

**RESOLUTION NO. 24-\_\_\_\_**

**A RESOLUTION OF THE CUPERTINO CITY COUNCIL WAIVING THE  
IMPOSITION OF CERTAIN IMPACT FEES FOR THE VALLCO/RISE  
SB 35 PROJECT**

WHEREAS, on September 21, 2018, the City of Cupertino (“City”) City Manager approved an application under Government Code section 65913.4 (“SB 35”) submitted by Vallco Property Owner LLC (“VPO”) for development of a mixed-use project on a 50.82-acre property (“Property”) located at 10101-10330 North Wolfe Road, hereinafter referred to as “the Approved Project”; and

WHEREAS, on June 3, 2022 and subsequently on February 16, 2024, the City approved two modifications to the Project under SB 35 (“Modified Project”). Collectively, the “Approved Project” and “Modified Project” are referred to herein as “the Project”; and

WHEREAS, the Project approval as modified authorizes the construction of 2,699 housing units, 890 of which would be affordable to lower income households; 1,954,613 square feet of office space; and 226,387 square feet of retail space; and

WHEREAS, prior to approval of the Project, as defined below, the Property was occupied by a shopping center comprised of 1,450,927 gross square feet of retail area; and

WHEREAS, on August 20, 2019, the Cupertino City Council adopted Resolution Nos. 19-108, 19-109, and 19-110, and Ordinance Nos. 19-2187 and 19-2188 amending the City of Cupertino General Plan to alter development standards for the Property (“General Plan Amendment”); and

WHEREAS, the Project is subject to certain “fees,” as defined in Government Code section 66000(b), charged by the City in connection with approval of the Project for the purpose of defraying all or a portion of the cost of public facilities related to the Project (“Impact Fees”), and is further subject to parkland dedication requirements and/or fees under the Quimby Act, Government Code section 66477; and

WHEREAS, VPO disputes the validity of the Impact Fees and parkland dedication fees imposed on the Project in whole or in part; and

WHEREAS, on August 15, 2022, the City and VPO (collectively, the “Parties”) entered into a Tolling Agreement that tolled the statute of limitations for certain challenges to Impact Fees and parkland dedication fees imposed on the Project, which, as amended, remains in effect and tolls the statute of limitations on those claims through July 31, 2024; and

WHEREAS, on July 10, 2024, the Parties entered into a Settlement Agreement and Release (“Settlement Agreement”) to resolve their dispute regarding Impact Fees and parkland dedication fees imposed on the Project; and

WHEREAS, as a condition of the Settlement Agreement, the City agreed to present for City Council consideration a request to waive Below Market Rate Housing Mitigation Fees (“BMR Fees”) and Zoning/Planning Municipal Code Fees (“Planning Fees”) that may otherwise apply to the Project; and

WHEREAS, on December 18, 2023, VPO renewed its prior request for a waiver of the BMR Fees under Section 2.3.3(D) of the City’s BMR Housing Mitigation Program Procedural Manual, Resolution No. 20-055 (Exhibit A); and

WHEREAS, the City Attorney has reviewed the request to waive BMR Fees, and has determined based on Exhibit A and other evidence considered, including but not limited to the City’s 2015 Non-Residential Jobs-Housing Nexus Analysis, that the Project fully mitigates the impact of market-rate residential and nonresidential components of the Project on the demand for affordable housing; and

WHEREAS, under *Sheetz v. County of El Dorado* (2024) 601 U.S. 267, 275 (“*Sheetz*”), a generally applicable, legislatively imposed fee charged as a condition of granting a land use permit must have an “essential nexus” to the government’s land-use interest and “rough proportionality” to the development’s impact on that interest to avoid a finding that the fee is a taking of property in violation of the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution. In the absence of an impact of the Project on the demand for affordable housing in Cupertino, the imposition of the BMR Fees on the Project would in the opinion of the City Attorney result in an unconstitutional taking of Property, and therefore a waiver of the BMR Fee is appropriate; and

WHEREAS, the City Attorney has reviewed the Planning Fees that would be imposed on the Project under the FY 2024-25 Fee Schedule and has determined

that the imposition of the full amount of the Planning Fees would be disproportionate to the impact of the Project on long-range planning efforts by the City (See *Sheetz, supra*, 601 U.S. at p. 275; see also Gov. Code, § 65104 [“. . . [A]ny fees to support the work of the planning agency . . . shall not exceed the reasonable cost of providing the service for which the fee is charged.”]); and

WHEREAS, in lieu of the paying Planning Fees, VPO, through the Settlement Agreement, has agreed to provide up to \$500,000 to fund future long range planning studies in the vicinity of the Project, which may include studies covering the Vallco and/or Heart of the City Specific Plan areas; and

WHEREAS, based on the findings and Recitals set forth above, the City Attorney recommends that the City Council waive the imposition of BMR and Planning Fees on the Project.

NOW, THEREFORE, BE IT RESOLVED, based on the Recitals set forth above, that:

1. The City Council hereby waives imposition of the BMR Fees and Planning Fees imposed on the Project.
2. Notwithstanding Resolution No. 20-055 or any other prior Resolution of the City Council, the fee waivers granted by this Resolution shall remain in effect during the Term of the Settlement Agreement; provided, however, the fee waiver shall expire upon the termination of the Settlement Agreement or, alternatively, upon a finding by the City Attorney that a BMR Fee is due and payable under Section 6(c) and Exhibit D of the Settlement Agreement, in which case applicable BMR Fees shall be determined according to the provisions of Section 6(c) and Exhibit D.
3. To the extent that Resolution No. 20-055 or any other prior Resolution of the City Council is inconsistent with this Resolution, this Resolution shall control, and nothing in any prior Resolution shall create a legal obligation or give rise to a duty of the City to act in a manner inconsistent with this Resolution.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this 16<sup>th</sup> day of July, 2024, by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

<p>SIGNED:</p>  _____ Sheila Mohan, Mayor City of Cupertino	  _____ Date
<p>ATTEST:</p>  _____ Kirsten Squarcia, City Clerk	  _____ Date

# EXHIBIT A

Coblentz  
Patch Duffy  
& Bass LLP

One Montgomery Street, Suite 3000  
San Francisco, CA 94104-5500

T 415 391 4800

coblentzlaw.com

---

Miles Imwalle  
D (415) 772-5786  
mimwalle@coblentzlaw.com

December 18, 2023

## VIA ELECTRONIC MAIL

Chris Jensen  
City Attorney  
City of Cupertino  
10300 Torre Avenue  
Cupertino, CA 95014-3202  
ChrisJ@cupertino.org

Re: The Rise – Request for Waiver of BMR Fee [Updated, December 2023]

Dear Chris:

This updated letter is submitted on behalf of Vallco Property Owner, LLC (the “Project Applicant”) regarding its project, The Rise (the “Project”), to request a waiver of the Affordable Housing Fee the City is proposing to charge on the office portion of the Project. This request is made in connection with the modification application recently submitted to the City for the Project. This waiver request is submitted pursuant to Section 2.3.3(D) of the BMR Housing Mitigation Program Procedural Manual. Specifically, the Project Applicant requests that the City decline to impose an Affordable Housing Mitigation Fee because the Project does not have an affordable housing impact. The Project, which includes 890 affordable units, more than offsets any affordable housing demand its other land use components generate. Imposing impact fees when the Project does not create an impact is unconstitutional.

The Project contains three primary components—residential, retail, and office—and replaces an existing retail mall. The Project’s 890 units of affordable housing yield more than any other Project in the history of the City. The retail and office components of the project induce demand for affordable housing; however, the removal of the existing retail mall and the Project’s provision of 890 affordable units offset that induced demand. Because the Project more than offsets any demand induced by its retail and office components, using the analysis from the City’s own nexus studies,<sup>1</sup> there is no affordable housing impact—indeed there is a benefit—and therefore the City cannot constitutionally impose an impact fee. We also note that in the SB 35 context applicable to the Project, the office portion is inextricably tied to the

---

<sup>1</sup> Residential Below Market Rate Housing Nexus Analysis, dated April 2015. Accessed from: <https://www.cupertino.org/home/showdocument?id=16828>.

Non-Residential Jobs-Housing Nexus Analysis, dated April 2015. Accessed from: <https://www.cupertino.org/home/showdocument?id=16830>.

Chris Jensen  
City Attorney City of Cupertino  
December 18, 2023  
Page 2

affordable units being provided since, by law, the office component cannot be built unless the residential component, including the BMR units, is also built. For that reason, the City must look at the impact based on the entire Project, not each subcomponent individually.

**a. Calculation of Affordable Housing Impact**

To understand why the Project does not create an affordable housing impact, we propose the following analytical framework:

- Step 1: Calculate the total induced demand for BMRs caused by the non-residential portions.
- Step 2: Calculate the existing induced demand for BMRs caused by the retail mall being removed.
- Step 3: Calculate the net new demand of non-residential (i.e., subtract existing demand from the new demand)
- Step 4: Calculate the number of BMR units in excess of what is required to mitigate the induced demand from market rate units.
- Step 5: Compare the "excess" BMR units to the non-residential net new induced demand to calculate the total net new demand of the entire Project

Credit for the existing mall should be based on the comparative demand for affordable housing, *i.e.*, the impact. For that reason, we look to the increased demand for the various uses contained in the City's nexus studies, rather than the fees for each. Fee amounts do not measure impacts, because the City considers other unrelated feasibility and policy factors when setting fees.

Non-Residential Jobs-Housing Nexus Analysis Table II-4: *Housing Demand Nexus Factors per Sq. Ft. of Building Area* (copied below) identifies the number of affordable housing units induced per square foot of building area per type of use, which identifies the impact of the Project components. As this Table demonstrates, retail has the highest induced demand for affordable housing per square foot and this demand is focused most on the very low-income level. Office has a lower induced demand, which is most focused on the low- and moderate-

Chris Jensen  
 City Attorney City of Cupertino  
 December 18, 2023  
 Page 3

income categories. While we note the disparity in income categories, to keep this analysis simpler, we focus only on the total amount of increased BMR units.<sup>2</sup>

**Table II-4: Housing Demand Nexus Factors per Sq. Ft. of Building Area**

	Number of Housing Units per Square Foot of Building Area <sup>(1)</sup>		
	OFFICE	HOTEL	RETAIL / RESTAURANT
Up to 50% Median Income	0.00014967	0.00014385	0.00067586
50% to 80% Median Income	0.00025726	0.00005615	0.00023980
80% to 120% Median Income	0.00031040	0.00002050	0.00006795
<b>Total</b>	<b>0.00071733</b>	<b>0.00022049</b>	<b>0.00098361</b>

We calculate Steps 1 to 3 as follows:

- Step 1: Calculate total demand from non-residential**

Office:	1,954,613 sf x 0.00071733 du/sf	1,402.10 BMR units
Retail:	226,386 sf x 0.00098361 du/sf	222.67 BMR units
<b>Total:</b>		<b>1,624.77 BMR units</b>

- Step 2: Calculate existing demand from the Mall**

Existing Mall: 1,207,774 sf x 0.00098361 du/sf      1,187.98 BMR units

<sup>2</sup> Not only is this simpler, it is also a conservative approach because it underestimates the benefit of the Project. A full accounting would acknowledge the affordable housing benefit of shifting the use from retail to office since office has less than one-quarter of the induced demand for very low income units compared to retail. Instead, office’s induced demand is concentrated on the low and moderate income end of the spectrum. This shift to higher income levels is itself a benefit.

Chris Jensen  
 City Attorney City of Cupertino  
 December 18, 2023  
 Page 4

- **Step 3: Calculate net demand**

	1,624.77 BMR units
	<u>-1,187.98 BMR units</u>
<i>Total new demand</i>	<i>437 BMR units</i>

- **Step 4: Calculate the number of BMR units in excess of what is required to mitigate the market rate induced demand**

The City requires that market rate projects set aside 15% of the on-site units as affordable to offset the induced demand of the market rate units. Here, there are 1,779 market rate units, meaning that 267 of the BMR units (rounded up) are offsetting the induced demand of the 1,779 market rate units. Therefore, the additional 623 BMR units are "excess" and should be credited when calculating the net new demand of the entire Project.

- **Step 5: Calculate the total net new demand of the entire project**

Comparing the total BMR unit demand from non-residential (437 BMR units) to the number of BMR units that are in excess to the market rate demand (623 BMR units) demonstrates that there is a net Project benefit of 186 BMR units. That is, all induced demand for affordable housing from all components of the Project is being met on-site and there are 186 BMR units being provided beyond that induced demand, which is a significant benefit to the City.

**b. Fees Cannot Be Imposed When The Project Has No Impact.**

The City cannot impose an affordable housing fee here because the Project produces a net benefit rather than an impact on the demand for affordable housing. The City's impact fees must have a "reasonable relationship" to the "deleterious public impact" of the development. *San Remo Hotel L.P. v. City and Cty. of San Francisco* (2002) 27 Cal.4th 643, 667 (citing Gov. Code § 66001). There is no such relationship here, where the predicate of imposition of fees—an impact—does not exist. Any fees imposed in the absence of such a relationship are unlawful, a violation of the Project Applicant's due process rights, and would be invalidated. *See Home Builders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554; *Boatworks, LLC v. City of Alameda* (2019) 35 Cal.App.5th 290, 300.

Indeed, a fair reading of the BMR Housing Mitigation Program Procedural Manual would not result in imposition of fees here. Only by making certain assumptions against the Project (that its components should be treated independently, and that the existing retail impact should be measured based on the time when the mall has been under redevelopment) can the City



Chris Jensen  
City Attorney City of Cupertino  
December 18, 2023  
Page 5

arrive at the conclusion that an affordable housing fee can be imposed. By making such assumptions, the City would engage in precisely the sort of individualized determinations that require a “rough proportionality” before a fee could be imposed. *Nollan v. Calif. Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013). Again, because there is no impact, the City would be engaging in an unconstitutional taking were it to impose fees. Instead, as the City’s Municipal Code recognizes, “[t]o the extent permitted by law, the City’s objective is to obtain actual affordable housing units within each development rather than off-site units or mitigation fee payments.” Cupertino Mun. Code 19.172.020(B). Units, rather than in-lieu fees, are exactly what the City needs, and are exactly what this Project provides (in excess of the induced demand).

Further, Section 2.3.3.D of the City’s BMR Housing Mitigation Program Procedural Manual recognizes that there may be instances in which application of the BMR requirements could have an unconstitutional result, in which case, waiver or modification of the BMR requirements is necessary. Although the City cannot charge a fee in excess of constitutional limits, so the specific procedure for requesting waivers is not controlling, we nonetheless submit this request for a waiver pursuant to that section.

Based on the foregoing, the Project Applicant requests that the City decline to impose an unconstitutional affordable housing fee.

Very truly yours,



Miles Imwalle

cc: Pamela Wu, City Manager  
Reed Moulds, Managing Director, Sand Hill Property Company