



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nanci Klein
Chris Burton

SUBJECT: FLEA MARKET REZONING

DATE: June 21, 2021

Approved

Date

6/21/21

SUPPLEMENTAL

REASON FOR SUPPLEMENTAL

Since posting of the transmittal memorandum from the Planning Commission on June 11, 2021, the applicant of the proposed Flea Market Rezoning project has offered to amend the rezoning project to include various measures in support of the existing Flea Market vendors. On June 16, 2021, the Mayor and Councilmembers Cohen and Peralez, with Councilmember Carrasco in attendance, held a meeting for the vendors to discuss the offers and the future of the Flea Market. City staff provided support at the meeting. This memorandum responds to some of the top questions received before and during the meeting and summarizes the support to be provided by the Office of Economic Development (OED) moving forward, if the rezoning is approved.

BACKGROUND

In 2003, the City of San José (the City) decided to make a major investment in the eastside of San José. In addition to improved transit access, the Bay Area Rapid Transit (BART) extension to Alum Rock and Berryessa would bring investment in housing, jobs, retail, and public amenities. In part, the City chose to locate a BART station next to the Flea Market, because the large site would allow for the development of much-needed homes, as well as commercial uses that would generate new jobs. The intent was to revitalize the BART station areas with vibrant transit-oriented urban villages comprised of housing, offices, and amenities.

In 2007, the City Council approved a rezoning of the approximately 100-acre Flea Market site that would allow 2,818 housing units and 365,000 square feet of commercial space. At the time, the timing of the BART construction was not known, and the rezoning supported the development of townhome-level density. Since then, the City has determined that the site can and should accommodate more development at higher density to support goals for transit ridership, Climate Smart, housing affordability, and neighborhood amenities. Due to its

adjacency to the BART station, the site is a prime resource for transit-oriented neighborhood development, and its development would deliver substantial benefits to the public. Accordingly, in 2016, the City Council approved a rezoning application to eliminate a school land use from the portion of the site north of Berryessa Road, and restated in the 2016 rezoning the previous 2007 zoning for the portion of the site south of Berryessa Road, with the condition that the property owner return with a rezoning of the south side of the Flea Market site to increase the amount of housing and commercial development capacity. This is an instance where the City is requesting increased density and development capacity to increase benefits to the public. The current rezoning application under consideration fulfills the Council's 2016 condition of approval.

The 2007 zoning required the Flea Market to remain in place for a minimum of five years. Neither the 2007 nor the 2016 rezonings required the developer to retain a portion of the site for the Flea Market, nor has there been any previous Council direction addressing the displacement of existing vendors resulting from redevelopment of the Flea Market south site.

As described in the memorandum from Mayor Liccardo and Councilmember Cohen (District 4), and Councilmember Jimenez (District 2), the applicant for the Flea Market rezoning voluntarily offered various measures to be incorporated into the project such as five-acres for an urban market, funding to support vendors and the Urban Market concept, and creation of a new Flea Market Advisory Group to guide decisions about the funding and market concept, and specific assurances of a one-year notice to each vendor of any temporary or permanent relocation of the market (to be given no earlier than July 2023).¹ These measures respond to input received from vendors over the past several months.

A meeting was held for the Flea Market vendors on June 16, 2021 at the Flea Market. The purpose of the meeting was to provide an update on plans for the Berryessa Flea Market and discuss how the proposed development plans preserve space for a market, offer potential resources for vendors, and provide opportunities for ongoing input and participation by vendors and community members. The Office of City Councilmember Cohen hosted the meeting, with Mayor Liccardo and Councilmembers Peralez (District 3) and Carrasco (District 5) also in attendance. Staff from the Planning Division, Office of Economic Development, and City Manager's Office provided support.

¹ According to the memorandum, a new Vendor Business Transition Fund would be established and managed by the City or its designee, for the primary purpose of mitigating direct expenses the vendors may experience when moving to any temporary site and/or Urban Market area on site, some other market location, or any other retail location in San José. The property owner shall endow the Vendor Business Transition fund with \$2.5 million, in accordance with the following schedule: (1) Within 120 calendar days of the effective date of the Planned Development Zoning File No. PDC17-051, the property owner shall transfer \$500,000 to the City in early funding to support the initiation of the Flea Market Advisory Group and Vendor Business Transition fund; and (2) On the date that the property owner issues the one-year notice to the vendors in accordance with Section 2.a in the memorandum, the property owner shall transfer \$2 million to the City's Vendor Business Transition Fund.

The meeting started with the City providing background context and an overview of the proposed offers. Then, the vendors provided comments and asked questions; staff, the Mayor, and Councilmembers responded to questions. Staff provided a handout in English and Spanish and consecutive interpretation in Spanish. Staff also provided some interpretation in Vietnamese with a small group of vendors. Approximately 300 people attended the meeting and 20 spoke during the comment section, which lasted over three hours. Each speaker had approximately two minutes in their primary language (i.e., the time limit did not include interpretations). Staff collected emails and created a distribution list for vendors to receive updates about the project. Outreach for the meeting included distribution of a flyer in English, Spanish, and Vietnamese. The information provided at the meeting is available on the project website: <http://www.sanjoseca.gov/FleaMarketProject>.

Many of the questions received before the meeting and during the comment section were about:

- The desire for the City to require the property owner/Flea Market operator to increase protections for vendors beyond those offered by the applicant
- Timeline and next steps following approval of the rezoning
- The desire to delay the City Council vote on the rezoning project for 90 days to allow more time to work with vendors on their concerns
- Criticism about outreach to vendors to date and questions about future involvement

The Analysis section below responds to these sets of questions.

There were also requests for more details on how the plans to replace the existing Flea Market with a new market would work. Specific questions include; how much notice will be given before any big changes to business operations would occur; how many of the existing vendors will the new market accommodate, and what will happen to those that do not get a space; how business operations will be able to continue during construction and the transition to the new market; how much it will cost to rent space in the future; what kind of compensation and support will be given to the vendors during the transition; and when will all of these changes occur.

ANALYSIS

Zoning and General Plan Consistency

Staff received questions about the property owner's right to develop and what happens if the City Council does not approve the proposed rezoning. This section summarizes the implications of various scenarios.

In the event that the Council does not approve the current Flea Market rezoning application, the Flea Market may be developed under the existing 2016 Planned Development (PD) zoning for the following reasons:

- The City gave the Flea Market an Urban Village land use designation upon adoption of the 2040 General Plan in 2011 even though, at the time, it was established as a Horizon II Urban Village. This was done because the site had preexisting approved zoning that was consistent with an Urban Village type of development.
- The zoning of the entire Flea Market site, both north and south of Berryessa Road, was again changed in 2016. The 2016 PD zoning was determined to be consistent with the General Plan because the General Plan states that, if an Urban Village has not been prepared, the underlying General Plan land use designation determines the appropriate use of a property. In the case of the Flea Market, the underlying General Plan land use designation was Urban Village.
- The 2016 rezoning did not change the allowable commercial and residential uses from those in the previous zoning, so in addition to other consistency reasons, the zoning was deemed consistent with the Urban Village land use designation in the General Plan.

If the City Council approves the Berryessa BART Urban Village (BBUV) plan but does not approve the proposed rezoning, the 2016 PD zoning would also remain in effect because the BBUV Plan adoption resolution includes a provision that the BBUV Plan does not take effect on the Flea Market District until the effective date of a consistent rezoning. The reason that the BBUV plan resolution includes this effective date for the Flea Market District is that Government Code section 65680 was amended in 2019 to require that the general plan and zoning of a charter city must be consistent, so the City cannot adopt amendments to its general plan without concurrently adopting consistent zoning. As a result, the BBUV Plan land uses designations would not be applied to the Flea Market District until such time as Council approves a consistent rezoning. Without Council approval of zoning that is consistent with the BBUV Plan, the land use designation of the Flea Market District would remain as the 2011 (current) General Plan designation of Urban Village, and the consistent 2016 PD zoning also would remain in effect.

If the City Council does not approve both the BBUV plan and the currently proposed rezoning, then the 2016 PD zoning would remain in effect. When the PD zoning was adopted in 2016, it was determined to be consistent with the 2011 (current) General Plan.

In either case, the City would be required to consider applications for Planned Development permits for the site, including a consistency determination with the 2011 (current) General Plan and the 2016 zoning in addition to all of the other findings required by San José Municipal Code section 20.100.940.

Unlike when the Council makes purely legislative land-use decisions that do not require the Council to make findings, as in the adoption or amendment of the general plan and zoning

ordinance, when the City decision-maker makes determinations on the issuance of land use permits, it acts in a quasi-adjudicatory manner and must make findings to support its permit determination.

If the current zoning is approved, the vendors, the City, and other potential partners will have a period of at least three years to determine a path forward (based on the applicant's offer to give a one-year notice of any Flea Market closure no earlier than July 2023), and any PD permit applications will be required to be consistent with the 2011 (current) General Plan, the BBUV Plan, and the 2021 subject rezoning.

No Development Agreement

Occasionally, there are terms that would benefit a community or neighborhood that can be incorporated as part of a development agreement with a city. California state law authorizes development agreements as two-party agreements between a developer and/or landowner (those with an equitable interest in the real property) and a local government agency (Government Code sections 65864-65869.5).

In California, development agreements are recognized primarily as a method by which local governments can provide that, upon approval of a project, the developer may proceed in accordance with existing policies, rules, and regulations, and subject to conditions of approval. Such an approval is intended to strengthen the planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development (Government Code section 65864). Development agreements are also the only method by which the parties can agree to the terms and benefits that have little or no nexus to the impacts of the project as would otherwise be required by law. The only other available method is when a developer voluntarily includes in its project application certain project design or other benefits that may not otherwise be required by the local agency.

With regard to development agreements, Government Code section 65865(c) states in relevant part: "Every city... shall upon request of an applicant, by resolution or ordinance, establish procedures and requirements for the consideration of development agreements upon application by, or on behalf of, the property owner or other person having a legal or equitable interest in the property." The required contents of development agreements are specified in Government Code section 65865.2. Chapter 18.02 of the San José Municipal Code (SJMC) establishes the City's process for the consideration of applications for development agreements by developers and property owners (those with an equitable interest in the property). SJMC section 18.02.020 specifies: "The City of San José may, at its sole discretion, enter into a binding development agreement with any qualified applicant for the development of such property pursuant to and in accordance with these regulations." Because the Flea Market owner has not applied to the City to negotiate a development agreement, this avenue for the possible negotiation of provisions that may address community benefits including the vendors' concerns is not available.

Timeline

If the rezoning is approved, the property owner would then identify a developer(s) and design team to prepare specific designs and apply for a site development permit. As part of the design stage, the developer and design team would work with the City and new Flea Market Advisory Group that would be formed as a condition of the new rezoning to design an urban market on the site, including the physical, programmatic, and operational elements. Many of the questions and concerns raised by the vendors could be worked out in this design stage when a developer and design team are on board and working on a specific site plan. The memorandum from the Mayor and Councilmembers Cohen and Jimenez requires that the property owners agree to bring the planned development permit for the five-acre urban market back to the City Council for approval, even though normally only a Director's Hearing would be required. The property owner supports the request and this condition of approval applies to future property owners.

Following Planning, Building and Code Enforcement (PBCE) Director approval of a planned development permit, or Council approval for the urban market site, the property owner would apply to the City for building permits and other required construction permits, then construction could commence. The timing of these next steps is uncertain; however, the applicant has indicated that, while they would begin design work in the short term, they would not make any physical modifications to the Flea Market site that would require displacement of the vendors prior to July 2024. This timeline (three plus years) is consistent with typical timelines for projects of this scale that are at the rezoning stage.

Implications of Delaying a Vote on the Proposed Rezoning

As described above, should the proposed zoning not proceed, the owners would be able to develop less commercial square footage and less residential units in accordance with the 2016 PD zoning until such time as Council adopts a rezoning that is consistent with the Berryessa BART Urban Village plan. The only notice of relocation or termination to the vendors would be as required by state law and the applicable rental agreements. If the rezoning is not approved, the property owner could withdraw its voluntary additions to its development proposal that are "on the table" currently. Delaying the decision on the rezoning jeopardizes the voluntary offers, such as the \$2.5 million contribution to a vendor support fund and additional notice requirements to the vendors of relocation, that were made by the applicant in its revised project description. The applicant made these offers voluntarily as additional conditions and could rescind them. As described earlier in this memorandum, if Council does not approve the proposed rezoning, the applicant could proceed under the existing 2016 zoning.

As the project is a rezoning and not a specific development proposal, delaying the decision would not have the desired effect of figuring out more details about the Urban Market concept. Doing the work described below under Next Steps will require more than 90 days to complete. It

will be a multi-year process to analyze and design a new urban market in coordination with other development on the site and with providing support to vendors as the market evolves. The project as amended establishes a framework and process to ensure collaboration and communication with vendors for the coming years. As described below, if the rezoning is approved, the collaboration with the vendors will be initiated within the 90-day timeframe requested by the vendors.

The Office of Economic Development agrees that any path forward must include the vendors' participation. Staff is working to establish better communication and ensure their active involvement in the future of the Flea Market. As described in the following section, the near-term substantive issues to partner with the vendors include establishment of the Flea Market Advisory Group, data analysis of the current market, and connection to support services for small businesses. While OED staff will begin partnering with the stakeholders, the work itself will require more than 90 days to fully flesh out.

Next Steps

If City Council approves the proposed rezoning, staff would initiate the following work within 90 days, in coordination with the vendors and property owner as applicable:

- 1) Staff could immediately begin to connect vendors with available resources to support their existing businesses and help them plan for the future. Staff from OED's business development team would review the services that are available to small business with the vendors, such as federal, State, and local resources; assistance with relevant application processes; and access to business/technical assistance, including financial counseling, marketing, and legal assistance for vendors seeking to explore expanding to a retail space. In addition, staff from OED's work2future team could provide information about available employment and training services with interested vendors, as a previous study found that more than 50% of the vendors work at the Flea on weekends, and information about access to training and jobs in growth industries may provide desirable career options to complement the vendors' participation at the market.
- 2) The City would work with the vendors to determine the Advisory Group composition, frequency of meetings, and other process elements. Consultant assistance with experience in establishing and operating public markets and/or advisory groups may be desirable, funded from the property owner contribution. This step would involve working with the vendors to bring on consultants.
- 3) OED staff and the Advisory Group would then begin work on the assessment of the current market, including data analysis and research.

Next would be to continue planning for the Urban Market, based on the market assessment and other initial work. This step would need to occur in coordination with the vendors, the City,

property owner, developer, and any consultants. It would involve studying the physical design and operational elements (including a potential multi-level market option), financing options, and ownership/management options. Examples of ownership options to explore may include privately-owned and operated with covenants on the long-term operation of the market, a City-owned market, or a land trust. This step could also include exploring the potential to incorporate other space in the area into the Urban Market (such as below the BART tracks) and/or to include a public market in other off-site projects. Staff recommends communicating with Valley Transportation Authority (VTA) and/or BART to explore design options and shared parking arrangements.

Staff anticipates that consultant services would be needed in order to establish the Flea Market Advisory Group, conduct studies in collaboration with the vendors and the property owner, and coordinate with stakeholders to develop the Urban Market concept. Staff anticipates that this funding would come from the Vendor Business Transition Fund.² As the Flea Market Advisory Group would be responsible for guiding the funding decisions, staff would work with the group to scope the consultant services. The City would be responsible for administering the consultant contracts.

RECOMMENDATION

Staff supports the proposed rezoning with the voluntary measures offered by the applicant to support vendors as it would result in many more benefits to residents, vendors, and the City such as an increase in commercial square footage and the number of housing units than the existing 2016 zoning. Specifically, staff recommends that the City Council:

- Accept staff's memorandum outlining next steps and potential areas of exploration for a new urban market for existing Flea Market vendors.
- Direct staff to explore financial tools to complete development of the new five-acre Urban Market on the project site, including public funding options should gap financing be required.
- Direct staff to explore potential partnerships with BART and potential off-site market options.

² The property owner shall endow the Vendor Business Transition fund with \$2.5 million, in accordance with the following schedule: (1) Within 120 calendar days of the effective date of the Planned Development Zoning File No. PDC17-051, the property owner shall transfer \$500,000 to the City in early funding to support the initiation of the Flea Market Advisory Group and Vendor Business Transition fund; and (2) On the date that the property owner issues the one-year notice to the vendors in accordance with Section 2.a (in the memorandum referenced in Footnote 1 above), the property owner shall transfer \$2 million to the City's Vendor Business Transition Fund.

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- Direct staff to work with the Flea Market Advisory Group to allocate the \$2.5 million dollars in the Vendor Business Transition Fund to direct vendor support and to consultant services and non-profit, as needed.

This memorandum was prepared in coordination with the City Attorney's Office.

/s/

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/s/

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For questions, please contact Nanci Klein, Office of Economic Development, at (408) 535-8184.