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CITY COUNCIL STAFF REPORT

Meeting: July 16, 2024

Subject

Waiver of Below Market Rate Housing Mitigation Fees (“BMR Fees”) and Zoning/Planning Municipal Code Fees (“Planning Fees”) imposed on Vallco/Rise SB 35 project (10101-10330 North Wolfe Road).

Recommended Action

Adopt Resolution No. 24-____ waiving BMR and Planning Fees imposed of the Vallco/Rise SB 35 project.

Reasons for Recommendation

On September 21, 2018, the City Manager approved an application submitted under Government Code section 65913.4 (“SB 35”) by Vallco Property Owner LLC (“VPO”) for development of a mixed-use project on a 50.82-acre property located at 10101-10330 North Wolfe Road, the location of the former Vallco Shopping Mall. SB 35 requires that jurisdictions that have failed to meet their regional housing needs allocation review qualifying projects with specified levels of affordability ministerially, based on objective development standards, and without discretionary review by the Planning Commission or City Council. The City Manager’s approval applied the provisions of state law and the Municipal Code and was subsequently upheld in a decision of the Santa Clara County Superior Court.

Following the original approval, on June 3, 2022 and subsequently on February 16, 2024, the City approved two modifications to the project (now called “the Rise”) under SB 35. The project approval as modified authorizes the construction of 2,699 housing units, 890 of which would be affordable to lower income households, 226,386 square feet of retail space, and 1,954,613 square feet of office space. (See Attachment A.)

The project is subject to certain impact fees under the Mitigation Fee Act (Gov. Code, § 66000 *et seq.*) and the Quimby Act (Gov. Code, § 66477), including the Transportation Impact Fee (“TIF”), the Below Market Housing Mitigation Fee (“BMR Fee”), the Master Storm Drain Fee, the Zoning/Planning Municipal Code Fees (“Planning Fees”), and the Parkland Dedication Fee. These fees may generally be met in whole or part by the

provision of amenities in lieu of fee payments (*e.g.*, the dedication of public parkland in lieu of paying parkland fees).

Since the original project approval, VPO has consistently disputed the validity of the impact fees imposed on the Project in whole or in part. Following approval of the second project modification in February 2024, the City Manager's and City Attorney's Offices renewed discussions with VPO to attempt to resolve this dispute. After extensive discussions between the parties, the City Council unanimously voted in its June 18, 2024 closed session to authorize the City Attorney to negotiate and enter into a settlement agreement with VPO. The parties executed a Settlement and Release Agreement ("Settlement Agreement," Attachment B) consistent with that direction on July 10, 2024.

The terms of the Settlement Agreement include the following:

- VPO will pay a TIF calculated based on the per trip fee in the City's fee schedule in place at the time the fee is due (totaling \$10.3 million for the Project under the FY 2024-25 fee schedule).
- VPO will dedicate public parkland and provide private open space with amenities consistent with the requirements of Municipal Code Chapter 13.08, and will in exchange receive credit against the full amount of the Parkland Dedication Fee due.
- VPO will make "benefit payments" to the City totaling \$32 million, subject to adjustment for inflation. The benefit payments will be available to fund transportation, affordable housing, and parks and recreation facilities.
- VPO will pay up to \$500,000 to fund City long range planning efforts in the Vallco area and/or the Stevens Creek corridor.

In addition, as a condition of the Settlement Agreement, the City Council must be presented with the current item requesting a waiver of the BMR and Planning Fees imposed on the Project. The waiver requests must be acted upon in open session. The fees waived would be substantial (totaling approximately \$77 million, as calculated under the FY 2024-25 fee schedule). However, the decision to enter into the Settlement Agreement reflects the legal risk and uncertainty surrounding the ability to collect the full amount of impact fees that would be owed by the project, particularly in light of the U.S. Supreme Court's recent decision in *Sheetz v. County of El Dorado* (2024) 601 U.S. 267. In *Sheetz*, Supreme Court held that a generally applicable, legislatively imposed fee charged as a condition of granting a land use permit must have an "essential nexus" to the government's land use interest and "rough proportionality" to the development's impact on that interest to avoid a finding that the fee is a taking of property in violation of the 5th and 14th Amendments of the U.S. Constitution. The decision clarified that the same heightened standard for review that had been previously applied to ad hoc fees and other exactions also applies to legislatively adopted impact fees.

Section 2.3.3(D) of the City’s Below Market Rate Housing Mitigation Procedures Manual requires the City Council to approve a request for waiver of modification of BMR requirements based on a showing that applying the requirement would result in an unconstitutional taking of property or any other unconstitutional result, based on the advice of the City Attorney. Similarly, the City Council has authority to waive or modify the application of an excessive Planning Fee by resolution.

As explained in the findings set forth in the proposed Resolution (Attachment C), the provision of 890 affordable housing units fully mitigates the impact of the project’s market-rate housing and nonresidential components on demand for affordable housing, thereby justifying the waiver of the BMR Fee under *Sheetz v. County of El Dorado*. In addition, imposition of the full amount of the Planning Fee would be disproportionate to the impact of the project on the City’s long range planning efforts. The contribution under the Settlement Agreement that would fund a significant portion of the cost of future specific planning efforts at the Vallco site or in the Stevens Creek corridor would more appropriately represent a payment that is “roughly proportionate” to the impact of the project, consistent with the *Sheetz* decision. (See also Gov. Code, § 65104 [“. . . [A]ny fees to support the work of the planning agency . . . shall not exceed the reasonable cost of providing the service for which the fee is charged.”]) The City Attorney’s Office recommends waiving the BMR and Planning Fees on these grounds.

If the City Council adopts the proposed resolution, the parties will move forward with implementation of the Settlement Agreement. If Council declines to agree to the proposed fee waivers, the Settlement Agreement would be null and void.

Sustainability Impact

No sustainability impact.

Fiscal Impact

The total revenue from impact fees, benefit payments, and reimbursement of City expenses under the Settlement Agreement would be \$42.8 million based on the current project, subject to changes to future fee schedules and adjustments for inflation. The City would forego the possibility of obtaining revenue from disputed BMR and Planning Fees.

California Environmental Quality Act

The project is subject to ministerial review and exempt from CEQA under Government Code section 65913.4.

Prepared by: Christopher D. Jensen, City Attorney
Approved for Submission by: Pamela Wu, City Manager

Attachments:
A – February 2024 Modified Project Approval

B – Settlement Agreement and Release
C – Draft Resolution