



## **CITY COUNCIL AGENDA REPORT**

**Meeting Date: June 4, 2020**

**From: John Swiecki, Community Development Director**

**Subject: Public Convenience or Necessity – Draft Ordinance No. 652**

### **Community Goal/Result**

Economic Development, Safe Community

### **Purpose**

To amend the Brisbane Municipal Code (BMC) to establish a process for determining whether there is a public convenience or necessity (PCN) for certain types of alcoholic beverage licenses issued by the California Department of Alcoholic Beverage Control (ABC).

### **Recommendation**

That the City Council introduce Ordinance No. 652 (Attachment 1).

### **Background**

The California Department of Alcoholic Beverage Control (ABC) regulates the granting of licenses for the sale of alcoholic beverages within the state. An “on-sale” license authorizes the sale of alcoholic beverages for consumption on the premises where sold, while an “off-sale” license authorizes the sale of alcoholic beverages for consumption off the premises.

As part of the ABC’s licensing process, ABC contacts cities to confirm the proposed use is permitted by local zoning regulations. Additionally, where the ABC has determined a requested license is located in an area of “undue concentration” of similar licenses (based upon countywide averages), cities must make a PCN determination in order for ABC to grant the license. If the city finds that granting the license would serve the public convenience or necessity, it would make an affirmative PCN determination and the license would be issued. If the city does not make an affirmative PCN determination, ABC would deny the requested license. If the city takes no action, the ABC will allow the applicant to justify an affirmative PCN determination as part of their review of the license. Per Business and Professions Code Section 23958.4 a PCN determination may be required for the issuance of all off-sale liquor licenses and certain on-sale liquor licenses in an area of undue concentration.

### **Discussion**

The City of Brisbane does not currently have an established process for making a PCN determination, meaning there are no prescribed findings or procedure in place to process any requests received for a PCN determination. Lacking established procedures, any PCN request would require the City Council to make a determination within 90 days from when ABC notifies

the City. In the event the Council does not make a determination within 90 days, the ABC would perform their own investigation before making a decision to issue the liquor license.

The City was recently contacted by ABC regarding an application for an off-sales license for a business in Crocker Park for which a PCN determination is required due to an overconcentration of similar licenses in the census tract.

In light of this pending request, the draft Ordinance (Attachment 1) proposes a new chapter to the Brisbane Municipal Code that authorizes the Community Development Director or their designee to review applications for PCN determinations and grant a PCN determination when findings set forth in the ordinance are met. The findings address whether the granting of a license would enhance a commercial area or provide a convenience to an underserved part of the community without being detrimental to public health, safety and welfare. The property owner of the subject establishment and owner(s) within 300 feet of the site shall receive mailed notice of the director's determination. The director's action may be appealed to the city manager, who may act on the appeal or refer it to the City Council for final action. For applications that require Planning Commission approval of a related discretionary approval (such as a use permit), the Planning Commission would make the PCN determination. The Commission's decision would be appealable to the City Council.

#### **Fiscal Impact**

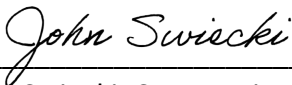
None. The City's fee schedule will be updated to cover staff time for processing PCN determinations.

#### **Measure of Success**

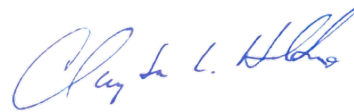
Adoption of a procedure for determining public convenience and necessity for certain liquor licenses consistent with state law.

#### **Attachments**

1. Draft Ordinance No. 652
2. Government Code Section [23958.4](#), relating to PCN determinations of ABC licenses



John Swiecki, Community Development Director



Clay Holstine, City Manager

**ATTACHMENT 1**  
**DRAFT ORDINANCE NO. 652**

**Draft  
ORDINANCE 652**

**AN ORDINANCE OF THE CITY OF BRISBANE  
ADDING CHAPTER 5.70 TO THE BRISBANE MUNICIPAL CODE  
CONCERNING THE DETERMINATION OF PUBLIC CONVENIENCE OR  
NECESSITY FOR AN ALCOHOLIC BEVERAGE CONTROL LICENSE**

**The City Council of the City of Brisbane hereby ordains as follows:**

**SECTION 1: Chapter 5.70 is hereby added to the Brisbane Municipal Code to read as follows:**

**Chapter 5.70 - DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY FOR AN ALCOHOLIC BEVERAGE CONTROL LICENSE**

**5.70.010 - Applicability.**

The purpose of this chapter is to execute the City's authority to review applications for the City's determination of public convenience or necessity for alcohol beverage sales for all retail licenses of on-premises sale or off-premises sale establishments, excluding retail licenses for on-sale bona fide eating places, hotels, motels, or other lodging establishments, or retail licenses issued in conjunction with a beer manufacture or a wine grower's license, when such applications are referred to the City by the California Department of Alcohol Beverage Control in those areas that are deemed to be over-concentrated with on-sale or off-sale outlets or those areas that are considered high crime, as specified in Business and Professions Code Section 23958.4, and following, as the same may be amended from time to time.

**5.70.20 - Authority.**

- A. The Community Development Director shall review and take action on applications for the determination of public convenience or necessity except as provided in subsection B of this section 5.70.020. The Director's action on the application shall be final unless appealed as provided in Section 5.70.060 of this Chapter.
- B. In any case where the applicant is required to obtain a separate use permit, variance, design permit, planned development permit, zoning ordinance amendment, or other land use permit(s) that otherwise would be considered by the planning commission, then the application for the determination for public convenience or necessity shall be reviewed and action taken on such application by the planning commission in conjunction with the separate land use permit(s). The planning commission's action shall be final unless appealed in accordance with Chapter 17.52.

**5.70.030 - Definitions.**

For the purposes of this chapter, the following definitions apply:

- A. "Determination" means a decision of public convenience or necessity by the City of Brisbane to assist the State of California in the issuance of a license for the on-premises sale and off-premises sale of alcoholic beverages by the California Department of

Alcoholic Beverage Control in those areas that are deemed to be over-concentrated with on-sale or off-sale outlets or those areas that are considered high crime, as specified in Business and Professions Code 23958.4, and following, as the same may be amended from time to time.

- B. “Decision-making body” shall mean the Community Development Director, the City Manager, the Planning Commission of the City, of the City Council of the City, as such terms are defined in this Section and in Title 2 of this Municipal Code.
- C. “Director” means the Community Development Director or the Director’s designee.
- D. “On-premises sale” means the same as on-sale outlet and refers to the sale of alcoholic beverages for consumption on and off the premises.
- E. “Off-premises sale” means the same as off-sale outlet and refers to the sale of alcoholic beverages for consumption off the premises in original, sealed containers from an alcoholic beverage company.

**5.70.040 - Notice of Action on the Application.**

Within 90 days of receipt of a complete application for a determination of public convenience or necessity, the Director shall either grant or deny the application pursuant to the findings in Section 5.70.050 of this Chapter. Notice of the Director’s action on the application shall be mailed to the applicant, the subject property owner, and to all owners of property within three hundred (300) feet of the subject property. Any person may appeal the director’s action on the application as provided in Section 5.70.060 of this Chapter.

**5.70.050 – Findings.**

Subject to this section 5.70.050, the decision-making body shall review an application for a determination and may issue a determination of public convenience or necessity in connection with an application for a license from the California Department of Alcoholic Beverage Control for the on-premises sale or off-premises sale only after making all of the following findings:

- A. The property for which the alcoholic beverage license is requested has no active Building Code or Health Code violations of record, and on-premises sale or off-premises sale is a permitted use; and
- B. The proposed on-premises sale or off-premises sale use is not located within an area that the proposed use would:
  - 1. Be detrimental to the public health, safety, or welfare of persons located in the area; or
  - 2. Increase the severity of existing law enforcement or public nuisance problems in the area; and
- C. At least one of the following additional findings:
  - 1. The proposed outlet for the on-premises sale or off-premises sale would act as a convenience to an underserved portion of the community; or

- 2. The proposed outlet for the on-premises sale or off-premises sale would enhance or facilitate the vitality of an existing commercial area; or
- 3. The proposed on-premises sale or off-premises sale is incidental and appurtenant to a larger retail use and provides for a more complete and convenient shopping experience.

**5.70.060 - Appeals.**

- A. Appeal of Director action. An appeal of the Director’s action shall be made to the City Manager in writing and filed with the city clerk within ten (10) calendar days after the final action of the Director. The appeal shall be accompanied by a fee, as set by the city council, and shall clearly state the reason for appeal. The City Manager shall conduct a review of the application and may affirm, modify or reverse the action of the Director, or refer the matter to the City Council for action. If the City Manager refers the matter to the City Council, Section 5.70.050 shall apply.
- B. Appeal of planning commission action. An appeal of the planning commission’s action to the City Council shall be made in accordance with Chapter 17.52 of Title 17.

**SECTION 2:** Adoption of this Ordinance does not require environmental review because it represents general policy making that would not result in a direct or indirect physical change in the environment and therefore it is not a project under the California Environmental Quality Act. CEQA Guidelines, Section 15378 (b)(2).

**SECTION 3:** If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Brisbane hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that one or more sections, subsections, sentences, clauses or phrases may be held invalid or unconstitutional.

**SECTION 4:** This Ordinance shall be in full force and effect thirty days after its passage and adoption.

\* \* \*

The above and foregoing Ordinance was regularly introduced and after the waiting time required by law, was thereafter passed and adopted at a regular meeting of the City Council of the City of Brisbane held on the \_\_\_\_\_ day of \_\_\_\_\_, 2020, by the following vote:

- AYES:
- NOES:
- ABSENT:
- ABSTAIN:

\_\_\_\_\_  
Mayor

DRAFT

ATTEST:

APPROVED AS TO FORM:

---

City Clerk

---

City Attorney

**ATTACHMENT 2**  
**GOVERNMENT CODE SECTION 23958.4**



**State of California**

**BUSINESS AND PROFESSIONS CODE**

**Section 23958.4**

---

23958.4. (a) For purposes of Section 23958, “undue concentration” means the case in which the applicant premises for an original or premises-to-premises transfer of any retail license are located in an area where any of the following conditions exist:

(1) The applicant premises are located in a crime reporting district that has a 20 percent greater number of reported crimes, as defined in subdivision (c), than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency.

(2) As to on-sale retail license applications, the ratio of on-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of on-sale retail licenses to population in the county in which the applicant premises are located.

(3) As to off-sale retail license applications, the ratio of off-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of off-sale retail licenses to population in the county in which the applicant premises are located.

(b) Notwithstanding Section 23958, the department may issue a license as follows:

(1) With respect to a nonretail license, a retail on-sale bona fide eating place license, a retail license issued for a hotel, motel, or other lodging establishment, as defined in subdivision (b) of Section 25503.16, a retail license issued in conjunction with a beer manufacturer’s license, or a winegrower’s license, if the applicant shows that public convenience or necessity would be served by the issuance.

(2) With respect to any other license, if the local governing body of the area in which the applicant premises are located, or its designated subordinate officer or body, determines within 90 days of notification of a completed application that public convenience or necessity would be served by the issuance. The 90-day period shall commence upon receipt by the local governing body of (A) notification by the department of an application for licensure, or (B) a completed application according to local requirements, if any, whichever is later.

If the local governing body, or its designated subordinate officer or body, does not make a determination within the 90-day period, then the department may issue a license if the applicant shows the department that public convenience or necessity would be served by the issuance. In making its determination, the department shall not attribute any weight to the failure of the local governing body, or its designated subordinate officer or body, to make a determination regarding public convenience or necessity within the 90-day period.

(c) For purposes of this section, the following definitions shall apply:

(1) “Reporting districts” means geographical areas within the boundaries of a single governmental entity (city or the unincorporated area of a county) that are identified by the local law enforcement agency in the compilation and maintenance of statistical information on reported crimes and arrests.

(2) “Reported crimes” means the most recent yearly compilation by the local law enforcement agency of reported offenses of criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, theft, and motor vehicle theft, combined with all arrests for other crimes, both felonies and misdemeanors, except traffic citations.

(3) “Population within the census tract or census division” means the population as determined by the most recent United States decennial or special census. The population determination shall not operate to prevent an applicant from establishing that an increase of resident population has occurred within the census tract or census division.

(4) “Population in the county” shall be determined by the annual population estimate for California counties published by the Demographic Research Unit of the Department of Finance.

(5) “Retail licenses” shall include the following:

(A) Off-sale retail licenses: Type 20 (off-sale beer and wine) and Type 21 (off-sale general).

(B) On-sale retail licenses: All retail on-sale licenses, except Type 43 (on-sale beer and wine for train), Type 44 (on-sale beer and wine for fishing party boat), Type 45 (on-sale beer and wine for boat), Type 46 (on-sale beer and wine for airplane), Type 53 (on-sale general for train and sleeping car), Type 54 (on-sale general for boat), Type 55 (on-sale general for airplane), Type 56 (on-sale general for vessels of more than 1,000 tons burden), and Type 62 (on-sale general bona fide public eating place intermittent dockside license for vessels of more than 15,000 tons displacement).

(6) A “premises-to-premises transfer” refers to each license being separate and distinct, and transferable upon approval of the department.

(d) For purposes of this section, the number of retail licenses in the county shall be established by the department on an annual basis.

(e) The enactment of this section shall not affect any existing rights of any holder of a retail license issued before April 29, 1992, whose premises were destroyed or rendered unusable as a result of the civil disturbances occurring in Los Angeles from April 29 to May 2, 1992, to reopen and operate those licensed premises.

(f) This section shall not apply if the premises have been licensed and operated with the same type license within 90 days of the application.

(Amended by Stats. 2019, Ch. 29, Sec. 46. (SB 82) Effective June 27, 2019.)