

RESOLUTION NO. \_\_\_\_\_

**A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING, SUBJECT TO CONDITIONS, A CONDITIONAL USE PERMIT AND GRANTING A DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO ALLOW LATE NIGHT USE, AND THE OFF-SALE OF ALCOHOL FOR A FULL RANGE OF ALCOHOLIC BEVERAGES (ABC TYPE-21 LICENSE) WITHIN A COMMERCIAL/RETAIL DEVELOPMENT ON AN APPROXIMATE 2.0-GROSS ACRE SITE LOCATED AT THE SOUTHEAST CORNER OF WEST SAN CARLOS STREET AND RACE STREET (320 RACE STREET)**

**FILE NOS. CP17-005 & ABC17-002**

**WHEREAS**, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on February 1, 2017 and February 16, 2017, applications (File Nos. CP17-005 & ABC17-002) were filed, respectively, by the applicant, Terry Pries, with the City of San José for a Conditional Use Permit and a Determination of Public Convenience or Necessity to allow the off-sale of alcohol (ABC Type-21 License) of a full range of alcoholic beverages at a yet-to-be-constructed 29,575-square foot full-service grocery store (Smart & Final Extra!) on a 2.0-gross acre site, on that certain real property situated in the Combined Industrial/Commercial Zoning District and located at the southeast corner of West San Carlos Street and Race Street (320 Race Street, San José, which real property is sometimes referred to herein as the “subject property”); and

**WHEREAS**, the subject property is all that real property more particularly described in Exhibit "A," entitled “Legal Description,” which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

**WHEREAS**, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code, the Planning Commission conducted a hearing on said application on August 23, 2017, notice of which was duly given; and

**WHEREAS**, at said hearing, the Planning Commission gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

**WHEREAS**, at said hearing, the Planning Commission made a recommendation to the City Council respecting said matter based on the evidence and testimony; and

**WHEREAS**, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code, this City Council conducted a hearing on said application, notice of which was duly given; and

**WHEREAS**, at said hearing, this City Council gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

**WHEREAS**, at said hearing this City Council received and considered the reports and recommendations of the City's Planning Commission and City's Director of Planning, Building and Code Enforcement; and

**WHEREAS**, at said hearing, this City Council received in evidence a development plan for the subject property entitled, "Conditional Use Permit for Smart & Final Extra!," dated revisions on July 25, 2017, said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

**WHEREAS**, said public hearing before the City Council was conducted in all respects as required by the San José Municipal Code and the rules of this City Council; and

**WHEREAS**, this City Council has heard and considered the testimony presented to it at the public hearing, and has further considered written materials submitted on behalf of the project applicant, City staff, and other interested parties;

**NOW, THEREFORE**, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

After considering all of the evidence presented at the Public Hearing, the City Council finds that the following are the relevant facts regarding this project:

1. **Site Description and Surrounding Uses.** The subject site is located on the southeast corner of West San Carlos Street and Race Street (320 Race Street). The project is located on the site of the former Mel Cotton's Sporting Goods store. Across West San Carlos Street to the north are an existing car dealership, restaurants, and commercial offices. Directly south of the project site is an existing gymnasium/dance center, and across Race Street to the west is an existing retail and commercial center (Safeway). East of the site is an existing industrial fabrication business (O.C. McDonald Company Inc.). The entrance of the use would be approximately 400 feet distant and separated by a street from the nearest residentially zoned property. Within a half mile of the site, there are approximately 1,767 residential units that are entitled or under construction.

On June 28, 2017 a proposal for a Site Development Permit to allow the demolition of an existing commercial building (Mel Cotton's), removal of seven ordinance-size trees, and construction of a new 29,575-square foot commercial building (Smart & Finals Extra!) was approved at a Director's Hearing. The project was environmentally appealed to the City Council and the City Council voted on August 8, 2017, to deny the appeal and uphold the Director's environmental review determination and approval of the Site Development Permit and Tentative Map. That decision allowed the building's demolition and construction of the commercial building on the subject site.

2. **Project Description.**

This application is a Conditional Use Permit and Determination of Public Convenience or Necessity (PCN) to allow late-night use for 24-hour operation of the store and allow the off-sale of alcohol for the sale of a full range of alcoholic beverages (ABC Type-21 License) between the hours of 6:00 a.m. to 12:00 a.m. on the subject 2.0-gross acre site within the yet to be constructed full-service grocery store. The off-sale of alcohol would occupy approximately 395 square feet within the store's 23,082-square foot sales area (approximately 1.71% of the total sales area). A Management and Operations Plan has been prepared for the site that describes security measures and disturbance reporting contact information.

3. **General Plan Conformance.** The project site has a General Plan Land Use/Transportation Diagram designation of Combined Industrial/Commercial. This category allows a significant amount of flexibility for the development of a varied mixture of compatible commercial and industrial uses. This designation occurs in areas where the existing development pattern exhibits a mix of commercial and industrial land uses, or in areas on the boundary between commercial and industrial uses. The Conditional Use Permit and Determination of Public Convenience or Necessity would allow a use that provides retail services to the community and is consistent with uses allowed in areas designated as Combined Industrial/Commercial under the General Plan. The use is also consistent with the following General Plan policies:

- a. Neighborhood Serving Commercial Policy LU-5.1: In order to create complete communities, promote new commercial uses and revitalize existing commercial areas in locations that provide safe and convenient multi-modal access to a full range of goods and services.

*Analysis: The project site is located within walking distance to existing and proposed residential uses and provides commercial uses to the benefit of nearby residents. Additionally, the use would be located within 2,000 feet of the existing VTA light rail and at the corner of a proposed bus rapid transit station. The off-sale of alcohol would complement the full range of foods and goods at this location, accommodate the shopping needs of a wide range of residential and business customers, and increase the number of retail uses along major arterial streets, and replace an existing vacant building. The allowance of the late night operation of the project would also be consistent with the other allowed late night use of the nearby existing businesses (E.g. Safeway) and would provide further activity in a major commercial corridor for night time uses*

- b. Neighborhood Serving Commercial Policy LU-5.10: In the review of new locations for the off-sale of alcohol, give preference to establishments that offer a full range of food choices including fresh fruit, vegetables, and meat.

*Analysis: Based on the submitted floor plan, the project is a full service commercial store offering a range of foods from fresh fruit, vegetables, meat and other products consistent with this policy. Furthermore, conditions of approval have been placed on the project to only allow the off-sale of alcohol to be implemented in conjunction with a full service grocery store (see Condition Nos. 5, 6, and 8).*

- c. Maintain Employment Land Policy LU-8.2: Encourage more large-format commercial uses in Combined Industrial/Commercial lands, since these development typologies are typically similar to the development scale of industrial development in the same area. Discourage small-scale and strip commercial shopping centers in the Combined Industrial/Commercial area.

*Analysis: The subject commercial/retail business is a large-format commercial use that is similar in scale to the adjacent commercial and industrial businesses. Additionally, the new development will locate the building closer to the street frontage and corner, which will provide sufficient buffer from the adjacent industrial uses and allow the functionality of both the commercial and industrial uses. Additional night time uses of the area will bring human activity to an industrial area that is predominately inactive at night, therefore providing more eyes on the area. As stated in the Management and Operation Plan of the Smart and Final Extra!, the store would include merchandise that is normally found in a grocery store, but also have supplies and food for business needs as well. This dual use of the store functions as both a benefit to the business and residential community.*

4. **Midtown Specific Plan.** The Midtown Specific Plan was adopted in 1992 and covers approximately 210 acres of industrial and commercial service area. The plan divided the area into six subareas and the subject project is located in the Lincoln Auzeais subarea, which is characterized by numerous industrial and service commercial uses. The land use designation noted in the Midtown Specific Plan has been retired and the land use designation in the General Plan land use designation of Combined Industrial/Commercial applies. However, the use is consistent with both the Midtown Specific Plan and the CIC general plan designation.
5. **Zoning Ordinance Compliance.** As stated above, the project is located in the CIC Combined Industrial/Commercial Zoning District. Late night uses and off-sale (alcoholic beverages, full range) are allowed in the CIC Combined Industrial/Commercial Zoning District with an approved Conditional Use Permit. As discussed below, the site is located in a census tract that exceeds the number of authorized ABC off-sale licenses (two licenses authorized for this census tract) and is located in a police beat that exceeds 20 percent greater number of reported crimes than the average number of reported crimes for the City as a whole. Therefore, findings for a determination of a public convenience or necessity are required. Additional analysis is below in the Determination of Public Convenience or Necessity section.
6. **City Council Policy 6-27: Evaluation of 24-Hour Uses.** On November 30, 1984, the City Council approved an amendment to the Zoning Ordinance that required all commercial uses operating between the hours of 12:00 midnight and 6:00 a.m. be subject to a Conditional Use Permit. This ordinance change was established to ensure compatibility of late night and early morning uses with surrounding land uses. The policy acknowledges that while there is a general public need for some late night services, there are potentially significant problems with such uses including proximity to residential uses and noise. This policy is intended to provide guidelines for the appropriate development of establishments that operate during these late

night hours, while avoiding the problems associated with such operations. To do that, the policy evaluates each using applicable guidelines outlined below:

- a. **Area Use Compatibility:** Twenty-four hour uses should not be approved unless the facility can operate without detriment to nearby residential uses or the general welfare of the surrounding areas.

*Analysis: The primary use of the site is a full-service commercial/retail store. The conditional use permit limits the off-sale of alcohol to between the hours of 6:00 a.m. to 12 midnight but allows the use of the non-alcohol portion of the business to operate 24 hours a day. As the site would be buffered from the surrounding industrial uses by a parking lot and the entrance to the business is located more than 400 feet from the nearest residential property line, the use would not be a detriment to any uses in the surrounding areas.*

- b. **Use Separation:** Physical separation of incompatible uses is the best means to avoid potential problems. Generally, 24-hour uses should be located at least 300 feet (measured from the building entrance and “Designated Parking Area” and/or “Outdoor Use Area” to the residential property line) from any property that is residentially zoned, planned, or in use. The 300-foot separation requirement may be increased or decreased on a case by case review of the specific circumstance of the site and proposed use based on the intensity of the use, location of other buildings and physical features, neighborhood input or other relevant criteria.

*Analysis: The front doors of the store are approximately 400 feet from the nearest residential property line. Due to the distance between the uses and the existence of other buildings and street between the entrance and residences, public nuisances from the site would be minimized for the closest neighbors.*

- c. **Outdoor Activities:** Outdoor activities may be limited for 24-hour operations except in the Downtown Core Area.

*Analysis: There is no outdoor activity, as the store would be enclosed on all sides with the primary access from the eastern (interior) portion of the site. Additionally, the loading areas would be screened in an enclosed area on the south portion of the site.*

- d. **Noise:** Use of sound attenuation walls and landscaping may be required at property lines in order to minimize noise emanating from the site. No amplified sound is permitted between 10:00 p.m. and 7:00 a.m., except low-volume drive-through speakers specifically approved in conjunction with 24-hour drive-through use.

*Analysis: The closest residential property line is approximately 400 feet from this use and is separated by the building and street. There will be no amplified sound outdoors.*

- e. **Lighting:** Light fixtures shall be designed and installed to minimize impacts on adjacent properties, while providing adequate lighting levels to assure security and discourage loitering in parking areas.

*Analysis: The new lighting fixtures would be appropriately shielded to direct light downward per the City's lighting policy to minimized impact to adjacent properties, while ensuring sufficient lighting of the site for safety.*

- f. **Cleaning and Maintenance:** Cleaning and maintenance for outdoor areas utilizing mechanical blowers, vacuums or other noise generating equipment shall not be used between the hours of 10:00 p.m. and 7:00 a.m. Special conditions to control on- and off-site litter may be required on a case-by-case basis.

*Analysis: This Conditional Use Permit Resolution includes a condition of approval (Condition No. 15) that requires the operator of the use to clean the public right-of-way immediately adjacent to the subject site before 8:00 a.m. each day. This condition of the Resolution also limits the operator of the use to using mechanical equipment for outside maintenance only between the hours of 7:00 a.m. and 10:00 p.m.*

- 7. **Environmental Review.** Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act, this project is exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended (CEQA), as the off-sale of alcohol, would be located within an existing approved structure. The use will occupy approximately 395 square feet within the store's 23,082-square foot sales area (approximately 1.71% of the total sales area), and would not require expansion of the approved building or use. The CEQA Guidelines Section 15332 (In-fill Development Projects) exemption applies to the project as it is consistent with the General Plan designation; the project occurs within city limits and is no more than five acres and substantially surrounded by urban uses; the project site has no value as habitat for endangered, rare or threatened species; the approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality; and the site is adequately served by all required utilities and public services.

- 8. **Conditional Use Permit Findings.** The City Council concludes and finds, based on the analysis of the above facts in regards to this Conditional Use Permit and Determination of Public Convenience or Necessity, that:

- a. The Conditional Use Permit, as approved, is consistent with and will further the policies of the General Plan, applicable specific plans and area development policies; and
- b. The Conditional Use Permit, as approved, conforms with the Zoning Code and all other provisions of the San José Municipal Code applicable to the project; and

- c. The Conditional Use Permit, as approved, is consistent with applicable City Council policies, or counter Conditional Use Permit balancing considerations justify the inconsistency; and

*Analysis: The use, which is the subject of the Conditional Use Permit, is consistent with the General Plan Designation of Combined Industrial/Commercial as it complements the full-service grocery retail uses of this site, while not impacting nearby industrial and commercial uses. The previously approved Site Development Permit (File No. H17-018) contains a layout in which the new building provides access from the pedestrian walkway while buffering the adjacent industrial uses to the east with a parking lot and is consistent with the Development Standards and applicable Zoning Codes. The late night use and off-sale of alcohol would not modify the site layout and would provide additional services and convenience to serve the needs of existing and anticipated residential and commercial growth in the area. The applicable City Council policies (Late night and Off-Sale) are discussed in detail below.*

- d. The proposed use at the location requested will not adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or impair the utility or value of property of other persons located in the vicinity of the site; or be detrimental to public health, safety or general welfare; and

*Analysis: As stated in the Police Department Memorandum dated May 16, 2017 the San José Police Department is neutral to the issuance of the Conditional Use Permit, with the follow conditions included as a part of the permittee's ABC license:*

- 1) No single sales of malt liquor.*
- 2) No single sales of "mini bottles" also known as "shooters, minis, or airplane bottles" of alcohol.*
- 3) Drug Paraphernalia, including but not limited to "Brillo" or steel wool style scrubbing pads (single sales), cigarette papers, water/glass smoking pipes, hookah style pipes and "Ziploc" style bags smaller than 5"x5" shall not be sold.*
- 4) The licensee shall be responsible for keeping litter-free the area adjacent to the premises over which they have control.*
- 5) Any graffiti painted or marked upon the premises or adjacent area under the control of the licensee shall be removed or painted over within 48 hours.*
- 6) The licensee shall ensure no loitering occurs in the area of the establishment.*



*The use is not located adjacent to residential uses and provides sufficient buffer from existing industrial uses in the area. The use would further support the new development at the subject site with active uses and provide services that complement planned retail and commercial uses in the area. In addition to the above conditions that would be included as part of the permittee's ABC license, this resolution includes conditions addressing items 4-6 in the Police Department memo as those conditions are also within the City's authority to regulate. Additional conditions about nuisance, clean up and noise are included as a part of this Conditional Use Permit to further reduce the potential for adverse effect on the surrounding neighborhood. (Condition Nos. 14-17)*

- e. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in this title, or as is otherwise required in order to integrate said use with the uses in the surrounding areas.

*Analysis: This Conditional Use Permit will not modify the approved site layout and building design for the new grocery store (Smart & Final Extra!). As stated in the Site Development Permit (File No. H17-018) for the project, the project site was found to be adequate in size to accommodate the new building and associated site improvements.*

- f. The proposed site is adequately served by highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate, and by other public or private service facilities as are required.

*Analysis: The project has adequate access from both West San Carlos Street and Race Street, with pedestrian access from both the street frontages and from the parking lot. In addition, the project site is served by a VTA bus route along West San Carlos Street, and is connected to public utilities and systems.*

Based on the above analysis, all of the above general findings related to the Conditional Use Permit can be made.

9. **Off-sale of Alcohol Findings.** Pursuant to Section 20.80.900 of the Municipal Code, a use permit may be issued pursuant to the applicable provisions of the Zoning Ordinance for the off-sale of any alcoholic beverages only if the decision-making body first makes the following three findings, if applicable, to the off-sale of alcoholic beverages:

- a. For such use at a location closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situated either within or outside the City, that the proposed location of the off-sale of alcoholic beverages use would not result in a total of more than four (4) establishments that provide alcoholic

beverages for off-site consumption within a 1,000 foot radius from the proposed location.

*Analysis: There are two other uses involving the off-sale of alcoholic beverages within a 500-foot radius of the site (Safeway and 3 Kings Market & Beer). With the project, there would be a total of four off-sale establishment (Project Site, Safeway, 3 Kings Market & Beer, and Yawh Mini Market) within 1,000 feet of the site. The resulting project would not result in more than four establishments for off-site consumption within 1,000 foot radius; therefore, this finding **can** be made.*

- b. For such use at a location closer than five hundred (500) feet from any other use involving the off-sale of alcoholic beverages, situated either within or outside the City, where the proposed location of the off-sale of alcoholic beverages use would result in a total of more than four (4) establishments that provide alcoholic beverages for off-site consumption within a one thousand (1,000) foot radius from the proposed location, that the resulting excess concentration of such uses will not:
  - i. Adversely affect the peace, health, safety, morals, or welfare of persons residing or working in the surrounding area; or
  - ii. Impair the utility or value of property of other persons located in the vicinity of the area; or
  - iii. Be detrimental to public health, safety or general welfare.

*Analysis: As stated above, the use is located within 500 feet of two other off-sales of alcohol uses, but will not result in more than four establishments that provide alcoholic beverages for off-site consumption within a 1,000 foot radius of the location. Therefore, this finding is not applicable.*

- c. For a proposed use at a location closer than five hundred (500) feet from any child care center, public park, social service agency, residential care facility, residential service facility, elementary school, secondary school, college or university, or closer than one hundred fifty (150) feet from any residentially zoned property, that the building in which the proposed use is to be located is situated and oriented in such a manner that would not adversely affect such residential, child care center, public park, social service agency, residential care facility, residential service facility and/or school use.

*Analysis: The site is not located closer than 500 feet from any child care center, public park, social service agency, residential care facility, residential service facility, elementary school, secondary school, or college or university. The off-sale use is not within 150 feet from residential units and residentially zoned properties. The nearest residential use property line is more than 400 feet away from the entrances to the use. Therefore, this finding is not applicable.*

**10. Determination of Public Convenience or Necessity Findings.** Under California Business and Professions Code Sections 23958 and 23958.4, the Department of Alcohol Beverage Control (ABC) must deny an application for a liquor license “if issuance of that license would tend to create a law enforcement problem, or if the issuance would result in or add to an undue concentration of liquor licenses in the area,” unless the City determines that the public convenience or necessity would be served by the issuance of the license (Determination of Public Convenience or Necessity). An “undue concentration” is defined as follows:

- a. The premises of the license are located in an area that has a 20 percent greater number of reported crimes than the average number of reported crimes for the City as a whole, or
- b. The premises of the license are located in a census tract where the ratio of existing retail off-sale licenses to population in the census tract exceeds the ratio in the County as a whole.

*Analysis: The project site is located within an area that has 20 percent greater number of reported crimes than the average number of reported crimes for the City as a whole. Additionally, the project is located in a census tract where the ratio of existing retail off-sale license to population in the census tract exceeds that ratio in the County as a whole. The number of authorized licenses for off-sale alcohol in this census tract is two licenses and currently there are three licenses in this census tract. Therefore, for the ABC Department to be able to issue a license for this off-sale use, the City must grant a Determination of Public Convenience or Necessity (PCN). The analysis of the proposal is based on the required findings identified in Title 6 of the San José Municipal Code.*

Chapter 6.84 of the San José Municipal Code identifies the process and findings related specifically to the off-sale of alcohol and specifies that the Planning Commission may issue a PCN only after first making the specified factual findings identified below:

- 1) The proposed use is not located within a strong neighborhoods initiative or neighborhood revitalization area or other area designated by the city for targeted neighborhood enhancement services or programs, or located within an area in which the chief of police has determined based upon quantifiable information that the proposed use: (a) would be detrimental to the public health, safety, or welfare of persons located in the area; or (b) would increase the severity of existing law enforcement or public nuisance problems in the area; and

*Analysis: The use is located within the Burbank/Del Monte Strong Neighborhoods Initiative (SNI) area. Therefore, the finding that the site is not located in an SNI or neighborhood privatization area **cannot** be made.*

*As stated in the Police Department memo dated May 16, 2017, the Police Department is neutral to the issuance of the Conditional Use Permit, as it would be a full service grocery store. To further minimize nuisances to law enforcement and the public, the Police Department requested the following conditions be included as a part of the permittee's ABC license:*

- 1) No single sales of malt liquor.*
- 2) No single sales of "mini bottles" also known as "shooters, minis, or airplane bottles" of alcohol.*
- 3) Drug Paraphernalia, including but not limited to "Brillo" style scrubbing pads (single sales), cigarette papers, water/glass smoking pipes, hookah style pipes and "Ziploc" style bags smaller than 5"x5" shall not be sold.*
- 4) The licensee shall be responsible for keeping litter-free the area adjacent to the premises over which they have control.*
- 5) Any graffiti painted or marked upon the premises or adjacent area under the control of the licensee shall be removed or painted over within 48 hours.*
- 6) The licensee shall ensure no loitering occurs in the area of the establishment.*

*Therefore, because the Police Department is neutral to this use and items 4-6 above are incorporated as conditions of approval (see Conditions 14-17) this finding can be made. With the inclusion of the above conditions in the ABC license, this finding is further supported.*

- 2) The proposed use would not lead to the grouping of more than four off-premises sale of alcoholic beverage uses within a one thousand-foot radius from the exterior of the building containing the proposed use; and

*Analysis: With the project there would be a total of four off-sale establishments (Project Site, Safeway, 3 Kings Market & Beer, and Yawh Mini Market) within 1,000 feet of the site. The resulting project would not result in more than four establishments for off-site consumption within a 1,000 foot radius; therefore, this finding **can** be made.*

- 3) The proposed use would not be located within five hundred feet of a school, day care center, public park, social services agency, or residential care or service facility, or within one hundred fifty feet of a residence; and

*Analysis: The use is not located within 500 feet of a school, day care center, public park, social services agency, or residential care or service facility. The use is not within 150 feet of a residence. Therefore, this finding **can** be made.*

- 4) Alcoholic beverage sales would not represent a majority of the proposed use.

*Analysis: The off-sale of alcohol would consist of an approximately 395-square foot portion of the store's 23,082-square foot sales area (approximately 1.71% of the total sales area). Furthermore, conditions on the project will only allow the off-sale of alcohol to be implemented in conjunction with a full service grocery store. Accordingly, the off-sale use represents an ancillary and incidental component to the primary grocery store use and does not represent a majority of the overall use. Therefore, this finding **can** be made.*

- 5) At least one of the following additional findings must be made:
- a) The census tract in which the proposed outlet for the off-premises sale of alcoholic beverages is located is unusually configured and the proposed outlet would act as a convenience to an underserved portion of the community without presenting a significant adverse impact on public health or safety; or
  - b) The proposed outlet for the off-premises sale of alcoholic beverages would enhance or facilitate the vitality of an existing commercial area without presenting a significant adverse impact on public health or safety; or
  - c) The census tract in which the proposed outlet is located has a low population density in relation to other census tracts in the city, and the proposed outlet would not contribute to an over- concentration in the absolute numbers of outlets for the off-premises sale of alcoholic beverages in the area; or
  - d) The proposed off-premises sale of alcoholic beverages is incidental and appurtenant to a larger retail use and provides for a more complete and convenient shopping experience.

If however, the Planning Commission cannot make one or more of the first four findings listed above (8.1, 8.2, 8.3, and 8.4), then the Planning Commission shall make a recommendation to the City Council as to whether the Council should make a determination for the proposed use.

*Analysis: Given the above-stated analysis, all but one of the findings for PCN can be made for the off-sale of alcohol for this permit. The first finding cannot be made as the use is located within the existing Burbank/Del Monte Strong Neighborhoods Initiative (SNI) area. However, findings 5.c and 5.d of the additional findings can be made for a PCN determination.*

*As shown in the plan set, within a half mile of the use and located in this project's census tract, there are approximately 1,767 residential units that are currently under*

*construction or have been entitled for development. This would significantly increase the population density of this census tract and would increase the authorized number of off-sale license. Therefore, as the population density increases, the project would not contribute to the over-concentration in the absolute number of outlets for this census tract. As stated above the alcohol sales area would represent approximately 1.71% of all the total sales area of the store and would be the primary use of the building. Although all the required findings cannot be made for the Determination of Public Convenience or Necessity as the site is located in an SNI boundary, the project meets all the other required findings and there are significant and overriding benefits as previously stated in the findings for this permit by the use, and the use would activate a currently vacant building and provide redevelopment and new amenities to the existing and proposed population growth in the surrounding area.*

In accordance with the findings set forth above, a Conditional Use Permit and a Determination of Public Convenience or Necessity to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby **approved**. The City Council expressly declares that it would not have granted this Determination and Permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

## **CONDITIONS**

1. **Acceptance of Permit.** Per Section 20.100.290(B) of Title 20 of the San José Municipal Code, should the permittee fail to file a timely and valid appeal of this Conditional Use Permit within the applicable appeal period, such inaction by the permittee shall be deemed to constitute all of the following on behalf of the permittee:
  - a. Acceptance of the Permit by the permittee; and
  - b. Agreement by the permittee to be bound by, to comply with, and to do all things required of or by the permittee pursuant to all of the terms, provisions, and conditions of this Permit or other approval and the provisions of Title 20 of the San José Municipal Code applicable to such Permit.
2. **Permit Expiration.** This Conditional Use Permit shall automatically expire two (2) years from and after the date of issuance hereof by the City Council, if within such time period, a Building Permit has not been obtained or the use, if no Building Permit is required, has not commenced, pursuant to and in accordance with the provision of this Permit. The date of issuance is the date this Permit is approved by the City Council. However, the Director of Planning may approve a Permit Adjustment/Amendment to extend the validity of this Permit in accordance with Title 20 of the

San José Municipal Code. The Permit Adjustment/Amendment must be approved prior to the expiration of this Conditional Use Permit.

3. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the permittee for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Regional Wastewater Facility represented by approved land uses in the area served by said Facility will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Regional Wastewater Facility to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
4. **Conformance to Plans.** The development of the site shall conform to the approved Conditional Development Permit plans entitled, "Conditional Use Permit for Smart & Final Extra!," dated revisions on July 25, 2017, on file with the Department of Planning, Building and Code Enforcement, as may be amended subject to City's approval, and to the San José Building Code (San José Municipal Code, Title 24), as amended. The plans are referred to herein as the "Approved Plan Set".
5. **Use Authorization.** This Conditional Use Permit and Determination of Public Convenience or Necessity authorizes the off-sale of alcohol (ABC Type 21 License) of a full range of alcoholic beverages for off-site consumption, to be implemented only in conjunction with a full service grocery store, as defined in Condition of Approval # 7 below. Allows for the 24 hours operation of the use, but limit the off-sale of alcohol from 6 a.m. to 12 a.m.
6. **Alcoholic Beverage Control.** The off-sale of alcoholic beverages shall only be allowed in strict conformance with the requirements of the Department of Alcoholic Beverage Control (ABC). The permittee shall maintain full compliance and in good standing with the Department of Alcoholic Beverage Control.
7. **Alcohol Service and Sale.** Alcohol service and sale shall be conducted in full compliance with the issued ABC license.
8. **Limitations on Area of Alcohol Sales.** The sale of alcohol for off-site consumption allowed by this Permit shall be limited and incidental to the primary use of a full service grocery store. "Full service grocery store" as used herein means a retail establishment that provides a full and wide complement of fresh produce, grains, dairy goods, and baked products, together with other food and household merchandise for general public consumption. The area in which alcoholic beverages are displayed or otherwise offered for sale shall not exceed 2.0% percent of the total

floor sales area of the retail area that is open and accessible to the general public (i.e., excluding backroom storage and office spaces). Alcohol product displays shall not be placed outside the retail tenant space.

9. **Limitation of off-sale of alcohol hours.** The sales hours for the off-sale of alcohol shall be from 6:00 a.m. to 12 midnight.
10. **Building Permit/Certificate of Occupancy.** No change in the character of occupancy or change to a different group of occupancies as described by the Building Code shall be made without first obtaining a Certificate of Occupancy from the Building Official, as required under San José Municipal Code Section 24.02.610, and any such change in occupancy must comply with all other applicable local and state laws.
11. **Compliance with All Laws.** The subject use shall be conducted in full compliance with all local, state, and federal laws and regulations. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code.
12. **Discretionary Review.** The Director of Planning, Building and Code Enforcement maintains the right of discretionary review of requests to alter or amend structures, conditions, or restrictions of this Permit incorporated by reference in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code.
13. **Disturbance Coordinator.** The permittee shall implement the following:
  - a. Provide an on-site disturbance coordinator during all hours of operation;
  - b. Post contact information for the disturbance coordinator in a prominent location within the establishment near the primary entrance;
  - c. Maintain a complaint log including the time and content of all complaints and a summary of the time and nature of the establishment's response to each complaint;
  - d. Ensure that the log is kept current and is available on the project site for inspection by City staff.
14. **Nuisance.** This use shall be operated in a manner that does not create a public or private nuisance. Nor shall the use adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area or be detrimental to public health, safety or general welfare. Any such nuisance shall be abated immediately upon notice by the City.
15. **Anti-Litter.** The site and surrounding area shall be maintained free of litter, refuse, and debris:
  - a. Cleaning shall include keeping all publicly used areas free of litter, trash, cigarette butts and garbage and shall include daily damp washing of all exterior walls and sidewalks along the project's frontage.



- b. The permittee of the use shall clean the public right-of-way immediately adjacent to the subject site before 8:00 a.m. each day.
  - c. Mechanical equipment used for outside maintenance, including blowers and street sweepers shall not be used between 10:00 p.m. and 6:00 a.m. daily.
16. **Anti-Graffiti.** The property owner or property management company shall remove all graffiti from buildings and wall surfaces of the grocery store area within 48 hours of defacement.
17. **Loitering.** Loitering shall not be allowed in the public right-of-way adjacent to the subject site.
18. **Refuse.** All trash areas shall be effectively screened from view and covered and maintained in an orderly state to prevent water from entering into the garbage container. No outdoor storage is allowed / permitted unless designated on the approved plan set. Trash areas shall be maintained in a manner to discourage illegal dumping.
19. **Noise.** Noise shall be contained within the buildings and the buildings shall be adequately insulated to prevent excessive sound from emanating outside. Adequate HVAC (air conditioning) shall be provided to allow all doors and windows on the subject site to remain closed during the operation and activities of the site.
20. **Lighting.** No new on-site lighting is approved through issuance of this Permit.
21. **Sign Approval.** No signs are approved as part of this permit. All proposed signs shall be subject to review and approval by the Director of Planning through a subsequent Permit Adjustment.
22. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 2 of Chapter 20.100 of Title 20 of the San José Municipal Code it finds:
- a. A violation of any conditions of the Conditional Use Development Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
  - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
  - c. The use as presently conducted creates a nuisance

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In accordance with the findings set forth above, a permit to use the subject property for said purpose specified above is hereby **approved**.

ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2017, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

\_\_\_\_\_  
SAM LICCARDO  
Mayor

ATTEST:

\_\_\_\_\_  
TONI J. TABER, CMC  
City Clerk

#### NOTICE TO PARTIES

*The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6.*

**EXHIBIT "A"**  
Legal Description

**For APN/Parcel ID(s): 264-14-017, 264-14-019, 264-14-020, 264-14-082 and 264-14-083**

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA AND IS DESCRIBED AS FOLLOWS:

PARCEL ONE:

Beginning at a 3/4" iron pipe driven flush in the Easterly line of Race Street said point being South 3° 18' East, 34.00 feet from the Southerly line of San Carlos Street as it existed on November 22, 1940 (60 feet in width); and running thence from said point of beginning North 86° 51' 10" East and parallel with and distant therefrom 34.00 feet measured at right angles Southerly from said Southerly line of San Carlos Street 200.00 feet to a 3/4" iron pipe driven flush; thence South 3° 18' parallel with said Easterly line of Race Street 200.00 feet to a 3/4" iron pipe driven flush; thence South 86° 51' 10" West parallel with said Southerly line of San Carlos Street 200.00 feet to a 3/4" iron pipe driven flush in said Easterly line of Race Street; thence along said Easterly line of Race Street North 3° 18' West 200.00 feet to the point of beginning.

APN: 264-14-019; 264-14-082 & 264-14-083

PARCEL TWO:

Being a portion of Lot 65, as shown upon the map entitled, "Map Showing Subdivisions of The Rancho De Los Coches, Adjoining The City of San Jose, Santa Clara County", which map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California on November 6, 1867, in Book "A" of Maps, at Page 47, and more particularly described as follows:

Beginning at a 3/4 inch iron pipe set in the present Southerly line of San Carlos Street as now widened (94 feet wide) distant thereon N. 86° 51' 10" E., 200.00 feet from an iron pipe set at the point of intersection of said Southerly line of San Carlos Street with the Easterly line of Race Street; thence along said line of San Carlos Street, N. 86° 51' 10" E., 150 feet; thence Southerly and parallel with the Easterly line of Race Street S. 3° 18' E., 275 feet to the Northerly line of that certain parcel described in the Deed from Karl F. Newhouse, et ux., to John E. Gordon and Eugenia T. Dale, recorded May 17, 1946 in Book 1366 of Official Records, Page 40, Santa Clara County Records; thence along said North line which is also the Southerly line of a certain 25 foot right of way, South 86° 51' 10" West 50 feet to the East line of that certain parcel described in the Deed from Karl F. Newhouse, et ux, to Jack B. Anderson, et al., recorded May 23, 1946, in Book 1340 of Official Records, Page 176, Santa Clara County Records; thence North along said East line, North 3° 18' West 25 feet to the Northeast corner of said parcel; thence along the North line of said parcel the North line of the 25 foot right of way, South 86° 51' 10" West 100 feet to the Southeast corner of that certain parcel described in the Deed from Karl F. Newhouse, et ux., to Joseph Malvini, et al., recorded June 12, 1947, in Book 1441 of Official Records, Page 458, Santa Clara County Records; thence along the East line and prolongation Northerly, North parallel to Race Street, 250 feet to the point of beginning.

APN: 264-14-020

PARCEL THREE:

An unobstructed right of way for ingress and egress and a right of way for the installation of public utilities over a strip of land 25 feet wide, described as follows:

Beginning at an iron pipe in the Westerly line of Lincoln Avenue, that is distant thereon South 3° 11' East 250 feet from an iron pipe at the point of intersection of said Lincoln Avenue with the present Southerly line of San Carlos Street, said point also being distant North 3° 11' West 625.59 feet from the Northerly line of San Salvador Street; thence along said line of Lincoln Avenue, South 3° 11' East 25 feet; thence parallel with said line of San Carlos

**EXHIBIT "A" (File No. CP17-005)**

**EXHIBIT "A"**  
Legal Description  
(continued)

Street, South 86° 51' 10" West, 741.77 feet to the Easterly line of Race Street; thence along said line, North 3° 18' West 25 feet to a point that is distant South 3° 18' East 250 feet from the present Southerly line of San Carlos Street; thence parallel with the said line of San Carlos Street, North 86° 51' 10" East 741.82 feet to the point of beginning being a portion of Lots 65 and 66 as said laid down, designated and delineated upon that certain map entitled "Map Showing Subdivisions of The Rancho De Los Coches, Adjoining The City of San Jose, Santa Clara County", which said map was filed for record in the Office of the County Recorder of the County of Santa Clara, State of California, on November 6, 1867, in Book "A" of Maps, at Page 47.

PARCEL FOUR:

Being a portion of Lot 65, as shown upon the map entitled "Map Showing Subdivisions of The Rancho De Los Coches, Adjoining The City of San Jose, Santa Clara County", which map was filed for record in the Office of the Recorder of the County of Santa Clara, State of California, on November 6, 1867, in Book "A" of Maps, at Page 47, and more particularly described as follows:

Beginning at a point on the Easterly line of Race Street, distant thereon Southerly 200 feet from the point of intersection thereof with the Southerly line of San Carlos Street, as now widened to a width of 94 feet; thence from said point of beginning, Southerly along said line of Race Street, 50 feet to the Northwesterly corner of the parcel of land conveyed by San Jose Abstract & Title Insurance Co., a corporation, to Hettie Baker Smith, by Deed dated October 10, 1941, recorded October 11, 1941, in Book 1063 of Official Records, Page 155, Records of Santa Clara County, California; thence Easterly parallel with the aforementioned Southerly line of San Carlos Street and along the Southerly line of said Smith parcel 200 feet to the Northeasterly corner thereof; thence Northerly parallel with the aforementioned Easterly line of Race Street 50 feet to a point which bears Southerly, along a line parallel with the said Easterly line of Race Street, a distance of 200 feet from the aforementioned Southerly line of San Carlos Street; thence Westerly and parallel with the said Southerly line of San Carlos Street, 200 feet to the point of beginning.

APN: 264-14-017

PARCEL FIVE:

An unobstructed right of way for ingress and egress and a right of way for the installation of public utilities over a strip of land 25 feet wide, described as follows:

Beginning at an iron pipe in the Westerly line of Lincoln Avenue, that is distant thereon South 3° 11' East 250 feet from an iron pipe at the point of intersection of said line of Lincoln Avenue with the present Southerly line of San Carlos Street, said point of beginning also being distant North 3° 11' West, 625.59 feet from the Northerly line of San Salvador Street; thence along said line of Lincoln Avenue, South 3° 11' East 25 feet; thence parallel with said line of San Carlos Street, South 86° 51' 10" West 741.77 feet to the Easterly line of Race Street; thence along said line, North 3° 18' West 25 feet to a point that is distant South 3° 18' East 250 feet from the present Southerly line of San Carlos Street; thence parallel with said line of San Carlos Street, North 86° 51' 10" East 741.82 feet to the point of beginning, being a part of The Los Coches Rancho.

**EXHIBIT "A" (File No. CP17-005)**