

Katherine Jane Morris  
Administrative Hearing Officer  
City of San Diego

IN THE MATTER OF )  
)  
WALGREENS )  
3222 UNIVERSITY AVE. )  
SAN DIEGO, CALIFORNIA )  
REPRESENTED BY DALE )  
MALEE, DISTRICT MGR. )  
\_\_\_\_\_ )

APPEAL—DENIAL OF TYPE 20 OFF-SALE  
BEER & WINE LICENSE BASED ON PUBLIC  
CONVENIENCE OR NECESSITY  
ADMINISTRATIVE ENFORCEMENT ORDER

**I**  
**STATEMENT OF THE CASE**

This matter came on regularly for hearing before Katherine Jane Morris, Administrative Hearing Officer for the City of San Diego on 30 November 2010 at 2:30 p.m. and was heard on that date, notice duly and regularly given. The purpose of the hearing was to determine whether the decision of the San Diego Police Department to deny a Type 20 Off-Sale Beer & Wine License based on the provisions of Public Convenience or Necessity as stated in the San Diego Business and Professions Code section 23958.4 shall be upheld.

Sgt. Linda Griffin, Vice Administration Unit, represented the San Diego Police Department. The manager of the Walgreens at 3222 University Avenue, Jeri Radtke, and the District Manager for Walgreens in San Diego and Orange Counties, Dale Malee, were present and were represented by Jennifer LaFond Chavez, Esq.

The following individuals testified on behalf of the San Diego Police Department:

1. Sgt. Linda Griffin, Vice Unit.
2. Joe Dalton, Crime Analyst.

The following individuals testified on behalf of the appellant, Walgreens:

1. Jeri Radtke, Store Manager at 3222 University Avenue.
2. Dale Malee, District Manager, San Diego and Orange Counties.
3. Jennifer LaFond Chavez, Esq., Luce, Forward, Hamilton & Scripps, LLP.

The following documents or other physical evidence were introduced by Sgt. Griffin and received into evidence:

1. Exhibit #C1: PCN Hearing Brief, 11/230/10, Walgreens, 3222 University Avenue.
2. Exhibit #C2: San Diego Business and Professions Code section 23958.4.

3. Exhibit #C3: Guidelines for Determining Public Convenience or Necessity.
4. Exhibit #C4: Letter dated 10/18/10 from Sgt. Linda Griffin to Jennifer Chavez, Esq. denying a Type 20 License for the Walgreens located at 3222 University Avenue.
5. Exhibit #C5: Form Per Section 23958.4 B&P, City of San Diego, For Off-Sale, On-Sale Beer and Public Premises Licenses showing application date of 7/20/10 and denial date of 10/18/10.
6. Exhibit #C6: Memorandum from Joe Dalton, Crime Analyst, dated 7/30/10 addressed to Sgt. Linda Griffin, Vice Unit, re: Walgreens, 3222 University Avenue with Search Criteria 1/1/09-12/31/09 with attachments including SDPD Alcohol Arrests & Cites – By Federal Census Tract (Excluding Unknown Tracts) January to December 2009; San Diego Static ABC Report Part 1 Crime and Part 2 Arrest Report from January 2009-December 2009 Reported by Contract 001600 dated 2/8/10; Alcohol and Beverage Control Licenses (San Diego) 3222 University Avenue – 0.2 Mile Radius (4 pages); Calls for Service, 3222 University Avenue, 1/1/09-12/31/09; CAD Incident Reports for 3222 University Avenue in 2009; Lookup Sheet for 3222 University Avenue, undated.
7. Exhibit # C7: Photographic Exhibit – 3222 University Avenue and environs (8 photos).
8. Exhibit #C8: California Department of Alcoholic Beverage Control, License Query System Summary census tracts 0016, 0015, 0014 as of 2010.
9. Exhibit #C9: Printout of Licensees showing Walgreens at 3222 University Avenue needing a CUP; less than 15,000 sq.ft. for Type 20 license.
10. Exhibit #C10: ABC License Request Work Up Sheet, 7/20/10-7/26/10, for Walgreens, 3222 University Avenue.
11. Exhibit #C11: Email to Sgt. Linda Griffin from Lt. Jerry Hara, SDPD Western Division, dated 7/29/10.
12. Exhibit #C12: Letter from Sgt. Andra Brown to Jennifer Hill, District Administrator, Alcoholic Beverage Control, dated 2/18/10.
13. Exhibit #C13: Letter to Sgt. Andra Brown from Rebekkah Horowitz, Licensing Representative, Department of Alcohol Beverage Control, dated 2/1/10, with attachments: (1) Licenses Premises Diagram (Retail) for 3222 University Avenue; (2) Planned Operation (Retail) 3222 University Avenue; (3) Application for Alcoholic Beverage License(s), 3222 University Avenue.
14. Exhibit #C14: ABC License Request Work Up Sheet, dated 2/9/10-2/18/09.
15. Exhibit #C15: Email from Sgt. Andra Brown to Joseph Dalton, David Vega, Lorena Cordova re: New ABC License request for Walgreens, 3222 University Avenue, undated.
16. Exhibit #C16: Email from David Vega to Sgt. Andra Brown, re: New ABC License, dated 2/9/10.
17. Exhibit #C17: Memorandum from Joe Dalton, Crime Analysis, to Sgt. Andra Brown, Vice Unit dated 2/11/10 re: Walgreens at 3222 University with attachments (same as ex. C6)

18. Exhibit #C18: Letter dated 10/28/10 from Jennifer Chavez, Esq. appealing the decision of the SDPD to deny a finding of Public Convenience or Necessity for the Walgreens located at 3222 University Avenue.

## II FINDINGS OF FACT

1. In January 2010, several San Diego area Walgreens Stores having applied to the ABC for Type 20 Off-Sale Beer and Wine Permits, including the Walgreens located at 3222 University Avenue, a case was opened and assigned to Sgt. Andra Brown, San Diego Police Department, Vice Department-Investigations.
2. Sgt. Brown received a letter dated 2/1/10 from Rebekkah Horowitz, Licensing Representative for the Department of Alcoholic Beverage Control requesting the input of the SDPD regarding an application from Walgreens for a Type 20 Off-Sale Beer and Wine License for the store located at 3222 University Avenue, San Diego, California; she was given until 2/19/10 to respond. Upon the completion of her investigation, Sgt. Brown sent a letter dated 2/18/10 to Jennifer Hill, District Administrator, Alcoholic Beverage Control, protesting the proposed issuance of a Type-20-486178 License to the Walgreens at 7222 University Avenue on the grounds of high crime in the area, an overconcentration of licenses in the vicinity, and the SDPD's belief that new ABC licenses tend to aggravate existing police problems.
3. An application dated 7/20/10 was subsequently submitted to the City of San Diego for a License Type 20 Off-Sale Beer and Wine by Jennifer Chavez, Esq. on behalf of the Walgreens located at 3222 University Avenue.
4. The application was referred to Sgt. Linda Griffin, SDPD, Vice Administration Unit who conducted an investigation including visits to the premises at 3222 University Avenue and surrounding location. Based on the information gathered from her visits, the response of Lt. Hara at Western Division and the statistics provided by the SDPD crime analyst, Sgt. Griffin denied the application on 10/18/10. In a letter to Ms. Chavez on that same date, she stated: "The premises falls within a crime data area which has a twenty percent greater number of reported crimes than the average number of crimes for all crime data areas in the City (High Crime area); The issuance of a new license will result in an undue concentration of ABC licenses within the census tract; The business will not serve businesses or residents not currently being served by a same or similar business; This license will aggravate existing Police problems."
5. At the hearing of 11/30/10, Sgt. Griffin referred to the Guidelines for Determining Public Convenience or Necessity and highlighted from her hearing brief those which were not in conformance with the applicant,

specifically #1: The application will impact the number of ABC licenses in the area and will contribute to the over concentration of ABC licenses that already exists; #2. The business will not serve businesses or residences not currently being served by a same or similar business; Sgt. Griffin showed photographs from her site visit to illustrate her point regarding the proximity of surrounding businesses already licensed to sell alcohol, both Type 20 and Type 21, both in Census tract 0016.00 and Census tracts immediately adjacent to it; #3. Per their application they are within 600' of incompatible facilities including schools, day care centers, parks, homeless shelters, alcohol rehabilitation centers, and facilities designed and operated to serve minors; #4. The Census tract is over-concentrated (4 allowed/4 active/1 pending) with the issuance of this license and is considered high crime. The crime rate is 256.6% which is more than the acceptable 120% crime rate. Additionally, alcohol-related arrests and citations totaled 120, which is 193.5% of the acceptable crime rate; #5. In 2009, there were 5 reported crimes (4 robbery/1 petty theft) against the business. This is above the acceptable threshold of 4 reported crimes. In addition, there were 32 calls for service with the majority of those being disturbances (415's) with at least 5 of these calls specifically referring to a person drunk in public or a loitering transient; #6. The sale or service of alcohol to law-abiding residents/visitors does promote goals of the City. However, the addition of another alcohol outlet would merely add to the already over-concentration of licenses in this area; #9 Per their application they are located within 100' of a residentially-zoned property; and #10. As the SDPD Vice Unit has the authority to determine Public Convenience or Necessity in alcoholic beverage licensing matters, Sgt. Griffin sought the input of the SDPD Western Division which services the area in questions. The response was negative due to the overconcentration of ABC licenses in the area and the high crime rate, particularly the alcohol-related crime that already exist in this Census tract. Sgt. Griffin stated that this is a Census tract with a higher than average time per service call, which taxes other SDPD resources with a higher than average percentage of violent crimes, as well as narcotics and sex crimes, and Mr. Dalton added that this is a problem Census tract for the city.

6. Sgt. Griffin concluded that of the ten Guidelines for Determining Public Convenience or Necessity set by City Council Resolution R-294124, seven and a half were in conflict with the application for a Type 20 License for the Walgreens located at 3222 University Avenue, and she asked that the SDPD's decision to deny the application be upheld.
7. At the hearing of 11/30/10, the appellants, represented by Ms. Chavez, took the position that Walgreens, which is the largest drug store chain in the country, could point to decades of experience as a responsible seller of regulated produces including alcohol, tobacco and pharmaceuticals. They stressed that the Walgreens at 3222 University would set aside only a small percentage of its existing floor space for the sale of beer and wine to casual

drinkers. In doing so they would provide “one-stop shopping” for their customers. Further, the Walgreens would not sell single bottles or cans of beer or malt liquor, and all cashiers and managers would be required to undergo training based on corporate policies and procedures which Walgreens had developed over time. The appellant further took the position that Census tract based statistics were in imprecise way to determine whether a new off-sale license should be issued, and were based on data that was developed from the 2000 Census which was almost ten years old. Many of the crimes reported to the police occurred in the area of Walgreens, not at the store itself. The store manager testified regarding the proactive measures she had taken to discourage transients and alcohol use on or near the premises. The district manager said that the Walgreens at 3222 University had helped turn around a blighted corner just as it had at 3005 Midway, and that the Type 20 license would assist existing customers, especially females. He felt that the lack of the Type 20 License would put the store at a competitive disadvantage with stores both in its Census tract and nearby Census Tracts, and he stated all that was wanted was a fair process which put him on an equal footing with similar stores. In conclusion, the appellants asked that the Walgreens located at 3222 University Avenue be granted a Type 20 Off-Sale Beer and Wine License based on Public Convenience or Necessity.

8. A written notice of the time and place of this hearing was served upon the appellant at least ten (10) calendar days prior to the hearing.
9. The written notice was served upon the appellant in accordance with San Diego Municipal Code section 11.0301 by certified mail, postage prepaid, return receipt requested. Simultaneously, the same notice was sent by regular mail.

### **III DETERMINATION OF ISSUES**

1. By reason of the facts found in Findings of Fact paragraph numbers 1 and 3, Walgreens is the Responsible Party.
2. By reason of the facts found in Findings of Fact paragraph numbers 8 and 9, the appellants were notified of this Administrative Hearing.
3. By reason of the facts found in Findings of Fact paragraph numbers 1 and 3, Walgreens applied for a Type 20 Off-Sale Beer and Wine License for the Walgreens store located at 3222 University Avenue, San Diego, California.
4. By reason of the facts found in Findings of Fact paragraph numbers 2, 4, 5 and 6 the appellants failed to meet the criteria for Public Convenience or Necessity as defined in the San Diego Business and Professions Code section 23958.4.

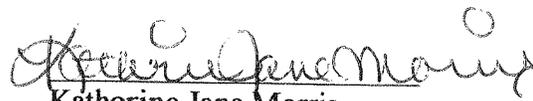
5. By reason of the facts found in Findings of Fact paragraph numbers 2, 4, 5 and 6, the SDPD properly reviewed the application for a Type 20 Off-Sale Beer and Wine License for the Walgreens located at 3222 University Avenue, San Diego, California and compared it to the standards set forth in Business and Professions Code section 23958.4.
6. By reason of the facts found in Findings of Fact paragraph numbers 2, 4, 5 and 6 the San Diego Police Department's denial of a Type 20 Off-Sale Beer and Wine License for the Walgreens store located at 3222 University Avenue, San Diego, California shall be upheld.

**IV  
ORDER**

THEREFORE, the following order is made:

The decision to deny a Type 20 Off-Sale Beer and Wine License for the Walgreens store located at 3222 University Avenue, San Diego, California is upheld.

Dated: 12/27/10

  
Katherine Jane Morris  
Administrative Hearing Officer

JENNIFER LA FOND CHAVEZ, ASSOCIATE  
DIRECT DIAL AND FAX NUMBER 619.699.2537  
EMAIL ADDRESS [jchavez@luce.com](mailto:jchavez@luce.com)

October 28, 2010

38415-6094

**VIA E-MAIL AND U.S. MAIL**

Administrative Hearings  
Citizens Review Board on Police Practices  
202 C Street, MS 9A  
San Diego, CA 92101  
Attn: Ms. Denise Sandoval

Re: **Ref No. 1914141113/Appeal of Police Department Decision to Deny Finding of Public Convenience or Necessity for Walgreens at 3005 Midway Drive**

Dear Ms. Sandoval:

Pursuant to San Diego Municipal Code section 33.0501, this letter serves as Walgreens' appeal of the San Diego Police Department determination, dated October 18, 2010 and received by us on October 21, 2010, that a finding of public convenience or necessity ("PCN") cannot be made for the issuance of an ABC Type 20 License for the existing Walgreens store at 3005 Midway Drive in San Diego (a copy of which is enclosed for your reference). Walgreens, the nation's largest drug store chain, has decades of experience as a responsible seller of regulated products such as pharmaceuticals, tobacco and alcohol. As the following explains, that experience will be brought to bear if the City approves Walgreens' proposal to dedicate a small percentage of its existing store in the Midway community to the sale of beer and wine for the casual drinker. For those and the other reasons described below, Walgreens respectfully requests that a hearing officer find that issuance of a Type 20 license to Walgreens would serve the public convenience or necessity.

**Public Convenience or Necessity Would be Served By Issuance of A Type 20 License to Walgreens**

State law establishes PCN thresholds, after which, the consent of the relevant local agency is required before the ABC may issue additional off sale licenses within a census tract. That law regarding PCNs does not require a denial of an alcohol license when the threshold is triggered, only an analysis of whether the specific application before the local agency is convenient or necessary. A PCN is required here because of the crime rate and the number of existing off-sale alcohol establishments within the applicable census tract. Walgreens is located in Census Tract 68.02. Based on 2000 population counts, the threshold for requiring a PCN in this census tract is 3 off-sale licenses and 5 licenses currently exist.

The public convenience or necessity would be served by permitting beer and wine sales for off-site consumption at the 3005 Midway Drive Walgreens store. Walgreens is a national chain of retail drugstores selling prescription and over-the-counter medicines as well as a variety of general

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merchandise, sundries and grocery items to the public. Walgreens will dedicate only a very small percentage of the 15,033 square foot store for beer and wine sales. As such, beer and wine sales are expected to account for only a small percentage of overall sales. Further, unlike some other nearby retailers, Walgreens is not requesting a license to sell liquor nor will it sell single bottles or cans of beer or malt liquor as its inventory will only target the casual consumer of beer and wine.

Of equal importance to this appeal, the impetus for the sale of beer and wine is demand from existing Walgreens customers. By adding beer and wine to the other retail items already offered in the store, Walgreens can better serve the surrounding community by providing its customers with the convenience of "one-stop" shopping. Walgreens will also offer the security and crime prevention measures, described in more detail below, not available at other stores in the area. As demonstrated by the attached ABC chart, Walgreens will be the only store with a limited beer and wine inventory that is offering all the above described security and convenience within Census Tract 68.02.

#### **Beer And Wine Sales Will Not Aggravate Existing Police Problems or Otherwise Adversely Impact Police Resources**

As noted above, a PCN is required because Walgreens is located within a census tract with a crime rate that is at least 20% greater than the Citywide average crime rate. Walgreens is an experienced and trusted retailer that has sold regulated products, including pharmaceutical and tobacco, in all types of neighborhoods (including others like the Midway area) and Walgreens will bring that experience to its proposed alcohol sales program. Along those lines, so as to ensure compatibility with surrounding neighborhoods, Walgreens has taken measures to assure that any alcoholic beverage will be sold in a highly responsible and conscientious manner. Detailed, corporate policies and procedures are already in place and will be strictly enforced. The policies and procedures may include requirements such as:

- Employees at each store must undergo training prior to beer and wine being made available for sale at the store;
- Each cash register clerk must submit a policy acknowledgement as part of the daily log-in and log-out process;
- Each cash register clerk must request identification and proof of age for any customer attempting to purchase beer or wine who appears to be under the age of 40. Pre-programmed cash register "prompts" will remind the clerks to request this proof;
- Any under-aged employees will be required to involve the manager or assistant manager for the sale of beer or wine.

Training will be accomplished in part through a Walgreens internal alcohol sales training program, which is required for all cashiers and managers. The training program focuses on recognizing and

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preventing sales of alcohol that may be detrimental to the public welfare (i.e., the sale of alcohol to minors and intoxicated persons). Implementation of this program will help ensure that the sale of alcohol at the store will not be detrimental to residents, shoppers, or other business in the vicinity of this store.

Walgreens also uses a variety of security strategies to ensure the safety of their employees and customers as well as the security of its merchandise. For example, cameras and public view monitors have been installed in all Walgreens stores to deter criminal activity and promote security. The digital images captured from these devices are stored for a period of time on a Digital Video Recorder and can be made available to the Police Department. Beer and wine displays will also be positioned on the opposite side of the store from where the entrance is located. To prevent abuses, Walgreens will also only sell beer in 6 packs, 12 packs, 18 packs and cases. Walgreens will not sell beer by the individual can or bottle. With all of these measures in place, the issuance of a beer and wine license to Walgreens will not have a material and adverse impact on police resources or the community in general.

### **Census Tract Based Statistics Are In Imprecise Way to Determine Whether a New Off-Sale License Should Be Issued**

The census tract and household population based PCN threshold assumes that alcohol retailers and household populations will be spread evenly throughout a City. That analytical approach fails to consider an individual City's land use and zoning patterns. Census Tract 68.02, for example, is dominated by the busy commercial corridors of Rosecrans Avenue and Midway Drive. As a result of these and other non-residential land uses within the census tract (such as Sharp Healthcare and Kaiser Permanente), the threshold for requiring a PCN is lower than it would be in a predominantly residential census tract of a similar size. Indeed, two adjacent census tracts do not trigger the PCN threshold because they are predominantly residential and/or non-commercial<sup>1</sup>. Walgreens will serve the residential population within all three census tracts as well as others living and working in the surrounding area. When the relevant statistics are combined, the threshold for triggering a PCN within those 3 census tracts would be 12 licenses and only 9 exist.

Finally, the issuance of the ABC license to Walgreens is necessary in order for the community to benefit from competition between Walgreens and the CVS located less than a quarter mile away in Census Tract 66. Currently, Walgreens is at a competitive disadvantage because CVS already sells alcohol pursuant to an existing ABC license. If CVS has to compete on a level playing field with Walgreens, and Walgreens is allowed to provide the same "one stop" shopping experience that people want, each of these national retailers will be encouraged to provide the type of safe and customer oriented environment that the surrounding community expects and deserves. If the PCN finding for Walgreens is withheld, the benefits of true competition are lost and it is the surrounding

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<sup>1</sup> Census Tract 69 and 74.

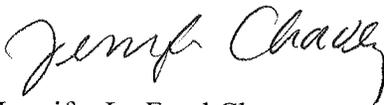
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community that suffers in the end. Therefore, the City should find that issuance of an ABC license to Walgreens is appropriate and would serve the public convenience or necessity.

**Conclusion**

The foregoing demonstrates that public convenience and necessity would be served and even enhanced by the sale of beer and wine at this Walgreens store. Such sales would facilitate convenient, "one-stop" shopping for Walgreens' many customers in the City of San Diego. Sales at Walgreens will be conducted in a way that maximizes public safety, minimizes public nuisance and at a location that is very well suited for beer and wine sales. Additionally, the beer and wine sales will allow Walgreens to remain competitive with retailers in the vicinity such as CVS. This competition will not only benefit the community in general, it will help to maintain the up to 43 full time and part time jobs generated by Walgreens. For all of these reasons, the City should make a finding of public convenience or necessity for the proposed sale of beer and wine at Walgreens' 3005 Midway Drive store.

Sincerely,



Jennifer La Fond Chavez  
for  
LUCE, FORWARD, HAMILTON & SCRIPPS LLP  
JLC/

Enclosures

cc: Brian Fish, Esq.  
Michael Redstone, Esq.