Oakland City Planning Commission STAFF REPORT

Case File Number CM10313 **March 2, 2011**

Location:	**3222 Martin Luther King Jr. Way ("S & N Market")**
Assessor's Parcel Number:	**009 -0716-027-00**
Proposal:	**To allow a convenience market selling beer and wine to include sale of liquor/distilled spirits.** **The project would convert a Deemed Approved (legal nonconforming) activity to a conditionally permitted activity and would require an upgrade to the ABC license from a #20/Beer&Wine to a #21/General** ***The project was originally scheduled for the February 2, 2011 hearing***
Applicant/ Phone Number:	Adel M. Homnan (510) 654-6471
Owner:	David Kwong
Planning Permits Required:	Major Conditional Use Permit to change the ABC license type of a legal nonconforming Alcoholic Beverage Sales Commercial Activity (OMC Sec. 17.102.210(A), 17.114.070(A)(4)); Additional criteria (2 sets) for sale of alcoholic beverages and for findings of Public Convenience or Necessity for an over-concentrated area (OMC Sec. 17.102.210(B)(3), (4))
General Plan:	Urban Residential
Zoning:	C-10 Local Retail Commercial Zone
Environmental Determination:	Statutorily exempt, Section 15270(a)(b)(c) of the State CEQA Guidelines: Project Which Are Disapproved
Historic Status:	Potential Designated Historic Property; Survey rating: Dc2- (ASI non-contributor, minor importance, potentially secondary)
Service Delivery District:	I
City Council District:	3 - Nadel
Date Filed:	December 6, 2010
Action to be Taken:	Deny the application
Finality of Decision:	*Appealable to City Council within 10 days*
For Further Information:	Contact case planner **Aubrey Rose** at **(510) 238-2071** or arose@oaklandnet.com

SUMMARY

The applicant Mr. Adel Homnan on behalf of the property owner Mr. David Kwong requests Planning Commission approval of a Major Conditional Use Permit with additional findings to allow a convenience market selling beer and wine to include sale of liquor (distilled spirits). The project would convert a Deemed Approved (legal nonconforming) activity to a conditionally permitted activity and would require an upgrade to the ABC license from a type 20 (Beer & Wine) to a type 21 (General).

Staff recommends the Planning Commission deny the project as described in this report and attached Findings for Denial.

CITY OF OAKLAND PLANNING COMMISSION

Case File: CM10-313
Applicant: Adel M. Homnan
Address: 3222 Martin Luther king Jr. Way ("S&N Market")
Zone: C-10

PROPERTY DESCRIPTION

The property is an interior 4,000 square-foot lot in west Oakland located on Martin Luther King Jr. Way abutting the 980/24 freeway. It contains a one-story commercial building at zero lot line containing a convenience market. The convenience market sells household products, food including meat, produce, dairy, and alcoholic beverages consisting of beer and wine by Deemed Approved (legal nonconforming) status. Alcoholic beverages are located in seven coolers along the market's rear wall. The cashier is located to the left of the entrance. The convenience market has operated for approximately 68 years and by the current operator for the last 12 years. Business hours are daily from 7:00am to 11:00pm.

Situated to the north (left) and west (across the street) are single-family homes, and a day care center within 1,000-feet of the site at 3321 Martin Luther King Jr. Way; to the east (rear) is the 980/24 freeway; to the south (right) is a small factory or warehouse and further south is a church within 1,000-feet of the site. The area contains a mix of housing types, other civic uses including an elementary school, and some commercial uses. No other active liquor licenses or properties possessing conditional use permits allowing sale of alcoholic beverages exist within 1,000-feet of the site. Although there previously were convenience markets located within 1,000 feet of the site, these uses all have lapsed and none of these currently has authority to reopen without new City permits.

BACKGROUND

The convenience market is legal nonconforming use, and alcoholic beverages sales commercial activities there are subject the City's Deemed Approved and Legal Nonconforming Use Regulations. The market is a Deemed Approved/Legal nonconforming use because the business did not obtain a conditional use permit, which was not required when the business was established but is required under the current Planning Code. Deemed Approved status applies to certain legal nonconforming uses specified in the Planning Code, including sale of alcoholic beverages and includes additional operational standards for those uses. Markets previously operating within 1,000-feet of the site have lost their Deemed Approved status and no longer sell alcoholic beverages. These markets previously were located at 3039 Martin Luther King Jr. Way, 3227 West Street, and 3145 West Street.

PROJECT DESCRIPTION

The proposal is to add the sale of distilled spirits to the business' existing beer and wine sales. This would require a change of the establishment's ABC license from a Type 20 to a Type 21. The proprietor has submitted a neighborhood petition indicating support for the proposal signed by eighty-six people from the surrounding community.

GENERAL PLAN ANALYSIS

The project site is located within the Urban Residential area of the General Plan. The intent of the area is: *"To create, maintain, and enhance areas of the City that are appropriate for multi-unit, mid-rise or high-rise residential structures in locations with good access to transportation and other services."* Desired Character and Use is for primary future uses to be residential. The proposal does not conform to the Desired Character and Use or to the following Policies of the General Plan's Land Use & Transportation Element:

Policy N1.6 Reviewing Potential Nuisance Activities.
The City should closely review any proposed new commercial activities that have the potential to create public nuisance or crime problems, and should monitor those that are existing. These may include isolated commercial or industrial establishments located within residential areas, alcoholic beverage sales activities (excluding restaurants), adult entertainment, or other entertainment activities.

Policy N5.2 Buffering Residential Areas.
Residential areas should be buffered and reinforced from conflicting uses through the establishment of performance-based regulations, the removal of non-conforming uses, and other tools.

The proposal involves intensifying a nonconforming use that is of an activity type considered to be a potential nuisance when located adjacent to residences as in this instance.

ZONING ANALYSIS

The property is located in the C-10 Local Retail Commercial Zone. The intent of the C-10 Zone is: *"to create, preserve, and enhance areas of small-scale retail establishments serving frequently recurring needs in convenient locations, and is typically appropriate to small shopping clusters located within residential communities."* In the C-10 Zone, Alcoholic Beverage Sales Commercial Activity is conditionally permitted use (that is, requiring a Conditional Use Permit). All Conditional Use Permits involving sale of alcoholic beverages are Major Conditional Use Permits under the Planning Code, with require Planning Commission review and are appealable to the City Council.

Nonconforming use substitutions
The Planning Code's Nonconforming Use Regulations Chapter (OMC Sec. 17.114) specifies certain types of substitutions in use that may be allowed without removing the legal nonconforming status of a use. A change that requires obtaining a different type of alcoholic beverage sale retail license from the ABC is expressly prohibited (O.M.C. Sec. 17.114(A)(4)).

Conditional Use Permit
Because the proposal would not be an authorized substitution, the proposal to sell distilled spirits would require a Major Conditional Use Permit. The proposal does not meet general findings and additional findings for alcohol sales as it would act to solidify a historically problematic land use in a high crime area at a site with close proximity to civic uses. The required Findings of Public Convenience or Necessity also clearly are not met for the project. Following are discussions regarding over-concentration (alcohol licenses and crime in the area) as well as Public Convenience or Necessity findings:

Over-concentration
The property is located in an over-concentrated area under the Planning Code. Over-concentrated areas contain a high number of alcohol outlets within a census tract and/or a high crime rate within a Police Beat. The area is over-concentrated due to its high crime rate. The property is located in Police Beat 6X where 1,828 crimes were reported where over-concentration, twenty-percent over the City median crime rate, was 968.4 for 2009 per OPD. This is nearly two times the threshold for over-concentration. OPD statistics indicate twenty-nine reported crimes within 1,000-feet of the project site over a ninety-day period (Attachment B).

Findings of Public Convenience or Necessity
When over-concentration exists, a proposal must meet Findings for Public Convenience or Necessity (PC or N findings) pursuant to the Planning Code in addition to Conditional Use Permit findings. PC or N findings are

legally required findings that justify how the project will be beneficial to the surrounding community. They are modeled on State findings to ensure that an establishment does not constitute an undue proliferation of such establishments. This is especially intended to identify an area where a new establishment may contribute to distressed conditions in the area that negatively impact the community. For over-concentrated sites located outside of downtown, additional PC or N findings are required. There is an exemption for establishments exceeding 20,000 square-feet in floor area and twenty-five full-time employees; however, this project is not eligible for the exemption. These legally-required additional PC or N findings contained in the Planning Code are particularly clear (OMC Sec. 17.102.210(B)(4)); they cannot be made for the proposal as follows

a. The proposed project is not within one thousand (1,000) feet of another alcohol outlet (except full service restaurants), school, licensed day care center, public park or playground, churches, senior citizen facilities, and licensed alcohol or drug treatment facilities; and

This finding cannot be made: the convenience market is located within 1,000-feet of a church (3208 Martin Luther King, Jr. Way, approx. 43-feet between properties), a park (northeast of 34th Avenue at the 24 freeway), and an elementary school (890 Brockhurst Street, approx. 850-feet between properties).

b. Police department calls for service within the "beat" where the project is located do not exceed by twenty (20) percent, the average of calls for police service in police beats citywide during the preceding twelve (12) months.

This finding cannot be made: Police Beat 6X had 14,795 calls for police service where 9,918 calls constitutes over-concentration (that is, twenty-percent over the Citywide mean per most recent 2009 OPD data provided to staff). The project area's statistics for police service calls exceed over-concentration by fifty-percent.

Staff has made the applicant abundantly aware of these findings and their implications. In conclusion, staff finds the proposal to be inconsistent with the Planning Code and specifically the findings related to Alcoholic Beverage Sales Commercial Activities.

ENVIRONMENTAL DETERMINATION

The California Environmental Quality Act (CEQA) Guidelines statutorily exempt projects which are disapproved (Section 15270) and the proposal is therefore not subject to further Environmental Review.

KEY ISSUES AND IMPACTS

In staff's analysis, the general and additional Conditional Use Permit findings as well as Public Convenience or Necessity findings in particular are not met by this proposal. Additionally, the conversion of a Deemed Approved alcoholic beverage sales establishment to a conditionally permitted establishment may be undesirable at the given establishment and area and may set an undesirable precedent. While zoning practice intends for legally nonconforming uses to cease over time and be replaced by conforming uses, these uses are largely unregulated until that time that they chose to disband. Some land uses historically known to be problematic in Oakland, such as alcohol outlets and hotels/motels, have been "deemed approved" which allows the City to apply performance standards to these uses. This tool allows the City greater control over these uses than what is afforded to other nonconforming uses. A City Hearing Officer can revoke the status of Deemed Approved establishments for repeated transgressions, after due notice and hearing.

In the case of a conditionally approved activity, the activity legally runs with the land in perpetuity. A conditional use permit essentially acts to vest a use that is meant to remain subject to regulations; it therefore offers greater protection than legal nonconforming status. Although a conditional use permit can be revoked for repeated transgressions, control over problematic locations is drastically reduced in comparison with City control over Deemed Approved establishments. Approval of the proposal would essentially vest existing activities and their intensification, removing the establishment from special monitoring by ABAT under the Deemed Approved program and approving liquor sales at this location forever. It could also set a precedent for hundreds of Deemed Approved alcoholic beverages sales activities throughout Oakland to apply for conditional use permits with the expectation of a similar decision. ABAT has been contacted regarding the application and has not recommended approval or denial but has suggested additional conditions, should the project be approved.

In this case, however, required legal findings from the Planning Code including Public Convenience or Necessity findings. Due to the fact that required findings are not met by this proposal, staff cannot support the request. Staff has informed the applicant of the situation and their options both prior to and after submitting an application.

In conclusion, staff recommends denial of the application.

RECOMMENDATIONS:

1. Affirm staff's environmental determination.
2. Deny the application subject to the attached findings.

Prepared by:

Aubrey Rose

AUBREY ROSE
Planner II

Approved by:

Scott Miller

SCOTT MILLER
Zoning Manager

Approved for forwarding to the
City Planning Commission:

ERIC ANGSTADT
Deputy Director
Community and Economic Development Agency

ATTACHMENTS:

A. Findings for Denial
B. OPD crime statistics

Attachment A: Findings for Denial

This proposal does not meet all of the required findings under General Use Permit Criteria (OMC Sec. 17.134.050), Special Regulations Applying to Certain Establishments Selling Alcoholic Beverages (OMC Sec. 17.102.210(A)), Findings for Public Convenience or Necessity (OMC Sec. 17.102.210(B)(3)), and Additional Findings for Public Convenience or Necessity (OMC Sec. 17.102.210(B)(4)) as set forth below. Required findings that cannot be made are shown in bold type; explanations as to why these findings cannot be made are in normal type.

GENERAL USE PERMIT CRITERIA (OMC SEC. 17.134.050)

C. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region;

The proposal would provide greater Zoning protections to a historically problematic use (off sale of alcoholic beverages featuring liquor/distilled spirits) at a nonconforming site located in a high crime area.

F. That the proposal conforms in all significant respects with the Oakland General Plan and with any other applicable guidelines or criteria, district plan or development control map which has been adopted by the Planning Commission or City Council.

The proposal does not conform to the following Policies of the General Plan's Land Use & Transportation Element:

> Policy N1.6 Reviewing Potential Nuisance Activities.
> The City should closely review any proposed new commercial activities that have the potential to create public nuisance or crime problems, and should monitor those that are existing. These may include isolated commercial or industrial establishments located within residential areas, alcoholic beverage sales activities (excluding restaurants), adult entertainment, or other entertainment activities.
>
> Policy N5.2 Buffering Residential Areas.
> Residential areas should be buffered and reinforced from conflicting uses through the establishment of performance-based regulations, the removal of non-conforming uses, and other tools.

The proposal involves intensifying a nonconforming use that is of an activity type considered to be a potential nuisance when located adjacent to residences as in this instance.

SPECIAL REGULATIONS APPLYING TO CERTAIN ESTABLISHMENTS SELLING ALCOHOLIC BEVERAGES (OMC SEC. 17.102.210(A))

1. That the proposal will not contribute to undue proliferation of such uses in an area where additional ones would be undesirable, with consideration to be given to the area's function and character, problems of crime and loitering, and traffic problems and capacity;

The property is located in an over-concentrated area under the Planning Code. Over-concentrated areas contain a high number of alcohol outlets within a census tract and/or a high crime rate within a Police Beat. The property is located in Police Beat 6X where 1,828 crimes were reported where over-concentration, twenty-percent over the

City median crime rate, was 968.4 for 2009 per OPD. This is nearly two times the threshold for over-concentration.

2. That the proposal will not adversely affect adjacent or nearby churches, temples, or synagogues; public, parochial, or private elementary, junior high, or high schools; public parks or recreation centers; or public or parochial playgrounds;

The proposal would increase Zoning protections to a convenience market is located within 1,000-feet of a church (3208 Martin Luther King, Jr. Way, approx. 43-feet between properties), a park (northeast of 34th Avenue at the 24 freeway, approximately 600-feet between properties), a daycare center (3261 Martin Luther King Jr. Way, approximately 120-feet between properties) and an elementary school (890 Brockhurst Street, approx. 850-feet between properties).

FINDINGS OF PUBLIC CONVENIENCE OR NECESSITY (OMC SEC. 17.102.210.B.3)
In addition to the criteria prescribed elsewhere in the zoning regulations, a land use permit for an Alcoholic Beverage Sales Activity located within an Alcoholic Beverage Sales license overconcentrated area shall be granted and a finding of Public Convenience or Necessity made only if the proposal conforms to all of the following three criteria:

a. That a community need for the project is clearly demonstrated. To demonstrate community need, the applicant shall document in writing, specifically how the project would serve an unmet or underserved need or population within the overall Oakland community or the community in which the project is located, and how the proposed project would enhance physical accessibility to needed goods or services that the project would provide, including, but not limited to alcohol; and

The applicant did not submit findings. There are other alcohol outlets in the area including establishments selling distilled spirits.

b. That the overall project will have a positive influence on the quality of life for the community in which it is located, providing economic benefits that outweigh anticipated negative impacts, and that will not result in a significant increase in calls for police service; and

Sale of distilled spirits has no measurable positive influence of a community's quality of life and does not provide economic benefits to it. A significant increase in calls for police service may result from the project.

c. That alcohol sales are typically a part of this type of business in the City of Oakland (for example and not by way of limitation, alcohol sales in a laundromat would not meet this criteria).

Alcohol sales are typical of several but not all convenience stores.

ADDITIONAL FINDINGS OF PUBLIC CONVENIENCE OR NECESSITY (OMC SEC. 17.102.210(B)(4)
In addition to the above criteria, projects outside the Central Business District and Hegenberg Corridor shall meet all of the following criteria to make a finding of Public Convenience or Necessity, with the exception of those projects that will result in twenty-five (25) or more full time equivalent (FTE) employees and will result in a total floor area of twenty thousand (20,000) square feet or more.

The following findings apply: the convenience market is located in an area that is over-concentrated for crime that is not located downtown nor on Hegenberger west of the 880 freeway; the market measures no greater than 4,000 square-feet in area and employs approximately two persons.

a. The proposed project is not within one thousand (1,000) feet of another alcohol outlet (except full service restaurants), school, licensed day care center, public park or playground, churches, senior citizen facilities, and licensed alcohol or drug treatment facilities; and

This findings cannot be made: the convenience market is located within 1,000-feet of a church (3208 Martin Luther King, Jr. Way, approx. 43-feet between properties), a park (northeast of 34th Avenue at the 24 freeway), and an elementary school (890 Brockhurst Street, approx. 850-feet between properties).

b. Police department calls for service within the "beat" where the project is located do not exceed by twenty (20) percent, the average of calls for police service in police beats citywide during the preceding twelve (12) months.

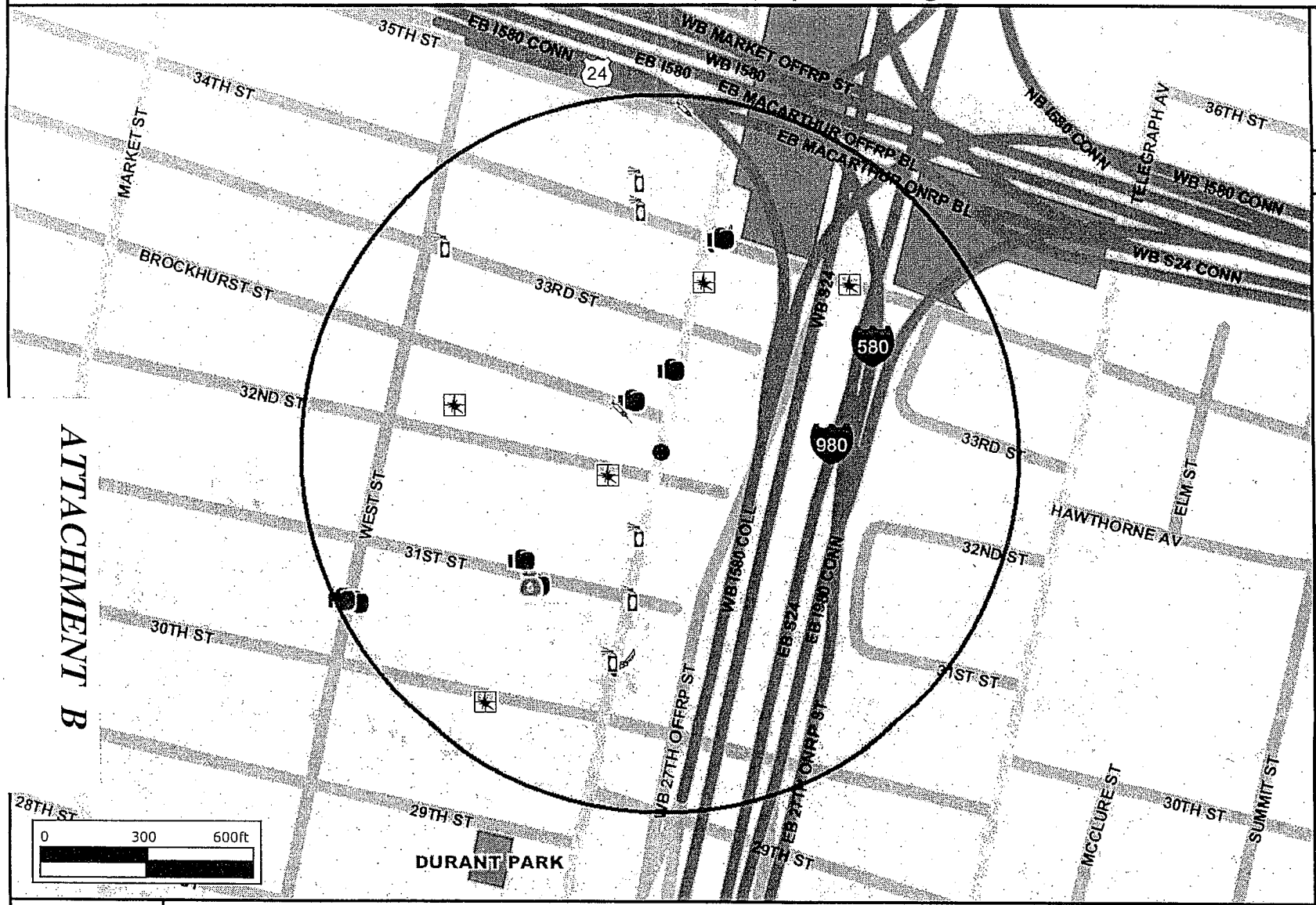
This finding cannot be made: Police Beat 6X had 14,795 calls for police service where 9,918 calls constitutes over-concentration (that is, twenty-percent over the Citywide mean per most recent 2009 OPD data provided to staff). The project area's statistics for police service calls exceed over-concentration by fifty-percent.

DENIED BY:

City Planning Commission:_____(date)_____(vote)

3222 Martin Luther King Jr Way

1,000-ft radius/90-days ending 3/23/11



Legend

Incidents
- Aggravated Assault
- Simple Assault
- Burglary
- Narcotics
- Robbery
- Theft
- Vandalism
- Freeways
- Major City Streets

Streets
- City Streets
- Water
- PARKS
- CITY LIMITS

N W E S

This map application does not reflect official crime index totals as reported to the FBI's Uniform Crime Reporting program. The crime icons do not reflect the exact location of any particular crime. The listed crimes are subject to change for a variety of reasons, including late reporting, reclassification of some offenses and discovery that some offenses were unfounded.

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City of Oakland

ATTACHMENT B

Incident Summary Report

LEGEND	Total	Chart
AGGRAVATED ASSAULT	4	
BURGLARY	5	
NARCOTICS	3	
ROBBERY	3	
SIMPLE ASSAULT	4	
THEFT	3	
VANDALISM	7	
Grand Total	**29**	