

CC 7-16-2024

Oral  
Communications

Written Comments

**From:** [Jennifer Griffin](#)  
**To:** [City Council](#); [City Clerk](#)  
**Cc:** [grenna5000@yahoo.com](mailto:grenna5000@yahoo.com)  
**Subject:** No Oral Communications at 7/9/24 City Council Meeting? Why?  
**Date:** Monday, July 8, 2024 10:47:28 AM

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CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear City Council:

Why are we having a City Council meeting when we normally would have a Planning Commission Meeting on 7/9/24?

Why is the 7/9/24 City Council Meeting a Special Meeting? We really need to get back to The regular process of having two City Council meetings per month and two Planning Commission meetings per month. This seems to have been disregarded a great deal in The last several months.

So we have had the Planning Commission meeting cancelled for the 7/9/24 meeting Where we could have had Oral Communications which is a right under the City Code. So now we have a very oddly placed "Special" City Council meeting on the 7/9/24 Where the public can't even make Oral Communications as is their right.

Vision Zero has nothing to do with the certification of the Cupertino Housing Element. It seems now it has more to do with the implementation of Missing Middle in the city. Why can't the Vision Zero items be left to the regular City Council Meeting on 7/16/24? What is the rush to have a Special City Council Meeting just on Vision Zero? It is all the more bizarre because this "Special" City Council Meeting has no Oral Communications and believe me, the city has a lot to say in Oral Communications Based on what happened last Tuesday, 7/2/24 at the City Council meeting.

I'm also concerned that the overlap of the Park and Rec Commission meeting at the Same time as the Housing Element meeting last month was to accommodate the Bike and Ped. Commission meeting the following Thursday.

Honestly, the Vision Zero meeting can wait until the next scheduled City Council Meeting On 7/16/24. There is no reason to have the meeting tomorrow (7/9/24) at all.

I really do think it would a courtesy to the public to allow Oral Communications tomorrow At the 7/9/24 City Council Meeting since the public is already confused enough with Why all these meetings are off-cycle.

Thank you.

Sincerely,

Jennifer Griffin

**From:** [Santosh Rao](#)  
**To:** [City Clerk](#)  
**Subject:** Fw: Why was BlackBerry Farm daytime activities cancelled.  
**Date:** Thursday, July 4, 2024 10:57:37 PM

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Dear City Clerk,

Please include the below in written communications for the 11/9 council meeting.

Thank you for your service to our city and your commendable job managing meetings on Dias. We truly appreciate all that you do.

Thanks,  
Santosh Rao

Begin forwarded message:

On Thursday, July 4, 2024, 10:54 PM, Santosh Rao <[santo\\_a\\_rao@yahoo.com](mailto:santo_a_rao@yahoo.com)> wrote:

Dear Mayor Sheila and City Council Members,

I am writing to express my deep disappointment regarding the cancellation of the BlackBerry Farm daytime pool and BBQ activities this July 4th. In previous years, these activities were a cherished part of our community's celebrations. While we were informed that the evening celebrations were to be canceled, there was no prior discussion or notification about the discontinuation of the BlackBerry Farm daytime events.

This decision has resulted in what many consider the worst July 4th in Cupertino's recent history, surpassing even last year's poor showing at the July 4th event.

Additionally, I would like to address the issue of funding for the evening celebrations. Santa Clara County offers a community fireworks grant, which the city of Santa Clara successfully utilized to fund their fireworks display. Why was this grant not discussed as an option during the November 21st council meeting

or any subsequent follow-ups?

Moreover, why did Cupertino not seek sponsorships to sustain the evening celebration? The city managed to secure sponsorships for events like Shakespeare in the Park. Why was a similar effort not made to preserve our July 4th celebrations?

The residents of Cupertino deserve better. As our elected representatives, it is your responsibility to ensure that our community events are upheld and celebrated. I urge you to take these concerns seriously and to prioritize the needs and expectations of the residents of Cupertino in all decisions.

Thanks,  
Santosh Rao

CC 7-16-2024

#1

Consent Calendar - FY  
2022-23 ACFR

Written Comments

**From:** [Rhoda Fry](#)  
**To:** [City Clerk](#); [City Council](#)  
**Subject:** Please pull ACFR Agenda Item #1 off consent  
**Date:** Monday, July 15, 2024 10:15:11 AM  
**Attachments:** [P11745887-P11342371-P11777825 \(1\).pdf](#)

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Please pull ACFR Agenda Item #1 off consent  
Please explain the reason for the late changes.  
Please explain why the ACFR was posted last week to the federal website on 7/9/2024 **prior to council approval.**

Note that:

The ACFR is late per our debt agreement of a March 30 deadline.

The only notice provided by UFI was on March 30, stating that “The City anticipates the Audited Financial Statements will be complete and available for posting no later than April 30, 2024.”

We are now July 15. Why wasn't a supplemental message posted?

Why hasn't UFI posted information about the CDTFA audit as this is a major material change to the City's finances?

Being late impacts the City's reputation and credit-worthiness.

Separately, the 2020 sales-tax income in the ACFR is incorrect and inflated by about \$10M. This is evidenced by comparing CDTFA records and rebates to Apple and Insight.

Regards,  
Rhoda



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**NOTICE TO MUNICIPAL SECURITIES RULEMAKING BOARD  
FAILURE TO FILE FINANCIAL STATEMENTS**

\$22,040,000  
CITY OF CUPERTINO  
2020A Certificates of Participation

NOTICE IS HEREBY GIVEN that City of Cupertino ("City") has not provided the Audited Financial Statements for the Fiscal Year ending June 30, 2023, as required by the applicable Continuing Disclosure Agreement/Certificate for the above-captioned Bonds. The City anticipates the Audited Financial Statements will be complete and available for posting no later than April 30, 2024.

Dated: March 30, 2024

Urban Futures, Inc., as Dissemination Agent  
on behalf of City

CC 7-16-2024

#7

Second reading and  
zoning map  
amendments for  
Ordinance No. 24-2261

Written Comments



**From:** [Sandhana Siva](#)  
**To:** [City Council](#); [City Clerk](#)  
**Subject:** Cupertino Housing Element  
**Date:** Monday, July 15, 2024 3:58:42 PM

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Hi Mayor Mohan and Cupertino City Council Members,

My name is Sandhana Siva. I am a resident of the Rancho Rinconada neighborhood and rising freshman at San Jose State University hoping to study ecology/ environmental science and city planning.

I just wanted to thank you for your consideration of the community input regarding amendments to the municipal code to be in compliance with the HCD's 6th RNHA cycle. The rezonings you passed on July 2, will enable full agreement with HCD and remove any situation of builder's remedy.

I fully endorse the Housing Element to further the supply of housing needs and to affirmatively further fair housing in the city of Cupertino. This will allow our city to become a more economically and socially diverse community which is currently lacking in its present state and promises housing opportunities for future generations who want to live here like myself.

Additionally, I would like to encourage the city council to do more than what is outlined in the amendments and continue to further policies and strategies in the upcoming months and years.

Thank you once again for enacting improved zoning policies, which ensure the Housing Element's full compliance, and lay the foundation for a more vibrant Cupertino.

Sincerely,  
Sandhana Siva

**From:** [Sean Hughes](#)  
**To:** [City Clerk](#); [City Council](#)  
**Subject:** Public Comment (7/16): Consent Calendar Item #7  
**Date:** Monday, July 15, 2024 2:57:37 PM

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hello,

I would like to submit the text below as public comment regarding item 7 on this Tuesday meeting's Consent Calendar.

Thank you,  
Sean

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July 15, 2024

Dear Mayor Mohan and Cupertino City Council,

I am writing today to thank you for your response to community input regarding amendments to Cupertino's Municipal Code to implement the 6th RHNA Cycle Housing Element. The City's rezonings passed on July 2 will enable our Housing Element to be eligible for full certification by HCD.

I look forward to watching for an ambitious implementation of our Housing Element, and hope that this is only the first step in a journey to make the city of Cupertino a more inclusive, sustainable, and desirable place to call home. The implementation process is crucial to ensuring the Housing Element meets its full potential as a planning document for Cupertino.

As Cupertino continues to implement policies and strategies in the coming months and years, I encourage the city to do more than the amendments passed last meeting. Over the coming years, the public and HCD will watch for signs of success of our Housing Element's implementation: more housing opportunities at all income levels, more walkable environments, and more environmentally friendly dense, multi-family developments, which might host the prospect of retail or community amenities as well. The accomplishments of such success will likely require further action, and I hope this Council - as well as future Councils - can find a way to continually improve our municipal codes and policies to meet the current and future housing needs of our community.

Thank you once again for enacting improved zoning policies that will ensure the Housing Element's full compliance, as well as laying the foundation for a more welcoming and livable Cupertino.

Regards,  
Jun-Xiong Sean Hughes

**From:** [Gauri Chawla](#)  
**To:** [City Council](#); [City Clerk](#)  
**Subject:** For Public Comment (7/17): Consent Calendar Item #7  
**Date:** Monday, July 15, 2024 1:47:00 PM

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Mayor Mohan and Councilmembers,

Two weeks ago, I wrote to you regarding rezoning recommendations to bolster our recently adopted Housing Element. I am reaching out today to thank you for taking my suggestions into consideration when modifying Staff's report.

Thank you for your prioritization of community input regarding amendments to Cupertino's Municipal Code to implement the 6th RHNA Cycle Housing Element. The rezonings you passed on July 2 will enable our Housing Element to be eligible for full certification by HCD.

I fully endorse Cupertino's Housing Element for certification. Because of Council's modifications, which thoughtfully took into account both public sentiment and our actual housing needs, our Housing Element fully meets all of HCD's requirements for compliance.

I look forward to an ambitious implementation of our Housing Element. Our public implementation process is crucial to ensuring the Housing Element meets its full potential as a planning document so that Cupertino can keep its promises to future generations.

In fact, because the Housing Element is only a baseline, I encourage the city to do more than what is outlined as it continues to implement policies and strategies in the coming months and years. This approach enjoys the support of both the general public, and HCD, who will continually monitor our Housing Element's success via its implementation.

Thank you once again for enacting improved zoning policies, which ensure the Housing Element's full compliance, and lay the foundation for a more vibrant Cupertino.

Sincerely,

Gauri Chawla

**From:** [Kitty Moore](#)  
**To:** [City Clerk](#); [Pamela Wu](#); [Kirsten Squarcia](#); [Lauren Sapudar](#)  
**Cc:** [Christopher Jensen](#); [Luke Connolly](#)  
**Subject:** Agenda Item 7 Written Communications and Questions  
**Date:** Monday, July 15, 2024 7:45:15 AM

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Dear City Clerk and City Manager,

Please pull agenda item 7 for discussion.

After the close of public comments for the hearing on the Zoning Ordinance there was an email with proposed changes to the ordinance sent to the City Clerk by VM Fruen to be added to and included in the ordinance. The public was not allowed to have a discussion on what these extensive changes mean and the changes were not explained clearly to the Council. The VM Fruen changes also had *future actions* to be added to the Objective Standards. Please provide that email from VM Fruen to the City Clerk for the public records for this agenda item and as a response to these questions.

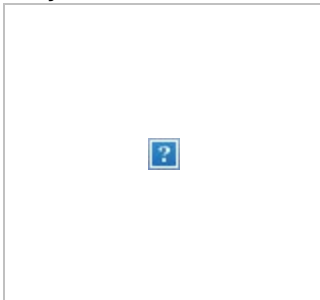
Questions:

Please provide a detailed description with a diagram where appropriate, of what each of the following new zoning changes, added after public comment closed, means:

1. Removing the five-story limit in the R-4 zoning district;
2. Eliminating the proposed objective standard for comparable size in the definition of duplex;
3. Amending development standards related to duplexes in the R-1 zoning district proposed under Housing Element Policy HE-1.3.6 as follows:
  - a. Amend allowable Floor Area Ratio to 65%;
  - b. Adopt a lot coverage of 50%;
  - c. Conform parking standards to R-1 zone standards (4 total – 2 open/2 enclosed); and
  - d. Allow interior side yard setbacks to align with minimum R-1 standards; and
4. Amending the lot coverage to 50% in the R-3 zoning district for developments with

up to 4 units.

Thank you,  
Kitty Moore



**Kitty Moore**  
Councilmember  
City Council  
KMoore@cupertino.gov  
(408) 777-1389



**From:** [Kirsten Squarcia](#)  
**To:** [Lauren Sapudar](#)  
**Subject:** FW: motion  
**Date:** Monday, July 15, 2024 11:20:54 AM  
**Attachments:** [image017.png](#)  
[image018.png](#)  
[image019.png](#)  
[image020.png](#)  
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[image031.png](#)  
[image032.png](#)

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**Kirsten Squarcia**

City Clerk  
City Manager's Office  
[KirstenS@cupertino.gov](mailto:KirstenS@cupertino.gov)  
(408) 777-3225



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**From:** J.R. Fruen <[JRFruen@cupertino.gov](mailto:JRFruen@cupertino.gov)>  
**Sent:** Tuesday, July 2, 2024 8:55 PM  
**To:** Kirsten Squarcia <[KirstenS@cupertino.gov](mailto:KirstenS@cupertino.gov)>  
**Subject:** motion

I move the staff-recommended action with the following modest modifications reflected the public comment to the proposed Municipal Code amendments in Attachment A:

1. That with respect to the new R-4 zone, that the story restriction be removed;
2. That the change in definition of a "duplex" under Municipal Code Section 19.08.030 be removed;
3. That with respect to the duplex overlay implementing Strategy HE 1.3.6:
  1. That the 55% floor area ratio be changed to 65%;
  2. That the existing constraint of 1.5 enclosed and 1.5 exposed parking spaces per dwelling unit be reduced to 1 enclosed and 1 exposed to align with neighboring single-family R-1 standards;
  3. That interior side yard setbacks be set at a flat 5 feet to align with minimum single-family R-1 standards; and
  4. That the lot coverage standard be increased to 50%; and
4. That with respect to R-3 zones for developments up to 4 units, that the permissible lot coverage be expanded to 50%.

I further move that we direct the City Manager to align and harmonize these standards in the upcoming Objective Design Standards for our other zoning districts with a focus on feasibility and architectural flexibility.



**J.R. Fruen**

Vice Mayor

City Council

[JRFruen@cupertino.gov](mailto:JRFruen@cupertino.gov)

[\(408\)777-1316](tel:(408)777-1316)



**From:** [Cupertino ForAll](#)  
**To:** [Jauregui, Jose @HCD](#); [Melinda.Coy@hcd.ca.gov](mailto:Melinda.Coy@hcd.ca.gov)  
**Cc:** [City Clerk](#); [benf@cupertino.gov](mailto:benf@cupertino.gov); [City of Cupertino Planning Dept.](#)  
**Subject:** Certification of Cupertino's Housing Element  
**Date:** Saturday, July 13, 2024 12:01:59 AM  
**Attachments:** [CFA Letter Supporting Certification of Cupertino's Housing Element \(July 12, 2024\).pdf](#)

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good evening,

Cupertino For All is glad to endorse Cupertino's Housing Element for full certification after the city's July 2 rezonings, which we believe are a faithful implementation of Cupertino's commitments.

Please see our official letter detailing our reasons for endorsement as well as our role (and other local organizations' role) in the rezoning process.

**Further Attachments (Included in Letter)**

Attachment 1: CFA Letter to Cupertino City Council Urging Modifications to Zoning Code  
Attachment 2: SV@Home Letter to Cupertino City Council Urging Modifications to Zoning Code  
Attachment 3: Housing Action Coalition Letter to Cupertino City Council Urging Modifications to Zoning Code

Thank you,

Steering Committee  
[Cupertino for All](#)





July 12, 2024

Department of Housing and Community Development  
2020 W. El Camino Avenue, Suite 500 Sacramento, CA 95833  
Attn: Jose Jauregui & Melinda Coy

Re: Certification of Cupertino's Housing Element

Mr. Juaregui and Ms. Coy:

Cupertino for All (CFA) is a local nonprofit housing advocacy organization focused on helping Cupertino become a more affordable, inclusive, and vibrant place. To that end, we – as an organization and individually as members – have actively participated in the development of Cupertino's 6th RHNA Cycle Housing Element. **Following the City Council's first reading of amended rezonings undertaken at its July 2, 2024, meeting, we are very happy to fully endorse Cupertino's recently adopted Housing Element and strongly believe it merits the Department's certification.**

After the Department's April 10, 2024, letter which certified Cupertino's draft Housing Element (adopted May 14, 2024) conditioned on the City completing legally required rezonings, CFA took to interacting with our community and City Council<sup>1</sup> to implement amendments to our Municipal Code that reflect more inclusive zoning policies, rather than restrictive ones. City Council incorporated key CFA-proposed modifications to these proposed rezonings – especially to the implementation of the City's Missing Middle housing policy (Strategy HE 1.3.6) – at its July 2<sup>2</sup> session. **We are**

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<sup>1</sup> See Attachment 1, Letter of Cupertino for All to the Cupertino City Council, dated July 1, 2024 (urging specific modifications to Cupertino's proposed rezonings). Other local and regional housing advocacy organizations submitted modification proposals in alignment with CFA. See e.g., Attachment 2, Letter of Silicon Valley at Home to the Cupertino City Council, dated July 1, 2024; Attachment 3, Letter of the Housing Action Coalition to the Cupertino City Council, dated July 2, 2024.

<sup>2</sup> See Draft Minutes of Regular Meeting of the Cupertino City Council of July 2, 2024, at pp. 5-6 (describing the substitute motion that carried on a 3-2 vote), available at <https://cupertino.legistar.com/View.ashx?M=F&ID=13127505&GUID=5FB32F25-96A1-47EE-B467-4FD85C56DE31&G=74359C04-A5F0-4CB2-A97A-0032996BB90E>.

**now confident that Cupertino's Housing Element more than meets the Department's requirements for certification and that the rezonings of July 2 are a faithful implementation of the City's commitments.** We are happy to see the City Council taking positive steps to implement an ambitious Housing Element.

We urge you to find the rezonings legally sufficient and to certify Cupertino's Housing Element, so that the city can begin working on implementing it to its full potential.

Regards,

Steering Committee  
[Cupertino For All](#)

# ATTACHMENT 1



July 1, 2024

Cupertino City Council  
10350 Torre Avenue Cupertino, California 95014

For Public Comment Re: 7/2 Council Meeting - Item 7 Housing Element Rezoning

Dear Cupertino City Council and to whom it may concern,

We are pleased to see the Staff's Report considers the letter we sent on June 18. Our suggestions are reflective of our hope for the city to strengthen the Housing Element by implementing zoning code amendments that allow for flexible development standards and architectural freedom to create more housing affordable at all income levels. We want to emphasize Council's role as the policymaking body of the city. You can and should act on certain rezoning items listed by Staff.

Please also recall that per Assembly Bill 1398 (2021), though Cupertino has adopted a Housing Element, the city cannot be considered certified until it has conducted required rezonings. As such, Cupertino has no certified Housing Element until the city rezones.<sup>1</sup> **The California Department of Housing and Community Development (HCD) must also still review such rezonings for adequacy. Acceptance is not guaranteed.** Similarly, pursuant to Assembly Bill 72 (2017), HCD maintains ongoing authority to revoke a city's Housing Element for failure to comply with the obligations to which the city bound itself by adopting the Housing Element

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<sup>1</sup> We have become aware of public comments (specifically during the Oral Communications section of the June 18, 2024 Council Meeting) claiming that any alteration of the proposed Municipal Code amendments would "jeopardize" the Housing Element certification, or that we are asking for the Housing Element to be "reopened." These comments misstate or misunderstand the position of the Housing Element and the path to certification. The Housing Element is adopted. **The rezonings and related actions in Item 7 are part of the required series of actions to implement the Housing Element.** As HCD has noted in prior comments, the city may always be more ambitious in its Housing Element implementation than the programs and policies it committed to at adoption. It is emphatically *not* allowed to do less. **In other words, the Housing Element is a floor, not a ceiling.** Erring on the side of a more permissive and ambitious Housing Element implementation increases the likelihood that HCD will accept the city's rezonings. **We do not believe that the specified policies we ask you to adjust currently meet HCD's requirements.**

– including through its policy implementation. Indeed, in the 6th RHNA Cycle, HCD has already revoked the certification of the Town of Portola Valley.<sup>2</sup>

Irrespective of the requirements of state law, rezonings that reflect thoughtful and supportive implementation of the Housing Element would ensure that Cupertino not only complies with the letter and spirit of state law, but also creates the legal framework within which we are positioned to build enough of the right types of housing to make a serious dent in our housing crisis. Though the proposed rezonings contain many improvements for which staff and the city’s consultants should be lauded – especially the innovation of the townhome combining district – a number of policies undermine or frustrate the Housing Element’s plain purpose and, we strongly believe, **jeopardize the city’s conditional certification**. We therefore ask that Council enact the following refinements to the Municipal Code amendments:

1. **Remove the 5-story limit for the new R-4 Zoning District:** The 5-story restriction is unnecessary, and only further limits developments. The 70 foot height limit is more than sufficient.

Removing the 5-story limit promotes flexibility in designing housing of all forms, thus empowering architects to design housing of various types and for varying incomes without forcing developers to rely on workarounds such as the Density Bonus Law, which would allow significant deviations from other development standards.

Our new codes should reflect state law requirements to support a range of housing across different income levels. The 5-story limit encourages developers to design more expensive housing,<sup>3</sup> which does not uphold the principles of affirmatively furthering fair housing or the fundamental overarching goal of Housing Element law and HCD’s focus of ensuring that the city has enabled and supported the construction of housing for people of all income levels.

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<sup>2</sup> See Letter of HCD to Town of Portola Valley, dated March 26, 2024 (revoking finding of substantial compliance for failure to implement Housing Element programs), available at: <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/portola-valley-rev-032624.pdf>.

<sup>3</sup> At the June 11, 2024 Planning Commission meeting where these rezonings were previously considered, the city’s consultant from Placeworks described the 5-story limitation as favoring a “really high quality product” with higher ceilings and touted the fact that such developments would be amenity-rich or allow for ground-floor retail. Forcing developers down this path unnecessarily produces a more expensive product since construction costs would have to be distributed over fewer units and would command higher rents for more amenities. Removing the story restriction would allow architects more freedom to design housing typologies of varying forms that could cater to a wider range of housing needs and be more likely to reach or exceed the capacity assumptions in the Housing Element.

2. **Strengthen Implementation of Strategy HE 1.3.6:** The March 2024 revision of the Third Submittal of the Draft Housing Element<sup>4</sup> changed the Strategy to allow development under severely limiting R-2 standards, as opposed to the four-unit developments under R-3 standards (which were designed for garden apartment and fourplex-style development, and thus are better fit for Strategy HE 1.3.6).<sup>5</sup>

If the Strategy is to create real opportunity in Cupertino, the new duplex overlay must be much more flexible than what is currently proposed, especially when considering the antiquated R-2 standards to which it refers. Council should:

- A. **Establish parking standards at 1 enclosed space and 1 exposed space per principal dwelling unit in the duplex overlay.**

Current R-2 zoning standards require 1.5 enclosed spaces and 1.5 exposed parking spaces per principal dwelling unit. This standard requires the construction of a three-car garage with an interior square footage of 600 square feet, all of which counts towards the lot coverage and floor area ratio of the proposed structure.

Council should not *require* such excessively large garages because they (1) generally go unused for car storage, (2) reduce the allowable usage living space for people, and (3) are visually intrusive on lots with smaller frontages, and therefore out of alignment with the aesthetic goals of the policy.

On a 50-foot wide lot, for instance, a three-car garage spanning 30 feet would consume more than 50% of the facade of the building. Allowing for two-car garages instead will permit homeowners and architects developing under these standards to build homes that look more like the single-family homes around them that are only required to have a two-car garage. Moreover, housing built with less space dedicated to

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<sup>4</sup> See

[https://ehq-production-us-california.s3.us-west-1.amazonaws.com/3003c6a0b619866578abf9d066a0e48e95ca8ede/original/1714502824/e489f6eef8b1d5e01798357c1bae860a\\_Third\\_Draft\\_Housing\\_Element\\_-\\_Submitted\\_to\\_HCD\\_March\\_28\\_2024.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNOAKICO37GBEP%2F20240701%2Fus-west-1%2Fs3%2Faws4\\_request&X-Amz-Date=20240701T221600Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=676da40a488d9943d71acb139c385285c8bdedc1cefbc9fb0685f730264f145b](https://ehq-production-us-california.s3.us-west-1.amazonaws.com/3003c6a0b619866578abf9d066a0e48e95ca8ede/original/1714502824/e489f6eef8b1d5e01798357c1bae860a_Third_Draft_Housing_Element_-_Submitted_to_HCD_March_28_2024.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNOAKICO37GBEP%2F20240701%2Fus-west-1%2Fs3%2Faws4_request&X-Amz-Date=20240701T221600Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=676da40a488d9943d71acb139c385285c8bdedc1cefbc9fb0685f730264f145b) (Page 21/H-17).

<sup>5</sup> Indeed, the aforementioned Housing Element draft and the staff report both admit that this change was made not in response to feedback from the communities historically excluded from housing in Cupertino, but to aesthetic concerns raised by others as well as untoward worries about the potential application of the Density Bonus Law.

car storage would be cheaper to build and correspondingly cheaper to rent or sell.<sup>6</sup>

**B. Remove the change in the definition of a duplex, which requires principal dwelling units to be no more than 200 square feet different from each other.**

According to the staff report, this change was meant to define comparable sized units, but, in reality, it distorts the Missing Middle Program (Strategy HE 1.3.6). The same restriction exists in the city's SB 9 implementation ordinance – an ordinance which has failed to produce *any* SB 9 units. We should not replicate a demonstrably failed policy.

The change also generates the unfortunate result of creating legal nonconforming duplexes in existing R-2 zones. In addition, without clarity on how enclosed parking spaces would be counted, the extra parking required for a duplex would consume the entire 200 square foot differential between units, requiring two units to be rigidly and precisely the same size. Council can and should eliminate this new proposed restriction.

**C. Remove the floor area ratio (FAR) limit in the duplex overlay.**

The imposition of a 55% FAR in the proposed Municipal Code amendment reflects a reduction from the R-2 standards to which the overlay otherwise refers. **R-2 currently has no FAR limitation.** If we do not impose a FAR restriction on R-2 zoned sites, which already sit in neighborhoods with predominantly single-family homes, then the sudden choice to add one to the R-1 duplex overlay seems unnecessary.

Moreover, when Strategy HE 1.3.6 was originally contemplated in prior iterations of the Housing Element draft, it referred instead to R-3 standards for developments up to 4 units. These standards likewise lack a FAR standard per the staff report.

As such, the lack of a FAR standard has always been contemplated for these sites until their first appearance in the Municipal Code

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<sup>6</sup> We are aware that staff intend to bring back a comprehensive reform of parking standards. However, adopting our proposed change to the duplex overlay parking standards would allow Strategy HE 1.3.6 to be usable now. The housing crisis is *now* – our response should be *now*.

amendments as originally proposed.<sup>7</sup> If the permissible building space for structures built under the duplex overlay is too small, homeowners will have an incentive, instead, to build maximum FAR single-family homes (so called “monster” homes) with ADUs. That result would render Strategy HE 1.3.6 largely inert and would be less favorable to the city because of the reduced impact fees collected from ADUs relative to principal dwelling units.

**D. Adjust the lot coverage maximum in the duplex overlay and in R-3 Zoning Districts for developments of up to 4 units to 50%.**

R-2 and smaller R-3 standards restrict development to 40% of the lot. This is *lower* than R-1 standards, which sit at 45%.<sup>8</sup> By expanding permissible lot coverage to 50%, homeowners will have an incentive to build under the new duplex overlay standards and to build more cheaply at the first story instead of being forced to build upward to obtain additional square footage. Keeping building costs down favors the production of naturally less expensive housing. Allowing shorter buildings also creates less visual impact in neighborhoods, which would increase the presumed aesthetic compatibility of these developments with such neighborhoods.

**E. Establish an interior side yard setback minimum of 5 feet in the duplex overlay.**

R-1 zones currently have a minimum interior side yard setback of 5 feet. Duplexes developed under the Strategy HE 1.3.6 overlay should be allowed to utilize this modestly reduced standard from R-2 standards.

**3. Provide additional direction to the City Manager to favor increased flexibility and architectural freedom in the upcoming objective**

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<sup>7</sup> The staff report describes the FAR standard as being derived from surveying nearby jurisdictions. It also paints a curious picture of an unreasonably unlikely potential for a duplex in excess of 80% FAR. The scenario described fails to account for numerous other standards like second-story setbacks and presumes the use of exceptions for balcony overhangs and the like. We appreciate staff’s concern for potential impacts, but we believe this scenario to be unrealistic. Our current R-2 standards, again, have no FAR restrictions and no duplex looks the way described in the staff report. Though we favor simplicity and consistency across similarly situated zoning districts and housing typologies, if Council feels a need to create a FAR restriction, then 65% would be reasonable under the overlay – provided that parking restrictions are reduced. Functionally, we do not see any realistic likelihood of a duplex developing at a greater FAR even without the FAR restriction given the other restrictions imposed under R-2 standards.

<sup>8</sup> See Cupertino Municipal Code, Table 19.28.070, “Building Development Regulations” (describing R-1 lots as enjoying 45% FAR and 45% lot coverage maximums).



**development standards ordinance and to harmonize it with today's updates:**

Council should encourage development standards that advocate for increased flexibility and architectural freedom rather than creating new, often unnecessary, restrictions (see: the R-4 5-story restriction, the change in the definition of a duplex).

In order to bring life to the Housing Element, Council should facilitate projects that are assuredly feasible and responsive to market demands. Therefore, we call on Council to ask staff to partner with stakeholders, community based organizations, developers, and homeowners with respect to the creation of objective development standards. These standards should also aid Strategy HE 1.3.6 and revisions to the city's SB9 implementation ordinance in order to successfully align our zoning standards with our Housing Element and ensure consistency in the Cupertino zoning code.

Council has an ongoing duty to affirmatively further fair housing. Thoughtful implementation of Strategy 1.3.6 and greater consistency within the zoning code will assist in this goal.

Without your thorough consideration of the way rezonings are approached, our Housing Element is in danger of losing its eligibility for state certification. Please uphold your commitment to Cupertino and its ability to govern its own housing plans by incorporating these changes.

Regards,

Steering Committee  
[Cupertino For All](#)

# ATTACHMENT 2

# SILICON VALLEY IS HOME

JOIN OUR HOUSER MOVEMENT. BECOME A MEMBER.

sv@home

**RE: Agenda Item #7- Municipal Code Text, Specific Plan, Below Market Rate Mitigation Manual and Zoning Map Amendments related to implementing the 6th Cycle Housing Element**

We write to express our concerns with the agenda item above, portions of which leave in place significant known constraints to housing production and fail to meet state requirements to affirmatively further fair housing (AFFH). We are concerned that these changes jeopardize the certification by HCD of the City of Cupertino's Adopted Housing Element. SV@Home values its partnership with the City of Cupertino, and it is in that spirit that we provide our feedback on the City's Housing Element.

The 6th Cycle Housing Element Update process is a unique opportunity to fully assess and address housing needs in Cupertino and to **identify and remove constraints on housing development**. On April 10, 2024, the City received a letter from HCD stating that the revised draft housing element meets the statutory requirements of State Housing Element Law once adopted, submitted to, and approved by HCD, in accordance with Government Code section 65585.

Strategy HE 1.3.6 is the City's primary Housing Element program to address AFFH by enabling missing middle housing types across the city and expanding more equitable access to high-resource areas. We are concerned that, rather than identifying and removing barriers to the development of much-needed missing middle housing in Cupertino, the proposed zoning ordinance amendments leave existing barriers in place and add new ones. From our reading, these proposed actions expand on and further codify the unnecessary constraints from the City's SB-9 implementing ordinance, such that Strategy HE 1.3.6 does not enable new types of development to be feasible. This is not what we understand to be the intent of the missing middle strategy.

**SV@Home recommends the following changes to the proposed zoning amendments concerning Strategy HE 1.3.6:**

- Remove the .55 FAR limit, a **new constraint** relative to existing R-2 standards, which effectively precludes a two-story duplex on a typical lot.
- Remove the **new constraint** of the definition of a "duplex" in Section 19.08.030 by striking the line "of comparable size." Requiring a maximum difference of 200 square feet between units unnecessarily limits the ability to configure housing for a range of needs.
- Address the **existing constraint** of R-2 parking requirements of 1.5 enclosed and 1.5 exposed parking spaces per unit (6 spaces per duplex) by reducing the requirement to 2 parking spaces per unit.
- Address the **existing constraint** of interior side yard setbacks by aligning to the minimum R-1 standard of 5 feet.
- Address the **existing constraints** on lot coverage and minimum lot sizes by allowing minimum lot coverage of at least 50% and imposing no minimum lot size requirement.

- For consistency, in this or a future ordinance update, align existing R-2 standards with the duplex overlay in Strategy HE 1.3.6

We are also concerned about height and lot coverage/ size limitations in R-4 and R-3 and **recommend the following changes to the proposed zoning amendments:**

- Remove the **new constraint** of a 5-story limit in R-4 zones, which when applied to an existing height limit of 70 feet, undermines the potential for affordability and incentivizes more expensive housing.
- With respect to changes to R-3 zoning
  - Address an **existing constraint** by expanding the lot coverage maximum for R-3-zoned properties proposing up to 4 units to at least 50%.
  - Address an **existing constraint** by eliminating the R-3 minimum lot size standard.

We value this opportunity to share our comments on the City of Cupertino's Housing Element Update, and appreciate the enormous amount of work that Cupertino staff, elected and appointed representatives, and members of the community have done to date. We are pleased with the City's real progress toward enabling more housing development, including entitlement of The Rise mixed-use development on the site of the former Vallco Mall. However, we remain concerned that the objective standards created by the proposed zoning amendments leave in place significant known constraints to housing production and impose new constraints that prevent compliance with state requirements to affirmatively further fair housing. We welcome the opportunity to engage in an ongoing dialogue with you as you deem helpful.

*SV@Home is a nonprofit organization that works with a broad coalition of strategic partners to address the urgent housing needs of Santa Clara County's diverse residents across all our communities. We advocate for solutions including increasing production of homes at all income levels, especially affordable housing; preserving existing affordable housing; and protecting our community's most vulnerable residents from displacement.*

# ATTACHMENT 3



July 2, 2024

RE: Agenda Item #7 - Housing Element Implementation Amendments

Dear Cupertino City Council,

I am writing on behalf of the Housing Action Coalition (HAC). HAC is a member-supported nonprofit that advocates for building housing at all income levels in order to alleviate California and the Bay Area's housing shortage, affordability, and displacement crisis. We have been specifically dedicated to supporting cities in meeting their housing goals through the Housing Element.

We are writing to express our concerns regarding the proposed amendments related to the 6th Cycle Housing Element. Certain aspects of these amendments retain significant barriers to housing production and fail to meet state Affirmatively Furthering Fair Housing (AFFH) requirements, potentially jeopardizing California's Department of Housing and Community Development (HCD) certification of Cupertino's Housing Element.

The 6th Cycle Housing Element Update offers a unique chance to address housing needs and remove development constraints. On April 10, 2024, HCD indicated that the revised draft housing element meets statutory requirements once adopted and approved, per Government Code section 65585.

Strategy HE 1.3.6 is crucial for enabling missing middle housing and improving access to high-resource areas. However, the proposed amendments maintain existing barriers and introduce new ones, contradicting the strategy's intent.

We recommend the following changes to the proposed zoning amendments for Strategy HE 1.3.6:

- Eliminate the .55 FAR limit to permit two-story duplexes on standard lots.
- Remove the "comparable size" requirement for duplexes to allow more flexible housing configurations.
- Reduce R-2 parking requirements to 2 spaces per unit.
- Align interior side yard setbacks with the R-1 standard of 5 feet.
- Permit minimum lot coverage of at least 50% and remove minimum lot size requirements.
- Align existing R-2 standards with the duplex overlay in Strategy HE 1.3.6.

For R-4 and R-3 zones, we recommend:

- Remove the 5-story limit in R-4 zones to maintain the 70-foot height potential.



555 Montgomery Street  
Suite 720  
San Francisco, CA 94111  
[info@housingactioncoalition.org](mailto:info@housingactioncoalition.org)  
[housingactioncoalition.org](http://housingactioncoalition.org)

- Increase lot coverage maximum for R-3 properties proposing up to 4 units to at least 50%.
- Eliminate the R-3 minimum lot size standard.

We appreciate Cupertino's efforts and commend the progress made, including The Rise development. However, the proposed amendments impose new constraints that hinder compliance with state AFFH requirements. We welcome the opportunity for further dialogue to address these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Corey Smith", is placed on a light gray rectangular background.

**Corey Smith**, *Executive Director*  
Housing Action Coalition (HAC)

*Ali Sapirman*

**Ali Sapirman**, *South Bay & Peninsula Organizer*  
Housing Action Coalition (HAC)



CC 7-16-2024

#10

Waiver of BMR  
Housing  
Mitigation Fees

Written Comments

**From:** [Jean Bedord](#)  
**To:** [City Council](#); [City Clerk](#); [Cupertino City Manager's Office](#)  
**Subject:** Agenda Item #10: Waiver of BMR and Planning Fees for Vallco/Rise SB35 Project, July 16  
**Date:** Monday, July 15, 2024 3:06:43 PM

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Mayor Sheila Mohan, Vice-Mayor J.R. Fruen, Councilmembers Hung Wei, Liang Chao and Kitty Moore,

I commend the council for your **unanimous decision** in closed session to move the Vallco/Rise project forward with a win-win negotiated agreement between the City and Vallco Property Owner LLC. Vallco could have continued this lawsuit for \$77 million which the city would have most likely lost due to the recent Sheetz court decision. The city would also have incurred additional legal costs. Instead, **the city receives \$42.8 million in fees**, a compromise which now clears the way for Vallco to move forward without the obstacles of the past. CBS News provided an informative video summary of the delays over the past ten years of attempted development: [Development at Cupertino's old Vallco Shopping Mall site finally moves ahead](#)

I urge you to **reaffirm this commitment to the community by unanimously approving these fee waivers**, thereby ensuring progress in finally developing this vacant 50 acre site which has been an eyesore for so many years.

Warm regards,  
Jean Bedord  
Cupertino resident and City Council Observer

**From:** [Connie-Comcast Swim5am](#)  
**To:** [City Clerk](#); [City Council](#); [Pamela Wu](#)  
**Subject:** Agenda item Fee Agreement with Vallco (Rise) July 16, 2024  
**Date:** Monday, July 15, 2024 12:06:52 PM

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CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Mayor Mohan, Vice Mayor Fruen  
Councilmember, Wei, Councilmember Ciao, Councilmember Moore, and City Manager and City Staff,  
Thank you to the staff for reaching a resolution to the fee negotiations with the rise. This will bring benefits to Cupertino and a good resolution for the Rise.

Please approve this agreement unanimously on Tuesday July 16, 2024.

Sincerely,  
Connie Cunningham, Chair, Housing Commission (self only)  
From Connie's iPhone

**From:** [Rhoda Fry](#)  
**To:** [City Clerk](#); [City Council](#)  
**Subject:** Item 10 Vallco Fees - question  
**Date:** Monday, July 15, 2024 10:20:08 AM

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

And another question regarding item 10 on vallco fees.  
The agenda shows that the reports were created way back in May.  
Why did it take so long for this to get on the agenda?  
Thanks.



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**From:** [Rhoda Fry](#)  
**To:** [City Clerk](#); [City Council](#)  
**Subject:** #10 7/16 Vallco Fees  
**Date:** Monday, July 15, 2024 10:02:41 AM  
**Attachments:** [A Detailed Status Report .pdf](#)  
[Staff Report 64.pdf](#)  
[20210921 Letter to VPO Re .pdf](#)  
[Response to Fee Protest Le.pdf](#)

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear City Council,

I would like to get some clarity around giving away \$77M in impact fees to a developer. This number comes from the newspaper – why not coming from the staff report. We need more transparency.

1. For the fees to be paid, please itemize. Are these fees based on the old fees or the current fee structure. If it is based on the old fees, please also list how much the fee would have been based on current fee structures for the sake of transparency.
2. Please refer to the attached documents that are unequivocal about the City's past stance on paying impact fees.
3. Please explain why Planning Fees are being waived. What are the Planning Fee costs of this project?
4. With respect to BMR, it seems to me like the developer is getting development bonuses on the one-hand and waiving fees on the other. In my opinion, this is double dipping. The BMR is not true BMR housing. The BMR housing is not integrated with the market-rate housing, it is smaller, and of lower quality. Consequently it will rent for less. Is that true BMR housing? In my mind, it looks like the developer is building market-rate substandard housing on the true BMR housing, while reaping many other benefits.
5. Why was the City adamant about charging for BMR housing in the past but not now? Please explain.
6. Please see the attachment referring to the fact that the project will create a housing deficit - - - that also demonstrates why we need a BMR mitigation fee.
7. This is setting a bad precedent for other projects that will use Vallco as an example to waive impact fees.
8. In the past, the City had measures in place that would guarantee that the BMR housing would be built – this is no longer the case. We need to collect those fees (and get interest on them) until such time that the BMR is built. And although I think we should keep them, the City could rebate the fees minus the interest after the BMR is built.
9. We are also losing out on retail – sales-tax is our best revenue-generator.
10. Why is the City subsidizing fees to Vallco and who will pay for the impacts in the end?

Sorry, this email is rather rushed. Please do read the attachments.

Thanks,  
Rhoda Fry

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**CITY MANAGER'S OFFICE**

CITY HALL  
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255  
TELEPHONE: (408) 777-3195 • FAX: (408) 777- 3366  
CUPERTINO.ORG

September 21, 2021

*Via Electronic Mail*

Reed Moulds  
Managing Director  
Vallco Property Owner LLC  
965 Page Mill Road  
Palo Alto, CA 94304

Katharine Van Dusen  
Coblentz Patch Duffy & Bass LLP  
One Montgomery Street, Suite 3000  
San Francisco, CA 94104

**Re: Vallco Town Center Project**

Dear Mr. Moulds and Ms. Van Dusen:

I write in response to Vallco Property Owner LLC's ("Developer's") request for an extension of the project approval for the Vallco Town Center Project ("Project") pursuant to Government Code section 65913.4(f)(3), or Senate Bill 35 ("SB 35"), and to your letter dated September 17, 2021 objecting to the City of Cupertino's ("City's") meeting with the Santa Clara County Department of Environmental Health ("SCCDEH"). As explained in detail below, your extension request is moot in light of the passage of Assembly Bill 1174, and your objection to public participation in matters that directly impact the health and safety of City residents is deeply concerning and wholly unwarranted.

**1. Mootness of Extension Request**

On September 14, 2021, Ms. Van Dusen sent a letter to the City requesting an extension of the Project's entitlement under Government Code section 65913.4 (SB 35). Under the version of section 65913.4(f)(3) in effect at that time, the September 21, 2018 Project approval expired on September 21, 2021. That version of section 65913.4(f)(3) also provided that "the development proponent may request, and the local government

shall have discretion to grant, an additional one-year extension to the original three-year period.” You argued that the Developer was not required to comply with this statutory requirement because the Project approval was tolled while litigation challenging the Project was pending.

As you are aware, no provision tolling the expiration of the Project approval appeared in section 65913.4(f)(3). The Department of Housing and Community Development (“HCD’s”) strained attempt to rewrite the statute through administrative fiat was wholly unconvincing, as was explained in detail in the City Attorney’s September 7, 2021 letter enclosed herewith.

You also argued that one sentence in a lengthy May 26, 2021 letter to the City’s outside counsel, which references a prior oral request for an extension of the Project approval, was sufficient to request an extension. That argument ignored the Developer’s burden of documenting sufficient progress toward construction. The City requested that the Developer submit a procedurally and substantively adequate request to the Community Development Department. While your letter to the City Attorney did not comply with this request, we were prepared to overlook your unwillingness to follow regular procedures and to review your extension request on the merits.

That review is no longer necessary, however. On September 16, 2021, the Governor signed Assembly Bill 1174 (“AB 1174”). AB 1174 retroactively amends Government Code section 65913.4(f) to provide that a project approval “shall remain valid for three years from the date of the final action establishing that approval, or if litigation is filed challenging that approval, from the date of the final judgment upholding that approval.” (Gov. Code, § 65913.4(f)(2).) The statute became effective immediately upon adoption and has the effect of conforming the statute to the interpretation that HCD erroneously and illegally attempted to implement through administrative fiat.<sup>1</sup>

Under the amended version of section 65913.4(f), the Legislature has relieved the Developer of its obligation to demonstrate progress toward construction and completion of the project by September 21, 2021. The Legislature has also provided the Developer almost two more years to address the numerous challenges facing the project, including (i) completion of necessary, long-delayed environmental investigation and remediation; (ii) design of the green roof, which impacts many aspects of the Project; (iii) addressing Project modifications that have not yet been approved by the

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<sup>1</sup> You also complain that the City did not inform HCD of its error when the Department’s SB 35 Guidelines were published. The City was under no obligation to correct HCD’s misreading of the statute during the administrative process, and both HCD and the Developer could have identified the error by simply reading the statute.



City; and (iv) the Developer's objections to paying the full amount of legislatively adopted impact fees due for development of the Project. While it is regrettable that the Legislature has decided to retroactively change the rules under which this Project was approved, apparently for the benefit of a single property owner, we are compelled by the newly adopted statute to conclude that the Developer's request for an extension of its entitlement is now moot.

## **2. Project Review and Implementation**

Despite the challenges outlined above, and despite the Developer's argumentative, irrelevant, and factually incorrect efforts to shift blame for what it perceives to be Project delays onto the City, the City continues to diligently process necessary Project approvals. The Developer chose to phase the Project in a manner that deferred path-critical site preparation work, including necessary environmental investigation work, and it has now only barely begun necessary site characterization work on the west side of Wolfe Road. (No substantial work has been performed east of Wolfe Road.) The Developer also chose to pursue ministerial approval of a large, complex mixed use project, leaving many critical details to be resolved following Project approval (as opposed to through a development agreement or conditions of approval). It is disingenuous to blame the City for these decisions.

The Developer also appears to take issue with the City's decision to engage in specific plan and zoning amendment processes that do not directly impact the current Project approval and with City staff's efforts to engage in post-approval discussions to achieve specific policy goals. With respect to the former, nothing in SB 35 restricts the City Council's right to adopt prospective legislation, and in any case these purported concerns are irrelevant to the current Project. As for the City's interest in pursuing policy goals such as transit improvements and greenhouse gas reductions, it would be an abdication of our responsibility to the residents of Cupertino to ignore those goals in ongoing discussions regarding the Project. Your characterization of advocacy that seeks improvements to the Project as delay is telling, and unfortunate.

This framing also ignores the fact that these good-faith discussions were initiated in large part because the Developer has argued that it should not be subject to objective, legislatively adopted impact fees to address the Project's impacts on transportation, housing, and recreational facilities. SB 35's commitment to comply with objective standards applies equally to the Developer and the City. To date, the Developer has not been willing to honor that commitment.

Notwithstanding these challenges, the City remains committed to processing subsequent approvals for the Project in compliance with SB 35. Rather than engaging in

finger-pointing as to the causes of any delays—which are in any event not unexpected for a Project of this scale and complexity—the City instead provides the attached Project Review and Implementation Schedule for review and acceptance by the Developer. We look forward to continuing to work with you on Project implementation issues and will continue to commit significant City resources to the review and implementation of the Project in accordance with the law.

### **3. Your Unwarranted Objections to Routine Public Participation in the Site Cleanup Process**

Ms. Van Dusen chose to write separately to object to City staff’s meeting with SCCDEH and to a request for a public record made to SCCDEH by the City’s consultant. To be clear, City staff have the right and responsibility to coordinate with partner agencies that share responsibility for protecting the health and safety of Cupertino residents. It would be a dereliction of our duty to those residents to refuse to engage with the regulator who is overseeing the investigation and remediation of the Project site.

Nor is there anything unusual or untoward about such a meeting. Environmental regulators routinely meet with stakeholders to discuss the investigation and remediation of contaminated properties. Indeed, many agencies have extensive guidelines for public participation in the site cleanup process. (See, e.g., [DTSC Public Participation Policies & Procedures](#).) The City’s interest in ensuring that the site is thoroughly investigated and remediated is wholly appropriate, and we have confidence that SCCDEH’s oversight will ensure that thorough and prompt measures to address environmental contamination are implemented. The City will continue to work with SCCDCEH and other partner agencies to ensure the Project meets applicable health and safety requirements.

Your citation to Government Code section 65913.4(h)(2) is also misguided. Section 65913.4(h)(2) prohibits local jurisdictions from imposing procedures on processing permits for SB 35 projects that “inhibit, chill, or preclude the development.” This provision is irrelevant because SCCDEH is not a permitting agency subject to SB 35. Moreover, the purpose of the City’s meeting was to ensure that its processing of building permit and other applications is aligned with SCCDEH’s restrictions on soil disturbing activities. Rather than casting unwarranted and ill-informed aspersions on

the City's motives, you should welcome this type of coordination among partner agencies.<sup>2</sup>

Finally, you grossly mischaracterize a routine request for a public record made by a consultant the City has retained to provide advice regarding the site cleanup process. Like any other person, the City's consultant has the right to request and obtain public records from SCCDEH. The request was a natural outgrowth of a meeting with SCCDEH, and we are under no obligation to seek your permission to make a public records request from a partner agency. For you to suggest otherwise is absurd and counterproductive.

A far more productive approach would be to work in partnership with SCCDEH, with appropriate City involvement, to move toward an understanding of the full extent of contamination at the site—which remains poorly characterized three years after the Project approval—and to take all necessary steps to remediate that contamination. To advance that goal, the enclosed Review and Implementation Schedule describes ongoing SCCDEH oversight of the Project site west of Wolfe Road and outlines a process for extending that oversight east of Wolfe Road. We hope that you share our goal of promptly completing the investigation and remediation of the site, and we are confident that the process we have outlined is the best path forward for doing so.

Sincerely,



Greg Larson  
City Manager



Christopher D. Jensen  
City Attorney

Enclosures:

Letter to HCD from Cupertino City Attorney (Sept. 7, 2021) (w/o enclosure)  
Project Review and Implementation Schedule

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<sup>2</sup> For example, when the City reached out to California Water Service Company ("Cal Water") regarding the lack of progress in completing water plans, the City found out that Cal Water had stopped working on the Project due to unpaid fees. The Developer was able to correct this problem after the City pointed it out.



**CITY ATTORNEY'S OFFICE**

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September 7, 2021

*Via Email (shannan.west@hcd.ca.gov)*

Shannan West  
Department of Housing and Community Development  
Division of Housing Policy Development  
2020 W. El Camino Avenue, Suite 500  
Sacramento, CA 95833

**Re: Vallco Town Center Project**

Dear Shannan West:

I write in response to your "Letter of Technical Assistance" dated September 1, 2021, concerning the anticipated application for an extension of Vallco Property Owner LLC's ("Developer's") entitlement to construct a 6.9 million square foot mixed-use project under Senate Bill 35 ("SB 35") at the former Vallco Mall site.

As an initial matter, your letter states the requests arises from a conversation with the former City Manager and the project applicant. Neither our current Interim City Manager Greg Larson nor I was aware of that conversation. In the future, please direct any inquiries regarding technical assistance to Mr. Larson.

Setting that aside, we understand the challenges the Department of Housing and Community Development ("HCD") faces in interpreting complex and evolving state housing legislation, including SB 35. You argue that a requirement to toll the expiration of the Developer's project approval while legal challenges to the approval are pending, which does not exist in the applicable provision of the statute, should be added to the law by administrative fiat. As you may be aware, the Developer has raised a similar

## Re: Vallco Town Center Project

September 7, 2021

Page 2

argument in conversations with the City. They are aware, as you must be, that we disagree with this interpretation of the statute.

The residential component of the Vallco project includes 2,402 units, 1,201 which will be deed-restricted affordable units. The applicable provision governing the term of the entitlement of the project is Government Code section 65913.4(f)(3), which states:

If a local government approves a development pursuant to this section, that approval shall remain valid for three years from the date of the final action establishing that approval and shall remain valid thereafter for a project so long as vertical construction of the development has begun and is in progress. Additionally, the development proponent may request, and the local government shall have discretion to grant, an additional one-year extension to the original three-year period. The local government's action and discretion in determining whether to grant the foregoing extension shall be limited to considerations and processes set forth in this section.

Your argument that Government Code section 65913.4(f)(2) determines the term of the Developer's entitlement is wrong. As an initial matter, you completely fail to address the fact that subdivision (f)(2) applies only "[i]f a local government approves a development pursuant to this section and the project does **not** include 50 percent of the units affordable to households making at or below 80 percent of the area median income." (Gov. Code, § 65913.4(f)(2) (emphasis added).) When at least 50 percent of the units in the project are affordable, subdivision (f)(2) does not apply. Your argument to the contrary ignores the text of the statute.

Given that subdivision (f)(2) does not apply to the Vallco project, your contention that subdivision (f)(3) merely "informs the interpretation of subdivision (f)(2), rather than as one creating a separate, third timeline for the expiration of entitlements," is irrelevant, as well as being incorrect. And in any case, subdivision (f)(3) does create a separate timeline for entitlements for projects that fall within its scope (*i.e.*, SB 35 projects that do not fall within the scope of subdivision (f)(1) or (f)(2)). Just like subdivisions (f)(1) and (f)(2), subdivision (f)(3) sets the term of the entitlement, and like subdivision (f)(2), subdivision (f)(3) provides for a one-year extension of that term. The terms of subdivision (f)(3) are parallel to those of subdivision (f)(2), not an interpretation of its provisions, and any contrary reading of the statute would render subdivision (f)(3) redundant and the remaining extension provisions nonsensical where a project falls outside the scope of both subdivisions (f)(1) and (f)(2).

## Re: Vallco Town Center Project

September 7, 2021

Page 3

Indeed, to the extent the terms of one of these paragraphs “informs the interpretation” of the other, your interpretation of the statute gets it backward: subdivision (f)(3)’s standard for reviewing an extension request incorporates the “considerations and processes set forth in this section,” which presumably include the standards set forth in subdivision (f)(2) (*i.e.*, “significant progress toward getting the development construction ready”). The quoted language in subdivision (f)(3) is meaningless unless that subdivision is interpreted as an independent provision that controls the term of SB 35 entitlements for projects that fall outside the scope of subdivisions (f)(1) and (f)(2)—as this project does.

In sum, the City’s interpretation of the extension provisions of SB 35 is dictated by the statutory language. This interpretation is also consistent with the conditions of the project’s approval. The City’s September 21, 2018 approval letter states:

As mandated by Government Code Section 65913. 4( e)( 3) [now (f)(3)], this Approval shall remain valid for three years from the date of this letter (September 21, 2021) and shall remain valid so long as vertical construction of the Project has begun and is in progress as determined in Municipal Code Sections 19. 12. 180, 15. 02.150 and the California Building Code Section 105.

The Project proponent may request, and the City has discretion to grant, an additional one-year extension to the original three-year period. The City's action and discretion in determining whether to grant the extension shall be limited to considerations and process set forth in Government Code Section 65913. 4.

Neither HCD nor the Developer disputed the validity of this condition at the time of approval, and they are barred from doing so now. The permit condition is controlling. Thus, the City will process an application for an extension received based on the requirements of the permit condition stated above, which are entirely consistent with the requirements of SB 35. The City will exercise its discretion to review that application based on the criteria set forth in SB 35, including evidence that the project has made significant progress toward construction.

In anticipation of receiving a timely extension request, the City has devoted significant resources to processing subsequent approvals for the Vallco project. These approvals include building permits, public right-of-way improvements, a final subdivision map,

**Re: Vallco Town Center Project**

September 7, 2021

Page 4

and affordable housing agreements. The scope, extent, and complexity of those approvals and other issues arising from the project is reflected in the recently prepared City Manager's report to the City Council, which is enclosed with this letter for your review. The report demonstrates that the City is fully engaged in work to allow the project to move forward.

That being the case, the Developer, and not the City, ultimately has the responsibility to obtain all necessary approvals and commence vertical construction within in the timeframe contemplated by SB 35. In particular, the Developer inexplicably delayed taking the necessary steps to investigate, manage, and remediate environmental contamination onsite. *The City is not responsible for any delays resulting from the Developer's mismanagement of the environmental investigation*, although of course we will continue to diligently process applications for subsequent approvals, consistent with all legal requirement and the requirements of SB 35.

Again, please feel free to contact me directly at [chrisj@cupertino.org](mailto:chrisj@cupertino.org) if you have any questions about this letter or if you believe further technical assistance is necessary.

Sincerely,



Christopher D. Jensen  
City Attorney

cc: Greg Larson, Interim City Manager  
Melinda Coy, Land Use and Planning Manager, HCD  
Fidel Herrera, Senior Housing Policy Specialist, HCD  
Ryan Seeley, General Counsel, HCD

Enclosure:

City Council Staff Report (Sept. 7, 2021)

**VALLCO TOWN CENTER SB 35 PROJECT  
PROJECT REVIEW AND IMPLEMENTATION SCHEDULE**

1. Site Investigation and Remediation

Vallco Property Owner LLC (“Developer”) has entered into an oversight agreement with the Santa Clara County Department of Environmental Health (“SCCDEH”) covering the portion of the Vallco Town Center site (“Site”) west of Wolfe Road. Excavation and shoring can only be carried out west of Wolfe Road with authorization from SCCDEH, after the property has been assessed and/or remediated to the satisfaction of SCCDEH. The City of Cupertino (“City”) will require written confirmation from SCCDEH prior to developer being able to perform any work west of Wolfe Road under any excavation and shoring permit, or any other soil disturbing work west of Wolfe Road.

The Developer will request to enter an oversight agreement with SCCDEH for the portion of the site east of Wolfe Road before commencing significant soil disturbing activity on that portion of the Site.

2. Fire Station Construction

Subject to negotiating a final agreement and approval of the Santa Clara County Fire District Board, the Developer will, at its cost, construct a fire station on the Site to assure that current emergency times can be maintained in light of increased traffic volumes. The fire station will be developed in accordance with the requirements of the Santa Clara County Fire District (“Fire District”). These requirements include:

- A scope of development will be prepared in sufficient detail to be incorporated as an exhibit in legal agreements.
- A concept plan must show fire station with Central Plant.
- The Developer and the Fire District will enter into a 30-year no-cost lease agreement, with the Developer responsible for maintenance of building exterior and core systems.
- The Fire District will review and provide input on developing design and construction plans.
- The fire station will be constructed in Project first phase and completed prior to first phase occupancy.



- The Developer will consult with the Fire District regarding building standards employed for construction of the fire station.

The agreement will be fully executed prior to the approval of the first phase building permit.

3. Fire Station Access Issues/New Intersection at Wolfe Road and Street 7

The Fire District has requested the City's assistance in ensuring that emergency vehicles can turn northbound on Wolfe Road from the Project Site. At the Developer's request, the City is considering allowing an intersection at Wolfe Road and Road 7 to help accommodate this movement only for emergency vehicles. The City will require the Developer to prepare plans, including traffic signal preemption and median modifications, to accommodate the District's access request. The improvements will be completed prior to first occupancy.

4. Green Roof Emergency Access

The Fire District determined that the green roof amenity will require direct access fire lanes from the street level for fire vehicles. The Fire Code requires that fire roads support aerial equipment weighing 75,000 lbs. In lieu of this weight requirement, the Fire District will authorize alternative means and methods for fire access, as permitted under the Fire Code. The green roof must support emergency response vehicles weighing up to a 10,000 pounds.

5. Green Roof Design Issues

The City Building Official will convene a working group consisting of the Developer's design team, the District and their consultant, and the City's plan checking consultant to address emergency access and structural issues related to the green roof. The City will require information to determine if the key design, green roof superstructure, supports, and foundations can resist potential sliding forces. The City will require that the access and fire lane issues be resolved prior to the issuance of the parking garage and podium building permits.

6. Transit Hub/Transportation

The Mobility Element of the General Plan required that the Vallco Developer "work with VTA [Valley Transportation Authority] / and or other transportation organizations to study and develop a transit transfer station that incorporates a hub for alternative services, such as car sharing, bike sharing and/or other services." The Developer's plans recognize the importance of such a transit hub. The Developer and the City agree

to cooperatively work with VTA to develop transportation connection and to review proposed transportation system management (“TSM”) and traffic demand management (“TDM”) programs. The Developer and the City will reach an agreement on the transit hub design and other transportation issues before issuance of the first building permit for vertical construction of the first phase of the Project, based on a phasing plan approved by the Developer and the City.

7. Cal Water

Before issuance of the building permit for vertical construction of the first phase of the Project, California Water Service Company (“Cal Water”) will provide the City with a letter confirming that the agency can provide sufficient water for all uses, including residential, office, retail, landscape irrigation, and cooling towers. The Project’s water supply, including landscaping water, is based in part on an innovative cistern recapture system. The Developer will provide proof that the cistern system is viable and will be adequate to provide year-round irrigation needs, or that water will be provided by other means such as reclaimed water. This letter will be provided to the City before issuance of the building permit for vertical construction of the first parking garage or podium building permit.

8. Final Map

The Developer proposes to record phased final maps, and the City will permit phasing provided all map conditions are satisfied. Prior to approval of the final map, the City will require clearance letters from all agencies and property owners with easements within the property and letters from agencies certifying that they will provide services to the development. All required planning and inspection fees must be paid prior to recording any map, as well as any required impact fees. The Subdivision Improvement Agreement and CC&Rs must also be recorded concurrently with recordation of the final map.

9. Below Market Rate Housing Manual

The Developer is required to implement the City’s Below Market Rate Housing (“BMR”) Procedural Manual. The BMR Manual will provide covenants for 840 of the affordable housing units. The template BMR Manual has been provided to the Developer. The City must approve a BMR Manual, template regulatory agreement, and a BMR program administrator prior to the issuance of building permits for the first housing units. A list of affordable units must be recorded before occupancy of any housing unit.

## 10. Project Modification

The development will require modifications to the approved SB 35 plans. State law contemplates a 60-day approval process for substantial changes in plans. Minor changes that are in substantial compliance with the approved plans will be addressed at the building permit stage.

## 11. Impact Fees

City impact fees include parkland dedication in-lieu, transportation (TIF) and housing (BMR) fees. The fees are validated through nexus studies demonstrating the connection between the amount of the fee and development project impacts. The Developer has contested the reasonableness of these fees as applied to the Project. The parties will continue to negotiate in good faith until agreement is reached and approved by the City Council, or the City imposes legislatively adopted fees in accordance with applicable requirements of the Municipal Code. The Developer agrees that the City Council has the discretion to impose or modify its impact fees. The Developer retains its right to challenge any decision made by City Council in accordance with law. Nothing in this paragraph waives any claim or defense either party may have in any action seeking a refund of or challenging the validity of any impact fees.

The parties agree any impact fees due are payable as follows:

- Parkland Dedication Fees: Parkland fees must be paid at the time of the issuance of the core and shell building permit for each building.
- Transportation Impact Fees (TIF): TIF fees must be paid prior to issuance of building permit. (CMC § 14.02.040.) The Developer will pay TIF fees at the time of the issuance of the core and shell building permit for each building.
- BMR Fees: BMR fees must be paid prior to or by date of issuance of construction permits. (Resolution 20-055, BMR Manual, § 2.2.1.) The Developer will pay BMR fees at the time of the issuance of the core and shell building permit for each building.

This Project Review and Implementation Schedule is intended to provide a road map for review and processing of subsequent permits and other work necessary to complete construction of the Project. By providing this Schedule, the City does not waive or modify any requirement of the September 21, 2018 approval letter or any requirements that have been or may lawfully be imposed by any subsequent approval. Additionally, nothing in this Schedule limits the City's obligations to process subsequent permits for the Project under Government Code section 65913.4 and other applicable law. Both

parties recognize that additional issues may arise in the course of development of the Project, and by agreeing to the procedures outlined above, neither party waives its right to raise additional issues or require compliance with any state or federal law or any City ordinance, resolution, or policy applicable to the Project under state law.

**ACKNOWLEDGEMENT**

On behalf of Vallco Property Owner LLC, I acknowledge receipt of the foregoing Project Review and Implementation Schedule for the Vallco Town Center SB 35 Project and consent to the process for resolution of outstanding issues set forth herein.

\_\_\_\_\_  
Reed Moulds  
Managing Director, Vallco Property Owner LLC

\_\_\_\_\_  
Date

## Attachment A

### **Detailed Status Report on the Vallco SB 35 Development Project**

(prepared for the September 7, 2021 City Council meeting)

#### **Summary**

The old Vallco Town Center, a traditional retail mall with some unique elements, was historically the City of Cupertino's retail hub. Like other urban and regional malls, it faced the need for redevelopment with aging and vacant retail spaces. The redevelopment process has faced various strategic planning options, referendums, and litigation, eventually leading to the current project as proposed by the property owners.

The owners and developers of the Vallco Town Center ("Developer") applied for a mixed-use affordable housing project (the Project) in 2018 under a Government Code Section 65913.4 (approved under Senate Bill 35, or SB 35), a State housing law that allows affordable housing projects to bypass traditional city planning processes as only a "ministerial" approval (i.e., not subject to typical discretionary municipal approvals).

Specifically, to increase the supply of affordable housing in California, SB 35 requires cities to approve qualifying housing projects without a public hearing or otherwise required environmental review. Under SB 35, the Project in Cupertino was approved with specific conditions based on previously established "objective" City rules and regulations not involving City discretion, and without a vote of the City Council or any public hearings.

Under SB 35, the Vallco Town Center project's initial approval is due to expire on September 21, 2021, subject to certain conditions as described below. The statute allows for a one-year time extension for a developer to begin vertical construction upon a showing that substantial progress is being made.

The initial three-year period has proven insufficient to begin vertical construction. Issues have arisen including (i) contamination found on the site, and the development and oversight of a remediation plan; (ii) the construction of a fire station; (iii) the development of a 30 acre "green roof" as part of the Project; (iv) traffic impacts and off-site transportation improvements; (v) the development of a transit hub as part of the Project; and (vi) the payment of certain impact fees, among other issues.

In recent months a great deal of progress has been made on some of the above subjects, though difficult issues remain. This report outlines agreements which have been reached and those areas still under discussion.

Staff has been working with the Developer on an implementation plan to be contained in an extension letter (the "Extension Letter"). One of the goals of this report is to provide transparency to the community and the City Council on the Vallco Town Center project.

## **DISCUSSION**

### **A. Background**

#### **1. The Project**

Vallco Property Owner LLC ("Developer") submitted a planning application to redevelop the former Vallco Mall on March 27, 2018. The Developer proposed a mixed use, residential, commercial and office project known as the Vallco Town Center under SB 35. This was one of the earliest applications submitted under SB 35 Statewide, and the first one submitted in Cupertino.

The project is located on North Wolfe Road, between Interstate 280 and Steven's Creek Boulevard (the "Site"). The application and permits are more fully described in the project approval letter dated September 21, 2018, including a discussion of the residential density bonuses granted under State and City statutes. Copies of the approval letter, plans, reports and other materials can be found on the City's [website](http://Cupertino.org/vallcosb35) at [Cupertino.org/vallcosb35](http://Cupertino.org/vallcosb35).

The Site is approximately 50 acres and had been the location of the former 1.12 million square foot Vallco Mall originally constructed between 1974 and 1979. The Vallco Mall had approximately 100 tenant spaces and was anchored by Macy's, Sears, and JCPenney. Former underground storage tanks at the Sears Automotive Center and JCPenney Automotive Center were removed under regulatory oversight in 1994 and 1999, respectively.

Prior to submission of the SB 35 project, the Developer had worked for a number of years on a prior redevelopment plan for the Mall, which became controversial within the community. The original Vallco Specific Plan was adopted in September 2018. However, due to three separate voter-initiated referenda petitions challenging those approvals, the City Council repealed the Vallco Specific Plan in May 2019.

Due to the uncertainty of the Specific Plan, the Developer concurrently proceeded with an application under SB 35 for the current mixed-used affordable housing project known as the Vallco Town Center as an alternative development<sup>1</sup>. That SB 35 Project was approved administratively by the City on September 21, 2018.

When completed, the Vallco Town Center will consist of 2,402 residential units, with 1,201 of these being affordable units. The remainder of the Project will consist of 485,912 square feet of retail use and 1,981,447 square feet of office use.

While the Project was administratively approved under SB 35's simplified and streamlined requirements for the provision of additional affordable housing, the total provision of affordable and market rate housing is less than would otherwise be needed to support the office development provided in the approved project. Specifically, the project as approved under SB 35 increases the jobs-housing imbalance in Cupertino rather than reducing it, without allowing the City to impose conditions that would mitigate the full extent of the project's impacts.

## **2. SB 35 Eliminates Discretion; Bypasses CEQA**

The intent of SB 35 is to improve the State's housing supply and to streamline the local development review process for affordable housing projects. Normally, development projects above a certain size are required to undergo an environmental review process under the California Environmental Quality Act (CEQA) to determine the project's impacts on air quality, traffic, noise, recreation, land uses, biological resources, geology and soils, water resources, and greenhouse gas emissions, among several other categories. If impacts are determined to be significant, they must be mitigated to an acceptable level. This environmental review process can take several years.

Affordable housing projects that meet the requirements of SB 35, however, are not required to go through the environmental review process under CEQA. Thus, various noise, air quality, and traffic studies are not completed for such projects, and mitigation measures are not identified or implemented.

SB 35 also bypasses the traditional land-use approval processes that involve public hearings before a city's planning commission and/or city council prior to approving a discretionary project. Under SB 35, approval of a qualified affordable housing project is delegated to city staff in what is known as a "ministerial" or "administrative" review of

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<sup>1</sup> The Project certainly illustrates the problem of "one size fits all" inherent in legislating solutions from Sacramento. Arguing that the retail space is reduced by 60% allowing development of 2,400 residential units, yet 1.9 million square feet of office is being built, creating a possible shortfall of 3,400 residential units from what is needed by the office workers, thus actually burdening the transportation and other infrastructure of the City.

the project, to determine whether the project meets the objective zoning and development standards in effect at the time the project application is submitted to the city. Ministerial review and approval involves no discretionary or subjective judgment by city staff and is limited to evaluating whether the project meets certain city standards that are knowable, available and/or quantifiable. Projects with more than 150 housing units that meet all objective standards must be approved within 180 days of submitting the application.

Projects approved under SB 35 must comply with all city ordinances, general plan, and policies that are “objective” and which were in effect when the development application was submitted (in this case, March 27, 2018). The State law assumes that city ordinances, plans, and policies can adequately address the impacts from a proposed SB 35 project. The Vallco Town Center was one of the first developments Statewide approved under SB 35 and has resulted in City staff relying on ordinances and general planning documents that did not envision a development of this scale and impact.

Once a project is approved under SB 35, the developer is required by State law to commence vertical construction within three years. If physical construction of a vertical structure does not begin within that three-year period, the approval may expire. However, according to SB 35, a project approval may be extended for a one-time, one-year extension if the developer “can provide documentation that there has been *significant progress* toward getting the development construction-ready, such as filing a building permit application.” (Gov. Code § 65913.4(f)(2) and (f)(3).) City staff are required to apply the criteria in SB 35 in reviewing an extension request.

### **3. Permit Applications**

The Developer has applied for initial building permits that would authorize construction of certain parts of the Project. As is typical for a project of this scale, the building permit application is phased for different parts of the construction process and different areas of the Site. The plan review following submission of these permits resulted in a series of meetings and discussions involving the City staff, the Developer and responsible agencies, such as the Santa Clara County Fire District, the Santa Clara County Department of Environmental Health, the California Water Company, Valley Transit and others. The plan review has resulted in the identification of issues related to soil remediation, fire and life safety, structural design, traffic, transit, the provision of water to the development, affordable housing, development impact fees, parcel map processing and other issues which are discussed in this report.



Staff and the Developer have made substantial progress in resolving many issues. However, other issues remain unresolved. Staff and the Developer are working to agree on a process for addressing the outstanding issues.

This report is intended to make the public aware of the Project status and will discuss where substantial progress has been made and where issues remain.

## **B. Major Issues**

The following issues were identified during the review of the current permit applications submitted by the Developer as compared to the approved SB 35 plans. The City intends to develop remedies for inconsistencies and an implementation plan through ongoing work with the Developer.

### **1. Soil Remediation**

In conjunction with the building permit review process that commenced at the end of 2018 when the Developer submitted certain building permit applications, the City required the Developer to conduct soil testing and provide associated reports.

As a result, the Developer submitted its initial Soil Characterization Report (SCR) and Environmental Site Management Plan (ESMP) for the Site in April 2019. Contained in the April 2019 SCR as an appendix was a 2016 Geosphere report showing soil testing samples at the Site that exceeded State residential screening levels for polychlorinated biphenyls (PCBs). However, the text of the April 2019 SCR contradicted its own documentation by stating that PCB levels were not detected above laboratory reporting limits in the testing samples. Upon receipt of the April 2019 SCR and all appendices, the City hired a third-party consultant (Baseline) to peer-review the SCR. In June 2019, Baseline submitted draft comments to City staff informing the City of the elevated PCB levels. This was the first time the City became aware that soil test results exceeded PCB screening levels.

Following receipt of the SCR and being informed of the elevated PCB levels in the samples, the City required the Developer to prepare a PCB work plan, to be reviewed and approved by the City, to determine the extent of some PCB contamination identified in the SCR and associated reports. The work plan needed to be submitted and reviewed prior to issuance of certain demolition permits. Furthermore, the City required the Developer to present the results of the investigation conducted per the PCB work plan and to submit a soil vapor investigation report. The Developer submitted a PCB investigative report in August 2020 and a soil vapor investigation report in January 2021.

Upon discovery of contaminated soils above threshold levels, the project's approved permit condition required the Developer to conduct further testing and remediate the contaminated soils if necessary, in accordance with applicable environmental laws.

The Developer originally proposed to "self-monitor" the remediation of the contaminated soils on the Site and believed that the Santa Clara County Department of Environmental Health (SCCDEH) had an "informal" program. After lengthy discussions with the City, the Developer recently entered the Voluntary Clean-up Program with SCCDEH to develop and implement a soil remediation plan. Known or potential soil contamination is being investigated on both parcels on either side of Wolfe Road at or near the locations of the former Sears Automotive Center, the JCPenney Automotive Center, and elsewhere on site. SCCDEH is responsible to ensure that these properties do not present a human health hazard to workers on the Site during excavation and construction, as well as to prevent long-term health hazards to the eventual residents and users of the properties. SCCDEH has jurisdiction over the Site under their Voluntary Clean-Up Program and will ensure that the groundwater is not impacted by the contaminated soils.

SCCDEH is in the process of reviewing soil contamination reports submitted by the Developer and will determine if additional soil characterization is required, which may require additional soil borings and laboratory analysis. The results of the soil studies will inform soil clean-up and management planning. SCCDEH has made the decision to process each side of Wolfe Road as one soil remediation plan and permit. The Developer has designated the west side of Wolfe Road as their priority parcel. The east side of Wolfe Road will be processed as a separate plan and permit at a later date when development plans are prepared, and further SCCDEH review may be required at that time for that parcel.

The SCCDEH's review will address PCB contamination identified in 2016 as well as any additional environmental issues that are identified in the Developer's recently commenced site investigation. These additional issues include undelineated PCE contamination in soil vapor that was documented by the Developer's consultant in a July 30, 2021 site investigation report. The consultant recommended additional site investigation to delineate the horizontal and vertical extent of PCE contamination on the Site.

At this point the Site is under the control of the SCCDEH. Excavation, shoring, or other soil-disturbing activities can only proceed with their authorization. The Developer has cooperated with the City by posting Proposition 65 warning notices around the Site. SCCDEH will allow above ground demolition, as long as soil is not disturbed. Demolition

permits have been issued for the above ground portions of the former Macy's and mall parking structures, with the condition that the demolition work does not disturb the soil.

The Developer applied for building permits in December of 2018, as follows:

- 1. Shoring and Excavation Zone A -#B-2018-2107**
- 2. Foundations and Podium Garage – #B-2018-2171**
- 3. Core and Shell Superstructure - #B-2018-2172**

There are a series of other project permits, including Demolition Zone B-1 (JC Penny garage) – BLD-2020-1628; Shoring and Excavation Zone B – BLD-2021-0433; and Site Utilities – BLD-2019-1422 which are pending. The excavation and shoring permits were amended in January of 2021 to cover only the west side of Wolfe Road. This permit was issued subject to a condition that work shall not commence until environmental clearance is given by the Santa Clara County Department of Health (See the expanded discussion of the soil remediation in the section below.)

## **2. Fire Station**

Fire suppression and emergency medical services are provided in Cupertino by the Santa Clara County Fire District (District). The closest fire station to the Vallco Project is located at 20215 Steven's Creek Boulevard. The SB 35 plan calls for an "optional auxiliary fire station," as part of the Vallco Project. The station was depicted on plans located on the northeast side of Wolfe Road and the Project's perimeter road, adjacent to the development's central utilities plant (see Exhibits - Master Plan, Street Level, P-0202, Site Diagram, P-0509 and Building Plan Parking Level, P-0880.B1).

The City met with the Fire District in order to determine if the station was optional and auxiliary. The District indicated that they do not staff auxiliary fire stations, and that a full-time fire station was needed to serve the development and to preserve existing emergency response times in Cupertino. The District was concerned that the increases in vehicles and pedestrian traffic from the development would slow response times to a level outside of their standards for emergency response, as well as impact fire suppression response. The District reports an average response time to urban fires and medical incidents of five minutes, thirty seconds, as established in their strategic plan and policies. Developing an on-site fire station should allow the District to maintain their current response standards.

The District views the Vallco Project as "a city within a city" in terms of its fire and emergency medical services demand. Population projections submitted by the Developer with the SB 35 application forecast 6,005 residents, 11,000 office workers and 1,500

employees (See Luk and Associates, Project Report – Vallco Town Center Project 50% BMR, March 22, 2018, Page 2). The proposed green roof/park/open space presents additional emergency response challenges. The Vallco station would provide 24 hour, 7 days per week staffing, with four full-time fire fighters. The District would provide the equipment, while the developer would construct the station.

The District met with the Developer and has discussed a 7,000 to 8,000 square foot building footprint adjacent to the Project’s central utility plant. The District reported to the City that the draft plans they reviewed illustrated a structure two-stories in height, with living quarters upstairs and apparatus bays located on the ground floor. The station would include space for three engines and equipment, office space, housing in dorm rooms, three gender-neutral pod-style restrooms, two of which would include a shower. The station would include a day/living room, kitchen, workout area, and three offices, with at least one office that would have a public-facing ADA accessible entrance. The station will need to provide co-located parking for the firefighters and the public.

The station would be planned in collaboration with the District, the City and the Developer. The Developer would be responsible for constructing the station. As the Fire Station was not detailed in the approved SB 35 Plans, it will need to comply with the California Codes in effect at the time of submission. The City would be involved in the review of the construction plans, permit issuance, and inspections. The estimated costs of the new station range from \$9 to \$10 million.

The station’s location on the northwest section of Perimeter Road presents circulation challenges. Emergency vehicles will require special access to Wolfe Road for northbound emergency equipment. Staff and the District explored alternative sites for the station; however, due to a number of constraints, including high land costs, the District determined that the location on Perimeter Road is satisfactory. The District has requested that the traffic signals be programmed to allow emergency equipment to “preempt” the normal intersection cycle in order to access Wolfe Road and other public streets. The City has installed signal preemption systems citywide and believes it can accommodate a new traffic signal on Wolfe Road that will help to serve the new station.

### **3. Green Roof**

The Project envisions the construction of a sizable green roof/park/open space that would include both public and privately accessible space. While much of the green roof is inaccessible to people and is primarily unusable open space, the plans depict private swimming pools, a children’s playground, two turf play areas, gardens, picnic areas, and a system of interconnected walkways and pathways. The applicant has also indicated

that portions of the accessible portions of the green roof could be blocked off to accommodate the needs of their office tenants. The green roof is a complex structure and can be better described as a series of green roofs constructed atop several buildings, and free standing in some locations. Portions of the green roof(s) span from building to building, and span Wolfe Road. The City currently has not seen plans for the green roof(s). It is assumed that the structures will need to be constructed in phases, since the various green roofs cover a large area (30 acres of the 50-acre development site).

The Building Official will require separate plans, permits and inspections for the green roof(s). The plans will need to address how the phases relate to one another and how temporary access will be provided. The project will also require a construction management plan to address construction safety issues. Adding to the complexity, the green roof(s) are also intended to capture and treat rainfall to assist the Project in complying with Federal and State stormwater quality regulations. The Building Official will be convening a working group to discuss and resolve emergency access and structural issues which will include the participation of the Fire District and their fire code consultant, the developer and their design team, and the City's consultant plan checker, as discussed below.

(a) Green Roof Emergency Access

A large portion of the green roof is elevated approximately 100 feet above the ground. This height is beyond the reach of the Fire District's aerial equipment (ladder and snorkel trucks) in an emergency.

The SB 35 plans illustrate two pedestrian walkways from Perimeter Road and Stevens Creek Boulevard accessing the green roof, one elevator each from the west and east sides of Wolfe Road to the green roof, and one ten-story stairwell from Steven's Creek Boulevard (see Exhibit P-0502) to the green roof. The SB 35 plans also illustrate areas on the surface streets where aerial equipment would be staged to reach buildings under the green roof; however, these staging areas are insufficient for dealing with emergencies on the green roof (see Exhibits P-0408, P-0409 and P-0409.01).

The exact occupancy limit of the green roof will be determined a later stage; however, the green roof could be used by hundreds of people at any one time. The Fire District notified the Developer that the green roof did not meet the California Fire Code emergency access requirements (see the City's September 21, 2018, Project approval [letter](#)). The District's correspondence references the "green roof amenity" and states that the roof does not provide fire vehicle access. California Fire Code Section 503.2.2 and District policies

require access roads for buildings over thirty feet in height. The access roads must be of the size and construction to support aerial equipment weighing 75,000 lbs.

The District has determined that the green roof will require direct access fire lanes from the street level for fire vehicles. However, the District is recommending that the green roof be capable of supporting the weight of their lightest vehicle (Type 6 vehicle with a 20,000 lb. weight limit) to respond to public safety incidents on the green roof. These are smaller fire trucks and EMS ambulances. The District and the Santa Clara County Sheriff often respond together to incidents. This weight allowance will accommodate sheriff patrol vehicles. The Developer will also need maintenance vehicles on the green roof. The City will require that the access and fire lane issues be resolved prior to the issuance of the phased foundation permits. The City will also require an enforceable commitment to construct and ensure public and emergency access to the green roof and other private open space.

(b) Green Roof Structural Design

Few cities have extensive experience with green roof construction of this magnitude. The planning, permitting, construction, and inspection of the green roof requires careful consideration. Special care will need to be taken to ensure worker and public safety during construction. The Development has not submitted any plans for the green roof at this time. The geotechnical reports submitted with the SB 35 plans describes the green roof as an “approximately 30-acre, base-isolated green roof, over the majority of the proposed buildings” (See Langan, Geotechnical Investigation, October 27, 2016, Page 36.)

The geotechnical reports indicate that the green roof would be comprised of polystyrene expanded foam blocks, covered with approximately 20 inches of soil to reduce the overall weight. The park and open space amenities, including the walkways, gardens, turf areas, trees, lighting, water mains, irrigation system, and picnic areas, would be constructed atop the polystyrene blocks and soil. Portions of the 30-acre green roof would contain slopes ranging from 20% to 25% in gradient. The report describes the roof construction consisting of interlocking “sheer keys.”

The geotechnical report prepared by Langan in 2020 omits a discussion of the green roof foundation systems. (See Geotechnical Investigation Vallco Town Center, October 29, 2020, Pages 35-36.) It is unknown if the green roof will be supported by separate base isolated columns or constructed as part of the foundation, podium and superstructure systems for the buildings or a combination of both construction types. The geotechnical engineer has cautioned that the green roof needs to be able to withstand sliding forces, should a landslide occur in the steeper manufactured slope areas.

The City will require clarification of the green roof foundation and support structures in the working group. This includes determining if the key design, green roof superstructure, supports and foundations can resist potential sliding forces. The working group will also need to determine if the expanded polystyrene blocks and soil can support the weight of multiple 20,000 lb. emergency vehicles. The developer has indicated that they have designed their foundations, structural supports and super structure to support a 10,000 lb. weight limit for the emergency vehicles, which is inconsistent with the Fire Department specification provided above. The working group will need to resolve these structural issues prior to the issuance of the parking garage foundation and podium permits.

#### **4. Traffic**

SB 35 restricted the ability of the City to conduct the standard environmental review. The housing statute prevented the preparation of a project specific traffic study. The standard environmental review would have required that the City contact Caltrans and surrounding jurisdictions to understand the development's impacts on their roadways. Due to the SB 35 requirements, Caltrans and the cities were not consulted.

During the 2018 SB 35 review, the City was required to rely on the existing Mobility Element of the General Plan to review the impacts from the development. The City also had information on traffic impacts from the 2017 Impact Fee Nexus Study. However, these studies never anticipated that the Vallco Town Center would be constructed in the first five years of their planning horizons. General plans typically study ten- to twenty-year planning horizon and the Nexus Study examined the same period as the General Plan. Baseline conditions can change, so good planning typically entails project specific traffic studies, which was not permitted under SB 35 as part of the project review and approval.

As part of the SB 35 Project, the Developer proposed improving two intersections immediately adjacent to the development. However, developments of this size can have major impacts to the local and regional traffic network. Staff has reviewed the General Plan, the Nexus Study and prior traffic studies for the property to estimate traffic impacts from the Vallco Town Center. This review revealed that twenty-one intersections could be impacted, both locally and in the region. Ten of the impacted intersections are in Cupertino. Staff prepared a map of the impacted intersections and the approximate costs to improve the Cupertino intersections only. If the Vallco Project had been subject to the City's normal environmental review, the Developer would have been required to pay their "fair share contribution" for the eleven intersections located outside of Cupertino, and would still have been subject to the City's Traffic Impact Fees.

Four of the regional intersections are in the unincorporated areas of Santa Clara County, three intersections are in Santa Clara, one intersection is in San Jose, and three intersections are in Sunnyvale. The Nexus study did not include cost estimates for the intersection improvements needed outside of the City.

Cupertino Impacted Intersections

#	Street Names	Estimated Cost
1	DeAnza Blvd/Homestead Rd	\$1,721,914
2	DeAnza Blvd/McClellan Rd	\$6,810,066
3	DeAnza Blvd/Stevens Creek Blvd	\$ 107,010
4	Homestead Rd/Tantau Ave	\$ 56,405
5	Stevens Creek Blvd/SR 85	\$ 268,809
6	Stevens Creek Blvd/Stelling Rd	\$1,283,415
7	Stevens Creek Blvd/Tantau Ave	\$ 129,305
8	Wolfe Rd/Homestead Rd	\$3,216,112
9	Wolfe Rd/Stevens Creek Blvd	\$ 135,742 (Developer Provided)
10	Wolfe Rd/Vallco Pkwy	N/A (Developer Provided)

Potential New Intersection – Fire Department Access

Wolfe Road & Road 7	N/A (Developer Provided)
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### Level of Service Impacts

Intersection #	Current LOS	LOS after Project	Included in the TIF
1	D-	E+	Yes
2	D	E-	Yes
3	D-	E-	Yes
4	D-	E+	Yes
5	D-	E+	Yes
6	D-	E	Yes
7	D	E+	Yes
8	D-	E	Yes
9	D	E	Yes
10	D+	E	No

Nine of the ten intersections in Cupertino were included in the Nexus Study used to determine the Traffic Impact Fee.

The improvements to intersections #9 and #10 will be funded and constructed by the Developer. Staff recommends prioritizing intersections #6 and #8 because they are the most congested intersections of this group. The improvement costs for #6 are \$1,318,000 and the costs for #8 are \$7,131,000. Intersection #2 is currently planned for improvement in the City's CIP (\$9,707,000). Intersection #3 is one of the most heavily trafficked intersections in the City (\$145,000) and it would benefit from improvement. Intersections #4 (\$145,000), #5 (\$536,000), and #7 (\$145,000) would also benefit from improvement.

The Traffic Impact Fee may provide the estimated \$22.5 million in improvement costs; however, these costs will increase over time as projects are scheduled in the City's capital improvement program (see Development Impact Fee discussion below).

Finally, the Developer is proposing a new traffic signal at the intersection of Wolfe Road and "Street 7." In March 2021, the City Transportation Manager requested additional analysis of the impacts of the proposed design on traffic and emergency response times. City staff repeated that request in July 2021 and again in August 2021 and are awaiting a response from the Developer.

## **5. Transit and Transportation**

The Vallco Project at completion will generate significant vehicular traffic. The Mobility Element of the General Plan adopted goals and policies to address the community's traffic and transit concerns. The Mobility Element includes policies that encourage planning and coordination of regional and local transit services "both public and private,

to accommodate diverse community needs and to make transit a safe, comfortable and efficient option” (Page M-14). A specific policy requires developers to work with the Valley Transit Authority (VTA) to “ensure that all new development projects include amenities to support public transit, including bus stop shelters, space for transit vehicles as appropriate and attractive amenities such as trash receptacles, signage, seating and lighting” (Page M-18).

The Mobility Element includes the following specific Vallco condition:

Policy M-4-7: Vallco Shopping District Transfer Station – Work with VTA/and or other transportation organizations to study and develop a transit transfer station that incorporates a hub for alternative services, such as car sharing, bike sharing and/or other services.”

The Mobility Element also requires that projects reduce greenhouse gas emissions through implementation of Transportation Demand Management (TDM) – specific programs that a developer would implement to encourage a project’s residents and visitors to use alternative transportation modes, rather than automobiles, to reduce congestion in and around the development (e.g., walking, biking, transit, car or van pooling, bus pass subsidies and other programs). Policy M-8-3 states that the City should “[e]mploy TDM strategies to improve efficiency of the transportation infrastructure including strategic right-of-way improvements, intelligent transportation systems and optimization of signal timing to coordinate traffic flow.” The City is to require TDM programs for all existing and new developments.

The approved SB 35 project plans show that the developer is planning a Vallco Bike Hub/Shared Facility and both public and private transit routes, including a proposed private shuttle bus stop and relocated VTA bus stops. These issues have been discussed with Developer and the Developer has indicated that they are developing those plans. Staff is looking at transit and transportation options and alternatives. Staff will be working with the Developer and VTA to implement the General Plan requirement for the Transit Hub and incorporate them in an implementation plan.

## **6. Cal Water**

The Vallco Town Center is located in the service territory of California Water Company (Cal Water). Cal Water is responsible for ensuring that sufficient water supply exists for the development. The Developer provided a Water Demand Summary (See Project Report – Vallco Town Center Project 50% BMR, March 22, 2018, Page 7). The summary

indicated that the development would require 364 acre-feet of water annually. The analysis examined both potable water and reclaimed water sources.

The developer is proposing a cistern system to capture storm water. This captured water would be reused for irrigation. Staff is concerned that the cistern system will not provide sufficient water from rainfall for the Project's annual irrigation needs. Staff also notes that the current regional reclaimed water system may bypass Cupertino (see Need for Reclaimed Water discussion below). Since rainfall is subject to climate variability, Cal Water will need to provide evidence that they can supply potable water for all uses – residential, office, retail, landscape irrigation, and cooling towers – until reclaimed water is available. Cal Water will also need to estimate the amount of water and the time period for the establishment of the Project's landscaping, since landscape establishment requires additional water. Calwater has indicated verbally that sufficient water exists, but a formal water supply assessment for the Vallco Town Center project has not been completed.

## **7. Reclaimed Water**

The Vallco Town Center consists of over thirty acres of landscape areas in the green roof(s) alone. There are also landscape medians and plaza areas that require irrigation. The Project will also utilize centralized cooling towers that require water.

California is in the third year of a prolonged drought, with another dry year forecast for the 2021-2022 season. The Vallco Town Center would be served by California Water Company with potable water, which would be used not only for drinking water purposes, but for landscape irrigation, water tower cooling and toilet flushing. The developer indicated that they would be open to constructing a dual plumbing system if recycled water is available for Project use. (See Project Report, Vallco Town Center Project 50% BMR – Water Demand Assessment, Page 3.) The Developer will install a landscape irrigation system that can accept reclaimed water if a reclaimed water main is extended to the Project. The approved development permit also requires the Developer to install a gray water system for toilet flushing.

The Infrastructure Element of the Cupertino General Plan (Chapter 8) anticipated in 2014 that reclaimed water could offset the need for potable water, specifically in the North Vallco Park Special Area. The Element foresaw the potential extension of the regional reclaimed water system from the Apple Campus on Wolfe Road and a reclaimed water main was installed to serve the Apple Campus. That twenty-four-inch reclaimed water main terminates at Wolfe Road and Homestead Avenue.

Policy INF-1-3 of the City of Cupertino Infrastructure Element requires the City to coordinate with utility providers to ensure that their planning meets the City’s future growth. Policy INF-1.4 requires that the City explore opportunities to fund infrastructure needs. Policy INF-3.2 requires that the City coordinate with the State and regional agencies to meet City goals. A regional framework exists for Cupertino to work cooperatively in obtaining the funding needed to construct a reclaimed water main to the Vallco Town Center and other areas of the community. However, Cupertino has not previously participated in the Bay Area Integrated Water Management Plan, which might provide funding for reclaimed water projects.

The Developer also prepared a water demand summary based on a dual system with both potable water and recycled water (see Project Report – Vallco Town Center Project 50% BMR, Luk and Associates, March 22, 2018, Page 7). As discussed above, the Project includes a cistern system to harvest rainwater; however, it is anticipated this supply will be inadequate for the annual irrigation and cooling tower needs. Vallco’s engineers estimated in March of 2018 that 45-acre feet of water would be necessary to meet the Project’s annual irrigation needs. The engineers also estimated 19 acre-feet of water would be needed for the cooling towers. Another 36 acre-feet was estimated for toilet flushing needs.

The Developer studied extending the reclaimed water main from the Apple Campus on Wolfe Road, concluding that 5,700 linear feet of 24-inch pipeline would be needed. Staff has identified four phases to the design, funding and construction of the reclaimed water main:

Phase I – Homestead to the I-280 (northside)	2,000 lineal feet	\$4.2 million
Phase II – I-280 Bridge	1,500 lineal feet	\$3.2 million
Phase III – I-280 south to Vallco Parkway	1,100 lineal feet	\$2.3 million

The City could also extend the reclaimed water main to Steven’s Creek Boulevard to serve other projects in the community.

Phase IV – Vallco Parkway to Steven’s Creek	950 lineal feet	\$2 million
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The total costs of the Wolfe Road Reclaimed Water Main Project are estimated at \$11.7 million. The Project would be more cost effective if it is completed with the public improvements for the Project, including improvements to the I-280 bridge.

Cupertino is served by the Santa Clara County Water District (Valley Water), which also covers all of Santa Clara County. The City is located in District 5, along with the cities of Saratoga and Sunnyvale. The extension of the reclaimed water main to the Apple Campus

involved a partnership between Valley Water, Sunnyvale (which operates a water reclamation plant), California Water Company and Apple.

Staff notes that the current regional reclaimed water plan would largely bypass Cupertino, foreclosing the opportunity to extend reclaimed water into the community for decades into the future. The City could explore with Valley Water the opportunity to form a similar partnership, including the Developer, Sunnyvale, California Water Company, and Caltrans, to draft a reclaimed water main plan and to advocate for State funding for the extension. The Developer has indicated that they are in favor of developing this plan, but that the City would need to provide the leadership to create the necessary partnership.

## **8. Stormwater Management**

The Developer will be required to prepare and submit a comprehensive Stormwater Pollution Prevention Plan for City and regional regulatory review, to address stormwater management during construction operations. The project will also need to prepare a stormwater management plan to address ongoing treatment for stormwater runoff from all permeable and impermeable surfaces including the green roof(s), parking, streets, and structures for the completed project.

## **9. Below Market Rate Housing Manual/ Affordability Covenant**

The Developer proposed 1,201 affordable residential units as part of the Project. The development is subject to the City's affordable housing program (City of Cupertino BMR Housing Mitigation Program Procedural Manual) regulating the affordability of 361 units (217 as Very Low Income units and 144 as Low Income Units). The City's BMR Procedural Manual requires that the affordability of these units be protected for a period not less than 99 years. The remaining 840 affordable units are subject to a Developer-prepared housing manual, similar to the City's manual (144 Very Low Income units and 696 Low Income units). These 840 affordable units will remain affordable for a period of 55 years for rental housing and 45 years for owner-occupied housing, as required by SB 35.

Municipal Code Section 19.56.050(F) requires that affordable units be constructed for each phase of the Project. They also shall be constructed concurrent with, or prior to, the construction of the market rate units. The Developer has not provided a phasing plan for the Project. The Developer is also required to prepare an affordability covenant for review by the City Attorney. The affordability covenant must be recorded prior to the issuance of the first building permit (See Condition 4, Attachment C, September 21, 2018 Project approval letter).

## **10. Final Parcel Map/Sequencing**

The Developer notified the City with the SB 35 application that they will be phasing the final map for the development. The prior shopping mall was divided into several parcels to facilitate orderly development. Multiple parcels are common to shopping mall development, as major anchor retailers, who owned their own parcels, typically required parcels tied to sufficient parking. The existing recorded parcel map contains easements that are no longer needed, such as joint parking easements. The proposed parcel map would consolidate the existing parcels in order to facilitate the orderly development of the Vallco Town Center Project.

The Developer requested that they be allowed to phase the final parcel map, which is permitted by State law (See Government Code Section 66456.1). Staff is currently reviewing the final map submittals and the developer has been responding to staff comments. There are a series of ministerial conditions that the Developer must comply with to record the final map. The City will need clearance letters from agencies and property owners with any easement deeds (Cal Water, PG&E, Cupertino Sanitary District, Comcast, AT&T, Hyatt House and Simian Properties). The City will require letters from the utilities certifying that they can provide service to the development and that all planning and inspection fees have been paid by the Developer.

The Developer has been working with staff to complete the public improvement plans for City facilities (streets, intersection improvement, landscape medians, sewers, storm drains, etc.). The Developer will be required to execute a Subdivision Improvement Agreement and provide sureties or guarantees to cover the costs to construct the public improvements. The Developer will be required to provide a faithful performance bond and labor and materials bond for the public improvements. The City will require a quitclaim deed of the underground water rights. There are also other ministerial requirements, including obtaining a certification of tax clearance and arranging for the recordation of the final map.

## **11. Development Impact Fees**

The Developer has raised numerous arguments that it should be entitled to a reduction in or elimination of the amount of parkland, transportation, and affordable housing impact fees to be paid to the City. The City disagrees with these arguments and had calculated that the Project owes impact fees in excess of \$125 million to the City alone. Discussions between the City and the Developer to attempt to reach a resolution regarding this disputed issue are ongoing. Any agreement to modify the amount of

impact fees due would require the City Council's approval at an open and noticed Council meeting.

Required or negotiated impact fees must be paid prior to approval and issuance of the final maps and building permits for the Project.

### **C. Project Extension**

Under SB 35, a project may be extended for "a one-time, one-year" extension of the project's entitlement (Gov. Code § 65913.4((f)(3).) The Developer may apply to extend the expiration of the entitlement for one year, until September 21, 2022.<sup>2</sup> The City's discretion in determining whether to grant the extension is limited to considerations and processes set forth in Government Code Section 65913.4. Although the criteria for granting an extension are not clearly defined in the statute, the legislative history and related legislative provisions suggest that an extension should be granted if the proponent can demonstrate that there has been significant progress toward getting the development construction-ready.

Generally, the filing of a building permit may be considered as evidence of "significant progress" toward construction of a project. In order for a building permit application to be accepted by a city, the project applicant would generally need to submit detailed building plans and pay all applicable building, traffic, and other fees. There are other ways a project applicant could show "significant progress toward getting the development construction ready," such as remediation of environmental contamination, demolition of existing buildings, grading, and excavation work.

For this Project, the existing buildings on the west side of Wolfe Road have been demolished, and the Developer is seeking to demolish one above-ground parking structure on the east side of Wolfe Road. The Developer has also entered into the voluntary clean-up program with SCCDEH for soil remediation and provided relevant documents to SCCDEH for their review and creation of a remediation workplan. Although no substantial grading has commenced (due to remediation work that must be completed), the Developer has submitted permit applications for shoring and mass excavation, site utilities, foundations and podium garage, and a superstructure. Site utility relocation is already underway. Detailed plans have been submitted for the shoring/excavation and structural permits, and after several rounds of comments from

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<sup>2</sup> The Developer, with assistance from state Department of Housing and Community Development ("HCD"), has attempted to avoid its obligation to apply for an extension through a strained and highly implausible interpretation of applicable requirements of SB 35. On September 1, 2021, the City received a "technical assistance" letter from HCD that repeats these deeply flawed arguments, The City intends to follow the law as written.

the City for additional details and clarification, the Developer has re-submitted detailed plans with more complete information.

Overall, evidence that substantial progress has been demonstrated includes the following: (i) the Developer has entered into an agreement with SCCDEH for investigation and remediation of the soil contamination; (ii) the Developer has orally committed to construct a fire station at the Site; (iii) the Developer has submitted plans for shoring/excavation and structural permits, and resubmitted plans where more information was needed; (iv) certain offsite public improvements for the Project are agreed upon; (v) the Developer has submitted a Final Map for approval and various other draft agreements; and (vi) significant negotiations are ongoing with the Developer over the appropriate level of development impact fees to be paid.

Accordingly, the City Attorney has advised that it would be appropriate to grant a one-time, one-year extension upon receipt of a timely application. As noted above, any extension would be issued by the City Manager under the requirements in SB 35.

Despite this determination, the outstanding issues are substantial. Prior to issuing an extension, the City plans to seek written commitments from the developer on a timeline for addressing outstanding issues, consistent with the City's obligation under SB 35 to process subsequent permits associated with construction of the approved Project without unreasonable delay.





**CITY ATTORNEY'S OFFICE**

CITY HALL  
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255  
TELEPHONE: (408) 777-3223 • FAX: (408) 777-3366  
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March 15, 2019

Miles Imwalle  
Coblentz Patch Duffy & Bass LLP  
One Montgomery Street, Suite 3000  
San Francisco, CA 94104-5500  
mimwalle@coblenzlaw.com

Re: Vallco Town Center Project Fee Protest Letter

Dear Mr. Imwalle,

The City has received your December 21, 2018 letter protesting the Below Market Rate Housing Mitigation Fee and other development impact fees for the Vallco Town Center SB 35 Project. In response, the City reiterates that, as required by the City's Project Approval Letter, Vallco Property Owner LLC shall pay the required housing mitigation fees and all other applicable development impact fees pursuant to the City's Municipal Code, Fee Schedule, and Housing Mitigation Manual. As further specified in the Approval Letter, the City will not issue building permits for the Project unless and until these fees have been paid, as applicable to each permit. *See* Approval Letter – Vallco Town Center SB 35 Project Application (Sept. 21, 2018), Attachment C, Standard Project Requirements and Project Implementation Requirements, Requirement 5 and 6.

Sincerely,

Heather M. Minner  
City Attorney

cc: Mayor Scharf and City Councilmembers  
Timm Borden, Interim City Manager  
Roger Lee, Acting Director of Public Works  
Benjamin Fu, Interim Director of Community Development



## CITY MANAGER'S OFFICE

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## CITY COUNCIL STAFF REPORT

September 7, 2021

### **Subject**

Status Report on the Vallco Town Center SB 35 Development Project

### **Recommended Action**

Accept report.

### **Background**

The original Vallco Mall, constructed during the late 1970s, was located on both sides of N. Wolfe Road between Stevens Creek Boulevard and Interstate 280. The mall occupied approximately 50 acres and had over 1 million square feet of retail space with approximately 100 tenant spaces anchored by Macy's, Sears and JCPenny, including two automotive centers. Approximately 13 acres of the original mall property was divested between 2007 and 2012, including the Hyatt House Hotel, the 19800 (Rosebowl) development, and an unused parking lot. The mall was acquired by the current owners in 2014.

Several proposals for redeveloping the Vallco Mall site have been created and considered since 2015. A Vallco Specific Plan was adopted by the City Council in September 2018, which was then subject to three separate voter-initiated referenda petitions, ultimately leading to City Council repeal of the Specific Plan in May 2019.

California State Senate Bill (SB) 35 went into effect on January 1, 2018. The State law provides for a streamlined, ministerial local review process for certain residential and mixed-use developments that meet certain conditions. The intent of the legislation is to increase California's housing supply and to accelerate the development of affordable housing projects. SB 35 eligible projects are not required to go through the California Environmental Quality Act (CEQA) review process typically used for other developments to assess and mitigate impacts to air quality, traffic, noise, land uses, water resources, recreation, greenhouse gas emissions and other elements. Further, SB 35 projects require ministerial review to be completed within no more than 180 days. A decision to approve or deny a project under SB 35 must be based on objective standards only, without the usual public hearings conducted for other developments before Planning Commissions and City Councils.

Even though there was a pending Vallco Specific Plan for the site, the Vallco property owner submitted an SB 35 project proposal on March 27, 2018. The application was among the first and largest SB 35 project applications submitted state-wide and was administratively approved by the City on September 21, 2018.

As approved under SB 35, the Vallco Project (Project) will consist of up to 2,402 residential units (half of them affordable), up to 485,912 square feet of retail uses, and up to 1,981,447 square feet of office. While the Project was approved under the State's SB 35 process intended to increase housing supply and affordable housing, this massive mixed-use project results in far greater housing demand than the number of housing units being provided within the project. Specifically, Vallco's own estimates predict that the Project would bring over 8,700 new jobs to the City of Cupertino, thereby creating a need for nearly 6,000 more housing units, while only providing 2,402 of those new housing units. As a result, the Project results in the need for 3,410 more housing units than it provides, further exacerbating the Bay Area housing crisis, and seemingly in opposition to the goals of SB 35

The purpose of this report is not to revisit the City's decision to approve the project—a process that would be time-consuming, distracting from other issues at hand, and extremely unlikely to have any tangible impacts on the approved project—but rather, to provide the City Council and community with an update on the progress the project has made to date, as well as ongoing challenges arising from application of SB 35 to a project of this scale.

Additional information on prior Vallco development proposals, SB 35, and the approved Vallco SB 35 Development Project can be found on the City's website at [Cupertino.org/vallco](http://Cupertino.org/vallco).

## **Discussion**

Attachment A provides extensive documentation and information regarding the current status of the Vallco SB 35 Development Project. Key highlights are summarized below.

### *Extensive Progress to Date*

- **Soil Investigation/Remediation Underway** – Due to additional review and requirements by the City, contaminated soils and soil vapor have been identified on the project site. The Project developer has entered into a voluntary clean-up agreement with the Santa Clara County Department of Environmental Health (SCCDEH). SCCDEH now has regulatory jurisdiction over continuing site investigation and remediation, and is prohibiting soil disturbance until it can validate that it is safe to do so. The Vallco Project anticipates that SCCDEH's oversight will continue until Spring 2022, although recent testing has revealed even greater contamination issues than previously identified, including some measures beyond permissible residential thresholds.

- **Fire Station Location Identified** - The City, in consultation with the Santa Clara County Fire Department, has reached conceptual agreement with the Vallco Project on the location, size and egress for the new fire station required to maintain response times and health and safety with the new Vallco development. The agreement between the County and the Vallco project regarding the fire station is being prepared and will be presented to the County Board of Supervisors for approval.
- **Building Permit Application Review**– As is typical with large development projects, phased building permits are being submitted for regulatory review as the detailed designs progress. These permits are reviewed by both partner agencies (e.g., Fire Department, utilities), consulting experts (e.g., traffic engineers), and City staff in Planning, Building, Engineering, and Housing, with legal and management support and oversight. No discretionary review is allowed by any appointed or elected body for these permits. To date, two building permits have been issued. One building permit is for site utility work which is underway primarily within the public right-of-way, and the other is an excavation/shoring permit. The commencement of the excavation/shoring scope is on hold pending DEH approval. Three other building permits are also in the iterative review and comment process, but at least two of those will also likely be held pending DEH approval. Status on building permits has been available online since December 2018 at <https://www.cupertino.org/our-city/departments/community-development/building/faqs-permit-activity-vallco-town-center>.
- **CalWater** – City communications with the water utility service provider and the Vallco Project has eliminated a hold on required progress for the documentation of water supply and a service delivery system for the Project.
- **Agreements** – As noted in Attachment A, several agreements will be required for continued progress on the Vallco Project, including a Subdivision Improvement Agreement for improvements to City facilities within and adjacent to the project and a Below Market Rate (BMR) Housing Agreement to ensure the ongoing preservation of the required affordable units. These draft agreements are still under review.

#### *Challenging Issues Remain*

- **Green Roof** – Relatively little is known about the 30-acre “green roof” proposed on top of most of the buildings, spanning Wolfe Road, and connecting to the ground. This public and private accessible space as described in the approved project will directly impact structural considerations, emergency services, water supply, and stormwater management, and may also impact the amount of impact fees due. The City has requested an all-hands meeting with the Vallco Project to better understand the plans and design for this facility to facilitate current and subsequent permit review and processing.
- **Project Modifications** – As part of the City’s review of all permit submissions, staff is working to ensure conformance with the previously approved SB 35

Project. Potential modifications in the submitted plans have already been identified. The City will need to review any modifications to the Project for conformance with the approved permit, applicable objective standards, and SB 35.

- **Impact Fees** – The City has calculated using the City’s standard impact fees that the Vallco Project would be required to pay over \$125 million in Traffic, Parkland and Housing Impact Fees. However, the applicant for the Vallco Project believes most of these fees should be waived or significantly reduced. Payment of the fees in full or City Council approval of any reduction or waiver of these fees will be required before certain permitting and other approvals are possible, prior to the commencement of construction.

#### *SB 35 Development Project Extension*

- SB 35 stipulates that the approval of a project lasts for three years, by which time “vertical construction” must commence.
- SB 35 also provides that a one-year extension of the approval be granted if there is evidence of substantial progress on the project. This approval must be processed at the staff level, without a public hearing.
- The three-year project approval expires on September 21, 2021, and a one-year extension of the approval would expire September 21, 2022. However, the Vallco Project applicant and the California Housing and Community Development Department have argued that the three-year deadline has been “tolled,” or extended, due to prior litigation. This argument is based on a misreading of the statutory provisions governing the term of SB 35 project approvals and is incorrect.
- Regardless, the Vallco Project’s work to date (e.g., soil remediation, demolition, preliminary utility work) and submission of permits and draft agreements will likely constitute substantial progress on the project as required for approval of a one-year extension.

#### **Recommendation**

Accept the report.

#### **Sustainability Impact**

The acceptance of this report will have no sustainability impact. The City is actively seeking measures such as transit improvements that will improve the sustainability of the Vallco Project, but as previously indicated, the City was prohibited from conducting a full environmental review of that project under SB 35.

#### **Fiscal Impact**

Direct City costs for plan review and inspections will be covered by fees collected from the Project. City required impact fees will be collected related to parkland, traffic, and housing, although the developer contends that it should not pay those impact fees.

General municipal revenues and expenditures likely to result from the Project are unknown given the limited scope of the City's review of the Project under SB 35.

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Prepared by: Greg Larson, Interim City Manager

Approved for Submission by: Greg Larson, Interim City Manager

Attachments:

A - Detailed Status Report on the Vallco SB 35 Development Project

**From:** [Rhoda Fry](#)  
**To:** [City Clerk](#); [City Council](#)  
**Subject:** Agenda Item #10 - waiving BMR fees  
**Date:** Friday, July 12, 2024 9:52:08 AM

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**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear City Council,

Can you please ask staff to reveal how much money the City will be giving up in BMR fees for the Vallco project?

We know that the Vallco project will create a demand for more housing – this was even in a staff report – so why would we give up BMR fees?

If Vallco is successful in waiving its BMR fees, then what does that mean for other projects in the City? I think it is setting a bad precedent.

Cupertino needs assurance that the BMR housing will be built timely – we have already experienced a bait and switch at Main St. with Senior Housing - please be smart and get the BMR housing built first.

If you really feel the need kowtow to Vallco owners, then please hold the BMR funds in escrow until such time that the BMR housing is built.

Thanks,

Rhoda



Virus-free. [www.avg.com](http://www.avg.com)