



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Planning Commission

**SUBJECT:** SEE BELOW

**DATE:** August 28, 2017

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**COUNCIL DISTRICT: 6**

**SUBJECT: CONDITIONAL USE PERMIT (FILE NO. CP17-005) AND DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY (FILE NO. ABC17-002) TO ALLOW LATE NIGHT USE AND THE OFF-SALE OF ALCOHOL FOR A FULL RANGE OF ALCOHOLIC BEVERAGES (ABC TYPE-21 LICENSE) WITHIN AN APPROVED COMMERCIAL/RETAIL DEVELOPMENT (FILE NO. H17-018) ON AN APPROXIMATE 2.0-GROSS ACRE SITE (1266 AND 1270 WEST SAN CARLOS STREET, AND 1298, 310 AND 320 RACE STREET).**

## **RECOMMENDATION**

The Planning Commission voted 7-0-0 to recommend that the City Council:

1. Make the required findings for the Determination of Public Convenience or Necessity for the proposed off-sale use.
2. Adopt a resolution approving the Conditional Use Permit and Determination of Public Convenience or Necessity File Nos. CP17-005 and ABC17-002) to allow late night use, and the off-sale of alcohol for a full range of alcoholic beverages (ABC Type-21 License) within a proposed commercial/retail development (File No. H17-018) on an approximate 2.0-gross acre site at the southeast corner of Race Street and West San Carlos Street (1266 and 1270 West San Carlos Street, and 1298, 310 and 320 Race Street).

## **OUTCOME**

Should the City Council adopt the resolution, the applicant would be able to proceed with 24-hour operation of the commercial/retail business and allow off-sale of a full range of alcoholic beverages (ABC Type-21 License) from 6 a.m. to 12 a.m. (midnight) as proposed in the Conditional Use Permit and Determination of Public Convenience or Necessity.

## **BACKGROUND**

On August 23, 2017, the Planning Commission held a public hearing to consider applications for a Conditional Use Permit and Determination of Public Convenience, the CEQA exemption, and staff analysis to provide a recommendation to the City Council. The Planning Commission was able to make all the required findings for the Determination of Public Convenience or Necessity with the exception of the finding that the site is not located within a Strong Neighborhood Initiative boundary. In this instance, as required by Chapter 6.84 of the San José Municipal Code, the Planning Commission voted 7-0-0 to forward a recommendation to the City Council to make the required findings for the significant and overriding public benefit of the proposed use.

As part of the staff presentation, staff noted that at time of the posting of the Staff Report, the project site contained vacant commercial buildings (former Mel Cotton's Sporting Goods), but one day after the posting, the site demolition began as permitted under the previously approved Site Development Permit (File No. H17-018).

Staff provided an overview of the required findings for the Conditional Use Permit and Determination of Public Convenience and Necessity. Staff also addressed a comment letter submitted by Mark Wolfe on behalf of San José residents Janice Nelson, Hector Moreno, and Michael Madeiros. In the letter, the author asserted that the project did not meet the required findings for the Conditional Use Permit with regard to potential adverse effects on adjacent properties and insufficient capacity for future traffic in the neighborhood. Staff stated that the Initial Study prepared for the previously approved Site Development Permit and Tentative Map at this site are the same documents used to analyze the proposed Conditional Use Permit for off-sale of alcohol and late night use. The Initial Study's project description included the entire scope of the development and propose uses. The Planning Director approved the Site Development Permit and Tentative Map on June 28, 2017, and City Council subsequently denied an appeal of the CEQA determination at a public hearing on August 8, 2017. Staff previously responded to the same analysis and comments found in this letter and determined that the project, including the late night use and alcohol sales, would have less than significant impact on surrounding uses. Further, staff found that the analysis for traffic and air quality is consistent with all related City Policies. Staff also stated that the inclusion of the off-sale of alcohol as part of the project would not add a significant number of trips or increase air quality impacts to the project and might actually reduce trips that would otherwise occur if the off-sale is not provided as a convenience in the commercial/retail store. Therefore, adverse impacts on adjacent property and the amount of traffic are deemed less than significant, and the proposed project is consistent with the required findings for the Conditional Use Permit.

In his letter, Mr. Wolfe also stated that the proposed project would provide no significant and overriding public benefit. However, consistent with the findings for Determination of Public Convenience or Necessity, the off-sale of alcohol represents a small percentage of the total sales area, would complement other good for purchase at a full scale commercial/retail business, and would allow the store to be more viable. In addition to the previously approved proposed site improvements, including lighting, new security measures and increase activity in the area would all result in a projects that would provide significant and override public benefits.

The applicant's representative, Ray Hashimoto, provided the only public testimony. He stated that the proposed use would help meet the future demand for additional commercial development in the area

as the site is located within close proximity to approximately 1,000 residential units under construction and 800 units entitled near the project site. Mr. Hashimoto explained that the store's staff would be well trained to adhere to Department of Alcohol Beverage Control (ABC) policies, and given the competitive nature of similar retail/commercial businesses, the 24-hour use is a vital component of the new store business model. Additionally, the off-sale of alcohol would represent less than 2% of the total sales area and would primarily provide a convenience to shoppers and facilitate a one-stop shopping experience to remain competitive with nearby commercial uses.

Commissioners Ballard, Bit-Badal, and Abelite suggested that the City Council may want to consider the role of the Strong Neighborhood Initiatives (SNI) in the review of this and other development projects. The Commissioners did not recommend specific changes to the SNI policy but suggested that the Council explore how to implement and/or modify the review of future projects within the SNI boundaries.

Commissioner Allen asked if the conditions in the Police Memorandum (e.g. no single-sales of malt liquor) could be included in the conditions of approval for the Conditional Use Resolution. Staff stated that those specific regulations on the type or how the products are sold are under the regulation by the Department of Alcohol Beverage Control and that the Department of Planning, Building, and Code Enforcement could not enforce such conditions. The Police Department, in conjunction with ABC, would include those conditions as part of the ABC license for the proposed use. However, regulations such as keeping the premises clean and hours of operations are under the purview of the City and have been included as conditions of the Conditional Use Permit.

The Planning Commission recommended to the City Council to make the required Determination of Public Convenient or Necessity findings and approve the adoption of the proposed Conditional Use resolution by a unanimous vote of 7-0-0.

## **ANALYSIS**

Complete analysis of the issues regarding this project, including the environmental analysis (CEQA) and conformance with the Envision San Jose 2040 General Plan, Midtown Specific Plan, Municipal Code, Determination of Public Convenience or Necessity, and City Council Policies is contained in the attached Planning Commission staff report.

## **EVALUATION AND FOLLOW-UP**

If the City Council adopts the resolution, the applicant would be able to proceed with obtaining permits and occupancy for a 24-hour commercial/retail business operation with off-sale of a full range of alcoholic beverages (ABC Type-21 License) from 6 a.m. to 12 a.m. (midnight) for a previously approved commercial/retail development.

## **PUBLIC OUTREACH**

Staff followed Council Policy 6-30: Public Outreach Policy to inform the public about this project. The property owners and occupants within a 500 foot radius of the project site were sent public hearing notices for the Planning Commission and City Council hearing. An electronic version of this memorandum has been available online, accessible from the City Council Agenda for the September 12, 2017, hearing. Staff has been available to discuss the proposal with members of the public.

## **COORDINATION**

Preparation of this memorandum has been coordinated with the City Attorney's Office.

## **CEQA**

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 proposed off-sale of alcohol would be located within an approved building. The proposed 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. Section 15332 of the State CEQA Guidelines (In-fill Development Projects) applies to the proposed 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. The Initial Study/Exemption is available for review on the Planning Division's Environmental webpage at <http://www.sanjoseca.gov/index.aspx?NID=5604>.

/s/  
ROSALYNN HUGHEY, SECRETARY  
Planning Commission

For questions, please contact Planning Official, Steve McHarris, at (408) 535-7819.

Attachment: Planning Commission Staff Report and attachments



## PLANNING COMMISSION STAFF REPORT

<b>File No.</b>	<b>CP17-005 and ABC17-002</b>
<b>Applicant</b>	<b>Terry Pries</b>
<b>Location</b>	<b>Southeast corner of West San Carlos Street and Race Street (320 Race Street)</b>
<b>Existing Zoning</b>	<b>CIC Combined Industrial/Commercial</b>
<b>General Plan Designation</b>	<b>Combined Industrial/Commercial</b>
<b>Council District</b>	<b>6</b>
<b>Historic Resource</b>	<b>No</b>
<b>Annexation Date</b>	<b>March 31, 1955 (Sunol No. 2)</b>
<b>CEQA</b>	<b>Exempt per CEQA Section 15332 for In-fill Development</b>

### APPLICATION SUMMARY:

Conditional Use Permit (File No. CP17-005) and Determination of Public Convenience or Necessity (File No. ABC17-002) to allow late night use, and the off-sale of alcohol for a full range of alcoholic beverages (ABC Type-21 License) within a proposed commercial/retail development (File No. H17-018) on an approximate 2.0-gross acre site.

### RECOMMENDATION:

Staff recommends that the Planning Commission recommend to the City Council the adoption of a resolution approving the Conditional Use Permit and Determination of Public Convenience or Necessity based upon the facts and findings in this staff report and the attached draft Resolution.

### PROJECT DATA

GENERAL PLAN CONSISTENCY			
General Plan Designation		Combined Industrial/Commercial <input checked="" type="checkbox"/> Consistent <input type="checkbox"/> Inconsistent	
Consistent Policies		Policy LU-5.1, LU-5.10, LU-8.2	
Inconsistent Policies		None	
SURROUNDING USES			
	General Plan Land Use	Zoning	Existing Use
North	Urban Village	CP Commercial Pedestrian	Car Dealership, Restaurant, Commercial Office (across West San Carlos Street)
South	Combined Industrial/Commercial	Light Industrial	Gymnastic and Dance Center
East	Combined Industrial/Commercial	Light Industrial	Industrial Fabrication Business

<b>West</b>	Neighborhood/Community Commercial	A(PD) Planned Development (File No. PDC94-002)	Commercial/Grocery Center (across Race Street)
<b>RELATED APPROVALS</b>			
<b>Date</b>	<b>Action</b>		
01/22/03	Administrative Permit (File No. AP03-002) to allow a hotdog cart/stand in the front of the business.		
10/26/16	Conforming Rezoning (File No. C16-048) to rezone the site from LI Light Industrial Zoning District to the Combined Industrial/Commercial Zoning District.		
6/18/17	Site Development Permit (File No. H17-018) to allow the demolition of existing commercial buildings (Mel Cotton's), removal of seven ordinance-size trees, and construction of a new 29,575-square commercial building		
6/18/17	Tentative Map (File No. T16-050) to combine three lots into one lot.		

## PROJECT DESCRIPTION AND SITE LOCATION

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 CEQA determination and approval of the Site Development Permit and Tentative Map. That decision allowed the building's demolition and construction of the proposed commercial building on the subject site.

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 am on the subject 2.0-gross acre site within the yet to be constructed full-service commercial/retail 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), as shown in the proposed floor plan in Figure 1. The proposed location of the alcohol display and sales would occur at the northeast portion of the building and adjacent to the cash registers, therefore allowing significant visibility for the staff to monitor the off-sale of alcohol. A Management and Operations Plan has been prepared for the site that describes security measures and proposed operation of the proposed use.

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 and across West San Carlos Street to the north is 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). The entrance of the proposed use would be approximately 400 feet and separated by Race Street from the nearest residentially zoned property. East of the site is an existing industrial fabrication business (O.C. McDonald Company Inc.), as shown in the aerial of Figure 2. Additionally, within a half mile of the proposed project, there are approximately 1,767 residential units that have been approved with entitlements or under construction.





## ANALYSIS

The proposed Conditional Use Permit and Determination of Public Convenience or Necessity was analyzed with respect to conformance with: 1) the Envision 2040 General Plan; 2) the Zoning Ordinance; 3) Requirements for a Determination of Public Convenience or Necessity; 4) City Council Policy 6-27: Evaluation of 24-Hour Uses, and, 5) Midtown Specific Plan 6) the California Environmental Quality Act (CEQA).

### Envision San José 2040 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.

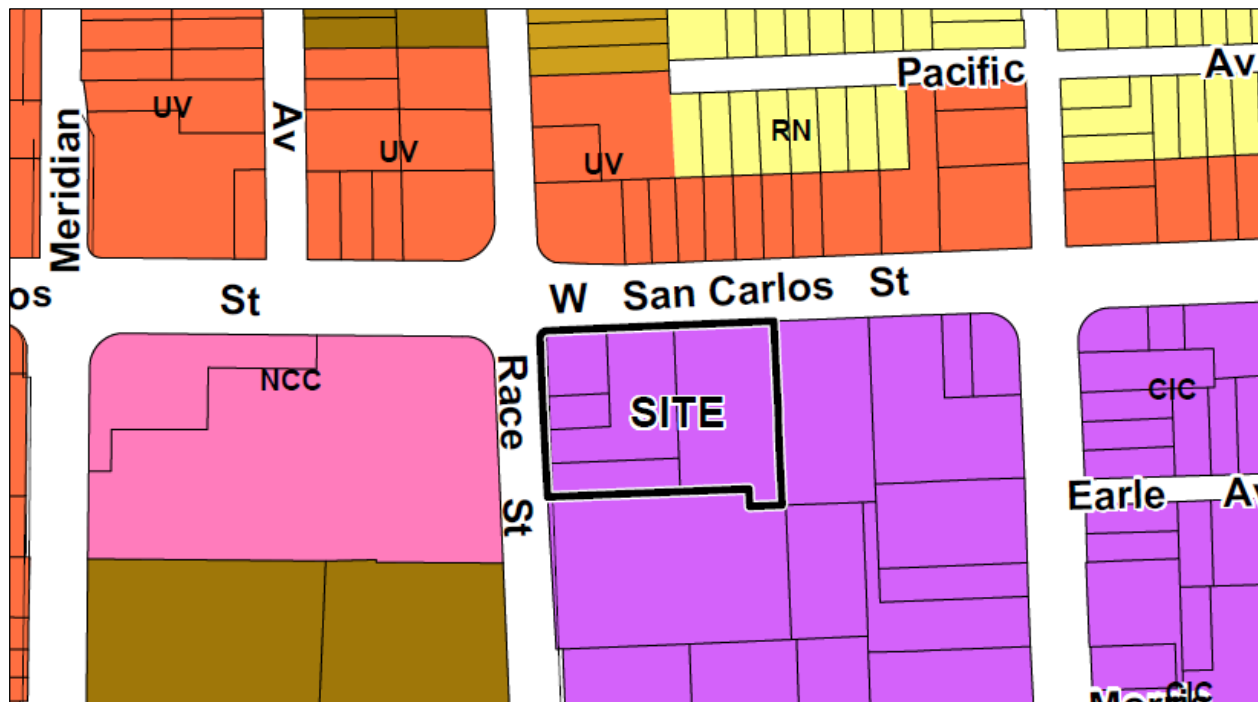


Figure 3: General Plan Land Use Map

The proposed 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 proposed use is also consistent with the following General Plan policies:

1. 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 proposed 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 proposed 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 proposed 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*

2. 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 proposed 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 commercial/retail store.*

3. 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 proposed 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 proposed store functions as both a benefit to the business and residential community.*

## **Zoning Ordinance Conformance**

### *Land Use*

As stated above, the proposed project is located in the CIC Combined Industrial/Commercial Zoning District (Figure 4). 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. Both analysis of the Conditional Use Permit and Determination of Public Convenience or Necessity are provided below.

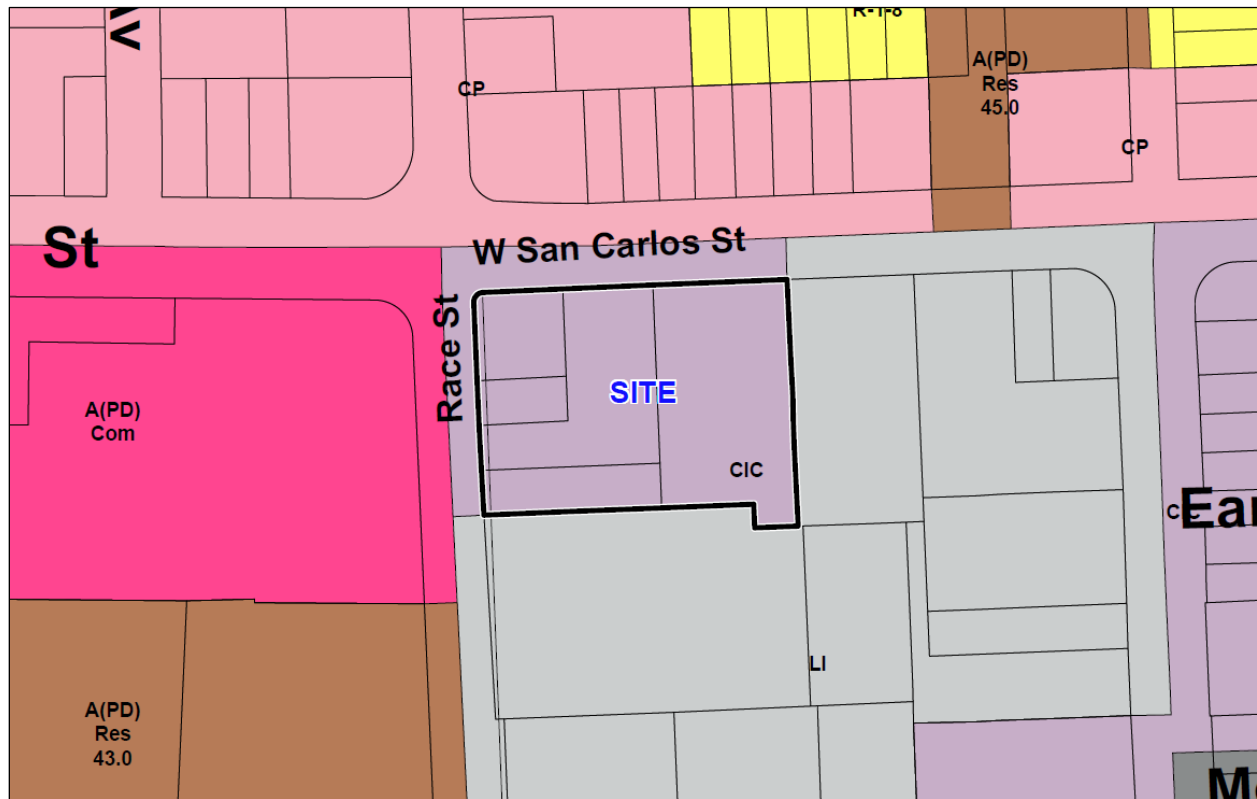


Figure 4: Zoning District Map

### *Conditional Use Permit*

Section 20.100.700 of the Zoning Ordinance specifies the required findings for approval of a Conditional Use Permit. These findings are made for the project based on the analysis related to General Plan, Zoning and CEQA conformance and subject to the conditions set forth in the Permit.

1. 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.
2. 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.
3. The Conditional Use Permit, as approved, is consistent with applicable city council policies, or counter Conditional Use Permit balancing considerations justify the inconsistency.

*Analysis: The proposed use that 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 commercial/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 proposed 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 in the following sections.*

4. 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.

*Analysis: As stated in the attached 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:*

- a. *No single sales of malt liquor.*
- b. *No single sales of "mini bottles" also known as "shooters, minis, airplane bottles" of alcohol.*
- c. *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.*
- d. *The licensee shall be responsible for keeping litter-free the area adjacent to the premises over which they have control.*
- e. *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.*
- f. *The licensee shall ensure no loitering occurs in the area of the establishment.*

*The proposed use is not located adjacent to residential uses and provides sufficient buffer from existing industrial uses in the area. The proposed 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, additional conditions about nuisance, clean up and noise would be included as a part of the Conditional Use Permit to further reduce the potential for adverse effect on the surrounding neighborhood.*

5. 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 proposed project, the project site was found to be adequate in size to accommodate the new building and associated site improvements.*

6. 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.

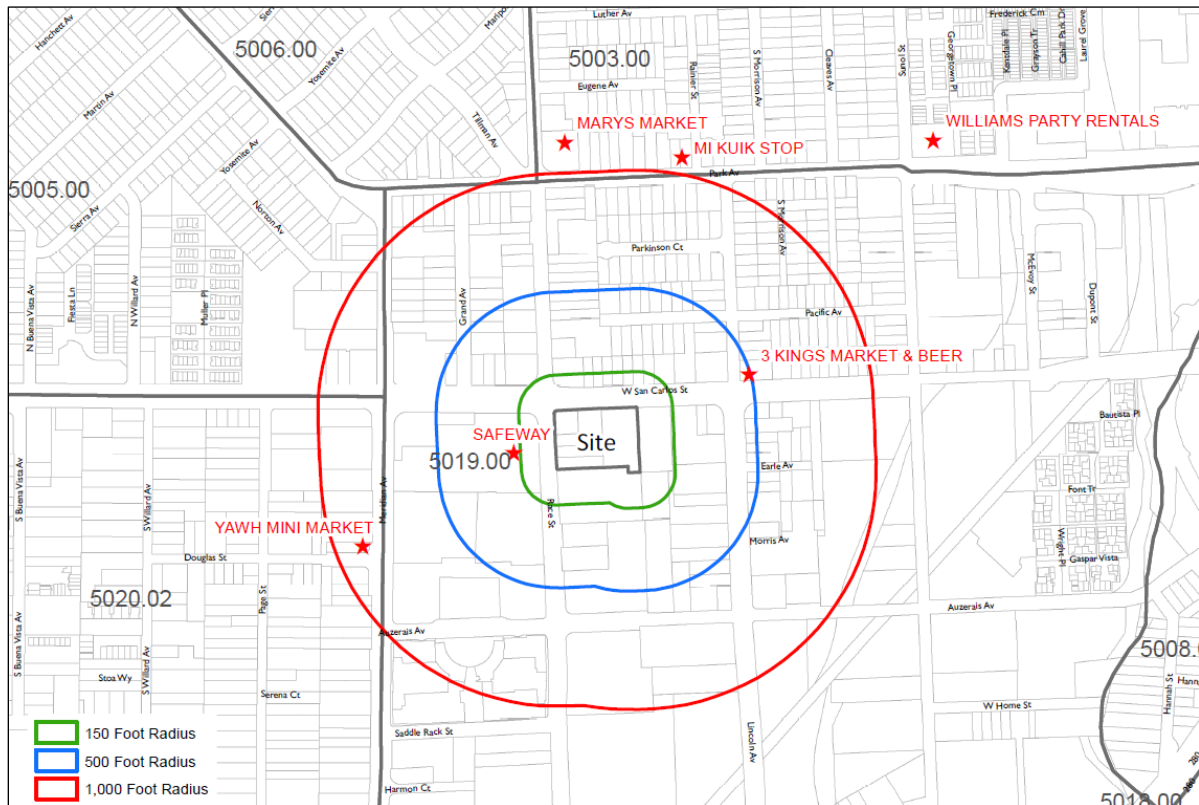
*Analysis: The proposed project has adequate access from both West San Carlos Street and Race Street, with pedestrian access from both the street frontages and from the parking lot. A Traffic Operational Analysis (TOA) has been performed for this project based on no additional AM and an additional 17 PM peak hour trips. Due to the small size of the project (resulting in less than 25 net peak hour vehicle trips), a comprehensive Transportation Impact Analysis (TIA) per the City of San Jose's Transportation Policy 5-3 is not necessary. Based on the findings in the TOA, the subject project is in conformance with the City of San José Transportation Level of Service Policy (Council Policy 5-3) and a determination for a negative declaration can be made with respect to traffic impacts.*

### *Required Findings for Off-Sale of Alcohol*

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:

1. For such use at a location closer than 500 feet from any other use involving the off-sale of alcoholic beverages, situate 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 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 proposed site (Safeway and 3 Kings Market & Beer). With the proposed 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 proposed site (Figure 5). 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.*



**Figure 5: Radius around project site and other off-sale uses**

2. For such use at a location closer than 500 feet from any other use involving the off-sale of alcoholic beverages, situate 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 1,000 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 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 stated above, the proposed use is located within 500 feet of two other off-sale 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 proposed location. Therefore, this finding is not applicable.*

3. For such a use at a location closer than 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 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 proposed 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 proposed 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 proposed use. Therefore, this finding is not applicable.*

### **Requirements 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). An “undue concentration” is defined as follows:

1. 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
2. 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 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 Jose 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 proposed 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:*

- a. *No single sales of malt liquor.*
- b. *No single sales of "mini bottles" also known as "shooters, minis, or airplane bottles" of alcohol.*
- c. *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.*
- d. *The licensee shall be responsible for keeping litter-free the area adjacent to the premises over which they have control.*
- e. *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.*
- f. *The licensee shall ensure no loitering occurs in the area of the establishment.*

*Therefore, with implementation of the above conditions, findings 1.a. and 1.b. **can** be made.*

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 proposed 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 proposed 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 proposed 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 proposed use is not within 150 feet of a residence. Therefore, this finding can be made.*

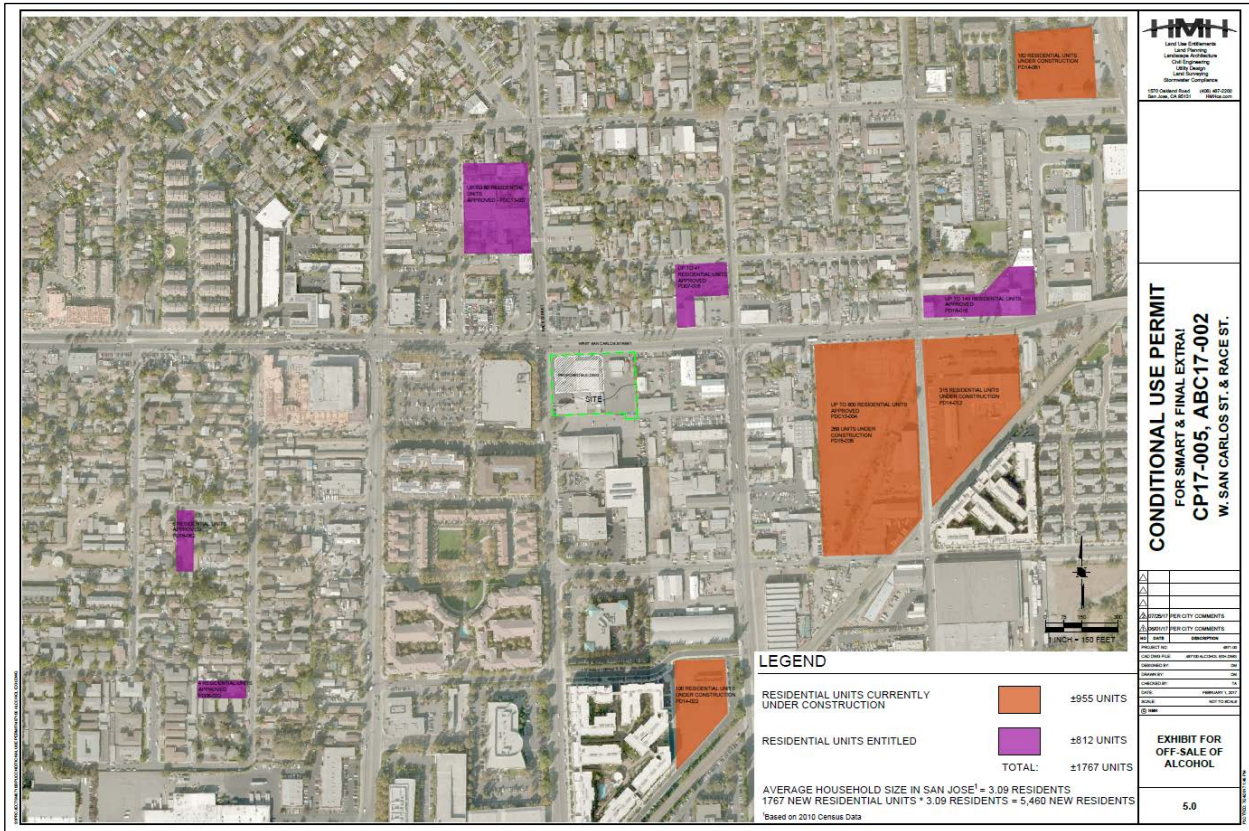
4. Alcoholic beverage sales would not represent a majority of the proposed use; and

*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 proposed 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, if the Planning Commission is able to make all of the findings enumerated above. If the Planning Commission is not able to make one or more of the above required findings, then the Planning Commission shall make a recommendation to the City Council. The Planning Commission must be able to also find that:

- 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.

*Analysis: Given the above-stated analysis, all but one of the findings for PCN can be made by the Planning Commission for the proposed off-sale of alcohol. The Planning Commission cannot make the first finding as the proposed use is located within the existing Burbank/Del Monte Strong Neighborhoods Initiative (SNI) area. However, the Planning Commission can make all the other findings and the additional 5.c and 5.d findings for a PCN determination. As shown in the below figure and in page 5.0 of the plan set, within a half mile of the proposed 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 primarily use of the building. Although, the Planning Commission cannot make all the required findings 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 by the proposed use, as it would activate a currently vacant building and provide redevelopment and new amenities to the existing and proposed population growth in the surrounding area.*



*Figure 6: Project site and other nearby residential developments that are entitled or under construction*

### 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:

1. **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 project would limit the off-sale of alcohol to between the hours of 6:00 a.m. to 12 a.m. but allow 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 proposed use would not be a detriment to any uses in the surrounding areas.*

2. **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 adjacent neighbors.*

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

*Analysis: There is no proposed 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.*

4. 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 outdoor.*

5. 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 minimize impact to adjacent properties, while ensuring sufficient lighting of the site for safety.*

6. 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: The draft Resolution contains a condition of approval that requires the operator of the proposed use to clean the public right-of-way immediately adjacent to the subject site before 8:00 a.m. each day. The draft Resolution also contains a condition of approval that limits the operator of the proposed use to using mechanical equipment for outside maintenance only between the hours of 7:00 a.m. and 10:00 p.m.*

### **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 Auzerais 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 proposed use is consistent with both the Midtown Specific Plan and the CIC general plan designation.




**CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

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 proposed off-sale of alcohol, would be located within an existing approved structure. The proposed 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. The Section 15332 (In-fill Development Projects) exemption applies the proposed 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. The Initial Study/Exemption is available for review on the Planning Division's Environmental webpage at <http://www.sanjoseca.gov/index.aspx?NID=5604>.

**PUBLIC HEARING NOTIFICATION**

In order to inform the public of the proposed project, staff followed Council Policy 6-30: Public Outreach Policy. A notice of the public hearing was distributed to the owners and tenants of all properties located within 500 feet of the project site and posted on the City website. The staff report is also posted on the City's website. Staff has been available to respond to questions from the public.

**Project Manager:** John Tu

**Approved by:** , Planning Official for Rosalynn Hughey, Interim Planning Director

**Date:** 8/16/17

**Attachments:**

Draft Resolution  
Police Department Memorandum  
Plan Set  
Operation and Management Plan

**Owner:**

Terry Pries  
PO Box 6540  
San José, CA 95150

**Applicant:**

Terry Pries  
PO Box 6540  
San José, CA 95150



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 PROPOSED 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 proposed 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 proposed use would be approximately 400 feet and separated by a street from the nearest residentially zoned property. Within a half mile of the proposed project, 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 CEQA determination and approval of the Site Development Permit and Tentative Map. That decision allowed the building's demolition and construction of the proposed 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 proposed 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 proposed 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 proposed use would be located within 2,000 feet of the existing VTA lightrail and at the corner of a proposed bus rapid transit station. The proposed 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 proposed 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 proposed 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.*

- 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 proposed 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 proposed 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 Auzerais 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 proposed use is consistent with both the Midtown Specific Plan and the CIC general plan designation.
5. **Zoning Ordinance Compliance.** As stated above, the proposed 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 project would limit the off-sale of alcohol to between the hours of 6:00 a.m. to 12 midnight but allow 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 proposed 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 adjacent neighbors.*

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

*Analysis: There is no proposed 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 outdoor.*

- 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: The draft Resolution contains a condition of approval that requires the operator of the proposed use to clean the public right-of-way immediately adjacent to the subject site before 8:00 a.m. each day. The draft Resolution also contains a condition of approval that limits the operator of the proposed 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 proposed off-sale of alcohol, would be located within an existing approved structure. The proposed 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. The Section 15332 (In-fill Development Projects) exemption applies the proposed 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 proposed use that 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 proposed 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" 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 proposed use is not located adjacent to residential uses and provides sufficient buffer from existing industrial uses in the area. The proposed 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, additional conditions about nuisance, clean up and noise would be included as a part of the Conditional Use Permit to further reduce the potential for adverse effect on the surrounding neighborhood.*

- 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 proposed 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 proposed 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 proposed site (Safeway and 3 Kings Market & Beer). With the proposed 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 proposed 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 proposed use is located within 500 feet of two other off-sale 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 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 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 proposed 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, with implementation of the above conditions, this finding can be made.

- 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 by the Planning Commission for the proposed off-sale of alcohol. The Planning Commission cannot make the first finding as the proposed use is located within the existing Burbank/Del Monte Strong Neighborhoods Initiative (SNI) area. However, the Planning Commission can make findings 5.c and 5.d of the additional findings for a PCN determination. As shown in the below figure and in page 5.0 of the plan set, within a half mile of the proposed 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 primarily use of the building. Although, the Planning Commission cannot make all the required findings 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 by the proposed use, as it 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 proposed 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 Alcohol 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;
  - a. 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:
  - d. 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.
  - e. The permittee of the proposed use shall clean the public right-of-way immediately adjacent to the subject site before 8:00 a.m. each day.
  - a. 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

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.*



# Memorandum

**TO:** John Tu  
Planning Department

**FROM:** Sgt. Todd Trayer #3301  
San Jose Police Vice Unit

**SUBJECT:** ABC17-002 (CP17-005)  
Smart and Final

**DATE:** May 16, 2017

---

Approved

Date

---

I have received your request for input regarding Smart and Final, located at 320 Race St. in San Jose. Smart and Final is a full service grocery store and is seeking to obtain off-sale alcohol endorsement as well as late night use.

Per Business and Professions (B&P) Code Section 23958, the State of California Department of Alcohol Beverage Control shall deny an ABC Application for an ABC License if the issuance of that license would tend to create a law enforcement problem or if it would result in or add to an undue concentration of ABC Licenses, as described in B&P Sections 23958.4 (a)(1) and 23958.4(a)(3). A location can be unduly concentrated because of its criminal statistics and/or it's proximity to other ABC Licenses. ABC can issue the license per B&P Sections 23958.4 (b)(1), and 23958.4 (b)(2) if the local governing body determines that the public convenience or necessity would be served. The City of San Jose Planning Department and the Planning Commission are the delegated authorities to grant these exceptions.

The location is in the Burbank/Del Monte Strong Neighborhood Initiative (SNI) area.

320 Race St. is located in San Jose Police Beat F5 The reported crime statistics as defined by B&P Section 23958.4(c) are over the 20% crime index thus the location is considered unduly concentrated per B&P Section 23958.4 (a)(1).

## Police Beat Crime Statistics

Beat	Index Crimes	Arrests	Total	20% Above Average
F5 (2016)	429	116	545	Yes
City Average	383	146	529	

Department of Alcohol Beverage Control (ABC) records indicate that 320 Race St. is in census tract 5019.00. Pursuant to B&P Section 23958.4 (a)(3), the ratio of off-sale retail licenses population in census tract 5019.00 does exceed the ratio of off-sale retail licenses to population in the county in which the applicant premises are located.

### **Authorized and Current ABC Licenses in Census Tract 5119.00**

Census Tract	Authorized ABC Licenses as of August 2014		Current ABC Licenses as of September 2015		Unduly Concentrated	
	On - Sale	Off - Sale	On - Sale	Off – Sale	On - Sale	Off – Sale
5019.00	6	2	8	3	YES	YES

The San Jose Police Department is **neutral** to Smart and Final's Conditional Use endorsement for alcohol sales, located at 320 Race St., with a Type 21 Off-Sale General ABC License.

Should a decision be made to allow alcohol, the San Jose Police Department recommends the following conditions in order to minimize the potential for a public nuisance around the area of the newly proposed grocery store:

- 1) No single sales of malt liquor.
- 2) No single sales of "mini bottles" also known as "shooters, minis, 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.

Please feel free to contact me at 408-277-4322 if you have any questions.

Acting Lieutenant Todd Trayer #3301  
Special Investigations/Vice Unit  
408-277-4322



# CONDITIONAL USE PERMIT

FOR

## SMART & FINAL EXTRA!

### A COMMERCIAL DEVELOPMENT AT WEST SAN CARLOS STREET AND RACE STREET



#### TABLE OF CONTENTS

1.0	TITLE SHEET
3.0	SITE PLAN
FFP	FUTURE FLOOR PLAN
5.0	CENSUS TRACT EXHIBIT

#### PROJECT INFORMATION

ASSESSOR'S PARCEL NUMBER:	264-14-019, 020, 082, 083,
PROJECT ADDRESS/LOCATION:	CORNER OF WEST SAN CARLOS STREET AND RACE STREET
PRIOR APPROVALS:	AD94-302, AP03-002, C16-048, H17-018 (PENDING), T16-050 (PENDING)
EXISTING GENERAL PLAN DESIGNATION:	CIC - COMBINED INDUSTRIAL COMMERCIAL
EXISTING ZONING DESIGNATION:	CIC - COMBINED INDUSTRIAL COMMERCIAL
PROPOSED USE:	COMMERCIAL
GROSS SITE AREA:	±2.04 AC
RIGHT-OF-WAY DEDICATION:	±0.00 AC
NET SITE AREA:	±2.04 AC
PROPOSED SITE COVERAGE:	
BUILDINGS:	±29,575 SF (33.3%)
PRIVATE CIRCULATION:	±39,293 SF (44.3%)
LANDSCAPE/HARDSCAPE:	±19,882 SF (22.4%)
	±88,750 SF (100%)
PROPOSED DENSITY:	29,575 SF GROSS BUILDING AREA 88,750 SF SITE AREA 0.33 FAR
REQUIRED PARKING:	85% X 29,575 SF = 25,139 SF (NET) 25,139 SF/200 SF = 126 SPACES 20% REDUCTION* = 126 X .80 = 101 VEHICLE SPACES REQUIRED  *REDUCTION GRANTED AS THE SITE IS WITHIN 2,000 FEET OF A PLANNED BUS RAPID TRANSIT STATION (CORNER OF RACE AND W. SAN CARLOS)  6 MOTORCYCLE SPACES 10 BICYCLE SPACES: 8 SHORT TERM, 2 LONG TERM  PROPOSED PARKING :  101 VEHICLE SPACES 6 MOTORCYCLE SPACES 18 BICYCLE SPACE: 16 SHORT TERM, 2 LONG TERM  HOURS OF OPERATION:  24 HOURS, WITH THE SALE OF ALCOHOL RESTRICTED TO THE HOURS OF 6:00AM-12:00AM.  CONSTRUCTION SCHEDULE: START DATE: COMPLETION DATE:  SUMMER 2017 TBD

#### PROJECT DESCRIPTION

CONDITIONAL USE PERMIT AND A DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY TO ALLOW LATE NIGHT USE, OFF-SALE OF ALCOHOL (ABC TYPE 21 LICENSE) FOR A FULL RANGE OF ALCOHOLIC BEVERAGES ON A PROPOSED COMMERCIAL/RETAIL DEVELOPMENT (FILE NO. H17-018) ON AN APPROXIMATE 2.0 GROSS ACRE SITE.

**CONDITIONAL USE PERMIT**  
**FOR SMART & FINAL EXTRA!**  
**CP17-005, ABC17-002**  
**W. SAN CARLOS ST. & RACE ST.**

△	
△	
△	
△	07/25/17 PER CITY COMMENTS
△	06/01/17 PER CITY COMMENTS
NO	DATE DESCRIPTION
PROJECT NO:	4871.00
CAD DWG FILE:	487100TS.DWG
DESIGNED BY:	DM
DRAWN BY:	DM
CHECKED BY:	TA
DATE:	FEBRUARY 1, 2017
SCALE:	AS SHOWN
© HMM	

#### TITLE SHEET



## LEGEND

PROJECT BOUNDARY  
PROPERTY LINE (EXISTING)  
EASEMENT (EXISTING)  
EASEMENT (PROPOSED)

### PARKING BREAKDOWN

#### VEHICLE SPACES

PARKING REQUIRED: 101 SPACES  
PARKING PROVIDED: 101 SPACES

ACCESSIBLE SPACES: 5 SPACES 5%  
FULL-SIZE SPACES: 71 SPACES 70%  
COMPACT SPACES (C): 14 SPACES 14%  
CLEAN AIR SPACES (CA): 11 SPACES 11%  
TOTAL PARKING: 101 SPACES  
OVERALL PARKING RATIO: 3.4 SPACES/1000 SF

FULL SIZE PARKING SPACES ARE 9'x18' \*  
COMPACT PARKING SPACES ARE 8'x16' \*  
\*SOME PARKING SPACES INCLUDE A 2' OVERHANG, NOTED BY A DASHED LINE

#### MOTORCYCLE SPACES

PARKING REQUIRED: 6 SPACES  
PARKING PROVIDED: 6 SPACES

#### BICYCLE PARKING

PARKING REQUIRED: 10 SPACES  
PARKING PROVIDED: 18 SPACES  
LONG TERM: 2 SPACES  
SHORT TERM: 16 SPACES

# CONDITIONAL USE PERMIT FOR SMART & FINAL EXTRA! CP17-005, ABC17-002 W. SAN CARLOS ST. & RACE ST.

NO	DATE	DESCRIPTION
PROJECT NO:	4871.00	
CAD DWG FILE:	487100SP.DWG	
DESIGNED BY:	DM	
DRAWN BY:	DM	
CHECKED BY:	TA	
DATE:	FEBRUARY 1, 2017	
SCALE:	NOT TO SCALE	
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## SITE PLAN

3.0

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FIXTURE FLOOR PLAN  
EXTRA

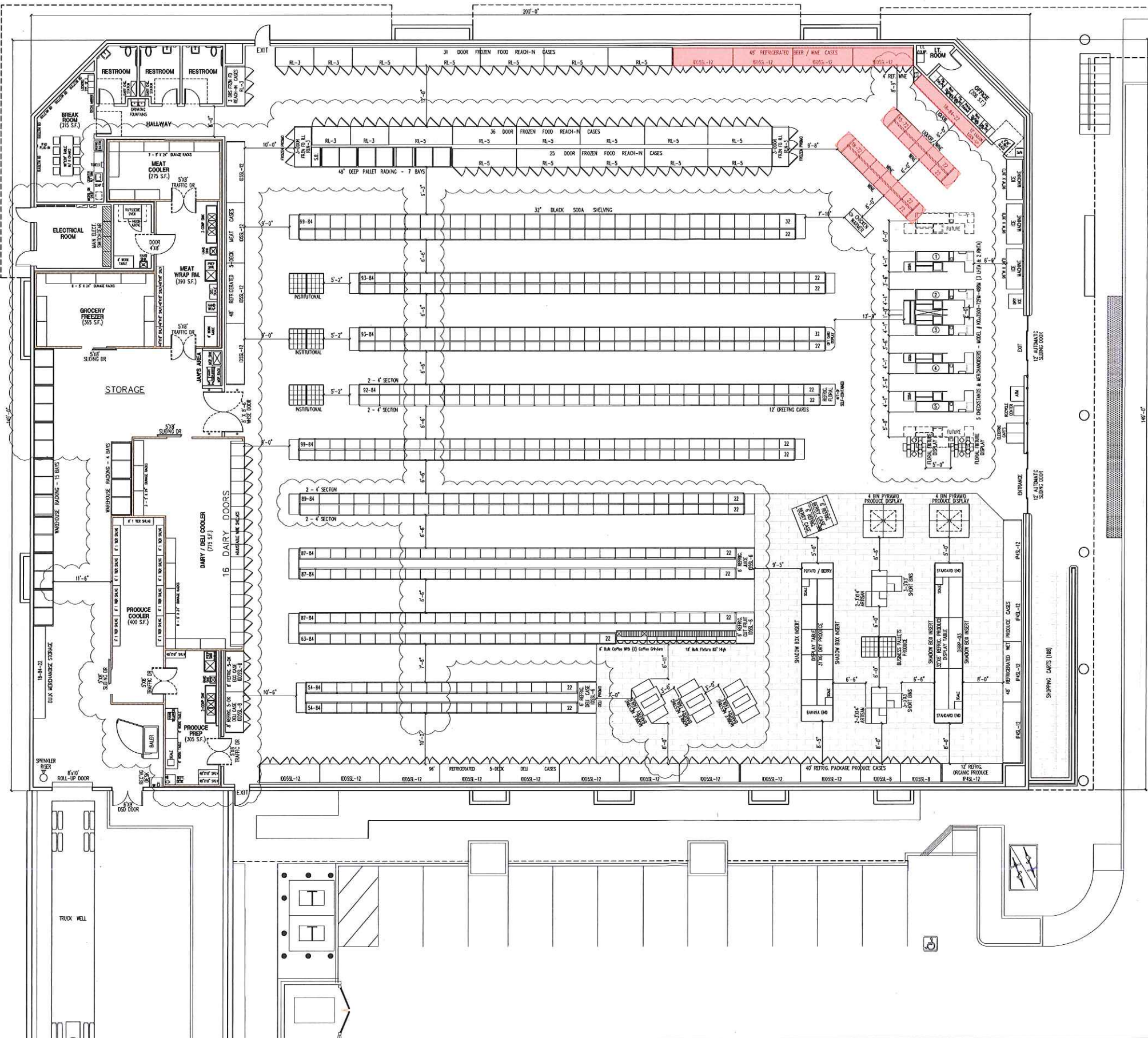
W. SAN CARLOS & RACE ST.  
SAN JOSE  
2018 NEW STORE

Alcoholic Beverage Area Calculation  
Refrigerated Cases = 183 sf  
Dry Shelving = 212 sf  
Total Alcohol Sales Area = 395 sf  
  
Sales Area = 23,082 sf  
  
Total Alcohol Sales Area sf ÷ Sales Area sf  
395 sf ÷ 23,082 sf = 0.01711 = 1.71%

PROJECT DATA		EXTRA MIN.
GROSS BLDG	29,575 S.F.	
SALES AREA (78%)	23,082 S.F.	23,000 S.F.
STORAGE AREA	1,949 S.F.	1,600 S.F.
COOLER / FREEZER	2,510 S.F.	2,310 S.F.
MISC AREA	2,034 S.F.	1,500 S.F.
BULK FOOD	18 S.F.	
BULK COFFEE	6 S.F.	
GONDOLA	1,562 L.F.	1,441 L.F.
PALLETS IN LINE (9)	38 L.F.	40 L.F.
LIQUOR / WINE	84 L.F.	69 L.F.
TOTAL	1,682 L.F.	1,550 L.F.
PROMO PALLETS	8	10
FROZEN FOOD FREEZER	365 S.F.	364 S.F.
FROZEN FOOD (WALK-IN BOXES & CASES = DR COUNT)		
FROZEN WALK-IN BOX	0	0
COFFINS	0	0
REACH-IN CASES	95	85
TOTAL	95	85
PROMO FROZEN FOOD	6	4
PRODUCE PREP ROOM	305 S.F.	275 S.F.
PRODUCE COOLER	400 S.F.	375 S.F.
PRODUCE		
PRODUCE WET RACK M/D	48 L.F.	48 L.F.
PRODUCE PACKAGE M/D	40 L.F.	28 L.F.
PRODUCE ORGANIC M/D	12 L.F.	12 L.F.
TOTAL L.F.	100 L.F.	88 L.F.
PRODUCE DRY TABLES		
16'X6' (0)	0 L.F.	63 L.F.
31'X6' (2)	82 L.F.	82 L.F.
TOTAL L.F.	82 L.F.	
MEAT WRAP ROOM	390 S.F.	295 S.F.
MEAT COOLER	275 S.F.	275 S.F.
FRESH MEAT		
SELF SERVICE MEAT M/D	44 L.F.	48 L.F.
SERVICE MEAT M/D	0 L.F.	0 L.F.
TOTAL L.F.	44 L.F.	48 L.F.
DAIRY/DELI COOLER	775 S.F.	700 S.F.
DAIRY (WALK-IN BOXES = DR COUNT)	10	10
DELI (WALK-IN BOXES = DR COUNT)	6	6
DELI M/D (104 L.F.)	26	27
EGG CASE (8 L.F.)	2	2
TOTAL DAIRY/DELI DRS	44	45
CHEESE ISLAND	0 L.F.	0 L.F.
PROMO DELI	6 L.F.	4 L.F.
REFRIGERATED BEER/WINE	48 L.F.	40 L.F.

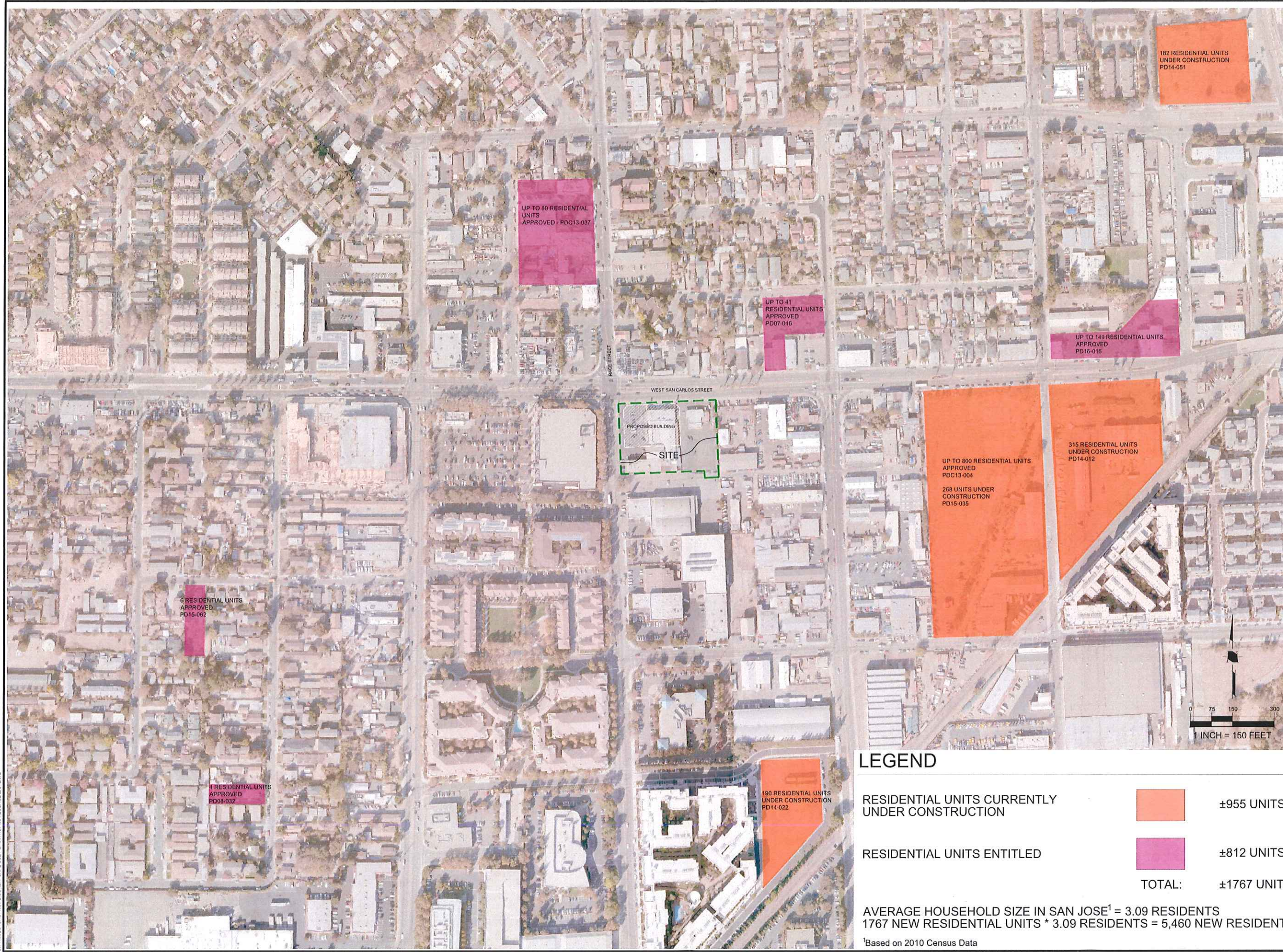
EXECUTIVE APPROVAL		
INITIAL	NAME	DATE
S.D.		
M.M.		
D.H.		

DATE 04-21-17  
SCALE 1/8" = 1'  
STORE #810  
DRAWING NO.  
FFP  
810FFP (SAN JOSE)





S:\PROJECTS\487100\CONDITIONAL USE PERMIT\487100 ALCOHOL EXH.DWG



**CONDITIONAL USE PERMIT**  
FOR SMART & FINAL EXTRA!  
**CP17-005, ABC17-002**  
W. SAN CARLOS ST. & RACE ST.

NO.	DATE	DESCRIPTION
1	07/25/17	PER CITY COMMENTS
2	06/01/17	PER CITY COMMENTS
PROJECT NO. 487100		
CAD DWG FILE: 487100 ALCOHOL EXH.DWG		
DESIGNED BY: DM		
DRAWN BY: DM		
CHECKED BY: TA		
DATE: FEBRUARY 1, 2017		
SCALE: NOT TO SCALE		
© HMM		

**EXHIBIT FOR  
OFF-SALE OF  
ALCOHOL**

**5.0**

**LEGEND**

- RESIDENTIAL UNITS CURRENTLY UNDER CONSTRUCTION ±955 UNITS
- RESIDENTIAL UNITS ENTITLED ±812 UNITS
- TOTAL: ±1767 UNITS

AVERAGE HOUSEHOLD SIZE IN SAN JOSE<sup>1</sup> = 3.09 RESIDENTS  
1767 NEW RESIDENTIAL UNITS \* 3.09 RESIDENTS = 5,460 NEW RESIDENTS

<sup>1</sup>Based on 2010 Census Data

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## **Operation and Management Plan for Smart and Final Extra!**

Smart & Final's customers include the traditional retail customer, as well as institutional or food service businesses, including caterers, food trucks, and non-profit organizations. One of the attractions of a Smart & Final store is that it offers wholesale items at wholesale costs without requiring a membership, while providing the cash and carry convenience. Additionally, with the implementation of our "Smart and Final Extra!" model, our Extra! Stores provide a large selection of fresh produce and meats, as well as smaller sized grocery and janitorial items for the traditional retail customer.

The sale of alcohol is a small ancillary use to our stores. Alcohol represents a very small percentage of the gross sales of those stores licensed to sell alcoholic beverages, and historically our customer counts do not increase because of a liquor license. Less than 2% of the sales area of this location would be dedicated to the sale of alcohol. The inclusion of alcohol into our product selection is primarily done as a convenience to our customers, creating the opportunity for a one-stop shopping experience. For example, a customer planning a party may come to Smart & Final to purchase the decorations, food, paper supplies, clean up supplies, beverages and, if permitted, alcohol. Smart & Final does not encourage a retail walk-in trade for alcohol at any of our licensed locations. The likelihood of customers purchasing alcohol for immediate consumption, particularly on the premises, is very minimal. Our stores have good security and lighting to minimize safety concerns. Additionally, the high-end liquor is kept in a locked 3" display cabinet and the remaining inventory is protected by liquor caps, which are removed by the cashier after purchase of item. We have found this to be an effective deterrent to liquor theft.

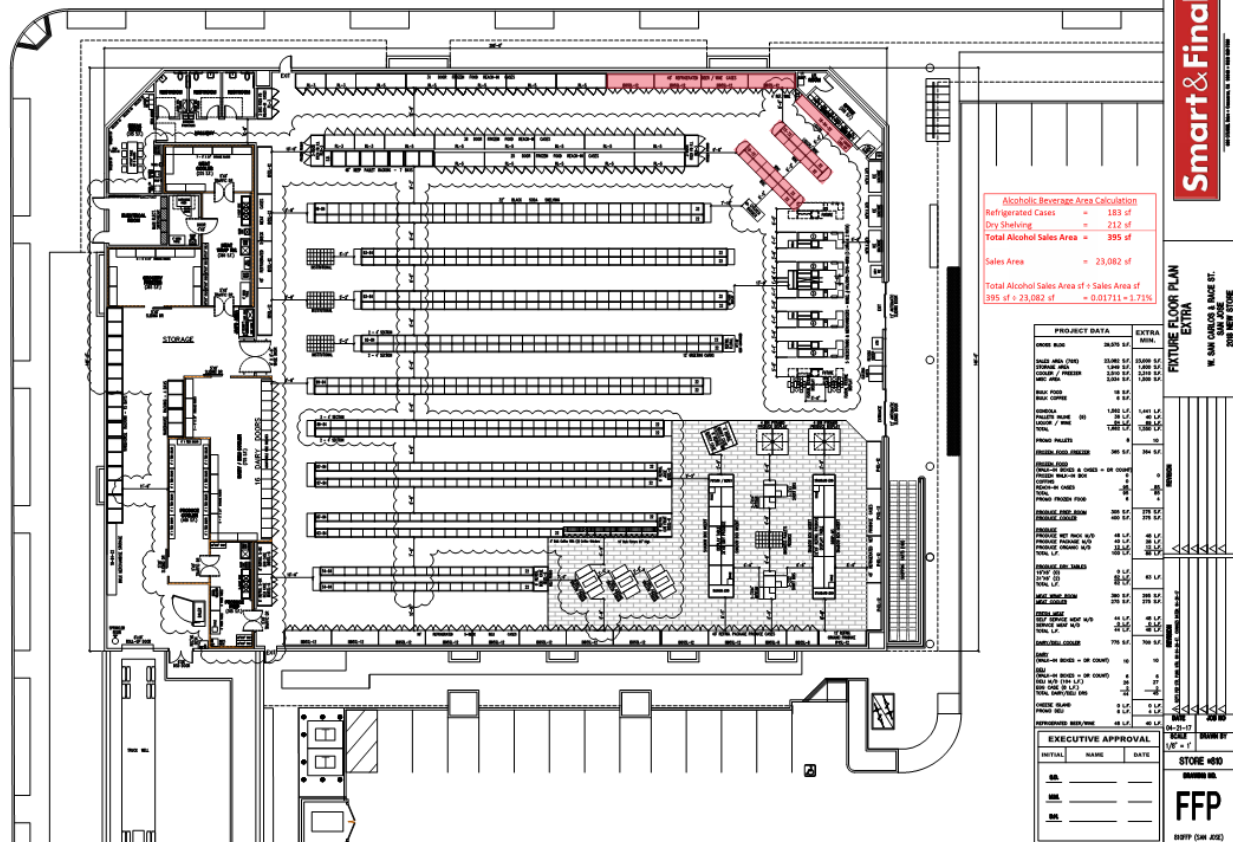
With our offering of wholesale items, Smart & Final may be different from traditional retail grocery stores, but we still strive to provide the traditional retail customer with top quality goods and services. Our unique niche in the marketplace also allows us to best serve our wholesale customers, such as the food service business owner who relies on a consistent source of quality products in a convenient fashion. Our lack of a membership requirement separates us from other warehouse stores as "Costco" and "Sam's Club". The success of our business over the past 100 years and our current operation throughout the state attests to the success of our niche marketing.

This proposed store is thoughtfully designed in such a way as to benefit the existing surrounding neighborhood. The architecture is designed to complement the existing neighborhood, and the proposed trellis feature will help to create an urban edge while adding an interesting design component and greenery to the site. The entrance is set back from the street away from the residential, yet designed to draw people into the site. The store will be providing above and beyond the required number of bike racks to encourage multi-modal transportation. The customer parking is located behind the building away from the street & the residential area.

Smart & Final Stores LLC has always provided many services and conveniences to the community and neighborhood, consistently maintaining good relationships with nearby residents. We will maintain the premises and operate this location in such a manner to ensure the quiet enjoyment of the neighborhood. There is no live entertainment, on-site food service, arcade games, or other attractions which might generate crowds and/or problems. This store is requesting 24-hours of operation, with the sale of alcohol limited from 6:00am – 12:00am. 24-hour operation will allow us to provide the highest level of convenience to our customers.

Smart & Final takes pride in being a responsible retailer. The inclusion off the off-site sales of alcohol will not jeopardize, endanger or otherwise constitute a menace to public health, safety or general welfare, nor will it exacerbate existing police problems. To ensure the safety of our customers, we take steps to provide adequate lighting, security systems, and vigilance to avoid problems which might arise in parking lots and surrounding areas. We too are very much concerned with the welfare of the community and will comply with all laws and rules associated with the sales of alcohol.

Smart & Final is committed to operating its stores with the health, safety and well-being of all associates and customers in mind. The preliminary security camera plan includes a total of 42 cameras, with (2) cameras specifically dedicated to the liquor department. The cameras record to a digital recorder (DVR) and images are retained for a minimum of 60 days. Although the census tract that this store is in is currently over-saturated with liquor licenses, the number of residential units currently under construction or recently entitled with provide more than enough new residents to the neighborhood to support an additional liquor license.



The following  
items were  
received after  
packets were  
distributed.

**From:** Mark Wolfe <[mrw@mrwolfeassociates.com](mailto:mrw@mrwolfeassociates.com)>

**Sent:** Tuesday, August 22, 2017 1:04 PM

**To:** City Clerk; Tu, John

**Subject:** Letter to Planning Commission re: CUP and PCN- 320 Race St at W. San Carlos [File Nos. CP17-005 & ABC17-002]

**RE: Public Hearing on Proposed Conditional Use Permit and Determination of Public Convenience and Necessity at 320 Race Street, File Nos. CP17-005 and ABC17-002.**

To the City Clerk:

Attached in PDF format is correspondence addressed to the Planning Commission concerning the above-referenced public hearing, currently set as Item 5.a on the Commission's **August 23, 2017** regular meeting agenda.

Please distribute copies to Planning Commissioner in advance of the hearing.

I would be grateful if you could acknowledge receipt of this email and attachment via reply e-mail.

Thank you very much.

--

Mark R. Wolfe | **M. R. Wolfe & Associates, P.C.**

555 Sutter Street | Suite 405 | San Francisco, CA 94102

Tel: 415.369.9400 | Fax: 415.369.9405 | [www.mrwolfeassociates.com](http://www.mrwolfeassociates.com)

The information in this e-mail may contain information that is confidential and/or subject to the attorney-client privilege.

If you have received it in error, please delete and contact the sender immediately. Thank you.



August 22, 2017

**By E-Mail**  
**Acknowledgement of Receipt Requested**

Nick Pham, Chair  
Members of the Planning Commission  
City of San Jose  
c/o City Clerk  
200 E. Santa Clara Street  
San Jose, CA 95113  
cityclerk@sanjoseca.gov

Re: Conditional Use Permit and Determination of Public Convenience or  
Necessity for Alcohol Sales – Commercial/Retail Development at  
320 Race Street (File Nos. CP17-005 and ABC17-002)

Dear Chairperson Pham and Members of the Planning Commission:

On behalf of San Jose residents Janice Nelson, Hector Moreno, and Michael Madeiros, this is to formally object to the issuance of the above-referenced conditional use permit (CUP) and determination of public convenience and necessity (DPCN) for the proposed Smart & Final grocery store at West San Carlos and Race Streets in San Jose (Project). As you may be aware, these individuals appealed the City's earlier environmental determination for this project, namely that it was categorically exempt from environmental review under CEQA pursuant to Section 15332 of the CEQA Guidelines. Notwithstanding the City Council's denial of the environmental appeal on August 8, 2017, the administrative record currently before you does not contain sufficient evidence or information to support mandatory findings in support of the CUP and DPCN as requested.

In order to issue the CUP, the City Council, following a recommendation from the Planning Commission, must adopt findings of fact supported by substantial evidence in the record that, among other things: "[t]he 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; 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." Zoning Ordinance Section 20.100.720.A.4. The City Council must also find that "[t]he 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.” *Id.*, subd. A.6.

These findings cannot be made for this Project due to substantial adverse impacts on traffic and air quality. These impacts were thoroughly documented in our previous submittals to the City Council from technical experts in these areas, which we attach and incorporate by reference here. Most notably, these submittals establish that the Project will generate significant cumulative health impacts to area residents as a result of long-term exposure to diesel particulate matter and other toxic air contaminants (TACs) emitted by diesel-powered delivery trucks serving the grocery store on a regular basis. The submittals further establish that the Project will also generate substantially more vehicle trips than claimed by the initial study previously prepared to support the claimed exemption from CEQA, belying the Staff Report’s statement that no comprehensive Transportation Impact Analysis is required per the City’s Transportation Policy 5-3.

With regard to the findings necessary to issue the DPCN, the Staff Report acknowledges that City cannot make the required finding that “[t]he proposed use is not located within a strong neighborhoods initiative or neighborhood revitalization area” because the Project site is located within the Burbank/Del Monte Strong Neighborhoods Initiative (SNI) area. Under Section 6.84.030 of the Municipal Code, a DPCN may be issued only if the Planning Commission can make all of the listed mandatory findings, including the foregoing. If this or any other finding cannot be made, then a DPCN may not be issued. The various conditions prohibiting single sales of malt liquor, “mini bottles,” and drug paraphernalia, while laudable, do not allow for a departure from the mandatory provisions of the Municipal Code.

While the Municipal Code allows the City Council to issue a DPCN even if not all of the required findings can be made, this is proper only upon a separate finding, based on substantial evidence in the record, that there is “a significant and overriding public benefit or benefits” provided by the proposed use. Here, as the Staff Report acknowledges there are already two other commercial uses offering off-sale alcoholic beverage within a 500-foot radius of the Project (Safeway and 3 Kings Market), and a third (Yawh Minim Market) within 1,000 feet. There accordingly is no reasonable basis to claim that adding a fourth off-sale alcohol location in this vicinity will confer a “significant and overriding public benefit.”

August 22, 2017

Page 3

For all these reasons, we respectfully request that the Planning Commission **DECLINE** to recommend to the City Council the approval of the requested CUP and DPCN. Thank you for your consideration of these comments and concerns.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.

A handwritten signature in blue ink, appearing to read 'M Wolfe', with a long horizontal flourish extending to the right.

Mark R. Wolfe

MRW:

attachments

cc: John Tu (by email)





SMITH ENGINEERING & MANAGEMENT

July 22, 2017

Mr. John Farrow  
M. R. Wolfe & Associates  
555 Sutter Street, Suite 405  
San Francisco, CA 94102

**Subject:** West San Carlos and Race Street Commercial Development H17-018

Dear Mr. Farrow:

Per your request, I have reviewed the City of San Jose's (the "City") Statement of Exemption and Initial Study for the West San Carlos and Race Street Commercial Development (the "Project") under the exemption defined in the California Environmental Quality Act ("CEQA" Guidelines § 15332. My qualifications to perform this review include registration as a Civil and Traffic Engineer in California and 49 years of consulting practice in traffic and transportation engineering. I have both prepared and reviewed the traffic and transportation components of numerous CEQA environmental documents. My professional resume is attached herewith.

The criteria for exemption under CEQA Guidelines § 15332 include a finding that the Project would not result in any significant effects relation to traffic. The conclusion of my review is that the Initial Study on which the Statement of Exemption is based failed to disclose significant traffic impacts of the Project. Hence the requirements of CEQA Guidelines § 15332 are not met and no exemption can be made under this section.

Technical details of my analysis follow.

**The Initial Study Analyzes the Trip Generation of the Proposed Project and the Prior Use in a Land Use Category That Is Appropriate to Neither. As a Result, Net New Trips Caused By the Project Are Significantly Understated.**

The traffic analysis for the Initial Study<sup>1</sup> (hereinafter the IS) evaluates the trip generation for the retail component of the Project and the prior use of the site relying on the average rate for Institution of Transportation Engineers (“ITE”) *Trip Generation, 9<sup>th</sup> Edition* Land Use Category 820 – Shopping Center. In particular, the traffic analysis applies the ITE average Land Use Category 820 shopping center rates (42.7 trips daily, 0.96 AM peak trips and 3.71 PM peak trips, all rates in trips per thousand square feet) and applies a 25 percent trip reduction for attracted passers-by to both the proposed retail component and the prior retail. Thus, the traffic analysis finds that the proposed retail component would generate 947 daily, 20 am peak and 82 PM peak trips and estimates that the prior retail use would have generated 640 daily, 13 AM peak and 56 PM peak trips. Subtracting the prior retail use trips and also subtracting the prior office use trips (a portion of the trip generation analysis in which we concur), IS Appendix G, Table 2 concludes that the Project would cause +241 daily, -2 am peak and +17 PM peak net new trips. Based on the small numbers of net new peak hour vehicle trips the Project generates, the IS and its Appendix G conclude that the Project is exempt from conducting full Traffic Impact Analyses under both City of San Jose and Valley Transportation Authority (“VTA”) Congestion Management Plan (“CMP”) policies.

However, the small numbers of net new peak hour trips are the result of erroneously estimating the trip generation of both the proposed retail use and the retail component of the prior use at ITE Land Use Category 820 Shopping Center average rates. The ITE Land Use Category 820 – Shopping Center does not properly apply to either the existing or the proposed use. The retail component of the proposed use is a supermarket of 29,580 square feet, a Smart and Final Store. The retail component of the prior use was a 20,000 square foot Mel Cotton's Sporting Goods store. Shopping centers ordinarily range from about 100,000 square feet to over 1,000,000 square feet and contain multiple retail stores. Both the Project retail component and the prior use are individual retail stores, are well below shopping center size, are on their own site, and are not shopping centers.

Using the categories appropriate to each retail use makes an enormous difference in the overall trip generation of the proposed Project, the prior use, and the net new peak period trip generation caused by the Project, as documented below. The difference in net new trip generation fundamentally changes the traffic analysis. The Initial Study claims that, due to the small number of net new trips, which it estimates as only 17 PM peak hour trips, the project would not have the potential to degrade service in the surrounding roadways and that the

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<sup>1</sup> Traffic related findings of the Initial Study are based on a June 20,2017 Memorandum from Brian Jackson and Trisha Dudala of Hexagon Transportation Consultants to Akoni Danielson of David Powers & Associates entitled *Traffic Operations Analysis for a Commercial Development at Race Street and W. San Carlos Street in San Jose California* that is incorporated in the IS as Appendix G



Project is not required to adhere to the VTS's CMP traffic study requirements. The VTA's Traffic Impact Analysis guidance only exempts a project if it results in fewer than 100 net new peak hour trips; the guidance specifically requires a full traffic impact study for a project that re-occupies a vacant or underutilized parcel and changes the land use if it generates 100 net new peak hour trips.<sup>2</sup> As explained and documented below, it is clear that the Project will generate well in excess of 100 net new trips based on the correct trip generation rates for the proposed and existing land uses, regardless whether the analysis is based on City of San Jose trip generation rates or ITE trip generation rates, provided that the applicable rates for these land uses are applied..

The City of San Jose's *Traffic Impact Analysis Handbook – Volume 1 Methodologies and Requirements* specifies that a traffic impact analysis should be “based on the number of peak-hour trips generated by the project *using City of San José approved trip generation rates.*”<sup>3</sup> The handbook provides trip rates for typical uses in its Appendix B, Table B1, “Common Vehicle Trip Generation Rates For The San Jose Area”. Trip rates from the Institute of Transportation Engineers should only be used for comparison purposes or if the City's trip rate table does not include the land use:

The Institute of Transportation Engineers (ITE) also provides trip generation rates for a variety of land uses that may be used for comparison purposes or for land uses not included in the City's table of trip generation rates.<sup>4</sup>

Thus, the proposed Project trip generation and that of the prior use should, in the first instance, be analyzed at the most applicable San Jose rates.<sup>5</sup> For the proposed Project, the applicable trip rate would be for Neighborhood Shopping, for retail under 100,000 square feet, (120 trips per 1000 square feet daily, 4 percent of daily in AM peak, 11 percent of daily in the PM peak). At these rates the 29,580 square-foot proposed project would generate 3550 gross trips daily, 142 in the AM peak and 391 in the PM peak. With allowance for 25 percent passer-by attraction, these trip totals become 2663 trips daily, 107 in the AM peak and 293 in the PM peak. The appropriate San Jose rate for the prior sporting goods retail component would be Specialty Retail (40 trips per 1000 square feet daily, 3 percent of daily in the AM peak hour and 9 percent in the PM

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<sup>2</sup> Santa Clara Valley Transportation Authority, Transportation Impact Analysis Guidelines, October, 2014, pp. 3, 6-7, available at

<http://www.vta.org/sfc/servlet.shepherd/document/download/069A0000001f9gIIAQ>.

<sup>3</sup> City of San Jose, *Traffic Impact Analysis Handbook – Volume 1 Methodologies and Requirements*, November 2009, p. 22, emphasis added, available at <http://www.sanjoseca.gov/DocumentCenter/View/4366>

<sup>4</sup> *Id.*

<sup>5</sup> Hereinafter we refer to trip generation rates from San Jose's *Traffic Impact Analysis Handbook – Volume 1 Methodologies and Requirements* as “San Jose rates” and from *Trip Generation, 9<sup>th</sup> Edition* as “ITE rates”.

peak). At these rates, the 20,000 square foot prior retail component would have a gross trip generation of 800 trips daily, 24 trips in the AM peak and 72 trips in the PM peak. With adjustment for 25 percent passer-by attraction, these totals become 600 trips daily, 18 in the AM peak and 54 in the PM peak. Subtracting these prior retail trips and the trips for the prior office component (with the office trips compiled per Appendix G, Table 2) from the trip generation for the Project compiled at San Jose Neighborhood Shopping rates, the net new trips for the Project are 1997 daily, 80 in the AM peak hour and 230 in the PM peak hour. This total of net new peak hour trips exceeds 100 net new trips and therefore requires a formal Traffic Impact Analysis performed under City of San Jose and VTA CMP protocols.

Alternatively, applying the appropriate ITE trip generation rates, there would be still be in excess of 100 net new trips. The appropriate trip generation land use category for the Project's retail component relying on ITE's *Trip Generation, 9<sup>th</sup> Edition* is Category 850- Supermarket. The prior sporting goods store, if analyzed relying on *Trip Generation, 9<sup>th</sup> Edition*, should be analyzed as Land Use Category 861-Sporting Goods Superstore. If estimated at ITE Category 850 Supermarket rates (102.24 daily, 3.4 AM peak, 9.48 PM peak, all rates trips per thousand square feet), the 29,580 square foot Smart & Final supermarket use would have a gross trip generation of 3,024 daily, 101 AM peak and 280 PM peak trips. Applying a 25 percent reduction for attracted passers-by, these numbers become 2,268 daily, 75 AM peak and 210 PM peak net trips. The prior retail component was a 20,000 square foot sporting goods store. At ITE rates for Category 861 Sporting Goods Store (0.25 AM peak and 1.84 PM peak, all rates in trips per 1000 square feet), the prior retail component would have generated 5 gross trips in the AM peak and 37 gross trips in the PM peak. When these are adjusted for 25 percent passer-by attraction, the totals for the prior retail become 4 trips in the AM peak and 28 trips in the PM peak. Subtracting these trips and those of the prior office use as computed in IS Appendix G, Table 2, the net new peak hour trips caused by the proposed Project become 62 in the AM peak and 173 in the PM peak. Again, because the net new peak hour trips exceed 100, a full traffic impact analysis would be required under City of San Jose and VTA CMP protocols.

Hence, a formal Traffic Impact Analysis is required based on the use of the correct trip generation rates from the City of San Jose or ITE sources for the Project retail and prior retail. No such analysis has been performed. Hence, the traffic analysis relied upon to meet the condition that the Project is found to have no significant traffic effects in order to qualify for Exemption under CEQA Guidelines § 15332 is defective.

### **It Is Questionable Whether the Prior Use Trip Generation Should Be Deducted From the Project's Trip Generation At All**

CEQA Guidelines § 15125(a) provide that the ordinary baseline for evaluating environmental impacts of a Project is the environmental conditions that exist at the time a Notice of Preparation is produced, or, if no Notice of Preparation is produced, at the time environmental analysis of a project is commenced. The prior use was discontinued in 2016. The City's file number, H 17-018 appears to indicate that environmental analysis on this Project began in 2017. Hence, a prior use that terminated in 2016 should not be considered in the existing environmental conditions.

Furthermore, under VTA guidelines, "If the proposed project involves vacant or underutilized site without development rights, all trips generated by the project would be 'project trips.'<sup>6</sup>" Here, the project involves a vacate or underutilized site and also requires a Site Development Permit, so it does not have development rights. So even under the VTA's guidelines, the baseline for site-generated trips should be zero. Hence, the Net New Project trip generation would be even greater than we have estimated above.

Finally, as a practical traffic matter, the theoretical trips generated by a prior use should not be deducted from the analysis unless the prior use was fully operational at the time the baseline traffic counts were taken. The baseline traffic counts presented in IS Appendix G (for the queuing analysis) are not dated in the document but may have been taken subsequent to the sporting goods store ceasing operations. In order to take the prior use trip generation deductions in any LOS or traffic operation assessments like queuing, it must be demonstrated that the baseline counts reflect and include full operation of the sporting goods store.

### **The Queuing Analysis Is Flawed By The Understatement Of Net New Trips; It Fails To Acknowledge That, Even With The Understated Net New Trips, The Project Would Cause A Significant New Queuing Impact; And Its Conclusions Regarding Existing And Future Queue Storage Adequacy Are Inconsistent With Queuing Analysis Presented**

Queuing analysis is intended to determine whether congestion will result from a new project due to new turning movement demand that results in queues in dedicated turn lanes that exceed the storage capacity of those turn lanes. As is typical for queuing analyses, the traffic analysis for the IS determines whether the storage queues in the 95<sup>th</sup> percentile case would exceed available storage. A significant impact occurs when the storage capacity is less than the queue length in this 95<sup>th</sup> percentile case.

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<sup>6</sup> Santa Clara Valley Transportation Authority, Transportation Impact Analysis Guidelines, October, 2014, p. 27.

Because, as documented in the sections above, the analysis of the Project's net new trip generation seriously understates the Project's net new trip generation, the inputs to the IS Appendix G queuing analysis are seriously understated. Had the queuing analysis used the properly calculated net new Project trips, significantly greater queues than reported would be disclosed. The analysis must be redone using a proper estimate of net new Project trips.

More problematically, even using the seriously understated net new trip generation data, the queuing analysis documents a significant queuing impact that would be caused by the Project, but the IS fails to acknowledge it. In particular, the queuing analysis results presented in Appendix G, Table 3 documents that the storage capacity for the north bound left turn lane of West San Carlos and Race Street is currently modeled as adequate during the PM peak period but would become inadequate with the addition of Project traffic. In short, even using seriously understated net new trips, the queuing analysis demonstrates that the Project would degrade existing conditions so that a currently adequate left turn storage length becomes inadequate. This should be identified as a significant impact. The impact would be even greater had the analysis been based on correctly analyzed net new trips

Furthermore, the traffic study disingenuously dismisses the results of its queuing analysis as "conservative" based on "field observations." The results of the queuing computational analysis in Appendix G, Table 3 show that queues in the northbound left turn lane on Race at West San Carlos exceed storage capacity in the AM peak under existing conditions. Despite this calculated result, the traffic analysis claims that "AM peak hour field observations at the study intersection show the vehicle queues for the northbound left-turn movement do not actually exceed the turn pocket storage. Therefore the calculated maximum northbound left-turn vehicle queue length during the AM peak hour is a conservative estimate, and the left-turn pocket is expected to provide adequate vehicle storage under all traffic scenarios." The purported basis for this rationalization is that when observations were made, the observer did not see the subject queue exceed the storage capacity. This facile reasoning ignores the fundamental basis of queue science – the number of vehicles arriving at an intersection to make a particular movement in a short period of time is random – hence, it is statistically possible to observe an intersection or particular movement for a considerable period of time without observing a high percentile queue event. The narrative conclusion constitutes an unscientific evasion of the results of scientific calculations.<sup>7</sup>

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<sup>7</sup> The traffic study seeks to buttress its claim that its computational analysis is "conservative" with reference to observations of PM traffic queuing. This claim is even more absurd, because the computational analysis in Table 3 does not show that the existing PM queue at in the northbound left turn lane on Race at West

Furthermore, even if the existing turn pocket were adequate under existing conditions, there is simply no basis to claim that this turn pocket would “provide adequate vehicle storage under *all traffic scenarios*,” i.e., future increased traffic due to the Project. This is particularly evident considering that the volume of net new peak hour Project traffic reflected in the calculations is significantly understated due to the use of inapplicable trip rates. Thus, the queue calculations presented in Appendix G, Table 3 are also understated, not “conservative.” If a proper trip generation analysis of the Project had been done, queues would be longer – worse – than those disclosed in the calculations.

The queue analysis also addresses conditions at the intersection of Race Street with Earle Lane. The computational results show the situation to be adequate in all the scenarios analyzed. However, this analysis ignores a concern that we address in depth below that maneuvering of heavy trucks between Earle Lane and the Project’s loading docks, which are located closely adjacent to the Race Earle intersection, involves difficult movements in a tight area that would result in Early being blocked for several moments at a time. This will create queuing conditions unaddressed in the analysis.

### **Truck Loading Bay Inadequate**

The Site Plan (Figure 4 in IS Appendix G) shows that the proposed building’s loading bays are located at the southwest corner of the building and accessed/egressed from Earle Lane. The Figure shows a California Legal tractor-trailer rig (maximum overall length 65 feet) in the loading bay. The narrative of IS Appendix G at page 12 states as follows. “*The loading spaces were reviewed for truck access by the method of truck turning-movement templates. Access was reviewed for the truck type WB-60, which represents very large semitrailers. The analysis shows that the WB-60 truck types would have adequate access to the on-site loading spaces.*” The problem with this is that with a 65 foot overall length tractor trailer rig parked in the loading bay as illustrated in IS Appendix G, there is a bare 50 foot clearance to the far side of Earle Lane. The minimum turning radius for such rigs is 50 feet. Hence, for the articulated rig to make the 90-degree turn from Earle Lane either backing into or driving out of the loading bay, even if the driver made a perfect 50-foot radius turn, the turn would be a paint-scraper if the adjacent property to the south of Earle Lane had a fence, structure or parked cars at the limit line. Current aerial photography shows that the adjacent property has cars parked to the limit line of Earle Lane. Moreover, because the analysts have not inscribed the turning

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San Carlos is inadequate, so *there was no reason to suppose that field observations would show inadequate turn pocket length.* The absence of queueing problems where such problems are *not* predicted can prove nothing about future conditions when additional traffic is added and problems *are* predicted.

template on Appendix G, Figure 4, it is not evident whether the maneuver could be made at all if a large truck or multiple trucks were in the adjacent loading bay. Because of the difficulty for large trucks in accessing and egressing the loading dock area, their drivers may just stop in Earle Lane and off-load from there, obstructing traffic in one direction or the other. The Appendix G analysis must be more candid in addressing the obvious difficulties inherent in the site plan relative to the loading docks.

### **Potential Parking Inadequacy**

Ordinarily, by City Code, the Project would be required to provide 126 parking spaces. However, because the Project is very close to VTA's Race – W. San Carlos station on the planned Stevens Creek bus rapid transit line, City Code entitles the Project to an optional reduction of 20 percent of the required spaces. This allows it to provide as few as 101 spaces. The Project sponsor has elected to take the maximum reduction. This is an odd decision for the proposed use since transit riders generally only carry limited incidental convenience supermarket items and the vast majority of supermarket shoppers come by motor vehicle. The 101 space parking supply is further compromised by being comprised of 5 handicapped spaces which are unavailable to the general public and 11 clean air vehicle spaces which are presumably unavailable to the general public. The parking provision is further compromised by the inclusion of 14 compact spaces, the problem with these being that compact car drivers often prefer the convenience of full size spaces and occupy them. When full size spaces are scarce, drivers of full size cars jam their cars into available compact stalls, impairing the use of adjacent stalls. Only 71 of the parking spaces are full size general use stalls and of these have full size depth by overhanging the landscape or walkway areas, a dubious practice that makes mockery of the landscape provisions.

When the overall provisions for truck loading and parking on the site plan are objectively considered, it becomes obvious that the Project Sponsor is jamming too big a supermarket onto too small a site.

### **Conclusion**

This completes my current comments on the proposed West San Carlos and Race Street Commercial Development. Because of the flaws in the IS and Appendix G traffic analysis there can be no doubt that the proposed Project would have significant traffic impact and therefore is ineligible for exemption under CEQA Guidelines § 15332.

Mr. John Farrow  
M.R. Wolfe & Associates  
July 22, 2017  
Page 9

Sincerely,

Smith Engineering & Management  
A California Corporation



Daniel T. Smith Jr., P.E.  
President

Attachments:  
Resume of Daniel T. Smith Jr., P.E.





SMITH ENGINEERING & MANAGEMENT

**DANIEL T. SMITH, Jr.**  
**President**

**EDUCATION**

Bachelor of Science, Engineering and Applied Science, Yale University, 1967  
Master of Science, Transportation Planning, University of California, Berkeley, 1968

**PROFESSIONAL REGISTRATION**

California No. 21913 (Civil) Nevada No. 7969 (Civil) Washington No. 29337 (Civil)  
California No. 938 (Traffic) Arizona No. 22131 (Civil)

**PROFESSIONAL EXPERIENCE**

Smith Engineering & Management, 1993 to present, President.  
DKS Associates, 1979 to 1993. Founder, Vice President, Principal Transportation Engineer.  
De Leuw, Cather & Company, 1968 to 1979. Senior Transportation Planner.  
Personal specialties and project experience include:

**Litigation Consulting.** Provides consultation, investigations and expert witness testimony in highway design, transit design and traffic engineering matters including condemnations involving transportation access issues; traffic accidents involving highway design or traffic engineering factors; land use and development matters involving access and transportation impacts; parking and other traffic and transportation matters.

**Urban Corridor Studies/Alternatives Analysis.** Principal-in-charge for State Route (SR) 102 Feasibility Study, a 35-mile freeway alignment study north of Sacramento. Consultant on I-280 Interstate Transfer Concept Program, San Francisco, an AA/EIS for completion of I-280, demolition of Embarcadero freeway, substitute light rail and commuter rail projects. Principal-in-charge, SR 238 corridor freeway/expressway design/environmental study, Hayward (Calif.) Project manager, Sacramento Northeast Area multi-modal transportation corridor study. Transportation planner for I-80N West Terminal Study, and Harbor Drive Traffic Study, Portland, Oregon. Project manager for design of surface segment of Woodward Corridor LRT, Detroit, Michigan. Directed staff on I-80 National Strategic Corridor Study (Sacramento-San Francisco), US 101-Sonoma freeway operations study, SR 92 freeway operations study, I-880 freeway operations study, SR 152 alignment studies, Sacramento RTD light rail systems study, Tasman Corridor LRT AA/EIS, Fremont-Warm Springs BART extension plan/EIR, SRs 70/99 freeway alternatives study, and Richmond Parkway (SR 93) design study.

**Area Transportation Plans.** Principal-in charge for transportation element of City of Los Angeles General Plan Framework, shaping nations largest city two decades into 21<sup>st</sup> century. Project manager for the transportation element of 300-acre Mission Bay development in downtown San Francisco. Mission Bay involves 7 million gsf office/commercial space, 8,500 dwelling units, and community facilities. Transportation features include relocation of commuter rail station; extension of MUNI-Metro LRT; a multi-modal terminal for LRT, commuter rail and local bus; removal of a quarter mile elevated freeway; replacement by new ramps and a boulevard; an internal roadway network overcoming constraints imposed by an internal tidal basin; freeway structures and rail facilities; and concept plans for 20,000 structured parking spaces. Principal-in-charge for circulation plan to accommodate 9 million gsf of office/commercial growth in downtown Bellevue (Wash.). Principal-in-charge for 64 acre, 2 million gsf multi-use complex for FMC adjacent to San Jose International Airport. Project manager for transportation element of Sacramento Capitol Area Plan for the state governmental complex, and for Downtown Sacramento Redevelopment Plan. Project manager for Napa (Calif.) General Plan Circulation Element and Downtown Riverfront Redevelopment Plan, on parking program for downtown Walnut Creek, on downtown transportation plan for San Mateo and redevelopment plan for downtown Mountain View (Calif.), for traffic circulation and safety plans for California cities of Davis, Pleasant Hill and Hayward, and for Salem, Oregon.

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**Transportation Centers.** Project manager for Daly City Intermodal Study which developed a \$7 million surface bus terminal, traffic access, parking and pedestrian circulation improvements at the Daly City BART station plus development of functional plans for a new BART station at Colma. Project manager for design of multi-modal terminal (commuter rail, light rail, bus) at Mission Bay, San Francisco. In Santa Clarita Long Range Transit Development Program, responsible for plan to relocate system's existing timed-transfer hub and development of three satellite transfer hubs. Performed airport ground transportation system evaluations for San Francisco International, Oakland International, Sea-Tac International, Oakland International, Los Angeles International, and San Diego Lindberg.

**Campus Transportation.** Campus transportation planning assignments for UC Davis, UC Berkeley, UC Santa Cruz and UC San Francisco Medical Center campuses; San Francisco State University; University of San Francisco; and the University of Alaska and others. Also developed master plans for institutional campuses including medical centers, headquarters complexes and research & development facilities.

**Special Event Facilities.** Evaluations and design studies for football/baseball stadiums, indoor sports arenas, horse and motor racing facilities, theme parks, fairgrounds and convention centers, ski complexes and destination resorts throughout western United States.

**Parking.** Parking programs and facilities for large area plans and individual sites including downtowns, special event facilities, university and institutional campuses and other large site developments; numerous parking feasibility and operations studies for parking structures and surface facilities; also, resident preferential parking.

**Transportation System Management & Traffic Restraint.** Project manager on FHWA program to develop techniques and guidelines for neighborhood street traffic limitation. Project manager for Berkeley, (Calif.), Neighborhood Traffic Study, pioneered application of traffic restraint techniques in the U.S. Developed residential traffic plans for Menlo Park, Santa Monica, Santa Cruz, Mill Valley, Oakland, Palo Alto, Piedmont, San Mateo County, Pasadena, Santa Ana and others. Participated in development of photo/radar speed enforcement device and experimented with speed humps. Co-author of Institute of Transportation Engineers reference publication on neighborhood traffic control.

**Bicycle Facilities.** Project manager to develop an FHWA manual for bicycle facility design and planning, on bikeway plans for Del Mar, (Calif.), the UC Davis and the City of Davis. Consultant to bikeway plans for Eugene, Oregon, Washington, D.C., Buffalo, New York, and Skokie, Illinois. Consultant to U.S. Bureau of Reclamation for development of hydraulically efficient, bicycle safe drainage inlets. Consultant on FHWA research on effective retrofits of undercrossing and overcrossing structures for bicyclists, pedestrians, and handicapped.

#### **MEMBERSHIPS**

Institute of Transportation Engineers Transportation Research Board

#### **PUBLICATIONS AND AWARDS**

*Residential Street Design and Traffic Control*, with W. Homburger *et al.* Prentice Hall, 1989.

Co-recipient, Progressive Architecture Citation, *Mission Bay Master Plan*, with I.M. Pei WRT Associated, 1984.

*Residential Traffic Management, State of the Art Report*, U.S. Department of Transportation, 1979.

*Improving the Residential Street Environment*, with Donald Appleyard *et al.*, U.S. Department of Transportation, 1979.

*Strategic Concepts in Residential Neighborhood Traffic Control*, International Symposium on Traffic Control Systems, Berkeley, California, 1979.

*Planning and Design of Bicycle Facilities: Pitfalls and New Directions*, Transportation Research Board, Research Record 570, 1976.

Co-recipient, Progressive Architecture Award, *Livable Urban Streets, San Francisco Bay Area and London*, with Donald Appleyard, 1979.





## Autumn Wind Associates

Air Quality CEQA Analysis and Consulting Services

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July 24, 2017

RE: West San Carlos and Race Street Commercial Development Project; File No H17-018 and T16-050; Air Quality Comments

At the request of John Farrow, Esq., Autumn Wind Associates has reviewed the Statement of Exemption and Initial Study for the West San Carlos and Race Street Commercial Development Project. The project would demolish and remove existing improvements, and construct a 29,580-square foot building to be used as a Smart and Final store. This comment letter summarizes our concerns after assessing the adequacy of the air quality analysis. As demonstrated in the attached statement of qualifications, Autumn Wind Associates is well qualified to prepare this evaluation based on our experience evaluating air quality issues for numerous public and private clients. For the reasons set forth below, we believe that the Statement of Exemption and Initial Study fails to provide a reasoned, substantive basis for its conclusions.

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- 1. The cumulative toxic air contaminant analysis omits sources beyond 1,000 feet, even though when those sources are included, the excess cancer risk at the project site is at least double the 100 in one million level identified as the acceptable cumulative risk.**

The Health Risk Assessment (HRA) adopts the thresholds of significance in the Bay Area Air Quality Management District (BAAQMD) CEQA guidelines.<sup>1</sup> Under BAAQMD's CEQA guidelines, the health risk from a single source is significant if the excess cancer risk from that source is more than 10 in one million. The cumulative risk is significant if the excess cancer risk from all sources within 1,000 feet of the project site is greater than 100 in one million.

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<sup>1</sup> Race and San Carlos Street Commercial Redevelopment Construction Health Risk Assessment, page 3, citing BAAQMD, California Environmental Quality Act Air Quality Guidelines, June 2010, updated May 2011 (available at <http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CEQA/BAAQMD%20CEQA%20Guidelines%20May%202011.ashx?la=en>).

The HRA provides a “combined community risk impact” that purports to consider all toxic air contaminant (TAC) sources located within 1,000 feet of the site. The results are summarized in Table 2, Cumulative Construction Risk Assessment. The table determines that the combined cancer risks from 3 identified sources within 1,000 feet of the project site is 17.4 cancers per one million. The table compares that risk to the BAAQMD threshold for cumulative sources of 100 additional cancers, and concludes that there is no significant cumulative impact.

The BAAQMD significance thresholds for TAC’s were explained and justified in Appendix D to the BAAQMD CEQA guidelines, which is a June 2, 2010 report captioned “Thresholds of Significance Justification.” BAAQMD’s Thresholds of Significance Justification explains that the selection of significant excess cancer thresholds for both single projects and cumulative risk was based on the United States EPA guidance for “acceptable” cancer risk levels, which ranges from 1 in one million to 100 in one million.

... a range of what constitutes a significant increment of cancer risk from any compound has been established by the U.S. EPA. EPA’s guidance for conducting air toxics analyses and making risk management decisions at the facility- and community-scale level considers a range of acceptable cancer risks from one in a million to one in ten thousand (100 in a million). The guidance considers an acceptable range of cancer risk increments to be from one in a million to one in ten thousand. In protecting public health with an ample margin of safety, EPA strives to provide maximum feasible protection against risks to health from HAPs by limiting additional risk to a level no higher than the one in ten thousand estimated risk that a person living near a source would be exposed to at the maximum pollutant concentrations for 70 years. This goal is described in the preamble to the benzene National Emissions Standards for Hazardous Air Pollutants (NESHAP) rulemaking (54 Federal Register 38044, September 14, 1989) and is incorporated by Congress for EPA’s residual risk program under Clean Air Act section 112(f).<sup>2</sup>

BAAQMD’s cumulative threshold of 100 excess cancers was based on the high end of the EPA acceptable risk range:

Emissions from a new source or emissions affecting a new receptor would be considered significant where ground-level concentrations of carcinogenic TACs from any source result in an increased cancer risk greater than 100.0 in one million.

The significance threshold of 100 in a million increased excess cancer risk would be applied to the cumulative emissions. The 100 in a million threshold is based on EPA guidance for conducting air toxics analyses and making risk management decisions at the facility and community-scale level. In protecting public health with an ample margin of safety, EPA strives to provide maximum feasible protection against risks to health from hazardous air pollutants (HAPs) by limiting risk to a level no higher than the one in ten thousand (100 in a million) estimated risk that a person living near a source would be exposed to at the maximum pollutant concentrations for 70 years (NESHAP 54 Federal Register 38044, September 14, 1989; CAA section 112(f)). One hundred in a million excess cancer cases is also consistent with the ambient cancer risk in the most pristine portions of the Bay Area based on the District’s recent regional modeling analysis.<sup>3</sup>

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<sup>2</sup> BAAQMD, Thresholds of Significance Justification, June 2010, page D-35.

<sup>3</sup> Id., page D-43.

BAAQMD's approach to cumulative analysis considers only the excess cancers caused by TAC sources within the so-called "Zone of Influence," which includes only the area within a 1,000-foot radius of the project site.<sup>4</sup> The stated rationale for this 1,000-foot limitation is that the effects of a particular TAC source tend to attenuate with distance. Thus, BAAQMD explains that "concentrations of particulate matters tend to be reduced substantially at a distance of 1,000 feet downwind from sources such as freeway or large distribution centers."<sup>5</sup> BAAQMD also argues that ARB recommends that new receptors not be sited within 1,000 feet of major sources.<sup>6</sup>

Although the effects of a particular source do attenuate with distance, and although it is obviously inadvisable to site a new receptor adjacent to a major source, cumulative cancer risk at a site is determined by the total TAC concentration from all sources that contribute any TAC concentration to the site, not just the TAC from sources within 1,000 feet. And, in fact, BAAQMD acknowledges that TAC sources more distant than 1,000 feet do cause increased cancer risk:

... the larger the radius, the greater the number of sources considered that may contribute to the risk and the greater the expected modeled risk increment.<sup>7</sup>

Thus, if an agency seeks to assess the cumulative risk from all sources that affect receptors adjacent to a project site, it is improper to exclude TAC sources that are farther than 1,000 feet if they contribute to the TAC concentration at that location.

In the Bay Area and other urban locations, ambient TAC concentrations are due to many individual TAC sources at varying distances. BAAQMD data establish that the cancer risk from all of the TAC sources that affect the project site at Race and San Carlos Street in San Jose substantially exceeds 100 excess cancers in one million, the level identified by BAAQMD as the acceptable cumulative risk.

For example, BAAQMD's 2009 justification report for its CEQA thresholds of significance explains that most of the Bay Area population suffers TAC risks well in excess of the 100 in one million excess cancer threshold identified as the acceptable cumulative risk.<sup>8</sup> The 2009 justification report establishes:

- only 2 percent of the population is exposed to background risk less than 200 in one million, and
- 50 percent of the population suffer an exposure risk over 500 cancers in one million.<sup>9</sup>

BAAQMD's 2009 justification report for its CEQA thresholds of significance provides data that demonstrate that the project site itself suffers a disproportionately higher risk than other Bay Area

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<sup>4</sup> BAAQMD, CEQA Guidelines, June 2010, updated May 2011, page 2-2. BAAQMD permits an agency to consider sources farther than 1,000 feet under the unusual circumstance that a particularly large source of TACs is located beyond the recommend 1,000-foot range. (Thresholds of Significance Justification, page D-40.) However, this was not done for the project here.

<sup>5</sup> BAAQMD, Thresholds of Significance Justification, June 2010, page D-40.

<sup>6</sup> Id. at page D-38.

<sup>7</sup> Id.

<sup>8</sup> BAAQMD, Revised Draft Options and Justification Report, CEQA Thresholds of Significance, October 2009, available at [http://www.gsweventcenter.com/GSW\\_RTC\\_References/2009\\_1001\\_BAAQMD.pdf](http://www.gsweventcenter.com/GSW_RTC_References/2009_1001_BAAQMD.pdf). The document contains various options for significance thresholds, including the thresholds eventually adopted in 2010.

<sup>9</sup> Id., pages 55, 58.

locations. It identifies San Jose as one of 5 critically affected communities in the Bay Area, i.e., communities that are “disproportionately impacted from high concentrations of TACs.”<sup>10</sup> Mapping demonstrates that the project site is within the area designated as disproportionately impacted.<sup>11</sup> Modeled inhalation cancer risks at the site from diesel particulate matter (DPM), the dominant TAC source, exceeded 600 per one million based on 2005 emissions data.<sup>12</sup>

More recently, BAAQMD has updated its identification of the disproportionately impacted “communities of concern” based on current emissions data and population characteristics.<sup>13</sup> BAAQMD describes its methodology as a health impact study, not just a screening tool, because it quantifies impacts based on up-to-date pollution concentrations and epidemiologic data that correlates health impacts to pollutants.<sup>14</sup> The study uses pollutant concentrations for TAC from all sources, together with cancer-risk factors for TAC developed by Cal/EPA, to estimate an increase in cancer risk from air pollution.<sup>15</sup> Air pollution concentrations were derived from a combination of modeling and measurements for TACs, PM2.5, and other pollutants present within each gridded area. The analysis is performed at the zip code level as the spatial unit of analysis.<sup>16</sup> The analysis reveals that the excess cancer risk for due to TAC exposure in the 95126 zip code in which the project is located is 202.9 in one million.<sup>17</sup>

In sum, BAAQMD data indicate that the actual cumulative cancer risk from TAC exposure at the project site ranges from 600 in one million, based on 2005 pollutant concentrations, to 200 in one million, based on more recent pollutant concentrations. The cancer risk assessments are based on TAC concentration from all sources present in each zip code area, not just the sources within a particular radius. Thus, the cumulative cancers caused by the TAC concentration at the project site attributable to all TAC emission sources are well in excess of 100 in one million, the level identified as the acceptable cumulative threshold by BAAQMD.

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<sup>10</sup> Id., page 54. This information is repeated in the Thresholds of Significance Justification appended to BAAQMD's 2010 CEQA Air Quality, updated in 2011. (BAAQMD, Thresholds of Significance Justification, June 2010, page D-39.)

<sup>11</sup> BAAQMD, Revised Draft Options and Justification Report, CEQA Thresholds of Significance, October 2009, page 56, Figure 2, “Communities of High Concern.”

<sup>12</sup> Id., page 57, Figure 3. (The modeling for this analysis is set out in BAAQMD Technical Memorandum, Applied Method for Developing Polygon Boundaries for CARE Impacted Communities, December 2009, available at <http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/ImpactedCommunitiesMethodsMemo.ashx?la=en>).

<sup>13</sup> BAAQMD, Identifying Areas with Cumulative Impacts from Air Pollution in the San Francisco Bay Area, Version 2, March 2014, available at [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/ImpactCommunities\\_2\\_Methodology.ashx?la=en](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/ImpactCommunities_2_Methodology.ashx?la=en).

<sup>14</sup> Id., page 9.

<sup>15</sup> Id., page 11.

<sup>16</sup> Id., page 13.

<sup>17</sup> BAAQMD, Identifying Areas with Cumulative Impacts from Air Pollution in the San Francisco Bay Area, Version 2, March 2014, attached spreadsheet identified as ImpactCommunities\_2\_ScoresbyZipCode.xlsx, available at [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/ImpactCommunities\\_2\\_ScoresbyZipCode.ashx?la=en](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/ImpactCommunities_2_ScoresbyZipCode.ashx?la=en); see also BAAQMD, Identifying Areas with Cumulative Impacts from Air Pollution in the San Francisco Bay Area, Version 2, March 2014, page 17, Figure 3 (Cancer Risk map).

BAAQMD explains that its cumulative impact threshold “sets a level beyond which any additional risk is significant.”<sup>18</sup> Here, the Health Risk Assessment and Initial Study should have identified a significant cumulative impact because 1) sensitive receptors adjacent to the project will be exposed to more than the 100 in one million excess cancers identified by BAAQMD as the maximum acceptable cumulative risk, and 2) the project will generate additional cancer risk. For example, the health risk assessment indicates that project construction would cause at least 5.9 in one million cancers at the location of sensitive receptors proximate to the project site. And, as discussed below, the project operations would also cause additional cancers from TAC emission from diesel delivery vehicles.

## **2. The Health Risk Assessment omits TAC emitted by diesel delivery trucks during the operational phase of the project.**

The Initial Study indicates that Policy MS-11.2 requires that projects emitting TAC “prepare health risk assessments in accordance with BAAQMD-recommended procedures as part of environmental review and employ effective mitigation to reduce possible health risks to a less than significant level.”

However, the Initial Study provides no assessment of the potential significance of any air pollutant emissions during the operational phase of the project, arguing that “the proposed 29,580-square-foot retail/commercial building is below the BAAQMD operational criteria pollutant screening size.”<sup>19</sup>

BAAQMD’s CEQA guidelines do provide screening levels for criteria pollutants such as ozone precursors, and for greenhouse gases, below which no impact analysis is typically required.<sup>20</sup> However, toxic air contaminants are not criteria pollutants or greenhouse gases. In fact, BAAQMD’s CEQA guidelines state that the screening values for criteria pollutants “cannot be used as screening for risk and hazard impacts.”<sup>21</sup>

BAAQMD’s CEQA guidelines reference screening guidance for TAC sources. However, the guidelines state that screening criteria are not available for sources that would not require permits from BAAQMD, such as retail projects where emissions are primarily from mobile sources.<sup>22</sup> For those sources, BAAQMD states that “a more refined analysis is necessary,” i.e., modeled cancer risk based on emissions determined with reference to “the number and activity of vehicle and fleet information”<sup>23</sup> Where project operations involve a substantial number of diesel trucks and associated diesel truck-mounted refrigeration units, a health risk assessment should be undertaken using one of the BAAQMD recommended methods or protocols.<sup>24</sup> Accordingly, the City should prepare a health risk assessment for operational emissions just as it prepared a health risk assessment for construction period emissions.

The traffic report for the Initial Study indicates that the project will require about 14 daily deliveries from diesel trucks that generate TAC:

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<sup>18</sup> BAAQMD, Revised Draft Options and Justification Report, CEQA Thresholds of Significance, October 2009, page 34.

<sup>19</sup> Initial Study, page 26.

<sup>20</sup> BAAQMD, CEQA Guidelines, June 2010, updated May 2011, pages 3-1 to 3-3.

<sup>21</sup> Id., page 3-3.

<sup>22</sup> Id., page 5-7.

<sup>23</sup> Id.

<sup>24</sup> Id.; see, e.g., BAAQMD, Recommended Methods for Screening and Modeling Local Risks and Hazards, May 2012, available at <http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/risk-modeling-approach-may-2012.pdf?la=en>.



Deliveries to the project site would occur daily via a wide range of truck types varying from small tractors to large semitrailers. The anticipated number of truck deliveries are noted below:

- Refrigerated Deli/Produce – 4 to 5 deliveries per week
- Frozen Foods – 3 deliveries per week
- Grocery Trailers – 6 deliveries per week
- DSD Vendors (Coke, Pepsi, 7-up, etc.) – 8 to 12 trucks per day<sup>25</sup>

Many of these deliveries would be of refrigerated or frozen foods, which would require truck-mounted refrigeration units (TRUs). TRUs run continuously and are not subject to truck engine idling period limitations. Given the volume of traffic, and the plan to provide only two loading docks, on-site truck movements, idling, and TRU emissions from waiting trucks are likely to be substantial. In addition, the site would require frequent garbage collection, which would also be undertaken with diesel trucks.<sup>26</sup>

Without a health risk assessment for this activity, the precise number of additional cancers from TAC cannot be determined. However, it is reasonable to assume that over the project's lifetime the diesel truck TAC emissions from daily delivery and refuse collection activities are very likely to cause as many cancers as the diesel TAC emissions from construction equipment during the one-year construction period, which the Health Risk Assessment determined to be 5.9 in one million. Thus, the combined number of cancers caused by both the construction and operational phases is likely in excess of the BAAQMD significance threshold of 10 in one million for a single project.

### **3. Mitigation is required to ensure conformance with Tier 2 emissions standards.**

The Health Risk Assessment assumes that all construction equipment will meet at least the Tier 2 engine emission standards. This assumption is not warranted unless a mitigation measure is imposed that requires that construction equipment conform to the Tier 2 emissions standards. In fact, no applicable condition would require conformance with Tier 2 standards, and older Tier 1 or Tier 0 equipment could be used for construction. The older equipment would generate substantially more TAC emissions than assumed in the Health Risk Assessment. Thus, without requiring Tier 2 or better equipment for the construction phase, the City cannot rely on the health risk assessment.

The applicable standard permit conditions do not require Tier 2 equipment. The Initial Study states that the project would be required to conform to BAAQMD BMPs (Best Management Practices) "recommend by BAAQMD to reduce Project construction dust impacts."<sup>27</sup> These conditions, which are listed in the Initial Study and also in the BAAQMD CEQA guidelines, do not include a requirement to use Tier 2 or better construction equipment.<sup>28</sup> Furthermore, the City's own Standard Permit Conditions for non-residential project site development permits does not require Tier 2 engines. The City's standard conditions list requires only the following air quality conditions:

**Air Quality.** During construction, the following measures shall be incorporated to mitigate any possible significant air quality impacts. (EC25-2013)

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<sup>25</sup> Initial Study, Appendix G, page 12.

<sup>26</sup> Id., page 13.

<sup>27</sup> Initial Study, pages 24-25.

<sup>28</sup> Initial Study, page 25; BAAQMD, CEQA Guidelines, June 2010, updated May 2011, page 8-3, Table 8-1 Basic Construction Mitigation Measures Recommended for ALL Proposed Projects.

- a. Water all active construction areas at least twice daily.
- b. Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least two feet of freeboard.
- c. Pave, apply water three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas at construction sites.
- d. Sweep daily (with water sweepers) all paved access roads, parking areas and staging
- e. Sweep streets daily (with water sweepers) if visible soil material is carried onto adjacent public streets.<sup>29</sup>

In sum, either the Health Risk Assessment should be revised to eliminate the assumed use of Tier 2 equipment, or a mitigation conditions should require Tier 2 or better equipment.

#### **4. Operational emissions are inadequately assessed.**

The Initial Study dismisses operational criteria pollutants as insignificant, arguing that the project is smaller than the BAAQMD criteria pollutant screening level of 346,000 sq. ft. This contention is incorrect because the 346,000 sq. ft. screening level is for a general office building, not the proposed neighborhood shopping use.

Furthermore, the CalEEMod modeling for operational emissions is based on a trip rate of approximately 57 trips per 1,000 sq. ft. We understand that the trip rate actually applicable to the project, based on the City of San Jose traffic impact analysis guidance for neighborhood shopping, is 120 trips per 1,000 sq. ft. Because the CalEEMod modeling does not use the applicable trip rate, it does not provide evidence that operational air quality impacts from criteria pollutants are less than significant.

Should you have any questions or comments regarding this comment letter, please feel free to contact me at your convenience.

Sincerely,



Greg Gilbert  
Autumn Wind Associates

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<sup>29</sup> City of San Jose, [Standard Conditions for] Site Development Permits, 12/9/13, Part 5 – Environmental Conditions, Condition Number 24.

**STATEMENT OF QUALIFICATIONS**  
**Greg Gilbert**  
**Autumn Wind Associates**

Greg Gilbert is director and founder of Autumn Wind Associates, located northeast of Sacramento, CA. AWA provides expert review, analysis, and estimation of potential air quality and related environmental impacts of proposed land-use development projects involving indirect- (mobile) and stationary (operating under air agency permit) sources of air pollution. He has consulted on air quality land use planning, mobile, and stationary source matters and projects to private and public clients since leaving public service as an air agency manager in 2000. Previously, he was national marketing director for an emissions catalyst products and technology firm with international markets in mobile and stationary sources. Between 1990 and 2000 Mr. Gilbert was employed in two California air agencies, most recently as project manager in the Mobile Source Division of the Sacramento Metropolitan Air Quality Management District (SMAQMD). While at SMAQMD Mr. Gilbert was responsible for managing development and implementation of the agency's heavy-duty diesel vehicle low-emission incentive program that would later evolve into the statewide Moyer Program; the evaluation of land use-related air quality emission impacts and control strategies, development of California Environmental Quality Act (CEQA) thresholds of significance and mitigations to reduce, offset, or eliminate air quality impacts of new land use; development of air-related CEQA guidance; and creation of the first air quality CEQA mitigation fee program with percentage-based emission reduction mitigation choices provided to the developer.

Since 2001, AWA has provided consulting expertise to private entities and air agencies, conducted research on construction practices and equipment emissions, assisted with development of CEQA land-use guidance documents and mitigation strategies for CA air quality agencies, and provided analysis and modeling of potential air quality impacts identified primarily in Mitigated Negative Declarations and Environmental Impact Reports for proposed land use development projects throughout California. Mr. Gilbert reviews and provides expert written and testimony on CEQA- and development-related project-specific environmental analysis, mitigation, and documentation for a wide range of public-, private-, and environmental-sector clients, including law firms specializing in CEQA-NEPA cases.