

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

**A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING, SUBJECT TO CONDITIONS, A CONDITIONAL USE PERMIT TO ALLOW THE OFF-SALE OF ALCOHOL IN AN EXISTING 1,150 SQUARE FOOT RETAIL STORE AND GRANTING A DETERMINATION OF PUBLIC CONVENIENCE OR NECESSITY FOR A TYPE 21 ALCOHOLIC BEVERAGE CONTROL LICENSE ON AN APPROXIMATELY 0.46-GROSS ACRE SITE, LOCATED AT THE SOUTHEAST CORNER OF NORTH KING ROAD AND MABURY ROAD (788 NORTH KING ROAD)**

**FILE NO. CP19-028**

**WHEREAS**, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on August 8, 2019, an application (File No. CP19-028) was filed by the applicant, Amritpal Kaur Powar, on behalf of owners Carmelo and Leticia Rosado, with the City of San José for a Conditional Use Permit to allow the off-sale of alcohol in an existing 1,150-square foot retail store and granting the Determination of Public Convenience or Necessity for off-sale alcohol for a proposed retail use, on an approximately 0.46-gross acre site, on that certain real property situated in the CP Commercial Pedestrian Zoning District and located on the southeast corner of North King Road and Mabury Road (788 North King Road, 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,” and depicted in Exhibit “B,” entitled “Plat Map,” 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 January 15, 2020, notice of which was duly given; and

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

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

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

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

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

**WHEREAS**, at said hearing, this City Council received in evidence a plan for the subject property entitled, "Conditional Use Permit for Off-Sale of Alcohol Mabury Market, 788 King Road #80 San José, CA 95133, File No. CP19-028" dated received October 25, 2019, said development plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

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

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

**NOW, THEREFORE, BE IT RESOLVED BY THE 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 the proposed project:

- 1. Site Description and Surrounding Uses.** The subject 0.46-gross acre site is located on a corner lot occupied by an existing 5,535-square foot retail building. The existing retail convenience store is located in an 1,150-square foot tenant space within the existing retail building. The subject site is surrounded by vacant land to the east and a single-family house to the south. To the west of the subject site, across King Road are industrial uses. The north of the site, across Mabury Road, are existing multi-family residences. The nearest residential use is adjacent to the subject site to the south. The site is accessed by two driveways, one on North King Road and one on Mabury Road. There are 24 existing parking spaces on-site.
- 2. Project Description.** The project is a Conditional Use Permit and Determination of Public Convenience or Necessity for a Type 21 Alcoholic Beverage Control (ABC) License to allow for the off-sale of alcoholic beverages (full range of alcoholic beverages) at an existing retail convenience store in the Commercial Pedestrian Zoning District on the approximately 0.46-gross acre subject site. There is no increase in building square footage. As described above, the site is accessible from one entrance on North King Road and one on Mabury Road. As noted in the Operations Management Plan, store hours of operation are from 6:30 AM to 11:30 PM from Monday to Sunday. There are two employees on site at all times. The sales floor area of the existing store is approximately 1,000 square feet. The area dedicated to the sale of alcoholic beverages would be 50 square feet or 5% of the total sales floor area.
- 3. General Plan Conformance.** The subject site has an Envision San José 2040 General Plan Land Use/Transportation Diagram land use designation of Urban Village. The Urban Village land use designation is applied within the Urban Village areas that are planned in the current Horizon to accommodate higher density housing growth along with a significant amount of job growth. This designation supports a wide variety of commercial, residential, institutional or other land uses with an emphasis on establishing an attractive urban form in keeping with the Urban Village Concept.

The subject site is in the Berryessa BART Urban Village. Creation of Urban Villages is Major Strategy #5 in the General Plan and the Urban Village concept is to create a policy framework to direct most new job and housing growth to occur within walkable

and bike-friendly Urban Villages that have good access to transit and other existing infrastructure and facilities. Urban Villages are to provide active, walkable, bicycle-friendly, transit-oriented, mixed-use urban settings for new housing and job growth attractive to an innovative workforce and consistent with the General Plan's environmental goals.

The project is consistent with the following General Plan Policies:

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

*Analysis:* The existing convenience store is one of the few commercial retail uses within a half mile radius of and located within walking and biking distance of the Berryessa BART Station and new and existing residential areas.

Land Use Policy LU-5.2: To facilitate pedestrian access to a variety of commercial establishments and services that meet the daily needs of residents and employees, locate neighborhood-serving commercial uses throughout the city, including identified growth areas and areas where there is existing or future demand for such uses.

*Analysis:* The current and future demand for off-sale alcohol use is expected to increase as the area is located in the Berryessa BART Urban Village. According to Appendix 5 of the General Plan, there have already been 3,884 dwelling units entitled, with 930 additional dwelling units planned for Horizon 1 in the Berryessa BART Urban Village. The project's use would add to the variety of retail products available to the growing community. The store is within convenient walking and biking distance of the surrounding neighborhood and within 1,000 feet of the Berryessa BART Station.

Community Design Policy 1.15: Consider the relationship between street design, use of the public right-of-way, and the form and uses of adjoining development. Address this relationship in the Urban Village Planning process, development of new zoning ordinances, and the review of new development proposals in order to promote a well-designed, active, and complete visual street environment.

*Analysis:* The subject site is located at the intersection of two major streets that serve the surrounding community and provide access to the Berryessa BART Station. The project does not change the overall footprint of the existing building and the retail building and entrance to the convenience store are set back one foot from the sidewalk along Mabury Road. The retail building is oriented with the storefronts to the street. Pedestrians and bicyclists are adequately served by sidewalks as well as bicycle lanes on both North King Road and Mabury Road. Additionally, the existing building provides adequate bicycle parking spaces. The subject site is also served by two VTA Bus Lines, Routes 70 and 77, which have stops within 250 feet of the subject site.

#### 4. Zoning Ordinance Conformance.

The existing building conforms to the development standards set forth in the CP Commercial Neighborhood Zoning District. The site is located in the CP Commercial Pedestrian Zoning District, which conforms to the Envision San José 2040 General Plan Land Use/Transportation Diagram designation. The Commercial Pedestrian district is intended to support pedestrian-oriented retail activity at a scale compatible with surrounding residential neighborhoods. The existing use as a retail store is a permitted use in the Commercial Pedestrian Zoning District. The off-sale of alcoholic beverages requires a Conditional Use Permit.

##### Development Standards

- a. **Setbacks:** There are no changes to the existing 5,535-square foot retail building, which was entitled through a Site Development Permit (File No. H04-047). The subject site has two front property lines along North King Road and Mabury Road and two rear property lines. In the Commercial Pedestrian Zoning District, there are no minimum front setbacks and a maximum front setback of 10 feet is required. The existing building has front setbacks of 1 foot along both North King Road and Mabury Road. In the Commercial Pedestrian Zoning District, a 25-foot rear, corner setback is required. The existing building provides rear setbacks of 52 feet and 77 feet respectively. The required maximum building height in the Commercial Pedestrian Zoning District is 50 feet. The existing building has a maximum height of 35 feet. No modifications would occur to the existing building. The existing setbacks and height are not being altered by this Conditional Use Permit.
- b. **Parking:** There are no changes to the existing 5,535-square foot retail building. The existing retail building was entitled by a Site Development Permit (File No. H04-047) and is required to provide 24 vehicle parking spaces. The project site currently provides 24 vehicle parking spaces. The additional off-sale alcohol use would not require additional vehicle parking spaces. The subject site requires 4 bicycle parking spaces, which are provided in the parking lot area at the east end of the subject site.

#### 5. California Environmental Quality Act.

Under the provisions of Section 15301(a) for Existing Facilities of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) as stated below, this project is found to be 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.

Class 1 Categorical Exemption consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The key consideration is whether the project involves negligible or no expansion of an

existing use. The project does not involve any modifications or expansion to the footprint of the existing retail building.

The project would allow off-sale alcohol in an existing retail store. The project would include interior modifications to allow for the display of alcoholic beverages. The retail use of off-sale alcoholic beverages will be conducted within an approximately 50-square foot area wholly inside the 1,150-square foot tenant space. Based on the discussion and findings in the above sections, the activity is not anticipated to have a significant effect on the environment. Therefore, a CEQA exemption can be issued under Section 15301(a) for Existing Facilities.

6. **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 Ordinance, and CEQA conformance and subject to the conditions set forth in the Permit.

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.

*Analysis:* As explained in detail above, the project use would be consistent with and further the policies of the General Plan. The existing convenience store is the only commercial use within an approximately ½ mile radius of the project site providing retail products in a safe and convenient multimodal neighborhood. The use would add to the variety of retail products available to the surrounding community and would further facilitate pedestrian and bicycle access to the subject site.

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.

*Analysis:* The project has no modifications to the existing building. The existing setbacks, height, and number of parking spaces are not being altered by this Conditional Use Permit. The existing retail use is allowed in the Commercial Pedestrian Zoning District, and off-sale alcohol use would also be permitted with a Conditional Use Permit pursuant to Table 20-90 of the Municipal Zoning Code. Therefore, the project would be in compliance with the requirements of the of the Commercial Pedestrian Zoning District.

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

*Analysis:* There are no applicable City Council policies for project.

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.

*Analysis:* As indicated in the San José Police Department Memorandum, dated October 1, 2019, the project use is located in an area that is unduly concentrated with alcohol sales, but is not in an area of high crime. The Police department is neutral regarding this project. Due to the concentration of alcohol sales, a Determination of Public Convenience and Necessity is required. The sales area dedicated to off-sale alcohol sales is 50 square feet, which is 5% of the 1,000-square foot sales area. Additionally, the Mitigation Management and Operations Plan prepared by the applicant and submitted on October 25, 2019 provides provisions for trash and graffiti removal, security and safety, loitering and panhandling, and employee training. Therefore, the use would not be detrimental to 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:* The existing retail building conforms to the development regulations, including setbacks, height, and parking for a building in the Commercial Pedestrian Zoning District. There are no modifications to the existing building.

- 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 subject site is adequately served and accessed from North King Road and Mabury Road. The subject site is located within 1,000 feet of the future Berryessa BART Station and is along the path of two Valley Transportation Authority bus routes, numbers 70 and 77. There are three stops that are less than 250 feet from the site located to the east, west, and southwest.

- g. The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.

*Analysis:* The project does not involve any modifications to the existing retail building. There would be no construction on-site. The retail store in which the off-sale alcohol would be sold is already existing. Therefore, there would be no unacceptable negative environmental impacts related to noise, vibration, dust, drainage, storm water runoff, or odor, and would not have an unacceptable negative affect on adjacent properties.

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## 7. Required Findings for Off-Sale of Alcohol

A conditional use permit may be issued pursuant to the applicable provisions of this title for the off-sale of any alcoholic beverages only if the decision-making body first makes the following additional findings, where applicable:

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

*Analysis:* The use is not located within 500 feet from any other use involving the off-sale of alcoholic beverages. The project use would also not result in a total of more than four establishments that provide alcoholic beverages for off-site consumption within a 1,000-foot radius from the project location. Therefore, this finding **can** be made.

- b. For such use at a location closer than five hundred feet from any other use involving the off-sale of alcoholic beverages, situated either within or outside the city, where the proposed location of the off-sale of alcoholic beverages use would result in a total of more than four establishments that provide alcoholic beverages for off-site consumption within a one-thousand-foot radius from the proposed location, that the resulting excess concentration of such uses will not:
  - 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:* The use is not located within 500 feet from any such use involving the off-sale of alcoholic beverages. The use would also not result in a total of more than four establishments that provide alcoholic beverages for off-site consumption within a one thousand-foot radius from the project location. As indicated in the San José Police Department Memorandum dated October 1, 2019, the Police Department is neutral regarding the project use. Additionally, the Mitigation Management and Operations Plan, prepared by the applicant and submitted on October 25, 2019, provides provisions for trash and graffiti removal, security and safety, loitering and panhandling, and employee training. Therefore, this finding **can** be made.

- c. For such use at a location closer than five hundred feet from any child care center, public park, social service agency, residential care facility, residential service facility, elementary school, secondary school, college or university, or one hundred fifty feet from any residentially zoned property, that the building in which the

proposed use is to be located is situated and oriented in such a manner that would not adversely affect such residential, child care center, public park, social service agency, residential care facility, residential service facility and/or school use.

*Analysis: The use is located less than 500 feet from two social service agencies. Family Supportive Housing, a shelter providing temporary housing to families is located approximately 330 feet from door to door to the south of the subject site. Greater Opportunities Day Program, a non-profit agency providing daytime services to adults with developmental disabilities, is located approximately 180 feet west of the subject site across North King Road. There are residentially zoned properties located within 150 feet from the subject site to the north, south, and east. The subject site is adjacent to residentially zoned properties to the east and south. Therefore, this finding **cannot** be made. Because this finding cannot be made, the project is required to receive a Determination of Public Convenience or Necessity.*

8. **Requirements for Determination of Public Convenience or Necessity.** Under California Business and Professions Code Sections 23958 and 23958.4, the Department of Alcoholic 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 20 percent or greater number of reported crimes than the average number of reported crimes for the City as a whole, or
- b. The premises of the proposed license are located in a census tract where the ratio of existing retail off-sale licenses to population in the census tract exceeds the ratio in the County as a whole.

*Analysis: The project site is located within Census Tract 5037.09. According to the Police Memorandum, dated October 1, 2019, the neighborhood does not report 20 percent more crimes above the city average. However, the ratio of existing retail off-sale licenses to population in the census tract exceeds the ratio in the County as a whole. Therefore, for the California Department of Alcoholic Beverage Control to be able to issue a license for this off-sale use, the City must grant a Determination of Public Convenience or Necessity. The analysis of the project is based on the required findings identified in Title 6 of the San José Municipal Code and is described below.*

Chapter 6.84 of Title 6 identifies the process and findings related specifically to the off-sale of alcohol and specifies that a PCN may be issued only after first making all of the findings specified below (see San José Municipal Code section 6.84.030):

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

*Analysis: The project site is not located within an SNI or neighborhood revitalization area or other area designated by the City for targeted neighborhood enhancement services or programs. According to the Police Department Memorandum dated October 1, 2019, The Police Department stated that it is neutral to the issuance of a Conditional Use Permit for the off-sale of alcohol at the subject site. Additionally, the Mitigation Management and Operations Plan, prepared by the applicant and submitted on October 25, 2019, provides provisions for trash and graffiti removal, security and safety, loitering and panhandling, and employee training. The project would not be detrimental to public health, safety, or welfare of persons located in the area, or increase the severity of existing law enforcement or public nuisance problems in the area. Therefore, this finding **can** be made.*

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

*Analysis: The use would result in less than four off-sale establishments in a 1,000-foot radius. There are currently no off-sale establishments within a 1,000-foot radius. Therefore, this finding **can** be made.*

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

*Analysis: The use would be located less than 500 feet from two social services agencies, and within 150 feet of a residence. Family Supportive Housing, a shelter providing temporary housing to families is located approximately 330 feet door to door to the south of the subject site. Greater Opportunities Day Program, a non-profit agency providing services to adults with developmental disabilities, is located approximately 180 feet to the west of the subject site.*

*The subject site is located within 150 feet from residentially zoned properties to the north, east, and south. There are residentially zoned properties adjacent to the site to the east and south. Therefore, this finding **cannot** be made.*

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

*Analysis: The existing convenience store is 1,150 square feet. The sales floor area of the convenience store is approximately 1,000 square feet. The area dedicated to alcohol sales is 50 square feet or 5% of the total sales floor area. Therefore, the percentage of alcohol sales would be 5% of the sales area. Therefore, this finding **can** be made.*

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

- 1) The census tract in which the proposed outlet for the off-premises sale of alcoholic beverages is located is unusually configured and the proposed outlet would act as a convenience to an underserved portion of the community without presenting a significant adverse impact on public health or safety; or

*Analysis: The census tract is not unusually configured in shape. However, the geographic concentration of sites providing off-sale alcohol in the census tract is unusually configured. Based on a California Alcoholic Beverage Control report for Census tract 5037.09, there are 4 existing businesses that have off-sale alcohol licenses (Type 20 or 21). The allowed number of off-sale licenses in the census tract is 2. The closest off-sale business is located approximately 2,300 feet to the southeast of the subject site and is an importer of high-quality commodities, beer, and wine from East Africa, and only provides wholesale products to businesses. The remaining three off-sale businesses are convenience stores located within 200 feet of one another and are located at the southernmost edge of the census tract, approximately 3,800 feet from the subject site, along McKee Road. Therefore, this finding **can** be made.*

- 2) The proposed outlet for the off-premises sale of alcoholic beverages would enhance or facilitate the vitality of an existing commercial area without presenting a significant adverse impact on public health or safety; or

*Analysis: The project is located in an area that has experienced significant population growth. With the opening of Berryessa BART, the neighborhood is expected to increase in population and jobs through the development of an urban multi-modal, transit-oriented neighborhood. The surrounding neighborhood has experienced significant residential development in recent years. From 2014 to present there have been 511 residential units constructed within 1,000 feet of the subject site (File Nos. PD13-023, PD14-029, PD14-044, and PD15-024), significantly increasing*

*the population density of the census tract. The additional off-sale alcohol use would provide a more convenient shopping experience and would further enhance the pedestrian and bicycle-oriented nature of the neighborhood. Furthermore, the immediate area around the subject site is expected to experience further significant population and job growth with the opening of the Berryessa BART station. Finally, based on the Police Memorandum, dated October 1, 2019, the subject site is not located in a high crime area, and the Police are neutral to the addition of off-sale alcohol use at the subject site. Therefore, the additional off-sale alcohol use at the existing convenience store would not present a significant adverse impact on public health or safety. Therefore, this finding **can** be made.*

- 3) The census tract in which the proposed outlet is located has a low population density in relation to other census tracts in the city, and the proposed outlet would not contribute to an over- concentration in the absolute numbers of outlets for the off-premises sale of alcoholic beverages in the area; or

*Analysis: The census tract in which the project is located has a higher population density in relation to other census tracts in the city and is located in an already over-concentrated area. According to the 2010 U.S. Census, the average population density of the census tract in which the subject site is located was 14,890 people per square mile. According to the 2010 U.S. Census, the average population density of the City of San José was 5,358 people per square mile. Therefore, this finding **cannot** be made.*

- 4) 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: Approximately 5% of the sales floor area would be dedicated to the off-sale of alcohol. The remainder of the sales floor area would be dedicated to sales of items typical of a convenience store including chips, snacks, soda, water, soups, frozen foods, coffee, candy, medication, and tobacco products. The subject site is the only convenience store within 1,000 feet of the new BART station. Furthermore, it serves a census tract that has a higher than average population density for the City of San José. Other businesses that provide off-sale alcohol are not located within walking distance. Furthermore, the off-sale of alcohol at this location would provide a more complete and convenient shopping experience in a neighborhood with transit, bicycle, and pedestrian connections. Therefore, this finding **can** be made.*

Notwithstanding the foregoing provisions and requirements contained in the San José Municipal Code Section 6.84.030.D, a determination may be issued in connection with an application for a license from the California Department of Alcoholic Beverage Control for the off-premises sale of alcoholic beverages where the City Council does all of the following:

- a. Makes a determination that not all of the required findings in San José Municipal Code Section 6.84.040.B can be made; and

*Analysis: Given the above-stated analysis, the third finding for the Determination of Public Convenience or Necessity cannot be made for the off-sale of alcohol because the subject site is located within 500 feet of a social services agency and within 150 feet of a residentially zoned property. However, three of the four findings and findings 5.a, 5.b and 5.d of the additional findings can also be made for a PCN determination.*

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

*Analysis: The surrounding neighborhood has experienced significant residential development in recent years. From 2014 to present, there have been 511 residential units constructed within 1,000 feet of the subject site, significantly increasing the population density of the census tract. Furthermore, the immediate area around the subject site is expected to experience further population and job growth with the opening of the Berryessa BART station. The existing retail stores is one of the few commercial retail uses within a half-mile of the Berryessa BART station and within walking and biking distance of new and existing residential areas. As stated above, the alcohol sales area would represent approximately 5% of the total sales area of the store and would not be a primary use of the building. While not all of the required findings can be made for the Determination of Public Convenience or Necessity, there are significant and overriding benefits by the project use, as it would further activate an existing commercial area and provide new amenities to the existing and future residents in the surrounding area.*

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

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## CONDITIONS

1. **Acceptance of Conditional Use Permit and Determination of Public Convenience or Necessity.** 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 and Determination of Public Convenience or Necessity 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 Conditional Use Permit and Determination of Public Convenience or Necessity by the permittee; and
  - b. Agreement by the permittee to be bound by, to comply with, and to do all things required of or by the permittee pursuant to all of the terms, provisions, and conditions of this 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 and Determination of Public Convenience or Necessity shall automatically expire two 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 Conditional Use Permit and Determination of Public Convenience or Necessity. The date of issuance is the date this Conditional Use Permit and Determination of Public Convenience or Necessity is approved by the City Council. However, the Director of Planning may approve a Permit Adjustment/Amendment to extend the validity of this Permit in accordance with Title 20 of the San José Municipal Code. The Permit Adjustment/Amendment must be approved prior to the expiration of this Permit.
3. **Building Permit/Certificate of Occupancy.** Procurement of a Building Permit and/or Certificate of Occupancy from the Building Official for the structures described or contemplated under this permit shall be deemed acceptance of all conditions specified in this Permit and the permittee's agreement to fully comply with all of said conditions. No change in the character of occupancy or change to a different group of occupancies as described by the Building Code shall be made without first obtaining a Certificate of Occupancy from the Building Official, as required under San José Municipal Code Section 24.02.610, and any such change in occupancy must comply with all other applicable local and state laws.
4. **Sewage Treatment Demand.** Pursuant to Chapter 15.12 of Title 15 of the San José Municipal Code, acceptance of this Permit by Permittee shall constitute acknowledgement of receipt of notice by Permittee that (1) no vested right to a Building Permit shall accrue as the result of the granting of this Permit when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José - Santa Clara Regional Wastewater Facility represented by approved land uses in the area served by said Facility will cause the total sewage treatment demand

to meet or exceed the capacity of San José - Santa Clara Regional Wastewater Facility to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region; (2) substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority; (3) issuance of a Building Permit to implement this Permit may be suspended, conditioned or denied where the City Manager is necessary to remain within the aggregate operational capacity of the sanitary sewer system available to the City of San José or to meet the discharge standards of the sanitary sewer system imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region.

5. **Use Authorization.** Subject to all conditions herein, this Conditional Use Permit and Determination of Public Convenience or Necessity authorizes the off-sale of alcohol (full range of alcoholic beverages) in an existing 1,150-square foot convenience store, on the approximately 0.46-gross acre subject site. The Management and Operations Plan, prepared by the permittee and submitted on October 25, 2019, provides provisions for trash and graffiti removal, security and safety, loitering and panhandling, and employee training. Permittee shall fully comply with the approved Management and Operation Plan, as may be amended. The hours of operation allowed are between 6:30 a.m. and 11:00 p.m. only.
6. **Off-Sale of Alcohol.** This Conditional Use Permit and Determination of Public Convenience or Necessity authorizes the off-sale of alcohol at the subject establishment and successors of said tenant spaces whereby the subsequent tenant maintains a similar use as deemed by the Director of Planning.
7. **Alcoholic Beverage Control.** The off-sale of alcohol (full range of alcoholic beverages) is allowed in conformance with the requirements of the Department of Alcoholic Beverage Control (ABC). The permittee shall obtain and maintain full compliance with its ABC license and remain in good standing with the Department of Alcoholic Beverage Control.
8. **Limitations on the Area of Alcohol Sales.** The sale of alcohol for off-site consumption allowed by this Permit shall be limited and incidental to the primary use of a convenience store. The area in which alcoholic beverages are displayed or otherwise offered for sale shall not exceed 5 percent of the total floor 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. **Conformance to Plans.** The development of the site shall conform to the approved Conditional Use Permit plans entitled, "Conditional Use Permit for Off-Sale of Alcohol Mabury Market, 788 King Road. San José, CA 95133, File No. CP19-028," dated received October 25, 2019, on file with the Department of Planning, Building and Code Enforcement as may be amended and approved by the Director of Planning, Building, and Code Enforcement, and to the San José Building Code (San José Municipal

Code, Title 24). The plans are referred to herein as the “approved plans” or the “Approved Plan Set.”

10. **Nuisance.** This use shall be operated in a manner which does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
11. **Compliance with Local and State Laws.** The subject use shall be conducted in full compliance with all local and state laws. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code. The Permit shall be subject to revocation if the subject use is conducted in such a manner as to cause a nuisance, as defined above.
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 the San José Municipal Code.
13. **Anti-Graffiti.** The permittee shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement, including job sites for projects under construction.
14. **Anti-Litter.** The site and surrounding area shall be maintained free of litter, refuse, and debris:
  - a. Cleaning shall include keeping all publicly used areas free of litter, trash, cigarette butts and garbage and shall include daily damp washing of all exterior walls and sidewalks along the project's frontage.
  - b. The operator of the project use shall clean the public right-of-way immediately adjacent to the subject site before 8:00 a.m. each day.
  - c. Mechanical equipment used for outside maintenance, including blowers and street sweepers may not be used between 10:00 p.m. and 6:00 a.m. daily.
15. **Outdoor Storage.** No outdoor storage is allowed or permitted unless designated on the Approved Plan Set.
16. **Sign Approval.** No signs are approved at this time. All proposed signs shall be subject to review and approval by the Director of Planning through a subsequent Permit Adjustment.
17. **Building and Property Maintenance.** The permittee shall maintain the property in good visual and functional condition. This shall include, but not be limited to all exterior elements of the enclosure such as paint, roof, lighting and landscaping.
18. **Lighting.** All on-site exterior, unroofed lighting shall conform to the Outdoor Lighting Policy (Council Policy 4-3) as amendment. All lighting shall require issuance of a Permit Adjustment.

19. **Building Division Clearance for Issuing Permits.** Prior to the issuance of a Building Permit, the following requirements must be met to the satisfaction of the Chief Building Official:

- a. *Construction Plans.* This permit file number *CP19-028* shall be printed on all construction plans submitted to the Building Division.
- b. *Americans with Disabilities Act.* The permittee shall provide appropriate access as required by the Americans with Disabilities Act (ADA).
- c. *Construction Plan Conformance.* A project construction plan conformance review by the Planning Division is required. Planning Division review for project conformance will begin with the initial plan check submittal to the Building Division. Prior to any building permit issuance, building permit plans shall conform to the approved Planning development permits and applicable conditions.
- d. *Construction Hours.* Construction and grading activities shall be limited to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday.

20. **Fire Department Clearance.** Hazmat clearance and compliance with all applicable fire and building codes and standards relating to fire and panic safety shall be verified by the Fire Department during the Building Permit process.

21. **Revocation, Suspension, Modification.** This Conditional Use Permit and Determination of Public Convenience or Necessity may be revoked, suspended or modified by the City Council at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 2, Chapter 20.100, Title 20 of the San José Municipal Code it finds:

- a. A violation of any conditions of the Conditional Use Permit and Determination of Public Convenience or Necessity 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.

Based on all of the above facts and findings for this Conditional Use Permit application, this project to allow the off-sale of alcohol in an existing 1,150-square foot retail store and granting the Determination of Public Convenience or Necessity for off-sale alcohol for retail use on the subject site is hereby **approved**.

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ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2020, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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SAM LICCARDO  
Mayor

ATTEST:

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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.*

**SCHEDULE C  
LEGAL DESCRIPTION**

All that certain real property situate in the Unincorporated Area, County of Santa Clara, State of California, described as follows:

Lots 2, 3, 4 and 5, as shown on that certain Map entitled, "Map of Mayflower Park being a part of 500 acre Lot No. 47, San Jose City Lands, Santa Clara County, California", which Map was filed for record in the office of the Recorder of the County of Santa Clara, State of California on October 4, 1926 and is of record in Book "V" of Maps, pages 30 and 31.

Excepting therefrom all that portion of land granted to the City of San Jose, a municipal corporation, by deed filed for record in the office of the Recorder of the County of Santa Clara on July 24, 1980 in Book F457 at page 80, Official Records and being more particularly described as follows:

Being a parcel of land situate in the City of San Jose, County of Santa Clara, State of California, and, also being a portion of Lot 5 as said Lot is shown on the Map of Mayflower Park recorded in Book V of Maps at Page 30, Santa Clara County Records, and being more particularly described as follows:

Beginning at the most Westerly corner of Lot 5, said POINT OF BEGINNING being also the point of intersection of the Southeasterly Right-of-Way line of Mabury Road (50 feet wide) and the Northeasterly Right-of-Way line of King Road (50 feet wide) as said Lot and Roads are shown on said Map; Thence Northeasterly from said POINT OF BEGINNING along said South easterly Right-of-Way line of Mabury Road North 53° 20' 43" East 16.10 feet; Thence leaving said Southeasterly Right-of-Way line along a non-tangent curve concave, to the Southeast having a radial bearing of North 64° 59' 58" West and a radius of 50:00 feet through a central angle of 4° 21' 45" an arc distance of 3.31 feet; Thence Southeasterly South 27° 59' 32" East 11.99 Feet; Thence Southwesterly South 49° 36' 01" West 10.73 Feet to a point on the said Northeasterly right of way line of King Road; Thence along the last said Right-of-Way line North 37° 54' 34" West 14.49 Feet to the POINT OF BEGINNING of this description.

ARB No: 254-04-004, 005, 048

APN No: 254-04-092 254-04-093 254-04-094

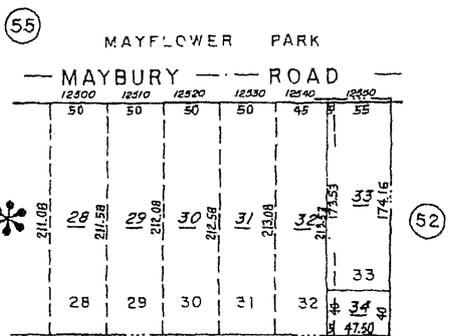
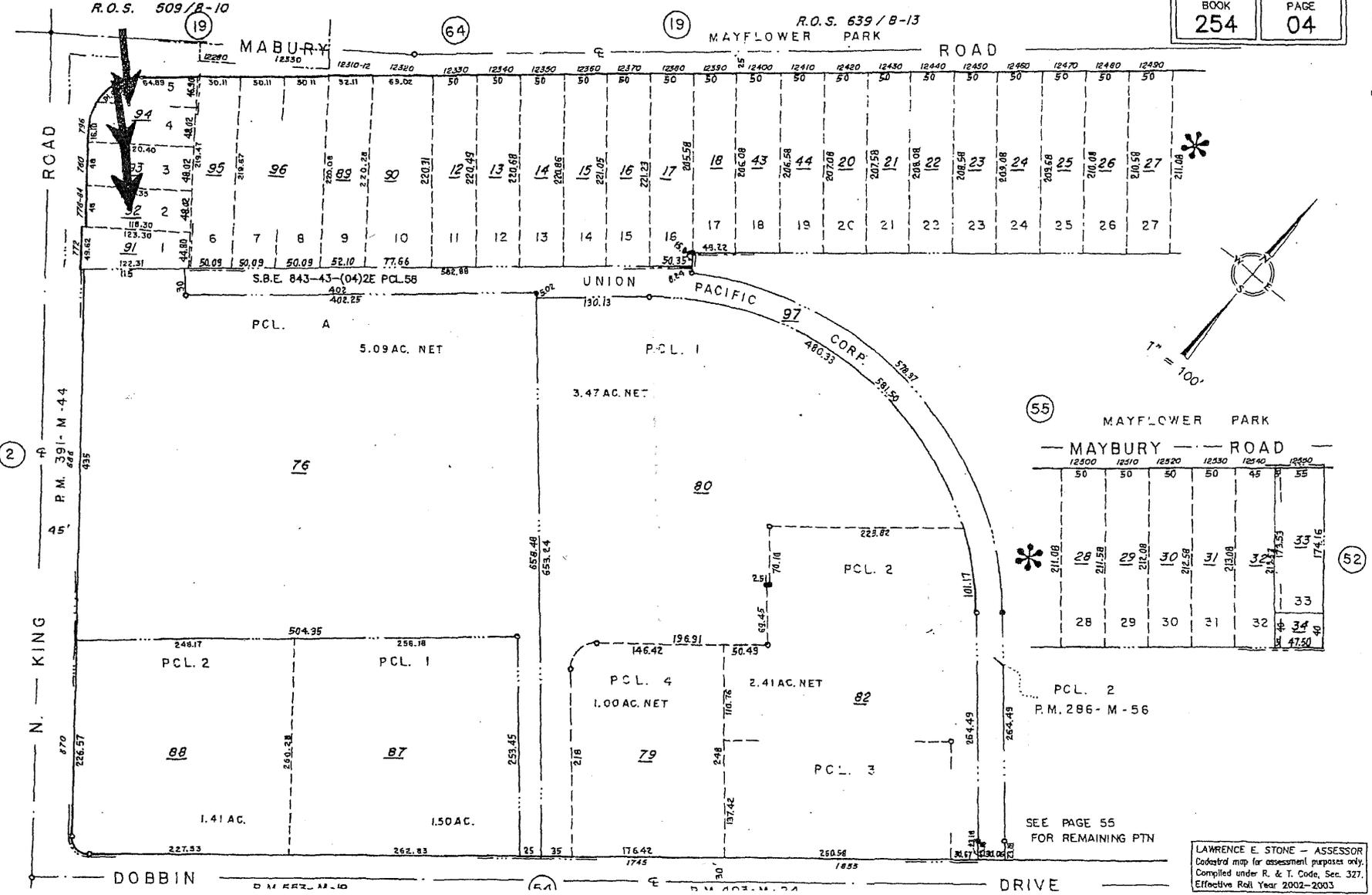
**EXHIBIT "A"**  
**(File No. CP19-028)**

R.O.S. 509/B-10

R.O.S. 639/B-13

BOOK	PAGE
254	04

54004 Page 1



LAWRENCE E. STONE — ASSESSOR  
 Cadastral map for assessment purposes only.  
 Compiled under R. & T. Code, Sec. 327.  
 Effective Roll Year 2002-2003

EXHIBIT "B"  
 (File No. CP19-028)