

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.

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 development¹. 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

¹ 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, 2022.² 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

² 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.