

RESOLUTION NO. 20-XXXX

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CUPERTINO DENYING THE PETITION OF LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 270, SEEKING COUNCIL RECONSIDERATION OF ITS DECISION 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. LOCATION AT 10931 N DE ANZA BLVD.

WHEREAS, on March 3, 2020, the Cupertino City Council held a public hearing and at the conclusion of the hearing approved on a 4-1 vote (Willey voting no) applications GPA-2018-01, DP-2018-01, ASA-2018-02, U-2018-02, EA-2018-03 for a new seven story, 155 room located at 10931 N. De Anza Blvd (“Project”);

WHEREAS, the Cupertino City Council's decision was within its discretion and made at a properly noticed public meeting;

WHEREAS, petitioner Laborers International Union of North America, Local Union No. 270 (“LIUNA”) filed a petition for reconsideration with the City on March 13, 2020, and petitioned the City Council to reconsider its decision under the provisions of Cupertino Municipal Code (“CMC”) Section 2.08.096; and

WHEREAS, the City Council has considered all relevant evidence presented by the parties at all hearings, including evidence presented at the April 7, 2020 reconsideration hearing.

NOW, THEREFORE, IT IS HEREBY RESOLVED AS FOLLOWS:

1. The petitioner’s petition for reconsideration is defective on its face in that it does not offer proof of facts as required by CMC Section 2.08.096.

2. The petitioner did not provide new relevant evidence which, in the exercise of reasonable diligence, could not have been produced at any earlier city hearing on the Project (CMC § 2.08.096 (B) (1)).
3. The petitioner did not provide relevant evidence which was improperly excluded at any prior city hearing on the Project (CMC § 2.08.096 (B) (2)).
4. The petitioner has failed to provide proof of facts which demonstrate that the City Council proceeded without, or in excess of its, jurisdiction (CMC § 2.08.096 (B) (3)).
5. The petitioner has failed to present any evidence that the City Council failed to provide a fair hearing (CMC § 2.08.096 (B) (4)).
6. The petitioner has failed to demonstrate that the City Council abused its discretion by not proceeding in a manner required by law; rendering a decision which was not supported by findings of fact; and/or rendering a decision in which the findings of fact were not supported by the evidence (CMC § 2.08.096 (B) (5)).
7. The City Council determines that:
  - a. The City Council's decision is supported by findings of fact in the attached Exhibit A.
  - b. The findings of fact of the City Council's decision are supported by substantial evidence in the record of proceedings as demonstrated in Exhibit A.
8. The petitioners' Petition for Reconsideration of the City Council's decision of March 3, 2020 is DENIED, thereby affirming the original decision.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this 7<sup>th</sup> day of April 2020, by the following vote:

Vote                      Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

SIGNED:  _____ Steven Scharf, Mayor City of Cupertino	_____ Date
ATTEST:  _____ Kirsten Squarcia, City Clerk	_____ Date
APPROVED AS TO FORM:  _____ Heather Minner, City Attorney	_____ Date

## EXHIBIT A

### CITY COUNCIL FINDINGS IN RESPONSE TO PETITION FOR RECONSIDERATION

Cupertino Municipal Code Section 2.08.096 states:

“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 proceeding 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.”

The petition for reconsideration submitted by Michael Lozeau, Lozeau Drury LLP on behalf of LIUNA, consisting of 374 pages, contests the City Council’s March 3, 2020 decision on the grounds listed in CMC Section 2.08.096.B.5. Each of the grounds for the reconsideration as submitted by the petitioner and the City’s findings of fact and responses to each of the grounds is described below.

If reconsideration is granted, the Council may conduct a hearing and reconsider its decision in light of the new evidence presented. Reconsideration of the Project approvals would constitute the third full hearing on the Project conducted by the City.

- 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.**

City Findings of Fact:

The petitioner has not provided any proof of facts that 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 construction would create a significant noise impact.” (Petition for Reconsideration Letter, p. 4.)</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 and supporting technical studies, other prepared written material including, but not limited to, responses to</p>

comments, staff reports and testimony by staff and members of the public. Please refer to Attachment AD, *Initial Study and Mitigated Negative Declaration Response to Comments Memo for City Council dated March 24, 2020*, 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 due to noise and the petitioner has not made a fair argument.