidence did establish that there are no churches or hospitals within 600 feet of the premises.

14. The evidence did establish that the Pearl Zanker Elementary School is located within 600 feet of the premises. (Findings of Fact, ¶ 8.) School Principal Doi neither supports nor opposes this application. The school is separated from the premises by numerous residences. Operation of the business, subject to the agreed upon conditions, will have no negative impact on the school or its students.

15. Issuance of the conditional license to Applicant at the Proposed Premises will not be inimical to public welfare or morals.

ORDER

The Off-Sale General License shall issue to Applicant subject to the Exhibit 2 conditions.

Dated: August 9, 2007

John W. Lewis
Administrative Law Judge

BEFORE THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE PROTEST OF:

Fe Aurelia V. Doyle, et al
80 Lone Tree Court
Milpitas, CA 95035

AGAINST THE ISSUANCE OF AN OFF-SALE GENERAL LICENSE TO:

Aslam Hussain Ali
Jerrys Market
1491 South Main Street
Milpitas, CA 95035

FILE : 21 - 395084
REG. : 07065621

DECLARATION OF SERVICE BY MAIL

under the Alcoholic Beverage Control Act.

The undersigned declares:

I am over eighteen years of age, and not a party to the within cause; my business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. I served by **X-CERTIFIED & *-REGULAR** mail a copy of the following documents:

CERTIFICATE OF DECISION

on each of the following, by placing same in an envelope(s) addressed as follows:

X & *-SEE ATTACHED LIST

***- Aslam Hussain Ali**
Jerrys Market
1491 South Main Street
Milpitas, CA 95035

***- Richard D. Warren**
Attorney at Law
929 Fresno Avenue
Berkeley, CA 94707-2304

Each said envelope was then, on September 5, 2007 sealed and deposited in the United States Mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 5, 2007 at Sacramento, California.

Judy Carlton

Declarant

X San Jose District Office(interoffice mail)
___ Division Office(interoffice mail)

ATTACHMENT TO DECLARATION OF SERVICE BY MAIL

Aslam Hussain ALI

File: 395084 - Reg. No.: 07065621

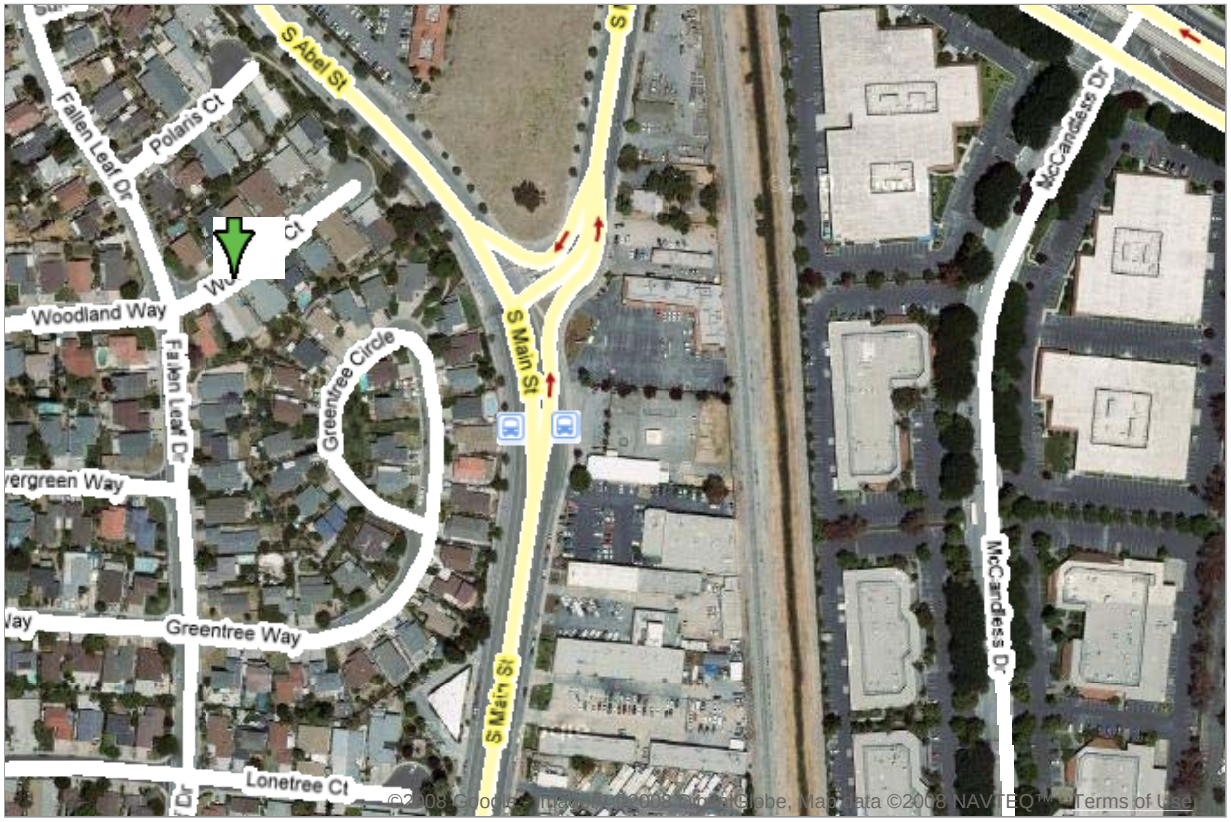
September 5, 2007

*- Irene C Johnson
56 Lonetree Court
Milpitas, CA 95035

X- Michael Novotny
36 Greentree Way
Milpitas, CA 95035

X- Sally Novotny
36 Greentree Way
Milpitas, CA 95035

X- Loren Plumb
39 Greentree Way
Milpitas, CA 95035

Google Maps

Address **Woodland Ct**
Milpitas, CA 95035