CC 07-16-2024

#1

FY 2022-23 Annual Comprehensive Financial Report (ACFR)

Supplemental Report

CITY OF CUPERTINO

ADMINISTRATIVE SERVICES DEPARTMENT

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
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CITY COUNCIL STAFF REPORT
SUPPLEMENTAL 1
Meeting: June 16, 2024

Agenda Item #1

Subject
Receive the FY 2022-23 Annual Comprehensive Financial Report (ACFR)

Recommended Action
Receive the FY 2022-23 Annual Comprehensive Financial Report (ACFR)

Background:
Staff's responses to questions received from councilmembers are shown in italics.

Q1: Please explain the reason for the late changes. (**Councilmember Chao**)

Staff Response: The reasons for the late changes are detailed in the staff report on page 3.

Q2: Please explain why the ACFR was posted last week to the federal website on 7/9/2024 prior to council approval. (**Councilmember Chao**)

Staff Response: According to Urban Futures Inc (UFI), the City's Dissemination Agent, posting draft ACFRs to the federal website is acceptable. Council approval of the ACFR is not required.

Q3: 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? (**Councilmember Chao**)

Staff Response: In accordance with the Continuing Disclosure Certificate for the 2020A Certificates of Participation, the City, through UFI, posted a Failure to File Notice on March 30, 2024, when the FY2023 ACFR was not yet available. At that time, it was anticipated by the City that the ACFR would be completed by April 30, 2024. Although the ACFR was completed after that date, there is no obligation to file additional notices updating this date.

Q4: 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. (**Councilmember Chao**)

Staff Response: This question is not germane to the item under discussion. Additionally, according to the City's consultant, UFI, this year's late submittal did not, and will not, impact the City's reputation and credit-worthiness.

Q5: 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. (**Councilmember Chao**)

Staff Response: This statement is not a question, is false, and is outside of the scope of the item agendized for discussion.

Attachments Provided with Original Staff Report:

A – FY 22-23 ACFR

CC 07-16-2024

#7

Municipal Code and Zoning Amendments Housing Element

Supplemental Report

CITY OF CUPERTINO

CITY MANAGER'S OFFICE

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CITY COUNCIL STAFF REPORT
SUPPLEMENTAL 1
Meeting: July 16, 2024

Agenda Item #7

Subject
Second reading of Municipal Code Amendments and Zoning Map Amendments to ensure conformance with the Housing Element and related CEQA exemption. (Application No.: MCA-2023-001, Z-2024-001; Applicant: City of Cupertino; Location: Citywide)

Recommended Action
1. Conduct the second reading and enact Ordinance No. 24-2261 "An Ordinance of the City Council of the City of Cupertino Amending Various Chapters in Title 14, Title 17 And Title 19, Including but Not limited to the Addition of Three New Chapters in Title 19, to Implement Policies in the General Plan and for Clarity" (Attachment A); and
2. Conduct the second reading and enact Ordinance No. 24-2262 "An Ordinance of the City Council of the City of Cupertino Rezoning Certain Sites in the City for Conformance with General Plan and Housing Element" (Attachment B) to reflect changes to Priority Housing Sites and other minor changes for internal consistency.

Background:

Staff received the following questions regarding Item #7 via email on July 15. Staff's responses to questions received from Councilmembers are shown in italics.

Q1: Councilmember request **(Councilmember Moore)**: 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.

Staff Response: This statement is false and is not a question. The cited information was discussed

extensively prior to introduction of the ordinance.

Q2: Councilmember question (**Councilmember Moore**)

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.

Staff response:

- Removing the five-story limit in the R-4 zoning district:
  The five-story limit in the R-4 zoning district regulations has been eliminated in the new Chapter in the Municipal Code (Chapter 19.38), as indicated in the following excerpt:

Table 19.38.070: Building Development Regulations	
A. Maximum Lot Coverage	55% of net lot area, unless inconsistent with Section 65913.11.
B. Maximum Height	~~Limited to five stories (n~~Not to exceed 70 feet)

  This would result in new structures being limited to a 70-foot height restriction without limitation on the number of stories that could be constructed. For instance, if a six-story building were designed to fit within the 70-foot height limit, that would be allowable.

- Eliminating the proposed objective standard for comparable size in the definition of duplex:

  Staff Response: The definition of duplex in subsection 19.08.030 of the Municipal Code has been amended from the staff's recommendation as follows:

  19.08.030: Definitions

  "Duplex" means a residential development, on a lot under one ownership, containing not more than two kitchens, designed and used as two attached or detached primary dwelling units, of comparable size ~~(i.e., no more than 200 square-foot difference between primary dwelling units),~~ independent of each other, and having no internal connection.

  This change does not quantify any required difference in size between the two units in a proposed duplex.

- Amending development standards related to duplexes in the R-1 zoning district proposed under Housing Element Policy HE-1.3.6 as follows:
  - Amend allowable Floor Area Ratio to 65%;
  - Adopt a lot coverage of 50%;
  - Conform parking standards to R-1 zone standards (4 total – 2 open/2 enclosed); and
  - Allow interior side yard setbacks to align with minimum R-1 standards.
  - Amending the lot coverage to 50% in the R-3 zoning district for developments with up to 4 units.

Stafff response: The definition of duplex has been amended from the staff's recommendation as follows:

19.28.040: Permits required for development

Table 19.28.040 Permits Required		
Planning permit required prior to building permit application	**Approval authority**	**Type of Project**
K. Conditional Use Permit pursuant to Chapter 19.12, Administration	Admin	~~Rental d~~Duplex developments in a single structure on corner lots or on properties where the adjacent property (1) fronts an arterial or major collector and (2) is zoned and currently used for commercial or mixed-use development. 1. All units shall comply with Section 19.32.060, Building Development Regulations for Residential Duplex (R-2), ~~and~~are subject to a maximum lot coverage of 50%, a floor area ratio of ~~55~~65%, and underlying R-1 zoning standards for parking and interior side yard setback standards for R1-5 zones. 2. Combined with two attached and/or detached ADUs, a maximum of four units are allowed. 3. Units located on property with an "i" or "e" suffix after the R1 designation are also subject to the respective overlay standards. 4. Units located on parcels zoned R1-a shall meet the required front setbacks for R1-a zoning district. Units on parcels where the zoning map identifies a different front setback shall meet the required front setback.

Eligible R-1 zoned lots developing a duplex under Policy (Strategy) HE-1.3.6 would be allowed through the amendment to have a 65% FAR. Currently, the R-2 zoning district, which is characterized by duplex development, does not have an FAR limitation. The R-1 zoning district, characterized by single-family detached residences, has an FAR limit of 45%.

Maximum lot coverage in the R-1 zoning districts is 45%. Therefore, the 50% lot coverage proposed through the amendment would allow R-1 zoned lots eligible to develop duplexes under Strategy HE-1.3.6 to exceed the R-1 coverage standard by five percent.

The current parking standard for duplexes in the R-2 zoning district is 1.5 enclosed and 1.5 open spaces per dwelling unit, for a total of six parking spaces per duplex. The current parking standard for single-family residences in the R-1 zoning district is 2 enclosed and 2 open spaces, for a total of four parking spaces per home. Through the amendment, R-1 lots eligible to develop duplexes under Strategy HE-1.3.6 would need to provide 2 enclosed and 2 open parking spaces for the duplex, for a total of four parking spaces. In other words, duplexes in R-1 zones constructed per Strategy HE-1.3.6 would have the same parking requirements as a single-family

detached residence.

The interior side yard setback in the R1-5 zoning district (this district typically includes the City's smallest single-family lots) is five feet for both sides, for a total of 10 feet on the first floor and a total of 25 feet (no side setback less than 10 feet) on the second floor. R-1 zoned lots eligible to develop duplexes under Strategy HE-1.3.6 would follow these side yard setback requirements.

Under the amendment, lot coverage for projects up to four units in the R-3 zoning district would have a maximum lot coverage of 50%. For projects that are five units or more the maximum coverage would be 55%. Currently, the R-3 zoning district has a maximum coverage of 40%, regardless of the number of units.

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Attachments Provided with Original Staff Report:

A. *Ordinance No. 24-2261*
B. *Ordinance No. 24-2262*

CC 07-16-2024

#10

Vallco / Rise SB 35 Project BMR and Planning Fee Waivers

Supplemental Report

CITY OF CUPERTINO

CITY ATTORNEY'S OFFICE

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CITY COUNCIL STAFF REPORT
SUPPLEMENTAL 1
Meeting: July 16, 2023

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

Recommended Action
Adopt Resolution No. 24-077 waiving BMR and Planning Fees imposed of the Vallco/Rise SB 35 project.

Supplemental Report
A corrected draft resolution is provided with this Supplement Report (Attachment C).

Staff's responses to questions received from councilmembers are shown in italics.

Q1: A common question from residents is "What's the total amount of fee waived?" I found two figures mentioned in the staff report: $70M in one place and then $42.8M in another place: The staff report first states "requesting a waiver of the BMR and Planning Fees imposed on the Project. ... The fees waived would be substantial (totaling approximately $77 million, as calculated under the FY 2024-25 fee schedule)." Then under Fiscal Impact, the report states "The total revenue from impact fees, benefit payments, and reimbursement of City expenses under the Settlement Agreement would be $42.8 million based on the current project, subject to changes to future fee schedules and adjustments for inflation. The City would forego the possibility of obtaining revenue from disputed BMR and Planning Fees." (Councilmember Chao)

Q1A: What exactly are the amounts waived for the BMR fee and the planning fee? (Councilmember Chao)

A: The BMR fee would be approximately $67 million based on the FY 2024-25 fee schedule. The "Planning Fee" would be approximately $10 million based on the FY 2024-25 fee schedule. These

amounts do not necessarily reflect amounts that the City could lawfully collect from the developer.

Q1B: How are the amounts calculated? (Councilmember Chao)

A: The fees are calculated based on the FY 2024-25 fee schedule.

Q2: Resident RF asks "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?" (Councilmember Chao)

A: This statement is incorrect. Please refer to the staff report and draft resolution. Based on the City's 2015 Non-Residential Jobs-Housing Nexus Analysis, the project fully mitigates its induced demand for affordable housing.

Q2A: What's the percentage of BMR units, compared with total units in the Second Revised project? What's the amount of office space and retail space in the Second Revised Project? (Councilmember Chao)

A: This question is not material to the agenda item.

Q3: Resident RF asks "If Vallco is successful in waiving its BMR fees, then what does that mean for other projects in the City?" Will this set a precedent so other projects would also challenge BMR fees? (Councilmember Chao)

A: Like jurisdictions throughout the county, the City is mindful of the potential impact of Sheetz v. County of El Dorado *(2024) 601 U.S. 267 on the City's ability to assess impact fees on development projects, as well as of the perception created by granting a fee waiver for any specific project. Formally, speaking, however, the City Council's decision does not have precedential value, and as a practical matter, the unique characteristics of this project—a large, mixed-use project with a high percentage of affordable units—renders this project distinguishable from future applications that the City could reasonably anticipate receiving.*

Q4: Resident RF wrote "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." (Councilmember Chao)

Q4A: Do we have any assurance in the approved Second Revised project that the BMR portion will be built first? (Councilmember Chao)

A: The conditions of approval for the modified project require concurrent construction of BMR housing with other phases of the project. Those conditions of approval are not affected by the settlement agreement or requested fee waiver and are not agendized for discussion.

Q4B: Can we revise the ordinance so that the BMR fee is waived only after the occupancy permit is pulled for the BMR portion of the project? (Councilmember Chao)

A: The BMR fee is set by resolution. The BMR fee waiver is being requested as a condition of a settlement agreement that will result in significant payments to the City as the project is built. In the absence of a settlement agreement—and even assuming the BMR fee could ever be collected—the time frame for payment of any BMR fees to the City would be highly uncertain and likely deferred for many years, given that the fee payments would largely be tied to office construction.

Q5: Resident RF wrote "please hold the BMR funds in escrow until such time that the BMR housing is built." Why do we need to waive the BMR fees now? (Councilmember Chao)

A: Please see the response to Question 4B, above. There are no funds to be held in escrow.

Q5A: What if the BMR portion of the project is not built due to the lack of funding or whatever reason, would the waiver of BMR/planning fees still apply? (Councilmember Chao)

A: Please see the response to Question 4A, above. Also refer to Exhibit D, Part II of the Settlement Agreement and Release, which addresses project modifications.

Q5B: What if Vallco submits a third amendment to change the project again? Would the waiver of BMR/planning fees still apply? (Councilmember Chao)

A: The settlement agreement would remain effective as long as the developer's current SB 35 entitlement remains in place, up to a maximum term of 20 years.

Q5C: What if the property is sold to another property owner who modified the project again? Would the waiver of BMR/planning fees still apply? (Councilmember Chao)

A: Yes. The agreement is binding on the developer's successors in interest.

Q6: The staff report states "VPO will pay a TIF calculated based on the per trip fee in the City's fee schedule in place at the time the fee is due (totaling $10.3 million for the Project under the FY 2024-25 fee schedule)." But there is no amount listed under the Fiscal Impact section to state the fiscal impact of the settlement agreement. (Councilmember Chao)

A: The value of the settlement agreement to the City is stated in the fiscal impact section.

Q6A: Will there be any upcoming agenda item to execute this portion of the settlement agreement? (Councilmember Chao)

A: No. The City Council authorized the City Attorney to negotiate and execute the agreement at its June 19, 2024 closed session. The settlement agreement was executed by the parties on July 10, 2024.

Q6B: What's the fiscal impact of the TIF portion of the agreement? Meaning what is the normal amount of the TIF fee? How is it calculated, if there is no settlement agreement? (Councilmember Chao)

A: The TIF fee was calculated based on the City's current fee schedule and recommendations developed by the Institute of Transportations Engineers (ITE) in consultation with the Department of Public Works, based on the number of trips expected to be generated by the project.

Q6C: When is the fee of $10.3M due? (Councilmember Chao)

A: The TIF would be paid at the time of issuance of a building permit or certificate of occupancy for each phase of the project, after credits for trips generated by the former mall are exhausted.

Q6D: Would this set a precedence for other projects to receive waiver? (Councilmember Chao)

A: See the response to Question 3, above.

Q7: The staff report states "VPO will dedicate public parkland and provide private open space with amenities consistent with the requirements of Municipal Code Chapter 13.08, and will in exchange receive credit against the full amount of the Parkland Dedication Fee due." (Councilmember Chao)

Q7A: Will there be any upcoming agenda item to execute this portion of the settlement agreement? (Councilmember Chao)

A: No. As the approval authority for the SB 35 project, the Director of Community Development approves dedication of parkland and credit for private open space pursuant to Municipal Code sections 13.08.040 and 13.08.080.

Q7B: What's the fiscal impact of the parkland dedication fee portion of the settlement agreement? What is that calculated, if there is no settlement agreement? (Councilmember Chao)

A: In the absence of any credits, the Parkland Dedication Fee for the project would be $54,000 per market-rate dwelling unit. However, that amount would be subject to mandatory reductions for qualifying private open space and reasonableness and constitutional constraints on the Director of Community Development's decision to accept, or not accept, parkland for dedication. The settlement agreement provides for a global resolution of all fee disputes, which avoids, among

other things, litigating the constraints on the City's ability to charge the developer all or part of the Parkland Dedication Fee.

Q7C: How much public parkland and private open space is there to receive "full credit against the full amount of the Parkland Dedication Fee due."

A: Approximately 9.61 acres.

Q7D: What is typically allowed for other projects? Would this set a precedence for other projects to receive waiver? (Councilmember Chao)

A: Parkland dedication has been allowed for other projects. As noted above, the decision with respect to this project would not have a binding, precedential effect on future City decisions, although staff is certainly mindful of the perception created by individual decisions.

Q8: Staff report states "In *Sheetz*, Supreme Court held that a generally applicable, legislatively imposed fee charged as a condition of granting a land use permit must have an "essential nexus" to the government's land use interest and "rough proportionality" to the development's impact on that interest to avoid a finding that the fee is a taking of property in violation of the 5th and 14th Amendments of the U.S. Constitution." (Councilmember Chao)

Q8A: Has the city done a nexus study before determining the current BMR impact fee? TIF? Parkland dedication fee? Planning fee? (Councilmember Chao)

A: Yes. Please refer to the response to Question 2, above, as well as the draft resolution submitted with the staff report.

Q8B: Does the city recover the full impact as analyzed by the nexus study? (Councilmember Chao)

A: Please refer to the response to Question 2, above, as well as the draft resolution submitted with the staff report.

Q9: How much has the city spent on consultant fees due to the challenge of impact fees? Is the city compensated for the consultant fees and city staff time spent due to this challenge? (Councilmember Chao)

A: This question is not material to the agenda item.

Q9A: Could the city adopt an ordinance to recover consultant fees and city staff time for any future challenge of city fees? Since this is a fee that the city would not have to bear unless an applicant challenge the fees. (Councilmember Chao)

A: This question is not material to the agenda item.

Q10: For the planning fee waived, would the project still apply for permits and any other planning services? If so, the city will then subsidize all fees for the project, regardless of the extent of the effort needed? (Councilmember Chao)

A: The settlement agreement provides that the developer will pay all fees identified in the City's current fee schedule other than those specifically addressed in the agreement.

Q10A: Would there be an item in the budget report for such subsidized/waived fees in the annual financial report or any relevant report? (Councilmember Chao)

A: Please refer to Exhibit F of the Settlement Agreement and Release, which provides a template of the annual report required under the agreement.

Q11: Resident RF asked "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." (Councilmember Chao)

A: See the response to Question 1B, above. An itemization of all fees to be paid by the project is outside the scope of this agenda item and is in any event not possible to calculate at this time.

Q12: Resident RF asked "Please explain why Planning Fees are being waived. What are the Planning Fee costs of this project?" (Councilmember Chao)

A: Please refer to the staff report, the attached resolution, and the response to Question 1A, above.

Q12A: Does the resolution include waiving the planning fees, such as "plan review and inspections"? Does that mean the city won't recover any cost for any plan review and inspect for any permit for any phase of the Rise project?

A: No. Please refer to the response to Question 10, above.

Q13: Resident RF asked: "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?" (Councilmember Chao)

A: It is unclear what "reports" this question is referencing. The settlement agreement was executed on July 10. This agenda item is being heard six days later, on July 16.

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

C – Draft Resolution

RESOLUTION NO. 24-____

A RESOLUTION OF THE CUPERTINO CITY COUNCIL WAIVING THE IMPOSITION OF CERTAIN IMPACT FEES FOR THE VALLCO/RISE SB 35 PROJECT

WHEREAS, on September 21, 2018, the City of Cupertino ("City") City Manager approved an application under Government Code section 65913.4 ("SB 35") submitted by Vallco Property Owner LLC ("VPO") for development of a mixed-use project on a 50.82-acre property ("Property") located at 10101-10330 North Wolfe Road, hereinafter referred to as "the Approved Project"; and

WHEREAS, on June 3, 2022 and subsequently on February 16, 2024, the City approved two modifications to the Project under SB 35 ("Modified Project"). Collectively, the "Approved Project" and "Modified Project" are referred to herein as "the Project"; and

WHEREAS, the Project approval `as modified authorizes the construction of 2,6~~9~~99 housing units, 890 of which would be affordable to lower income households; 1,954,613 square feet of office space; and 226,387 square feet of retail space; and

WHEREAS, prior to approval of the Project, as defined below, the Property was occupied by a shopping center comprised of 1,450,927 gross square feet of retail area; and

WHEREAS, on August 20, 2019, the Cupertino City Council adopted Resolution Nos. 19-108, 19-109, and 19-110, and Ordinance Nos. 19-2187 and 19-2188 amending the City of Cupertino General Plan to alter development standards for the Property ("General Plan Amendment"); and

WHEREAS, the Project is subject to certain "fees," as defined in Government Code section 66000(b), charged by the City in connection with approval of the Project for the purpose of defraying all or a portion of the cost of public facilities related to the Project ("Impact Fees"), and is further subject to parkland dedication requirements and/or fees under the Quimby Act, Government Code section 66477; and

WHEREAS, VPO disputes the validity of the Impact Fees and parkland dedication fees imposed on the Project in whole or in part; and

WHEREAS, on August 15, 2022, the City and VPO (collectively, the "Parties") entered into a Tolling Agreement that tolled the statute of limitations for certain challenges to Impact Fees and parkland dedication fees imposed on the Project, which, as amended, remains in effect and tolls the statute of limitations on those claims through July 31, 2024; and

WHEREAS, on July 10, 2024, the Parties entered into a Settlement Agreement and Release ("Settlement Agreement") to resolve their dispute regarding Impact Fees and parkland dedication fees imposed on the Project; and

WHEREAS, as a condition of the Settlement Agreement, the City agreed to present for City Council consideration a request to waive Below Market Rate Housing Mitigation Fees ("BMR Fees") and Zoning/Planning Municipal Code Fees ("Planning Fees") that may otherwise apply to the Project; and

WHEREAS, on December 18, 2023, VPO renewed its prior request for a waiver of the BMR Fees under Section 2.3.3(D) of the City's BMR Housing Mitigation Program Procedural Manual, Resolution No. 20-055 (Exhibit A); and

WHEREAS, the City Attorney has reviewed the request to waive BMR Fees, and has determined based on Exhibit A and other evidence considered, including but not limited to the City's 2015 Non-Residential Jobs-Housing Nexus Analysis, that the Project fully mitigates the impact of market-rate residential and nonresidential components of the Project on the demand for affordable housing; and

WHEREAS, under *Sheetz v. County of El Dorado* (2024) 601 U.S. 267, 275 ("*Sheetz*"), a generally applicable, legislatively imposed fee charged as a condition of granting a land use permit must have an "essential nexus" to the government's land-use interest and "rough proportionality" to the development's impact on that interest to avoid a finding that the fee is a taking of property in violation of the 5th and 14th Amendments of the U.S. Constitution. In the absence of an impact of the Project on the demand for affordable housing in Cupertino, the imposition of the BMR Fees on the Project would in the opinion of the City Attorney result in an unconstitutional taking of Property, and therefore a waiver of the BMR Fee is appropriate; and

WHEREAS, the City Attorney has reviewed the Planning Fees that would be imposed on the Project under the FY 2024-25 Fee Schedule and has determined

that the imposition of the full amount of the Planning Fees would be disproportionate to the impact of the Project on long-range planning efforts by the City (See *Sheetz*, *supra*, 601 U.S. at p. 275; see also Gov. Code, § 65104 [". . . [A]ny fees to support the work of the planning agency . . . shall not exceed the reasonable cost of providing the service for which the fee is charged."]); and

WHEREAS, in lieu of the paying Planning Fees, VPO, through the Settlement Agreement, has agreed to provide up to $500,000 to fund future long range planning studies in the vicinity of the Project, which may include studies covering the Vallco and/or Heart of the City Specific Plan areas; and

WHEREAS, based on the findings and Recitals set forth above, the City Attorney recommends that the City Council waive the imposition of BMR and Planning Fees on the Project.

NOW, THEREFORE, BE IT RESOLVED, based on the Recitals set forth above, that:

1. The City Council hereby waives imposition of the BMR Fees and Planning Fees imposed on the Project.

2. Notwithstanding Resolution No. 20-055 or any other prior Resolution of the City Council, the fee waivers granted by this Resolution shall remain in effect during the Term of the Settlement Agreement; provided, however, the fee waiver shall expire upon the termination of the Settlement Agreement or, alternatively, upon a finding by the City Attorney that a BMR Fee is due and payable under Section 6(c) and Exhibit D of the Settlement Agreement, in which case applicable BMR Fees shall be determined according to the provisions of Section 6(c) and Exhibit D.

3. To the extent that Resolution No. 20-055 or any other prior Resolution of the City Council is inconsistent with this Resolution, this Resolution shall control, and nothing in any prior Resolution shall create a legal obligation or give rise to a duty of the City to act in a manner inconsistent with this Resolution.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this 16th day of July, 2024, by the following vote:

Members of the City Council

AYES:
NOES:
ABSENT:
ABSTAIN:

SIGNED: _____ Sheila Mohan, Mayor City of Cupertino	_____ Date
ATTEST: _____ Kirsten Squarcia, City Clerk	_____ Date

EXHIBIT A

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December 18, 2023

VIA ELECTRONIC MAIL

Chris Jensen
City Attorney
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10300 Torre Avenue
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Re: The Rise – Request for Waiver of BMR Fee [Updated, December 2023]

Dear Chris:

This updated letter is submitted on behalf of Vallco Property Owner, LLC (the "Project Applicant") regarding its project, The Rise (the "Project"), to request a waiver of the Affordable Housing Fee the City is proposing to charge on the office portion of the Project. This request is made in connection with the modification application recently submitted to the City for the Project. This waiver request is submitted pursuant to Section 2.3.3(D) of the BMR Housing Mitigation Program Procedural Manual. Specifically, the Project Applicant requests that the City decline to impose an Affordable Housing Mitigation Fee because the Project does not have an affordable housing impact. The Project, which includes 890 affordable units, more than offsets any affordable housing demand its other land use components generate. Imposing impact fees when the Project does not create an impact is unconstitutional.

The Project contains three primary components—residential, retail, and office—and replaces an existing retail mall. The Project's 890 units of affordable housing yield more than any other Project in the history of the City. The retail and office components of the project induce demand for affordable housing; however, the removal of the existing retail mall and the Project's provision of 890 affordable units offset that induced demand. Because the Project more than offsets any demand induced by its retail and office components, using the analysis from the City's own nexus studies,[1] there is no affordable housing impact—indeed there is a benefit—and therefore the City cannot constitutionally impose an impact fee. We also note that in the SB 35 context applicable to the Project, the office portion is inextricably tied to the

[1] Residential Below Market Rate Housing Nexus Analysis, dated April 2015. Accessed from: https://www.cupertino.org/home/showdocument?id=16828.

Non-Residential Jobs-Housing Nexus Analysis, dated April 2015. Accessed from: https://www.cupertino.org/home/showdocument?id=16830.

affordable units being provided since, by law, the office component cannot be built unless the residential component, including the BMR units, is also built. For that reason, the City must look at the impact based on the entire Project, not each subcomponent individually.

a. Calculation of Affordable Housing Impact

To understand why the Project does not create an affordable housing impact, we propose the following analytical framework:

- Step 1: Calculate the total induced demand for BMRs caused by the non-residential portions.
- Step 2: Calculate the existing induced demand for BMRs caused by the retail mall being removed.
- Step 3: Calculate the net new demand of non-residential (i.e., subtract existing demand from the new demand)
- Step 4: Calculate the number of BMR units in excess of what is required to mitigate the induced demand from market rate units.
- Step 5: Compare the "excess" BMR units to the non-residential net new induced demand to calculate the total net new demand of the entire Project

Credit for the existing mall should be based on the comparative demand for affordable housing, *i.e*., the impact. For that reason, we look to the increased demand for the various uses contained in the City's nexus studies, rather than the fees for each. Fee amounts do not measure impacts, because the City considers other unrelated feasibility and policy factors when setting fees.

Non-Residential Jobs-Housing Nexus Analysis Table II-4: *Housing Demand Nexus Factors per Sq. Ft. of Building Area* (copied below) identifies the number of affordable housing units induced per square foot of building area per type of use, which identifies the impact of the Project components. As this Table demonstrates, retail has the highest induced demand for affordable housing per square foot and this demand is focused most on the very low-income level. Office has a lower induced demand, which is most focused on the low- and moderate-

income categories. While we note the disparity in income categories, to keep this analysis simpler, we focus only on the total amount of increased BMR units.[2]

Table II-4: Housing Demand Nexus Factors per Sq. Ft. of Building Area

	Number of Housing Units per Square Foot of Building Area[(1)]		
	OFFICE	**HOTEL**	**RETAIL / RESTAURANT**
Up to 50% Median Income	0.00014967	0.00014385	0.00067586
50% to 80% Median Income	0.00025726	0.00005615	0.00023980
80% to 120% Median Income	0.00031040	0.00002050	0.00006795
Total	**0.00071733**	**0.00022049**	**0.00098361**

We calculate Steps 1 to 3 as follows:

- **Step 1: Calculate total demand from non-residential**

Office:	1,954,613 sf x 0.00071733 du/sf	1,402.10 BMR units
Retail:	226,386 sf x 0.00098361 du/sf	222.67 BMR units
Total:		1,624.77 BMR units

- **Step 2: Calculate existing demand from the Mall**

Existing Mall: 1,207,774 sf x 0.00098361 du/sf 1,187.98 BMR units

[2] Not only is this simpler, it is also a conservative approach because it underestimates the benefit of the Project. A full accounting would acknowledge the affordable housing benefit of shifting the use from retail to office since office has less than one-quarter of the induced demand for very low income units compared to retail. Instead, office's induced demand is concentrated on the low and moderate income end of the spectrum. This shift to higher income levels is itself a benefit.

- **Step 3: Calculate net demand**

	1,624.77 BMR units
	-1,187.98 BMR units
Total new demand	*437 BMR units*

- **Step 4: Calculate the number of BMR units in excess of what is required to mitigate the market rate induced demand**

  The City requires that market rate projects set aside 15% of the on-site units as affordable to offset the induced demand of the market rate units. Here, there are 1,779 market rate units, meaning that 267 of the BMR units (rounded up) are offsetting the induced demand of the 1,779 market rate units. Therefore, the additional 623 BMR units are "excess" and should be credited when calculating the net new demand of the entire Project.

- **Step 5: Calculate the total net new demand of the entire project**

  Comparing the total BMR unit demand from non-residential (437 BMR units) to the number of BMR units that are in excess to the market rate demand (623 BMR units) demonstrates that there is a net Project benefit of 186 BMR units. That is, all induced demand for affordable housing from all components of the Project is being met on-site and there are 186 BMR units being provided beyond that induced demand, which is a significant benefit to the City.

b. Fees Cannot Be Imposed When The Project Has No Impact.

The City cannot impose an affordable housing fee here because the Project produces a net benefit rather than an impact on the demand for affordable housing. The City's impact fees must have a "reasonable relationship" to the "deleterious public impact" of the development. *San Remo Hotel L.P. v. City and Cty. of San Francisco* (2002) 27 Cal.4th 643, 667 (citing Gov. Code § 66001). There is no such relationship here, where the predicate of imposition of fees—an impact—does not exist. Any fees imposed in the absence of such a relationship are unlawful, a violation of the Project Applicant's due process rights, and would be invalidated. *See Home Builders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554; *Boatworks, LLC v. City of Alameda* (2019) 35 Cal.App.5th 290, 300.

Indeed, a fair reading of the BMR Housing Mitigation Program Procedural Manual would not result in imposition of fees here. Only by making certain assumptions against the Project (that its components should be treated independently, and that the existing retail impact should be measured based on the time when the mall has been under redevelopment) can the City

arrive at the conclusion that an affordable housing fee can be imposed. By making such assumptions, the City would engage in precisely the sort of individualized determinations that require a "rough proportionality" before a fee could be imposed. *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013). Again, because there is no impact, the City would be engaging in an unconstitutional taking were it to impose fees. Instead, as the City's Municipal Code recognizes, "[t]o the extent permitted by law, the City's objective is to obtain actual affordable housing units within each development rather than off-site units or mitigation fee payments." Cupertino Mun. Code 19.172.020(B). Units, rather than in-lieu fees, are exactly what the City needs, and are exactly what this Project provides (in excess of the induced demand).

Further, Section 2.3.3.D of the City's BMR Housing Mitigation Program Procedural Manual recognizes that there may be instances in which application of the BMR requirements could have an unconstitutional result, in which case, waiver or modification of the BMR requirements is necessary. Although the City cannot charge a fee in excess of constitutional limits, so the specific procedure for requesting waivers is not controlling, we nonetheless submit this request for a waiver pursuant to that section.

Based on the foregoing, the Project Applicant requests that the City decline to impose an unconstitutional affordable housing fee.

Very truly yours,

Miles Imwalle

cc: Pamela Wu, City Manager
Reed Moulds, Managing Director, Sand Hill Property Company