

RESOLUTION NO. _____

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING, SUBJECT TO CONDITIONS, A SPECIAL USE PERMIT AND DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO REINSTATE A LEGAL NONCONFORMING USE FOR OFF-SALE OF ALCOHOL (TYPE 21 ABC LICENSE – FULL RANGE OF ALCOHOLIC BEVERAGES) AT AN EXISTING COMMERCIAL BUILDING ON AN APPROXIMATELY 0.74 GROSS-ACRE SITE, LOCATED ON THE SOUTH SIDE OF BLOSSOM HILL ROAD, EAST OF SNELL AVENUE (430 BLOSSOM HILL ROAD)

FILE NO. SP22-023

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on August 10, 2022, an application (File No. SP22-023) was filed by Art Rodriguez Associates for the applicant, Smart & Final Stores LLC, on behalf of Downer Square LLC, with the City of San José for a Special Use Permit to allow the off-sale of beer, wine, and liquor in an approximately 32,000-square foot grocery store and granting the Determination of Public Convenience or Necessity for off-sale of beer, wine, and liquor on an approximately 0.74 gross-acre site, on that certain real property situated in the CP Commercial Pedestrian Zoning District and located on the south side of Blossom Hill Road east of Snell Avenue at 430 Blossom Hill Road, San José (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 December 7, 2022, 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 the City's Director of Planning, Building and Code Enforcement; and

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

WHEREAS, at said hearing, this City Council received in evidence a plan for the subject property entitled, "Smart & Final #829" dated received October 21, 2022, said development plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said development plan is incorporated herein by this reference; and

WHEREAS, said public hearing before this 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 CITY COUNCIL OF THE CITY OF SAN JOSE THAT:

The foregoing recitals are incorporated by reference, and after considering all of the evidence presented at the Public Hearing, the City Council determines, concludes, and finds as follows:

1. **Site Description and Surrounding Uses.** The project site is located within the Smart & Final grocery store in an existing shopping center on the south side of Blossom Hill Road east of Snell Avenue. The site is currently developed with a commercial building totaling approximately 32,350 square feet. The site is accessed by three driveways from Blossom Hill Road to the north and two driveways from Snell Avenue to the west. The site is surrounded by a fueling station to the north, pharmacy to the west, and residences to the south and east.
2. **Project Description.** The project consists of a Special Use Permit and Determination of Public Convenience or Necessity to allow for the off-sale of alcohol (Type 21 Off-sale General) at an approximately 32,000-square foot grocery retail store located on an approximately 0.74-gross acre site. Smart & Final is a full-service grocery store that offers a variety of grocery products including produce, meat, frozen foods, dairy products, and alcoholic beverages.

Beer, wine, and liquor sales would be incidental to the grocery store, which is a permitted use in the Commercial Pedestrian Zoning District. Off-sale of beer, wine, and liquor requires State Alcoholic Beverage Control License Type 21. A Type 21 License allows for off-sale of beer, wine, and liquor for consumption off the premises where items are sold. The grocery store includes 25,165 square feet of floor sales area, 460 square feet of which would be dedicated to the sale of alcohol; this amounts to 1.83% dedicated to alcohol. Approximate floor area dedicated to alcohol sales is depicted in the Plan Set. Alcohol sales would coincide with the grocery store hours (6:00 a.m. to 10:00 p.m., seven days a week).

The census tract of the project site (5120.29) has 4 existing off-sale retail licenses. As described in the Police Department Memorandum dated September 7, 2022, this exceeds the ratio of off-sale retail licenses to population in Santa Clara County. Therefore, the census tract is considered unduly concentrated pursuant to California Business & Professions Code Section 23958.4 (a)(3), and a new off-sale retail license cannot be approved by the Department of Alcoholic Beverage Control (ABC) unless a Determination of Public Convenience or Necessity is approved by the City.

3. **General Plan Conformance.** The subject site has an Envision San José 2040 General Plan Land Use/Transportation Diagram land use designation of Neighborhood/Community Commercial. The project is located in the Blossom Hill Rd/Snell Av Urban Village and has an Urban Village land use designation of Neighborhood/Community Commercial. This designation supports a very broad range of commercial activity, including commercial uses that serve the communities in neighboring areas, such as neighborhood serving retail and services and commercial/professional office development. Neighborhood/Community Commercial uses typically have a strong connection to and provide services and amenities for the nearby community and should be designed to promote that connection with an appropriate urban form that supports walking, transit use and public interaction. The project would establish a full-service grocery store with off-sale of alcohol which provides commodities to the nearby community.

Analysis: Alcohol sales would be incidental to the full-sale grocery store, which is a consistent use with the General Plan Land Use Designation of Neighborhood/Community Commercial.

The project conforms to the following General Plan policies:

- A. Land Use Goal LU-4: Establish commercial uses that maximize revenue to the City and provide employment for its residents in order to achieve fiscal sustainability and our desired jobs per employed resident ratio.

Analysis: The current tenant, Smart & Final, is a full-service grocery store which continues a history of grocery stores at this site. The store would offer a variety of grocery products including produce, meat, frozen foods, and dairy products. The off-sale of alcohol will produce an additional revenue-generating opportunity in association with these other products.

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

Analysis: Smart & Final continues a history of grocery stores at this existing commercial plaza. The grocery store would re-vitalize the existing shopping center by filling a commercial tenant vacancy and maintaining an employment use on the site.

- C. Land Use 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: The full-service grocery store would provide a wide range of groceries that service the daily necessities of the community. The store would offer produce, meat, frozen foods, and dairy products. The amount of floor area dedicated to the off-sale of alcohol would be minimal, less than 2% of the total sales area.

4. **Zoning Ordinance Conformance.** The existing building conforms to the development standards set forth in the CP Commercial Pedestrian Zoning District. The CP Commercial Pedestrian District is a district intended to support pedestrian-oriented retail activity at a scale comparable with surrounding residential neighborhoods. This district allows for a full range of retail and commercial uses with a local or regional market. Development is expected to be auto-accommodating and includes larger commercial centers as well as regional malls. The grocery store is a permitted use in the Commercial Pedestrian Zoning District, and no development permit is required for the occupation of the commercial space as a grocery store. The off-sale of alcoholic beverages requires a Conditional Use Permit in this zoning district.

Land Use

Pursuant to Section 20.40.100 and Table 20-90 of the Zoning Ordinance, food, beverages, and groceries are a permitted use in the CP Zoning District. However, the off-sale of alcoholic beverages requires a Conditional Use Permit in this zoning district. The site was previously occupied by Lucky, a full-service grocery store with an approved Type 21 ABC License. Lucky surrendered its Type 21 ABC license on October 5, 2021. Section 20.150.020 of the San José Municipal Code states, in part, that any such legal nonconforming use that is “discontinued or abandoned for a period of six months or more” . . . “shall thereafter conform to the provisions of [Title 20], unless the nonconforming use is reinstated with issuance of a Special Use Permit in accordance with Chapter 20.100.” The applicant only seeks to reinstate off-sale of alcohol as a legal nonconforming use through a Special Use Permit rather than apply for a Conditional Use Permit to formally approve and permit the use. The application includes documentation confirming the site has been continuously used for off-sale of alcohol since 1965 with no more than 18-month gaps between.

Development Standards

There are no changes to the existing 32,350 sq. ft. commercial building at this time. It is expected the tenant will apply for tenant improvements to modify the building interior to accommodate any new structural, electrical, or mechanical changes. As such, the subject Special Use Permit will not alter existing building setbacks, height, or parking.

5. **Council Policies.** The project is consistent with the City’s On-Site Noticing/Posting Requirements and City Council Policy 6-30: Public Outreach Policy for Pending Land Use and Development Proposals, including an on-site posting and a mailing to all addresses within a radius of 500 feet from the project site.
6. **California Environmental Quality Act.** Under the provisions of Section 15301(a) for Existing Facilities of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is found to be Class 1 categorically exempt from the environmental review requirements of Title 21 of the San José Municipal Zoning Code, implementing the California Environmental Quality Act of 1970, as amended.

Class 1 Categorical Exemption consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The key consideration is whether the project involves negligible or no expansion of an existing use. The project does not involve any modifications or expansion to the footprint of the existing commercial building.

The project would allow off-sale alcohol at a retail store (grocery store). The retail sale of off-sale alcoholic beverages will be conducted wholly inside the building and result in negligible or no expansion of the existing grocery store use. Based on the discussion and findings in the above sections, the activity is not anticipated to have a significant effect on the environment. Therefore, a CEQA exemption can be issued under Section 15301(a) for Existing Facilities.

7. **Required Findings for Special Use Permit.** Section 20.100.820 of Title 20 of the San José Municipal Code establishes required findings for issuance of a Special Use Permit, which findings are made for the project based on the above-stated findings related to General Plan, Zoning and CEQA conformance and for the reasons stated below, and subject to the conditions set forth in this Permit:

- A. The Special Use Permit, as approved, is consistent with and will further the policies of the General Plan and applicable Specific Plans and Area Development Policies; and

Analysis: As described above in the General Plan Conformance section, the project would be consistent with and further the policies of the General Plan. The existing building will not change in land use as the previous and current tenants are both full-service grocery stores with off-sale of alcohol. The use would continue to adhere to the Neighborhood/Community Commercial land use designation and provide services and amenities to the surrounding neighborhood.

- B. The Special Use Permit, as approved, conforms with the zoning code and all other provisions of the San José Municipal Code applicable to the project; and

Analysis: The project does not include modifications to the existing building exterior. The existing setbacks, height, and number of parking spaces are not being altered by this Special Use Permit. The existing retail use is allowed in the Commercial Pedestrian Zoning District, and legal nonconforming off-sale alcohol use may be reinstated with a Special Use Permit pursuant to Section 20.150.110 of the Municipal Zoning Code. Therefore, the project would be in conformance with the requirements of the of the Commercial Pedestrian Zoning District.

- C. The Special Use Permit, as approved, is consistent with applicable City Council policies, or counterbalancing considerations justify the inconsistency; and

Analysis: Per City Council Development Policy 6-30, an on-site sign describing the

project has been installed on the project site since October 25, 2022, and notices for the public hearing were mailed to property owners and tenants within a radius of 500 feet of the project site, which is consistent with the City Council Policy.

D. The proposed use at the location requested will not:

- a) Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
- b) Impair the utility or value of property of other persons located in the vicinity of the site; or
- c) Be detrimental to public health, safety, or general welfare; and

Analysis: The project consists of the reinstatement of the legal nonconforming status of an existing full-service grocery store with an ancillary off-sale alcohol use and minor interior tenant improvements. The project will not affect the peace, health, safety, morals, or welfare of persons residing or working in the surrounding area, impair the utility or value of property or other persons located in the vicinity of the site or be detrimental to the public health, safety, or general welfare. The previous and current tenant will have substantially similar operational characteristics.

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 the use with existing and planned uses in the surrounding area; and

Analysis: The project involves the reinstatement of a legal nonconforming use and does not require any site improvements. The previous and current tenant will have substantially similar operational characteristics and thus the project will not require additional yards, walls, fences, parking and loading, landscaping, or other development features.

F. The proposed site is adequately served:

- a) By highways or streets of sufficient width and improved as necessary to carry the kind and quantity of traffic such use would generate; or by other forms of transit adequate to carry the kind and quantity of individuals such use would generate; and
- b) By other public or private service facilities as are required.

Analysis: The subject property is served by Blossom Hill Road, a public street, and all necessary public and private utilities and services. The continued use of the site as a full-service grocery store with ancillary off-sale of alcohol will not increase demand for public or private facilities.

G. The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for

purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.

Analysis: The environmental impacts of the project are analyzed above. The project is categorically exempt under CEQA Guidelines Section 15301(a).

8. Required Findings for Reinstatement of Nonconforming Use. Section 20.150.110 of the San José Municipal Code require the Director, or Planning Commission, on appeal, to issue a Special Use Permit for a nonconforming use if the following findings can be made:

- A. In the case of an application for a Special Use Permit for reinstatement of a legal nonconforming use:
- B. No more than eighteen (18) months has elapsed between the date the date the application for the Special Use Permit was filed and found complete; and
- C. The conversion to a conforming use would create undue hardship under the particular circumstances presented.
- D. The finding required by subsection a above does not need to be made for reinstatement of residential legal nonconforming uses or the residential mixed use residential/commercial legal nonconforming uses.

Analysis: The off-sale of alcoholic beverages requires a Conditional Use Permit in the CP – Commercial Pedestrian Zoning District. However, the application includes documentation confirming the site has been continuously used for off-sale of alcoholic beverages in conjunction with a grocery store since at least 1965 with no more than eighteen (18) month gaps. This permit affirms the legal nonconforming status of the off-sale use.

- E. In addition to the findings required by Subsection a, no Special Use permit shall be issued, pursuant to this part, unless it is found that:
 - a) The permit will not impair the character and integrity of the neighborhood; and
 - b) The permit will not impair the utility or value of adjacent property or the general welfare of the neighborhood; and
 - c) The permit is not detrimental to the public peace, health, safety, morals or welfare.

Analysis: The project consists of the reinstatement of the legal nonconforming status of an existing full-service grocery store with an ancillary off-sale alcohol use and minor interior tenant improvements. The project will not affect the peace, health, safety, morals, or welfare of persons residing or working in the surrounding area, impair the utility or value of property or other persons located in the vicinity of the site or be detrimental to the public health, safety, or general welfare because the previous and current tenant will have substantially similar operational

characteristics. Notably, the site has been used for off-sale of alcoholic beverages since at least 1965.

9. **Required Findings for the Off-Sale of Alcohol.** Per Section 20.80.900 of the San José Municipal Code, a Conditional Use Permit may be issued pursuant to the applicable provisions of Title 20 for the off-sale of any alcoholic beverages only if the decision-making body first makes the following additional findings, where applicable. As discussed earlier, the Special Use Permit serves as the Conditional Use Permit for instating a legal nonconforming use.

- A. For such use at a location closer than 500 feet from any other such use involving the off-sale of alcoholic beverages, situated either within or outside the city, that the proposed location of the off-sale alcohol use would not result in a total of more than four establishments that provide alcoholic beverages for off-site consumption within a one-thousand-foot radius from the proposed location.

Analysis: The closest location with off-sale alcohol is the Downer Square Bottle Shop at 402 Blossom Hill Road, which is approximately 315 feet away from the project site and the only location within 1,000 feet of the project site. Therefore, this finding can be made.

- B. For such use at a location closer than five hundred 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 establishments that provide alcoholic beverages for off-site consumption within a one-thousand-foot radius from the proposed location, that the resulting excess concentration of such uses will not:

- a) Adversely affect the peace, health, safety, morals, or welfare of persons residing in or working in the surrounding area; or
- b) Impair the utility or value of property of other persons located in the vicinity of the area; or
- c) Be detrimental to public health, safety or general welfare

Analysis: As discussed above, there is one existing establishment within 1,000 feet of the project site that provides alcoholic beverages for off-site consumption. Therefore, the use would not result in a total of more than four establishments that provide alcoholic beverages for off-site consumption within a 1,000-foot radius from the project site. In a memorandum dated September 7, 2022, the San José Police Department ("SJPd") stated that it is opposed to the issuance of a Special Use Permit to continue the legal nonconforming off-sale of alcohol at the subject site. SJPd believes issuance of the license would add to an undue concentration of ABC licenses in an area over the 20% crime index compared to the City average. However, the site is located along a major commercial thoroughfare and adjacent to major highways which is more likely to have higher report crime. The site is

*currently vacant and subject to blight and other crime. With additional renovations and land use, the project would add value and increase the overall activity and safety of the area. Additionally, the applicant's Operations Plan includes provisions for Licensee Education on Alcohol and Drugs (LEAD) employee training and surveillance camera systems (48 exterior cameras and 4 exterior cameras). As a result, issuance of a license would not be detrimental to public health, safety, or welfare of persons located in the area, nor increase the severity of existing law enforcement or public nuisance problems in the area. Therefore, this finding **can** be made.*

- C. For such use at a location closer than five hundred 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 one hundred fifty 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 use would be located less than 500 feet from a school, day care center, public park, social services agency, or residential care/service facility. Specifically, the use would be located less than 150 feet from residentially zoned properties to the south and east. However, there is a fence separating and limiting access from Downer Square plaza to the rear yards of the adjacent residences. There are 13 residences within 150 feet of the project site and 5 within 100 feet. Therefore, this finding **cannot** be made.*

- 10. Required Findings for Determination of Public Convenience or Necessity.** 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, or "PCN"). An "undue concentration" is defined as follows:

- A. The premises of the proposed license are located in an area that has 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 proposed 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 Census Tract 5120.29. According to the SJPD Memorandum, dated September 7, 2022, the neighborhood reports 20% greater crimes above the city average. Additionally, the ratio of existing retail off-

sale licenses to population in the census tract exceeds the ratio in the County as a whole. Therefore, for ABC to be able to issue a license for this off-sale use the City must grant a PCN. The analysis of the proposal is based on the required findings identified in Title 6 of the San José Municipal Code. Specifically, 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 all of the findings specified below (see San José Municipal Code section 6.84.030.B):

- C. The proposed use is not located within a Strong Neighborhoods Initiative (“SNI”) 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 project site is neither located within an SNI nor a neighborhood revitalization area or other area designated by the City for targeted neighborhood enhancement services or programs. According to the SJPd Memorandum, SJPd stated that it is opposed to the issuance of a Special Use Permit to continue the legal nonconforming off-sale of alcohol at the subject site. SJPd claims issuance of the license would add to an undue concentration of ABC licenses in an area over the 20% crime index compared to the City average. However, the project would not present a significant adverse impact as the project’s ABC license is to replace a recently surrendered license at the same location. Furthermore, the site is located along a major commercial thoroughfare and adjacent to major highways which is more likely to have higher report crime. The site is currently vacant and subject to blight and other crime, with the additional renovations and land use, the site would add value and increase the overall activity and safety of the area. Additionally, the applicant’s Operations Plan includes provisions for Licensee Education on Alcohol and Drugs (LEAD) employee training and surveillance camera systems (48 interior cameras and 4 exterior cameras). The project would not present a significant adverse impact as the project’s ABC license is to replace a recently surrendered license at the same location. As a result, issuance of a license would not be detrimental to public health, safety, or welfare of persons located in the area, nor increase the severity of existing law enforcement or public nuisance problems in the area. Therefore, this finding can be made.

- D. 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: The use would result in less than four off-sale establishments in a 1,000-foot radius. There is currently one off-sale establishment within a 1,000-foot radius

at 402 Blossom Hill Road. Therefore, this finding can be made.

- E. 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 would be located less than 500 feet from a school, day care center, public park, social services agency, or residential care/service facility. Specifically, the use would be located less than 150 feet from residentially zoned properties to the south and east. However, there is a fence separating and limiting access from Downer Square plaza to the rear yards of the adjacent residences. There are thirteen residences within 150 feet of the project site and five within 100 feet. Therefore, this finding cannot be made.

- F. Alcoholic beverage sales would not represent a majority of the proposed use; and

Analysis: The existing commercial building is 32,350 square feet. The sales floor area of the new grocery store is 25,165 square feet. The floor area dedicated to alcohol sales is 460 square feet or 1.83% of the total sales floor area. Therefore, the percentage of alcohol sales does not represent a majority of the sales floor area. Therefore, this finding can be made.

- G. At least one of the following additional findings:

- 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

Analysis: The census tract is not unusually configured in shape. However, the geographic concentration of sites providing off-sale alcohol in the census tract is unusually configured as a majority of the off-sale licenses are concentrated at the opposite end of the census tract. Based on a California Alcoholic Beverage Control report for Census tract 5120.29, there are 4 existing businesses that have off-sale alcohol licenses (Type 20 or 21). The allowed number of off-sale licenses in the census tract is 3. The closest off-sale business is located approximately 250 feet to the northeast of the subject site and offers the sale of alcohol as the primary service. The remaining three off-sale businesses (a liquor store, gas station, and small neighborhood grocery store) are all located approximately 1.4 miles from the subject site, along Cottle Road. Therefore, this finding can be made.

- 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

Analysis: The project site is within the Blossom Hill Road / Snell Avenue Urban

Village, which is part of the General Plan's leading strategy to focus residential and commercial development near existing and future transit opportunities. Furthermore, the project site is within an important existing commercial plaza in close proximity to the Blossom Hill and Snell VTA light rail stations. The grocery store would re-vitalize the existing shopping center by filling a commercial tenant vacancy and maintaining an employment use on the site. The project would not present a significant adverse impact as the project's ABC license is to replace a recently surrendered license at the same location. Therefore, the addition of off-sale alcohol use at the existing grocery store would not present a significant adverse impact on public health or safety. Therefore, this finding can be made.

- 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

Analysis: The census tract in which the project is located has a higher population density in relation to other census tracts in the city and is located in an already over-concentrated area. Therefore, this finding cannot be made.

- 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.

Analysis: Less than 2% of the sales floor area would be dedicated to the off-sale of alcohol. The remainder of the sales floor area would be dedicated to sales of items typical of a full-service grocery store. Furthermore, the off-sale of alcohol at this location would provide a more complete and convenient shopping experience to patrons seeking to obtain day-to-day commodities at a single location. Therefore, this finding can be made.

Given the above-stated analyses, the third finding for the PCN cannot be made by the Planning Commission for the off-sale of alcohol because the project site is located within 150 feet of a residentially zoned property. However, the Planning Commission can make two of the four findings. Moreover, the Commission can make findings 5.a, 5.b and 5.d of the additional findings for a PCN. While the Planning Commission cannot make all of the required findings for the PCN, there are significant and overriding benefits by the use, as it would further activate an existing commercial area and provide new amenities to the existing and proposed population and job growth in the surrounding area.

If the Planning Commission cannot make one or more of the first four findings (items 1 through 4) listed above, then the Planning Commission is required by

San José Municipal Code Section 6.84.030.D to make a recommendation to the City Council as to whether the Council should make a determination for the proposed use.

Notwithstanding the foregoing provisions and requirements contained above, the City Council may issue a determination in connection with an application for a license from the California Department of Alcoholic Beverage Control for the off-premises sale of alcoholic beverages where the City Council does all of the following:

- i. Makes a determination that not all of the required findings set forth in Subsection B. can be made; and

Analysis: The third finding for the PCN cannot be made by the Planning Commission for the off-sale of alcohol because the subject site is located within 150 feet of a residentially zoned property. However, the Planning Commission can make three of the four findings. Specifically, the Commission can make findings 5.a, 5.b and 5.d of the additional findings for a PCN.

- ii. Identifies and finds that a significant and overriding public benefit or benefits will be provided by the proposed use.

Analysis: The project site is within the Blossom Hill Road / Snell Avenue Urban Village which is part of the General Plan's leading strategy to focus residential and commercial development near existing and future transit opportunities. Considering the site is in a growth area, the City expects the area to densify, thus benefiting from additional commercial options. Furthermore, the project site is within an important existing commercial plaza in close proximity to the Blossom Hill and Snell VTA light rail stations. The project is consistent with the General Plan and conforms to the City's development standards set forth in the CP Commercial Pedestrian Zoning District. As stated above, the alcohol sales area would represent less than 2% of the total sales area of the store and would not be a primary use of the building. While the Planning Commission cannot make all of the required findings for the PCN, there are significant and overriding benefits by the project use, as it would further activate an existing commercial area and continue to provide amenities to the existing and future residents in the surrounding area. Smart & Final will expand upon the operational characteristics of previous tenants by providing employee training and enhanced security measures.

In accordance with the findings set forth above, a Special Use Permit and 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 **granted**. This City Council expressly declares that it would not have approved this 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.

APPROVED SUBJECT TO THE FOLLOWING CONDITIONS:

1. **Acceptance of Special Use 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 Special Use Permit and Determination of Public Convenience or Necessity (collectively "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 Special Use Permit and Determination of Public Convenience or Necessity 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 Special Use Permit and Determination of Public Convenience or Necessity or other approval and the provisions of Title 20 of the San José Municipal Code applicable to such Permit.
2. **Permit Expiration.** This Special Use Permit shall automatically expire four 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 Special Use Permit and Determination of Public Convenience or Necessity. The date of issuance is the date this Special Use Permit and Determination of Public Convenience or Necessity 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 Special Use Permit.
3. **Building Permit/Certificate of Occupancy.** Procurement of a Building Permit and/or Certificate of Occupancy from the Building Official for the structures described or contemplated under this permit shall be deemed acceptance of all conditions specified in this Special Use Permit and the permittee's agreement to fully comply with all of said conditions. 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.
4. **Sewage Treatment Demand.** Pursuant to Chapter 15.12 of Title 15 of the San José Municipal Code, acceptance of this Permit by Permittee shall constitute

acknowledgement of receipt of notice by Permittee that (1) no vested right to a Building Permit shall accrue as the result of the granting of this Permit 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; (2) substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority; (3) issuance of a Building Permit to implement this Permit may be suspended, conditioned or denied where the City Manager is necessary to remain within the aggregate operational capacity of the sanitary sewer system available to the City of San José or to meet the discharge standards of the sanitary sewer system imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region.

5. **Use Authorization.** Subject to all conditions herein, this Permit allows a Special Use Permit and Determination of Public Convenience or Necessity to reinstate a legal nonconforming use for off-sale of alcohol (Type 21 ABC License – full range of alcoholic beverages) at an existing commercial building on an approximately 0.74-gross acre site.
- a. The use shall be limited to 2% of the total sales floor area (25,165 square feet) of the retail space that is open and accessible to the general public.
 - b. This use shall be operated in a manner which does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City of San José.
 - c. All trash and refuse storage areas shall be effectively screened from view and covered and maintained in an orderly state to prevent water from entering into the trash or refuse container(s). Trash areas shall be maintained in a manner to discourage illegal dumping.
 - d. All graffiti shall be removed from buildings and wall surfaces, including job sites for projects under construction, within 48 hours of defacement.
 - e. The site and surrounding area shall be maintained free of litter, refuse, and debris. Cleaning shall include keeping all publicly-used areas free of litter, trash, cigarette butts, and garbage.
 - f. Security cameras will be strategically throughout the space, including facing the public right-of-way. All security camera video footage will be retained for 30 days in the event that an incident needs review by security personnel or the police.
 - g. Loitering and panhandling will not be tolerated, and the business operator will

- maintain a zero-tolerance policy. No loitering signs will be posted in conspicuous places containing wording (Spanish and English) that aligns with state and local law (business owner to work with San José Police to obtain proper language). All loitering and panhandling issues will be dealt with in a swift and consistent manner by notifying local police. No consumption or open alcoholic beverages will be permitted on the premises. Signs specifically prohibiting this activity will also be placed in conspicuous places in both Spanish and English.
- h. The permittee/business operator will engage the community organization/neighborhood leaders/etc. to address neighborhood concerns with any aspect of the business. The project applicant/business operator will be available to meet with concerned parties and create a mutually beneficial mitigation plan in accordance with any and all relevant laws and regulations.
 - i. The project is located in a well-lit area that contains ample streetlight/parking lot lighting/exterior lighting (detailed on the site plan). All lighting issues, such as inadequate lighting or burned-out lights, will be addressed promptly by our maintenance provider. The business is designed with full height glass windows to provide a clear and unobstructed view from inside and out. All signage affixed to the windows will not obstruct these views.
6. **Conformance with ABC Requirements.** The off-sale of alcohol (full range of alcoholic beverages) is allowed in conformance with the requirements of the Department of Alcohol Beverage Control (ABC). The permittee shall obtain and maintain full compliance with its ABC license and remain in good standing with the Department of Alcoholic Beverage Control.
7. **Limitations on the 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 convenience store. The area in which alcoholic beverages are displayed or otherwise offered for sale shall not exceed 2% of the total sales floor area (25,165 square feet) of the retail space 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.
8. **Conformance to Plans.** The development of the site shall conform to the approved Planned Development Permit plans entitled, “Smart & Final #829” received November 23, 2022, on file with the Department of Planning, Building and Code Enforcement as may be amended and approved by the Director of Planning, Building, and Code Enforcement, and to the San José Building Code (San José Municipal Code, Title 24). The plans are referred to herein as the “approved plans” or the “Approved Plan Set.”
9. **Conformance with Municipal Code.** No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code.

10. **Compliance with Local, State, and Federal Laws.** The subject use shall be conducted in full compliance with all local, state, and federal laws.
11. **Discretionary Review.** The City 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 the San José Municipal Code.
12. **Outdoor Storage.** No outdoor storage is allowed or permitted unless designated on the Approved Plan Set.
13. **Sign Approval.** No signs are approved at this time. All proposed signs shall be subject to review and approval by the Director of Planning, Building and Code Enforcement through a subsequent Permit Adjustment.
14. **Lighting.** No new lighting is approved at this time. All on-site exterior, unroofed lighting shall conform to the Outdoor Lighting Policy (Council Policy 4-3), as amended. All proposed lighting shall be subject to review and approval by the Director of Planning through a subsequent Permit Adjustment.
15. **No Generators Approved.** This Permit does not include the approval of any stand-by/backup electrical power generation facility. Any future stand-by/backup generators shall secure appropriate permits and shall conform to the regulations of Title 20 of the Municipal Code.
16. **Building and Property Maintenance.** The permittee shall maintain the property in good visual and functional condition. This shall include, but not be limited to all exterior elements of the building such as paint, roof, paving, signs, lighting and landscaping.
17. **Street Number Visibility.** Street numbers of the buildings shall be easily visible from the street at all times, day and night.
18. **Bureau of Fire Department Clearance for Issuing Permits.** Prior to the issuance of a Building Permit, the project must comply with the California Fire Code as adopted or updated by the city.
19. **Building Division Clearance for Issuing Permits.** Prior to the issuance of any Building permit, the following requirements shall be met to the satisfaction of the Chief Building Official:
 - a. **Construction Plans.** This Permit file number, SP22-023 shall be printed on all construction plans submitted to the Building Division.
 - b. **Americans with Disabilities Act.** The permittee shall provide appropriate access as required by the Americans with Disabilities Act (ADA).
 - c. **Construction Plan Conformance.** A project construction plan conformance review by the Planning Division is required. Planning Division review for project conformance will begin with the initial plan check submittal to the Building Division.

Prior to any Building Permit issuance, Building Permit plans shall conform to the approved Planning development permits and applicable conditions.

20. Revocation, Suspension, Modification. This Planned Development Permit and Determination of Public Convenience or Necessity may be revoked, suspended or modified by the City Council 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, Chapter 20.100, Title 20 of the San José Municipal Code it finds:

- a. A violation of any conditions of the Planned 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.

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 ____, 2023 by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

MATT MAHAN
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.

LEGAL DESCRIPTION

ALL THAT CERTAIN REAL PROPERTY SITUATE IN THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, CITY OF SAN JOSE, DESCRIBED AS FOLLOWS:

ALL THAT PORTION OF LOTS 47 AND 48, OF MAP OF THE SEED FARM, AS SHOWN ON A MAP FILED IN BOOK N, PAGE 67 OF MAPS, RECORDS OF SANTA CLARA COUNTY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWESTERN CORNER OF LOT 47 OF SAID TRACT, (FOR THE PURPOSE OF THIS DESCRIPTION BEING THE INTERSECTION CENTER LINES OF DOWNER AVENUE AND SNELL ROAD AS SHOWN ON SAID MAP); THENCE SOUTH $00^{\circ}38'00''$ EAST ALONG THE CENTER LINE OF SNELL ROAD 565.00 FEET TO THE MOST WESTERLY NORTHWEST CORNER OF THE LAND CONVEYED TO VALLEY TITLE COMPANY OF SANTA CLARA COUNTY, A CORPORATION; THENCE NORTH $89^{\circ}30'42''$ EAST ALONG SAID LAND OF VALLEY TITLE COMPANY, 699.50 FEET TO A POINT; THENCE NORTH $00^{\circ}38'00''$ WEST ALONG THE LAND OF VALLEY TITLE COMPANY 565.00 FEET TO A POINT IN THE CENTERLINE OF DOWNER AVENUE, AS SAID CENTER LINE OF DOWNER AVENUE IS SHOWN ON THE MAP OF SAID TRACT, SAID POINT BEING NORTH $89^{\circ}30'42''$ EAST, 699.50 FEET FROM THE TRUE POINT OF BEGINNING; THENCE SOUTH $89^{\circ}30'42''$ WEST, 699.50 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION OF SAID LAND LYING NORTHERLY OF THE SOUTHERLY LINE OF THE LAND CONVEYED TO THE CITY OF SAN JOSE BY DEED RECORDED JANUARY 16, 1958 IN BOOK 3984 PAGE 510 OF OFFICIAL RECORDS.

ALSO EXCEPTING ALL THAT PORTION OF SAID LAND LYING WESTERLY, NORTHWESTERLY AND NORTHERLY OF THE LINE DESCRIBED IN DEED TO CITY OF SAN JOSE RECORDED JUNE 29, 1965, IN BOOK 7010, PAGE 600 OF OFFICIAL RECORDS.

ALSO EXCEPTING A PORTION OF THAT CERTAIN PARCEL OF LAND DESCRIBED IN THE DEED FROM FREDERICK C. HOCK, JR., AS TRUSTEE TO VIVIANNE A. HOCK, ET AL RECORDED JULY 17, 1986, IN BOOK J769 OF OFFICIAL RECORDS AT PAGE 465, SANTA CLARA COUNTY RECORDS, DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWESTERLY CORNER OF THAT CERTAIN PARCEL OF LAND DESCRIBED IN THE DEED FROM SNELL AND DOWNER INVESTMENT CO., A PARTNERSHIP, TO THE CITY OF SAN JOSE, A MUNICIPAL CORPORATION OF THE STATE OF CALIFORNIA, RECORDED JUNE 29, 1965, IN BOOK 7010 OF OFFICIAL RECORDS AT PAGE 600, SANTA CLARA COUNTY RECORDS; THENCE FROM SAID POINT OF BEGINNING, ALONG THE SOUTHERLY LINE OF SAID PARCEL CONVEYED TO HOCK SOUTH $89^{\circ}45'20''$ EAST, 81.44 FEET TO THE INTERSECTION THEREOF WITH THE WESTERLY LINE OF LOT 61 AS SHOWN ON TRACT NO. 3792, A MAP OF WHICH WAS FILED FOR RECORD IN BOOK 183 OF MAPS, AT PAGES 22 AND 23 SANTA CLARA COUNTY RECORDS; THENCE LEAVING SAID SOUTHERLY LINE, ALONG THE NORTHERLY PROLONGATION OF SAID WESTERLY LINE, NORTH $20^{\circ}43'28''$ WEST, 160.18 FEET; THENCE LEAVING SAID NORTHERLY PROLONGATION, ALONG A TANGENT CURVE TO THE RIGHT WITH A RADIUS OF 375.00 FEET, THROUGH A CENTRAL ANGLE OF $20^{\circ}49'23''$ FOR AN ARC LENGTH OF 136.29 FEET TO A POINT OF CUSP IN AN EASTERLY LINE OF SAID PARCEL CONVEYED TO THE CITY OF SAN JOSE; THENCE ALONG SAID EASTERLY LINE SOUTH $00^{\circ}05'55''$ WEST, 282.82 FEET TO THE POINT OF BEGINNING.