

RESOLUTION NO. _____

A RESOLUTION OF THE CUPERTINO CITY COUNCIL
APPROVING A TREE REMOVAL PERMIT TO ALLOW THE REMOVAL AND
REPLACEMENT OF 41 TREES TO ALLOW THE CONSTRUCTION OF A NEW 5-
STORY, 185 ROOM HOTEL WITH ASSOCIATED SITE AND LANDSCAPING
IMPROVEMENTS LOCATED AT 10801 AND 10805 NORTH WOLFE ROAD
(APN: 316-45-017 AND 316-05-56)

SECTION I: PROJECT DESCRIPTION

Application No.: TR-2017-46
Applicant: Kimco Realty (Michael Strahs)
Property Owner: Cupertino Village, LP
Location: 10801 and 10805 North Wolfe Road (APN: 316-45-017 and 316-05-56)

SECTION II: FINDINGS FOR TREE REMOVAL PERMIT:

WHEREAS, the City of Cupertino received an application for a Tree Removal Permit as described in Section I. of this resolution; and

WHEREAS, the necessary public notices have been given as required by the Procedural Ordinance of the City of Cupertino, and the Planning Commission has held at least one public hearing in regard to the application; and

WHEREAS, the City of Cupertino's Environmental Review Committee at its December 13, 2018 meeting reviewed the Draft Mitigated Negative Declaration, received public comments, and recommended adoption of a Mitigated Negative Declaration on a 5-0 vote with minor modifications, and provided measures that ensure the least impactful development of the proposed hotel; and

WHEREAS, on June 11, 2019, the Planning Commission, after considering the administrative record and the public hearing, exercised its independent judgment and recommended adoption of the Final Draft IS/MND (EA-2017-06) for the Project on a 4-0-1 vote, which incorporated all the identified mitigation measures as conditions of approval for the Project prior to taking final action on the Project; and

WHEREAS, on June 11, 2019 the Planning Commission recommended on a 4-0-1 vote that the City Council approve the General Plan Amendment (GPA-2017-05), in substantially similar form to the Resolution presented (Resolution no. 6876), approve the Development Permit (DP-2018-04) in substantially similar form to the Resolution presented (Resolution No. 6877), approve the Architectural and Site Approval Permit (ASA-2017-09) in

substantially similar form to the Resolution presented (Resolution No. 6879), approve a Use Permit (U-2018-03) in substantially similar form to the Resolution presented (Resolution No. 6881), approve the Tree Removal Permit (TR-2017-46) in substantially similar form to the Resolution presented (Resolution no. 6880) and approve a Development Agreement (DA-2017-01) in substantially similar form to the Ordinance presented (Resolution No. 6878); and

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

WHEREAS, on July 16, 2019, upon due notice, the City Council held a public hearing to consider the Development Permit; and

WHEREAS, after consideration of evidence contained in the entire administrative record, at the public hearing on July 16, 2019, the City Council exercised its independent judgment and adopted Resolution No. [####] adopting the Draft IS/MND, Resolution No. [####] adopting the General Plan Amendment, Resolution No. [####] approving a Development Permit, Resolution No. [####] approving a Use Permit, and Resolution No. [####] approving an Architectural and Site Approval; and

WHEREAS, the applicant has met the burden of proof required to support said application; and

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

- a) That the location of the trees restricts the economic enjoyment of the property by severely limiting the use of property in a manner typically not experienced by owners of similarly zoned and situated property, and the applicant has demonstrated to the satisfaction of the approval authority that there are no reasonable alternatives to preserve the tree(s).

The proposed trees are in conflict with the proposed new building and site improvements. The demolition of the existing structures and new construction would result in the removal of all 41 trees on site. The majority of the trees to be removed are Evergreen Ash. While the trees are not identified as a protected species as defined by Cupertino Municipal Code Chapter 14.18, these trees are protected under the category of "approved development tree," because they were planted as part of the originally approved development. Therefore, replacement plantings are required for the proposed removal. The project will meet the required replacements of 41 36" box-size trees and consist of trees that are suitable to the area climate (i.e., Valley Oak, Blue Oak, Deodar Cedar, etc.) Additionally, the project applicant has worked with the City's Arborist, and is committed to preserve 27 trees on site.

NOW, THEREFORE, BE IT RESOLVED:

That after careful consideration of maps, facts, exhibits, testimony and other evidence submitted in this matter and the Mitigated Negative Declaration and the Mitigation Monitoring and Reporting Program for the Project (EA-2017-01), subject to the conditions which are enumerated in this Resolution beginning on PAGE 2 thereof, and those contained in all other Resolutions approved for this Project,

The application for a Tree Removal Permit, Application No. TR-2017-46, 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. TR-2017-46 as set forth in the Minutes of the City Council Meeting of July 16, 2019 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 received November 8, 2018 consisting of 48 sheets labeled as Planning Submittal, Table of Contents, 3-43, C1.1, C2.1, C2.2, C3.1, and C.24 drawn by Hornberger + Worstell and Keir & Wright Civil Engineers & Surveyors, Inc, except as may be amended by conditions in this resolution.

2. CONCURRENT APPROVAL CONDITIONS

The conditions of approval contained in file nos. GPA-2017-05, DP-2018-04, DA-2017-01, ASA-2017-09, U-2018-03, and EA-2017-06 shall be applicable to this approval.

3. TREE REPLACEMENTS AND FINAL PLANTING PLAN

The applicant shall plant adequate replacement trees for the trees proposed to be removed in accordance with the replacements requirements of Chapter 14.18 of the Cupertino Municipal Code. The trees shall be planted prior to final occupancy.

The number, location and type of trees shall be incorporated into the detailed landscape plan to be reviewed and approved by the Director of Community Development in consultation with the City's consulting arborist prior to issuance of building permits. The Director of Community Development shall have the discretion to require additional tree replacements if deemed necessary. The City's consulting arborist shall confirm that the replacement trees were planted properly and according to plan prior to final occupancy.

5. TREE PROTECTION

In accordance with the project arborist recommendations, prior to building permit issuance the Applicant shall complete the following:

- a. Tree Protection During Construction: Tree Protection Zone (TPZ) fencing, either chain link and other root protection shall be installed around trees or groups of trees such that it maintains a distance of 1.5 times the diameter of the drip line.
- b. Work Activities Occurring within the Designated TPZ during construction:
 - i. Arborist Supervision – all activities occurring inside of the designated TPC must be approved and an ISA certified arborist must be present to supervise tree protection and root pruning activities.
 - ii. Root Protection – as long as the sidewalk pavement remains in place no additional protections are required. If sidewalk pavement is removed, exposed soil and roots must be covered with burlap and plywood or trenching plates.
 - iii. Required Method of Excavation within Critical Root Zone – any excavation within a distance from the tree three (3) times the diameter of the trunk (measured at 4.5' high) must be hand, air spade or ditch witch. An ISA certified arborist is to supervise any such activity.
- c. Post Construction Mitigation:
 - i. Monitoring Tree Health – An ISA certified arborist shall conduct regular visual inspection of trees to assess where further mitigation is required. Tree decline should be recorded and referenced against pre-construction health assessment. Leaf and stem insects and fungal pathogens are a sign of poor tree health (low energy reserves).
 - ii. Mitigation of Soil Compaction – the level and depth of soil compaction must be assessed and mitigated as necessary. Mitigation of soil compaction in areas where roots are present must minimize root loss. Tools most suitable to mitigate soil compaction are the water jet or air spade.
 - iii. Pest Management Program – Pest problems must be analyzed and treated.

In addition to the above, the applicant shall:

- a. No parking or vehicle traffic shall be allowed under root zones, unless using buffers approved by the Project Arborist.
- b. Notwithstanding section (b) (iii) above, if trenching is needed in the Tree Protection Zone, the City's consulting arborist shall be consulted before any trenching or root cutting beneath the dripline of the tree.
- c. Wood chip mulch shall be evenly spread inside the tree projection fence to a four-inch depth.
- d. Tree protection conditions shall be posted on the tree protection barriers.
- e. Retained trees shall be watered to maintain them in good health.
- f. A covenant on the property shall be recorded that identifies all the protected trees, prior to final occupancy.

Any willful action by the applicant, contractor and/or subcontractors that causes damage to the retained trees, without proper review by the City to allow additional tree removals, shall cause the applicant to be non-compliant with the City's Municipal Code and could require payment of the Retroactive Tree Removal penalties and fees pursuant to the most recently adopted fee schedule.

The tree protection measures shall be inspected and approved by the City's consulting arborist prior to issuance of building permits. The City's consulting arborist shall inspect the trees to be retained and shall provide reviews prior to issuance of demolition, grading or building permits. A report ascertaining the good health of the trees mentioned above shall be provided prior to issuance of final occupancy.

4. TREE REPLACEMENT BOND

The applicant shall provide a tree replacement bond in an amount determined by the City's consulting arborist prior to removals and issuance of demolition and grading permits. The bond shall be returned after construction is complete and the health of the retained trees and newly planted trees is verified by the City's consulting arborist.

5. 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.

6. INDEMNIFICATION

To the extent permitted by law, the applicant shall indemnify and hold harmless the City, its City Council, its officers, employees and agents (the "indemnified parties") from and against any claim, action, or proceeding brought by a third party against the indemnified parties and the applicant to attack, set aside, or void this Resolution or any permit or approval authorized hereby for the project, including (without limitation) reimbursing the City its actual attorneys' fees and costs incurred in defense of the litigation. The applicant and City shall use best efforts to select mutually agreeable legal counsel to defend such action, and the applicant shall pay all compensation for such legal counsel, following the applicant's receipt of invoices from City, together with reasonable supporting documentation. Such compensation shall include reasonable compensation paid to counsel not otherwise employed as City staff 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. If the applicant and the City cannot in good faith agree on joint counsel, the City shall have the right to retain counsel of its own choosing, separate from the applicant's litigation counsel.

7. 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. Pursuant to Government Code Section 66020(d) (1), these Conditions constitute written notice of a statement of the amount of such fees, and a description of the dedications, reservations, and other exactions. You are hereby further notified that the 90-day approval period in which you may protest these fees, dedications, reservations, and other exactions, pursuant to Government Code Section 66020(a), has begun. If you fail to file a protest within this 90-day period complying with all of the requirements of Section 66020, you will be legally barred from later challenging such exactions.

PASSED AND ADOPTED this 16th day of July 2019, at the Regular Meeting of the City Council of the City of Cupertino, State of California, by the following roll call vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

SIGNED: _____ Steven Scharf, Mayor City of Cupertino	_____ Date
ATTEST: _____ Grace Schmidt, City Clerk	_____ Date