

RESOLUTION NO. 80019

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE MAKING CERTAIN FINDINGS REQUIRED BY CALIFORNIA PUBLIC UTILITIES CODE SECTION 21676 THAT THE PROPOSED GENERAL PLAN AMENDMENT AND REZONING OF APPROXIMATELY 80 GROSS ACRES EXTENDING APPROXIMATELY ONE MILE FROM NORTH TO SOUTH, AND GENERALLY BOUNDED BY: LENZEN AVENUE AND THE UNION PACIFIC RAILROAD TRACKS TO THE NORTH; NORTH MONTGOMERY STREET, LOS GATOS CREEK, THE GUADALUPE RIVER, STATE ROUTE 87, BARACK OBAMA BOULEVARD, AND ROYAL AVENUE TO THE EAST; AUZERAIS AVENUE TO THE SOUTH; AND THE CALTRAIN RAIL CORRIDOR AND CAHILL STREET TO THE WEST, IS CONSISTENT WITH THE PURPOSES SET FORTH IN CALIFORNIA PUBLIC UTILITIES CODE SECTION 21670 AND OVERRULING THE SANTA CLARA COUNTY AIRPORT LAND USE COMMISSION (ALUC) DETERMINATION THAT THE PROPOSED PROJECT IS INCONSISTENT WITH CERTAIN ALUC NOISE AND HEIGHT POLICIES AS DEFINED BY THE “COMPREHENSIVE LAND USE PLAN FOR SAN JOSE INTERNATIONAL AIRPORT”

FILE NOS. GP19-009 AND PDC19-039

WHEREAS, pursuant to the provisions of Section 21676 of the California Public Utilities Code, the City made a referral of the General Plan Amendment (File No. GPA19-009) and Planned Development Rezoning (File No. PDC19-039) to the Airport Land Use Commission of Santa Clara County (ALUC) for a determination of consistency with the ALUC's plans to the extent that the area covered by the Downtown West project falls within the ALUC's Airport Influence Area surrounding Mineta San José International Airport; and

WHEREAS, the project is for a General Plan Amendment (Envision San José 2040 and Diridon Station Area Plan) and rezoning to a DC(PD) Planned Development Zoning District to bring forward a plan that reflects the objectives represented by the City, stakeholders, and residents of San José in an inclusive and extensive public process;

and consists of up to 5,900 residential units; up to 7,300,000 gross square feet (GSF) of office space; up to 500,000 GSF of active uses such as retail, cultural, arts, civic etc.; up to 300 hotel rooms; up to 800 limited-term corporate accommodations; up to two event and conference centers totaling up to 100,000 GSF; up to two central utility plants totaling approximately 130,000 GSF; logistic/warehouse(s) totaling approximately 100,000 GSF and approximately 15 acres of open space, all on approximately 80-gross acres in the area generally bounded by Lenzen Avenue and the Union Pacific Railroad tracks to the north; North Montgomery Street, Los Gatos Creek, the Guadalupe River, State Route 87, Barack Obama Boulevard, and Royal Avenue to the East; Auzerais Avenue to the South; and the Caltrain Rail Corridor and Cahill Street to the West; and

WHEREAS, on December 16, 2020, the ALUC, acting pursuant to its authority under Public Utilities Code Section 21676, determined that GP19-009 and PDC19-039 were inconsistent with ALUC noise and height policies, as defined in the “Comprehensive Land Use Plan for San José International Airport” (CLUP); and

WHEREAS, ALUC found the rezoning and general plan amendment would be inconsistent with the CLUP Noise Policy N-4 and Table 4-1 because a portion of the site would permit residential outdoor patios or outdoor activity areas within the CLUP’s 65 A-weighted decibels (dBA) Community Noise Equivalent Level (CNEL) noise contour, and the ALUC CLUP discourages residential uses with outdoor patios or outdoor activity areas within the 65 dba CNEL noise contour; and

WHEREAS, ALUC found the proposed rezoning and general plan amendment were also inconsistent with the CLUP H-1 height policy, as the project may propose building heights that exceed FAR Part 77 Surfaces. The CLUP height policy references FAR Part 77 Surfaces to determine compatible land uses in the Airport Influence Area; and

WHEREAS, the ALUC made its Land Use Plan inconsistency determination prior to the FAA’s issuance of any “No Hazard” determination for the subject project; and

WHEREAS, if a project exceeds FAR Part 77 surfaces but receives an FAA “Determination of No Hazard” following an FAA aeronautical study, CLUP Policy H-1 provides that the FAA determination shall prevail; and

WHEREAS, the ALUC found the proposed project to be consistent with the CLUP except for noise and height as described above; and

WHEREAS, the ALUC determined that the subject site is located outside of the outer safety zone (OSZ) and none of the safety policies contained within the CLUP are applicable to this proposed project; and

WHEREAS, pursuant to the provisions of Public Utilities Code Section 21676 the City may, after a public hearing on the matter, overrule a determination by the ALUC by a two-thirds vote of the City Council so long as the City Council makes specific findings that a proposed action is consistent with the purposes set forth in Public Utilities Code Section 21670; and

WHEREAS, on May 25, 2021, the City Council heard and considered all testimony and other evidence presented and submitted, including a memorandum dated May 14, 2021, from the Department of Planning, Building and Code Enforcement, related to this item; and

WHEREAS, on February 19, 2021, the City notified the ALUC and California Department of Transportation Division of Aeronautics, in writing, of the City’s proposed override of the ALUC’s determination and provided a copy to the ALUC of the City’s proposed override findings in a manner consistent with applicable State law; and

WHEREAS, on March 23, 2021, Caltrans submitted written comments to the City on the proposed overrule findings (“Caltrans letter”) and on April 15, 2021, the ALUC submitted written comments to the City on the proposed overrule findings (“ALUC letter”), and

copies of the Caltrans letter and the ALUC letter are attached hereto and incorporated by this reference; and

WHEREAS, the Caltrans letter and the ALUC letter are advisory to the City Council under Public Utilities Code Section 21676; and

WHEREAS, the ALUC considered and commented on the City's draft resolution for the proposed override of the ALUC's determination, which this City Council has received and considered; and

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

SECTION 1. Public Utilities Code Section 21676 provides that a local governmental body may overrule the ALUC's determination if it makes specific findings that the proposed local government body's action is consistent with the purposes of Section 21670. The City Council hereby makes the following overriding findings with regard to the ALUC's determination of inconsistency with noise and height policies listed in the CLUP:

- A. The recitals above are incorporated herein as findings.
- B. The first purpose of Section 21670 is to provide for the orderly development of each public use airport in the state and the area surrounding these airports so as to promote the overall goals and objectives of California airport noise standards and prevent the creation of new noise and safety problems. The second purpose of Section 21670 is to protect public health, safety and welfare by ensuring the orderly expansion of airports and the adoption of land use measures that minimize the public's exposure to excessive noise and safety hazards within areas around the public airports to the extent that these areas are not already devoted to incompatible uses.
- C. With respect to safety, the subject property is not located within any of the Safety Zones for the Mineta San José International Airport. Therefore, none of the CLUP safety policies are applicable to the proposed project.

- D. Consistent with the purposes of Section 21670, the City's General Plan development review process and methodology ensure that future development within the Airport Influence Area on the project site would minimize the public's exposure to excessive noise and that buildings will be constructed only if their heights and other characteristics result in FAA Determinations of No Hazard to Air Navigation.
- E. ALUC Policy N-4 provides that no residential or transient lodging construction shall be permitted within the 65 dBA CNEL (CNEL measurement is the same as DNL but adds a 5 dB penalty between 7pm and 10pm) contour boundary unless it can be demonstrated that a) the resulting interior sound levels will be less than 45 dBA DNL (DNL is the Day-Night Average Sound Level over a 24 hour time weight energy average noise level, with a 10 dB penalty between 10pm to 7am to account for the higher sensitivity to noise at night due to lower background noise) and b) there are no outdoor patios or outdoor activity areas associated with the residential portion of a mixed-use residential project. The City's analysis shows that the Year 2027 65 dBA CNEL noise contour extends into several blocks on the project site that the Downtown West Project would designate for residential or hotel use. Although the project is proposing the above type of development in the 65 dBA CNEL noise contour, the project is consistent with Section 21670 for the reasons stated below:
1. Consistent with Goal EC-1 of the Envision San José General Plan 2040, with the California Building Code, and with ALUC Policy N-4, interior noise levels in residences and hotel rooms will not exceed 45 dBA DNL. See project EIR Mitigation NO-3, which will be a condition of approval of the project's Planned Development Permit.
 2. General Plan Transportation Policy TR-14.4 requires dedication of aviation easements to protect airport operations. Such easements will be required as conditions of approval of the project's Planned Development Permit, establishing consistency with CLUP Policies G-5 and O-1, which call for aviation easements within the Airport Influence Area.
 3. Consistent with CLUP's Noise Compatibility Policy N-5, "all property owners within the Airport Influence Area who rent or lease their property for residential use shall include in their rental/lease agreement with the tenant, a statement advising that they (the tenants) are living within an exterior aircraft noise exposure area designated by the ALUC as greater than the 65 dBA CNEL in a manner that is consistent with current state law including AB2776 (2002)." The policy will be enforced through a condition of approval to the project's Planned Development Permit.
 4. The Envision San José 2040 General Plan identifies outdoor noise environments of 60-75 dBA DNL as "conditionally acceptable" for residential

and hotel uses, as long as interior noise levels are mitigated to 45 dBA DNL. The residential outdoor activities areas at Downtown West Blocks E3 and C3 are located both in the environs of the Mineta San José International Airport and in Downtown. These areas are exempt from the 60 dBA DNL exterior noise limit the City applies in other residential areas.

5. Residential exterior spaces such as apartment balconies and ground-floor common areas within the 65 dBA DNL noise contour would be consistent with orderly development of the Mineta San José International Airport. These spaces would be consistent with the recently adopted Airport Master Plan, whose noise analysis provides that residential uses within the 65 dBA DNL contour are considered compatible with airport operations because interiors are sound insulated. Exterior spaces do not preclude such residences from being considered compatible with airport operations.
6. Existing noise conditions in portions of Block E3 and C3 exceed 65 dBA CNEL, but these conditions are primarily due to highway, rail and street noise rather than aircraft. (Downtown West Mixed Use Project DEIR Table 3.10-1).
7. The benefits of access to outdoor spaces, including for multifamily residents, are well documented. The City encourages private outdoor space in multifamily developments. With the required notice, future residents will have the option of living in less urban areas further from the flight path; but in choosing to live in an urban area, they may have the option of spending time in their private balconies and communal outdoor spaces despite the potential annoyance of aircraft overflights. The purpose of the State Aeronautics Act would not be violated by allowing these options.
8. The Mineta San José International Airport maintains a webpage, <https://www.flysanjose.com/noise/noise-complaint>, through which it collects written noise complaints. Both the airport website and the County of Santa Clara website refer readers to this page. The City has examined the resulting records of noise complaints for a 10-year period and found that of 445,000 complaints received through the webpage, 1,505 (0.34 percent), originated in a ZIP code that includes any portion of Downtown San José (95110, 95112, 95113, 95126, and 95192). This ratio reflects a longstanding pattern of more frequent airport noise complaints from less urbanized areas and fewer from downtown areas. To explore specifically whether construction of multifamily residential buildings with outdoor patios and/or outdoor activity areas results in significant noise complaints, the City identified six such existing buildings in Downtown within the 65 dBA CNEL airport noise contour. The addresses were reviewed against the Airport's database. The review shows that in the last ten years, five of these

multifamily residential buildings reported no noise complaints and one building nearer to the airport reported a total of twelve complaints. This level of complaint is not considered significant and is consistent with the pattern that Downtown San José generates few airport noise complaints compared to less urbanized neighborhoods, even from residential buildings that include outdoor activity areas.

- F. ALUC CLUP Policy H-1 provides: “Any structure or object that penetrates the Federal Aviation Regulations Part 77, *Objects Affecting Navigable Airspace* (FAR Part 77) surfaces, as illustrated in Figure 6, is presumed to be a hazard to air navigation and will be considered an incompatible land use, except in the following circumstance. If the structure or object is above the FAR Part 77 surface, the proponent may submit the project data to the FAA for evaluation and air navigation hazard determination, in which case the FAA’s determination shall prevail.” General Plan Transportation Policy TR14.2 requires project proponents to submit this data to the FAA.

The project is in compliance with General Plan Transportation Policy TR14.2 in that if the City Council approves the proposed rezoning and general plan amendment, a condition of approval will be included in the Planned Development Permit requiring a “Determination of No Hazard” to Air Navigation be issued by the FAA for all buildings prior to issuance of any building permits.

- G. The Caltrans letter is summarized as follows, with responses in italics:
1. The Caltrans letter states; “On December 16, 2020, the SCCALUC found the proposed GPA and Rezoning inconsistent with the policies of safety, height and noise contained within the SJC CLUP.”
The ALUC did not find the Project inconsistent with any CLUP safety policy; the ALUC considered the Project’s consistency with the CLUP policies for safety, height and noise, but found inconsistencies only with specific noise and height policies.
 2. The Caltrans letter states that both the City’s existing General Plan and the City’s proposed resolution are inconsistent with noise provisions of the California Building Code limiting interior residential noise to 45 dBA CNEL and requiring acoustical analysis for residential type structures in areas that exceed 60 dB CNEL or DNL.
As stated in the Environmental Impact Report for the Project, the City requires compliance with the cited Building Code noise standards (p. 3.10-17), regularly imposes Standard Condition of Approval NO-2 to ensure compliance for residential and hotel development (p. 3.10-24) and includes Project-specific Mitigation Measure NO-3 to ensure the

Project meets these standards in relation to airport noise (p. 3.10-52). The EIR's analysis is based on the same 2027 noise contours as are used in the CLUP.

3. The Caltrans letter also addresses residential and hotel exterior use spaces within the 65 dBA CNEL noise contour, stating that two of the findings in the City's Resolution are individually insufficient to support the City's Conclusion that provision of these spaces would not cause inconsistency with the purposes of the Aeronautics Act.

This resolution does not rely on any single finding to support this conclusion, but rather on all the findings taken together; these findings include not only benefits of exterior spaces and minimal airport noise complaints from Downtown residents within the 65 dBA CNEL noise contour who have outdoor spaces, but all six other findings, including requirements for aviation easements and pre-contract notices to residential buyers and tenants.

4. Regarding building heights, Caltrans differs with the City's reliance on the FAA's regulatory process to ensure that building heights have been studied by the FAA as required by federal regulation and received a determination of no hazard.

The FAA is the only authoritative source on airspace utilization. FAR Part 77 and its imaginary airspace surfaces are used by the FAA to identify structures requiring aeronautical studies and airspace determinations. If a proposed building exceeds Part 77 Surfaces, then the FAA is required to determine the potential aeronautical effect. The FAA's studies account for all known and proposed structures in the airport environment and consider both project-specific and cumulative effect.

5. The Caltrans letter emphasizes the importance of the San José International Airport and expresses concern that the building heights permitted by the project would constrain future Airport development.

City policy also emphasizes the importance of the Airport, and the City Council has concluded that a vital Downtown and local economy are important to protecting the Airport's future. In addition, the City's Airport Department has been actively engaged in reviewing the Project and considers the Project consistent with Airport planning, safety and economic interests.

H. The ALUC letter is summarize as follows, with response in italics:

1. The ALUC letter states that the City's proposed resolution should amend or delete the following: "WHEREAS, the ALUC found the proposed project to be consistent with the CLUP except for noise and height as described above; and to; WHEREAS, the project was proposed outside of all ALUC safety zones for SJC; and"

The first finding is accurately quoted but the second is not quoted correctly. The ALUC letter does not explain why the ALUC believes these findings should be deleted or amended. These findings are accurate, are directly relevant to expressly stated purposes of the Aeronautics Act to prevent the creation of new safety problems and minimize the public's exposure to safety hazards, and match findings in previous overrule resolutions.

2. The ALUC letter states that the ALUC believes a settlement agreement providing for the ALUC to modify the CLUP "to include no outdoor residential space within the 65 dBA noise contour or greater" would be violated by approval of the Project.

The statement that the adoption of the Envision San José 2040 General Plan "included a court order settlement agreement" is incorrect. Instead, in 2011 the City and the ALUC settled the City's CEQA challenge to the 2010 version of the CLUP. The ALUC's statement that the settlement agreement provided for modification of the CLUP "to include no outdoor residential space within the 65 dBA CNEL noise contour" is also incorrect. The settlement agreement listed changes to other CLUP provisions, but none pertaining to outdoor patios or any noise issue. In addition, the settlement agreement could not, and did not purport to, divest the City of its statutory right, and obligation under appropriate circumstances, to overrule an ALUC determination of CLUP inconsistency under Section 21676.

3. The ALUC letter questions why the General Plan exempts residential uses Downtown and in the environs of the Airport from the 60 dBA CNEL noise limit that applies in other residential areas in the City.

The City exempted these areas from the 60 dBA DNL noise limit applied to quieter parts of the City because areas near the Airport and in Downtown were already subject to noisier conditions. The City's General Plan and noise ordinance are consistent with the "conditionally acceptable" limits described for residential and hotel uses in these areas. As stated above, the City allows this condition as long as interior noise levels are mitigated to 45 dBA CNEL, and will enforce this condition through Standard Condition of Approval NO-2 and Project Mitigation Measure NO-3.

4. The ALUC letter states that there would be no need for residential property owners to provide notice to prospective tenants of 65 dBA CNEL noise conditions “if the Project were consistent with CLUP policies.”

This notice requirement is itself a CLUP policy; CLUP Policy N-5 expressly requires notices for all rental residential properties that are within an Airport Influence Area and where exterior aircraft noise exceeds 65 dBA CNEL. The City will require compliance with CLUP Policy N-5.

5. The ALUC letter states that resolution findings regarding Project Consistency with certain General Plan policies are not relevant to the decision-making responsibility of the ALUC.

This statement is accurate, but the resolution is for consistency with the purpose of the Aeronautics Act. The findings that cite the City's General Plan are relevant to airport land use issues of safety, height and noise, and are relevant to the City Council decision to overrule the ALUC's determination under Public Utilities Code Section 21676.

6. The ALUC letter states that the Project's consistency with the San José International Airport Master Plan is irrelevant because an airport master plan, unlike the CLUP, is not a land use document.

Public Utilities Code Section 21675 requires that the CLUP be updated to conform to the Airport Master Plan; the ALUC has not yet done so for the Airport Master Plan adopted by the City and Airport Layout Plan approved by the FAA in 2020, specifically in regard to the Airport Master Plan Amendment's updated noise contours.

7. The ALUC letter states “Also, on January 13, 2021, the Federal Aviation Administration (“FAA”) published, in the Federal Register, Vol. 86, No. 8, Docket No. FAA-2021-0037 a noise analysis of impacts to receptors adjacent to airports. The ALUC notes regarding noise that document has direct applicability to the subject project and would be inconsistent with it.”

As stated in the Federal Register, the FAA has only released the cited document for public comments; accordingly, the document has no direct applicability to any project. The Federal Summary States: “The FAA is releasing a summary to the public of the research programs it sponsors on civil aircraft noise that could potentially inform future aircraft noise policy. The FAA invites public comment on the scope and applicability of these research initiatives to address aircraft noise. The FAA will not make any determination based on the findings of these research programs for the FAA's noise policies, including any potential revised

use of the Day-Night Average Sound Level (DNL) noise metric, until it has carefully considered public and other stakeholder input along with any additional research needed to improve the understanding of the effects of aircraft noise exposure on communities.”

8. The ALUC Letter states that ALUC uses FAA Part 77 Surfaces as a height restriction boundary.

See response above (Section 1.G.4) to Caltrans letter regarding FAA Part 77 Surfaces.

9. The ALUC letter states that the City has been unwilling to engage in dialogue with the ALUC and urges the City, if it disagrees with portions of the CLUP, to try to amend the CLUP rather than to overrule ongoing inconsistencies.

The City has expressed its substantive differences with CLUP Policy N-4, Table 4-1, and Policy H-1. The ALUC's responses to those differences are available in the staff reports for and videos of recent ALUC public hearings.

SECTION 2. Therefore, based upon the findings set forth above, the City Council hereby finds that the development proposed under Planned Development Rezoning File No. PDC19-039 and General Plan Amendment GP19-009 is not in conflict with and would be consistent with the purposes set forth in California Public Utilities Code Section 21670, regarding protection of public health, safety, and welfare by ensuring the orderly expansion of airports and the adoption of land use measures that minimize the public's exposure to excessive noise and safety hazards within areas around public airports, to the extent that these areas are not already devoted to incompatible uses.

SECTION 3. Based upon all of the foregoing findings and conclusions, the City Council hereby overrules the ALUC determination of nonconformance of Planned Development Rezoning File No. PDC19-039 and GP19-009 with the noise and height polices within the CLUP.

ADOPTED this 25th day of May, 2021 by the following vote:

AYES: ARENAS, CARRASCO, COHEN, DAVIS, ESPARZA,
FOLEY, JONES, JIMENEZ, MAHAN, PERALEZ,
LICCARDO.

NOES: NONE

ABSENT: NONE

DISQUALIFIED: NONE



SAM LICCARDO
Mayor

ATTEST 

TONI J. TABER, CMC
City Clerk

DEPARTMENT OF TRANSPORTATION

DIVISION OF AERONAUTICS – M.S. #40

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EXHIBIT "A"

March 23, 2021

Mr. Tong (John) Tu, Supervising Planner
Planning, Building and Code Enforcement
Planning Division
City of San Jose
200 East Santa Clara Street, 3rd Floor Tower
San José, CA 95113-1705

Electronically Sent
john.tu@sanjoseca.gov

Dear Mr. Tu:

The California Department of Transportation (Caltrans), Division of Aeronautics (Division) received a proposed overrule by the city of San Jose (City), in accordance with California Public Utilities Code (PUC) section 21676(a), on February 19, 2021. In accordance with PUC section 21676(a)ⁱ, an overrule may be proposed by the City after the Santa Clara County Airport Land Use Commission (SCCALUC) finds a general or specific plan, including amendments, inconsistent with the Comprehensive Land Use Plan (CLUP)ⁱⁱ for Norman Y Mineta San Jose International Airport (SJC). In accordance with PUC section 21675, the SJC CLUP contains height restrictions on buildings, specifies use of land, and determines building standards, including soundproofing adjacent to airports, within the airport influence area.

The proposed overrule involves a General Plan Amendment (Envision San José 2040 and Diridon Station Area Plan) and rezoning to a DC(PD) Planned Development Zoning Districtⁱⁱⁱ. This involves the City processing a proposed General Plan Amendment (GPA) and Planned Development Rezoning File Nos. GP19-009 and PDC19-039 to the Santa Clara County Airport Land Use Commission

ⁱ PUC section 21676(a), each local agency whose general plan includes areas covered an airport land use compatibility plan must submit a copy of its plan or specific plan to the airport land use commission (ALUC).

ⁱⁱ PUC section 21675(a): Each commission shall formulate an airport land use compatibility plan that will provide for the orderly growth of each public airport and the area surrounding the airport within the jurisdiction of the commission, and will safeguard the general welfare of the inhabitants within the vicinity of the airport and the public in general.

ⁱⁱⁱ The project consist of 5,900 residential units; ~7,300,000 square feet of office space; ~500,000 GSF square feet of retail, cultural, arts, and civic type uses; ~300 hotel rooms; ~800 rooms of limited-term accommodations; event and conference centers of ~100,000 GSF; ~approximately 15 acres of open space; and other accessory uses.

(SCCALUC) for a consistency determination with policies contained in the SJC CLUP.

On December 16, 2020, the SCCALUC found the proposed GPA and Rezoning inconsistent with the policies of safety, height, and noise contained within the SJC CLUP. The GPA and Rezoning were determined to be inconsistent with the SJC CLUP policies, Table 4-1, Policy N-4 and Policy H-1.

In response to the SCCALUC's inconsistency finding, the City prepared a resolution with draft findings in support of the GPA and Rezoning. The Division has reviewed the City's proposed findings relevant to the SCCALUC's specific inconsistency determination and has determined the proposed findings are not consistent with the declaration and purposes of the statutes set forth in PUC section 21670 and with the foundational principles contained in the California Airport Land Use Planning Handbook (Handbook)^{iv}

The City's resolution includes a finding that pertains to SJC CLUP Policy N-4. The City's finding states that "analysis shows that the Year 2027 65 decibels (dB) Community Noise Level Equivalent (CNEL) noise contour extends into several blocks on the project site that the Downtown West Project would designate for residential or hotel use." "Although the project is proposing the above type of development in the 65 dB CNEL noise contour, the City finds the project is consistent with Section 21670." In support of their noise finding, the City listed reasons why the noise finding is consistent with PUC section 21670.

The Division finds that Goal EC-1 of the Envision San José General Plan 2040 is not consistent with the California Building Code and with ALUC Policy N-4. The California Building Code (Building Code) section 1207.11 (California Code of Regulations, Title 24) states that interior noise levels shall not exceed 45 (dB) for either the Day-Night Average Sound Level (DNL) or the CNEL. The worst-case noise level of existing or 10 years in the future shall be used. Further, the Building Code states that a Noise Element be included as part of the local general plan and noise contours are to be included. The City's resolution does not provide the General Plan noise contours and analysis regarding a future worst-case scenario for residential type uses as required by the Building Code. According to the Building Code, if residential type structures exceed 60 dB CNEL or DNL, per the Noise Element, then an acoustical analysis is required. In any case, an acoustical analysis for residential type uses prior to building permit issuance should be included as a condition of approval.

^{iv}PUC section 21674.7

The Division finds that the Envision San José 2040 General Plan, which identifies outdoor noise environments of 60-75 dBA DNL as "conditionally acceptable" for residential and hotel uses, if interior noise levels are mitigated to 45 dBA DNL, is not consistent with PUC section 21670. The City's Envision San José 2040 General Plan is inconsistent with PUC section 21674.7(b)^v, PUC section 21675(a), the Handbook's foundational principles and CLUP policy. The City's finding does not discourage incompatible land uses near existing airports (PUC section 21674.7); proposed buildings are not guided by the noise criteria compatible with airport operations PUC section 21674.7); safeguard the inhabitants within the vicinity of airports (PUC section 21675(a); the Building Code that establishes 65 dB CNEL as the maximum acceptable noise level for county designated noise-problem airports; and SJC CLUP Policy N-4, which states that "no outdoor patios or outdoor activity areas associated with the residential portion of a mixed use residential project or a multi-unit residential project.

The Division finds that residential exterior spaces within the 65 dBA DNL noise contour would be inconsistent with orderly development of SJC. The City's finding is not consistent with the intent and declaration by the California Legislature in PUC section 21670(a)^{vi}, and PUC section 21676(a)^{vii}. The City's finding does not provide for the orderly development of SJC (PUC section 21670(a) because the SJC Master Plan noise analysis is not consistent with the SJC CLUP policies (PUC section 21676(a)).

The Division finds that the benefits of exterior spaces and where a person chooses to live is not a sufficient finding. It is the intent of the State Aeronautics Act (Act)

^v It is the intent of the Legislature to discourage incompatible land uses near existing airports. Therefore, prior to granting permits for the renovation or remodeling of an existing building, structure, or facility, and before the construction of a new building, it is the intent of the Legislature that local agencies shall be guided by the height, use, noise, safety, and density criteria that are compatible with airport operations, as established by this article, and referred to as the Airport Land Use Planning Handbook, published by the division, and any applicable federal aviation regulations, including, but not limited to, Part 77 (commencing with Section 77.1) of Title 14 of the Code of Federal Regulations, to the extent that the criteria has been incorporated into the plan prepared by a commission pursuant to Section 21675.

^{vi} PUC section 21670(a): The Legislature hereby finds and declares that: (1) It is in the public interest to provide for the orderly development of each public use airport in this state and the area surrounding these airports so as to promote the overall goals and objectives of the California airport noise standards adopted pursuant to Section 21669 and to prevent the creation of new noise and safety problems. (2) It is the purpose of this article to protect public health, safety, and welfare by ensuring the orderly expansion of airports and the adoption of land use measures that minimize the public's exposure to excessive noise and safety hazards within areas around public airports to the extent that these areas are not already devoted to incompatible uses.

^{vii} PUC 21676(a): Each local agency whose general plan includes areas covered by an airport land use compatibility plan shall, by July 1, 1983, submit a copy of its plan or specific plans to the airport land use commission. The commission shall determine by August 31, 1983, whether the plan or plans are consistent or inconsistent with the airport land use compatibility plan.

to ensure the orderly growth of airports and prevent new noise and safety problems, regardless of the benefits of exterior spaces and when people choose to live near an airport.

The Division finds that the City's noise complaint tracking system indicating minimal noise complaints from existing development is not consistent with PUC section 21670. This reason does not account for future conditions and does not prevent new noise and safety problems.

The City's resolution states that "the ALUC made its Land Use Plan inconsistency determination prior to the Federal Aviation Administration's issuance of any "No Hazard" determination for the subject project and that CLUP Policy H-1 provides that the FAA determination shall prevail." The Division finds that FAA aeronautical studies are typically conducted upon submission of Title 14, Code of Federal Regulations (CFR) Part 77, "*Safe, Efficient Use and Preservation of the Navigable Airspace*" (Part 77), Form 7460-1, which pertains to specific structures, objects or natural features. FAA aeronautical studies do not typically consider broad policies and standards applicable to a general or specific plan or a cumulative number of future buildings, objects or natural features as proposed with the GPA and Rezoning. If the FAA has made a "Determination of No Hazard" for the proposed GPA and Rezoning policies and standards, it was not submitted with the proposed resolution and findings.

The City's resolution includes a finding that pertains to ALUC CLUP Policy H-1: "Any structure or object that penetrates the Federal Aviation Regulations Part 77, *Objects Affecting Navigable Airspace* (FAR Part 77) surfaces, as illustrated in Figure 6, is presumed to be a hazard to air navigation and will be considered an incompatible land use, except..., the proponent may submit the project data to the FAA for evaluation and air navigation hazard determination, in which case the FAA's determination shall prevail." The Legislature enacted PUC sections 21402^{viii} and 21659(a)^{ix} for airspace protection purposes. According to the Act, CFR Part 77 is used as the primary airspace protection standard for the State. CFR Part 77 provides a static, evenly applied, and "mappable" basis for determining

^{viii}The ownership of the space above the land and waters of this State is vested in the several owners of the surface beneath, subject to the right of flight described in Section 21403. No use shall be made of such airspace which would interfere with such right of flight; provided, that any use of property in conformity with an original zone of approach of an airport shall not be rendered unlawful by reason of a change in such zone of approach.

^{ix}No person shall construct or alter any structure or permit any natural growth to grow at a height which exceeds the obstruction standards set forth in the regulations of the Federal Aviation Administration relating to objects affecting navigable airspace contained in Title 14 of the Code of Federal Regulations, Part 77, Subpart C, unless the Federal Aviation Administration has determined that the construction, alteration, or growth does not constitute a hazard to air navigation or would not create an unsafe condition for air navigation.

height compatibility of structures or objects near an airport. The FAA regulates navigable airspace and established the CFR Part 77 process that requires project sponsors to inform FAA about proposed construction that could affect navigable airspace. FAA Determinations on an Airspace Study does not constitute an approval of a proposed project. Rather, it is a finding relative to CFR Part 77 surfaces surrounding an airport. Further, the provisions of PUC section 21670 (inclusive) reference CFR Part 77 for ALUCs use in airport land use compatibility planning and policy formation. CFR Part 77 is incorporated as part of the SJC Airport Master Plan, on which ALUC policies must be based (PUC Section 21675(a)*). The SCCALUC adopted their policies consistent with the Handbook's foundational principles.

The City resolution also includes a finding that states, that "the project is in compliance with General Plan Transportation Policy TR14.2." The City's finding is not consistent with PUC section 21670 because it requires future determinations by the FAA for individual buildings, objects or natural features. It does not demonstrate that cumulative future conditions would ensure the orderly development of SJC or at a minimum maintain protection of SJC airspace. Such consequences may reduce the operating utility of SJC. It may be more appropriate for the FAA to conduct an aeronautical study that evaluates all potential development scenarios to best protect SJC and SJC's airspace.

The Division would like to reiterate the importance of protecting SJC. Development encroachment upon an airport is likely to constrain an airport's vital contribution to the community, region and State, and exposes people to safety hazard and excessive noise. In addition, SJC provides economic stimulus, generates on and off airport jobs and is a hub for domestic and international commerce and tourism. Caltrans concurs with SCCALUC's inconsistency determination because SJC is important to the California Aviation System Plan.

*The commission's airport land use compatibility plan shall include and shall be based on a long-range master plan or an airport layout plan, as determined by the Division of Aeronautics of the Department of Transportation, that reflects the anticipated growth of the airport during at least the next 20 years.

Mr. Tong (John) Tu
March 23, 2021
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If you have questions or need further assistance, please contact me at (916) 654-5314 or via email at robert.fiore@dot.ca.gov .

Sincerely,

Original signed by

ROBERT FIORE
Aviation Planner

c: Ryan Sheelen, C.M., Airport Planner III, Planning and Development Division
San José International Airport; rsheelen@sjc.org

Laurie Suttmeier, FAA, SFO; laurie.suttmeier@faa.gov

Mark Connolly, Program Manager, Santa Clara County Airport Land Use
Commission; Mark.Connolly@PLN.SCCGOV.ORG



Airport Land Use Commission

County Government Center, 70 W. Hedding Street, East Wing, 7th Fl., San Jose, CA 95110
(408) 299-5786 FAX (408) 288-9198

EXHIBIT "B"

April 15, 2021

James Han
Planner | Planning Division | PBCE
City of San José | 200 E. Santa Clara St. 3rd Floor San José, CA 95113

RE: ALUC comments on Overrule findings proposed by the City San Jose for the Downtown West General Plan Amendment and Rezoning (City of San Jose file numbers GP19-009, PDC19-039), affecting lands within the San Jose International Airport Influence Area (AIA).

Dear Mr. Han:

The ALUC considered the City’s proposed overrule of Downtown West General Plan Amendment and Rezoning at its March 24, 2021 meeting and concluded that the proposed overrule is not consistent with the purposes of Article 3.5 of Chapter 4 of Part 1 of Division 9 of the Public Utilities Code, sections 21670 through 21679.5, which are to protect public health, safety and welfare by, among other things, ensuring the adoption of land use measures that minimize the public’s exposure to excessive noise and safety hazards within areas around public airports to the extent that these areas are not already devoted to incompatible uses. The specific reasons for the ALUC’s determination are provided below.

In general, the ALUC finds that the overrule findings made by the City of San Jose are insufficient and not factual, as well as inconsistent with the purposes of the CLUP.

The following resolution language should be either be deleted, or amended:

WHEREAS, the ALUC found the proposed project to be consistent with the CLUP except for noise and height as described above; and
To;
WHEREAS, the project was proposed outside of all ALUC safety zones for SJC; and

Regarding draft resolution items D and E(4); The Envision San Jose 2040 General Plan adoption by the City, included a court order settlement agreement, accepted by the City and ALUC, that the San Jose International Land Use Plan (CLUP) would be modified to include no outdoor residential space within the 65 dBA noise contour or greater. The ALUC believes that allowing the project to move forward as proposed would be in violation of the settlement agreement.

Also, item E(4) States:

The Envision San José 2040 General Plan identifies outdoor noise environments of 60-75 dBA DNL as “conditionally acceptable” for residential and hotel uses, as long as interior

noise levels are mitigated to 45 dBA DNL. The residential outdoor activities areas at Downtown West Blocks E3 and C3 are located both in the environs of the Mineta San José International Airport and in Downtown. These areas are exempt from the 60 dBA DNL exterior noise limit the City applies in other residential areas.

The ALUC questions why are these areas exempt from the 60 dBA DNL noise limit? The CLUP does not have any exemption clauses for this area. Also, the City's General Plan and noise ordinance would reinforce the CLUP noise policies.

Item E(3) includes a statement regarding residents living with exterior noise and discussion of a property notice to those residents. The ALUC provides the City with a consistency determination to avoid the need for notices for unreasonable, adverse noise impacts. If the project were consistent with the SJC CLUP policies, there would be no need to use that notice.

The draft resolution includes many statements in Section 1 regarding project consistency with the City's General Plan. The ALUC notes that these are not relevant to the decision-making responsibility the ALUC, which is to provide a consistency determination with the policies of safety, height and noise.

Likewise, project consistency with the SJC Airport Master Plan is irrelevant and inaccurate in some cases, because the Airport Master Plan is an Airport operation document, not a surrounding land use document. The ALUC's responsibility for a project referral is to evaluate the project against the CLUP policies of safety height and noise, for which the project was found inconsistent with the height and noise policies.

Also, on January 13, 2021, the Federal Aviation Administration ("FAA") published, in the Federal Register, Vol. 86, No. 8, Docket No. FAA-2021-0037 a noise analysis of impacts to receptors adjacent to airports. The ALUC notes regarding noise that the document has direct applicability to the subject project and would be inconsistent with it.

The ALUC wishes to reiterate the following were the grounds under which the ALUC found the project Inconsistent at their December 16th, 2020 meeting:

The ALUC found the referral ***Inconsistent*** with the noise and height policies as defined in the San Jose International Airport Comprehensive Land Use Plan (SJC CLUP).

Table 4-1 of SJC CLUP states: "residential uses are "Generally Unacceptable" between the 65-70 dBA CNEL Noise Contours. New construction or development should be discouraged. If new construction or development does proceed, a detailed analysis of the noise reduction requirements must be made and needed noise insulation features included in the design. Outdoor activities are likely to be adversely affected."

Policy N-4 of the SJC CLUP states: "No residential or transient lodging construction shall be permitted within the 65 dB CNEL contour boundary unless it can be demonstrated that the resulting interior sound levels will be less than 45 dB CNEL and there are no outdoor patios or outdoor activity areas associated with the residential portion of a mixed-use residential project or

a multi-unit residential project. (Sound wall noise mitigation measures are not effective in reducing noise generated by aircraft flying overhead.) “

The proposed General Plan Amendment and Rezoning would also allow building heights in conflict with FAA Part 77 Surfaces by using TERP surfaces to define future building heights. The ALUC uses FAA Part 77 Surfaces as a height restriction boundary.

The ALUC wished to point out that nobody from the City of San Jose was willing to engage in a dialogue with ALUC at the time of the referral.

The ALUC urges the City of San Jose, if they disagree with portions of the SJC CLUP, they should engage in the appropriate paths to try and amend the CLUP, rather than to Overrule ongoing inconsistencies.

Last, the timing of Overrule notification by the City of San Jose made it impossible for the ALUC to comment within the 30-day period. The Overrule was transmitted to the ALUC on February 19, 2021 at 3:33 PM. Which was prior to the February meeting, but 30 days would expire before the March 24th, 2121 regular meeting.

Please note that ALUC staff wishes to be noticed and included in the City Council action pursuant to the Public Resources Code 21670, which requires a 2/3 vote of the entire body of the City of San Jose City Council. Also, that the Cal Trans Division of Aeronautics comments shall also be included.

If you have any questions, please feel free to contact ALUC staff, Mark Connolly, at 408-299-5786, or via e-mail at mark.connolly@pln.sccgov.org.

Sincerely,

A handwritten signature in black ink that reads "Mark J. Connolly". The signature is written in a cursive style with a long, sweeping underline.

Mark J. Connolly
Senior Planner / ALUC Program Manager

Cc: John Tu; Supervising Planner, City of San Jose