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TITLE:

RESOLUTION OF THE CITY'S INTENT TO OVERRULE THE ORANGE COUNTY AIRPORT LAND USE COMMISSION'S INCONSISTENCY DETERMINATION FOR THE CITY OF COSTA MESA'S 2021-2029 6TH CYCLE HOUSING ELEMENT UPDATE

DEPARTMENT: ECONOMIC AND DEVELOPMENT SERVICES DEPARTMENT/ PLANNING DIVISION

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RECOMMENDATION:

1. Conduct a public hearing and adopt a Resolution regarding the City's intent to overrule the Orange County Airport Land Use Commission's inconsistency determination for the City of Costa Mesa's 2021-2029 6th Cycle Housing Element Update.
2. Direct City staff to forward the Resolution to the Airport Land Use Commission (ALUC), and after 45 days schedule a City Council public hearing to consider overruling ALUC's determination.

BACKGROUND:

Pursuant to Public Utilities Code (PUC) Section 21676(b), when a jurisdiction proposes an amendment of a general plan or specific plan, or the adoption or approval of a zoning ordinance or building regulation within the planning boundary established by ALUC, the City must refer the proposed action to the ALUC to determine whether the action is consistent with the *Airport Environs*

Land Use Plan (AELUP). If the ALUC determines that the action is inconsistent with the AELUP, the City may overrule the Commission by a two-thirds vote of the City Council. State law indicates that the ALUC serves as a limited “advisory body” and therefore the Costa Mesa City Council has the final authority to make land use decisions in the City.

March 17, 2022 ALUC Review

On March 17, 2022, the ALUC considered the City’s 2021-2029 6th Cycle Housing Element. On a 4-0 decision and after receiving the ALUC staff presentation and a follow up presentation by City staff, the ALUC determined that the City’s Housing Element Update is inconsistent with the AELUP. The ALUC staff report specifically described four AELUP consistency review areas for the Housing Element update: 1) Aircraft Noise Impacts, 2) Aircraft Height Restrictions, 3) Flight Tracks and Safety Zones, and 4) Heliports.

The ALUC report concluded in only one of the AELUP review areas (Height Restrictions) that the City’s Housing Element update was inconsistent (see the attached ALUC staff report). This inconsistency finding was based on only nine (9) of the over 100 candidate housing sites identified in the Housing Element. Prior to the ALUC public hearing, City staff submitted a letter responding to the ALUC staff recommendation (see the attached City staff letter).

ANALYSIS:

Staff is recommending that the City Council adopt a Resolution indicating its intent to overrule the ALUC finding of inconsistency in regard to the City’s 2021-2029 6th Cycle Housing Element update. Overruling an ALUC inconsistency decision requires two public hearings: one hearing for the City Council determination to notify ALUC of its intention to overrule the ALUC decision, and a second hearing for the City Council to consider any additional ALUC comments and adopt the findings to overrule the ALUC determination. The current recommended action would authorize staff to formally provide notice to the ALUC pursuant to Public Utilities Code Section 21676(b) of the City’s intention and to move forward with scheduling a public hearing.

ALUC Housing Element Sites Determined to be Inconsistent

The ALUCs inconsistency determination was based on nine (9) candidate housing sites identified in the 2021-2029 6th Cycle Housing Element to satisfy the City’s Regional Housing Needs Assessment (RHNA). These sites and ALUC’s determinations are described below:

Housing Element Sites 144, 206 and 207

The ALUC made a determination that three of the City’s candidate housing sites are inconsistent with the AELUP in that the existing North Costa Mesa Specific Plan permits a maximum building height of 180 feet above ground level for these sites. When coupled with existing topography, if future buildings were constructed to the maximum allowable height, such buildings could penetrate the John Wayne Airport imaginary horizontal surface (206 feet above mean sea level) by three to five feet. These three sites are located in the North Costa Mesa Specific Plan-Area 6 (South Coast Metro Center), and are owned by JKS-CMFV LLC.

- **Site 144 (589 Anton Boulevard)** is developed with a surface parking lot that serves an adjacent health club (24 Hour Fitness), and is approximately 3.3 acres in size. The Housing

Element update indicates that this site can accommodate potentially 305 housing units.

- **Site 206 (545 Anton Boulevard)** is developed with a multi-tenant commercial building, and is approximately 0.7 acres in size. The Housing Element update indicates that this site can accommodate potentially 66 housing units.
- **Site 207 (545 Anton Boulevard)** is developed with a surface parking lot and is approximately 1.8 acres in size. The Housing Element update indicates that this site can accommodate potentially 164 housing units.

Housing Element Sites 139, 140, 141, 201, 202 and 205

The ALUC also made an inconsistency determination for six additional candidate housing sites. The existing North Costa Mesa Specific Plan maximum building height requirement for these sites is 315 feet above ground level. When coupled with existing topography, if future buildings were constructed to the maximum allowable height, the buildings could penetrate the John Wayne Airport imaginary horizontal surface by 141 to 145 feet. These six sites are located in North Costa Mesa Specific Plan-Area 4 (South Coast Plaza Town Center) and are owned by either South Coast Plaza or The Irvine Company.

- **Site 139 (3400 Bristol Street)** is developed with several commercial office uses and is approximately 0.53 acres in size. The Housing Element update indicates that this site can accommodate potentially 47 housing units.
- **Site 140 (APN: 410-051-51) 685 Sunflower Avenue** is a vacant portion of a parcel that is developed with a parking structure and is approximately 0.88 acres in size. The Housing Element update indicates that this site can accommodate potentially 78 housing units.
- **Site 141 (APN: 410-051-52) 3410 Bristol Street** is developed with an existing office building and is approximately 1.35 acres in size. The Housing Element update indicates that this site can accommodate potentially 121 housing units.
- **Site 201 (APN: 410-481-05) 3201 Park Center Drive** is developed with several Pacific Arts Center buildings and is approximately 1.35 acres in size. The Housing Element update indicates that this site can accommodate potentially 186 housing units.
- **Site 202 (APN: 410-491-07) 601 Anton Boulevard** is developed with several Pacific Arts Center buildings and is approximately 12.7 acres in size. The Housing Element update indicates that this site can accommodate potentially 349 housing units.
- **Site 205 (APN: 410-051-46) 3420 Bristol Street** is developed with an existing office building and is approximately 0.7 acres in size. The Housing Element update indicates that this site can accommodate potentially 70 housing units.

ALUC Override Process

In order to override the ALUC inconsistency decision regarding the City's Housing Element update, the City Council must make two findings, with an affirmative two-thirds vote, that the Housing Element update is consistent with the purposes of PUC Division 9, Part 1, Chapter 4, Article 3.5 as stated in Section 21670. If the City Council makes these findings, the City is required to provide

ALUC a notice of the intent to overrule the ALUC inconsistency determination with the applicable PUC findings at least 45 days prior to the City's final decision to overrule ALUC. ALUC may provide comments to the City upon receiving the notice and findings. The City must include the ALUC comments in the public record of any final decision to overrule ALUCs determination.

Override Findings

The two required overrule findings pursuant to PUC Section 21670 are shown in bold below, followed by the City's justification to overrule. (The findings are also provided in the attached Resolution.)

PUC Overrule Finding No. 1 - *Provide for the orderly development of areas surrounding 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.*

PUC Finding No. 1 justification for overrule:

The March 17, 2022 ALUC inconsistency determination did not identify concerns with noise in regard to the City's Housing Element update. To the contrary, the ALUC determination indicated that the City's candidate housing sites are appropriately located outside of Airport noise contours of concern and further the City's General Plan Noise Element already addresses potential applicable airport/residential noise impacts in General Plan Noise Element Policies N-1.1, N-1.5, N-1.6, N-2.4 and N-2.6. Specifically, the ALUC recognized that the City's Noise Element Policy N-2.6 requires an "interior noise standard of 45 dBA CNEL be enforced for any new residential project," which is consistent with the ALUC residential noise standards. Therefore, the City is justified to make the finding to overrule the ALUC inconsistency determination in regard to PUC Finding No. 1.

PUC Overrule Finding No. 2 - *Protect public health, safety, and welfare by ensuring the adoption of land use measures that minimize the public's exposure to safety hazards within areas around public airports to the extent that these areas are not already devoted to incompatible uses.*

PUC Finding No. 2 justification for overrule: At the March 17, 2022 ALUC hearing, the ALUC determined that in two general areas where the Housing Element proposed potential housing sites that the City's existing maximum building height provisions were inconsistent with the AELUP as described above. According to the ALUC staff report, the City's *existing* [emphasis added] North Costa Mesa Specific Plan provisions permit a maximum building height that could potentially result in building construction that exceeds the 206-foot John Wayne Airport Imaginary Horizontal Surface. As indicated by ALUC staff, the purpose of the ALUC imaginary horizontal surface standard is to (1) evaluate the effect of proposed uses on airport operating procedures, and (2) identify potential aeronautical hazards in order to prevent or minimize adverse impacts to navigable airspace.

However, the City's Housing Element update does not grant any entitlements, change any land use standards or authorize any development beyond what is allowed under the City's current General Plan and Zoning Code (including the maximum building height identified inconsistent by the ALUC). Rather, the Housing Element update only outlines a blueprint for future potential

actions needed to meet the City's Regional Housing Needs Assessment (RHNA) allocation and comply with State Housing Element law. Therefore, the ALUC's determination of inconsistency is not based on proposed policies of the Housing Element update but rather existing provisions of the North Costa Mesa Specific Plan.

In addition, both ALUC staff and at least one of the Commissioners during the public hearing recognized that the data used for calculating maximum building height was likely not accurate (Google is the data source used to establish existing ground topography). Using imprecise and unreliable data is problematic in this situation as the ALUC determination for three candidate housing sites is based on discrepancies of only three to five feet. As such, this identified inconsistency is likely not inconsistent and can be addressed pending actual topographical data either at the time of the North Costa Mesa Specific Plan update or when an actual project is proposed, which will require additional ALUC review.

Lastly, the remaining six candidate housing sites that the ALUC determined were inconsistent were previously reviewed in 2006 and 2007 by the ALUC. In 2007, the City submitted a project for ALUC consideration that included a mixed-use development with both hotel and residential uses (The Wyndham Hotel and High Rise Residential Project) in the South Coast Plaza Town Center area. This area already contains Plaza Tower and Center Tower which exceed 20 stories. The project included a General Plan Amendment, a Specific Plan Amendment, an Environmental Impact Report (EIR), a Final Master Plan and a proposed subdivision. The ALUC determined that the project and the General Plan/Specific Plan amendments were inconsistent in regard to the inclusion of height standards that penetrate the AELUP horizontal imaginary surface, and the City subsequently overruled the ALUC determination. The City's overrule finding was based on the Federal Aviation Administration (FAA) findings that the then proposed building height of 304 feet AMSL "would not adversely affect air safety" and the FAA subsequently issued a "no hazard determination." Additionally, the FAA conditioned that any future buildings proposed in this area with height proposed above 173 feet above grade level would require a specific determination of "no hazard" by the FAA in order to move forward. This requirement is included in the height standards of the North Costa Mesa Specific Plan applicable to the candidate housing sites in question. Therefore, potential safety risks associated with future construction on these six candidate housing sites are addressed by the FAA requirement and the Specific Plan requirements. It should be noted that the AELUP declares the FAA as the authority to determine impacts on airport or aeronautical operations.

Based on the aforementioned project history, City staff asserted during the ALUC hearing that the Commission had already previously reviewed this matter and the City followed the necessary procedures to overrule the ALUC determination on this issue. City staff further asserted that it was inappropriate for the ALUC to make a secondary finding of inconsistency for the same issue.

Based on the above facts, the City is justified in making the finding to overrule the ALUC inconsistency determination in regard to PUC Finding No. 2.

ALUC Requirement for the City to Submit City Actions, Regulations and Permits to the ALUC for Review

At the March 17, 2022 ALUC meeting, the ALUC required that the "City submit all subsequent City

actions, regulations, and permits within the John Wayne Airport influence area to the Commission for review until the City's General Plan is revised or specific overrule findings are made," in accordance with PUC Section 21676.5(a). During the ALUC hearing, City staff cautioned the ALUC that such a condition, if approved, would be imposed prematurely and is not consistent with the provisions of the Public Utilities Code. Staff's caution to the ALUC is substantiated by the specific language of the PUC Section 21676.5(a) which states:

"If the commission finds that a local agency has not revised its general plan or specific plan or overruled the commission by a two-thirds vote of its governing body after making specific findings that the proposed action is consistent with the purposes of this article as stated in Section 21670, the commission may require that the local agency submit all subsequent actions, regulations, and permits to the commission for review until its general plan or specific plan is revised or the specific findings are made."

According to the above PUC provision, the submission requirement may be imposed only if the City has not either (1) revised its general plan or specific plan, or (2) overruled the ALUCs determination of inconsistency. As indicated in PUC Section 21676.5(a), the submission requirement imposition can occur only after (1) the ALUC has made a determination of inconsistency, and (2) *the City has an opportunity to consider overruling the ALUC determination* [emphasis added]. Thus, the ALUC submission requirement is premature in that the City has not had the opportunity to first consider overruling the ALUC's determination. The same condition was applied to several other cities and their attorneys have also indicated that such a requirement is premature, unenforceable, and potentially illegal.

Notwithstanding, this condition is rendered inapplicable as soon as the City Council makes findings to overrule ALUC. As such, staff recommends the City Council proceed with the staff recommendation. In moving forward with the recommended action, the City is not conceding that ALUC's actions were legal, nor is it waiving its right to challenge ALUC actions, if necessary.

Environmental Determination

The proposed action is exempt from the California Environmental Quality Act (CEQA), because it is not a "project" within the meaning of CEQA and it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment pursuant to CEQA Guidelines Section 15061(b)(3).

ALTERNATIVES:

If the City Council wishes to proceed with the adopted Housing Element update, the Council must adopt the attached Resolution related to the Council's intent to overrule the ALUC determination.

Alternatively, the City Council could opt to modify the Housing Element to remove the aforementioned candidate housing sites from the Housing Element. However, additional sites that meet State requirements and satisfy ALUC would need to be identified, which may be infeasible and is not recommended by staff. The City Council could also modify the Housing Element to indicate that the City will amend the North Costa Mesa Specific Plan to lower the maximum building height elevations at the aforementioned candidate sites to below 206 feet AMSL, which would also address ALUC's concern. Staff does not recommend this course of action as the North Costa Mesa Specific Plan's

height standards are appropriate and have already been found by the FAA to pose no hazard to air safety.

FISCAL REVIEW:

There are no fiscal impacts with this agenda item.

LEGAL REVIEW:

The City Attorney's office has approved the Resolution as to form.

CITY COUNCIL GOALS AND PRIORITIES:

Diversify, stabilize and increase housing to reflect community needs.

CONCLUSION:

Staff recommends that the City Council adopt the Resolution of intent to overrule the ALUC's determination of inconsistency for the City's 2021-2029 6th Cycle Housing Element Update.