

RESOLUTION NO. \_\_\_\_\_

A RESOLUTION OF THE CUPERTINO CITY COUNCIL  
APPROVING A HEART OF THE CITY EXCEPTION TO ALLOW A REDUCTION OF  
THE RETAIL REQUIREMENT FOR BUILDINGS FRONTING STEVENS CREEK  
BOULEVARD TO ACCOMMODATE

A MIXED-USED DEVELOPMENT CONSISTING OF 267 HOUSING UNITS (88  
ROWHOUSE/TOWNHOMES, 179 SENIOR APARTMENTS, OF WHICH INCLUDE 48  
SENIOR AFFORDABLE APARTMENTS), 27 MEMORY CARE LICENSED ASSISTED  
LIVING RESIDENCES (“MEMORY CARE RESIDENCES”), AND 20,000 SQUARE FEET  
OF COMMERCIAL SPACE LOCATED AT 21267 STEVENS CREEK BOULEVARD  
(APN: 326-27-042, -043)

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SECTION I: PROJECT DESCRIPTION

Application No.: EXC-2019-03  
Applicant: KT Urban (Mark Tersini)  
Property Owner: 190 West St. James, LLC  
Location: 21267 Stevens Creek Blvd. (APN #326-27-042, -043)

SECTION II: FINDINGS FOR HEART OF THE CITY EXCEPTION:

WHEREAS, the Planning Commission of the City of Cupertino received an application for a Heart of the City Exception as described in Section I of this resolution; and

WHEREAS, The Westport Cupertino Mixed-Use Project (“Project”), including the Heart of the City Exception, is fully described and analyzed in the Initial Study and proposed Final Environmental Impact Report (State Clearinghouse No. 2019070377) (“EIR” or “Final EIR”) for the Project; and

WHEREAS, the City of Cupertino’s Environmental Review Committee at its April 16, 2020 meeting reviewed the Final EIR consisting of the April 7, 2020 Public Review Draft EIR and Response to Comments, received public comments, and voted 5-0 to recommend that the City Council certify the EIR for the project; and

WHEREAS, based on substantial evidence in the record, on May 12, 2020, the Planning Commission recommended on a 5-0 vote that the City Council certify that the EIR has been completed in compliance with the California Environmental Quality Act, Public Resources Code Section 21000 et seq. (“CEQA”) and reflects the independent judgment and analysis of the City, adopt Findings, adopt and require as conditions of approval all of the mitigation measures for the Project which are within the responsibility and

jurisdiction of the City that are identified in the EIR, and adopt the Mitigation Monitoring and Reporting Program for the Project (EA-2018-04); and

WHEREAS, on May 12, 2020 the Planning Commission recommended on a 5-0 vote that the City Council approve the Vesting Tentative Map (TM-2018-03), in substantially similar form to the Resolution presented (Resolution No. 6904), approve the Development Permit (DP-2018-05) in substantially similar form to the Resolution presented (Resolution No. 6901), approve the Architectural and Site Approval Permit (ASA-2018-05) in substantially similar form to the Resolution presented (Resolution No. 6902), approve the Use Permit (U-2019-03) in substantially similar form to the Resolution presented (Resolution No. 6903), approve the Tree Removal Permit (TR-2018-22) in substantially similar form to the Resolution presented (Resolution No. 6906), approve the Heart of the City Exception (EXC-2019-03) in substantially similar form to the Resolution presented (Resolution No. 6905) for the Senior Enhanced Alternative; and

WHEREAS, on June 4, 2020, as updated on June 25 and 26, 2020, the applicant submitted and requested the City to consider revisions to the Project (“Revised Senior Enhanced Project”) that include relocating nine Below Market Rate units from Building 1 to an additional top story on Building 2, altering the unit mix in Buildings 1 and 2 to provide additional space for terraces on the tops of those buildings, and changing the unit mix in Buildings 2 to include two-bedroom units in addition to studios and one-bedroom units; and

WHEREAS, because the revisions in the Project affect building height and dispersion of BMR units, the project was reviewed by the Planning Commission on July 14, 2020 for recommendation to the City Council; and

WHEREAS, on July 14, 2020, the Planning Commission recommended on a 3-2 vote that the City Council deny the project in accordance with Resolution No. 6908; and

WHEREAS, on July 31, 2020, the applicant submitted a request for an incentive/concession to consolidate all 48 of the senior BMR units in Building 2; and

WHEREAS, all necessary public notices having been given as required by the Procedural Ordinance of the City of Cupertino and the Government Code, and the Planning Commission held at least one public hearing in regard to this application, and on August 18, 2020, the City Council held a public hearing to consider the Architectural and Site Approval; and

WHEREAS, the City Council of the City of Cupertino is the decision-making body for this Resolution; and

WHEREAS, on August 18, 2020, after consideration of substantial evidence contained in the entire administrative record, and prior to consideration of the Development Permit,

the City Council adopted Resolution No. [####] certifying the EIR, adopting and requiring as conditions of approval all of the mitigation measures for the Project which are within the responsibility and jurisdiction of the City that are identified in the EIR, and adopting the Mitigation Monitoring and Reporting Program for the Project; and

WHEREAS, the applicant has met the burden of proof required to support the application for a Heart of the City Exception; and

WHEREAS, the City Council finds as follows with regard to this application:

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 of the project site is constrained by the fact that the Stevens Creek Boulevard frontage is adjacent to the onramp for Highway 85. This would discourage pedestrian traffic and reduce the visibility of future retail tenants significantly limiting the viability for commercial use. With the approved density bonus and associated waivers, the project is consistent with the General Plan. Other than this requested exception, the project is consistent with the Heart of the City Specific Plan.*

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, with the approved density bonus and associated waivers and incentive/concession, 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 townhome/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, 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, with the exception of those the applicant has requested density bonus waivers and incentive /concession for. The only 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.*

NOW, THEREFORE, BE IT RESOLVED:

That after careful consideration of maps, facts, exhibits, testimony and other evidence submitted in this matter and the Environmental Impact Report and the Mitigation Monitoring and Reporting Program for the Project (EA-2018-04), subject to the conditions which are enumerated in this Resolution, beginning on PAGE 3 herein, and subject to the conditions contained in all other Resolutions approved for this Project,

The application for Heart of the City Exception, Application No. EXC-2019-03, is hereby approved, and that the subconclusions upon which the findings and conditions specified in this Resolution are based are contained in the Public Hearing record concerning Application No. EXC-2019-03 as set forth in the Minutes of the City Council Meeting of August 18, 2020 Meeting, and are incorporated by reference as though fully set forth herein.

SECTION III: CONDITIONS ADMINISTERED BY THE COMMUNITY DEVELOPMENT DEPT.

1. APPROVED EXHIBITS

Approval is based on the plan set dated June 4, 2020, as updated June 25, 2020, consisting of 39 sheets labeled as Westport Cupertino, G200 – G213, A001-A222, VTM-1-VTM-6, and L100-L300, drawn by C2K, and Kimley Horn except as may be amended by conditions in this resolution.

2. ACCURACY OF PROJECT PLANS

The applicant/property owner is responsible to verify all pertinent property data including but not limited to property boundary locations, building setbacks, property size, building square footage, any relevant easements and/or construction records. Any misrepresentation of any property data may invalidate this approval and may require additional review.

3. CONCURRENT APPROVAL CONDITIONS

The conditions of approval contained in file nos. TR-2018-22, TM-2018-03, TM-2018-03, DP-2018-05, U-2019-03 and EA-2018-04 shall be applicable to this approval.

4. ANNOTATION OF THE CONDITIONS OF APPROVAL

The conditions of approval set forth shall be incorporated into and annotated on the first page of the building plans.

5. EXCEPTION

A Heart of the City Exception is granted to allow the construction of the proposed project with a maximum of 40% of the building frontage along Stevens Creek Boulevard and 75% of the rear of the building to be occupied by non-retail uses.

6. CONSULTATION WITH OTHER DEPARTMENTS

The applicant is responsible to consult with other departments and/or agencies with regard to the proposed project for additional conditions and requirements. Any misrepresentation of any submitted data may invalidate an approval by the Community Development Department.

7. INDEMNIFICATION

To the fullest extent permitted by law, the applicant shall agree to indemnify, defend with the attorneys of the City's choice, and hold harmless the City, its City Council, and its officers, employees, and agents (collectively, the "indemnified parties") from and against any liability, claim, action, cause of action, suit, damages, judgment, lien, levy, or proceeding (collectively referred to as "proceeding") brought by a third party

against one or more of the indemnified parties or one or more of the indemnified parties and the applicant related to any Ordinance, Resolution, or action approving the project, the related entitlements, environmental review documents, finding or determinations, or any other permit or approval authorized for the project. The indemnification shall include but not be limited to damages, fees, and costs awarded against the City, if any, and cost of suit, attorneys' fees, and other costs, liabilities, and expenses incurred in connection with such proceeding whether incurred by the Applicant, the City, or the parties initiating or bringing such proceeding.

The applicant shall agree to (without limitation) reimburse the City its actual attorneys' fees and costs incurred in defense of the litigation. Such attorneys' fees and costs shall include amounts paid to the City's outside counsel and shall include City Attorney time and overhead costs and other City staff overhead costs and any costs directly related to the litigation reasonably incurred by City. The applicant shall likewise agree to indemnify, defend, and hold harmless the indemnified parties from and against any damages, attorneys' fees, or costs awards, including attorneys' fees awarded under Code of Civil Procedure section 1021.5, assessed or awarded against the indemnified parties. The Applicant shall cooperate with the City to enter a Reimbursement Agreement to govern any such reimbursement.

The Applicant shall agree to (without limitation) reimburse the City for all costs incurred in additional investigation or study of, or for supplementing, redrafting, revising, or amending, any document (such as an Environmental Impact Report, negative declaration, specific plan, or general plan amendment) if made necessary by proceedings challenging the project approvals and related environmental review, if the applicant desires to continue to pursue the project.

The Applicant shall agree that the City shall have no liability to the Applicant for business interruption, punitive, speculative, or consequential damages.

8. NOTICE OF FEES, DEDICATIONS, RESERVATIONS, OR OTHER EXACTIONS

The Conditions of Project Approval set forth herein may include certain fees, dedication requirements, reservation requirements, and other exactions.

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PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this 18<sup>th</sup> day of August, 2020, by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

SIGNED:  _____ Steven Scharf, Mayor City of Cupertino	  _____ Date
ATTEST:  _____ Kirsten Squarcia, City Clerk	  _____ Date