

KT URBAN

June 28, 2021

[VIA EMAIL ONLY]

Ray Wang, Chairman
and Planning Commissioners
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3255

Re: Westport Project, Vesting Tentative Map Application No: TM-2021-002

Dear Chairman Wang and Commissioners:

At the Planning Commission hearing on June 22, 2021, several questions were asked by Commissioners, so I am taking this opportunity to provide answers.

1. *Question: Is there any change to the Project?*

Answer: No, the Project is completely unchanged. It was approved by a unanimous vote of the City Council in August 2020 and is now ready to proceed to construction. The minor modification to the Tentative Map is needed to facilitate financing, so that The Pacific Companies can move forward on Building 2, the Senior affordable building, and so that KT Urban can proceed to build the Rowhouse/Townhouse units.

Statements were made at the meeting that this would be a “new” project. That is not the case. The buildings and land uses remain the same as before; the only change is to draw lines on a map so that each of the primary components (Building 1 (Assisted living and memory care/retail), Building 2 (Senior affordable/retail), and the Rowhouses/Townhouses)) can proceed to construction.

2. *Question: Are there any changes to the Conditions of Approval?*

Answer: The Council approved five Resolutions in approving the Project, which included scores of conditions. Only two are proposed to be modified:

First, Public Works Condition 1 in Resolution 20-106 approving the Development Permit requires certain street dedications in fee title and frontage improvements along the Project frontage to the satisfaction of the Director of Public Works. However, because the City has not yet secured Caltrans approval of the Stevens Creek Blvd. bike lane improvements, the revised condition requires the Project to bond for 200% of the expected costs of improvements so that once the City obtains Caltrans' approval, the improvements can be completed.

Second, the construction of possible improvements (including bike lanes) on the south side of Stevens Creek Blvd. was originally required by Public Works Condition 2 in Resolution 20-106 to be of equal value to the Transportation Impact Fee required for the Project. However, the trip generation study for the Project shows the Project will result in a net reduction in trips as compared to the baseline conditions; therefore, there are no transportation impacts and no nexus for a fee. Staff requested the revised Vesting Tentative Map be updated to accurately show the improvements that are required on Stevens Creek Blvd.

3. Question: *Why is the parcelization necessary?*

Answer: At the time of the original approvals the City Council was concerned that the affordable Building 2 and the Rowhouse/Townhouse units be built concurrently. The City imposed Community Development Dept. Condition 11 in Resolution No. 20-106 approving the Development Permit that ties the construction of the Rowhouses/Townhouses and Building 2 together.

That condition reads:

11. CONCURRENT DEVELOPMENT OF BMR AND MARKET-RATE HOUSING

a. The senior BMR units shall be constructed concurrently with the Rowhouse/Townhouse Units. "Concurrent construction," shall mean the following:

i. All senior BMR units must have received a certificate of occupancy or final inspection or the Project shall have reached the Affordable Senior Housing Milestone before the City will issue a certificate of occupancy or undertake final inspections of the sixty-sixth (66th) Rowhouse/Townhouse Units. The "Affordable Senior Housing Milestone" means the time at which the following conditions (a) plus (b) have occurred, or condition (c) has occurred: (a) Developer has transferred the parcel on which the senior BMR housing will be constructed to an affordable housing developer or its affiliate; (b) the affordable housing developer has closed on its construction financing; (c) the Developer has provided evidence of a completion guaranty (which may be a performance bond) to the City, in a form and amount reasonably acceptable to the City.

ii. City will not issue a certificate of occupancy or undertake final inspections for the senior BMR units until it has issued a certificate of occupancy or completed final inspections for ten (10)

Rowhouse/Townhouse Units.

To build this housing development project, we must be able to comply with Condition 11. Thus, we have put Building 2 under contract with an expert affordable housing developer, The Pacific Companies. In order to transfer the property to them to satisfy condition (a) and for them to put their financing on the property to satisfy condition (b), the land for Building 2 must be parcelized to be its own parcel.

Attached is a letter dated June 28, 2021, from Mike Kelley of The Pacific Companies, who states: “We have produced over 150 affordable housing projects and every single project has its own parcel. This is driven by the fact that the financing for these projects require that they be single-asset entities. No debt or equity provider will provide financing unless the project has its own parcel. This is standard.”

In other words, without this requested minor subdivision, the approved housing development project cannot proceed.

4. *Question: Why was the bus stop moved from in front of the Senior Center?*

Answer: In Resolution No. 20-109, approving the VTM, Community Development Dept. Condition 6 stated: “The applicant will work with the Public Works staff to relocate the bus stop to a location along Stevens Creek Boulevard that will not conflict with the intersection of Mary Avenue and Stevens Creek Boulevard.” This has been done, and the location shown on the Vesting Tentative Map is as shown on the Cupertino Bicycle Transportation Plan. There is no request for a change to this condition.

5. *Question: Will there be an HOA? Will the Rowhouse/Townhouse buyers also own the ground?*

Answer: There will be an HOA for the Rowhouse/Townhouse buildings. The land will not be owned by the buyers.

6. *Question: Does State Law still control the City’s discretion regarding the Map?*

Answer: The original approval of this project was heavily constrained by the application of at least two State Laws: the Housing Accountability Act (the “HAA,” Govt. Code Sec. 65589.5) and the Density Bonus Law (Govt. Code Sec. 65915). I am advised by our attorneys that both laws still apply to this request. The project is still a “housing development project” within the meaning of the Housing Accountability Act. This means that the City cannot deny this subdivision request unless it finds a violation of specific, objective standards. Note that in 2017, the HAA was amended to make it clear that the HAA also applies to subdivisions, not just to zoning or permit approvals (see Govt. Code Sec. 65589.5(j)(1), (o)).

Subsection (j) of the Housing Accountability Act is most pertinent. It provides:

(j) (1) When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

(A) The housing development 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. As used in this paragraph, a “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 the application was deemed complete.

(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

There are also some helpful definitions in the Housing Accountability Act:

(7) “Lower density” includes any conditions that have the same effect or impact on the ability of the project to provide housing.

(8) Until January 1, 2025, “objective” means involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official. (Govt. Code Sec. 65589.5(h)(7), (8)).

Finally, both the Housing Accountability Act and the Density Bonus Law contain statements of Legislative intent. Thus, from the Housing Accountability Act:

“It is the policy of the State that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.” (Govt. Code Sec. 65589.5(a)(2)(L)).

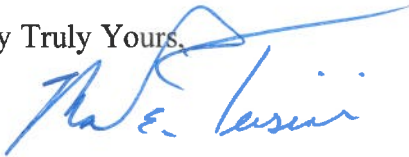
To my knowledge there are no objective standards that would justify the City in denying the requested map. As the City found in approving the Project in August, the Project complies fully with all objective General Plan and Zoning standards (subject to application of the Density Bonus Law). Any policies that “encourage” or “discourage” a particular activity are not deemed to be objective. Nothing has changed in that regard.

Chair Wang and Planning Commissioners
June 28, 2021

Conclusion: I want to emphasize that the present request is necessary to be able to continue with the Project to provide the approved housing for the City of Cupertino, including senior affordable housing and assisted living facilities. The new map does not change the Project. We urge you to recommend approval to the City Council.

If you need more information, do not hesitate to contact me.

Very Truly Yours,



Mark E. Tersini
KT Urban

Cc: [via email]
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