



## COMMUNITY DEVELOPMENT DEPARTMENT

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### CITY COUNCIL STAFF REPORT

Meeting: April 7, 2020

#### Subject

**Item 9A:** Petition for Reconsideration regarding the City Council decision of March 3, 2020 to approve a new 155-room seven-story hotel (24-hour operations) with underground parking, event meeting rooms, a ground floor restaurant with separate bar, and a rooftop lounge with separate bar by demolishing a commercial building with an area of 8,323 sq. ft., General Plan Amendments to amend Table LU-1 by increasing the development allocation of hotel rooms to 155 hotel rooms in the Homestead Special Area and Figure LU-2 and Policy LU-23.2 adding Figure LU-5 to allow increased heights and reduced building plane within the North De Anza Gateway specific to this development, Development, Architectural and Site Approval, and Use Permits (“Project”); Application No(s): GPA-2018-01, DP-2018-01, ASA-2018-02, DA-2018-01, U-2018-02, EA-2018-03; Applicant(s): John Vidovich (De Anza Properties); Location: 10931 N De Anza Blvd.; APN #326-10-061.

#### Recommended Actions

That the City Council conduct a public hearing, and:

1. Adopt Resolution No. 20-XXXX (Attachment AA) denying the petition, which does not meet the requirements of Cupertino Municipal Code (CMC) Section 2.08.096.

#### Discussion

#### **Background:**

#### ***Basis for Reconsideration***

City of Cupertino Municipal Code (“CMC”), Section 2.08.096, contains procedures for interested persons to petition the City Council to reconsider its adjudicatory decisions. A petition for reconsideration shall specify, in detail, each and every ground for reconsideration. Failure of a petition to specify any particular ground or grounds for reconsideration precludes that particular omitted ground or grounds from being raised or litigated in a subsequent judicial proceeding. The grounds for reconsideration are limited to the following:

1. An offer of new relevant evidence which, in the exercise of reasonable diligence, could not have been produced at any earlier city hearing.
2. An offer of relevant evidence which was improperly excluded at any prior city hearing.
3. Proof of facts which demonstrate that the City Council proceeded without, or in excess of its, jurisdiction.
4. Proof of facts which demonstrate that the City Council failed to provide a fair hearing.
5. Proof of facts which demonstrate that the City Council abused its discretion by:
  - a. Not preceding in a manner required by law; and/or
  - b. Rendering a decision which was not supported by findings of fact; and/or
  - c. Rendering a decision in which the findings of fact were not supported by the evidence.

### ***Reconsideration Petition***

The petition for reconsideration submitted by Michael R. Lozeau, Lozeau Drury LLP on behalf of petitioner Laborers International Union of North America, Local Union No. 270 ("LIUNA") (Attachment AC). The petition requests reconsideration of the approval of the Project, and lists the alleged grounds for reconsideration of the Council's March 3, 2020 decision in a letter submitted with the Reconsideration Petition form. The petition also includes 362 pages of reports and other materials previously submitted to the City.

The alleged ground for reconsideration are based on abuse of discretion, which is listed as one of the grounds for reconsideration in CMC Section 2.08.096.B.5:

- 5. Proof of facts which demonstrate that the City Council abused its discretion by:**
  - a. Not preceding in a manner required by law; and/or**
  - b. Rendering a decision which was not supported by findings of fact; and/or**
  - c. Rendering a decision in which the findings of fact were not supported by the evidence.**

Each of the alleged grounds for reconsideration as submitted by the petitioner, and the City's findings of fact and responses, to each of the alleged grounds, is described below.

If reconsideration is granted, the Council may conduct a hearing and reconsider its decision in light of the evidence presented. (CMC § 2.08.096.A.) This hearing on the

petition for reconsideration constitutes the third full hearing conducted by the City regarding the Project.

**City Findings of Fact:**

The petitioner has not provided any proof of facts which demonstrate that the Council abused its discretion by not proceeding in a manner required by law, rendering a decision which was not supported by findings of fact, or rendering a decision in which the findings of fact were not supported by the evidence.

Petition	Response
<p>A. The petitioner states that “[d]espite the additional conditions of approval for the Project added by the City Council on the Project, and after reviewing the Project, MND, and the City’s response to our comments, a ‘fair argument’ remains that the Project may have unmitigated adverse environmental impacts. Therefore, CEQA requires that the City prepare an environmental impact report (‘EIR’) for the Project pursuant to the California Environmental Quality Act (‘CEQA’), Public Resources Code section 21000, et seq. By adopting the [Mitigated Negative Declaration] (MND), the City failed to proceed in a manner required by law.” (Petition for Reconsideration Letter, p. 2.)</p> <p>B. &amp; C. Petitioner’s “[n]oise expert, Derek Watry, reviewed the proposed Project and relevant documents regarding the Project’s noise impacts, and concluded that the MND improperly analyzed construction noise levels.” and that “construction noise levels during the five stages of the Project</p>	<p>A. The City Council proceeded in a manner required by law and based its decision to approve the Project on substantial evidence including substantial evidence in the Initial Study/Mitigated Negative Declaration (“IS/MND”) and supporting technical studies, other prepared written material including, but not limited to, responses to comments, staff reports, and testimony at the hearings. Petitioner has not made a fair argument based on substantial evidence that the Project may have a significant effect on the environment for the reasons stated in the Response to Comments Memos dated December 5, 2019 and February 20, 2020, Attachments AF and AG, and Attachment AD <i>Initial Study and Mitigated Negative Declaration Response to Comments Memo for City Council dated March 24, 2020,</i></p> <p>B. &amp; C. The City Council conducted the hearing in a manner required by law, and rendered a decision based on the established regulations in the Cupertino Municipal Code, and the findings based on substantial evidence in the record as a whole including substantial evidence in the IS/MND</p>

<p>construction would create a significant noise impact.” (Petition for Reconsideration Letter, p. 4.)</p>	<p>and supporting technical studies, other prepared written material including, but not limited to, responses to comments, staff reports and testimony by staff and members of the public. Please refer to Attachment AD, <i>Initial Study and Mitigated Negative Declaration Response to Comments Memo for City Council dated March 24, 2020</i>, for a complete response to the petitioner, which concludes based on substantial evidence, that (1) the City previously responded to petitioner’s comments, including the alleged grounds for reconsideration; (2) the interpretation of the construction noise limits in the CMC is based on scientific and factual data which has been reviewed by the City and is reflected in its historical practices used for other projects as well as guidance from the Federal Transit Administration; (3) the construction noise levels on adjacent properties was calculated based on all construction equipment operating simultaneously, which is an extremely conservative assumption; (4) the City followed best practices with regard to spatial assumptions for calculating noise levels on adjacent properties and conservatively did not account for intervening structures and the buffering parking lots; (5) locating a hotel next to another hotel is not an incompatible use for purposes of the noise increase thresholds in the General Plan; and (6) the calculated traffic noise increase due to the Project is well below the threshold and would be imperceptible. For the foregoing reasons, there is no substantial evidence that the Project may have a significant effect on the environment</p>
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	due to noise and the petitioner has not made a fair argument.
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Based on the above discussion, the Attachments to this Staff Report, and the findings in Resolution No. 20-XXXX, the petition does not specify relevant grounds or relevant evidence for reconsideration; therefore, staff recommends that the City Council deny the petition for reconsideration and uphold the March 3, 2020 City Council decision.

Fiscal Impacts

The project will generate net positive fiscal impacts to the City's annual budget due to the collection of Transient Occupancy Taxes. This is estimated to be \$1 - 1.5 million per year. As previously mentioned, to ensure collection of the TOT, a condition of approval has been added that reservations may not be made that exceed 29 consecutive nights of stay.

## Sustainability Impacts

The project will incorporate a green roof on the second floor and is designed to achieve LEED silver. Further, the City's Zero Waste Policy will require that the project recover and divert at least 65 percent of the construction waste generated by the project.

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Prepared by: Gian Paolo Martire, Senior Planner

Approved by: Benjamin Fu, Director of Community Development

Approved by Submission by: Dianne Thompson, Assistant City Manager

## **ATTACHMENTS:**

AA – City Council Resolution No. 20-XXXX

AB - Resolution No. 20-005 – Adopting a Mitigated Negative Declaration, Mitigation Measures, and a Mitigation Monitoring and Reporting Program

AC - Petition for Reconsideration filed by Michael R. Lozeau, Lozeau Drury LLP, received March 13, 2020

AD - Initial Study and Mitigated Negative Declaration Response to Comments Memo for City Council, dated March 24, 2020.

AE – Initial Study/Mitigated Negative Declaration, dated July 2, 2019

AF – Initial Study and Mitigated Negative Declaration Responses to Comments Memo, dated December 5, 2019

AG - Initial Study and Mitigated Negative Declaration Responses to Comments Memo for City Council, dated February 20, 2020.

AH – Project Plans