

J. ABRAMS LAW, P.C.

538 Hayes Street
San Francisco, CA 94102

Jim Abrams
Jabrams@jabramslaw.com
(415) 999-4402

VIA E-EMAIL

June 18, 2024

Gian Martire
Senior Planner
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3255
GianM@cupertino.org

Re: Westport Cupertino Project, Building 1

Dear Mr. Martire:

This firm represents the project sponsor of the “Building 1” development (“Building 1”) within the Westport Cupertino project (the “Project”). This letter responds to your request for an explanation of the legal justifications authorizing the following modifications to the Building 1 approvals issued by the City Council on December 7, 2021:

- Modify the approved senior assisted living dwelling unit count to 136 dwelling units
- Eliminate the basement-level parking garage;
- Reduce the ground floor retail in Building 1 to 4,000 square feet; and
- Waive application of the Park Land Dedication Fee.

Though not discussed at length herein, we underscore that each of the above modifications are being pursued to make the construction of Building 1 and the overall approved Project financeable. Development of Building 1 is currently not financeable due to challenging capital market conditions, inflated construction costs, shifts in market demand, and expensive design elements in the currently approved design of Building 1. We respectfully submit that prompt processing of the modifications would further the goals of the City’s pending draft Housing Element, promote the use of the density bonus consistent with state law, reduce impact fees that constrain the production of housing, and streamline application processing.

Allowing Range of Dwelling Unit Density

The Project's records and approvals reflect that Cupertino's General Plan and Zoning Code permit a maximum residential density on the site (that is, the site's "base density") of 237 units.¹ Twenty-nine units (or 12% of the base density units) are designated as affordable to very low income households.² Under the state density bonus law, this means the Project is eligible for a density bonus of up 38.75% and could contain up to 329 units.³

As currently approved, the Project includes 88 dwelling units in townhomes, 48 total affordable units in Building 2, and 123 dwelling units in Building 1, well below maximum permitted density under the state density bonus law.⁴ As there are no proposed changes to the Project's townhome program or the Project's on-site affordable program in Building 2, this means Building 1 is eligible to contain up to 193 units (237 base density units multiplied by 1.3875, less the 88 townhome units and 48 on-site affordable units).

The project sponsor respectfully requests that the City Council modify the Project approvals to permit the final design of Building 1 to contain 136 dwelling units (this would be in addition to the 35 non-residential memory care units). The project sponsor will submit plans demonstrating that the increase in dwelling units would not require any increase to the approved height and bulk of Building 1. Instead, the unit count increase would be accommodated through floor plan modifications and minor façade alterations necessary to include additional balconies. Further, the submitted plans will demonstrate that the increase to 136 dwelling units would not require additional state density bonus law waivers or concessions. For example, the design of Building 1 with 136 dwelling units would satisfy increased open space requirements, along with other Code requirements associated with the increased unit count.

The proposal would allow less than an 11% increase in dwelling unit count over the currently approved 123-unit count. This is well under the Project's eligible 38.75% density bonus under the state density bonus law.

Elimination of Subsurface Basement Garage Level

After the 2021 City Council approval of the current Building 1 design and program, the state enacted AB-2097 (which prohibits cities from imposing minimum parking requirements on residential, commercial, and other development projects that are located within one-half mile of public transit.⁵ The Project's approvals reflect that the Project is located within one-half mile of a major transit stop.⁶

¹ See Figure 2 of the Staff Report for the City Council's August 18, 2020 meeting.

² An additional 19 units (8% of the base density units) are designated affordable to low-income households.

³ See Cal. Govt. Code § 65915(f)(2).

⁴ The project also includes 35 memory care units; however, the Project's approval record clearly reflects that these units are not considered dwelling units by the City and are instead non-residential.

⁵ See Cal. Govt. Code § 65863.2.

⁶ See page 25 of the Staff Report for the City Council's August 18, 2020 and December 7, 2021 meetings.

While AB-2097 allows cities to impose minimum parking requirements under certain, limited circumstances,⁷ the City cannot apply this exemption because more than 20% of its units are dedicated to very low- and low-income households and/or the elderly.⁸

As such, the project sponsor is eligible to invoke AB-2097 to eliminate required parking minimums.

The below-grade parking garage level in Building 1 was included solely for purposes of addressing the otherwise applicable minimum parking required by Cupertino. The project sponsor respectfully elects under AB-2097 to eliminate the basement level and associated parking. No change to Building 1's current surface parking is proposed, which is permitted under AB-2097 as voluntarily included.

Reduction in Ground Floor Retail

The 2021 Heart of the City Exception approval for Building 1 requires 17,600 square feet of retail.⁹ Since 2021, the retail program has proven detrimental to the financial feasibility of Building 1 and thereby to completing the sitewide Project improvements associated with Building 1. This is because the current amount of retail occupies ground floor space that could be used to create significantly more efficient building design, achieved by locating required mechanical systems and back-of-house spaces on the ground floor level of Building 1 rather than current, more expensive-to-build basement or upper-level building locations.

The Project's approvals make clear that the Project only uses one of the two state density bonus law incentives and concessions for which it is eligible.¹⁰ The project sponsor now requests to use the second available incentive and concession to reduce required ground floor retail in Building 1. The cost-reduction rationale for modifying the otherwise applicable ground floor retail requirements for Building 1 meets the requirement that state density bonus law concessions result in identifiable and actual cost reduction.¹¹ The successful construction of Building 1 is closely tied to the ability of the Building 2 operator to finance affordable housing costs, because, when completed, the users of Building 1 will pay for a share of on-going site maintenance costs of shared infrastructure with the Building 2 operator. Unless the financial feasibility of Building 1 is enhanced through the requested concession, Building 1 will not be constructed, and all of these costs will fall on the affordable housing at Building 2.

⁷ See Cal. Govt. Code § 65863.2(b).

⁸ See Cal. Govt. Code § 65863.2(c)(1).

⁹ See Resolution No. 21-117.

¹⁰ See City Council Resolution Nos. 20-106 & 21-118. We note that these resolutions contain a condition of approval that purports to "waive" any future claim of the project sponsor to receive the second concession for which it is eligible under state law. The project sponsor would eliminate this condition through a revised application to be approved by the City Council along with the other design and program changes described herein; however, we note that nothing in the density bonus law or other state laws (including the Housing Accountability Act) support that the City may condition project approval upon an applicant's permanent waiver of state law rights and benefits. Instead, we respectfully submit that a court and/or the state Housing and Community Development Housing Accountability Unit would find such a condition unlawful and unenforceable under state law.

¹¹ See Cal. Govt. Code § 65915(k)(1).

Credit Against Park Land Dedication Fee

At the revised 136-unit count, Building 1 would be required to pay approximately \$4,080,000 (\$30,000 per senior citizen housing development unit per City Council Resolution No. 23-094) under the Park Land Dedication In-Lieu Fee. The project sponsor respectfully requests that the City Council waive application of the Park Land Dedication Fee ordinance to help facilitate the implementation of Building 1 and completion of the Project. We believe that two important factors specific to the Building 1 development support this waiver.

First, the development of Building 1 includes new pedestrian walkways connecting Stevens Creek Boulevard and Mary Avenue. The construction of the walkways is not strictly required by the City's Zoning Code; however, will improve pedestrian circulation in the area, including between Stevens Creek Boulevard and Cupertino Memorial Park.

Second, while senior citizen housing developments are subject to a lesser impact fee than general population housing projects, the project sponsor respectfully asserts that residents of the senior housing units in Building 1 cannot reasonably be anticipated to generate a material demand on city park lands and instead are more reasonably anticipated to use the open space amenities included in Building 1 and its publicly accessible, privately maintained Central Green.

The November 2023 draft of the Cupertino Housing Element expressly requires the City to explore revising its Park Land Dedication Fee, including a specific reference to allowing credits for privately owned and maintained public open spaces and other pedestrian connections and trails. The Housing Element states that the objective of this revision would be to, among other things, facilitate a substantial amount of lower-income, moderate-income, and above moderate-income housing, such as the Project and its Building 1.¹²

Though the draft Housing Element provides that the City would have until June 2026 to complete the review and revision process, the project sponsor respectfully submits that waiving application of the Park Land Dedication Fee to the Building 1 more immediately advance the City's goals, while still providing the City with the complete set of publicly accessible, privately maintained green spaces in the Project, as well as enhanced pedestrian circulation, all maintained at no on-going cost to the City.

Sincerely,

A handwritten signature in black ink, consisting of a stylized, cursive 'J' followed by a horizontal line.

Jim Abrams

¹² See Strategy HE-2.3.9 in November 2023 Draft Housing Element.