



COMMUNITY DEVELOPMENT DEPARTMENT

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA
95014-3255 TELEPHONE: (408) 777-3308 • FAX: (408) 777-3333
CUPERTINO.ORG

CITY COUNCIL STAFF REPORT

Meeting: August 18, 2020

Subject

Consider approving a development proposal to demolish a 71,250 square foot retail center (The Oaks), remove and replace 74 protected trees, and construct a mixed-used development consisting of 267 housing units (88 Rowhouse/Townhouses, 179 senior apartments of which 131 are senior licensed assisted living units and 48 are affordable or below market rate (“BMR”) senior independent living units), 27 memory care licensed assisted living residences (“memory care residences”), and 20,000 square feet of commercial space. The applicant is requesting a Heart of the City Exception for retail frontage along Stevens Creek Boulevard. The applicant is also requesting a density bonus, including associated density bonus parking reduction and density bonus waivers for height, slope line setback, and dispersion of BMR housing units, as well as an incentive/concession for the consolidation of BMR housing units in a single, senior building. City approvals would be certification of the Final Environmental Impact Report, Development Permit (including findings regarding density bonus, parking reduction, concession, and waivers), Architectural and Site Approval Permit, Tree Removal Permit, Use Permit, Heart of the City Exception, and Vesting Tentative Map; (Application No(s): DP-2018-05, ASA-2018-05, TM-2018-03, TR-2018-22, U-2019-03, EXC-2019-03, EA-2018-04; Applicant(s): KT Urban (Mark Tersini); Location: 21267 Stevens Creek Boulevard; APN #326-27-042, -043

Recommended Actions

Staff recommends that the City Council consider the evidence presented and approve the project in accordance with the following draft resolutions (Attachments A-G). If the City Council wishes to approve the project, adopt the following resolutions:

1. Resolution No. 20-XX certifying the Final Environmental Impact Report and adopting the mitigation measures and Mitigation and Monitoring Reporting Program (EA-2018-04);
2. Resolution No. 20-XX approving the Development Permit (DP-2018-05);

3. Resolution No. 20-XX approving the Architectural and Site Approval Permit (ASA-2018-05);
4. Resolution No. 20-XX approving the Use Permit (U-2019-03);
5. Resolution No. 20-XX approving the Vesting Tentative Map (TM-2018-03);
6. Resolution No. 20-XX approving the Heart of the City Exception (EXC-2019-03); and
7. Resolution No. 20-XX approving the Tree Removal Permit (TR-2018-22).

Discussion

Project Data:

| | | |
|--|---|--|
| General Plan Land Use Designation | Commercial/Residential | |
| Special Planning Area | Heart of the City Specific Plan (West Stevens Creek subarea) | |
| Zoning Designation | P(CG, Res) | |
| Net/gross lot area | 7.9 acres/8.1 acres ¹ | |
| | <i>Allowed/Required</i> | Current Proposal (Revised Senior Enhanced Project, Presented to the Planning Commission on July 14, 2020) |
| Maximum units based on density | 237 | 267 ² |
| 35% Density Bonus units (State Law) | 83 | |
| Total number of units | 320 | |
| Residential Density | 30 du/acre | 33.79 du/acre |
| Height of Structures | Up to 45 feet | Building 1 - 79.5 feet |
| | | Building 2 – 74.5 feet |
| | | Townhouses – 30 feet |
| | | Rowhouses – 30 feet |
| Setbacks | | |
| Front | <i>35 feet from the face of curb (min.)</i> | 35 feet from the face of curb |
| Side | <i>Minimum One-half (1/2) the height of the Building (, or ten (10) feet, whichever is greater. (15 feet)</i> | 17.6 feet |
| Parking | | |
| Residential | 243 (Based on Density Bonus standards in Chapter 19.56) | 320 |

¹ The net acreage is a result of the subtraction of an existing Public Roadway Easement along the property's Mary Avenue frontage.

² Initially presented as 294 units, the 27 memory care rooms do not fulfill the definition of an independent unit as they do not contain provisions for cooking.

| | | |
|--|---|----------------------|
| Residential Care | 27 | 27 |
| Retail | 113 | 117 |
| Total on-site | 383 | 463 |
| Private Open Space (s.f. per unit) | <i>60 s.f. per unit</i> | 60-375 s.f. per unit |
| Common Open Space per Heart of the City | | |
| Residential | <i>44,100 s.f.(150 s.f. per unit)</i> | 44,945 s.f. |
| Commercial (Retail) | <i>500 s.f. (2.5% of gross floor area of buildings ≥ 20,000 sq. ft., or restaurants ≥ 10,000 sq. ft.)</i> | 2,915 s.f. |
| Retail Frontage | | |
| Stevens Creek Boulevard frontage | 75% | 60% |
| Rear of building | 50% | 26% |
| Building Area | 544,435 s.f. | |
| Project Consistency with: | | |
| General Plan: | Requested density bonus waivers for height and for slope line setback | |
| Zoning: | Requested Heart of the City Exception for retail frontage requirements, density bonus, parking reduction, and waivers for height, slope line setback, and BMR unit dispersion requirements, and an incentive/concession for BMR unit consolidation. | |

Background:

Application Requests

The applicant, Mark Tersini, KT Urban, is requesting permits to allow construction of a mixed-use development on an 8.1 gross-acre site currently occupied by the Oaks Shopping Center. The primary components of the project are listed below. Refer to Attachment 23 to view the development plans.

- Two residential/commercial buildings:
 - Building 1 is a six-story building with 131 senior licensed assisted living units, 27 memory care licensed assisted living residences, and 17,600 square-feet of ground-floor retail/commercial space.
 - Building 2 is a six-story building with 48 BMR senior independent living units and 2,400 square feet of ground-floor retail/commercial.
- 70 single-family residential townhouse and 18 single-family residential rowhouse condominiums.
- One-level, below-ground garage with 191 parking spaces.
- 44,945 square feet of Residential Common Open Space
- 2,915 square feet of Commercial Common Open Space
- 386 onsite and offsite tree replacements, for the 73 protected development trees proposed to be removed and/or relocated.

- A vesting tentative map that would divide the property into two separate parcels.

The applicant is requesting a density bonus and related parking reduction, waivers for height, slope line setback, and dispersion of BMR housing units, and a concession to allow all BMR units to be located in one senior building. A Heart of the City Exception for retail frontage along Stevens Creek Boulevard is also required. The following City permits would be required: Development, Architectural and Site Approval, Tree Removal, and Use Permits. A Vesting Tentative Map is proposed to divide the property into two parcels [one 4.7 acre and one 3.1 acre parcel].

Site and Location Description

The project site is known as the Oaks Shopping Center and is located in the Heart of the City Specific Plan Special Area within the Oaks Gateway of the West Stevens Creek subarea. The shopping center is on an approximately 8.1 gross-acre site bounded by Stevens Creek Boulevard to the south, Mary Avenue to the east and north, and Highway 85 to the west. The surrounding uses are the Glenbrook Apartments to the north, De Anza College to the south (across Stevens Creek Boulevard), and the Cupertino Senior Center to the east (See Figure 1).



Figure 1 Location of The Oaks Shopping Center and the proposed Westport Cupertino redevelopment.

The existing 71,684 square foot leaseable area includes a mix of retail, restaurant, specialty schools, and small office tenants. Currently much of the shopping center is vacant, including the former Bluelight Cinema space. Since 2011, the site has also been home to the West Coast Farmer's Market, held every Sunday morning.

Planning Commission Recommendation & Subsequent Request for Concession

The Planning Commission conducted two public hearings. The first was on May 12, 2020 in which the Planning Commission recommended (5-0) that City Council certify the Final Environmental Impact Report and adopt resolutions approving the Westport Cupertino application before the Planning Commission at that time.

After that Planning Commission hearing, on June 4, 2020, the applicant submitted an amended project. Revisions included, but are not limited to, the following:

- **Relocation of BMR units to Building 2 / Additional story added:** Consolidation of the BMR units by moving the nine BMR units formerly in Building 1 into Building 2 on an additional top floor of Building 2. Building 2 will now be six stories and will increase in height 0.75 feet from 73.75 ft. to 74.5 feet. Although Building 1 decreased in height (from 91.75 feet to 79.5 feet), it would still require a waiver.
- **Unit mix:** Altered unit mix to provide additional space for the terraces on the top floor of Buildings 1 and 2. In Building 2, the unit mix is adjusted to include two-bedroom units in addition to studios and one-bedroom units.

Because the above revisions affected building height and dispersion of BMR units, the project was brought back to the Planning Commission on July 14, 2020 for a second review and recommendation to City Council. At this hearing, the Planning Commission recommended (3-2, Fung and Takahashi voting no) that the City Council:

1. Find that this action is not subject to environmental review under Section 21080(b)(5) of the California Environmental Quality Act (CEQA) and Section 15270 of the CEQA Guidelines because CEQA does not apply to projects which a public agency rejects or disapproves.
2. Deny the following permits: Development Permit (DP-2018-05), Architectural and Site Approval (ASA-2018-05), Vesting Tentative Map (TM-2018-03), Tree Removal Permit (TR-2018-22), Use Permit (U-2019-03), and Heart of the City Exception (EXC-2019-03).

The Planning Commission, in its findings in Resolution No. 6908 (Attachment H), found that the proposed project was inconsistent with the BMR Housing Mitigation Program Procedural Manual (“Mitigation Manual”), Section 2.3.4(D), because all of the BMR units were contained in one senior building rather than being dispersed between the two senior buildings, as in the previous proposal. The request to waive this dispersion requirement was not supported with evidence that the requirement would “physically preclude” the project. Rather, the evidence submitted by the applicant indicated that the applicant would not qualify for funding from the Low-Income Housing Tax Credit program if Building 1 contained BMR units. While this evidence of financial impact may have supported a request for a “concession” under State Density Bonus Law, it did not justify a “waiver” of the BMR dispersion requirement because it did not demonstrate that the dispersion standard contained in the Mitigation Manual physically precluded development of the project as proposed. At that time, the applicant had not requested that the BMR dispersion requirement be modified as a “concession” under State Density Bonus Law.

On July 31, 2020, after the Planning Commission made its recommendation, the applicant submitted a request for a concession related to the BMR dispersion requirement and documentation in support. This request is discussed in more detail below. Because the applicant has now requested a “concession” rather than a “waiver,” the facts underlying the Planning Commission’s recommendation have changed. Due to these changed circumstances, staff recommends that the City Council approved the project.

Analysis:

General Plan and Housing Element Compliance

The proposed use is consistent with the General Plan Land Use Designation of Commercial/Residential. The City’s General Plan uses a development allocation system when evaluating development projects and allows the City flexibility in developing project and site-specific mitigation measures when reviewing projects. The Housing Element of the City of Cupertino’s *General Plan: Community Vision 2015 – 2040* (General Plan) identifies The Oaks Shopping Center as a Priority Housing Site. As a Priority Housing Site, it is allocated 200 units based on a ‘Realistic Capacity’, which is generally 85% of maximum capacity allowed (which for this site is 30 DU/acre). A Use Permit is required to develop to the maximum density of 30 DU/Acre allowed in the General Plan for this site. The proposed base density (237 units) is consistent with what is allowed in the General Plan.

The General Plan’s Community Form Diagram establishes heights and setbacks for development on sites within each of the Special Areas. The proposed development is in The Oaks Gateway within the Heart of the City Specific Plan Special Area, which has a height limit of 45 feet and a 1:1 slope line setback from the curb line. The applicant is asking for density bonus waivers of the height and slope line setback standards for Buildings 1 and 2. This will be discussed in further detail in the Density Bonus Section of this Staff Report.

Staff has evaluated the project’s consistency with the General Plan and concludes that based on the conformance with the General Plan Land Use designation for the site and the minimal environmental impacts of the project as analyzed in the Environmental Impact Report (further discussed in detail in the Environmental Review section of this Staff Report), the proposed project supports several of the City’s other General Plan goals including:

- **Policy LU-1.3: Land Use in All City-wide Mixed-Use Districts** - *Encourage land uses that support the activity and character of mixed-use districts and economic goals.*

- **Policy LU-5.2: Mixed-Use Villages** - *Where housing is allowed along major corridors or neighborhood commercial areas, development should promote mixed-use villages with active ground floor uses and public space. The development should help create an inviting pedestrian environment and activity center that can serve adjoining neighborhoods and businesses.*
- **Policy LU-14.1: Land Use** - *Primary land uses include quasi-public/public facilities, with supporting mixed commercial/ residential uses.*
- **Policy LU-14.3: Gateway Concept** - *Buildings should be high-quality in keeping with the gateway character of the area. Projects should provide or contribute towards gateway signs and landscaping.*
- **Policy LU-14.5: Oaks Gateway Node** - *This is a gateway retail and shopping node. New residential, if allowed, should be designed on the “mixed-use village” concept discussed earlier in this Element.*
- **HE-1.3.4: Flexible Development Standards** - *The City recognizes the need to encourage a range of housing options in the community. The City will continue to:*
 - *Offer flexible residential development standards in planned residential zoning districts, such as smaller lot sizes, lot widths, floor area ratios and setbacks, particularly for higher density and attached housing developments.*
 - *Consider granting reductions in off-street parking on a case-by-case basis for senior housing.*
- **HE-2.3.7: Density Bonus Ordinance** - *The City will encourage use of density bonuses and incentives, as applicable, for housing developments which include one of the following:*
 - *At least 5 percent of the housing units are restricted to very low-income residents.*
 - *At least 10 percent of the housing units are restricted to lower income residents.*
 - *At least 10 percent of the housing units in a for-sale common interest development are restricted to moderate income residents.*
 - *The project donates at least one acre of land to the city or county large enough for 40 very low income units; the land has the appropriate general plan designation, zoning, permits, approvals, and access to public facilities needed for such housing; funding has been identified; and other requirements are met. A density bonus of up to 20 percent must be granted to projects that contain one of the following:*
 - *The project is a senior citizen housing development (no affordable units required).*
 - *The project is a mobile home park age restricted to senior citizens (no affordable units required). For projects that contain on-site affordable housing, developers may request one to three regulatory concessions, which must result in identifiable cost reductions and be needed to make the housing affordable.*

Should the proposed project be approved, 237 units would be allocated to this project from the Heart of the City Special Area. The 30 density bonus units would not affect the

available Heart of the City allocation. Therefore, 93 residential units would continue to be available in this area.

Density Bonus; Waiver and Incentive/Concession Requests

The project includes requests for a density bonus, parking reduction, and three waivers, for height, slope setback line, and dispersion of BMR units. On July 31, 2020, in response to the decision by the Planning Commission, the applicant submitted a request for a concession to allow the consolidation of all proposed senior BMR units within Building 2. This concession would only authorize the project to avoid dispersion of BMR units between the two proposed senior buildings; the project would still require a waiver of the dispersion requirement as it applies to the non-age-restricted, rowhouse/townhouse portion of the project.

Section 19.56.070 *Findings* of the City's Density Bonus Ordinance requires that, before approving an application which includes a request for a density bonus, waiver, incentive/concession, or reduction in parking standards, the decision-making body must determine that the proposal is consistent with State Density Bonus Law by making the following findings, as applicable:

1. That the housing development is eligible for the density bonus requested and any incentives or concessions, waivers or reductions in parking standards requested.
2. That the development standard(s) for which the waiver(s) are requested would have the effect of physically precluding the construction of the housing development with the density bonus and incentives or concessions permitted, if a waiver is requested.
3. That the requested incentive(s) or concession(s) will result in identifiable, financially sufficient, and actual cost reductions based upon the financial analysis and documentation provided by the applicant and the findings of the peer-reviewer, if incentive(s) or concession(s) are requested (other than mixed use development).

In 2016, the Legislature revised the State Density Bonus law to prohibit cities and counties from conditioning the submission, review, or approval of an application for a density bonus on the preparation of "an additional report or study" not otherwise required by state law, including the density bonus law. Following this change, a city or county can require an applicant to provide "reasonable documentation" to establish eligibility for a requested density bonus, incentives/concessions, waivers, and parking ratios, but nothing more.

The City’s density bonus ordinance has not been amended to reflect these changes, and still requires that an applicant seeking an incentive or concession submit, among other things, a “project financial report,” an “appraisal report,” and a “use of funds statement.” Cup. Mun. Code § 19.56.060.B.8. As outside counsel for the City has explained in correspondence with the applicant: “state law has changed since the City’s density bonus ordinance was adopted, in that the City cannot require a ‘study’ to justify the concession, but may require ‘reasonable documentation.’ The documentation will need to demonstrate that the concession will ‘result in identifiable and actual cost reductions’ and will ‘provide for...rents for the targeted units to be set as specified in subdivision (c)’ of G.C. Section 65915. If the applicant decides to apply for the concession, the application should provide evidence for the actual cost reduction achieved by the incentive, and evidence that the cost reduction will allow the applicant to provide affordable rents.”

To comply with state law, the City should limit its findings in support of the incentive/concession to whether it will result in identifiable and actual cost reductions based upon the documentation provided by the applicant. The City has obtained a peer review of the documentation submitted by the applicant in support of its request for an incentive/concession.

Eligibility for a Density Bonus, Parking Reduction, Waivers, and Incentives/Concessions

The project is eligible for a density bonus, a parking reduction, waivers, and up to two incentives/concessions, consistent with the City of Cupertino Municipal Code Chapter (CMC) 19.56 *Density Bonus* and State Density Bonus Law. Below, in Figure 2, is a breakdown of the housing affordability types and percentage of development:

Figure 2 - Below Market Rate Units as a Percentage of the Development

| | Number of Below Market Rate Units | Percentage of Development Units ³ |
|-----------------|-----------------------------------|--|
| Very Low Income | 29 units (60% of total BMR) | 12.2% |
| Low Income | 19 units (40% of total BMR) | 8% |

³ “‘Density bonus’ means a density increase over the otherwise maximum allowable gross residential density . . .” Gov. Code § 65915(f). Consistent with this definition, the term “Development Units” as used in the Project Data Table includes only the 237 “base density” units proposed, based on the base density of 30 DU/acre, as required by the Density Bonus Law. The percentage of proposed BMR units (48 units, or 20% of 237 units) exceeds the 15% requirement in the City’s BMR Manual and complies with the Manual’s requirements for providing BMR units affordable to both very low income and low-income households.

Because the proposed project is providing 29 very low-income units, or 12% of the development, the applicant is entitled to the maximum Density Bonus (35%) allowed by State Law, or 83 units in addition to the base density of 237 units. Density bonus applicants may elect to build a lesser percentage of their allowable density increase, and KT Urban has requested a 13% bonus, or 30 units above the base density of 237, for a total of 267 units. The project is also entitled to a reduction of required residential parking to 243 spaces, although the applicant has elected to provide 320 spaces. (Please see detailed discussion under *Traffic, Circulation, and Parking*.)

Please refer to Attachment J for a full description of the Below Market Rate programming of the Westport Cupertino development. A condition of approval would require that, prior to occupancy, the applicant must record a regulatory agreement with the City requiring 36 of the BMR senior units to be occupied at rents that are affordable to very low or low-income households at a ratio of 60% very low-income (22 units) to 40% low-income (14 units) for a period not less than 99 years from the date of first occupancy of the unit pursuant to CMC Section 19.56.050.B and the City's Below Market Rate Housing Program. Also prior to occupancy, for the remaining 12 BMR senior units, the proposed project shall record covenants that require the units to be occupied at rents that are affordable to very low or low-income households at a ratio of 60% very low-income (7 units) to 40% low-income (5 units) for a period of not less than 55 years from the date of first occupancy of the unit pursuant to CMC Section 19.56.050.A.

Waivers and Incentive/Concession Requested

Because the proposed project qualified for a density bonus, the applicant may submit to the City a proposal for the waiver or reduction of development standards that will have the effect of physically precluding the construction of a development eligible for a density bonus at the densities permitted by density bonus law.

Further, because the development includes 12% Very Low-Income Units, the project is eligible for a maximum of two (2) incentives/concessions. Concessions are reductions in development standards, modifications of zoning code or architectural design requirements, or other concessions "that result in identifiable and actual cost reductions to provide for affordable housing costs." Gov. Code § 65915(k). The City must grant a proposed concession unless it finds, based on substantial evidence, that the concession does not result in identifiable or actual cost reductions, would have a specific adverse impact on public health and safety, or is contrary to state or federal law. Gov. Code § 65915(d)(1).

The applicant has requested three (3) waivers and one (1) incentive/concession for the proposed development:

- Height waivers of the 45 ft. height limit in the General Plan’s Community Form Diagram for Building 1 and Building 2 to allow the following heights:
 - Building 1 would be 70’ 0” to the eave line, and 79’ 6” to the roof ridge.
 - Building 2 would be 65’ to the eave line, and 74’ 6” to the roof ridge.
- Slope line setback waivers of the 1:1 slope line setback from the curb line in the General Plan’s Community Form Diagram to a slope line setback of 1:1.70 for Building 1 and a slope line setback of 1:1.48 for Building 2.
- Waiver from the requirement in CMC Section 19.56.050.G.1 and BMR Manual section is 2.3.4.D. that the affordable units be dispersed throughout the project to allow the affordable units to be located only within the senior housing buildings.
- Incentive/concession allowing all BMR units to be consolidated in one of the two senior housing buildings (Building 2) rather than dispersed between the two senior housing buildings, as required by CMC Section 19.56.050.G.1 and BMR Manual section is 2.3.4.D.

To approve the waivers, the City must find that the development standards for which the waivers are requested would have the effect of physically precluding the construction of the housing development with the density permitted by state density bonus law. Further, to approve the incentive/concession, the City must find that the incentive/concession will result in identifiable and actual cost reductions to provide for affordable housing costs.

Height and Slope Line Setback Waivers

The first two waivers for height and slope line setback are illustrated below in Figure 3.

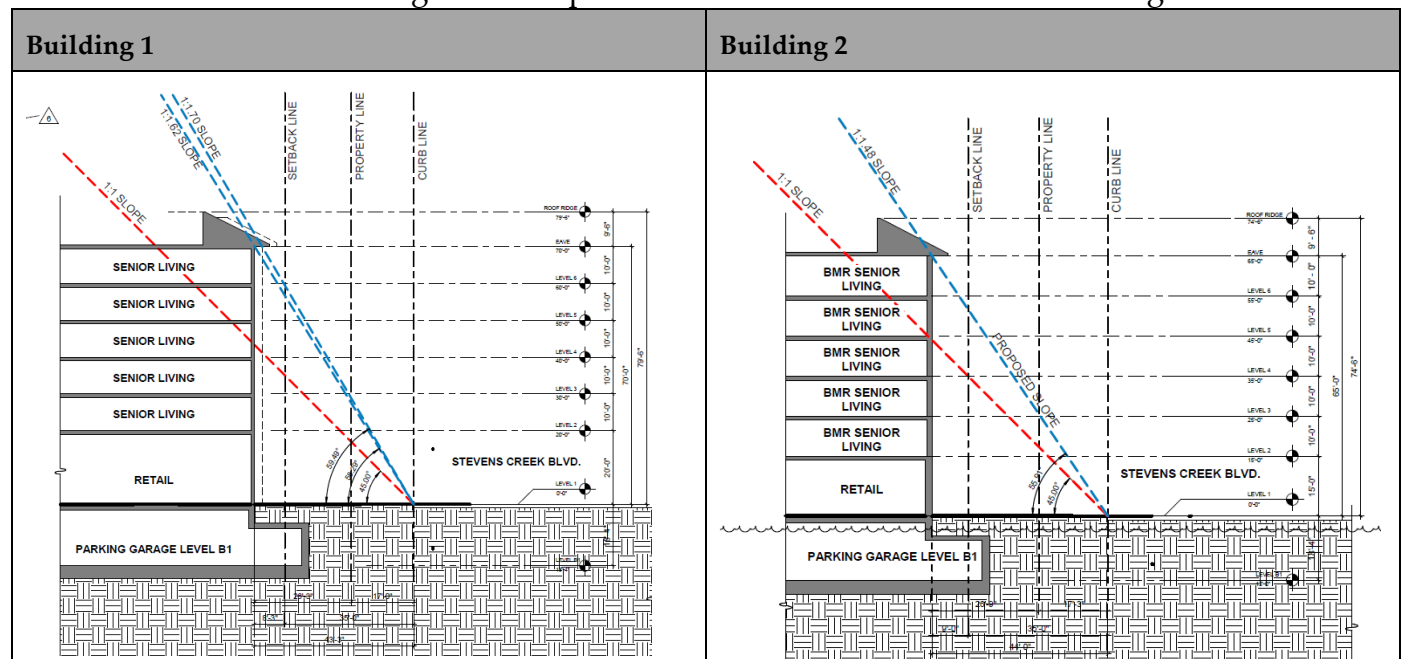


Figure 3 Illustration of height and slope setback waivers for Buildings 1&2

Prior to the May 12, 2020 Planning Commission hearing, the justification of the waivers was provided by the applicant in three letters, two submitted by Andrew Faber, Esq. of Berliner Cohen, LLP dated November 30, 2018 (Attachment K) and April 22, 2020 (Attachment L) and the other by Steven Ohlhaber, AIA of C2K Architecture on April 23, 2020.⁴ Subsequently, Mr. Ohlhaber's letter was revised and dated June 25, 2020 to reflect the amended application (Attachment M). The senior housing partner on the project, Randy Bekerman, representing Atria Senior Living, also submitted a letter dated June 24, 2020 (Attachment N). On July 31, 2020, Andrew Faber, Esq. of Berliner Cohen, LLP and the project development team submitted letters further justifying the waivers, as well as requesting an incentive/concession for the consolidation of the BMR units in Building 2 (Attachments O & P respectively). These letters state that the waivers and incentive/concession are necessary for a number of reasons, including but not limited to the following:

- Taller structures with higher density housing and retail are concentrated on the eastern end of the site, allowing a greater product mix of housing which includes townhouse/rowhouse options as well as both senior market rate and senior BMR apartments that vary from studio to two-bedroom units.
- Having the lower density townhouses/rowhouses spread across the western, northern and southern ends of the development acts to better transition to the single family and lower-elevated apartments along Mary Avenue. This pushes the need for the higher density senior housing buildings to be taller to accommodate the added density units.
- Consolidation of the senior housing components adheres to certain design requirements and laws and regulations that are particular to the senior population. In addition, placing these units closer to the Cupertino Senior Center, retail, and bus systems benefits this population.
- A strict enforcement of the height and slope line setback standards would require the units to be further relocated to parts around the site, potentially losing required open space. Limiting the height of Building 1 to 45 feet would directly eliminate 102 senior units from the Project and would eliminate another 15 units in order to relocate the amenity terrace to a lower floor. Limiting the height of Building 2 to 45 feet would directly eliminate 18 BMR senior units from the project. If taller buildings

⁴ Waiver justification letters had been submitted previously as part of the original application when the unit count was 242 units for the entire development. These letters are an updated version of those prior communications to reflect the modified unit count as part of the applicant's proposed Revised Senior Enhanced Project.

were to be placed deeper into the site in order to conform with the 1:1 slope line setback, the site's circulation would be compromised. It would force a reduction of the required Open Space and would reduce distance between buildings to an unacceptable degree.

The City worked with a third-party architectural firm (RRM Design Group) to review the requested height and slope line waivers. The results of this review are attached to the staff report as Attachment Q. The architectural review concludes that requiring the project to comply with the height and slope-line setback development standards would result in a decrease in the size of some of the senior units; reduce ground level open space below that required by the Heart of the City Specific Plan, thus requiring a waiver in any case; and a loss of surface level parking. Given these effects, the architects concluded that the proposed project would be physically precluded without the height and slope line waivers.

Dispersion of BMR Units

The previous version of the project, which was considered at the May 12, 2020 Planning Commission hearing, located some of the senior affordable units in Building 1 and most in Building 2. With respect to the BMR dispersion requirement, staff concluded that state and federal regulations prohibited the applicant from dispersing senior affordable units in the non-age restricted portion of the project. However, since the May 12, 2020 Planning Commission hearing, and as presented at the July 14, 2020 Planning Commission hearing, the applicant has revised the project to move Building 1's 9 BMR units to Building 2, resulting in a proposal that would locate all of the project's 48 senior BMR units in Building 2.

The Planning Commission was presented with the applicant's updated letters (dated June 25, 2020) in support of the waiver of the City's BMR unit dispersion requirements for the revised project and found that the waiver was no longer justified. This was because the applicant had not explained why complying with a requirement to disperse senior BMR units in both of the senior housing buildings would *physically* preclude development of the project. The applicant's previous proposal (reviewed by the Planning Commission on May 12) dispersed the BMR units between the two senior buildings, and the applicant's explanation for why this was no longer feasible was a financial one; i.e., that the applicant could not get tax credit funding for the BMR units in Building 1 if they were mixed with market rate units. This cost-based rationale does not justify a waiver under State Density Bonus Law; a waiver of a development standard is only justified if the development standard would *physically* preclude the project.

Following the July 14, 2020 Planning Commission hearing on the project, the applicant applied for a concession to allow all BMR units to be located in one of the senior buildings (Building 2). The letters submitted by Mr. Faber and the development team on July 31, 2020, and subsequent e-mail correspondence, included the following information in support of the concession request:

- Building 1 would operate as a state-licensed Senior Assisted Living facility. Building 2 would operate as an affordable (BMR) age-restricted, Senior Independent Living facility. As a state-licensed Assisted Living Facility, Building 1 is subject to additional regulatory requirements beyond those applicable to an Affordable Senior Independent Living facility. For a regulated Senior Assisted Living facility, the service offering, operating costs and logistics, additional facility requirements and financing aspects create physical and financial obstacles that require this population to be separated and, therefore, consolidated in Building 1. The Low-Income Housing Tax Credit program could not be used to support the affordable units in Building 1. If the affordable Senior Independent Living units are consolidated in Building 2, the Low-Income Housing Tax Credit program can be used to subsidize all of the affordable units.
- The State of California would require Building 1 to be constructed as Type I or concrete due to the physical limitations of the building's residents. Because of this, the cost to construct Building 1 is approximately \$129,500,000, or approximately \$820,000 per unit. Estimates for the total project cost for 48 affordable senior apartment units in Building 2 are \$29 million or approximately \$620,000 per unit, which is lower than the construction costs for Building 1 because it will be a different type of construction.⁵ Thus the total cost per unit is roughly \$215,000 less per unit in Building 2 than in Building 1, and there would be a cost savings of approximately \$1.8 million if the applicant were allowed to providing nine affordable units in Building 2 instead of dispersing them in Building 1.
- If the nine Age-Restricted Senior Apartment units were located in Building 1, the project would incur the additional cost of providing those residents with licensure - required services such as dining and housekeeping, etc., without any additional compensation beyond the stipulated affordable BMR "rent," which is defined in State Law and the Cupertino Code as covering only space rent for the premises. The estimated increased cost of services for each such unit in Building 1 would be several

⁵ Building 2 is anticipated to be constructed as a Type IIIA Sprinklered SM for the top 5 levels and Type IA Sprinklered SM for the ground floor and connected parking garage to Building 1 (Type IA). Please refer to the notes on Sheets G202A and G202B (AttachmentY)

thousand dollars per resident per month, over and above the allowed affordable space rent.

As noted above, State Density Bonus Law requires the City to grant the applicant up to two proposed concessions. Concessions are reductions in development standards, modifications of zoning code or architectural design requirements, or other concessions “that result in identifiable and actual cost reductions to provide for affordable housing costs.” Gov. Code § 65915(k). The City must grant a proposed concession unless it finds, based on substantial evidence, that the concession: does not result in identifiable or actual cost reductions; would have a specific adverse impact on public health and safety; or is contrary to state or federal law. Gov. Code § 65915(d)(1).

The City retained the services of Sally Nielson, Hausrath Economics Group, who is a vice president, to peer review the applicant’s incentive/concession request. See CMC Section 19.56.60. In Ms. Nielson’s report, she analyzed the above concession request justifications and concluded the following:

- Hard construction costs for Building 1 are at least 20% greater on a per square foot basis than they are for Building 2. Allowing the nine BMR units to be constructed with the rest of the BMR units in Building 2 results in construction cost savings of at least 20% on a per square foot basis.
- If the BMR units were included in Building 1, the on-going operating costs provided to the Assisted Living Facility units would exceed the BMR housing allowance for rent and utilities and add to the subsidy required needed to cover the gap between the value supported by BMR rents and building development costs. Allowing the BMR units to be consolidated in Building 2 eliminates this identified and actual cost burden and supports provision of affordable units.
- Requiring BMR units to be dispersed between Buildings 1 and 2 would impose significant additional costs on the project in terms of both the cost of financing and the cost to secure most likely several sources of competitive financing. One of the most significant sources of capital for affordable housing is the sale of tax credits, and this funding is not available for the nine BMR units if they were developed in Building 1 as state-licensed assisted living units. Higher total financing cost plus the additional time and cost of delay would be incurred to fill this gap. These costs are saved by consolidating the BMR units in Building 2 as senior independent living units.

She concluded that the request contained sufficient information to support the conclusion that the concession would result in “identifiable and actual cost reductions to provide for affordable housing costs.” Ms. Nielson’s analysis is attached as Attachment R to this staff report.

Even with this concession, the Project would still require a waiver of the BMR dispersion requirement for the rowhouse/townhouse component. The justification for that waiver is that age-restricted senior housing has special needs and is governed by specific fair housing codes that would require them these units to be consolidated in the same building(s). In particular, the applicant has stated:

- Dispersion of the Senior Housing within a mixed housing development (i.e., a development that includes non-age restricted units) is precluded by state and federal law. Housing that is developed as senior housing is subject to specific design features such as doors and hallways accessible by wheelchairs, grab bars and railings for those who have difficulty walking, additional lighting in common areas, and access provided without the use of stairs, and must be designed to encourage social contact by providing at least one common room and common open space. (Civil Code Section 51.2(d)). All senior housing must have rules and restrictions clearly restricting occupancy consistent with federal and state occupancy requirements and must verify occupancy by reliable surveys and affidavits. (42 U.S.C. Section 3607(b)(2); Civil Code Section 51.3(c).) The policies, procedures and marketing must demonstrate that the senior development is intended for seniors. (54 Fed. Reg. 3255 (Jan. 23, 1989)).

Staff previously concluded that this explanation was sufficient to support a waiver of the BMR dispersion requirement for the rowhouse/townhouse component of the project, which includes only non-age-restricted units.

Findings Required for Denial of a Waiver or an Incentive/Concession

If a waiver is justified because it would physically preclude a project, or if an incentive/concession is justified because the applicant has demonstrated it would “result in identifiable and actual cost reductions to provide for affordable housing costs,” the decision-making body may deny the waiver or the incentive/concession only if one of the following written findings, supported by substantial evidence, can be made:

1. That the waiver or incentive/concession would have an adverse impact on real property listed in the California Register of Historic Resources; or
2. That the waiver or incentive/concession would have a specific, adverse impact upon public health or safety or the physical environment, and there is no feasible

method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the residential project unaffordable to low- and moderate-income households. For the purpose of this subsection, "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, written public health or safety standards, policies, or conditions as they existed on the date that the application for the residential project was deemed complete; or

3. That the waiver or incentive/concession is contrary to state or federal law.

No evidence has been presented that any property on the California Register would be affected, or that the incentive/concession or waivers would have a "specific, adverse impact," or that a justified incentive/concession, or waiver would be contrary to state or federal law.

Compliance with BMR Unit Comparability Requirement

The BMR Manual requires that the BMR Units:

- Shall be comparable to market rate units in terms of unit type, number of bedrooms per unit, quality of exterior appearance and overall quality of construction.
- Unit size should be generally representative of the unit sizes within the market-rate portion of residential project.
- Interior features and finishes in affordable units shall be durable, of good quality and consistent with contemporary standards for new housing.

Table 1, below, shows the proposed unit mix within the BMR Building 2 and the market-rate Building 1. Because the senior housing portion of the development is required by the State to be designed with specific features and amenities, the table only compares the attributes of the units in the two senior buildings, i.e., Buildings 1 and 2. The applicant states that this proposed mix satisfies the BMR Manual's "comparability" requirements.

Table 1 Unit Comparability Between Buildings 1 & 2

| Building 1 (131 Units) | Studio | One Bedroom | Two Bedroom |
|-------------------------------|---------------|--------------------|--------------------|
| Average Unit Size | 537.7 s.f. | 691.3 s.f. | 1,087 s.f. |
| Unit Count | 26 | 74 | 31 |
| Mix Percentage | 20% | 56% | 24% |
| Building 2 (48 Units) | Studio | One Bedroom | Two Bedroom |

| | | | |
|-------------------|------------|------------|----------|
| Average Unit Size | 518.6 s.f. | 615.7 s.f. | 843 s.f. |
| Unit Count | 9 | 28 | 11 |
| Mix Percentage | 19% | 58% | 23% |

It is up to the City Council to decide whether to find that this unit mix is “comparable.” The project would be conditioned to ensure that the quality of the BMR units is comparable to the market rate units. Because the Planning Commission recommended denial of the Project, it made no recommendation on this issue.

Use Permit

The project proposal requires a Use Permit to (1) allow the development of residential units on a mixed-use Housing Element site that proposes units above the realistic capacity in the Housing Element, and (2) to allow a residential care facility, with seven or greater residents in a residential zone.

The Housing Element of the City of Cupertino’s *General Plan: Community Vision 2015 – 2040* identifies The Oaks Shopping Center as a Priority Housing Site. As a Priority Housing Site, it is allocated 200 units based on a ‘Realistic Capacity’, which is generally 85% of the maximum capacity allowed (30 DU/acre) for the site. The General Plan, *Heart of the City Specific Plan*, and CMC Chapter 19.80: *Planned Development (P) Zones* provide that a residential development on a Priority Housing Site that exceeds the number of units designated for that Priority Housing Site shall be a conditional use. The applicant proposes to build the project at the maximum allowable density, which is 30 units per acre or 237 units (not counting density bonus units); therefore, the applicant has submitted a Use Permit application. The applicant has submitted this application under protest because the maximum density for the site as shown in the General Plan is 30 units per acre.

Within Building 1, 27 rooms on the second floor are dedicated to memory care. CMC Section 19.20.020 requires a use permit to develop residential care facilities in any residential zone. The memory care portion of the development meets the definition of the “Residential care facility” in CMC Section 19.08 *Definitions*:

“Residential care facility” means a building or portion designed or used for the purpose of providing twenty-four-hour-a-day nonmedical residential living accommodations pursuant to the Uniform Building, Housing and Fire Codes, in exchange for payment of money or other consideration, where the duration of tenancy is determined, in whole or in part, by the individual resident’s participation in group or individual activities such as counseling, recovery planning, medical or therapeutic assistance. Residential care facility includes, but is not limited to, health

facilities as defined in California Health and Safety Code (H&SC Section 1250 et seq.), community care facilities (H&SC Section 1500 et seq.), residential care facilities for the elderly (H&SC Section 1569 et seq.) or facilities for the mentally disordered or otherwise handicapped (W&I Code Section 5000 et seq.), alcoholism or drug abuse recovery or treatment facilities (H&SC Section 11384.11), and other similar care facilities.

The memory care facility, also referred to as ‘Life Guidance’ units on the plan sheets, will also include a separate kitchen, activity room/library, and terrace. The residents will be supervised 24 hours a day in a controlled wing of Building 1 and will not live independently due to security and safety requirements. Pursuant to CMC Section 19.20.020, residential care facilities must be a minimum distance of 500 feet from the property boundary of another residential care facility and, if required, must obtain any license issued by appropriate State and/or County agencies and/or departments. The proposed facility is more than 500 feet from the property boundary of another residential care facility (Sunnyview Retirement Home being the closest at 1 mile). The project is conditioned to obtain any license, if required, issued by appropriate State and/or County agencies and/or departments.

Development Regulations

The project site has a zoning designation of P(CG, Res) which defers to the development standards in the General Plan and the Heart of the City Specific Plan. Figure 4 below details the project’s adherence to the objective standards.

| | Required | Building 1 | Building 2 | Townhouses/Rowhouses |
|--|---|--|-------------------------------------|---|
| Front Setback along Stevens Creek Boulevard | 35 feet from curb line | 42.83 feet | 43 feet | 35 feet |
| Side Setback along Mary Avenue | Minimum 1/2 the height of the Building, or 10 feet, whichever is greater. | 68 feet (Required 40 feet) | - | 17.6 feet (Required 15 feet) |
| Side Setback along Highway 85 | Minimum 1/2 the height of the Building, or 10 feet, whichever is greater. | - | - | 17.6 feet (Required 15 feet) |
| Private Open Space | 60 square feet per unit | 60 - 132 square feet per unit (balconies) ⁶ | 60 square feet per unit (balconies) | Town Houses: 104 to 125 square feet per unit (Patios) Row Houses: 295 to 375 square feet per unit (Patios) |

⁶ The Memory Care rooms will not have individual balconies, but a secure 1,650 square feet terrace dedicated to these residents and located on their building floor, for supervised activity.

| | | | | |
|--|------------------------|---------------------------|---------------------------|---------|
| | | | | |
| Height | 45 feet | Roof Ridge – 79.5 feet | Roof Ridge – 64.5 feet | 30 feet |
| Slope Line form the curb line along Stevens Creek Boulevard | 1:1 Slope Line Setback | Roof Ridge – 1:1.63 | Roof Ridge – 1:1.24 | 1:1 |

As described previously, the developer is requesting waivers of the required 1:1 slope line setback from the curb along Stevens Creek Boulevard and of the maximum height for Buildings 1 and 2. The development standards for the rest of the physical development of the buildings, with the exception of the dispersion requirements,⁷ have either been met or fall within what is required in the General Plan and Heart of the City Specific Plan.

The Common Open Space Requirement in Development Standard 1.01.040.C.2 of the Heart of the City Specific Plan is 150 square feet per unit or 44,100 square feet. The project is providing 44,945 square feet of common open space, which is designed with 34,150 square feet of common landscaping space and 9,004 square feet of common hardscape in the form of pathways and roof decks on both Buildings 1 and 2. The development is also providing 2,915 square feet of common retail outdoor space where only 500 square feet is required.

Heart of the City Exception

Residential development is a permitted use on mixed-use zoning designation sites if the site is identified as a Priority Housing site in the Housing Element, as is this site. However, the Heart of the City Specific Plan limits uses that do not involve the direct retailing of goods or services to the general public to no more than 25% of a building frontage along Stevens Creek Boulevard, and no more than 50% of the rear of a building. The project provides 60% of the frontage along Stevens Creek and approximately 25% of the rear of the buildings as direct retail. Because the proposed project does not provide the requisite percentage of retail along Stevens Creek Boulevard, as required by the Heart

⁷ As noted above, the project is not consistent with the City’s BMR unit dispersion requirement.

of the City Specific Plan, an Exception is required. The applicant disputes that an exception is required because it interprets the 25% requirement to apply only to retail commercial frontage, not to residential frontage, but has agreed to apply for the exception under protest.

The proposed development provides 20,000 square feet of retail clustered at the corner of Stevens Creek Boulevard and Mary Avenue. The applicant submitted both a retail analysis provided by a commercial broker and an alternate site plan showing a conforming retail frontage, which are attached as Attachments S and T, respectively. In summary, the study and alternative site plan state and illustrate the following conclusions:

- That retail spaces fronting Stevens Creek Boulevard, facing the busy boulevard would be challenging, if not impossible to lease. Stevens Creek Boulevard with its 6 lanes of traffic does not present an enticing walkable, or safe, retail boulevard.
- The closer to the Highway 85 on-ramp along Stevens Creek Boulevard, the less inviting it is for foot traffic.
- Virtually the same square footage of retail that is provided (20,000 square feet) as what would have been needed to meet the Heart of the City retail standard (20,330).
- Because of the higher concentration of residential density and better visibility by pedestrians and motorists, retail space clustered on the corner of Mary Avenue and Stevens Creek Boulevard would be more successful.

The Heart of the City Specific Plan allows for design flexibility in situations when small lot size, unusually shaped parcels, or unique surrounding land uses make it difficult to adhere to the development standards and where all efforts to meet the standards have been exhausted. The Heart of the City Exception for development standards can be approved if the final approval authority for a project makes all the following findings supported by substantial evidence (*staff's analysis included in italics below each finding*):

1. The proposed development is otherwise consistent with the City's General Plan and with the goals of this specific plan and meets one or more of the criteria for an exception for reasons to provide design flexibility in situations when small lot size, unusually shaped parcels, or unique surrounding land uses make it difficult to adhere to the development standards and where all efforts to meet the standards have been exhausted.

The project site is located along Stevens Creek Boulevard (identified Priority Development Area), surrounded by a mix of uses, proximity to services, and access to public transportation makes it conducive to a residential development. However, the

location the project site is constrained by the fact that the Stevens Creek Boulevard frontage is adjacent to the on-ramp for Highway 85. This would discourage pedestrian traffic and reduce the visibility of future retail tenants, significantly limiting the viability for commercial use.

2. The proposed development will not be injurious to property or improvements in the area nor be detrimental to the public health and safety.

The project site is designated as a Priority Housing Site in the City's Housing Element. The location is surrounded by similar urban uses and the project is consistent with the General Plan for density, landscaping, private outdoor space, access, streetscape, setbacks, and design. The existing shopping center will be developed with a mix of residential housing stock including affordable, age-restricted apartment complexes and market rate townhouse/rowhouse condominiums built to the current building and fire safety codes. Therefore, the project will not be detrimental or injurious to properties or improvements in the vicinity, and will not be detrimental to the public health, safety, general welfare, or convenience.

3. The proposed exception will not result in a hazardous condition for pedestrian and vehicular traffic.

The exception requested for the proposed project does not relate to the creation of a hazardous condition for pedestrian and vehicular traffic.

4. The proposed development has legal access to public streets and public services are available to serve the development.

The proposed project proposes the installation of a two-way driveway to allow access to Stevens Creek Boulevard and Mary Avenue, which are public streets that the property has frontages along. Additionally, all services necessary for development are available to serve the development. The proposed project will provide the appropriate hook-ups for access.

5. The proposed development requires an exception, which involves the least modification of, or deviation from, the development regulations prescribed in this chapter necessary to accomplish a reasonable use of the parcel.

The proposed development has met all other development standards for height, parking, landscaping, density, and building placement as mandated by the General Plan, Heart of the City Specific Plan, and Zoning Ordinance, except those for which the applicant has requested density bonus waivers. The only other development regulation it does not meet is the provision of at least 75% of the building frontage along Stevens Creek Boulevard and 50% of the rear of the building be occupied by uses that allow direct

retailing of goods. The development is providing retail frontage along Mary Avenue, where it is not required by the Heart of the City Specific Plan, in an equivalent size and scope that would have been needed to meet the retail frontage requirement along Stevens Creek Boulevard.

Considering the difficulties of situating retail along this portion of Stevens Creek Boulevard, and the fact that an amount of retail that is equal to what is required would be provided on the site but would be located along Mary Avenue and the portion of Stevens Creek Boulevard near the intersection of Mary Avenue, it is recommended that this Heart of the City Exception be approved.

Site Planning and Architectural Design

The proposed development sits between Stevens Creek Boulevard, Mary Avenue, and Highway 85. It has frontages on both Mary Avenue and Stevens Creek Boulevard, with three (3) driveways leading onto Mary Avenue and one on Stevens Creek Boulevard. Surface parking is mostly hidden from Stevens Creek Boulevard. Surface parking in front of Building 1 along Mary Avenue sets the building back from the right-of-way. Pedestrian access is allowed along various points throughout the development, with the project conditioned to provide an easement allowing pedestrian and bicycle traffic to utilize the site as a cut through from Mary Avenue to Stevens Creek Boulevard.

The common open space areas have been designed in order to foster gathering at various points in the development while landscape pathways crisscross the development to allow pedestrians ample circulation without having to walk on the internal street network. Active uses are on the bottom floor along major streets. The shorter Townhouse/Rowhouse buildings are buffering the Mary Avenue neighbors from the taller Buildings 1 and 2 along Stevens Creek Boulevard.

The proposed design quality of the buildings contains features consistent with a Spanish Revival style. The quality of materials as demonstrated in the project application is superior, and the City's architectural consultant has concurred on this point (Attachment U. Two design modifications that had been added as Conditions of Approval for the Architectural and Site Approval for the project were presented to the Planning Commission hearing on May 12, 2020:

- Revise the primary building entrances for both Building 1 and Building 2 to provide greater visual interest and orientation at the pedestrian level on-site. Possible design solutions could include a projecting tower massing element at a lower height, attached roof form at a lower height, awning/overhang at the first floor, and/or change in color/material application, among other possible design interventions.

- Pursue revisions to tower location to better highlight the primary entrance for the residential portion of Building 1 and/or highlight building corners.

These Conditions of Approval have been deleted from the resolution, however, because the applicant has removed the tower elements from Buildings 1 and 2. The space formerly occupied by the tower element has been lowered below the top of the proposed roof and programmed for amenity space for senior residents. Further, to make the building appear less tall and to reduce its presence along Stevens Creek Boulevard, the sixth floor of Building 1 (top floor) is reprogrammed with amenity spaces and roof terraces along this frontage. This allows the roof to be pushed back approximately 22'-0" from the face of the building, reducing the perceived height of the building from the sidewalk and street.

The design of the buildings and the layout of the site meet the intent of the 'Mixed-Use Urban Village' as defined in the General Plan.

Tree Removal and Replacement

The development proposes to remove and replace 74 protected development trees. Both the applicant's and the City's consultant arborists evaluated the existing 83 trees on the site. Out of the 83 trees surveyed, 74 trees were identified that would be directly impacted by development and would require removal. Of those impacted, 14 are Coast Live Oaks with trunk diameters ranging between 11-51 inches. Of the 14 Coast Live Oaks, four (4) will be relocated on-site.

The applicant is proposing to replace the removed trees with 386 trees (314 on-site and 74 off site). Of those trees, 35 will be 36" Box Coast Live Oaks. Eighteen of these oaks will be planted in the right-of-way consistent with the Heart of City Specific Plan's vision of the West Stevens Creek Boulevard subarea, between Stelling and Highway 85, becoming an 'Oak Grove'.

Traffic, Circulation and Parking Analysis

As part of the analysis of the project's potentially significant environmental effects in the Environmental Impact Report, traffic impacts were evaluated. These impacts were found to be less than significant, because the trip generation from the proposed Mixed-Use development compared to the existing Oaks Shopping Center would decrease from an existing daily trip count of 2,209 to 1,462. Peak morning trips would also decrease (57 to 39), as would peak evening trips (152 to 112).

The City's Density Bonus Ordinance, in compliance with State Law, allows density bonus projects the option to use alternate parking standards for all residential units (market-rate and affordable) based on bedroom count (0.5 per bedroom). The following standards

must be met:

- At least 11% very-low income or 20% low income units; and
- Within one-half mile of a Major Transit Stop; and
- Unobstructed Access to the Major Transit Stop.

The project meets the standard above because 12.2% of the development will be dedicated to very-low income residents. Further, the project is within one-half mile of a major transit stop, i.e., the intersection of VTA bus routes 23 and Rapid 523, both of which run at headways of 15 minutes or less, as found in the EIR. These bus stops are located at the intersection of N. Stelling Road and Stevens Creek Boulevard, approximately 0.46 miles from the furthest corner of the project. Residents will be able to access the major transit stop without encountering natural or constructed impediments by traveling down Stevens Creek Boulevard. See Figure 4 for a breakdown of the parking within the development.

Figure 4 Parking

| Building | Building Use | Parking Rate | Required Spaces | Provided Spaces |
|-----------------------------|-------------------------------------|---|-----------------|--|
| Building 1 | Non-Residential/Memory Care | Retail 1/250 SF | 29 | 130 Spaces (54 at grade, 76 in the garage) |
| | | Restaurant/café 1 space for every 3 seats + employees | 74 | |
| | | Memory Care 1 space per doctor +1 per 3 employees + 1 space per 6 beds | 27 | |
| | Residential (131 Senior Units) | 0.5 per bedroom | 81 | 81 total covered single spaces in garage. (Spaces are assigned to units) |
| Building 2 | Retail (2,400 SF) | 1/250 SF | 10 | 14 Total (10 at grade, 4 in garage) |
| | Residential (48 units Senior Units) | 0.5 per bedroom | 30 | 30 total covered single spaces in garage. (Spaces are assigned to units) |
| Townhouses/Rowhouses | Residential (88 units) | 0.5 per bedroom | 132 | 176 (2 per unit/in unit garages) |
| | Visitor Parking | - | - | 32 (at grade) |
| Total | | | 383 Required | 463 Provided |

Because the project site meets the criteria established by the Density Bonus Law, the project is required to provide only 383 spaces. However, the applicant proposes 463 parking spaces, which adequately meets the parking requirements of the proposed project.

Vesting Tentative Map

The project is currently two separate parcels. The application for the Vesting Tentative Map (VTM) revises the lot lines to create one 4.7 acre and one 3.1 acre parcel. The 4.7 acre parcel will include a condominium map for the 88 townhouse and rowhouse condominiums in contrast to the 3.1 acre parcel which will include all of the senior housing and retail portions of the projects. A condition of approval has been added to the VTM that would require dedication of reciprocal easements ensuring cross access between the parcels. A bicycle and pedestrian easement have been added along the western portion of the development that will connect Mary Avenue and Stevens Creek Boulevard.

Project Phasing

At the July 14, 2020 Planning Commission meeting, the applicant raised questions about whether the affordable units included in the proposed project would be constructed. As noted throughout this staff report, the project as proposed is inconsistent with a number of City development standards, and the only basis in the record for waiving these standards is the fact that the project will provide 48 BMR units. Thus, provision of affordable housing units is a fundamental condition of project approval.

To ensure that the affordable housing component of the project is constructed, the proposed Development Permit resolution (Attachment B) includes a condition of approval requiring the senior BMR units to be completed before the City will issue a certificate of occupancy for the 66th rowhouse/townhouse. Conversely, to ensure that the rowhouse/townhouse component is constructed without major modification, the proposed Development Permit resolution also requires that at least 10 of the rowhouses/townhouses are constructed before the City will issue a final certificate of occupancy for Building 2, which contains all of the senior BMR units. This project phasing

condition provides a reasonable mechanism for the applicant to proceed while affording the City assurances that the project will be constructed as approved.

Signage

Signage details are not included in this permit application. Staff will review the signage proposal with the property owner at the time the applicant applies for a sign permit through the Building Division.

Project History

On May 17, 2018 the applicant submitted an application that was deemed complete on July 23, 2019 and evaluated in the Draft Environmental Impact Report (DEIR). In February of 2020, the applicant submitted a Senior Enhanced Alternative that was evaluated as a feasible alternative in the Final Environmental Impact Report (Final EIR) (the Increased Senior Housing Alternative). On April 22, 2020, the applicant requested that the Senior Enhanced Alternative Plan be considered as the proposed project. Although the massing of the buildings, square footage, and overall exterior appearance of the Senior Enhanced Alternative Plan were virtually identical to originally proposed project, the unit count had been increased.

Other Department/Agency Review

The City's Building Division, Public Works Department, Environmental Services Division, Sheriff's Department, Cupertino Sanitary District and the Santa Clara County Fire Department have reviewed and conditioned the project.

Environmental Review

An Initial Study and Final EIR have been prepared for the project (see Attachment20). The Final EIR identifies mitigation measures to reduce the potentially significant environmental impacts of the project to less than significant levels. The mitigation measures would be adopted and made conditions of approval for this project. The areas in which mitigation measures have been identified are:

- *Air Quality:* Construction shall comply with BAAQMD's best management practices for reducing construction emissions of fugitive dust and shall ensure construction emissions are reduced.
- *Biological Resources:* The project shall protect nests of raptors and other birds when they are in active use. Tree removal, replacement, and protection should adhere to the standards as required in the City's Municipal Code.

- *Cultural and Tribal Resources:* The project shall implement identified measures in the event any cultural or archaeological resources are found on the site. This includes consulting with appropriate tribes as well as an archeologist.
- *Geology and Soils:* The project shall follow the identified measures if paleontological artifacts, such as fossils, are found on the site, which include consulting with a paleontologist.
- *Noise:* Construction activities shall comply with the City’s Noise Ordinance and best management practices for noise mitigation.
- *Utilities:* Demonstrate to the City of Cupertino and Cupertino Sanitary District that the development would not exceed peak wet weather flow capacity of the Santa Clara sanitary sewer system prior to issuance of building permits.

The Notice of Preparation (NOP) of a Draft Environmental Impact Report (EIR) for the Westport Mixed-use Project was published on July 11, 2019. In addition, the NOP was mailed to neighbors and interested parties. A scoping session was held at City Hall on July 19, 2019. Written comments were invited between July 11, 2019 and August 9, 2019. Fifteen comments were received during the 30-day NOP Public Review Period. The Notice of Availability (NOA) of the Draft EIR was published on November 6, 2019. A public meeting was held at the Senior Center on December 11, 2019 to determine the adequacy of the Draft EIR (DEIR). Nine comments were received during the 45-day review period ending on December 20, 2019.

At its April 16, 2020 meeting, the Environmental Review Committee (ERC) determined on a 5-0 vote to recommend that the City Council certify the EIR for the project (see Attachment 21). The proposed changes to the project would not have any new or substantially more severe significant environmental impacts.

Public Outreach and Noticing

The following table is a brief summary of the noticing done for this project:

| Notice of Public Hearing, Site Notice & Legal Ad | Agenda |
|--|--|
| <ul style="list-style-type: none"> ▪ Site Signage (10 days prior to the hearing) ▪ Citywide postcard mailed to each resident (10 days prior to the hearing) ▪ Legal ad placed in newspaper (at least 10 days prior to the hearing) ▪ Public hearing notices were mailed to property owners citywide (10 days prior to the hearing) | <ul style="list-style-type: none"> ▪ Posted on the City’s official notice bulletin board (one week prior to the hearing) ▪ Posted on the City of Cupertino’s website (one week prior to the hearing) |

Public Comment

The City has received comments regarding the project throughout the application period of almost two years. The comments vary, covering topics from traffic impacts to concerns about the request for density bonus waivers of height and slope line setback standards. Attachment X includes those comments that have not been responded to directly in the *Response to Comments Section* of the Final EIR because they do not raise environmental issues.

As stated earlier, the Final EIR found that the traffic impacts from the project are not significant. In fact, traffic levels are anticipated to decrease with the addition of housing and the reduction of retail, as compared to the site's current use. The findings for density bonus waivers as allowed in CMC Chapter 19.56 *Density Bonus* can be made for the requested height and slope line setback waivers, but not the BMR unit dispersion waiver, unless additional conditions of approval are imposed, as described below. The site is a Priority Housing Site as identified in the General Plan, and the vision for this area is for a vibrant, higher density mixed-use gateway development, like what has been proposed.

There has also been some concern about how the City's Density Bonus review process compares with other cities such as San Francisco. The City has reviewed this project and the Density Bonus Law carefully. Our City Attorney's Office has spoken to two planners in San Francisco who work on density bonus projects in that city and is aware that San Francisco's ordinance states that waivers must be necessary to achieve the additional density, or the concessions or incentives permitted by the law. The two San Francisco planners shared various ways that this standard has been applied and noted that it had not been applied in San Francisco on a larger site with a mix of unit types as is proposed in the Westport project. The City's third-party architect, as described previously, supported the requested waivers for height and slope line setback.

Housing Accountability Act

The Housing Accountability Act (HAA) (Gov. Code § 65589.5) limits the ability of a city to deny or impose certain conditions on a housing development project when the project complies with applicable, objective general plan, zoning, and subdivision standards and criteria. This project is a "housing development project" under the HAA because it is a mixed-use development consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.

As discussed in detail above, the project is either consistent with the City's objective standards or has applied for waivers and an incentive/concession under the Density Bonus Law.

When a project complies with objective standards, the HAA allows a city to disapprove the project or to impose a condition that the project be developed at a lower density only if the city finds *both* of the following, supported by a preponderance of the evidence in the record (*staff's analysis of each finding included in italics*):

1. The project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density; and

The City cannot make this finding. As evidenced by the findings and conclusions of the Environmental Impact Report, the Project would have no significant, quantifiable, direct, and unavoidable impact, based on objective, identified, written public health or safety standards, policies, or conditions as they existed on the date that the application for the residential Project was deemed complete.

2. No feasible method to satisfactorily mitigate or avoid the adverse impact exists.
Because no adverse impacts exist, the City cannot make this finding.

Number of Hearings Allowed

In October 2019, the Legislature passed SB 330, also known as the Housing Crisis Act. SB 330 added Section 65905.5 to the Government Code, which provides that, if a proposed project complies with the objective general plan and zoning standards in effect at the time the project application was deemed complete, a city or county may not conduct more than five hearings in connection with approval of the project. In his July 31, 2020 letter, Mr. Faber stated that “[t]he Council hearing set for August 18, 2020 will be the fifth hearing on this Project” for purposes of the limit on hearings in SB 330. This statement is incorrect.

SB 330 took effect on January 1, 2020, and there is no indication that the Legislature intended it to apply retroactively. The application for the Westport project was deemed complete on July 23, 2019, prior to the effective date of SB 330. For that reason, it is unlikely that SB 330’s five-hearing limit applies to the Westport project. However, even if SB 330’s limit applies to the number of hearings held since January 1, 2020, when SB 330 took effect, the Council’s August 18, 2020 hearing would only be the fourth hearing on the project. Since January 1, 2020, there have been three other meetings - an Environmental Review Committee meeting (April 2020), and two Planning Commission meetings (May and July 2020). Therefore, even under a conservative approach, there are still two hearings left.

Fiscal Impacts

The project will most likely generate a renewed source of property tax increases as well as required mitigation fees for park development and traffic impact fees.

Sustainability Impacts

As an infill redevelopment priority housing development in a designated Priority Development Area and Transportation Planning Area, the proposed project would be consistent with the overall intent of the City's Climate Action Plan (CAP) to support reductions in GHG emissions and the proposed project would not conflict any goals or measures to reduce GHG emissions in the CAP and impacts would be less than significant as analyzed in the EIR.

Conclusion

At the July 14, 2020 Planning Commission hearing, the Commission determined that there was insufficient justification for a waiver of the BMR unit dispersion requirement, because the applicant had not demonstrated that dispersing the senior BMR units between Buildings 1 and 2 would physically preclude the project. As a result, the Commission recommended denial of the project.

However, as discussed earlier, the applicant subsequently submitted a request for an incentive/concession for the consolidation of the BMR Units in Building 2. The peer review of this request conducted by Sally Nielson of Hausrath Economics Group concluded that the request contained sufficient information to support the conclusion that the concession would result in "identifiable and actual cost reductions to provide for affordable housing costs.

Staff recommends approval of the project because the project and conditions of approval address concerns related to the proposed development and all of the findings for approval of the proposed project, consistent with Chapters 14.18, 18.28, 19.56, 19.156, and 19.168 of the Cupertino Municipal Code, may be made. To the extent that concerns remain about the development's height and slope line, the State Density Bonus Law and Housing Accountability Act constrain the City's ability to address these concerns, and the project meets the standards that qualify it for protection under these laws.

Next Steps

The City Council's decision will be final unless reconsidered within 10 days of the decision. The applicant may apply for building permits at that time.

Prepared by: Gian Paolo Martire, Senior Planner

Reviewed by: Piu Ghosh, Planning Manager

Approved by: Benjamin Fu, Director of Community Development

Approved for Submission by: Deborah Feng, City Manager

ATTACHMENTS:

- A. Draft Resolution for EA-2018-04
- B. Draft Resolution for DP-2018-05
- C. Draft Resolution for ASA-2018-05
- D. Draft Resolution for U-2019-03
- E. Draft Resolution for TM-2018-03
- F. Draft Resolution for EXC-2019-03
- G. Draft Resolution for TR-2018-22
- H. Planning Commission Resolution No. 6908
- I. Project Description
- J. Below Market Rate Project Description
- K. Letter from Andy Faber to Eric S. Phillips dated November 30, 2018
- L. Letter from Andy Faber to the Planning Commission dated April 22, 2020
- M. Density Bonus Waiver Request: Enhanced Senior and Family Living Project
- N. Letter from Randy Bekerman, representing Atria Senior Living dated June 24, 2020
- O. Letter from Andrew Faber to Gian Paolo Martire, dated July 31, 2020
- P. Letter from KT Urban, Atria, and Related to Gian Paolo Martire, dated July 31, 2020
- Q. Memo from RRM Design Group, Westport Density Bonus Waiver Review – Enhanced Senior and Family Living Project, dated July 7, 2020.
- R. Memo from Sally Nielsen, Vice President, Hausrath Economics Group, *Westport Cupertino: Peer Review of Economic Justifications for a Density Bonus Concession*, dated August 11, 2020.
- S. Westport Cupertino Retail Layout Analysis
- T. Alternate Retail Plan
- U. Memo from RRM Design Group, Westport Design Review – Tower Element, dated May 1, 2020.
- V. Final EIR
- W. ERC Recommendation dated April 16, 2020
- X. Public Comments

Y. Project Plans

1273225.8