



CITY OF CUPERTINO

AGENDA

CITY COUNCIL

This will be a teleconference meeting without a physical location.

Tuesday, September 7, 2021

6:45 PM

Televised Regular Meeting

TELECONFERENCE / PUBLIC PARTICIPATION INFORMATION TO HELP STOP THE SPREAD OF COVID-19

In accordance with Governor Newsom's Executive Order No-29-20, this will be a teleconference meeting without a physical location to help stop the spread of COVID-19.

Members of the public wishing to observe the meeting may do so in one of the following ways:

- 1) Tune to Comcast Channel 26 and AT&T U-Verse Channel 99 on your TV.
- 2) The meeting will also be streamed live on and online at www.Cupertino.org/youtube and www.Cupertino.org/webcast

Members of the public wishing to comment on an item on the agenda may do so in the following ways:

- 1) E-mail comments by 4:30 p.m. on Tuesday, September 7 to the Council at citycouncil@cupertino.org. These e-mail comments will also be forwarded to Councilmembers by the City Clerk's office before the meeting and posted to the City's website after the meeting.
- 2) E-mail comments during the times for public comment during the meeting to the City Clerk at cityclerk@cupertino.org. The City Clerk will read the emails into the record, and display any attachments on the screen, for up to 3 minutes (subject to the Mayor's discretion to shorten time for public comments). Members of the public that wish to share a document must email cityclerk@cupertino.org prior to speaking.

3) Teleconferencing Instructions

Members of the public may provide oral public comments during the teleconference meeting as follows:

Oral public comments will be accepted during the teleconference meeting. Comments may be made during “oral communications” for matters not on the agenda, and during the public comment period for each agenda item.

To address the City Council, click on the link below to register in advance and access the meeting:

Online

Register in advance for this webinar:

https://cityofcupertino.zoom.us/webinar/register/WN_CFzjR-TfShWh2t-1NQ7FRA

Phone

Dial: 669-900-6833 and enter Webinar ID: 953 8500 7073 (Type *9 to raise hand to speak, *6 to unmute yourself). Unregistered participants will be called on by the last four digits of their phone number.

Or an H.323/SIP room system:

H.323:

162.255.37.11 (US West)

Meeting ID: 953 8500 7073

SIP: 95385007073@zoomcrc.com

After registering, you will receive a confirmation email containing information about joining the webinar.

Please read the following instructions carefully:

1. You can directly download the teleconference software or connect to the meeting in your internet browser. If you are using your browser, make sure you are using a current and up-to-date browser: Chrome 30+, Firefox 27+, Microsoft Edge 12+, Safari 7+. Certain functionality may be disabled in older browsers, including Internet Explorer.
 2. You will be asked to enter an email address and a name, followed by an email with instructions on how to connect to the meeting. Your email address will not be disclosed to the public. If you wish to make an oral public comment but do not wish to provide your name, you may enter “Cupertino Resident” or similar designation.
 3. When the Mayor calls for the item on which you wish to speak, click on “raise hand,” or, if you are calling in, press *9. Speakers will be notified shortly before they are called to speak.
 4. When called, please limit your remarks to the time allotted and the specific agenda topic.
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In compliance with the Americans with Disabilities Act (ADA), anyone who is planning to attend this teleconference City Council meeting who is visually or hearing impaired or has any disability that needs special assistance should call the City Clerk's Office at 408-777-3223, at least 48 hours in advance of the Council meeting to arrange for assistance. In addition, upon request, in advance, by a person with a disability, City Council meeting agendas and writings distributed for the meeting that are public records will be made available in the appropriate alternative format.

PLEDGE OF ALLEGIANCE

ROLL CALL

CEREMONIAL MATTERS AND PRESENTATIONS

1. Subject: Proclamation recognizing September as National Preparedness Month (NPM)
Recommended Action: Present proclamation recognizing September as National Preparedness Month (NPM)
[A - Proclamation](#)

POSTPONEMENTS AND ORDERS OF THE DAY

ORAL COMMUNICATIONS

This portion of the meeting is reserved for persons wishing to address the Council on any matter within the jurisdiction of the Council and not on the agenda. The total time for Oral Communications will ordinarily be limited to one hour. Individual speakers are limited to three (3) minutes. As necessary, the Chair may further limit the time allowed to individual speakers, or reschedule remaining comments to the end of the meeting on a first come first heard basis, with priority given to students. In most cases, State law will prohibit the Council from discussing or making any decisions with respect to a matter not listed on the agenda. A councilmember may, however, briefly respond to statements made or questions posed by speakers. A councilmember may also ask a question for clarification, provide a reference for factual information, request staff to report back concerning a matter, or request that an item be added to a future City Council agenda in response to public comment.

REPORTS BY COUNCIL AND STAFF (10 minutes)

2. Subject: Brief reports on councilmember activities and brief announcements
Recommended Action: Receive brief reports on councilmember activities and brief announcements
3. Subject: City Manager update on emergency response efforts
Recommended Action: Receive City Manager update on emergency response efforts

4. Subject: Report on Committee assignments
Recommended Action: Report on Committee assignments

CONSENT CALENDAR (Items 5-10)

Unless there are separate discussions and/or actions requested by council, staff or a member of the public, it is requested that items under the Consent Calendar be acted on simultaneously.

5. Subject: Approve the August 17 City Council minutes
Recommended Action: Approve the August 17 City Council minutes
[A - Draft Minutes](#)
6. Subject: Approve the August 24 City Council minutes
Recommended Action: Approve the August 24 City Council minutes
[A - Draft Minutes](#)
7. Subject: Consider adopting a resolution allowing Sudha Kasamsetty and Adhya Kasamsetty to serve simultaneously as commissioners on the Teen Commission and Fine Arts Commission, respectively
Recommended Action: Adopt Resolution No. 21-080 allowing Sudha Kasamsetty and Adhya Kasamsetty to serve simultaneously as commissioners
[Staff Report](#)
[A - Draft Resolution](#)
8. Subject: Consider amending the Council Committee Assignments to designate a voting delegate and up to two alternate voting delegates to vote at the General Assembly during the 2021 League of California Cities Annual Conference
Recommended Action: Approve amendments to the Council Committee Assignments to designate Vice Mayor Chao as the voting delegate and Councilmember Moore and Councilmember Wei as the alternate voting delegates to vote at the General Assembly during the 2021 League of California Cities Annual Conference
[Staff Report](#)
[A - 2021 Council Committee Assignments Clean](#)
[B - 2021 Council Committee Assignments Redline](#)
[C - Annual Conference Voting Procedures](#)
9. Subject: Approve use of American Rescue Plan Act of 2021 funding allocation and approve Budget Modification #2122-162 increasing appropriations in the General Fund (100-90-001 page 583 of the FY 2021-22 Adopted Budget) by \$4,847,386.50 and revenues in the General Fund by \$4,847,386.50 as shown in Attachment C.

Recommended Action: Approve use of American Rescue Plan Act of 2021 funding allocation and approve Budget Modification #2122-162 increasing appropriations in the General Fund (100-90-001 page 583 of the FY 2021-22 Adopted Budget) by \$4,847,386.50 and revenues in the General Fund by \$4,847,386.50 as shown in Attachment C.

[ARP Staff Report](#)

[A - U.S. Department of the Treasury Interim Final Rule](#)

[B - Revenue Loss Calculation](#)

[C - Budget Adjustment](#)

10. Subject: Consideration of a Professional Services Agreement for Plan Check Services for the Westport Cupertino Project (Continued from August 17, 2021)

Recommended Action: That City Council consider authorizing the City Manager to sign a Professional Services Agreement with ICCI and NV5 to provide plan check services for the proposed Westport Cupertino project in the amount not-to-exceed \$300,000 and, consider approving Budget Modification #2122-161 increasing appropriations by \$300,000 and increasing revenues by \$461,000 in the Community Development Department's Building Division (100-73-714)

[Staff Report](#)

[A – Draft Contract – ICCI](#)

[B – Draft Contract – NV5](#)

SECOND READING OF ORDINANCES - None

PUBLIC HEARINGS

11. Subject: Consider approving a Vesting Tentative Map to replace a previously approved Vesting Tentative Map (TM-2018-03) for the Westport Cupertino development project to create a separate parcel for the age restricted senior below market rate building. City approval would be a Vesting Tentative Map; (Application No(s): TM-2021-002; Applicant(s): KT Urban (Mark Tersini); Location: 21267 Stevens Creek Boulevard; APN #326-27-042, -043

Recommended Action: City Council consider the evidence presented and determine whether the project can be approved in accordance with the Resolution No. 21-081 to approve the Vesting Tentative Map (TM-2021-002).

[Staff Report](#)

[A – Draft Resolution for TM-2021-002](#)

[B – Planning Commission Resolution No. 6927](#)

[C – Project Plans](#)

[D – Letter from Mike Kelly, The Pacific Company, to the Planning Commission, titled Westport Cupertino – Parcel Requirement, dated June 28, 2021.](#)

[E – Letter from Mark Tersini KT Urban to the Planning Commission titled Westport Project Tentative Map Application No TM-2021-002 dated June 28 2021](#)

[F – Memorandum from Frederick Venter, P.E. and Anthony Nuti, Kimley Horn and Associates to Mark Tersini, KT Urban, titled Westport Cupertino – Transportation Analysis, dated November 27, 2018.](#)

[G – Memorandum from Frederick Venter, P.E. of Kimley Horn and Associates to Mark Tersini, KT Urban, titled Westport Cupertino – Alternative Proposal: Trip Generation Corporation, dated March 27, 2020.](#)

[H - Memorandum from Frederick Venter, P.E. and Anthony Nuti, Kimley Horn and Associates to Mark Tersini, KT Urban, titled Approved Westport Trip Generation, dated June 7, 2021.](#)

ORDINANCES AND ACTION ITEMS

12. Subject: Status Report on the Vallco Town Center SB 35 Development Project
Recommended Action: Accept report

[Staff Report](#)

[A - Detailed Status Report on the Vallco SB 35 Development Project](#)

ORAL COMMUNICATIONS - CONTINUED (As necessary)

COUNCIL AND STAFF COMMENTS AND FUTURE AGENDA ITEMS

ADJOURNMENT

The City of Cupertino has adopted the provisions of Code of Civil Procedure §1094.6; litigation challenging a final decision of the City Council must be brought within 90 days after a decision is announced unless a shorter time is required by State or Federal law.

Prior to seeking judicial review of any adjudicatory (quasi-judicial) decision, interested persons must file a petition for reconsideration within ten calendar days of the date the City Clerk mails notice of the City's decision. Reconsideration petitions must comply with the requirements of Cupertino Municipal Code §2.08.096. Contact the City Clerk's office for more information or go to <http://www.cupertino.org/cityclerk> for a reconsideration petition form.

In compliance with the Americans with Disabilities Act (ADA), anyone who is planning to attend this teleconference meeting who is visually or hearing impaired or has any disability that needs special assistance should call the City Clerk's Office at 408-777-3223, at least 48 hours in advance of the meeting to arrange for assistance. In addition, upon request, in advance, by a person with a disability, meeting agendas and writings distributed for the meeting that are public records will be made available in the appropriate alternative format.

Any writings or documents provided to a majority of the Cupertino City Council after publication of the packet will be made available for public inspection in the City Clerk's Office located at City Hall, 10300 Torre Avenue, Cupertino, California 95014, during normal business hours; and in Council packet archives linked from the agenda/minutes page on the Cupertino web site.

IMPORTANT NOTICE: Please be advised that pursuant to Cupertino Municipal Code section 2.08.100 written communications sent to the Cupertino City Council, Commissioners or City staff concerning a matter on the agenda are included as supplemental material to the agenda item. These written communications are accessible to the public through the City's website and kept in packet archives. Do not include any personal or private information in written communications to the City that you do not wish to make public, as written communications are considered public records and will be made publicly available on the City website.



CITY OF CUPERTINO

Agenda Item

21-9735

Agenda Date: 9/7/2021
Agenda #: 1.

Subject: Proclamation recognizing September as National Preparedness Month (NPM)

Present proclamation recognizing September as National Preparedness Month (NPM)



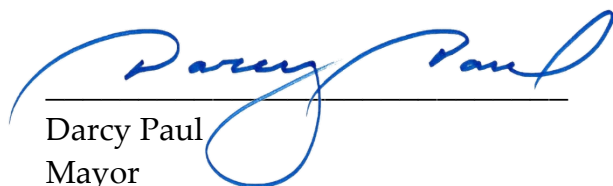
Proclamation

- WHEREAS,** The years 2020 and 2021 have reminded us that unexpected catastrophes can happen at any time, and we have seen that disasters and emergencies are not limited to any one crisis, location, or group of people;
- WHEREAS,** The United States observes National Preparedness Month every September since the attacks of September 11, and it is an ideal opportunity for every resident of the City of Cupertino to join citizens across the United States in preparing their homes, businesses, and communities for any type of emergency, including natural disasters such as earthquakes, wildfires, floods, and other large-scale emergencies we cannot predict;
- WHEREAS,** The Federal Emergency Management Agency announced the 2021 National Preparedness Month theme of “Prepare to Protect. Preparing for disasters is protecting everyone you love.”;
- WHEREAS,** Planning now, before a disaster, is the best way to improve community recovery from disasters, the chance of survival and return to normalcy following a disaster;
- WHEREAS,** All residents of the City of Cupertino are urged to plan ahead for disasters and encourage their family and friends to do so by participating in neighborhood preparedness activities and registering their contact information in the Santa Clara County AlertSCC mass notification system.
- THEREFORE,** I, Mayor Darcy Paul, and the Cupertino City Council do hereby Proclaim our support to

National Preparedness Month

in the City of Cupertino, and call on all government agencies, private organizations, businesses, and residents of Cupertino to develop their own emergency preparedness plan and work together toward creating a stronger, more resilient community.

IN WITNESS THEREOF, I have hereunto set my hand and caused the seal of the City of Cupertino to be affixed this Tuesday, September 7, 2021.



Darcy Paul
Mayor



CITY OF CUPERTINO

Agenda Item

21-9113

Agenda Date: 9/7/2021
Agenda #: 2.

Subject: Brief reports on councilmember activities and brief announcements

Receive brief reports on councilmember activities and brief announcements



CITY OF CUPERTINO

Agenda Item

21-9180

Agenda Date: 9/7/2021
Agenda #: 3.

Subject: City Manager update on emergency response efforts

Receive City Manager update on emergency response efforts



CITY OF CUPERTINO

Agenda Item

21-9192

Agenda Date: 9/7/2021
Agenda #: 4.

Subject: Report on Committee assignments

Report on Committee assignments



CITY OF CUPERTINO

Agenda Item

21-9204

Agenda Date: 9/7/2021
Agenda #: 5.

Subject: Approve the August 17 City Council minutes

Approve the August 17 City Council minutes



**DRAFT MINUTES
CUPERTINO CITY COUNCIL
Tuesday, August 17, 2021**

REGULAR MEETING

At 6:45 p.m. Vice Mayor Liang Chao called the Regular City Council meeting to order. This was a teleconference meeting with no physical location.

ROLL CALL

Present: Vice Mayor Liang Chao, and Councilmembers Kitty Moore, Hung Wei, and Jon Robert Willey. Absent: Mayor Darcy Paul. All Councilmembers teleconferenced for the meeting.

CEREMONIAL MATTERS AND PRESENTATIONS

1. Subject: Presentation from the Santa Clara Valley Urban Forestry Alliance on raising awareness to protect and expand the urban tree canopy for our region
Recommended Action: Receive presentation from the Santa Clara Valley Urban Forestry Alliance on raising awareness to protect and expand the urban tree canopy for our region

Written communications for this item included a presentation and an email to Council.

Olivia Rodriguez gave a presentation on behalf of the Santa Clara Valley Urban Forestry Alliance.

Councilmembers asked questions and made comments.

Vice Mayor Chao opened the public comment period and the following people spoke.

Housing Commissioner Connie Cunningham (representing self) supported the importance of the urban forest and trees for providing habitat and food for birds.

Jill Halloran supported rich urban tree canopies in cities which serve as bird habitats, and for traffic calming, ambient temperature reduction, and boosting home values.

Vice Mayor Chao closed the public comment period.

Council received the presentation from the Santa Clara Valley Urban Forestry Alliance on raising awareness to protect and expand the urban tree canopy for our region.

2. Subject: Presentation on online resources for the public to participate in the legislative process
Recommended Action: Receive presentation on online resources for the public to participate in the legislative process

Written communications for this item included a presentation.

Consultant Casey Elliott with Townsend Public Affairs gave a presentation.

Councilmembers asked questions and made comments.

Vice Mayor Chao opened the public comment period and the following people spoke.

Jennifer Griffin supported the presentation and was concerned about impacts to the legislative process in the event of the Governor's recall.

Vice Mayor Chao closed the public comment period.

Council received the presentation on online resources for the public to participate in the legislative process.

3. Subject: Proclamation Acknowledging Drought Conditions Regarding Local Water Conservation Efforts.
Recommended Action: Present Proclamation Acknowledging Drought Conditions Regarding Local Water Conservation Efforts.

Director of Public Works Roger Lee received the proclamation.

Vice Mayor Chao presented the proclamation acknowledging drought conditions regarding local water conservation efforts.

POSTPONEMENTS AND ORDERS OF THE DAY

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4. Subject: Consider approval of a Vesting Tentative Map to replace a previously approved Vesting Tentative Map (TM-2018-03) for the Westport Cupertino development project to create a separate parcel for the age restricted senior below market rate building. City approval would be a Vesting Tentative Map; (Application No(s): TM-2021-002; Applicant(s): KT Urban (Mark Tersini); Location: 21267 Stevens Creek Boulevard; APN #326-27-042, -043 has been continued to September 7, 2021.

Consideration of approval of a Vesting Tentative Map to replace a previously approved Vesting Tentative Map (TM-2018-03) for the Westport Cupertino development project was continued to September 7, 2021 and will be re-noticed.

ORAL COMMUNICATIONS

James Apffel supported the upcoming Bloom Energy Stars and Strides Charity Run to support frontline healthcare workers.

Jennifer Griffin was concerned about legislative housing bills SB9, SB10, and AB1401, streamlined and ministerial review processes, and loss of local control.

Call-In User_1 was concerned about an unpermitted structure in her backyard that must be torn down and would like resolution with the City.

Rhoda Fry was concerned about a County notice of violation against Stevens Creek Quarry and Lehigh Cement's new operations of importing materials and selling unwashed rock.

Interim City Manager Greg Larson provided updates on Ms. Fry's previous concerns regarding Lehigh.

Peggy Griffin was concerned about a potential General Plan land use designation violation with the proposed Bateh Brothers residential development project. (Submitted written comments).

Anjali Kausar, on behalf of the Cupertino Chamber of Commerce, supported the upcoming STAR awards to recognizing people, organizations, and businesses.

Tushar was concerned that Chapter 10.48 of the City's Noise Control Ordinance doesn't factor distance between commercial and residential properties like other cities.

Jack Zhang and Rachel Jiang supported the Cupertino Bell Ringing for Peace Ceremony hosted by Cupertino-Toyokawa Sister Cities to commemorate 75 years of peace since the bombing of Hiroshima, Nagasaki, and Toyokawa.

REPORTS BY COUNCIL AND STAFF (10 minutes)

5. Subject: Brief reports on councilmember activities and brief announcements
Recommended Action: Receive brief reports on councilmember activities and brief announcements

Council received brief reports on councilmember activities and brief announcements.

6. Subject: City Manager update on emergency response efforts
Recommended Action: Receive City Manager update on emergency response efforts

Interim City Manager Greg Larson reported on COVID-19 case counts and averages, vaccination booster doses and rates, face covering requirements, and available City Hall services.

7. Subject: Report on Committee assignments
Recommended Action: Report on Committee assignments

Councilmembers highlighted the activities of their various committees.

CONSENT CALENDAR (Items 8-18)

Willey moved and Moore seconded to approve the items on the Consent Calendar. Ayes: Chao, Moore, Wei, and Willey. Noes: None. Abstain: None. Absent: Paul.

8. Subject: Approve the July 20 City Council minutes
Recommended Action: Approve the July 20 City Council minutes

9. Subject: Approve the July 22 City Council minutes
Recommended Action: Approve the July 22 City Council minutes

10. Subject: Approve the July 27 City Council minutes
Recommended Action: Approve the July 27 City Council minutes

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11. Subject: Consider Adopting a Resolution of Support for the Annexation of the Lawrence Expressway and Mitty Avenue Properties and Authorize the City Manager to Submit Documentation for Annexation.
Recommended Action: 1) Adopt Resolution No. 21-072 Supporting the Annexation of Assessor Parcel Numbers (APN) 375-21-001 and 375-22-001, Located Along the Westerly Boundary of Lawrence Expressway and Mitty Avenue (Lawrence-Mitty) Properties into the City of Cupertino; and
2) Authorize the City Manager to Submit to the Local Agency Formation Commission of Santa Clara County (LAFCO) Applications for Sphere of Influence (SOI) and UrbanService Area (USA) Amendments, and Detachment and Annexation of the Properties, and Execute All Documentation and Take All Steps Necessary to Complete the Annexation of the Lawrence-Mitty Properties.
 12. Subject: Consider Adoption of a Resolution Accepting the 2021 Santa Clara County Multi-Jurisdictional Program for Public Information, a Program Under the Community Rating System of the Federal Emergency Management Agency's National Flood Insurance Program.
Recommended Action: Adopt Resolution No. 21-073 Accepting the 2021 Santa Clara County Multi-Jurisdictional Program for Public Information, a Program Under the Community Rating System of the Federal Emergency Management Agency's National Flood Insurance Program.
 13. Subject: Accept Accounts Payable for the period ending July 5, 2021
Recommended Action: Adopt Resolution No. 21-074 accepting Accounts Payable for the period ending July 5, 2021
 14. Subject: Accept Accounts Payable for the period ending July 12, 2021
Recommended Action: Adopt Resolution No. 21-075 accepting Accounts Payable for the period ending July 12, 2021
 15. Subject: Accept Accounts Payable for the period ending July 19, 2021
Recommended Action: Adopt Resolution No. 21-076 accepting Accounts Payable for the period ending July 19, 2021
 16. Subject: Accept Accounts Payable for the period ending July 26, 2021
Recommended Action: Adopt Resolution No. 21-077 accepting Accounts Payable for the period ending July 26, 2021

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17. Subject: Consider approving Resolution No. 21-XXX and Budget Modification #2122-159 increasing Compensated Absences Internal Service Fund appropriations (641-44-420) by \$240,000.
Recommended Action: Consider approving Resolution No. 21-078 and Budget Modification #2122-159 increasing Compensated Absences Internal Service Fund appropriations (641-44-420) by \$240,000.
18. Subject: Accept Treasurer's Investment Report for period ending June 30, 2021
Recommended Action: Accept Treasurer's Investment Report for period ending June 30, 2021

SECOND READING OF ORDINANCES – None

PUBLIC HEARINGS - None

ORDINANCES AND ACTION ITEMS

19. Subject: Consideration of a Professional Services Agreement for Plan Check Services for the Westport Cupertino Project
Recommended Action: That City Council consider authorizing the City Manager to sign a Professional Services Agreement with ICCI and NV5 to provide plan check services for the proposed Westport Cupertino project in the amount not-to-exceed \$300,000 and, consider approving Budget Modification #2122-161 increasing appropriations by \$300,000 and increasing revenues by \$461,000 in the Community Development Department's Building Division (100-73-714)

Written Communications for this item included a staff presentation.

Director of Community Development Ben Fu introduced the item.

Assistant Director of Community Development/Building Official Albert Salvador gave a presentation.

Councilmembers asked questions and made comments.

Vice Mayor Chao opened the public comment period and the following people spoke.

Peggy Griffin was concerned that the draft contract did not include a scope of work and only one contract was provided for two different companies.

Vice Mayor Chao closed the public comment period.

Moore moved and Willey seconded to table and continue consideration of a Professional Services Agreement for Plan Check Services for the Westport Cupertino Project item until September 7. The motion carried unanimously with Paul absent.

Council also directed staff to provide additional information requested by Councilmembers when the item comes back for approval.

20. Subject: Consider modifications to the Procedures for Processing General Plan Amendment Applications to implement the Fiscal Year 2020/21 City Work Program items related to quality of life. (Application No. CP-2020-003; Applicant: City of Cupertino; Location: City-Wide). (Tabled on February 2, 2021).

Recommended Action: That the City Council consider and potentially adopt Resolution No 21-079 (Attachment A) to:

- 1) Find the action exempt from CEQA; and
- 2) Amend the Procedures for Processing of General Plan Amendment Applications

Written Communications for this item included a staff presentation.

Director of Community Development Ben Fu introduced the item.

Senior Planner Erick Serrano gave a presentation.

Councilmembers asked questions and made comments.

Vice Mayor Chao opened the public comment period and the following people spoke.

Lisa Warren was concerned about using the term “community benefits/amenities” and supported compiling a prioritized list of items that community members agree on.

Peggy Griffin supported removing “community amenities,” modifications to “Backgrounds/Goals” and Attachment B Redlines, and detailed postcard mailers.

Jennifer Griffin supported postcard mailers, Planning Commission review, and reworking “community amenities.”

Vice Mayor Chao closed the public comment period.

Council consented to table consideration of modifications to the Procedures for Processing General Plan Amendment Applications to implement the Fiscal Year 2020/21 City Work Program items related to quality of life to a future meeting date; and directed staff to make further refinements to Council's direction from February 2, 2021.

21. Subject: Consideration of an Urgency Ordinance of the Cupertino City Council extending authorization of outdoor operations of qualifying establishments (restaurants, wineries, breweries, and bars) pursuant to a Special Temporary Outdoor Dining Permit
Recommended Action: 1. Find that the proposed actions are exempt from CEQA; and, 2. Conduct the one and only reading and enact Urgency Ordinance No. 21-2229: "An urgency ordinance of the City Council of the City of Cupertino authorizing the outdoor operations of qualifying establishments (restaurants, wineries, breweries, and bars) pursuant to a special temporary outdoor dining permit."

Written Communications for this item included a staff presentation.

Director of Community Development Ben Fu introduced the item.

Associate Planner Jeff Tsumura gave a presentation.

Councilmembers asked questions and made comments.

Vice Mayor Chao opened the public comment period and the following people spoke.

Anjali Kauser, on behalf of the Cupertino Chamber of Commerce, supported approval of the Urgency Ordinance.

Jennifer Griffin asked about the rules regarding outdoor alcohol service and was concerned that minors would find a way to obtain alcohol.

Vice Mayor Chao closed the public comment period.

City Clerk Kirsten Squarcia read the title of Ordinance No. 21-2229: "An urgency ordinance of the City Council of the City of Cupertino authorizing the outdoor operations of qualifying establishments (restaurants, wineries, breweries, and bars) pursuant to a special temporary outdoor dining permit."

Moore moved and Wei seconded to 1. Find that the proposed actions are exempt from CEQA; 2. That Ordinance No. 21-2229 be read by title only and that the City Clerk's reading constitute the only reading thereof; and 3. That Ordinance No. 21-2229 be enacted. Ayes: Moore, Wei, Willey, and Chao Noes: None. Abstain: None. Absent: Paul.

ORAL COMMUNICATIONS - CONTINUED (As necessary) – None

COUNCIL AND STAFF COMMENTS AND FUTURE AGENDA ITEMS

Added a new work program item to review the Parks and Recreation field usage rules for cricket games and bring back a future update for Council (Wei/Moore).

ADJOURNMENT

At 10:30 p.m., Vice Mayor Chao adjourned the meeting.

Kirsten Squarcia, City Clerk



CITY OF CUPERTINO

Agenda Item

21-9780

Agenda Date: 9/7/2021
Agenda #: 6.

Subject: Approve the August 24 City Council minutes

Approve the August 24 City Council minutes



DRAFT MINUTES
CUPERTINO CITY COUNCIL
Tuesday, August 24, 2021

SPECIAL MEETING

At 6:15 p.m., Mayor Darcy Paul called the Special City Council Meeting to order. This was a teleconference meeting with no physical location.

ROLL CALL

Present: Mayor Darcy Paul, Vice Mayor Liang Chao, and Councilmembers Kitty Moore, Hung Wei, and Jon Robert Willey. Absent: None. All Councilmembers attended the meeting via teleconference.

CLOSED SESSION

1. Subject: Conference with Legal Counsel - Anticipated Litigation. Significant exposure to litigation pursuant to § 54956.9(d) (two cases).

Council conducted the closed session.

In open session, Mayor Paul reported that no reportable action was taken.

ROLL CALL

Present: Mayor Darcy Paul, Vice Mayor Liang Chao, and Councilmembers Kitty Moore, Hung Wei, and Jon Robert Willey. Absent: None. All Councilmembers attended the meeting via teleconference.

OPEN SESSION REPORT REGARDING CLOSED SESSION

Mayor Paul conducted the open session report regarding the closed session.

ADJOURNMENT

At 9:26 p.m., Mayor Paul adjourned the meeting.

Kirsten Squarcia, City Clerk



CITY OF CUPERTINO

Agenda Item

21-9760

Agenda Date: 9/7/2021
Agenda #: 7.

Subject: Consider adopting a resolution allowing Sudha Kasamsetty and Adhya Kasamsetty to serve simultaneously as commissioners on the Teen Commission and Fine Arts Commission, respectively

Adopt Resolution No. 21-080 allowing Sudha Kasamsetty and Adhya Kasamsetty to serve simultaneously as commissioners



CITY ATTORNEY'S OFFICE

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
TELEPHONE: (408) 777-3403 • FAX: (408) 777-3366
CUPERTINO.ORG

CITY COUNCIL STAFF REPORT

Meeting: September 7, 2021

Subject

Consider adopting a resolution allowing Sudha Kasamsetty and Adhya Kasamsetty to serve simultaneously as commissioners on the Teen Commission and Fine Arts Commission, respectively

Recommended Action

Adopt Resolution No. 21-XXX allowing Sudha Kasamsetty and Adhya Kasamsetty to serve simultaneously as commissioners

Discussion

Sudha Kasamsetty has been a member of the City's Fine Arts Commission since January 29, 2019. On May 25, 2021, the City Council appointed Adhya Kasamsetty, Sudha Kasamsetty's daughter, to the Teen Commission.

The appointment of Adhya Kasamsetty requires a waiver of enforcement of Cupertino Municipal Code section 2.95.010 and Resolution No. 18-019, which provide: "None of the Teen Commissioners shall be otherwise officials or employees of the City of Cupertino nor be related by blood or marriage to any official or employee of the City."

Staff is aware of at least one prior instance in which a Teen Commissioner has served on the Commission at the same time as a relative has served on another City commission. Thus, considerations of fairness and consistent application of the law weigh in favor of waiving enforcement of section 2.95.010 and Resolution No. 18-019 in this instance. Council may also consider directing the City Manager to prepare amendments to section 2.95.010 to relax the restrictions on service of related persons as commissioners on different commissions.

Sustainability Impact

No sustainability impact.

Fiscal Impact

No fiscal impact.

Prepared by: Chris Jensen, City Attorney

Approved for Submission by: Greg Larson, City Manager

Attachments:

A – Draft Resolution

RESOLUTION NO. 21-__

**A RESOLUTION OF THE CUPERTINO CITY COUNCIL TO ALLOW FOR
THE SIMULTANEOUS APPOINTMENT OF SUDHA KASAMSETTY AND
ADHYA KASAMSETTY AS COMMISSIONERS**

WHEREAS, Sudha Kasamsetty has served on the City Fine Arts Commission since January 29, 2019; and

WHEREAS, the City Council appointed Adhya Kasamsetty to serve on the City Teen Commission on May 25, 2021; and

WHEREAS, Cupertino Municipal Code section 2.95.010 and Resolution No. 18-019 provide that “[n]one of the Teen Commissioners shall be otherwise officials or employees of the City of Cupertino nor be related by blood or marriage to any official or employee of the City”; and

WHEREAS, Council finds that it is the public interest to allow Adhya Kasamsetty and Sudha Kasamsetty to simultaneously serve as commissioners, notwithstanding the requirements of section 2.95.010 and Resolution No. 18-019.

NOW, THEREFORE, BE IT RESOLVED that the City Council hereby waives enforcement of the above-referenced requirement of Cupertino Municipal Code section 2.95.010 and Resolution No. 18-019 with respect to the simultaneous service of Sudha Kasamsetty and Adhya Kasamsetty as Fine Arts and Teen Commissioners, respectively, and reaffirms the appointment of Adhya Kasamsetty to the Teen Commission.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this 7th day of September, 2021, by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

<p>SIGNED:</p> _____ Darcy Paul, Mayor City of Cupertino	 _____ Date
<p>ATTEST:</p> _____ Kirsten Squarcia, City Clerk	 _____ Date



CITY OF CUPERTINO

Agenda Item

21-9781

Agenda Date: 9/7/2021
Agenda #: 8.

Subject: Consider amending the Council Committee Assignments to designate a voting delegate and up to two alternate voting delegates to vote at the General Assembly during the 2021 League of California Cities Annual Conference

Approve amendments to the Council Committee Assignments to designate Vice Mayor Chao as the voting delegate and Councilmember Moore and Councilmember Wei as the alternate voting delegates to vote at the General Assembly during the 2021 League of California Cities Annual Conference



CITY MANAGER'S OFFICE

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

CITY COUNCIL STAFF REPORT

Meeting: September 7, 2021

Subject

Consider amending the Council Committee Assignments to designate a voting delegate and up to two alternate voting delegates to vote at the General Assembly during the 2021 League of California Cities Annual Conference

Recommended Action

Approve amendments to the Council Committee Assignments to designate Vice Mayor Chao as the voting delegate and Councilmember Moore and Councilmember Wei as the alternate voting delegates to vote at the General Assembly during the 2021 League of California Cities Annual Conference

Discussion

The 2021 League of California Cities Annual Conference is scheduled for September 22-24 in Sacramento. An important part of the Annual Conference is the General Assembly on Friday, September 24, 2021. At this meeting, League membership, known as the General Assembly, considers and acts on resolutions that establish League policy. In order to vote during General Assembly, the City Council must designate a voting delegate by September 15, 2021. Council can also designate up to two alternate voting delegates, one of whom may vote if the designated voting delegate is unable to serve in that capacity.

This year, the General Assembly will convene to vote on [amendments to the League bylaws](#)¹ and on two resolutions that are related to sales tax redistribution and railroad right-of-way safety, as detailed further in the [Annual Conference Resolutions Packet](#)². More information on the voting delegate duties and procedures can be found in Attachment C.

As is customary with the Council Committee Assignments, the Mayor has proposed designating Vice Mayor Chao as the voting delegate and both Councilmember Moore and Councilmember Wei as the alternate voting delegates. These proposed

appointments have been added to the Council Committee Assignments document in Attachment A, with the changes shown in redline in Attachment B. Moving forward, these assignments will be established annually during the Council Committee Assignments process in December.

Sustainability Impact

No sustainability impact.

Fiscal Impact

No fiscal impact.

Prepared by: Astrid Robles, Management Analyst

Reviewed by: Katy Nomura, Acting Deputy City Manager
Dianne Thompson, Assistant City Manager

Approved for Submission by: Greg Larson, Interim City Manager

Attachments:

A – 2021 Council Committee Assignments Clean

B – 2021 Council Committee Assignments Redline

C – Annual Conference Voting Procedures

2021 Council Committees

Council Committees	2021 Representative	2020 Representative	Meetings
Association of Bay Area Governments (ABAG)	Darcy Alternate - Jon	Steven Alternate - Liang	Annually in April or May Bay Area Metro Center Yerba Buena Conference Room 375 Beale Street San Francisco, California
Audit Committee (City of Cupertino)	Liang and Kitty	Darcy and Rod	Quarterly on the 3rd Tuesday of the Month City Hall 4pm-6pm in Conference Room A
Comprehensive County Expressway Planning Study Policy Advisory Board	Jon Alternate - Hung	Jon Alternate - Rod	TBD
County of Santa Clara Housing and Community Development Advisory Committee	Darcy Alternate - Liang	Steven Alternate - Darcy	3-4 times a year Sounty of Santa Clara, Board of Supervisors' Chambers, County Government Center – 70 West Hedding Street, 1st Floor, San Jose, CA 95110 6:15pm
Disaster Council (Cupertino)	Hung Alternate - Darcy	Steven Alternate - Darcy	Quarterly on 3rd Thursday of the Month City Hall 2pm in EOC
Economic Development Committee	Darcy and Hung	Rod and Liang	Quarterly on the 2nd Wednesday of the Month City Hall 10am in Conference Room A
Environmental Review Committee	Kitty Alternate - Hung	Liang Alternate - Jon	Monthly on the 1st and 3rd Thursday of the Month City Hall 9:30am in Conference Room C
Fiscal Strategic Planning Committee	Darcy and Hung	Rod and Jon	Annually in April City Hall
Legislative Review Committee	Liang and Kitty	Steven and Liang	As needed City Hall
League of California Cities - Peninsula Division	All Voting Delegate - Liang Alternates - Kitty and Hung	All	2-3 times a year Dinner meetings Location is TBD
Silicon Valley Regional Interoperability Authority	Jon Alternate - Kitty	Darcy Alternate - Jon	Every two month on the 4th Wednesday of the month Santa Clara PD 601 El Camino, Santa Clara
Santa Clara County Cities Association - Board of Directors	Liang Alternate - Kitty	Steven Alternate - Rod	Monthly on the 2nd Thursday of the Month 7pm at Sunnyvale City Hall, West conference Room 456 W Olive Ave, Sunnyvale 94086

2021 Council Committees

Council Committees	2021 Representative	2020 Representative	Meetings
Santa Clara County Cities Association - City Selection Committee	Liang Alternate - Kitty	Steven Alternate - Rod	As needed and will be held before Board Meeting on 2nd Thursday of the Month 6pm at Sunnyvale City Hall, West conference Room 456 W Olive Ave, Sunnyvale 94086
Santa Clara County Cities Association - Legislative Committee	Liang Alternate - Darcy	Steven Alternate - Liang	As needed 6pm at Sunnyvale City Hall, West conference Room 456 W Olive Ave, Sunnyvale 94086
Santa Clara County Library District Joint Powers Authority - Board of Directors	Darcy Alternate - Hung	Darcy Alternate - Steven	Quarterly 1:30pm at Library Services & Support Center 1370 Dell Ave., Campbell, CA 95008
Santa Clara/Santa Cruz Airport/Community Roundtable on Aircraft Noise in the South Bay	Liang Alternate - Hung	Liang Alternate - Jon	Monthly on 4th Wednesday of the month 1:00pm-4:00pm City of Santa Clara, Council Chambers
Santa Clara Valley Water Commission	Hung Alternate - Jon	Jon Alternate - Steven	Quarterly on the 4th Wednesday of the Month Times and locations vary each month
Santa Clara Valley Transportation Authority (PAC) Policy Advisory Committee	Kitty Alternate - Jon	Darcy Alternate - Rod	Monthly on the 2nd Thursday of the Month 4pm at VTA River Oaks Campus 3331 North First Street, Conference Room B-106
School Board Liasion FUHSD, CUSD, Foothill-DeAnza Community College District	Hung Alternate - Liang	Jon Alternate - Liang	Quarterly Quinlan Community Center
Sister City Committees	Kitty and Jon	Darcy and Liang	As needed
West Valley Mayors and City Managers	Darcy Alternate - Liang	Steven Alternate - Darcy	Monthly on the 4th Wednesday of the Month 12pm Location changes monthly
State Route 85 Corridor Policy Advisory Board	Jon Alternate - Darcy	Rod Alternate - Jon	Quarterly on a Monday of the month selected 10am Location changes each quarter
Silicon Valley Clean Energy Authority (SVCEA) JPA	Jon Alternate - Hung	Rod Alternate - Jon	Monthly on the 2nd Wednesday of the month 7pm Cupertino Community Hall

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Sister City Committees	Kitty and Jon	Darcy and Liang	As needed
West Valley Mayors and City Managers	Darcy Alternate - Liang	Steven Alternate - Darcy	Monthly on the 4th Wednesday of the Month 12pm Location changes monthly
State Route 85 Corridor Policy Advisory Board	Jon Alternate - Darcy	Rod Alternate - Jon	Quarterly on a Monday of the month selected 10am Location changes each quarter
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Annual Conference Voting Procedures

1. **One City One Vote.** Each member city has a right to cast one vote on matters pertaining to Cal Cities policy.
2. **Designating a City Voting Representative.** Prior to the Annual Conference, each city council may designate a voting delegate and up to two alternates; these individuals are identified on the Voting Delegate Form provided to the Cal Cities Credentials Committee.
3. **Registering with the Credentials Committee.** The voting delegate, or alternates, may pick up the city's voting card at the Voting Delegate Desk in the conference registration area. Voting delegates and alternates must sign in at the Voting Delegate Desk. Here they will receive a special sticker on their name badge and thus be admitted to the voting area at the Business Meeting.
4. **Signing Initiated Resolution Petitions.** Only those individuals who are voting delegates (or alternates), and who have picked up their city's voting card by providing a signature to the Credentials Committee at the Voting Delegate Desk, may sign petitions to initiate a resolution.
5. **Voting.** To cast the city's vote, a city official must have in their possession the city's voting card and be registered with the Credentials Committee. The voting card may be transferred freely between the voting delegate and alternates, but may not be transferred to another city official who is neither a voting delegate or alternate.
6. **Voting Area at Business Meeting.** At the Business Meeting, individuals with a voting card will sit in a designated area. Admission will be limited to those individuals with a special sticker on their name badge identifying them as a voting delegate or alternate.
7. **Resolving Disputes.** In case of dispute, the Credentials Committee will determine the validity of signatures on petitioned resolutions and the right of a city official to vote at the Business Meeting.



CITY OF CUPERTINO

Agenda Item

21-9779

Agenda Date: 9/7/2021
Agenda #: 9.

Subject: Approve use of American Rescue Plan Act of 2021 funding allocation and approve Budget Modification #2122-162 increasing appropriations in the General Fund (100-90-001 page 583 of the FY 2021-22 Adopted Budget) by \$4,847,386.50 and revenues in the General Fund by \$4,847,386.50 as shown in Attachment C.

Approve use of American Rescue Plan Act of 2021 funding allocation and approve Budget Modification #2122-162 increasing appropriations in the General Fund (100-90-001 page 583 of the FY 2021-22 Adopted Budget) by \$4,847,386.50 and revenues in the General Fund by \$4,847,386.50 as shown in Attachment C.



ADMINISTRATIVE SERVICES DEPARTMENT

CITY HALL
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CITY COUNCIL STAFF REPORT

Meeting: September 7, 2021

Subject

Approve use of American Rescue Plan Act of 2021 funding allocation and approve Budget Modification #2122-162 increasing appropriations in the General Fund (100-90-001 page 583 of the FY 2021-22 Adopted Budget) by \$4,847,386.50 and revenues in the General Fund by \$4,847,386.50 as shown in Attachment C.

Recommended Action

Approve use of American Rescue Plan Act of 2021 funding allocation and approve Budget Modification #2122-162 increasing appropriations in the General Fund (100-90-001 page 583 of the FY 2021-22 Adopted Budget) by \$4,847,386.50 and revenues in the General Fund by \$4,847,386.50 as shown in Attachment C.

Discussion

On March 11, 2021, the American Rescue Plan Act (ARP) of 2021 was signed into law and established the Coronavirus State Fiscal Recovery Fund and Coronavirus Local Fiscal Recovery Funds, which together make up the Coronavirus State and Local Fiscal Recovery Funds (“SLFRF”).

The American Rescue Plan (ARP) Act of 2021 is a \$1.9 trillion economic stimulus bill. Within the ARP, the Coronavirus Local Fiscal Recovery Fund provided \$350 billion for states, municipalities, counties, tribes, and territories, including \$130 billion for local governments split evenly between municipalities and counties. California cities are expected to receive more than \$7 billion dollars in much needed assistance to help offset the billions of dollars in revenue shortfalls due to the shutdown of local economies and the billions spent protecting public health, delivering essential services, protecting vulnerable populations, and helping small businesses survive during the pandemic.

The City of Cupertino is expected to receive two payments totaling \$9,694,773 in SLFRF funding. The first payment was received in May 2021 in the amount of \$4,847,386.50 and the second payment is expected in May 2022. The City may use SLFRF funds to cover eligible costs incurred during the period that begins on March 3, 2021 and ends on December 31, 2024, as long as the award funds for the obligations incurred by December 31, 2024 are spent by December 31, 2026.

As a recipient of the SLFRF award, the City has substantial discretion to use the award funds in the ways that best suit the needs of the City's constituents – as long as such use fits into one of the following four statutory categories determined by the U.S.

Department of the Treasury:

1. Public Health/Negative Economic Impacts: Recipients may use SLFRF award funds to provide assistance to households – such as rent, mortgage, or utility assistance – for costs incurred by the household prior to March 3, 2021, provided that the City did not incur the cost of providing such assistance prior to March 3, 2021.
2. Premium Pay: Recipients may provide premium pay retrospectively for work performed at any time since the start of the COVID-19 public health emergency. Such premium pay must be “in addition to” wages and remuneration already received and the obligation to provide such pay must not have been incurred by the recipient prior to March 3, 2021.
3. Revenue Loss: Treasury's Interim Final Rule gives recipients broad latitude to use funds for the provision of government services to the extent of reduction in revenue. While calculation of loss revenue begins with the recipient's revenue in the last full fiscal year prior to the COVID-19 public health emergency and includes the 12-month period ending December 31, 2020, use of funds for government services must be forward looking for costs incurred by the recipient after March 3, 2021.
4. Investments in Water, Sewer, and Broadband: Recipients may use SLFRF award funds to make necessary investments in water, sewer, and broadband. Recipients may use SLFRF award funds to cover costs incurred for eligible projects planned or started prior to March 3, 2021, provided that the project costs covered by the SLFRF award funds were incurred after March 3, 2021.

The Treasury's Interim Final Rule includes explicit restrictions on use of SLFRF awards. Section 602(c)(2)(A) of the Act provides that States and territories may not “use the funds ... to either directly or indirectly offset a reduction in ... net tax revenue ... resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax ... or delays the imposition of any tax or tax increase. In addition, sections 602(c)(2)(B) and 603(c)(2) prohibit any recipient, including cities, nonentitlement units of government, and counties, from using Fiscal Recovery Funds for deposit into any pension fund.”

Following the guidance of the U.S. Department of the Treasury, City staff have estimated a total revenue reduction figure of \$29,329,752 through December 31, 2023. Because Revenue Loss estimates as of June 30, 2021 exceed the City's SLFRF allocation by \$19,634,979, or 302.5%, City staff recommend allocating the SLFRF funds toward Revenue Loss. Electing to direct the SLFRF allocations toward the City's Revenue Loss will allow the City to maintain current levels of operations and government services.

Additionally, this action will mitigate the use of fund balance City-wide and afford City Council the continued ability to consider new projects and initiatives in the future.

The SLFRF allocations have and will be recorded in the City’s General Fund (Non-Departmental Department as part of the FY 2021-22 Adopted Budget and as recommended in this staff report). To equitably allocate these dollars for maintaining government services, staff recommend transferring each of the two SLFRF payments to General Fund Departments proportionally based on the FY 21-22 and FY 22-23 Adopted Budget. Since FY 22-23 Department budget amounts are unknown at this time, the second SLFRF payment will be allocated to Departments as part of the FY 22-23 Adopted Budget. Below is the proposed allocation for FY 21-22:

General Fund Department	FY 21-22 Adopted Budget	Percentage	SLFRF Allocation
Administration	\$ 7,629,629	9.7%	\$ 471,145
Administrative Services	\$ 5,378,147	6.9%	\$ 332,112
Community Development	\$ 12,871,834	16.4%	\$ 794,862
Council and Commissions	\$ 1,334,303	1.7%	\$ 82,396
Innovation and Technology	\$ 2,369,287	3.0%	\$ 146,308
Law Enforcement	\$ 15,756,350	20.1%	\$ 972,987
Public Works	\$ 25,809,192	32.9%	\$ 1,593,773
Parks and Recreation	\$ 7,348,805	9.4%	\$ 453,804
	\$ 78,497,547	100%	\$ 4,847,387

In order to substantiate the appropriate use of these dollars, specific budgeted items have been identified within each department for which the American Rescue Plan Act dollars will fund. They primarily include City Work Plan and special project items as well as core services such as law enforcement, library services, and street pavement maintenance. If any budgetary savings are realized with the items noted below, any remaining departmental allocation amounts will go towards funding salaries and benefits of employees delivering services to the public.

	ARP		
	Department Allocation		
	Amount	Budgeted Item	Amount
Administration	\$ 471,145	CWP - Climate Action Plan	\$ 78,000
		CWP - Personal Preparedness	\$ 10,000
		Administration Overhead (Cost Allocation)	\$ 383,145
			\$ 471,145
Administrative Services	\$ 332,112	Internal Audit	\$ 150,000
		General Liability Insurance*	\$ 182,112
			\$ 332,112
Community Development	\$ 794,862	CWP - Homeless Jobs Program	\$ 200,000
		CWP - General Plan and Muni Code Update	\$ 250,000
		CWP - RHNA	\$ 295,000
		CWP - Encouraging Dark Sky Compliance	\$ 10,000
		CWP - Development Accountability	\$ 10,000
		CWP - Sign Ordinance Update	\$ 25,000
		Regulating Diversified Retail Use*	\$ 4,862
			\$ 794,862
Council and Commissions	\$ 82,396	Community Funding	\$ 82,396
Innovation and Technology	\$ 146,308	Accela Business License*	\$ 17,500
		Customer Service Solution	\$ 65,000
		ERP exploration	\$ 50,000
		Performance Management Application*	\$ 13,808
			\$ 146,308
Law Enforcement	\$ 972,987	Law Enforcement Services (SCC)	\$ 972,987
Public Works	\$ 1,593,773	CWP - Municipal Water System	\$ 10,000
		CWP - Revisit 5G	\$ 250,000
		Replenish Transfer to Fund 270 for Pavement Maintenance	\$ 1,333,773
			\$ 1,593,773
Parks and Recreation	\$ 453,804	CWP - Mental Health Support	\$ 10,000
		CWP - Senior Strategy	\$ 34,000
		CWP - Dogs Off Leash Area	\$ 5,000
		CWP - Revamping Block Leader and Neighborhood Watch	\$ 1,500
		Library Services*	\$ 403,304
			\$ 453,804
			\$ 4,847,387

*Does not represent full cost of budgeted item.

Because the revenue loss estimates are not anticipated to be realized until calendar year 2022 and 2023, there is a risk that alternative uses of these funds may need to be considered. Staff will ensure City Council is kept up to date regarding the revenue loss estimations as part of the quarterly budget reporting process. If changes from the plan described herein are needed, staff will bring alternative options to City Council for further consideration.

Sustainability Impact

No sustainability impact.

Fiscal Impact

The City's allocation of the American Rescue Plan Act of 2021 and the action to direct the funding toward Revenue Loss will increase General Fund fund balance by \$9.7 million. The budget modification increases transfers out of the General Fund's Non-Departmental Department and increases transfers in for all other General Fund Departments on a proportional basis with the FY 21-22 Adopted Budget as shown in Attachment C without any actual increase in budget City expenditures.

Prepared by: Zach Korach, Finance Manager

Reviewed by: Dianne Thompson, Assistant City Manager and Kristina Alfaro, Director of Administrative Services

Approved for Submission by: Greg Larson, Interim City Manager

Attachments:

A – U.S. Department of the Treasury Interim Final Rule

B – Revenue Loss Calculation

C – Budget Adjustment



Billing Code

DEPARTMENT OF THE TREASURY

31 CFR Part 35

RIN 1505-AC77

Coronavirus State and Local Fiscal Recovery Funds

AGENCY: Department of the Treasury.

ACTION: Interim final rule.

SUMMARY: The Secretary of the Treasury (Treasury) is issuing this interim final rule to implement the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund established under the American Rescue Plan Act.

DATES: *Effective date:* The provisions in this interim final rule are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment date: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Please submit comments electronically through the Federal eRulemaking Portal:

<http://www.regulations.gov>. Comments can be mailed to the Office of the Undersecretary for Domestic Finance, Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220. Because postal mail may be subject to processing delay, it is recommended that comments be submitted electronically. All comments should be captioned with “Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule Comments.” Please include your name, organization affiliation, address, email address and telephone number in your comment. Where appropriate, a comment should include a short executive summary.

In general, comments received will be posted on <http://www.regulations.gov> without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, will be part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you

consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Katharine Richards, Senior Advisor, Office of Recovery Programs, Department of the Treasury, (844) 529-9527.

SUPPLEMENTARY INFORMATION:

I. Background Information

A. Overview

Since the first case of coronavirus disease 2019 (COVID-19) was discovered in the United States in January 2020, the disease has infected over 32 million and killed over 575,000 Americans.¹ The disease has impacted every part of life: as social distancing became a necessity, businesses closed, schools transitioned to remote education, travel was sharply reduced, and millions of Americans lost their jobs. In April 2020, the national unemployment rate reached its highest level in over seventy years following the most severe month-over-month decline in employment on record.² As of April 2021, there were still 8.2 million fewer jobs than before the pandemic.³ During this time, a significant share of households have faced food and housing insecurity.⁴ Economic disruptions impaired the flow of credit to households, State and

¹ Centers for Disease Control and Prevention, COVID Data Tracker, <http://www.covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited May 8, 2021).

² U.S. Bureau of Labor Statistics, Unemployment Rate [UNRATE], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/UNRATE>, May 3, 2021. U.S. Bureau of Labor Statistics, Employment Level [LNU02000000], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/LNU02000000>, May 3, 2021.

³ U.S. Bureau of Labor Statistics, All Employees, Total Nonfarm [PAYEMS], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/PAYEMS>, May 7, 2021.

⁴ Nirmita Panchal et al., The Implications of COVID-19 for Mental Health and Substance Abuse (Feb. 10, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/#:~:text=Older%20adults%20are%20also%20more,prior%20to%20the%20current%20crisis>; U.S. Census Bureau, Household Pulse Survey: Measuring Social and Economic Impacts during the Coronavirus Pandemic, <https://www.census.gov/programs-surveys/household-pulse-survey.html> (last visited Apr. 26, 2021); Rebecca T. Leeb et al., Mental Health-Related Emergency Department Visits Among Children Aged <18 Years During the COVID Pandemic – United States, January 1 – October 17, 2020, *Morb. Mortal. Wkly. Rep.* 69(45):1675-80 (Nov. 13, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6945a3.htm>.

local governments, and businesses of all sizes.⁵ As businesses weathered closures and sharp declines in revenue, many were forced to shut down, especially small businesses.⁶

Amid this once-in-a-century crisis, State, territorial, Tribal, and local governments (State, local, and Tribal governments) have been called on to respond at an immense scale. Governments have faced myriad needs to prevent and address the spread of COVID-19, including testing, contact tracing, isolation and quarantine, public communications, issuance and enforcement of health orders, expansions to health system capacity like alternative care facilities, and in recent months, a massive nationwide mobilization around vaccinations. Governments also have supported major efforts to prevent COVID-19 spread through safety measures in settings like nursing homes, schools, congregate living settings, dense worksites, incarceration settings, and public facilities. The pandemic's impacts on behavioral health, including the toll of pandemic-related stress, have increased the need for behavioral health resources.

At the same time, State, local and Tribal governments launched major efforts to address the economic impacts of the pandemic. These efforts have been tailored to the needs of their communities and have included expanded assistance to unemployed workers; food assistance; rent, mortgage, and utility support; cash assistance; internet access programs; expanded services to support individuals experiencing homelessness; support for individuals with disabilities and older adults; and assistance to small businesses facing closures or revenue loss or implementing new safety measures.

In responding to the public health emergency and its negative economic impacts, State, local, and Tribal governments have seen substantial increases in costs to provide these services, often amid substantial declines in revenue due to the economic downturn and changing economic

⁵ Board of Governors of the Federal Reserve System, Monetary Policy Report (June 12, 2020), <https://www.federalreserve.gov/monetarypolicy/2020-06-mpr-summary.htm>.

⁶ Joseph R. Biden, Remarks by President Biden on Helping Small Businesses (Feb. 22, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/22/remarks-by-president-biden-on-helping-small-businesses/>.

patterns during the pandemic.⁷ Facing these budget challenges, many State, local, and Tribal governments have been forced to make cuts to services or their workforces, or delay critical investments. From February to May of 2020, State, local, and Tribal governments reduced their workforces by more than 1.5 million jobs and, in April of 2021, State, local, and Tribal government employment remained nearly 1.3 million jobs below pre-pandemic levels.⁸ These cuts to State, local, and Tribal government workforces come at a time when demand for government services is high, with State, local, and Tribal governments on the frontlines of fighting the pandemic. Furthermore, State, local, and Tribal government austerity measures can hamper overall economic growth, as occurred in the recovery from the Great Recession.⁹

Finally, although the pandemic's impacts have been widespread, both the public health and economic impacts of the pandemic have fallen most severely on communities and populations disadvantaged before it began. Low-income communities, people of color, and Tribal communities have faced higher rates of infection, hospitalization, and death,¹⁰ as well as higher rates of unemployment and lack of basic necessities like food and housing.¹¹ Pre-existing social vulnerabilities magnified the pandemic in these communities, where a reduced ability to work from home and, frequently, denser housing amplified the risk of infection. Higher rates of pre-existing health conditions also may have contributed to more severe COVID-19 health

⁷ Michael Leachman, House Budget Bill Provides Needed Fiscal Aid for States, Localities, Tribal Nations, and Territories (Feb. 10, 2021), <https://www.cbpp.org/research/state-budget-and-tax/house-budget-bill-provides-needed-fiscal-aid-for-states-localities>.

⁸ U.S. Bureau of Labor Statistics, All Employees, State Government [CES9092000001] and All Employees, Local Government [CES9093000001], retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/CES9092000001> and <https://fred.stlouisfed.org/series/CES9093000001> (last visited May 8, 2021).

⁹ Tracy Gordon, State and Local Budgets and the Great Recession, Brookings Institution (Dec. 31, 2012), <http://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession>.

¹⁰ Sebastian D. Romano et al., Trends in Racial and Ethnic Disparities in COVID-19 Hospitalizations, by Region – United States, March-December 2020, *MMWR Morb Mortal Wkly Rep* 2021, 70:560-565 (Apr. 16, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7015e2.htm?s_cid=mm7015e2_w.

¹¹ Center on Budget and Policy Priorities, Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-housing-and> (last visited May 4, 2021).

outcomes.¹² Similarly, communities or households facing economic insecurity before the pandemic were less able to weather business closures, job losses, or declines in earnings and were less able to participate in remote work or education due to the inequities in access to reliable and affordable broadband infrastructure.¹³ Finally, though schools in all areas faced challenges, those in high poverty areas had fewer resources to adapt to remote and hybrid learning models.¹⁴ Unfortunately, the pandemic also has reversed many gains made by communities of color in the prior economic expansion.¹⁵

B. The Statute and Interim Final Rule

¹² Lisa R. Fortuna et al., *Inequity and the Disproportionate Impact of COVID-19 on Communities of Color in the United States: The Need for Trauma-Informed Social Justice Response*, *Psychological Trauma* Vol. 12(5):443-45 (2020), *available at* <https://psycnet.apa.org/fulltext/2020-37320-001.pdf>.

¹³ Emily Vogles et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak* (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.

¹⁴ Emma Dorn et al., *COVID-19 and student learning in the United States: The hurt could last a lifetime* (June 2020), https://webtest.childrensinstitute.net/sites/default/files/documents/COVID-19-and-student-learning-in-the-United-States_FINAL.pdf; Andrew Bacher-Hicks et al., *Inequality in Household Adaptation to Schooling Shocks: Covid-Induced Online Engagement in Real Time*, *J. of Public Econ.* Vol. 193(C) (July 2020), *available at* <https://www.nber.org/papers/w27555>.

¹⁵ *See, e.g.*, Tyler Atkinson & Alex Richter, *Pandemic Disproportionately Affects Women, Minority Labor Force Participation*, <https://www.dallasfed.org/research/economics/2020/1110> (last visited May 9, 2021); Jared Bernstein & Janelle Jones, *The Impact of the COVID19 Recession on the Jobs and Incomes of Persons of Color*, https://www.cbpp.org/sites/default/files/atoms/files/6-2-20bud_0.pdf (last visited May 9, 2021).

On March 11, 2021, the American Rescue Plan Act (ARPA) was signed into law by the President.¹⁶ Section 9901 of ARPA amended Title VI of the Social Security Act¹⁷ (the Act) to add section 602, which establishes the Coronavirus State Fiscal Recovery Fund, and section 603, which establishes the Coronavirus Local Fiscal Recovery Fund (together, the Fiscal Recovery Funds).¹⁸ The Fiscal Recovery Funds are intended to provide support to State, local, and Tribal governments (together, recipients) in responding to the impact of COVID-19 and in their efforts to contain COVID-19 on their communities, residents, and businesses. The Fiscal Recovery Funds build on and expand the support provided to these governments over the last year, including through the Coronavirus Relief Fund (CRF).¹⁹

Through the Fiscal Recovery Funds, Congress provided State, local, and Tribal governments with significant resources to respond to the COVID-19 public health emergency and its economic impacts through four categories of eligible uses. Section 602 and section 603 contain the same eligible uses; the primary difference between the two sections is that section 602 establishes a fund for States, territories, and Tribal governments and section 603 establishes a

¹⁶ American Rescue Plan Act of 2021 (ARPA), sec. 9901, Pub. L. 117-2, codified at 42 U.S.C. 802 *et seq.* The term “state” as used in this SUPPLEMENTARY INFORMATION and defined in section 602 of the Act means each of the 50 States and the District of Columbia. The term “territory” as used in this SUPPLEMENTARY INFORMATION and defined in section 602 of the Act means the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of Northern Mariana Islands, and American Samoa. Tribal government is defined in the Act and the interim final rule to mean “the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published most recently as of the date of enactment of the [American Rescue Plan Act] pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).” See section 602(g)(7) of the Social Security Act, as added by the American Rescue Plan Act. On January 29, 2021, the Bureau of Indian Affairs published a current list of 574 Tribal entities. See 86 FR 7554, January 29, 2021. The term “local governments” as used in this SUPPLEMENTARY INFORMATION includes metropolitan cities, counties, and nonentitlement units of local government.

¹⁷ 42 U.S.C. 801 *et seq.*

¹⁸ Sections 602, 603 of the Act.

¹⁹ The CRF was established by the section 601 of the Act as added by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281 (2020).

fund for metropolitan cities, nonentitlement units of local government, and counties.

Sections 602(c)(1) and 603(c)(1) provide that funds may be used:

- a) To respond to the public health emergency or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
- b) To respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers;
- c) For the provision of government services to the extent of the reduction in revenue due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year prior to the emergency; and
- d) To make necessary investments in water, sewer, or broadband infrastructure.

In addition, Congress clarified two types of uses which do not fall within these four categories. Sections 602(c)(2)(B) and 603(c)(2) provide that these eligible uses do not include, and thus funds may not be used for, depositing funds into any pension fund. Section 602(c)(2)(A) also provides, for States and territories, that the eligible uses do not include “directly or indirectly offset[ting] a reduction in the net tax revenue of [the] State or territory resulting from a change in law, regulation, or administrative interpretation.”

The ARPA provides a substantial infusion of resources to meet pandemic response needs and rebuild a stronger, more equitable economy as the country recovers. First, payments from the Fiscal Recovery Funds help to ensure that State, local, and Tribal governments have the resources needed to continue to take actions to decrease the spread of COVID-19 and bring the pandemic under control. Payments from the Fiscal Recovery Funds may also be used by recipients to provide support for costs incurred in addressing public health and economic challenges resulting from the pandemic, including resources to offer premium pay to essential workers, in recognition of their sacrifices over the last year. Recipients may also use payments from the Fiscal Recovery Funds to replace State, local, and Tribal government revenue lost due

to COVID-19, helping to ensure that governments can continue to provide needed services and avoid cuts or layoffs. Finally, these resources lay the foundation for a strong, equitable economic recovery, not only by providing immediate economic stabilization for households and businesses, but also by addressing the systemic public health and economic challenges that may have contributed to more severe impacts of the pandemic among low-income communities and people of color.

Within the eligible use categories outlined in the Fiscal Recovery Funds provisions of ARPA, State, local, and Tribal governments have flexibility to determine how best to use payments from the Fiscal Recovery Funds to meet the needs of their communities and populations. The interim final rule facilitates swift and effective implementation by establishing a framework for determining the types of programs and services that are eligible under the ARPA along with examples of uses that State, local, and Tribal governments may consider. These uses build on eligible expenditures under the CRF, including some expansions in eligible uses to respond to the public health emergency, such as vaccination campaigns. They also reflect changes in the needs of communities, as evidenced by, for example, nationwide data demonstrating disproportionate impacts of the COVID-19 public health emergency on certain populations, geographies, and economic sectors. The interim final rule takes into consideration these disproportionate impacts by recognizing a broad range of eligible uses to help States, local, and Tribal governments support the families, businesses, and communities hardest hit by the COVID-19 public health emergency.

Implementation of the Fiscal Recovery Funds also reflect the importance of public input, transparency, and accountability. Treasury seeks comment on all aspects of the interim final rule and, to better facilitate public comment, has included specific questions throughout this SUPPLEMENTARY INFORMATION. Treasury encourages State, local, and Tribal governments in particular to provide feedback and to engage with Treasury regarding issues that may arise regarding all aspects of this interim final rule and Treasury's work in administering the

Fiscal Recovery Funds. In addition, the interim final rule establishes certain regular reporting requirements, including by requiring State, local, and Tribal governments to publish information regarding uses of Fiscal Recovery Funds payments in their local jurisdiction. These reporting requirements reflect the need for transparency and accountability, while recognizing and minimizing the burden, particularly for smaller local governments. Treasury urges State, territorial, Tribal, and local governments to engage their constituents and communities in developing plans to use these payments, given the scale of funding and its potential to catalyze broader economic recovery and rebuilding.

II. Eligible Uses

A. Public Health and Economic Impacts

Sections 602(c)(1)(A) and 603(c)(1)(A) provide significant resources for State, territorial, Tribal governments, and counties, metropolitan cities, and nonentitlement units of local governments (each referred to as a recipient) to meet the wide range of public health and economic impacts of the COVID-19 public health emergency.

These provisions authorize the use of payments from the Fiscal Recovery Funds to respond to the public health emergency with respect to COVID-19 or its negative economic impacts. Section 602 and section 603 also describe several types of uses that would be responsive to the impacts of the COVID-19 public health emergency, including assistance to households, small businesses, and nonprofits and aid to impacted industries, such as tourism, travel, and hospitality.²⁰

Accordingly, to assess whether a program or service is included in this category of eligible uses, a recipient should consider whether and how the use would respond to the COVID-19 public health emergency. Assessing whether a program or service “responds to” the COVID-19 public health emergency requires the recipient to, first, identify a need or negative impact of

²⁰ Sections 602(c)(1)(A), 603(c)(1)(A) of the Act.

the COVID-19 public health emergency and, second, identify how the program, service, or other intervention addresses the identified need or impact. While the COVID-19 public health emergency affected many aspects of American life, eligible uses under this category must be in response to the disease itself or the harmful consequences of the economic disruptions resulting from or exacerbated by the COVID-19 public health emergency.

The interim final rule implements these provisions by identifying a non-exclusive list of programs or services that may be funded as responding to COVID-19 or the negative economic impacts of the COVID-19 public health emergency, along with considerations for evaluating other potential uses of the Fiscal Recovery Funds not explicitly listed. The interim final rule also provides flexibility for recipients to use payments from the Fiscal Recovery Funds for programs or services that are not identified on these non-exclusive lists but that fall under the terms of section 602(c)(1)(A) or 603(c)(1)(A) by responding to the COVID-19 public health emergency or its negative economic impacts. As an example, in determining whether a program or service responds to the negative economic impacts of the COVID-19 public health emergency, the interim final rule provides that payments from the Fiscal Recovery Funds should be designed to address an economic harm resulting from or exacerbated by the public health emergency. Recipients should assess the connection between the negative economic harm and the COVID-19 public health emergency, the nature and extent of that harm, and how the use of this funding would address such harm.

As discussed, the pandemic and the necessary actions taken to control the spread had a severe impact on households and small businesses, including in particular low-income workers and communities and people of color. While eligible uses under sections 602(c)(1)(A) and 603(c)(1)(A) provide flexibility to recipients to identify the most pressing local needs, Treasury encourages recipients to provide assistance to those households, businesses, and non-profits in communities most disproportionately impacted by the pandemic.

1. Responding to COVID-19

On January 21, 2020, the Centers for Disease Control and Prevention (CDC) identified the first case of novel coronavirus in the United States.²¹ By late March, the virus had spread to many States and the first wave was growing rapidly, centered in the northeast.²² This wave brought acute strain on health care and public health systems: hospitals and emergency medical services struggled to manage a major influx of patients; response personnel faced shortages of personal protective equipment; testing for the virus was scarce; and congregate living facilities like nursing homes and prisons saw rapid spread. State, local, and Tribal governments mobilized to support the health care system, issue public health orders to mitigate virus spread, and communicate safety measures to the public. The United States has since faced at least two additional COVID-19 waves that brought many similar challenges: the second in the summer, centered in the south and southwest, and a wave throughout the fall and winter, in which the virus reached a point of uncontrolled spread across the country and over 3,000 people died per day.²³ By early May 2021, the United States has experienced over 32 million confirmed COVID-19 cases and over 575,000 deaths.²⁴

Mitigating the impact of COVID-19, including taking actions to control its spread and support hospitals and health care workers caring for the sick, continues to require a major public health response from State, local and Tribal governments. New or heightened public health needs include COVID-19 testing, major expansions in contact tracing, support for individuals in isolation or quarantine, enforcement of public health orders, new public communication efforts,

²¹ Press Release, Centers for Disease Control and Prevention, First Travel-related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

²² Anne Schuchat et al., Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24 – April 21, 2021, *MMWR Morb Mortal Wkly Rep* 2021, 69(18):551-56 (May 8, 2021), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e2.htm>.

²³ Centers for Disease Control and Prevention, COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (last visited May 8, 2021).

²⁴ *Id.*

public health surveillance (e.g., monitoring case trends and genomic sequencing for variants), enhancement to health care capacity through alternative care facilities, and enhancement of public health data systems to meet new demands or scaling needs. State, local, and Tribal governments have also supported major efforts to prevent COVID-19 spread through safety measures at key settings like nursing homes, schools, congregate living settings, dense worksites, incarceration settings, and in other public facilities. This has included implementing infection prevention measures or making ventilation improvements in congregate settings, health care settings, or other key locations.

Other response and adaptation costs include capital investments in public facilities to meet pandemic operational needs, such as physical plant improvements to public hospitals and health clinics or adaptations to public buildings to implement COVID-19 mitigation tactics. In recent months, State, local, and Tribal governments across the country have mobilized to support the national vaccination campaign, resulting in over 250 million doses administered to date.²⁵

The need for public health measures to respond to COVID-19 will continue in the months and potentially years to come. This includes the continuation of the vaccination campaign for the general public and, if vaccinations are approved for children in the future, eventually for youths. This also includes monitoring the spread of COVID-19 variants, understanding the impact of these variants (especially on vaccination efforts), developing approaches to respond to those variants, and monitoring global COVID-19 trends to understand continued risks to the United States. Finally, the long-term health impacts of COVID-19 will continue to require a public health response, including medical services for individuals with “long COVID,” and research to understand how COVID-19 impacts future health needs and raises risks for the millions of Americans who have been infected.

²⁵ Centers for Disease Control and Prevention, COVID Data Tracker: COVID-19 Vaccinations in the United States, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last visited May 8, 2021).

Other areas of public health have also been negatively impacted by the COVID-19 pandemic. For example, in one survey in January 2021, over 40 percent of American adults reported symptoms of depression or anxiety, up from 11 percent in the first half of 2019.²⁶ The proportion of children’s emergency department visits related to mental health has also risen noticeably.²⁷ Similarly, rates of substance misuse and overdose deaths have spiked: preliminary data from the CDC show a nearly 30 percent increase in drug overdose mortality from September 2019 to September 2020.²⁸ Stay-at-home orders and other pandemic responses may have also reduced the ability of individuals affected by domestic violence to access services.²⁹ Finally, some preventative public health measures like childhood vaccinations have been deferred and potentially forgone.³⁰

While the pandemic affected communities across the country, it disproportionately impacted some demographic groups and exacerbated health inequities along racial, ethnic, and socioeconomic lines.³¹ The CDC has found that racial and ethnic minorities are at increased risk

²⁶ Panchal, *supra* note 4; Mark É. Czeisler et al., Mental Health, Substance Abuse, and Suicidal Ideation During COVID-19 Pandemic— United States, June 24-30 2020, *Morb. Mortal. Wkly. Rep.* 69(32):1049-57 (Aug. 14, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm>.

²⁷ Leeb, *supra* note 4.

²⁸ Centers for Disease Prevention and Control, National Center for Health Statistics, Provisional Drug Overdose Death Counts, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (last visited May 8, 2021).

²⁹ Megan L. Evans, et al., A Pandemic within a Pandemic – Intimate Partner Violence during Covid-19, *N. Engl. J. Med.* 383:2302-04 (Dec. 10, 2020), *available at* <https://www.nejm.org/doi/full/10.1056/NEJMp2024046>.

³⁰ Jeanne M. Santoli et al., Effects of the COVID-19 Pandemic on Routine Pediatric Vaccine Ordering and Administration – United States, *Morb. Mortal. Wkly. Rep.* 69(19):591-93 (May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e2.htm>; Marisa Langdon-Embry et al., Notes from the Field: Rebound in Routine Childhood Vaccine Administration Following Decline During the COVID-19 Pandemic – New York City, March 1-June 27, 2020, *Morb. Mortal. Wkly. Rep.* 69(30):999-1001 (Jul. 31 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6930a3.htm>.

³¹ Office of the White House, National Strategy for the COVID-19 Response and Pandemic Preparedness (Jan. 21, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf>.

for infection, hospitalization, and death from COVID-19, with Hispanic or Latino and Native American or Alaska Native patients at highest risk.³²

Similarly, low-income and socially vulnerable communities have seen the most severe health impacts. For example, counties with high poverty rates also have the highest rates of infections and deaths, with 223 deaths per 100,000 compared to the U.S. average of 175 deaths per 100,000, as of May 2021.³³ Counties with high social vulnerability, as measured by factors such as poverty and educational attainment, have also fared more poorly than the national average, with 211 deaths per 100,000 as of May 2021.³⁴ Over the last year, Native Americans have experienced more than one and a half times the rate of COVID-19 infections, more than triple the rate of hospitalizations, and more than double the death rate compared to White Americans.³⁵ Low-income and minority communities also exhibit higher rates of pre-existing conditions that may contribute to an increased risk of COVID-19 mortality.³⁶

In addition, individuals living in low-income communities may have had more limited ability to socially distance or to self-isolate when ill, resulting in faster spread of the virus, and

³² In a study of 13 states from October to December 2020, the CDC found that Hispanic or Latino and Native American or Alaska Native individuals were 1.7 times more likely to visit an emergency room for COVID-19 than White individuals, and Black individuals were 1.4 times more likely to do so than White individuals. *See Romano, supra* note 10.

³³ Centers for Disease Control and Prevention, COVID Data Tracker: Trends in COVID-19 Cases and Deaths in the United States, by County-level Population Factors, https://covid.cdc.gov/covid-data-tracker/#pop-factors_totaldeaths (last visited May 8, 2021).

³⁴ The CDC's Social Vulnerability Index includes fifteen variables measuring social vulnerability, including unemployment, poverty, education levels, single-parent households, disability status, non-English speaking households, crowded housing, and transportation access.

Centers for Disease Control and Prevention, COVID Data Tracker: Trends in COVID-19 Cases and Deaths in the United States, by Social Vulnerability Index, https://covid.cdc.gov/covid-data-tracker/#pop-factors_totaldeaths (last visited May 8, 2021).

³⁵ Centers for Disease Control and Prevention, Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last visited Apr. 26, 2021).

³⁶ *See, e.g.*, Centers for Disease Control and Prevention, Risk of Severe Illness or Death from COVID-19 (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-illness.html> (last visited Apr. 26, 2021).

were over-represented among essential workers, who faced greater risk of exposure.³⁷ Social distancing measures in response to the pandemic may have also exacerbated pre-existing public health challenges. For example, for children living in homes with lead paint, spending substantially more time at home raises the risk of developing elevated blood lead levels, while screenings for elevated blood lead levels declined during the pandemic.³⁸ The combination of these underlying social and health vulnerabilities may have contributed to more severe public health outcomes of the pandemic within these communities, resulting in an exacerbation of pre-existing disparities in health outcomes.³⁹

Eligible Public Health Uses. The Fiscal Recovery Funds provide resources to meet and address these emergent public health needs, including through measures to counter the spread of COVID-19, through the provision of care for those impacted by the virus, and through programs or services that address disparities in public health that have been exacerbated by the pandemic. To facilitate implementation and use of payments from the Fiscal Recovery Funds, the interim final rule identifies a non-exclusive list of eligible uses of funding to respond to the COVID-19 public health emergency. Eligible uses listed under this section build and expand upon permissible expenditures under the CRF, while recognizing the differences between the ARPA and CARES Act, and recognizing that the response to the COVID-19 public health emergency

³⁷ Milena Almagro et al., *Racial Disparities in Frontline Workers and Housing Crowding During COVID-19: Evidence from Geolocation Data* (Sept. 22, 2020), NYU Stern School of Business (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3695249; Grace McCormack et al., *Economic Vulnerability of Households with Essential Workers*, *JAMA* 324(4):388-90 (2020), available at <https://jamanetwork.com/journals/jama/fullarticle/2767630>.

³⁸ See, e.g., Joseph G. Courtney et al., *Decreases in Young Children Who Received Blood Lead Level Testing During COVID-19 – 34 Jurisdictions, January-May 2020*, *Morb. Mort. Wkly. Rep.* 70(5):155-61 (Feb. 5, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7005a2.htm>; Emily A. Benfer & Lindsay F. Wiley, *Health Justice Strategies to Combat COVID-19: Protecting Vulnerable Communities During a Pandemic*, *Health Affairs Blog* (Mar. 19, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200319.757883/full/>.

³⁹ See, e.g., Centers for Disease Control and Prevention, *supra* note 34; Benfer & Wiley, *supra* note 38; Nathaniel M. Lewis et al., *Disparities in COVID-19 Incidence, Hospitalizations, and Testing, by Area-Level Deprivation – Utah, March 3-July 9, 2020*, *Morb. Mort. Wkly. Rep.* 69(38):1369-73 (Sept. 25, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6938a4.htm>.

has changed and will continue to change over time. To assess whether additional uses would be eligible under this category, recipients should identify an effect of COVID-19 on public health, including either or both of immediate effects or effects that may manifest over months or years, and assess how the use would respond to or address the identified need.

The interim final rule identifies a non-exclusive list of uses that address the effects of the COVID-19 public health emergency, including:

- *COVID-19 Mitigation and Prevention.* A broad range of services and programming are needed to contain COVID-19. Mitigation and prevention efforts for COVID-19 include vaccination programs; medical care; testing; contact tracing; support for isolation or quarantine; supports for vulnerable populations to access medical or public health services; public health surveillance (e.g., monitoring case trends, genomic sequencing for variants); enforcement of public health orders; public communication efforts; enhancement to health care capacity, including through alternative care facilities; purchases of personal protective equipment; support for prevention, mitigation, or other services in congregate living facilities (e.g., nursing homes, incarceration settings, homeless shelters, group living facilities) and other key settings like schools;⁴⁰ ventilation improvements in congregate settings, health care settings, or other key locations; enhancement of public health data systems; and other public health responses.⁴¹ They

⁴⁰ This includes implementing mitigation strategies consistent with the Centers for Disease Control and Prevention's (CDC) Operational Strategy for K-12 Schools through Phased Prevention, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html>.

⁴¹ Many of these expenses were also eligible in the CRF. Generally, funding uses eligible under CRF as a response to the direct public health impacts of COVID-19 will continue to be eligible under the ARPA, including those not explicitly listed here (e.g., telemedicine costs, costs to facilitate compliance with public health orders, disinfection of public areas, facilitating distance learning, increased solid waste disposal needs related to PPE, paid sick and paid family and medical leave to public employees to enable compliance with COVID-19 public health precautions), with the following two exceptions: 1) the standard for eligibility of public health and safety payrolls has been updated (see section II.A of this SUPPLEMENTARY INFORMATION) and 2) expenses related to the issuance of tax-anticipation notes are no longer an eligible funding use (see discussion of debt service in section II.B of this SUPPLEMENTARY INFORMATION).

also include capital investments in public facilities to meet pandemic operational needs, such as physical plant improvements to public hospitals and health clinics or adaptations to public buildings to implement COVID-19 mitigation tactics. These COVID-19 prevention and mitigation programs and services, among others, were eligible expenditures under the CRF and are eligible uses under this category of eligible uses for the Fiscal Recovery Funds.⁴²

- *Medical Expenses.* The COVID-19 public health emergency continues to have devastating effects on public health; the United States continues to average hundreds of deaths per day and the spread of new COVID-19 variants has raised new risks and genomic surveillance needs.⁴³ Moreover, our understanding of the potentially serious and long-term effects of the virus is growing, including the potential for symptoms like shortness of breath to continue for weeks or months, for multi-organ impacts from COVID-19, or for post-intensive care syndrome.⁴⁴ State and local governments may need to continue to provide care and services to address these near- and longer-term needs.⁴⁵
- *Behavioral Health Care.* In addition, new or enhanced State, local, and Tribal government services may be needed to meet behavioral health needs exacerbated by the pandemic and respond to other public health impacts. These services include mental health treatment, substance misuse treatment, other behavioral health services, hotlines or warmlines, crisis intervention, overdose prevention, infectious disease prevention, and

⁴² Coronavirus Relief Fund for States, Tribal Governments, and Certain Eligible Local Governments, 86 FR 4182 (Jan. 15, 2021), *available at* https://home.treasury.gov/system/files/136/CRF-Guidance-Federal-Register_2021-00827.pdf.

⁴³ Centers for Disease Control and Prevention, *supra* note 24.

⁴⁴ Centers for Disease Control and Prevention, Long-Term Effects (Apr. 8, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> (last visited Apr. 26, 2021).

⁴⁵ Pursuant to 42 CFR 433.51 and 45 CFR 75.306, Fiscal Recovery Funds may not serve as a State or locality's contribution of certain Federal funds.

services or outreach to promote access to physical or behavioral health primary care and preventative medicine.

- *Public Health and Safety Staff.* Treasury recognizes that responding to the public health and negative economic impacts of the pandemic, including administering the services described above, requires a substantial commitment of State, local, and Tribal government human resources. As a result, the Fiscal Recovery Funds may be used for payroll and covered benefits expenses for public safety, public health, health care, human services, and similar employees, to the extent that their services are devoted to mitigating or responding to the COVID-19 public health emergency.⁴⁶ Accordingly, the Fiscal Recovery Funds may be used to support the payroll and covered benefits for the portion of the employee's time that is dedicated to responding to the COVID-19 public health emergency. For administrative convenience, the recipient may consider public health and safety employees to be entirely devoted to mitigating or responding to the COVID-19 public health emergency, and therefore fully covered, if the employee, or his or her operating unit or division, is primarily dedicated to responding to the COVID-19 public health emergency. Recipients may consider other presumptions for assessing the extent to which an employee, division, or operating unit is engaged in activities that respond to the COVID-19 public health emergency, provided that the recipient reassesses periodically and maintains records to support its assessment, such as payroll records, attestations from supervisors or staff, or regular work product or correspondence

⁴⁶ In general, if an employee's wages and salaries are an eligible use of Fiscal Recovery Funds, recipients may treat the employee's covered benefits as an eligible use of Fiscal Recovery Funds. For purposes of the Fiscal Recovery Funds, covered benefits include costs of all types of leave (vacation, family-related, sick, military, bereavement, sabbatical, jury duty), employee insurance (health, life, dental, vision), retirement (pensions, 401(k)), unemployment benefit plans (Federal and state), workers compensation insurance, and Federal Insurance Contributions Act (FICA) taxes (which includes Social Security and Medicare taxes).

demonstrating work on the COVID-19 response. Recipients need not routinely track staff hours.

- *Expenses to Improve the Design and Execution of Health and Public Health Programs.*

State, local, and Tribal governments may use payments from the Fiscal Recovery Funds to engage in planning and analysis in order to improve programs addressing the COVID-19 pandemic, including through use of targeted consumer outreach, improvements to data or technology infrastructure, impact evaluations, and data analysis.

Eligible Uses to Address Disparities in Public Health Outcomes. In addition, in recognition of the disproportionate impacts of the COVID-19 pandemic on health outcomes in low-income and Native American communities and the importance of mitigating these effects, the interim final rule identifies a broader range of services and programs that will be presumed to be responding to the public health emergency when provided in these communities. Specifically, Treasury will presume that certain types of services, outlined below, are eligible uses when provided in a Qualified Census Tract (QCT),⁴⁷ to families living in QCTs, or when these services are provided by Tribal governments.⁴⁸ Recipients may also provide these services to other populations, households, or geographic areas that are disproportionately impacted by the pandemic. In identifying these disproportionately-impacted communities, recipients should be able to support

⁴⁷ Qualified Census Tracts are a common, readily-accessible, and geographically granular method of identifying communities with a large proportion of low-income residents. Using an existing measure may speed implementation and decrease administrative burden, while identifying areas of need at a highly-localized level.

While QCTs are an effective tool generally, many tribal communities have households with a wide range of income levels due in part to non-tribal member, high income residents living in the community. Mixed income communities, with a significant share of tribal members at the lowest levels of income, are often not included as eligible QCTs yet tribal residents are experiencing disproportionate impacts due to the pandemic. Therefore, including all services provided by Tribal governments is a more effective means of ensuring that disproportionately impacted Tribal members can receive services.

⁴⁸ U.S. Department of Housing and Urban Development (HUD), Qualified Census Tracts and Difficult Development Areas, <https://www.huduser.gov/portal/datasets/qct.html> (last visited Apr. 26, 2021); U.S. Department of the Interior, Bureau of Indian Affairs, Indian Lands of Federally Recognized Tribes of the United States (June 2016), <https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/webteam/pdf/idc1-028635.pdf> (last visited Apr. 26, 2021).

their determination that the pandemic resulted in disproportionate public health or economic outcomes to the specific populations, households, or geographic areas to be served.

Given the exacerbation of health disparities during the pandemic and the role of pre-existing social vulnerabilities in driving these disparate outcomes, services to address health disparities are presumed to be responsive to the public health impacts of the pandemic. Specifically, recipients may use payments from the Fiscal Recovery Funds to facilitate access to resources that improve health outcomes, including services that connect residents with health care resources and public assistance programs and build healthier environments, such as:

- Funding community health workers to help community members access health services and services to address the social determinants of health;⁴⁹
- Funding public benefits navigators to assist community members with navigating and applying for available Federal, State, and local public benefits or services;
- Housing services to support healthy living environments and neighborhoods conducive to mental and physical wellness;
- Remediation of lead paint or other lead hazards to reduce risk of elevated blood lead levels among children; and
- Evidence-based community violence intervention programs to prevent violence and mitigate the increase in violence during the pandemic.⁵⁰

⁴⁹ The social determinants of health are the social and environmental conditions that affect health outcomes, specifically economic stability, health care access, social context, neighborhoods and built environment, and education access. *See, e.g.*, U.S. Department of Health and Human Services, Office of Disease Prevention and Health Promotion, Healthy People 2030: Social Determinants of Health, <https://health.gov/healthypeople/objectives-and-data/social-determinants-health> (last visited Apr. 26, 2021).

⁵⁰ National Commission on COVID-19 and Criminal Justice, Impact Report: COVID-19 and Crime (Jan. 31, 2021), <https://covid19.counciloncj.org/2021/01/31/impact-report-covid-19-and-crime-3/> (showing a spike in homicide and assaults); Brad Boesrup et al., Alarming Trends in US domestic violence during the COVID-19 pandemic, *Am. J. of Emerg. Med.* 38(12): 2753-55 (Dec. 1, 2020), *available at* [https://www.ajemjournal.com/article/S0735-6757\(20\)30307-7/fulltext](https://www.ajemjournal.com/article/S0735-6757(20)30307-7/fulltext) (showing a spike in domestic violence).

2. Responding to Negative Economic Impacts

Impacts on Households and Individuals. The public health emergency, including the necessary measures taken to protect public health, resulted in significant economic and financial hardship for many Americans. As businesses closed, consumers stayed home, schools shifted to remote education, and travel declined precipitously, over 20 million jobs were lost in March and April 2020.⁵¹ Although many have returned to work, as of April 2021, the economy remains 8.2 million jobs below its pre-pandemic peak,⁵² and more than 3 million workers have dropped out of the labor market altogether relative to February 2020.⁵³

Rates of unemployment are particularly severe among workers of color and workers with lower levels of educational attainment; for example, the overall unemployment rate in the United States was 6.1 percent in April 2021, but certain groups saw much higher rates: 9.7 percent for Black workers, 7.9 percent for Hispanic or Latino workers, and 9.3 percent for workers without a high school diploma.⁵⁴ Job losses have also been particularly steep among low wage workers, with these workers remaining furthest from recovery as of the end of 2020.⁵⁵ A severe

⁵¹ U.S. Bureau of Labor Statistics, All Employees, Total Nonfarm (PAYEMS), retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/PAYEMS> (last visited May 8, 2021).

⁵² *Id.*

⁵³ U.S. Bureau of Labor Statistics, Civilian Labor Force Level [CLF16OV], retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/CLF16OV> (last visited May 8, 2021).

⁵⁴ U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey: Employment status of the civilian population by sex and age (May 8 2021), <https://www.bls.gov/news.release/empsit.t01.htm> (last visited May 8, 2021); U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey: Employment status of the civilian noninstitutional population by race, Hispanic or Latino ethnicity, sex, and age (May 8, 2021), <https://www.bls.gov/web/empsit/cpseea04.htm> (last visited May 8, 2021); U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey: Employment status of the civilian noninstitutional population 25 years and over by educational attainment (May 8, 2021), <https://www.bls.gov/web/empsit/cpseea05.htm> (last visited May 8, 2021).

⁵⁵ Elise Gould & Jori Kandra, Wages grew in 2020 because the bottom fell out of the low-wage labor market, Economic Policy Institute (Feb. 24, 2021), <https://files.epi.org/pdf/219418.pdf>. *See also*, Michael Dalton et al., The K-Shaped Recovery: Examining the Diverging Fortunes of Workers in the Recovery from the COVID-19 Pandemic using Business and Household Survey Microdata, U.S. Bureau of Labor Statistics Working Paper Series (Feb. 2021), <https://www.bls.gov/osmr/research-papers/2021/pdf/ec210020.pdf>.

recession—and its concentrated impact among low-income workers—has amplified food and housing insecurity, with an estimated nearly 17 million adults living in households where there is sometimes or often not enough food to eat and an estimated 10.7 million adults living in households that were not current on rent.⁵⁶ Over the course of the pandemic, inequities also manifested along gender lines, as schools closed to in-person activities, leaving many working families without child care during the day.⁵⁷ Women of color have been hit especially hard: the labor force participation rate for Black women has fallen by 3.2 percentage points⁵⁸ during the pandemic as compared to 1.0 percentage points for Black men⁵⁹ and 2.0 percentage points for White women.⁶⁰

As the economy recovers, the effects of the pandemic-related recession may continue to impact households, including a risk of longer-term effects on earnings and economic potential. For example, unemployed workers, especially those who have experienced longer periods of unemployment, earn lower wages over the long term once rehired.⁶¹ In addition to the labor

⁵⁶ Center on Budget and Policy Priorities, Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> (last visited May 8, 2021).

⁵⁷ Women have carried a larger share of childcare responsibilities than men during the COVID-19 crisis. *See, e.g.*, Gema Zamarró & María J. Prados, Gender differences in couples' division of childcare, work and mental health during COVID-19, *Rev. Econ. Household* 19:11-40 (2021), *available at* <https://link.springer.com/article/10.1007/s11150-020-09534-7>; Titan Alon et al., The Impact of COVID-19 on Gender Equality, National Bureau of Economic Research Working Paper 26947 (April 2020), *available at* <https://www.nber.org/papers/w26947>.

⁵⁸ U.S. Bureau of Labor Statistics, Labor Force Participation Rate - 20 Yrs. & Over, Black or African American Women [LNS11300032], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/LNS11300032> (last visited May 8, 2021).

⁵⁹ U.S. Bureau of Labor Statistics, Labor Force Participation Rate - 20 Yrs. & Over, Black or African American Men [LNS11300031], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/LNS11300031> (last visited May 8, 2021).

⁶⁰ U.S. Bureau of Labor Statistics, Labor Force Participation Rate - 20 Yrs. & Over, White Women [LNS11300029], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/LNS11300029> (last visited May 8, 2021).

⁶¹ *See, e.g.*, Michael Greenstone & Adam Looney, Unemployment and Earnings Losses: A Look at Long-Term Impacts of the Great Recession on American Workers, Brookings Institution (Nov. 4, 2021), <https://www.brookings.edu/blog/jobs/2011/11/04/unemployment-and-earnings-losses-a-look-at-long-term-impacts-of-the-great-recession-on-american-workers/>.

market consequences for unemployed workers, recessions can also cause longer-term economic challenges through, among other factors, damaged consumer credit scores⁶² and reduced familial and childhood wellbeing.⁶³ These potential long-term economic consequences underscore the continued need for robust policy support.

Impacts on Businesses. The pandemic has also severely impacted many businesses, with small businesses hit especially hard. Small businesses make up nearly half of U.S. private-sector employment⁶⁴ and play a key role in supporting the overall economic recovery as they are responsible for two-thirds of net new jobs.⁶⁵ Since the beginning of the pandemic, however, 400,000 small businesses have closed, with many more at risk.⁶⁶ Sectors with a large share of small business employment have been among those with the most drastic drops in employment.⁶⁷ The negative outlook for small businesses has continued: as of April 2021, approximately 70 percent of small businesses reported that the pandemic has had a moderate or large negative effect on their business, and over a third expect that it will take over 6 months for their business to return to their normal level of operations.⁶⁸

⁶² Chi Chi Wu, Solving the Credit Conundrum: Helping Consumers' Credit Records Impaired by the Foreclosure Crisis and Great Recession (Dec. 2013), https://www.nclc.org/images/pdf/credit_reports/report-credit-conundrum-2013.pdf.

⁶³ Irwin Garfinkel, Sara McLanahan, Christopher Wimer, eds., *Children of the Great Recession*, Russell Sage Foundation (Aug. 2016), available at <https://www.russellsage.org/publications/children-great-recession>.

⁶⁴ Board of Governors of the Federal Reserve System, *supra* note 5.

⁶⁵ U.S. Small Business Administration, Office of Advocacy, Small Businesses Generate 44 Percent of U.S. Economic Activity (Jan. 30, 2019), <https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/>.

⁶⁶ Biden, *supra* note 6.

⁶⁷ Daniel Wilmoth, U.S. Small Business Administration Office of Advocacy, *The Effects of the COVID-19 Pandemic on Small Businesses*, Issue Brief No. 16 (Mar. 2021), available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/03/02112318/COVID-19-Impact-On-Small-Business.pdf>.

⁶⁸ U.S. Census Bureau, Small Business Pulse Survey, <https://portal.census.gov/pulse/data/> (last visited May 8, 2021).

This negative outlook is likely the result of many small businesses having faced periods of closure and having seen declining revenues as customers stayed home.⁶⁹ In general, small businesses can face greater hurdles in accessing credit,⁷⁰ and many small businesses were already financially fragile at the outset of the pandemic.⁷¹ Non-profits, which provide vital services to communities, have similarly faced economic and financial challenges due to the pandemic.⁷²

Impacts to State, Local, and Tribal Governments. State, local, and Tribal governments have felt substantial fiscal pressures. As noted above, State, local, and Tribal governments have faced significant revenue shortfalls and remain over 1 million jobs below their pre-pandemic staffing levels.⁷³ These reductions in staffing may undermine the ability to deliver services effectively, as well as add to the number of unemployed individuals in their jurisdictions.

Exacerbation of Pre-existing Disparities. The COVID-19 public health emergency may have lasting negative effects on economic outcomes, particularly in exacerbating disparities that existed prior to the pandemic.

The negative economic impacts of the COVID-19 pandemic are particularly pronounced in certain communities and families. Low- and moderate-income jobs make up a substantial

⁶⁹ Olivia S. Kim et al., Revenue Collapses and the Consumption of Small Business Owners in the Early Stages of the COVID-19 Pandemic (Nov. 2020), <https://www.nber.org/papers/w28151>.

⁷⁰ See e.g., Board of Governors of the Federal Reserve System, Report to Congress on the Availability of Credit to Small Businesses (Sept. 2017), available at <https://www.federalreserve.gov/publications/2017-september-availability-of-credit-to-small-businesses.htm>.

⁷¹ Alexander W. Bartik et al., The Impact of COVID-19 on small business outcomes and expectations, PNAS 117(30): 17656-66 (July 28, 2020), available at <https://www.pnas.org/content/117/30/17656>.

⁷² Federal Reserve Bank of San Francisco, Impacts of COVID-19 on Nonprofits in the Western United States (May 2020), <https://www.frbsf.org/community-development/files/impact-of-covid-nonprofits-serving-western-united-states.pdf>.

⁷³ Bureau of Labor Statistics, *supra* note 8; Elijah Moreno & Heather Sobrepna, Tribal entities remain resilient as COVID-19 batters their finances, Federal Reserve Bank of Minneapolis (Nov. 10, 2021), <https://www.minneapolisfed.org/article/2020/tribal-entities-remain-resilient-as-covid-19-batters-their-finances>.

portion of both total pandemic job losses,⁷⁴ and jobs that require in-person frontline work, which are exposed to greater risk of contracting COVID-19.⁷⁵ Both factors compound pre-existing vulnerabilities and the likelihood of food, housing, or other financial insecurity in low- and moderate-income families and, given the concentration of low- and moderate-income families within certain communities,⁷⁶ raise a substantial risk that the effects of the COVID-19 public health emergency will be amplified within these communities.

These compounding effect of recessions on concentrated poverty and the long-lasting nature of this effect were observed after the 2007-2009 recession, including a large increase in concentrated poverty with the number of people living in extremely poor neighborhoods more than doubling by 2010-2014 relative to 2000.⁷⁷ Concentrated poverty has a range of deleterious impacts, including additional burdens on families and reduced economic potential and social cohesion.⁷⁸ Given the disproportionate impact of COVID-19 on low-income households discussed above, there is a risk that the current pandemic-induced recession could further increase concentrated poverty and cause long-term damage to economic prospects in neighborhoods of concentrated poverty.

The negative economic impacts of COVID-19 also include significant impacts to children in disproportionately affected families and include impacts to education, health, and welfare, all

⁷⁴ Kim Parker et al., Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest, Pew Research Center (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>; Gould, *supra* note 55.

⁷⁵ See *infra* Section II.B of this Supplementary Information.

⁷⁶ Elizabeth Kneebone, The Changing geography of US poverty, Brookings Institution (Feb. 15, 2017), <https://www.brookings.edu/testimonies/the-changing-geography-of-us-poverty/>.

⁷⁷ Elizabeth Kneebone & Natalie Holmes, U.S. concentrated poverty in the wake of the Great Recession, Brookings Institution (Mar. 31, 2016), <https://www.brookings.edu/research/u-s-concentrated-poverty-in-the-wake-of-the-great-recession/>.

⁷⁸ David Erickson et al., The Enduring Challenge of Concentrated Poverty in America: Case Studies from Communities Across the U.S. (2008), available at https://www.frbsf.org/community-development/files/cp_fullreport.pdf.

of which contribute to long-term economic outcomes.⁷⁹ Many low-income and minority students, who were disproportionately served by remote or hybrid education during the pandemic, lacked the resources to participate fully in remote schooling or live in households without adults available throughout the day to assist with online coursework.⁸⁰ Given these trends, the pandemic may widen educational disparities and worsen outcomes for low-income students,⁸¹ an effect that would substantially impact their long-term economic outcomes. Increased economic strain or material hardship due to the pandemic could also have a long-term impact on health, educational, and economic outcomes of young children.⁸² Evidence suggests that adverse conditions in early childhood, including exposure to poverty, food insecurity, housing insecurity, or other economic hardships, are particularly impactful.⁸³

The pandemic's disproportionate economic impacts are also seen in Tribal communities across the country—for Tribal governments as well as families and businesses on and off Tribal

⁷⁹ Educational quality, as early as Kindergarten, has a long-term impact on children's public health and economic outcomes. *See, e.g.,* Tyler W. Watts et al., The Chicago School Readiness Project: Examining the long-term impacts of an early childhood intervention, PLoS ONE 13(7) (2018), *available at* <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0200144>; Opportunity Insights, How Can We Amplify Education as an Engine of Mobility? Using big data to help children get the most from school, <https://opportunityinsights.org/education/> (last visited Apr. 26, 2021); U.S. Department of Health and Human Services (HHS), Office of Disease Prevention and Health Promotion, Early Childhood Development and Education, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/early-childhood-development-and-education> (last visited Apr. 26, 2021).

⁸⁰ *See, e.g.,* Bacher-Hicks, *supra* note 14.

⁸¹ A Department of Education survey found that, as of February 2021, 42 percent of fourth grade students nationwide were offered only remote education, compared to 48 percent of economically disadvantaged students, 54 percent of Black students and 57 percent of Hispanic students. Large districts often disproportionately serve low-income students. *See* Institute of Education Sciences, Monthly School Survey Dashboard, <https://ies.ed.gov/schoolsurvey/> (last visited Apr. 26, 2021). In summer 2020, a review found that 74 percent of the largest 100 districts chose remote learning only. *See* Education Week, School Districts' Reopening Plans: A Snapshot (Jul. 15, 2020), <https://www.edweek.org/leadership/school-districts-reopening-plans-a-snapshot/2020/07> (last visited May 4, 2021).

⁸² HHS, *supra* note 79.

⁸³ Hirokazu Yoshikawa, Effects of the Global Coronavirus Disease – 2019 Pandemic on Early Childhood Development: Short- and Long-Term Risks and Mitigating Program and Policy Actions, *J. of Pediatrics* Vol. 223:188-93 (Aug. 1, 2020), *available at* [https://www.jpeds.com/article/S0022-3476\(20\)30606-5/abstract](https://www.jpeds.com/article/S0022-3476(20)30606-5/abstract).

lands. In the early months of the pandemic, Native American unemployment spiked to 26 percent and, while partially recovered, remains at nearly 11 percent.⁸⁴ Tribal enterprises are a significant source of revenue for Tribal governments to support the provision of government services. These enterprises, notably concentrated in gaming, tourism, and hospitality, frequently closed, significantly reducing both revenues to Tribal governments and employment. As a result, Tribal governments have reduced essential services to their citizens and communities.⁸⁵

Eligible Uses. Sections 602(c)(1)(A) and 603(c)(1)(A) permit use of payments from the Fiscal Recovery Funds to respond to the negative economic impacts of the COVID-19 public health emergency. Eligible uses that respond to the negative economic impacts of the public health emergency must be designed to address an economic harm resulting from or exacerbated by the public health emergency. In considering whether a program or service would be eligible under this category, the recipient should assess whether, and the extent to which, there has been an economic harm, such as loss of earnings or revenue, that resulted from the COVID-19 public health emergency and whether, and the extent to which, the use would respond or address this harm.⁸⁶ A recipient should first consider whether an economic harm exists and whether this harm was caused or made worse by the COVID-19 public health emergency. While economic impacts may either be immediate or delayed, assistance or aid to individuals or businesses that did not experience a negative economic impact from the public health emergency would not be an eligible use under this category.

⁸⁴ Based on calculations conducted by the Minneapolis Fed’s Center for Indian Country Development using Flood et al. (2020)’s Current Population Survey.” Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles and J. Robert Warren. Integrated Public Use Microdata Series, Current Population Survey: Version 8.0 [dataset]. Minneapolis, MN: IPUMS, 2020. <https://doi.org/10.18128/D030.V8.0>; *see also* Donna Feir & Charles Golding, Native Employment During COVID-19: Hard hit in April but Starting to Rebound? (Aug. 5, 2020), <https://www.minneapolisfed.org/article/2020/native-employment-during-covid-19-hit-hard-in-april-but-starting-to-rebound>.

⁸⁵ Moreno & Sobrepena, *supra* note 73.

⁸⁶ In some cases, a use may be permissible under another eligible use category even if it falls outside the scope of section (c)(1)(A) of the Act.

In addition, the eligible use must “respond to” the identified negative economic impact.

Responses must be related and reasonably proportional to the extent and type of harm experienced; uses that bear no relation or are grossly disproportionate to the type or extent of harm experienced would not be eligible uses. Where there has been a negative economic impact resulting from the public health emergency, States, local, and Tribal governments have broad latitude to choose whether and how to use the Fiscal Recovery Funds to respond to and address the negative economic impact. Sections 602(c)(1)(A) and 603(c)(1)(A) describe several types of uses that would be eligible under this category, including assistance to households, small businesses, and nonprofits and aid to impacted industries such as tourism, travel, and hospitality.

To facilitate implementation and use of payments from the Fiscal Recovery Funds, the interim final rule identifies a non-exclusive list of eligible uses of funding that respond to the negative economic impacts of the public health emergency. Consistent with the discussion above, the eligible uses listed below would respond directly to the economic or financial harms resulting from and or exacerbated by the public health emergency.

- *Assistance to Unemployed Workers.* This includes assistance to unemployed workers, including services like job training to accelerate rehiring of unemployed workers; these services may extend to workers unemployed due to the pandemic or the resulting recession, or who were already unemployed when the pandemic began and remain so due to the negative economic impacts of the pandemic.
- *State Unemployment Insurance Trust Funds.* Consistent with the approach taken in the CRF, recipients may make deposits into the state account of the Unemployment Trust Fund established under section 904 of the Social Security Act (42 U.S.C. 1104) up to the level needed to restore the pre-pandemic balances of such account as of January 27, 2020 or to pay back advances received under Title XII of the Social Security Act (42 U.S.C. 1321) for the payment of benefits between January 27, 2020 and [INSERT DATE OF PUBLICATION IN THE

FEDERAL REGISTER], given the close nexus between Unemployment Trust Fund costs, solvency of Unemployment Trust Fund systems, and pandemic economic impacts. Further, Unemployment Trust Fund deposits can decrease fiscal strain on Unemployment Insurance systems impacted by the pandemic. States facing a sharp increase in Unemployment Insurance claims during the pandemic may have drawn down positive Unemployment Trust Fund balances and, after exhausting the balance, required advances to fund continuing obligations to claimants. Because both of these impacts were driven directly by the need for assistance to unemployed workers during the pandemic, replenishing Unemployment Trust Funds up to the pre-pandemic level responds to the pandemic's negative economic impacts on unemployed workers.

- *Assistance to Households.* Assistance to households or populations facing negative economic impacts due to COVID-19 is also an eligible use. This includes: food assistance; rent, mortgage, or utility assistance; counseling and legal aid to prevent eviction or homelessness; cash assistance (discussed below); emergency assistance for burials, home repairs, weatherization, or other needs; internet access or digital literacy assistance; or job training to address negative economic or public health impacts experienced due to a worker's occupation or level of training. As discussed above, in considering whether a potential use is eligible under this category, a recipient must consider whether, and the extent to which, the household has experienced a negative economic impact from the pandemic. In assessing whether a household or population experienced economic harm as a result of the pandemic, a recipient may presume that a household or population that experienced unemployment or increased food or housing insecurity or is low- or moderate-income experienced negative economic impacts resulting from the pandemic. For example, a cash transfer program may focus on

unemployed workers or low- and moderate-income families, which have faced disproportionate economic harms due to the pandemic. Cash transfers must be reasonably proportional to the negative economic impact they are intended to address. Cash transfers grossly in excess of the amount needed to address the negative economic impact identified by the recipient would not be considered to be a response to the COVID-19 public health emergency or its negative impacts. In particular, when considering the appropriate size of permissible cash transfers made in response to the COVID-19 public health emergency, State, local and Tribal governments may consider and take guidance from the per person amounts previously provided by the Federal Government in response to the COVID-19 crisis. Cash transfers that are grossly in excess of such amounts would be outside the scope of eligible uses under sections 602(c)(1)(A) and 603(c)(1)(A) and could be subject to recoupment. In addition, a recipient could provide survivor's benefits to surviving family members of COVID-19 victims, or cash assistance to widows, widowers, and dependents of eligible COVID-19 victims.

- *Expenses to Improve Efficacy of Economic Relief Programs.* State, local, and Tribal governments may use payments from the Fiscal Recovery Funds to improve efficacy of programs addressing negative economic impacts, including through use of data analysis, targeted consumer outreach, improvements to data or technology infrastructure, and impact evaluations.
- *Small Businesses and Non-profits.* As discussed above, small businesses and non-profits faced significant challenges in covering payroll, mortgages or rent, and other operating costs as a result of the public health emergency and measures taken to contain the spread of the virus. State, local, and Tribal governments may provide assistance to small businesses to adopt safer operating procedures, weather

periods of closure, or mitigate financial hardship resulting from the COVID-19

public health emergency, including:

- Loans or grants to mitigate financial hardship such as declines in revenues or impacts of periods of business closure, for example by supporting payroll and benefits costs, costs to retain employees, mortgage, rent, or utilities costs, and other operating costs;
- Loans, grants, or in-kind assistance to implement COVID-19 prevention or mitigation tactics, such as physical plant changes to enable social distancing, enhanced cleaning efforts, barriers or partitions, or COVID-19 vaccination, testing, or contact tracing programs; and
- Technical assistance, counseling, or other services to assist with business planning needs.

As discussed above, these services should respond to the negative economic impacts of COVID-19. Recipients may consider additional criteria to target assistance to businesses in need, including small businesses. Such criteria may include businesses facing financial insecurity, substantial declines in gross receipts (e.g., comparable to measures used to assess eligibility for the Paycheck Protection Program), or other economic harm due to the pandemic, as well as businesses with less capacity to weather financial hardship, such as the smallest businesses, those with less access to credit, or those serving disadvantaged communities. Recipients should consider local economic conditions and business data when establishing such criteria.⁸⁷

⁸⁷ See Federal Reserve Bank of Cleveland, *An Uphill Battle: COVID-19's Outsized Toll on Minority-Owned Firms* (Oct. 8, 2020), <https://www.clevelandfed.org/newsroom-and-events/publications/community-development-briefs/db-20201008-misera-report.aspx> (discussing the impact of COVID-19 on minority owned businesses).

- *Rehiring State, Local, and Tribal Government Staff.* State, local, and Tribal governments continue to see pandemic impacts in overall staffing levels: State, local, and Tribal government employment remains more than 1 million jobs lower in April 2021 than prior to the pandemic.⁸⁸ Employment losses decrease a state or local government's ability to effectively administer services. Thus, the interim final rule includes as an eligible use payroll, covered benefits, and other costs associated with rehiring public sector staff, up to the pre-pandemic staffing level of the government.
- *Aid to Impacted Industries.* Sections 602(c)(1)(A) and 603(c)(1)(A) recognize that certain industries, such as tourism, travel, and hospitality, were disproportionately and negatively impacted by the COVID-19 public health emergency. Aid provided to tourism, travel, and hospitality industries should respond to the negative economic impacts of the pandemic on those and similarly impacted industries. For example, aid may include assistance to implement COVID-19 mitigation and infection prevention measures to enable safe resumption of tourism, travel, and hospitality services, for example, improvements to ventilation, physical barriers or partitions, signage to facilitate social distancing, provision of masks or personal protective equipment, or consultation with infection prevention professionals to develop safe reopening plans.

Aid may be considered responsive to the negative economic impacts of the pandemic if it supports businesses, attractions, business districts, and Tribal

⁸⁸ U.S. Bureau of Labor Statistics, All Employees, State Government [CES9092000001] and All Employees, Local Government [CES9093000001], retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/CES9092000001> and <https://fred.stlouisfed.org/series/CES9093000001> (last visited May 8, 2021).

development districts operating prior to the pandemic and affected by required closures and other efforts to contain the pandemic. For example, a recipient may provide aid to support safe reopening of businesses in the tourism, travel, and hospitality industries and to business districts that were closed during the COVID-19 public health emergency, as well as aid for a planned expansion or upgrade of tourism, travel, and hospitality facilities delayed due to the pandemic.

When considering providing aid to industries other than tourism, travel, and hospitality, recipients should consider the extent of the economic impact as compared to tourism, travel, and hospitality, the industries enumerated in the statute. For example, on net, the leisure and hospitality industry has experienced an approximately 24 percent decline in revenue and approximately 17 percent decline in employment nationwide due to the COVID-19 public health emergency.⁸⁹ Recipients should also consider whether impacts were due to the COVID-19 pandemic, as opposed to longer-term economic or industrial trends unrelated to the pandemic.

To facilitate transparency and accountability, the interim final rule requires that State, local, and Tribal governments publicly report assistance provided to private-sector businesses under this eligible use, including tourism, travel, hospitality, and other impacted industries, and its connection to negative economic impacts of the pandemic. Recipients also should maintain records to support their assessment of how businesses or business districts receiving

⁸⁹ From February 2020 to April 2021, employment in “Leisure and hospitality” has fallen by approximately 17 percent. *See* U.S. Bureau of Labor Statistics, All Employees, Leisure and Hospitality, retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/USLAH> (last visited May 8, 2021). From 2019Q4 to 2020Q4, gross output (e.g. revenue) in arts, entertainment, recreation, accommodation, and food services has fallen by approximately 24 percent. *See* Bureau of Economic Analysis, News Release: Gross Domestic Product (Third Estimate), Corporate Profits, and GDP by Industry, Fourth Quarter and Year 2020 (Mar. 25, 2021), Table 17, https://www.bea.gov/sites/default/files/2021-03/gdp4q20_3rd.pdf.

assistance were affected by the negative economic impacts of the pandemic and how the aid provided responds to these impacts.

As discussed above, economic disparities that existed prior to the COVID-19 public health emergency amplified the impact of the pandemic among low-income and minority groups. These families were more likely to face housing, food, and financial insecurity; are over-represented among low-wage workers; and many have seen their livelihoods deteriorate further during the pandemic and economic contraction. In recognition of the disproportionate negative economic impacts on certain communities and populations, the interim final rule identifies services and programs that will be presumed to be responding to the negative economic impacts of the COVID-19 public health emergency when provided in these communities.

Specifically, Treasury will presume that certain types of services, outlined below, are eligible uses when provided in a QCT, to families and individuals living in QCTs, or when these services are provided by Tribal governments.⁹⁰ Recipients may also provide these services to other populations, households, or geographic areas disproportionately impacted by the pandemic. In identifying these disproportionately impacted communities, recipients should be able to support their determination that the pandemic resulted in disproportionate public health or economic outcomes to the specific populations, households, or geographic areas to be served. The interim final rule identifies a non-exclusive list of uses that address the disproportionate negative economic effects of the COVID-19 public health emergency, including:

- *Building Stronger Communities through Investments in Housing and Neighborhoods.* The economic impacts of COVID-19 have likely been most acute in lower-income neighborhoods, including concentrated areas of high unemployment, limited economic

⁹⁰ HUD, *supra* note 48.

opportunity, and housing insecurity.⁹¹ Services in this category alleviate the immediate economic impacts of the COVID-19 pandemic on housing insecurity, while addressing conditions that contributed to poor public health and economic outcomes during the pandemic, namely concentrated areas with limited economic opportunity and inadequate or poor-quality housing.⁹² Eligible services include:

- Services to address homelessness such as supportive housing, and to improve access to stable, affordable housing among unhoused individuals;
 - Affordable housing development to increase supply of affordable and high-quality living units; and
 - Housing vouchers, residential counseling, or housing navigation assistance to facilitate household moves to neighborhoods with high levels of economic opportunity and mobility for low-income residents, to help residents increase their economic opportunity and reduce concentrated areas of low economic opportunity.⁹³
- *Addressing Educational Disparities.* As outlined above, school closures and the transition to remote education raised particular challenges for lower-income students, potentially exacerbating educational disparities, while increases in economic hardship among families could have long-lasting impacts on children’s educational and economic

⁹¹ Stuart M. Butler & Jonathan Grabinsky, Tackling the legacy of persistent urban inequality and concentrated poverty, Brookings Institution (Nov. 16, 2020), <https://www.brookings.edu/blog/up-front/2020/11/16/tackling-the-legacy-of-persistent-urban-inequality-and-concentrated-poverty/>.

⁹² U.S. Department of Health and Human Services (HHS), Office of Disease Prevention and Health Promotion, Quality of Housing, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/quality-of-housing#11> (last visited Apr. 26, 2021).

⁹³ The Opportunity Atlas, <https://www.opportunityatlas.org/> (last visited Apr. 26, 2021); Raj Chetty & Nathaniel Hendren, The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects, *Quarterly J. of Econ.* 133(3):1107-162 (2018), available at <https://opportunityinsights.org/paper/neighborhoodsi/>.

prospects. Services under this prong would enhance educational supports to help

mitigate impacts of the pandemic. Eligible services include:

- New, expanded, or enhanced early learning services, including pre-kindergarten, Head Start, or partnerships between pre-kindergarten programs and local education authorities, or administration of those services;
 - Providing assistance to high-poverty school districts to advance equitable funding across districts and geographies;
 - Evidence-based educational services and practices to address the academic needs of students, including tutoring, summer, afterschool, and other extended learning and enrichment programs; and
 - Evidence-based practices to address the social, emotional, and mental health needs of students;
- *Promoting Healthy Childhood Environments.* Children’s economic and family circumstances have a long-term impact on their future economic outcomes.⁹⁴ Increases in economic hardship, material insecurity, and parental stress and behavioral health challenges all raise the risk of long-term harms to today’s children due to the pandemic. Eligible services to address this challenge include:
- New or expanded high-quality childcare to provide safe and supportive care for children;
 - Home visiting programs to provide structured visits from health, parent educators, and social service professionals to pregnant women or families with young children to offer education and assistance navigating resources for economic support, health needs, or child development; and

⁹⁴ See supra notes 52 and 84.

- Enhanced services for child welfare-involved families and foster youth to provide support and training on child development, positive parenting, coping skills, or recovery for mental health and substance use challenges.

State, local, and Tribal governments are encouraged to use payments from the Fiscal Recovery Funds to respond to the direct and immediate needs of the pandemic and its negative economic impacts and, in particular, the needs of households and businesses that were disproportionately and negatively impacted by the public health emergency. As highlighted above, low-income communities and workers and people of color have faced more severe health and economic outcomes during the pandemic, with pre-existing social vulnerabilities like low-wage or insecure employment, concentrated neighborhoods with less economic opportunity, and pre-existing health disparities likely contributing to the magnified impact of the pandemic. The Fiscal Recovery Funds provide resources to not only respond to the immediate harms of the pandemic but also to mitigate its longer-term impact in compounding the systemic public health and economic challenges of disproportionately impacted populations. Treasury encourages recipients to consider funding uses that foster a strong, inclusive, and equitable recovery, especially uses with long-term benefits for health and economic outcomes.

Uses Outside the Scope of this Category. Certain uses would not be within the scope of this eligible use category, although may be eligible under other eligible use categories. A general infrastructure project, for example, typically would not be included unless the project responded to a specific pandemic public health need (e.g., investments in facilities for the delivery of vaccines) or a specific negative economic impact like those described above (e.g., affordable housing in a QCT). The ARPA explicitly includes infrastructure if it is “necessary” and in water, sewer, or broadband. *See* Section II.D of this Supplementary Information. State, local, and Tribal governments also may use the Fiscal Recovery Funds under sections 602(c)(1)(C) or 603(c)(1)(C) to provide “government services” broadly to the extent of their reduction in revenue. *See* Section II.C of this Supplementary Information.

This category of eligible uses also would not include contributions to rainy day funds, financial reserves, or similar funds. Resources made available under this eligible use category are intended to help meet pandemic response needs and provide relief for households and businesses facing near- and long-term negative economic impacts. Contributions to rainy day funds and similar financial reserves would not address these needs or respond to the COVID-19 public health emergency but would rather constitute savings for future spending needs. Similarly, this eligible use category would not include payment of interest or principal on outstanding debt instruments, including, for example, short-term revenue or tax anticipation notes, or other debt service costs. As discussed below, payments from the Fiscal Recovery Funds are intended to be used prospectively and the interim final rule precludes use of these funds to cover the costs of debt incurred prior to March 3, 2021. Fees or issuance costs associated with the issuance of new debt would also not be covered using payments from the Fiscal Recovery Funds because such costs would not themselves have been incurred to address the needs of pandemic response or its negative economic impacts. The purpose of the Fiscal Recovery Funds is to provide fiscal relief that will permit State, local, and Tribal governments to continue to respond to the COVID-19 public health emergency.

For the same reasons, this category of eligible uses would not include satisfaction of any obligation arising under or pursuant to a settlement agreement, judgment, consent decree, or judicially confirmed debt restructuring plan in a judicial, administrative, or regulatory proceeding, except to the extent the judgment or settlement requires the provision of services that would respond to the COVID-19 public health emergency. That is, satisfaction of a settlement or judgment would not itself respond to COVID-19 with respect to the public health emergency or its negative economic impacts, unless the settlement requires the provision of services or aid that did directly respond to these needs, as described above.

In addition, as described in Section V.III of this SUPPLEMENTARY INFORMATION, Treasury will establish reporting and record keeping requirements for uses within this category, including enhanced reporting requirements for certain types of uses.

Question 1: Are there other types of services or costs that Treasury should consider as eligible uses to respond to the public health impacts of COVID-19? Describe how these respond to the COVID-19 public health emergency.

Question 2: The interim final rule permits coverage of payroll and benefits costs of public health and safety staff primarily dedicated to COVID-19 response, as well as rehiring of public sector staff up to pre-pandemic levels. For how long should these measures remain in place? What other measures or presumptions might Treasury consider to assess the extent to which public sector staff are engaged in COVID-19 response, and therefore reimbursable, in an easily-administrable manner?

Question 3: The interim final rule permits rehiring of public sector staff up to the government's pre-pandemic staffing level, which is measured based on employment as of January 27, 2020. Does this approach adequately measure the pre-pandemic staffing level in a manner that is both accurate and easily administrable? Why or why not?

Question 4: The interim final rule permits deposits to Unemployment Insurance Trust Funds, or using funds to pay back advances, up to the pre-pandemic balance. What, if any, conditions should be considered to ensure that funds repair economic impacts of the pandemic and strengthen unemployment insurance systems?

Question 5: Are there other types of services or costs that Treasury should consider as eligible uses to respond to the negative economic impacts of COVID-19? Describe how these respond to the COVID-19 public health emergency.

Question 6: What other measures, presumptions, or considerations could be used to assess "impacted industries" affected by the COVID-19 public health emergency?

Question 7: What are the advantages and disadvantages of using Qualified Census Tracts and services provided by Tribal governments to delineate where a broader range of eligible uses are presumed to be responsive to the public health and economic impacts of COVID-19? What other measures might Treasury consider? Are there other populations or geographic areas that were disproportionately impacted by the pandemic that should be explicitly included?

Question 8: Are there other services or costs that Treasury should consider as eligible uses to respond to the disproportionate impacts of COVID-19 on low-income populations and communities? Describe how these respond to the COVID-19 public health emergency or its negative economic impacts, including its exacerbation of pre-existing challenges in these areas.

Question 9: The interim final rule includes eligible uses to support affordable housing and stronger neighborhoods in disproportionately-impacted communities. Discuss the advantages and disadvantages of explicitly including other uses to support affordable housing and stronger neighborhoods, including rehabilitation of blighted properties or demolition of abandoned or vacant properties. In what ways does, or does not, this potential use address public health or economic impacts of the pandemic? What considerations, if any, could support use of Fiscal Recovery Funds in ways that do not result in resident displacement or loss of affordable housing units?

B. Premium Pay

Fiscal Recovery Funds payments may be used by recipients to provide premium pay to eligible workers performing essential work during the COVID-19 public health emergency or to provide grants to third-party employers with eligible workers performing essential work.⁹⁵ These are workers who have been and continue to be relied on to maintain continuity of operations of essential critical infrastructure sectors, including those who are critical to protecting the health and wellbeing of their communities.

⁹⁵ Sections 602(c)(1)(B), 603(c)(1)(B) of the Act.

Since the start of the COVID-19 public health emergency in January 2020, essential workers have put their physical wellbeing at risk to meet the daily needs of their communities and to provide care for others. In the course of this work, many essential workers have contracted or died of COVID-19.⁹⁶ Several examples reflect the severity of the health impacts for essential workers. Meat processing plants became “hotspots” for transmission, with 700 new cases reported at a single plant on a single day in May 2020.⁹⁷ In New York City, 120 employees of the Metropolitan Transit Authority were estimated to have died due to COVID-19 by mid-May 2020, with nearly 4,000 testing positive for the virus.⁹⁸ Furthermore, many essential workers are people of color or low-wage workers.⁹⁹ These workers, in particular, have borne a disproportionate share of the health and economic impacts of the pandemic. Such workers include:

- Staff at nursing homes, hospitals, and home care settings;
- Workers at farms, food production facilities, grocery stores, and restaurants;
- Janitors and sanitation workers;
- Truck drivers, transit staff, and warehouse workers;
- Public health and safety staff;

⁹⁶ See, e.g., Centers for Disease Control and Prevention, COVID Data Tracker: Cases & Death among Healthcare Personnel, <https://covid.cdc.gov/covid-data-tracker/#health-care-personnel> (last visited May 4, 2021); Centers for Disease Control and Prevention, COVID Data Tracker: Confirmed COVID-19 Cases and Deaths among Staff and Rate per 1,000 Resident-Weeks in Nursing Homes, by Week – United States, <https://covid.cdc.gov/covid-data-tracker/#nursing-home-staff> (last visited May 4, 2021).

⁹⁷ See, e.g., The Lancet, The plight of essential workers during the COVID-19 pandemic, Vol. 395, Issue 10237:1587 (May 23, 2020), available at <https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2820%2931200-9/fulltext>.

⁹⁸ *Id.*

⁹⁹ Joanna Gaitens et al., Covid-19 and essential workers: A narrative review of health outcomes and moral injury, *Int'l J. of Env'tl. Research and Pub. Health* 18(4):1446 (Feb. 4, 2021), available at <https://pubmed.ncbi.nlm.nih.gov/33557075/>; Tiana N. Rogers et al., Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States, *World Med. & Health policy* 12(3):311-27 (Aug. 5, 2020), available at <https://onlinelibrary.wiley.com/doi/full/10.1002/wmh3.358> (finding that vulnerability to coronavirus exposure was increased among non-Hispanic blacks, who disproportionately occupied the top nine essential occupations).

- Childcare workers, educators, and other school staff; and
- Social service and human services staff.

During the public health emergency, employers' policies on COVID-19-related hazard pay have varied widely, with many essential workers not yet compensated for the heightened risks they have faced and continue to face.¹⁰⁰ Many of these workers earn lower wages on average and live in socioeconomically vulnerable communities as compared to the general population.¹⁰¹ A recent study found that 25 percent of essential workers were estimated to have low household income, with 13 percent in high-risk households.¹⁰² The low pay of many essential workers makes them less able to cope with the financial consequences of the pandemic or their work-related health risks, including working hours lost due to sickness or disruptions to childcare and other daily routines, or the likelihood of COVID-19 spread in their households or communities. Thus, the threats and costs involved with maintaining the ongoing operation of vital facilities and services have been, and continue to be, borne by those that are often the most vulnerable to the pandemic. The added health risk to essential workers is one prominent way in which the pandemic has amplified pre-existing socioeconomic inequities.

The Fiscal Recovery Funds will help respond to the needs of essential workers by allowing recipients to remunerate essential workers for the elevated health risks they have faced and continue to face during the public health emergency. To ensure that premium pay is targeted to workers that faced or face heightened risks due to the character of their work, the interim final rule defines essential work as work involving regular in-person interactions or regular physical handling of items that were also handled by others. A worker would not be engaged in essential work and, accordingly may not receive premium pay, for telework performed from a residence.

¹⁰⁰ Economic Policy Institute, Only 30% of those working outside their home are receiving hazard pay (June 16, 2020), <https://www.epi.org/press/only-30-of-those-working-outside-their-home-are-receiving-hazard-pay-black-and-hispanic-workers-are-most-concerned-about-bringing-the-coronavirus-home/>.

¹⁰¹ McCormack, *supra* note 37.

¹⁰² *Id.*

Sections 602(g)(2) and 603(g)(2) define eligible worker to mean “those workers needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as each Governor of a State or territory, or each Tribal government, may designate as critical to protect the health and well-being of the residents of their State, territory, or Tribal government.”¹⁰³ The rule incorporates this definition and provides a list of industries recognized as essential critical infrastructure sectors.¹⁰⁴ These sectors include healthcare, public health and safety, childcare, education, sanitation, transportation, and food production and services, among others as noted above. As provided under sections 602(g)(2) and 603(g)(2), the chief executive of each recipient has discretion to add additional sectors to this list, so long as additional sectors are deemed critical to protect the health and well-being of residents.

In providing premium pay to essential workers or grants to eligible employers, a recipient must consider whether the pay or grant would “respond to” to the worker or workers performing essential work. Premium pay or grants provided under this section respond to workers performing essential work if it addresses the heightened risk to workers who must be physically present at a jobsite and, for many of whom, the costs associated with illness were hardest to bear financially. Many of the workers performing critical essential services are low- or moderate-income workers, such as those described above. The ARPA recognizes this by defining premium pay to mean an amount up to \$13 per hour in addition to wages or remuneration the worker otherwise receives and in an aggregate amount not to exceed \$25,000 per eligible worker. To ensure the provision is implemented in a manner that compensates these workers, the interim final rule provides that any premium pay or grants provided using the Fiscal Recovery Funds should prioritize compensation of those lower income eligible workers that perform essential work.

¹⁰³ Sections 602(g)(2), 603(g)(2) of the Act.

¹⁰⁴ The list of critical infrastructure sectors provided in the interim final rule is based on the list of essential workers under The Heroes Act, H.R. 6800, 116th Cong. (2020).

As such, providing premium pay to eligible workers responds to such workers by helping address the disparity between the critical services and risks taken by essential workers and the relatively low compensation they tend to receive in exchange. If premium pay would increase a worker's total pay above 150 percent of their residing state's average annual wage for all occupations, as defined by the Bureau of Labor Statistics' Occupational Employment and Wage Statistics, or their residing county's average annual wage, as defined by the Bureau of Labor Statistics' Occupational Employment and Wage Statistics, whichever is higher, on an annual basis, the State, local, or Tribal government must provide Treasury and make publicly available, whether for themselves or on behalf of a grantee, a written justification of how the premium pay or grant is responsive to workers performing essential worker during the public health emergency.¹⁰⁵

The threshold of 150 percent for requiring additional written justification is based on an analysis of the distribution of labor income for a sample of 20 occupations that generally correspond to the essential workers as defined in the interim final rule.¹⁰⁶ For these occupations, labor income for the vast majority of workers was under 150 percent of average annual labor income across all occupations. Treasury anticipates that the threshold of 150 percent of the annual average wage will be greater than the annual average wage of the vast majority of eligible workers performing essential work. These enhanced reporting requirements help to ensure grants are directed to essential workers in critical infrastructure sectors and responsive to the impacts of the pandemic observed among essential workers, namely the mis-alignment between

¹⁰⁵ County median annual wage is taken to be that of the metropolitan or nonmetropolitan area that includes the county. See U.S. Bureau of Labor Statistics, State Occupational Employment and Wage Estimates, <https://www.bls.gov/oes/current/oescrest.htm> (last visited May 1, 2021); U.S. Bureau of Labor Statistics, May 2020 Metropolitan and Nonmetropolitan Area Estimates listed by county or town, https://www.bls.gov/oes/current/county_links.htm (last visited May 1, 2021).

¹⁰⁶ Treasury performed this analysis with data from the U.S. Census Bureau's 2019 Annual Social and Economic Supplement. In determining which occupations to include in this analysis, Treasury excluded management and supervisory positions, as such positions may not necessarily involve regular in-person interactions or physical handling of items to the same extent as non-managerial positions.

health risks and compensation. Enhanced reporting also provides transparency to the public.

Finally, using a localized measure reflects differences in wages and cost of living across the country, making this standard administrable and reflective of essential worker incomes across a diverse range of geographic areas.

Furthermore, because premium pay is intended to compensate essential workers for heightened risk due to COVID-19, it must be entirely additive to a worker's regular rate of wages and other remuneration and may not be used to reduce or substitute for a worker's normal earnings. The definition of premium pay also clarifies that premium pay may be provided retrospectively for work performed at any time since the start of the COVID-19 public health emergency, where those workers have yet to be compensated adequately for work previously performed.¹⁰⁷ Treasury encourages recipients to prioritize providing retrospective premium pay where possible, recognizing that many essential workers have not yet received additional compensation for work conducted over the course of many months. Essential workers who have already earned premium pay for essential work performed during the COVID-19 public health emergency remain eligible for additional payments, and an essential worker may receive both retrospective premium pay for prior work as well as prospective premium pay for current or ongoing work.

To ensure any grants respond to the needs of essential workers and are made in a fair and transparent manner, the rule imposes some additional reporting requirements for grants to third-party employers, including the public disclosure of grants provided. *See* Section VIII of this SUPPLEMENTARY INFORMATION, discussing reporting requirements. In responding to the needs of essential workers, a grant to an employer may provide premium pay to eligible workers performing essential work, as these terms are defined in the interim final rule and discussed

¹⁰⁷ However, such compensation must be "in addition to" remuneration or wages already received. That is, employers may not reduce such workers' current pay and use Fiscal Recovery Funds to compensate themselves for premium pay previously provided to the worker.

above. A grant provided to an employer may also be for essential work performed by eligible workers pursuant to a contract. For example, if a municipality contracts with a third party to perform sanitation work, the third-party contractor could be eligible to receive a grant to provide premium pay for these eligible workers.

Question 10: Are there additional sectors beyond those listed in the interim final rule that should be considered essential critical infrastructure sectors?

Question 11: What, if any, additional criteria should Treasury consider to ensure that premium pay responds to essential workers?

Question 12: What consideration, if any, should be given to the criteria on salary threshold, including measure and level, for requiring written justification?

C. Revenue Loss

Recipients may use payments from the Fiscal Recovery Funds for the provision of government services to the extent of the reduction in revenue experienced due to the COVID-19 public health emergency.¹⁰⁸ Pursuant to sections 602(c)(1)(C) and 603(c)(1)(C) of the Act, a recipient's reduction in revenue is measured relative to the revenue collected in the most recent full fiscal year prior to the emergency.

Many State, local, and Tribal governments are experiencing significant budget shortfalls, which can have a devastating impact on communities. State government tax revenue from major sources were down 4.3 percent in the six months ended September 2020, relative to the same period 2019.¹⁰⁹ At the local level, nearly 90 percent of cities have reported being less able to meet the fiscal needs of their communities and, on average, cities expect a double-digit decline in

¹⁰⁸ ARPA, *supra* note 16.

¹⁰⁹ Major sources include personal income tax, corporate income tax, sales tax, and property tax. *See* Lucy Dadayan., States Reported Revenue Growth in July - September Quarter, Reflecting Revenue Shifts from the Prior Quarter, State Tax and Econ. Rev. (Q. 3, 2020), *available at* https://www.urban.org/sites/default/files/publication/103938/state-tax-and-economic-review-2020-q3_0.pdf

general fund revenues in their fiscal year 2021.¹¹⁰ Similarly, surveys of Tribal governments and Tribal enterprises found majorities of respondents reporting substantial cost increases and revenue decreases, with Tribal governments reporting reductions in healthcare, housing, social services, and economic development activities as a result of reduced revenues.¹¹¹ These budget shortfalls are particularly problematic in the current environment, as State, local, and Tribal governments work to mitigate and contain the COVID-19 pandemic and help citizens weather the economic downturn.

Further, State, local, and Tribal government budgets affect the broader economic recovery. During the period following the 2007-2009 recession, State and local government budget pressures led to fiscal austerity that was a significant drag on the overall economic recovery.¹¹² Inflation-adjusted State and local government revenue did not return to the previous peak until 2013,¹¹³ while State, local, and Tribal government employment did not recover to its prior peak for over a decade, until August 2019 – just a few months before the COVID-19 public health emergency began.¹¹⁴

Sections 602(c)(1)(C) and 603(c)(1)(C) of the Act allow recipients facing budget shortfalls to use payments from the Fiscal Recovery Funds to avoid cuts to government services

¹¹⁰ National League of Cities, *City Fiscal Conditions (2020)*, available at https://www.nlc.org/wp-content/uploads/2020/08/City_Fiscal_Conditions_2020_FINAL.pdf

¹¹¹ Surveys conducted by the Center for Indian Country Development at the Federal Reserve Bank of Minneapolis in March, April, and September 2020. See Moreno & Sobrepena, *supra* note 73.

¹¹² See, e.g., Fitzpatrick, Haughwout & Setren, *Fiscal Drag from the State and Local Sector?*, Liberty Street Economics Blog, Federal Reserve Bank of New York (June 27, 2012), <https://www.libertystreeteconomics.newyorkfed.org/2012/06/fiscal-drag-from-the-state-and-local-sector.html>; Jiri Jonas, *Great Recession and Fiscal Squeeze at U.S. Subnational Government Level*, IMF Working Paper 12/184, (July 2012), available at <https://www.imf.org/external/pubs/ft/wp/2012/wp12184.pdf>; Gordon, *supra* note 9.

¹¹³ State and local government general revenue from own sources, adjusted for inflation using the GDP price index. U.S. Census Bureau, *Annual Survey of State Government Finances* and U.S. Bureau of Economic Analysis, *National Income and Product Accounts*,

¹¹⁴ U.S. Bureau of Labor Statistics, *All Employees, State Government [CES9092000001]* and *All Employees, Local Government [CES9093000001]*, retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/CES9092000001> and <https://fred.stlouisfed.org/series/CES9093000001> (last visited Apr. 27, 2021).

and, thus, enable State, local, and Tribal governments to continue to provide valuable services and ensure that fiscal austerity measures do not hamper the broader economic recovery. The interim final rule implements these provisions by establishing a definition of “general revenue” for purposes of calculating a loss in revenue and by providing a methodology for calculating revenue lost due to the COVID-19 public health emergency.

General Revenue. The interim final rule adopts a definition of “general revenue” based largely on the components reported under “General Revenue from Own Sources” in the Census Bureau’s Annual Survey of State and Local Government Finances, and for purposes of this interim final rule, helps to ensure that the components of general revenue would be calculated in a consistent manner.¹¹⁵ By relying on a methodology that is both familiar and comprehensive, this approach minimizes burden to recipients and provides consistency in the measurement of general revenue across a diverse set of recipients.

The interim final rule defines the term “general revenue” to include revenues collected by a recipient and generated from its underlying economy and would capture a range of different types of tax revenues, as well as other types of revenue that are available to support government services.¹¹⁶ In calculating revenue, recipients should sum across all revenue streams covered as general revenue. This approach minimizes the administrative burden for recipients, provides for greater consistency across recipients, and presents a more accurate representation of the overall impact of the COVID-19 public health emergency on a recipient’s revenue, rather than relying

¹¹⁵ U.S. Census Bureau, Annual Survey of State and Local Government Finances, <https://www.census.gov/programs-surveys/gov-finances.html> (last visited Apr. 30, 2021).

¹¹⁶ The interim final rule would define tax revenue in a manner consistent with the Census Bureau’s definition of tax revenue, with certain changes (i.e., inclusion of revenue from liquor stores and certain intergovernmental transfers). Current charges are defined as “charges imposed for providing current services or for the sale of products in connection with general government activities.” It includes revenues such as public education institution, public hospital, and toll revenues. Miscellaneous general revenue comprises of all other general revenue of governments from their own sources (i.e., other than liquor store, utility, and insurance trust revenue), including rents, royalties, lottery proceeds, and fines.

on financial reporting prepared by each recipient, which vary in methodology used and which generally aggregates revenue by purpose rather than by source.¹¹⁷

Consistent with the Census Bureau’s definition of “general revenue from own sources,” the definition of general revenue in the interim final rule would exclude refunds and other correcting transactions, proceeds from issuance of debt or the sale of investments, and agency or private trust transactions. The definition of general revenue also would exclude revenue generated by utilities and insurance trusts. In this way, the definition of general revenue focuses on sources that are generated from economic activity and are available to fund government services, rather than a fund or administrative unit established to account for and control a particular activity.¹¹⁸ For example, public utilities typically require financial support from the State, local, or Tribal government, rather than providing revenue to such government, and any revenue that is generated by public utilities typically is used to support the public utility’s continued operation, rather than being used as a source of revenue to support government services generally.

The definition of general revenue would include all revenue from Tribal enterprises, as this revenue is generated from economic activity and is available to fund government services. Tribes are not able to generate revenue through taxes in the same manner as State and local governments and, as a result, Tribal enterprises are critical sources of revenue for Tribal governments that enable Tribal governments to provide a range of services, including elder care, health clinics, wastewater management, and forestry.

¹¹⁷ Fund-oriented reporting, such as what is used under the Governmental Accounting Standards Board (GASB), focuses on the types of uses and activities funded by the revenue, as opposed to the economic activity from which the revenue is sourced. *See* Governmental Accounting Standards Series, Statement No. 54 of the Governmental Accounting Standards Board: Fund Balance Reporting and Governmental Fund Type Definitions, No. 287-B (Feb. 2009).

¹¹⁸ *Supra* note 116.

Finally, the term “general revenue” includes intergovernmental transfers between State and local governments, but excludes intergovernmental transfers from the Federal Government, including Federal transfers made via a State to a local government pursuant to the CRF or as part of the Fiscal Recovery Funds. States and local governments often share or collect revenue on behalf of one another, which results in intergovernmental transfers. When attributing revenue to a unit of government, the Census Bureau’s methodology considers which unit of government imposes, collects, and retains the revenue and assigns the revenue to the unit of government that meets at least two of those three factors.¹¹⁹ For purposes of measuring loss in general revenue due to the COVID-19 public health emergency and to better allow continued provision of government services, the retention and ability to use the revenue is a more critical factor. Accordingly, and to better measure the funds available for the provision of government services, the definition of general revenue would include intergovernmental transfers from States or local governments other than funds transferred pursuant to ARPA, CRF, or another Federal program. This formulation recognizes the importance of State transfers for local government revenue.¹²⁰

Calculation of Loss. In general, recipients will compute the extent of the reduction in revenue by comparing actual revenue to a counterfactual trend representing what could have been expected to occur in the absence of the pandemic. This approach measures losses in revenue relative to the most recent fiscal year prior to the COVID-19 public health emergency by using the most recent pre-pandemic fiscal year as the starting point for estimates of revenue growth absent the pandemic. In other words, the counterfactual trend starts with the last full fiscal year prior to the COVID-19 public health emergency and then assumes growth at a constant rate in the subsequent years. Because recipients can estimate the revenue shortfall at

¹¹⁹ U.S. Census Bureau, Government Finance and Employment Classification Manual (Dec. 2000), <https://www2.census.gov/govs/class/classfull.pdf>

¹²⁰ For example, in 2018, state transfers to localities accounted for approximately 27 percent of local revenues. U.S. Census Bureau, Annual Survey of State and Local Government Finances, Table 1 (2018), <https://www.census.gov/data/datasets/2018/econ/local/public-use-datasets.html>.

multiple points in time throughout the covered period as revenue is collected, this approach accounts for variation across recipients in the timing of pandemic impacts.¹²¹ Although revenue may decline for reasons unrelated to the COVID-19 public health emergency, to minimize the administrative burden on recipients and taking into consideration the devastating effects of the COVID-19 public health emergency, any diminution in actual revenues relative to the counterfactual pre-pandemic trend would be presumed to have been due to the COVID-19 public health emergency.

For purposes of measuring revenue growth in the counterfactual trend, recipients may use a *growth adjustment* of either 4.1 percent per year or the recipient's average annual revenue growth over the three full fiscal years prior to the COVID-19 public health emergency, whichever is higher. The option of 4.1 percent represents the average annual growth across all State and local government "General Revenue from Own Sources" in the most recent three years of available data.¹²² This approach provides recipients with a standardized growth adjustment when calculating the counterfactual revenue trend and thus minimizes administrative burden, while not disadvantaging recipients with revenue growth that exceeded the national average prior to the COVID-19 public health emergency by permitting these recipients to use their own revenue growth rate over the preceding three years.

¹²¹ For example, following the 2007-09 recession, local government property tax collections did not begin to decline until 2011, suggesting that property tax collection declines can lag downturns. *See* U.S. Bureau of Economic Analysis, Personal current taxes: State and local: Property taxes [S210401A027NBEA], retrieved from Federal Reserve Economic Data, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/graph/?g=r3YI> (last visited Apr. 22, 2021). Estimating the reduction in revenue at points throughout the covered period will allow for this type of lagged effect to be taken into account during the covered period.

¹²² Together with revenue from liquor stores from 2015 to 2018. This estimate does not include any intergovernmental transfers. A recipient using the three-year average to calculate their growth adjustment must be based on the definition of general revenue, including treatment of intergovernmental transfers. 2015 – 2018 represents the most recent available data. *See* U.S. Census Bureau, State & Local Government Finance Historical Datasets and Tables (2018), <https://www.census.gov/programs-surveys/gov-finances/data/datasets.html>.

Recipients should calculate the extent of the reduction in revenue as of four points in time: December 31, 2020; December 31, 2021; December 31, 2022; and December 31, 2023.

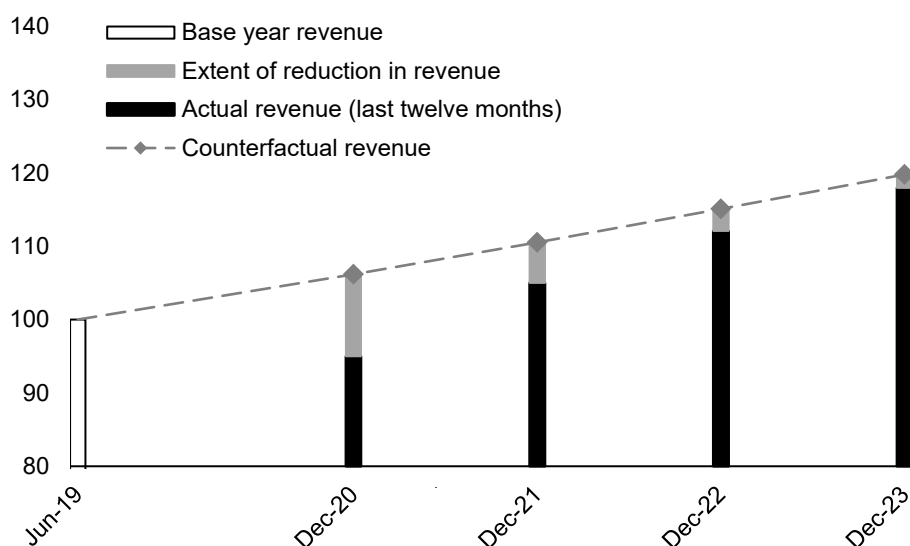
To calculate the extent of the reduction in revenue at each of these dates, recipients should follow a four-step process:

- Step 1: Identify revenues collected in the most recent full fiscal year prior to the public health emergency (i.e., last full fiscal year before January 27, 2020), called the *base year revenue*.
- Step 2: Estimate *counterfactual revenue*, which is equal to $base\ year\ revenue * [(1 + growth\ adjustment)^{(n/12)}]$, where n is the number of months elapsed since the end of the base year to the calculation date, and *growth adjustment* is the greater of 4.1 percent and the recipient’s average annual revenue growth in the three full fiscal years prior to the COVID-19 public health emergency.
- Step 3: Identify *actual revenue*, which equals revenues collected over the past twelve months as of the calculation date.
- Step 4: The extent of the reduction in revenue is equal to *counterfactual revenue* less *actual revenue*. If actual revenue exceeds counterfactual revenue, the extent of the reduction in revenue is set to zero for that calculation date.

For illustration, consider a hypothetical recipient with *base year revenue* equal to 100. In Step 2, the hypothetical recipient finds that 4.1 percent is greater than the recipient’s average annual revenue growth in the three full fiscal years prior to the public health emergency. Furthermore, this recipient’s base year ends June 30. In this illustration, n (months elapsed) and *counterfactual revenue* would be equal to:

As of:	12/31/2020	12/31/2021	12/31/2022	12/31/2023
n (months elapsed)	18	30	42	54
<i>Counterfactual revenue:</i>	106.2	110.6	115.1	119.8

The overall methodology for calculating the reduction in revenue is illustrated in the figure below:



Upon receiving Fiscal Recovery Fund payments, recipients may immediately calculate revenue loss for the period ending December 31, 2020.

Sections 602(c)(1)(C) and 603(c)(1)(C) of the Act provide recipients with broad latitude to use the Fiscal Recovery Funds for the provision of government services. Government services can include, but are not limited to, maintenance or pay-go funded building¹²³ of infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; school or educational services; and the provision of police, fire, and other public safety services. However, expenses associated with obligations under instruments evidencing financial indebtedness for borrowed money would not be considered the provision of government services, as these financing expenses do not directly provide services or aid to citizens. Specifically, government services would not include interest or principal on any outstanding debt instrument, including, for

¹²³ Pay-go infrastructure funding refers to the practice of funding capital projects with cash-on-hand from taxes, fees, grants, and other sources, rather than with borrowed sums.

example, short-term revenue or tax anticipation notes, or fees or issuance costs associated with the issuance of new debt. For the same reasons, government services would not include satisfaction of any obligation arising under or pursuant to a settlement agreement, judgment, consent decree, or judicially confirmed debt restructuring in a judicial, administrative, or regulatory proceeding, except if the judgment or settlement required the provision of government services. That is, satisfaction of a settlement or judgment itself is not a government service, unless the settlement required the provision of government services. In addition, replenishing financial reserves (e.g., rainy day or other reserve funds) would not be considered provision of a government service, since such expenses do not directly relate to the provision of government services.

Question 13: Are there sources of revenue that either should or should not be included in the interim final rule's measure of "general revenue" for recipients? If so, discuss why these sources either should or should not be included.

Question 14: In the interim final rule, recipients are expected to calculate the reduction in revenue on an aggregate basis. Discuss the advantages and disadvantages of, and any potential concerns with, this approach, including circumstances in which it could be necessary or appropriate to calculate the reduction in revenue by source.

Question 15: Treasury is considering whether to take into account other factors, including actions taken by the recipient as well as the expiration of the COVID-19 public health emergency, in determining whether to presume that revenue losses are "due to" the COVID-19 public health emergency. Discuss the advantages and disadvantages of this presumption, including when, if ever, during the covered period it would be appropriate to reevaluate the presumption that all losses are attributable to the COVID-19 public health emergency.

Question 16: Do recipients anticipate lagged revenue effects of the public health emergency? If so, when would these lagged effects be expected to occur, and what can Treasury do to support these recipients through its implementation of the program?

Question 17: In the interim final rule, paying interest or principal on government debt is not considered provision of a government service. Discuss the advantages and disadvantages of this approach, including circumstances in which paying interest or principal on government debt could be considered provision of a government service.

D. Investments in Infrastructure

To assist in meeting the critical need for investments and improvements to existing infrastructure in water, sewer, and broadband, the Fiscal Recovery Funds provide funds to State, local, and Tribal governments to make necessary investments in these sectors. The interim final rule outlines eligible uses within each category, allowing for a broad range of necessary investments in projects that improve access to clean drinking water, improve wastewater and stormwater infrastructure systems, and provide access to high-quality broadband service. Necessary investments are designed to provide an adequate minimum level of service and are unlikely to be made using private sources of funds. Necessary investments include projects that are required to maintain a level of service that, at least, meets applicable health-based standards, taking into account resilience to climate change, or establishes or improves broadband service to unserved or underserved populations to reach an adequate level to permit a household to work or attend school, and that are unlikely to be met with private sources of funds.¹²⁴

It is important that necessary investments in water, sewer, or broadband infrastructure be carried out in ways that produce high-quality infrastructure, avert disruptive and costly delays, and promote efficiency. Treasury encourages recipients to ensure that water, sewer, and broadband projects use strong labor standards, including project labor agreements and community benefits agreements that offer wages at or above the prevailing rate and include local hire provisions, not only to promote effective and efficient delivery of high-quality infrastructure

¹²⁴ Treasury notes that using funds to support or oppose collective bargaining would not be included as part of “necessary investments in water, sewer, or broadband infrastructure.”

projects but also to support the economic recovery through strong employment opportunities for workers. Using these practices in construction projects may help to ensure a reliable supply of skilled labor that would minimize disruptions, such as those associated with labor disputes or workplace injuries.

To provide public transparency on whether projects are using practices that promote on-time and on-budget delivery, Treasury will seek information from recipients on their workforce plans and practices related to water, sewer, and broadband projects undertaken with Fiscal Recovery Funds. Treasury will provide additional guidance and instructions on the reporting requirements at a later date.

1. Water and Sewer Infrastructure

The ARPA provides funds to State, local, and Tribal governments to make necessary investments in water and sewer infrastructure.¹²⁵ By permitting funds to be used for water and sewer infrastructure needs, Congress recognized the critical role that clean drinking water and services for the collection and treatment of wastewater and stormwater play in protecting public health. Understanding that State, local, and Tribal governments have a broad range of water and sewer infrastructure needs, the interim final rule provides these governments with wide latitude to identify investments in water and sewer infrastructure that are of the highest priority for their own communities, which may include projects on privately-owned infrastructure. The interim final rule does this by aligning eligible uses of the Fiscal Recovery Funds with the wide range of types or categories of projects that would be eligible to receive financial assistance through the Environmental Protection Agency's (EPA) Clean Water State Revolving Fund (CWSRF) or Drinking Water State Revolving Fund (DWSRF).¹²⁶

¹²⁵ Sections 602(c)(1)(D), 603(c)(1)(D) of the Act.

¹²⁶ Environmental Protection Agency, Drinking Water State Revolving fund, <https://www.epa.gov/dwsrf> (last visited Apr. 30, 2021); Environmental Protection Agency, Clean Water State Revolving Fund, <https://www.epa.gov/cwsrf> (last visited Apr. 30, 2021).

Established by the 1987 amendments¹²⁷ to the Clean Water Act (CWA),¹²⁸ the CWSRF provides financial assistance for a wide range of water infrastructure projects to improve water quality and address water pollution in a way that enables each State to address and prioritize the needs of their populations. The types of projects eligible for CWSRF assistance include projects to construct, improve, and repair wastewater treatment plants, control non-point sources of pollution, improve resilience of infrastructure to severe weather events, create green infrastructure, and protect waterbodies from pollution.¹²⁹ Each of the 51 State programs established under the CWSRF have the flexibility to direct funding to their particular environmental needs, and each State may also have its own statutes, rules, and regulations that guide project eligibility.¹³⁰

The DWSRF was modeled on the CWSRF and created as part of the 1996 amendments to the Safe Drinking Water Act (SDWA),¹³¹ with the principal objective of helping public water systems obtain financing for improvements necessary to protect public health and comply with

¹²⁷ Water Quality Act of 1987, Pub. L. 100-4.

¹²⁸ Federal Water Pollution Control Act as amended, codified at 33 U.S.C. 1251 *et seq.*, common name (Clean Water Act). In 2009, the American Recovery and Reinvestment Act created the Green Project Reserve, which increased the focus on green infrastructure, water and energy efficient, and environmentally innovative projects. Pub. L. 111-5. The CWA was amended by the Water Resources Reform and Development Act of 2014 to further expand the CWSRF's eligibilities. Pub. L. 113-121. The CWSRF's eligibilities were further expanded in 2018 by the America's Water Infrastructure Act of 2018, Pub. L. 115-270.

¹²⁹ See Environmental Protection Agency, *The Drinking Water State Revolving Funds: Financing America's Drinking Water*, EPA-816-R-00-023 (Nov. 2000), <https://nepis.epa.gov/Exe/ZyPDF.cgi/200024WB.PDF?Dockey=200024WB.PDF>; See also Environmental Protection Agency, *Learn About the Clean Water State Revolving Fund*, <https://www.epa.gov/cwsrf/learn-about-clean-water-state-revolving-fund-cwsrf> (last visited Apr. 30, 2021).

¹³⁰ 33 U.S.C. 1383(c). See also Environmental Protection Agency, *Overview of Clean Water State Revolving Fund Eligibilities* (May 2016), https://www.epa.gov/sites/production/files/2016-07/documents/overview_of_cwsrf_eligibilities_may_2016.pdf; Claudia Copeland, *Clean Water Act: A Summary of the Law*, Congressional Research Service (Oct. 18, 2016), <https://fas.org/sgp/crs/misc/RL30030.pdf>; Jonathan L. Ramseur, *Wastewater Infrastructure: Overview, Funding, and Legislative Developments*, Congressional Research Service (May 22, 2018), <https://fas.org/sgp/crs/misc/R44963.pdf>.

¹³¹ 42 U.S.C. 300j-12.

drinking water regulations.¹³² Like the CWSRF, the DWSRF provides States with the flexibility to meet the needs of their populations.¹³³ The primary use of DWSRF funds is to assist communities in making water infrastructure capital improvements, including the installation and replacement of failing treatment and distribution systems.¹³⁴ In administering these programs, States must give priority to projects that ensure compliance with applicable health and environmental safety requirements; address the most serious risks to human health; and assist systems most in need on a per household basis according to State affordability criteria.¹³⁵

By aligning use of Fiscal Recovery Funds with the categories or types of eligible projects under the existing EPA state revolving fund programs, the interim final rule provides recipients with the flexibility to respond to the needs of their communities while ensuring that investments in water and sewer infrastructure made using Fiscal Recovery Funds are necessary. As discussed above, the CWSRF and DWSRF were designed to provide funding for projects that protect public health and safety by ensuring compliance with wastewater and drinking water health standards.¹³⁶ The need to provide funding through the state revolving funds suggests that these projects are less likely to be addressed with private sources of funding; for example, by remediating failing or inadequate infrastructure, much of which is publicly owned, and by addressing non-point sources of pollution. This approach of aligning with the EPA state revolving fund programs also supports expedited project identification and investment so that

¹³² Environmental Protection Agency, Drinking Water State Revolving Fund Eligibility Handbook, (June 2017), https://www.epa.gov/sites/production/files/2017-06/documents/dwsrf_eligibility_handbook_june_13_2017_updated_508_version.pdf; Environmental Protection Agency, Drinking Water Infrastructure Needs Survey and Assessment: Sixth Report to Congress (March 2018), https://www.epa.gov/sites/production/files/2018-10/documents/corrected_sixth_drinking_water_infrastructure_needs_survey_and_assessment.pdf.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 42 U.S.C. 300j-12(b)(3)(A).

¹³⁶ Environmental Protection Agency, Learn About the Clean Water State Revolving Fund, <https://www.epa.gov/cwsrf/learn-about-clean-water-state-revolving-fund-cwsrf> (last visited Apr. 30, 2021); 42 U.S.C. 300j-12.

needed relief for the people and communities most affected by the pandemic can be deployed expeditiously and have a positive impact on their health and wellbeing as soon as possible. Further, the interim final rule is intended to preserve flexibility for award recipients to direct funding to their own particular needs and priorities and would not preclude recipients from applying their own additional project eligibility criteria.

In addition, responding to the immediate needs of the COVID-19 public health emergency may have diverted both personnel and financial resources from other State, local, and Tribal priorities, including projects to ensure compliance with applicable water health and quality standards and provide safe drinking and usable water.¹³⁷ Through sections 602(c)(1)(D) and 603(c)(1)(D), the ARPA provides resources to address these needs. Moreover, using Fiscal Recovery Funds in accordance with the priorities of the CWA and SWDA to “assist systems most in need on a per household basis according to state affordability criteria” would also have the benefit of providing vulnerable populations with safe drinking water that is critical to their health and, thus, their ability to work and learn.¹³⁸

Recipients may use Fiscal Recovery Funds to invest in a broad range of projects that improve drinking water infrastructure, such as building or upgrading facilities and transmission, distribution, and storage systems, including replacement of lead service lines. Given the lifelong impacts of lead exposure for children, and the widespread nature of lead service lines, Treasury encourages recipients to consider projects to replace lead service lines.

¹³⁷ House Committee on the Budget, State and Local Governments are in Dire Need of Federal Relief (Aug. 19, 2020), <https://budget.house.gov/publications/report/state-and-local-governments-are-dire-need-federal-relief>.

¹³⁸ Environmental Protection Agency, Drinking Water State Revolving Fund (Nov. 2019), https://www.epa.gov/sites/production/files/2019-11/documents/fact_sheet_-_dwsrf_overview_final_0.pdf; Environmental Protection Agency, National Benefits Analysis for Drinking Water Regulations, <https://www.epa.gov/sdwa/national-benefits-analysis-drinking-water-regulations> (last visited Apr. 30, 2020).

Fiscal Recovery Funds may also be used to support the consolidation or establishment of drinking water systems. With respect to wastewater infrastructure, recipients may use Fiscal Recovery Funds to construct publicly owned treatment infrastructure, manage and treat stormwater or subsurface drainage water, facilitate water reuse, and secure publicly owned treatment works, among other uses. Finally, consistent with the CWSRF and DWSRF, Fiscal Recovery Funds may be used for cybersecurity needs to protect water or sewer infrastructure, such as developing effective cybersecurity practices and measures at drinking water systems and publicly owned treatment works.

Many of the types of projects eligible under either the CWSRF or DWSRF also support efforts to address climate change. For example, by taking steps to manage potential sources of pollution and preventing these sources from reaching sources of drinking water, projects eligible under the DWSRF and the ARPA may reduce energy required to treat drinking water. Similarly, projects eligible under the CWSRF include measures to conserve and reuse water or reduce the energy consumption of public water treatment facilities. Treasury encourages recipients to consider green infrastructure investments and projects to improve resilience to the effects of climate change. For example, more frequent and extreme precipitation events combined with construction and development trends have led to increased instances of stormwater runoff, water pollution, and flooding. Green infrastructure projects that support stormwater system resiliency could include rain gardens that provide water storage and filtration benefits, and green streets, where vegetation, soil, and engineered systems are combined to direct and filter rainwater from impervious surfaces. In cases of a natural disaster, recipients may also use Fiscal Recovery Funds to provide relief, such as interconnecting water systems or rehabilitating existing wells during an extended drought.

Question 18: What are the advantages and disadvantages of aligning eligible uses with the eligible project type requirements of the DWSRF and CWSRF? What other water or sewer

project categories, if any, should Treasury consider in addition to DWSRF and CWSRF eligible projects? Should Treasury consider a broader general category of water and sewer projects?

Question 19: What additional water and sewer infrastructure categories, if any, should Treasury consider to address and respond to the needs of unserved, underserved, or rural communities? How do these projects differ from DWSRF and CWSRF eligible projects?

Question 20: What new categories of water and sewer infrastructure, if any, should Treasury consider to support State, local, and Tribal governments in mitigating the negative impacts of climate change? Discuss emerging technologies and processes that support resiliency of water and sewer infrastructure. Discuss any challenges faced by States and local governments when pursuing or implementing climate resilient infrastructure projects.

Question 21: Infrastructure projects related to dams and reservoirs are generally not eligible under the CWSRF and DWSRF categories. Should Treasury consider expanding eligible infrastructure under the interim final rule to include dam and reservoir projects? Discuss public health, environmental, climate, or equity benefits and costs in expanding the eligibility to include these types of projects.

2. Broadband Infrastructure.

The COVID-19 public health emergency has underscored the importance of universally available, high-speed, reliable, and affordable broadband coverage as millions of Americans rely on the internet to participate in, among critical activities, remote school, healthcare, and work. Recognizing the need for such connectivity, the ARPA provides funds to State, territorial, local, and Tribal governments to make necessary investments in broadband infrastructure.

The National Telecommunications and Information Administration (NTIA) highlighted the growing necessity of broadband in daily lives through its analysis of NTIA Internet Use Survey data, noting that Americans turn to broadband Internet access service for every facet of

daily life including work, study, and healthcare.¹³⁹ With increased use of technology for daily activities and the movement by many businesses and schools to operating remotely during the pandemic, broadband has become even more critical for people across the country to carry out their daily lives.

By at least one measure, however, tens of millions of Americans live in areas where there is no broadband infrastructure that provides download speeds greater than 25 Mbps and upload speeds of 3 Mbps.¹⁴⁰ By contrast, as noted below, many households use upload and download speeds of 100 Mbps to meet their daily needs. Even in areas where broadband infrastructure exists, broadband access may be out of reach for millions of Americans because it is unaffordable, as the United States has some of the highest broadband prices in the Organisation for Economic Co-operation and Development (OECD).¹⁴¹ There are disparities in availability as well; historically, Americans living in territories and Tribal lands as well as rural areas have disproportionately lacked sufficient broadband infrastructure.¹⁴² Moreover, rapidly growing demand has, and will likely continue to, quickly outpace infrastructure capacity, a phenomenon

¹³⁹ See, e.g., <https://www.ntia.gov/blog/2020/more-half-american-households-used-internet-health-related-activities-2019-ntia-data-show>; <https://www.ntia.gov/blog/2020/nearly-third-american-employees-worked-remotely-2019-ntia-data-show>; and generally, <https://www.ntia.gov/data/digital-nation-data-explorer>.

¹⁴⁰ As an example, data from the Federal Communications Commission shows that as of June 2020, 9.07 percent of the U.S. population had no available cable or fiber broadband providers providing greater than 25 Mbps download speeds and 3 Mbps upload speeds. Availability was significantly less for rural versus urban populations, with 35.57 percent of the rural population lacking such access, compared with 2.57 percent of the urban population. Availability was also significantly less for tribal versus non-tribal populations, with 35.93 percent of the tribal population lacking such access, compared with 8.74 of the non-tribal population. Federal Communications Commission, Fixed Broadband Deployment, <https://broadbandmap.fcc.gov/#/> (last visited May 9, 2021).

¹⁴¹ How Do U.S. Internet Costs Compare To The Rest Of The World?, BroadbandSearch Blog Post, *available at* <https://www.broadbandsearch.net/blog/internet-costs-compared-worldwide>.

¹⁴² See, e.g., Federal Communications Commission, Fourteenth Broadband Deployment Report, *available at* <https://docs.fcc.gov/public/attachments/FCC-21-18A1.pdf>.

acknowledged by various states around the country that have set scalability requirements to account for this anticipated growth in demand.¹⁴³

The interim final rule provides that eligible investments in broadband are those that are designed to provide services meeting adequate speeds and are provided to unserved and underserved households and businesses. Understanding that States, territories, localities, and Tribal governments have a wide range of varied broadband infrastructure needs, the interim final rule provides award recipients with flexibility to identify the specific locations within their communities to be served and to otherwise design the project.

Under the interim final rule, eligible projects are expected to be designed to deliver, upon project completion, service that reliably meets or exceeds symmetrical upload and download speeds of 100 Mbps. There may be instances in which it would not be practicable for a project to deliver such service speeds because of the geography, topography, or excessive costs associated with such a project. In these instances, the affected project would be expected to be designed to deliver, upon project completion, service that reliably meets or exceeds 100 Mbps download and between at least 20 Mbps and 100 Mbps upload speeds and be scalable to a minimum of 100 Mbps symmetrical for download and upload speeds.¹⁴⁴ In setting these standards, Treasury identified speeds necessary to ensure that broadband infrastructure is sufficient to enable users to generally meet household needs, including the ability to support the simultaneous use of work, education, and health applications, and also sufficiently robust to meet increasing household

¹⁴³ See, e.g., Illinois Department of Commerce & Economic Opportunity, Broadband Grants, h (last visited May 9, 2021), <https://www2.illinois.gov/dceo/ConnectIllinois/Pages/BroadbandGrants.aspx>; Kansas Office of Broadband Development, Broadband Acceleration Grant, <https://www.kansascommerce.gov/wp-content/uploads/2020/11/Broadband-Acceleration-Grant.pdf> (last visited May 9, 2021); New York State Association of Counties, Universal Broadband: Deploying High Speed Internet Access in NYS (Jul. 2017), [https://www.nysac.org/files/BroadbandUpdateReport2017\(1\).pdf](https://www.nysac.org/files/BroadbandUpdateReport2017(1).pdf).

¹⁴⁴ This scalability threshold is consistent with scalability requirements used in other jurisdictions. *Id.*

demands for bandwidth. Treasury also recognizes that different communities and their members may have a broad range of internet needs and that those needs may change over time.

In considering the appropriate speed requirements for eligible projects, Treasury considered estimates of typical households demands during the pandemic. Using the Federal Communication Commission's (FCC) Broadband Speed Guide, for example, a household with two telecommuters and two to three remote learners today are estimated to need 100 Mbps download to work simultaneously.¹⁴⁵ In households with more members, the demands may be greater, and in households with fewer members, the demands may be less.

In considering the appropriate speed requirements for eligible projects, Treasury also considered data usage patterns and how bandwidth needs have changed over time for U.S. households and businesses as people's use of technology in their daily lives has evolved. In the few years preceding the pandemic, market research data showed that average upload speeds in the United States surpassed over 10 Mbps in 2017¹⁴⁶ and continued to increase significantly, with the average upload speed as of November, 2019 increasing to 48.41 Mbps,¹⁴⁷ attributable, in part to a shift to using broadband and the internet by individuals and businesses to create and share content using video sharing, video conferencing, and other applications.¹⁴⁸

The increasing use of data accelerated markedly during the pandemic as households across the country became increasingly reliant on tools and applications that require greater

¹⁴⁵ Federal Communications Commission, Broadband Speed Guide, <https://www.fcc.gov/consumers/guides/broadband-speed-guide> (last visited Apr. 30, 2021).

¹⁴⁶ Letter from Lisa R. Youngers, President and CEO of Fiber Broadband Association to FCC, WC Docket No. 19-126 (filed Jan. 3, 2020), including an Appendix with research from RVA LLC, *Data Review Of The Importance of Upload Speeds* (Jan. 2020), and Ookla speed test data, available at <https://ecfsapi.fcc.gov/file/101030085118517/FCC%20RDOF%20Jan%20203%20Ex%20Parte.pdf>.

Additional information on historic growth in data usage is provided in Schools, Health & Libraries Broadband Coalition, *Common Sense Solutions for Closing the Digital Divide*, Apr. 29, 2021.

¹⁴⁷ *Id.* See also United States's Mobile and Broadband Internet Speeds - Speedtest Global Index, available at <https://www.speedtest.net/global-index/united-states#fixed>.

¹⁴⁸ *Id.*

internet capacity, both to download data but also to upload data. Sending information became as important as receiving it. A video consultation with a healthcare provider or participation by a child in a live classroom with a teacher and fellow students requires video to be sent and received simultaneously.¹⁴⁹ As an example, some video conferencing technology platforms indicate that download and upload speeds should be roughly equal to support two-way, interactive video meetings.¹⁵⁰ For both work and school, client materials or completed school assignments, which may be in the form of PDF files, videos, or graphic files, also need to be shared with others. This is often done by uploading materials to a collaboration site, and the upload speed available to a user can have a significant impact on the time it takes for the content to be shared with others.¹⁵¹ These activities require significant capacity from home internet connections to both download and upload data, especially when there are multiple individuals in one household engaging in these activities simultaneously.

This need for increased broadband capacity during the pandemic was reflected in increased usage patterns seen over the last year. As OpenVault noted in recent advisories, the pandemic significantly increased the amount of data users consume. Among data users observed by OpenVault, per-subscriber average data usage for the fourth quarter of 2020 was 482.6 gigabytes per month, representing a 40 percent increase over the 344 gigabytes consumed in the fourth quarter of 2019 and a 26 percent increase over the third quarter 2020 average of 383.8 gigabytes.¹⁵² OpenVault also noted significant increases in upstream usage among the data

¹⁴⁹ One high definition Zoom meeting or class requires approximately 3.8 Mbps/3.0 Mbps (up/down).

¹⁵⁰ See, e.g., Zoom, System Requirements for Windows, macOS, and Linux, https://support.zoom.us/hc/en-us/articles/201362023-System-requirements-for-Windows-macOS-and-Linux#h_d278c327-e03d-4896-b19a-96a8f3c0c69c (last visited May 8, 2021).

¹⁵¹ By one estimate, to upload a one gigabit video file to YouTube would take 15 minutes at an upload speed of 10 Mbps compared with 1 minute, 30 seconds at an upload speed of 100 Mbps, and 30 seconds at an upload speed of 300 Mbps. Reviews.org: What is Symmetrical Internet? (March 2020).

¹⁵² OVBI: Covid-19 Drove 15 percent Increase in Broadband Traffic in 2020, OpenVault, Quarterly Advisory, (Feb. 10, 2021), available at <https://openvault.com/ovbi-covid-19-drove-51-increase-in->

users it observed, with upstream data usage growing 63 percent – from 19 gigabytes to 31 gigabytes – between December, 2019 and December, 2020.¹⁵³ According to an OECD Broadband statistic from June 2020, the largest percentage of U.S. broadband subscribers have services providing speeds between 100 Mbps and 1 Gbps.¹⁵⁴

Jurisdictions and Federal programs are increasingly responding to the growing demands of their communities for both heightened download and upload speeds. For example, Illinois now requires 100 Mbps symmetrical service as the construction standard for its state broadband grant programs. This standard is also consistent with speed levels, particularly download speed levels, prioritized by other Federal programs supporting broadband projects. Bids submitted as part of the FCC in its Rural Digital Opportunity Fund (RDOF), established to support the construction of broadband networks in rural communities across the country, are given priority if they offer faster service, with the service offerings of 100 Mbps download and 20 Mbps upload being included in the “above baseline” performance tier set by the FCC.¹⁵⁵ The Broadband Infrastructure Program (BBIP)¹⁵⁶ of the Department of Commerce, which provides Federal funding to deploy broadband infrastructure to eligible service areas of the country also

broadband-traffic-in-2020; See OpenVault’s data set incorporates information on usage by subscribers across multiple continents, including North America and Europe. Additional data and detail on increases in the amount of data users consume and the broadband speeds they are using is provided in *OpenVault Broadband Insights Report Q4*, Quarterly Advisory (Feb. 10, 2021), available at <https://openvault.com/complimentary-report-4q20/>.

¹⁵³ OVBI Special Report: 202 Upstream Growth Nearly 4X of Pre-Pandemic Years, OpenVault, Quarterly Advisory, (April 1, 2021), available at <https://openvault.com/ovbi-special-report-2020-upstream-growth-rate-nearly-4x-of-pre-pandemic-years/>; Additional data is provided in *OpenVault Broadband Insights Pandemic Impact on Upstream Broadband Usage and Network Capacity*, available at <https://openvault.com/upstream-whitepaper/>.

¹⁵⁴ Organisation for Economic Co-operation and Development, Fixed broadband subscriptions per 100 inhabitants, per speed tiers (June 2020), <https://www.oecd.org/sti/broadband/5.1-FixedBB-SpeedTiers-2020-06.xls> www.oecd.org/sti/broadband/broadband-statistics.

¹⁵⁵ *Rural Digital Opportunity Fund*, Report and Order, 35 FCC Rcd 686, 690, para. 9 (2020), available at <https://www.fcc.gov/document/fcc-launches-20-billion-rural-digital-opportunity-fund-0>.

¹⁵⁶ The BIPP was authorized by the Consolidated Appropriations Act, 2021, Section 905, Public Law 116-260, 134 Stat. 1182 (Dec. 27, 2020).

prioritizes projects designed to provide broadband service with a download speed of not less than 100 Mbps and an upload speed of not less than 20 Mbps.¹⁵⁷

The 100 Mbps upload and download speeds will support the increased and growing needs of households and businesses. Recognizing that, in some instances, 100 Mbps upload speed may be impracticable due to geographical, topographical, or financial constraints, the interim final rule permits upload speeds of between at least 20 Mbps and 100 Mbps in such instances. To provide for investments that will accommodate technologies requiring symmetry in download and upload speeds, as noted above, eligible projects that are not designed to deliver, upon project completion, service that reliably meets or exceeds symmetrical speeds of 100 Mbps because it would be impracticable to do so should be designed so that they can be scalable to such speeds. Recipients are also encouraged to prioritize investments in fiber optic infrastructure where feasible, as such advanced technology enables the next generation of application solutions for all communities.

Under the interim final rule, eligible projects are expected to focus on locations that are unserved or underserved. The interim final rule treats users as being unserved or underserved if they lack access to a wireline connection capable of reliably delivering at least minimum speeds of 25 Mbps download and 3 Mbps upload as households and businesses lacking this level of access are generally not viewed as being able to originate and receive high-quality voice, data, graphics, and video telecommunications. This threshold is consistent with the FCC's benchmark for an "advanced telecommunications capability."¹⁵⁸ This threshold is also consistent with thresholds used in other Federal programs to identify eligible areas to be served by programs to improve broadband services. For example, in the FCC's RDOF program, eligible areas include those without current (or already funded) access to terrestrial broadband service providing

¹⁵⁷ Section 905(d)(4) of the Consolidated Appropriations Act, 2021.

¹⁵⁸ *Deployment Report*, *supra* note 142.

25 Mbps download and 3 Mbps upload speeds.¹⁵⁹ The Department of Commerce’s BBIP also considers households to be “unserved” generally if they lack access to broadband service with a download speed of not less than 25 Mbps download and 3 Mbps upload, among other conditions. In selecting an area to be served by a project, recipients are encouraged to avoid investing in locations that have existing agreements to build reliable wireline service with minimum speeds of 100 Mbps download and 20 Mbps upload by December 31, 2024, in order to avoid duplication of efforts and resources.

Recipients are also encouraged to consider ways to integrate affordability options into their program design. To meet the immediate needs of unserved and underserved households and businesses, recipients are encouraged to focus on projects that deliver a physical broadband connection by prioritizing projects that achieve last mile-connections. Treasury also encourages recipients to prioritize support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and co-operatives—providers with less pressure to turn profits and with a commitment to serving entire communities.

Under sections 602(c)(1)(A) and 603(c)(1)(A), assistance to households facing negative economic impacts due to COVID-19 is also an eligible use, including internet access or digital literacy assistance. As discussed above, in considering whether a potential use is eligible under this category, a recipient must consider whether, and the extent to which, the household has experienced a negative economic impact from the pandemic.

Question 22: What are the advantages and disadvantages of setting minimum symmetrical download and upload speeds of 100 Mbps? What other minimum standards would be appropriate and why?

¹⁵⁹ *Rural Digital Opportunity Fund*, *supra* note 156.

Question 23: Would setting such a minimum be impractical for particular types of projects? If so, where and on what basis should those projects be identified? How could such a standard be set while also taking into account the practicality of using this standard in particular types of projects? In addition to topography, geography, and financial factors, what other constraints, if any, are relevant to considering whether an investment is impracticable?

Question 24: What are the advantages and disadvantages of setting a minimum level of service at 100 Mbps download and 20 Mbps upload in projects where it is impracticable to set minimum symmetrical download and upload speeds of 100 Mbps? What are the advantages and disadvantages of setting a scalability requirement in these cases? What other minimum standards would be appropriate and why?

Question 25: What are the advantages and disadvantages of focusing these investments on those without access to a wireline connection that reliably delivers 25 Mbps download by 3 Mbps upload? Would another threshold be appropriate and why?

Question 26: What are the advantages and disadvantages of setting any particular threshold for identifying unserved or underserved areas, minimum speed standards or scalability minimum? Are there other standards that should be set (e.g., latency)? If so, why and how? How can such threshold, standards, or minimum be set in a way that balances the public's interest in making sure that reliable broadband services meeting the daily needs of all Americans are available throughout the country with the providing recipients flexibility to meet the varied needs of their communities?

III. Restrictions on Use

As discussed above, recipients have considerable flexibility to use Fiscal Recovery Funds to address the diverse needs of their communities. To ensure that payments from the Fiscal Recovery Funds are used for these congressionally permitted purposes, the ARPA includes two provisions that further define the boundaries of the statute's eligible uses. Section 602(c)(2)(A) of the Act provides that States and territories may not "use the funds ... to either directly or

indirectly offset a reduction in ... net tax revenue ... resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax ... or delays the imposition of any tax or tax increase.” In addition, sections 602(c)(2)(B) and 603(c)(2) prohibit any recipient, including cities, nonentitlement units of government, and counties, from using Fiscal Recovery Funds for deposit into any pension fund. These restrictions support the use of funds for the congressionally permitted purposes described in Section II of this Supplementary Information by providing a backstop against the use of funds for purposes outside of the eligible use categories.

These provisions give force to Congress’s clear intent that Fiscal Recovery Funds be spent within the four eligible uses identified in the statute—(1) to respond to the public health emergency and its negative economic impacts, (2) to provide premium pay to essential workers, (3) to provide government services to the extent of eligible governments’ revenue losses, and (4) to make necessary water, sewer, and broadband infrastructure investments—and not otherwise. These four eligible uses reflect Congress’s judgment that the Fiscal Recovery Funds should be expended in particular ways that support recovery from the COVID-19 public health emergency. The further restrictions reflect Congress’s judgment that tax cuts and pension deposits do not fall within these eligible uses. The interim final rule describes how Treasury will identify when such uses have occurred and how it will recoup funds put toward these impermissible uses and, as discussed in Section VIII of this SUPPLEMENTARY INFORMATION, establishes a reporting framework for monitoring the use of Fiscal Recovery Funds for eligible uses.

A. Deposit into Pension Funds

The statute provides that recipients may not use Fiscal Recovery Funds for “deposit into any pension fund.” For the reasons discussed below, Treasury interprets “deposit” in this context to refer to an extraordinary payment into a pension fund for the purpose of reducing an accrued,

unfunded liability. More specifically, the interim final rule does not permit this assistance to be used to make a payment into a pension fund if both:

1. the payment reduces a liability incurred prior to the start of the COVID-19 public health emergency, and
2. the payment occurs outside the recipient's regular timing for making such payments.

Under this interpretation, a "deposit" is distinct from a "payroll contribution," which occurs when employers make payments into pension funds on regular intervals, with contribution amounts based on a pre-determined percentage of employees' wages and salaries.

As discussed above, eligible uses for premium pay and responding to the negative economic impacts of the COVID-19 public health emergency include hiring and compensating public sector employees. Interpreting the scope of "deposit" to exclude contributions that are part of payroll contributions is more consistent with these eligible uses and would reduce administrative burden for recipients. Accordingly, if an employee's wages and salaries are an eligible use of Fiscal Recovery Funds, recipients may treat the employee's covered benefits as an eligible use of Fiscal Recovery Funds. For purposes of the Fiscal Recovery Funds, covered benefits include costs of all types of leave (vacation, family-related, sick, military, bereavement, sabbatical, jury duty), employee insurance (health, life, dental, vision), retirement (pensions, 401(k)), unemployment benefit plans (Federal and State), workers' compensation insurance, and Federal Insurance Contributions Act taxes (which includes Social Security and Medicare taxes).

Treasury anticipates that this approach to employees' covered benefits will be comprehensive and, for employees whose wage and salary costs are eligible expenses, will allow all covered benefits listed in the previous paragraph to be eligible under the Fiscal Recovery Funds. Treasury expects that this will minimize the administrative burden on recipients by treating all the specified covered benefit types as eligible expenses, for employees whose wage and salary costs are eligible expenses.

Question 27: Beyond a “deposit” and a “payroll contribution,” are there other types of payments into a pension fund that Treasury should consider?

B. Offset a Reduction in Net Tax Revenue

For States and territories (recipient governments¹⁶⁰), section 602(c)(2)(A)—the offset provision—prohibits the use of Fiscal Recovery Funds to directly or indirectly offset a reduction in net tax revenue resulting from a change in law, regulation, or administrative interpretation¹⁶¹ during the covered period. If a State or territory uses Fiscal Recovery Funds to offset a reduction in net tax revenue, the ARPA provides that the State or territory must repay to the Treasury an amount equal to the lesser of (i) the amount of the applicable reduction attributable to the impermissible offset and (ii) the amount received by the State or territory under the ARPA. *See* Section IV of this SUPPLEMENTARY INFORMATION. As discussed below Section IV of this SUPPLEMENTARY INFORMATION, a State or territory that chooses to use Fiscal Recovery Funds to offset a reduction in net tax revenue does not forfeit its entire allocation of Fiscal Recovery Funds (unless it misused the full allocation to offset a reduction in net tax revenue) or any non-ARPA funding received.

The interim final rule implements these conditions by establishing a framework for States and territories to determine the cost of changes in law, regulation, or interpretation that reduce tax revenue and to identify and value the sources of funds that will offset—i.e., cover the cost of—any reduction in net tax revenue resulting from such changes. A recipient government would only be considered to have used Fiscal Recovery Funds to offset a reduction in net tax revenue resulting from changes in law, regulation, or interpretation if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the Fiscal

¹⁶⁰ In this sub-section, “recipient governments” refers only to States and territories. In other sections, “recipient governments” refers more broadly to eligible governments receiving funding from the Fiscal Recovery Funds.

¹⁶¹ For brevity, referred to as “changes in law, regulation, or interpretation” for the remainder of this preamble.

Recovery Funds to offset the reduction in net tax revenue. If sufficient funds from other sources cannot be identified to cover the full cost of the reduction in net tax revenue resulting from changes in law, regulation, or interpretation, the remaining amount not covered by these sources will be considered to have been offset by Fiscal Recovery Funds, in contravention of the offset provision. The interim final rule recognizes three sources of funds that may offset a reduction in net tax revenue other than Fiscal Recovery Funds—organic growth, increases in revenue (e.g., an increase in a tax rate), and certain cuts in spending.

In order to reduce burden, the interim final rule’s approach also incorporates the types of information and modeling already used by States and territories in their own fiscal and budgeting processes. By incorporating existing budgeting processes and capabilities, States and territories will be able to assess and evaluate the relationship of tax and budget decisions to uses of the Fiscal Recovery Funds based on information they likely have or can obtain. This approach ensures that recipient governments have the information they need to understand the implications of their decisions regarding the use of the Fiscal Recovery Funds—and, in particular, whether they are using the funds to directly or indirectly offset a reduction in net tax revenue, making them potentially subject to recoupment.

Reporting on both the eligible uses and on a State’s or territory’s covered tax changes that would reduce tax revenue will enable identification of, and recoupment for, use of Fiscal Recovery Funds to directly offset reductions in tax revenue resulting from tax relief. Moreover, this approach recognizes that, because money is fungible, even if Fiscal Recovery Funds are not explicitly or directly used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for the State’s or territory’s funds that would otherwise have been needed to cover the costs of the reduction. By focusing on the cost of changes that reduce net tax revenue—and how a recipient government is offsetting those reductions in constructing its budget over the covered period—the framework prevents efforts to use Fiscal Recovery Funds to indirectly offset reductions in net tax

revenue for which the recipient government has not identified other offsetting sources of funding.

As discussed in greater detail below in this preamble, the framework set forth in the interim final rule establishes a step-by-step process for determining whether, and the extent to which, Fiscal Recovery Funds have been used to offset a reduction in net tax revenue. Based on information reported annually by the recipient government:

- First, each year, each recipient government will identify and value the changes in law, regulation, or interpretation that would result in a reduction in net tax revenue, as it would in the ordinary course of its budgeting process. The sum of these values in the year for which the government is reporting is the amount it needs to “pay for” with sources other than Fiscal Recovery Funds (total value of revenue reducing changes).
- Second, the interim final rule recognizes that it may be difficult to predict how a change would affect net tax revenue in future years and, accordingly, provides that if the total value of the changes in the year for which the recipient government is reporting is below a de minimis level, as discussed below, the recipient government need not identify any sources of funding to pay for revenue reducing changes and will not be subject to recoupment.
- Third, a recipient government will consider the amount of actual tax revenue recorded in the year for which they are reporting. If the recipient government’s actual tax revenue is greater than the amount of tax revenue received by the recipient for the fiscal year ending 2019, adjusted annually for inflation, the recipient government will not be considered to have violated the offset provision because there will not have been a reduction in net tax revenue.
- Fourth, if the recipient government’s actual tax revenue is less than the amount of tax revenue received by the recipient government for the fiscal year ending 2019, adjusted annually for inflation, in the reporting year the recipient government will identify any

sources of funds that have been used to permissibly offset the total value of covered tax changes other than Fiscal Recovery Funds. These are:

- State or territory tax changes that would increase any source of general fund revenue, such as a change that would increase a tax rate; and
- Spending cuts in areas not being replaced by Fiscal Recovery Funds.

The recipient government will calculate the value of revenue reduction remaining after applying these sources of offsetting funding to the total value of revenue reducing changes—that is, how much of the tax change has not been paid for. The recipient government will then compare that value to the difference between the baseline and actual tax revenue. A recipient government will not be required to repay to the Treasury an amount that is greater than the recipient government’s actual tax revenue shortfall relative to the baseline (i.e., fiscal year 2019 tax revenue adjusted for inflation). This “revenue reduction cap,” together with Step 3, ensures that recipient governments can use organic revenue growth to offset the cost of revenue reductions.

- Finally, if there are any amounts that could be subject to recoupment, Treasury will provide notice to the recipient government of such amounts. This process is discussed in greater detail in Section IV of this SUPPLEMENTARY INFORMATION.

Together, these steps allow Treasury to identify the amount of reduction in net tax revenue that both is attributable to covered changes and has been directly or indirectly offset with Fiscal Recovery Funds. This process ensures Fiscal Recovery Funds are used in a manner consistent with the statute’s defined eligible uses and the offset provision’s limitation on these eligible uses, while avoiding undue interference with State and territory decisions regarding tax and spending policies.

The interim final rule also implements a process for recouping Fiscal Recovery Funds that were used to offset reductions in net tax revenue, including the calculation of any amounts that may be subject to recoupment, a process for a recipient government to respond to a notice of

recoupment, and clarification regarding amounts excluded from recoupment. *See* Section IV of this SUPPLEMENTARY INFORMATION.

The interim final rule includes several definitions that are applicable to the implementation of the offset provision.

Covered change. The offset provision is triggered by a reduction in net tax revenue resulting from “a change in law, regulation, or administrative interpretation.” A covered change includes any final legislative or regulatory action, a new or changed administrative interpretation, and the phase-in or taking effect of any statute or rule where the phase-in or taking effect was not prescribed prior to the start of the covered period. Changed administrative interpretations would not include corrections to replace prior inaccurate interpretations; such corrections would instead be treated as changes implementing legislation enacted or regulations issued prior to the covered period; the operative change in those circumstances is the underlying legislation or regulation that occurred prior to the covered period. Moreover, only the changes within the control of the State or territory are considered covered changes. Covered changes do not include a change in rate that is triggered automatically and based on statutory or regulatory criteria in effect prior to the covered period. For example, a state law that sets its earned income tax credit (EITC) at a fixed percentage of the Federal EITC will see its EITC payments automatically increase—and thus its tax revenue reduced—because of the Federal Government’s expansion of the EITC in the ARPA.¹⁶² This would not be considered a covered change. In addition, the offset provision applies only to actions for which the change in policy occurs during the covered period; it excludes regulations or other actions that implement a change or law substantively enacted prior to March 3, 2021. Finally, Treasury has determined and previously announced that income tax changes—even those made during the covered period—that simply conform with recent changes

¹⁶² *See, e.g.*, Tax Policy Center, How do state earned income tax credits work?, <https://www.taxpolicycenter.org/briefing-book/how-do-state-earned-income-tax-credits-work/> (last visited May 9, 2021).

in Federal law (including those to conform to recent changes in Federal taxation of unemployment insurance benefits and taxation of loan forgiveness under the Paycheck Protection Program) are permissible under the offset provision.

Baseline. For purposes of measuring a reduction in net tax revenue, the interim final rule measures actual changes in tax revenue relative to a revenue baseline (baseline). The baseline will be calculated as fiscal year 2019 (FY 2019) tax revenue indexed for inflation in each year of the covered period, with inflation calculated using the Bureau of Economic Analysis’s Implicit Price Deflator.¹⁶³

FY 2019 was chosen as the starting year for the baseline because it is the last full fiscal year prior to the COVID-19 public health emergency.¹⁶⁴ This baseline year is consistent with the approach directed by the ARPA in sections 602(c)(1)(C) and 603(c)(1)(C), which identify the “most recent full fiscal year of the [State, territory, or Tribal government] prior to the emergency” as the comparator for measuring revenue loss. U.S. gross domestic product is projected to rebound to pre-pandemic levels in 2021,¹⁶⁵ suggesting that an FY 2019 pre-pandemic baseline is a reasonable comparator for future revenue levels. The FY 2019 baseline revenue will be adjusted annually for inflation to allow for direct comparison of actual tax revenue in each year (reported in nominal terms) to baseline revenue in common units of measurement; without inflation adjustment, each dollar of reported actual tax revenue would be worth less than each dollar of baseline revenue expressed in 2019 terms.

Reporting year. The interim final rule defines “reporting year” as a single year within the covered period, aligned to the current fiscal year of the recipient government during the covered

¹⁶³ U.S. Department of Commerce, Bureau of Economic Analysis, GDP Price Deflator, <https://www.bea.gov/data/prices-inflation/gdp-price-deflator> (last visited May 9, 2021).

¹⁶⁴ Using Fiscal Year 2019 is consistent with section 602 as Congress provided for using that baseline for determining the impact of revenue loss affecting the provision of government services. See section 602(c)(1)(C).

¹⁶⁵ Congressional Budget Office, An Overview of the Economic Outlook: 2021 to 2031 (February 1, 2021), available at <https://www.cbo.gov/publication/56965>.

period, for which a recipient government reports the value of covered changes and any sources of offsetting revenue increases (“in-year” value), regardless of when those changes were enacted. For the fiscal years ending in 2021 or 2025 (partial years), the term “reporting year” refers to the portion of the year falling within the covered period. For example, the reporting year for a fiscal year beginning July 2020 and ending June 2021 would be from March 3, 2021 to July 2021.

Tax revenue. The interim final rule’s definition of “tax revenue” is based on the Census Bureau’s definition of taxes, used for its Annual Survey of State Government Finances.¹⁶⁶ It provides a consistent, well-established definition with which States and territories will be familiar and is consistent with the approach taken in Section II.C of this SUPPLEMENTARY INFORMATION describing the implementation of sections 602(c)(1)(C) and 603(c)(1)(C) of the Act, regarding revenue loss. Consistent with the approach described in Section II.C of this SUPPLEMENTARY INFORMATION, tax revenue does not include revenue taxed and collected by a different unit of government (e.g., revenue from taxes levied by a local government and transferred to a recipient government).

Framework. The interim final rule provides a step-by-step framework, to be used in each reporting year, to calculate whether the offset provision applies to a State’s or territory’s use of Fiscal Recovery Funds:

(1) *Covered changes that reduce tax revenue.* For each reporting year, a recipient government will identify and value covered changes that the recipient government predicts will have the effect of reducing tax revenue in a given reporting year, similar to the way it would in the ordinary course of its budgeting process. The value of these covered changes may be reported based on estimated values produced by a budget model, incorporating reasonable assumptions, that aligns with the recipient government’s existing approach for measuring the

¹⁶⁶ U.S. Census Bureau, Annual Survey of State and Local Government Finances Glossary, <https://www.census.gov/programs-surveys/state/about/glossary.html> (last visited Apr. 30, 2021).

effects of fiscal policies, and that measures relative to a current law baseline. The covered changes may also be reported based on actual values using a statistical methodology to isolate the change in year-over-year revenue attributable to the covered change(s), relative to the current law baseline prior to the change(s). Further, estimation approaches should not use dynamic methodologies that incorporate the projected effects of macroeconomic growth because macroeconomic growth is accounted for separately in the framework. Relative to these dynamic scoring methodologies, scoring methodologies that do not incorporate projected effects of macroeconomic growth rely on fewer assumptions and thus provide greater consistency among States and territories. Dynamic scoring that incorporates macroeconomic growth may also increase the likelihood of underestimation of the cost of a reduction in tax revenue.

In general and where possible, reporting should be produced by the agency of the recipient government responsible for estimating the costs and effects of fiscal policy changes. This approach offers recipient governments the flexibility to determine their reporting methodology based on their existing budget scoring practices and capabilities. In addition, the approach of using the projected value of changes in law that enact fiscal policies to estimate the net effect of such policies is consistent with the way many States and territories already consider tax changes.¹⁶⁷

(2) *In excess of the de minimis.* The recipient government will next calculate the total value of all covered changes in the reporting year resulting in revenue reductions, identified in Step 1. If the total value of the revenue reductions resulting from these changes is below the de minimis level, the recipient government will be deemed not to have any revenue-reducing changes for the purpose of determining the recognized net reduction. If the total is above the de

¹⁶⁷ See, e.g., Megan Randall & Kim Rueben, Tax Policy Center, Sustainable Budgeting in the States: Evidence on State Budget Institutions and Practices (Nov. 2017), available at https://www.taxpolicycenter.org/sites/default/files/publication/149186/sustainable-budgeting-in-the-states_1.pdf.

minimis level, the recipient government must identify sources of in-year revenue to cover the full costs of changes that reduce tax revenue.

The de minimis level is calculated as 1 percent of the reporting year's baseline. Treasury recognizes that, pursuant to their taxing authority, States and territories may make many small changes to alter the composition of their tax revenues or implement other policies with marginal effects on tax revenues. They may also make changes based on projected revenue effects that turn out to differ from actual effects, unintentionally resulting in minor revenue changes that are not fairly described as "resulting from" tax law changes. The de minimis level recognizes the inherent challenges and uncertainties that recipient governments face, and thus allows relatively small reductions in tax revenue without consequence. Treasury determined the 1 percent level by assessing the historical effects of state-level tax policy changes in state EITCs implemented to effect policy goals other than reducing net tax revenues.¹⁶⁸ The 1 percent de minimis level reflects the historical reductions in revenue due to minor changes in state fiscal policies.

(3) *Safe harbor.* The recipient government will then compare the reporting year's actual tax revenue to the baseline. If actual tax revenue is greater than the baseline, Treasury will deem the recipient government not to have any recognized net reduction for the reporting year, and therefore to be in a safe harbor and outside the ambit of the offset provision. This approach is consistent with the ARPA, which contemplates recoupment of Fiscal Recovery Funds only in the event that such funds are used to offset a reduction in net tax revenue. If net tax revenue has not been reduced, this provision does not apply. In the event that actual tax revenue is above the baseline, the organic revenue growth that has occurred, plus any other revenue-raising changes, by definition must have been enough to offset the in-year costs of the covered changes.

(4) *Consideration of other sources of funding.* Next, the recipient government will identify and calculate the total value of changes that could pay for revenue reduction due to

¹⁶⁸ Data provided by the Urban-Brookings Tax Policy Center for state-level EITC changes for 2004-2017.

covered changes and sum these items. This amount can be used to pay for up to the total value of revenue-reducing changes in the reporting year. These changes consist of two categories:

(a) *Tax and other increases in revenue.* The recipient government must identify and consider covered changes in policy that the recipient government predicts will have the effect of increasing general revenue in a given reporting year. As when identifying and valuing covered changes that reduce tax revenue, the value of revenue-raising changes may be reported based on estimated values produced by a budget model, incorporating reasonable assumptions, aligned with the recipient government's existing approach for measuring the effects of fiscal policies, and measured relative to a current law baseline, or based on actual values using a statistical methodology to isolate the change in year-over-year revenue attributable to the covered change(s). Further, and as discussed above, estimation approaches should not use dynamic scoring methodologies that incorporate the effects of macroeconomic growth because growth is accounted for separately under the interim final rule. In general and where possible, reporting should be produced by the agency of the recipient government responsible for estimating the costs and effects of fiscal policy changes. This approach offers recipient governments the flexibility to determine their reporting methodology based on their existing budget scoring practices and capabilities.

(b) *Covered spending cuts.* A recipient government also may cut spending in certain areas to pay for covered changes that reduce tax revenue, up to the amount of the recipient government's net reduction in total spending as described below. These changes must be reductions in government outlays not in an area where the recipient government has spent Fiscal Recovery Funds. To better align with existing reporting and accounting, the interim final rule considers the department, agency, or authority from which spending has been cut and whether the recipient government has spent Fiscal Recovery Funds on that same department, agency, or authority. This approach was selected to allow recipient governments to report how Fiscal Recovery Funds have been spent using reporting units already incorporated into their budgeting

process. If they have not spent Fiscal Recovery Funds in a department, agency, or authority, the full amount of the reduction in spending counts as a covered spending cut, up to the recipient government's net reduction in total spending. If they have, the Fiscal Recovery Funds generally would be deemed to have replaced the amount of spending cut and only reductions in spending above the amount of Fiscal Recovery Funds spent on the department, agency, or authority would count.

To calculate the amount of spending cuts that are available to offset a reduction in tax revenue, the recipient government must first consider whether there has been a reduction in total net spending, excluding Fiscal Recovery Funds (net reduction in total spending). This approach ensures that reported spending cuts actually create fiscal space, rather than simply offsetting other spending increases. A net reduction in total spending is measured as the difference between total spending in each reporting year, excluding Fiscal Recovery Funds spent, relative to total spending for the recipient's fiscal year ending in 2019, adjusted for inflation. Measuring reductions in spending relative to 2019 reflects the fact that the fiscal space created by a spending cut persists so long as spending remains below its original level, even if it does not decline further, relative to the same amount of revenue. Measuring spending cuts from year to year would, by contrast, not recognize any available funds to offset revenue reductions unless spending continued to decline, failing to reflect the actual availability of funds created by a persistent change and limiting the discretion of States and territories. In general and where possible, reporting should be produced by the agency of the recipient government responsible for estimating the costs and effects of fiscal policy changes. Treasury chose this approach because while many recipient governments may score budget legislation using projections, spending cuts are readily observable using actual values.

This approach—allowing only spending reductions in areas where the recipient government has not spent Fiscal Recovery Funds to be used as an offset for a reduction in net tax revenue—aims to prevent recipient governments from using Fiscal Recovery Funds to supplant

State or territory funding in the eligible use areas, and then use those State or territory funds to offset tax cuts. Such an approach helps ensure that Fiscal Recovery Funds are not used to “indirectly” offset revenue reductions due to covered changes.

In order to help ensure recipient governments use Fiscal Recovery Funds in a manner consistent with the prescribed eligible uses and do not use Fiscal Recovery Funds to indirectly offset a reduction in net tax revenue resulting from a covered change, Treasury will monitor changes in spending throughout the covered period. If, over the course of the covered period, a spending cut is subsequently replaced with Fiscal Recovery Funds and used to indirectly offset a reduction in net tax revenue resulting from a covered change, Treasury may consider such change to be an evasion of the restrictions of the offset provision and seek recoupment of such amounts.

(5) *Identification of amounts subject to recoupment.* If a recipient government (i) reports covered changes that reduce tax revenue (Step 1); (ii) to a degree greater than the de minimis (Step 2); (iii) has experienced a reduction in net tax revenue (Step 3); and (iv) lacks sufficient revenue from other, permissible sources to pay for the entirety of the reduction (Step 4), then the recipient government will be considered to have used Fiscal Recovery Funds to offset a reduction in net tax revenue, up to the amount that revenue has actually declined. That is, the maximum value of reduction in revenue due to covered changes which a recipient government must cover is capped at the difference between the baseline and actual tax revenue.¹⁶⁹ In the event that the baseline is above actual tax revenue and the difference between them is less than the sum of revenue reducing changes that are not paid for with other, permissible sources, organic revenue growth has implicitly offset a portion of the reduction. For example, if a recipient government reduces tax revenue by \$1 billion, makes no other changes, and

¹⁶⁹ This cap is applied in § 35.8(c) of the interim final rule, calculating the amount of funds used in violation of the tax offset provision.

experiences revenue growth driven by organic economic growth worth \$500 million, it need only pay for the remaining \$500 million with sources other than Fiscal Recovery Funds. The revenue reduction cap implements this approach for permitting organic revenue growth to cover the cost of tax cuts.

Finally, as discussed further in Section IV of this SUPPLEMENTARY INFORMATION, a recipient government may request reconsideration of any amounts identified as subject to recoupment under this framework. This process ensures that all relevant facts and circumstances, including information regarding planned spending cuts and budgeting assumptions, are considered prior to a determination that an amount must be repaid. Amounts subject to recoupment are calculated on an annual basis; amounts recouped in one year cannot be returned if the State or territory subsequently reports an increase in net tax revenue.

To facilitate the implementation of the framework above, and in addition to reporting required on eligible uses, in each year of the reporting period, each State and territory will report to Treasury the following items:

- Actual net tax revenue for the reporting year;
- Each revenue-reducing change made to date during the covered period and the in-year value of each change;
- Each revenue-raising change made to date during the covered period and the in-year value of each change;
- Each covered spending cut made to date during the covered period, the in-year value of each cut, and documentation demonstrating that each spending cut is covered as prescribed under the interim final rule;

Treasury will provide additional guidance and instructions the reporting requirements at a later date.

Question 28: Does the interim final rule's definition of tax revenue accord with existing State and territorial practice and, if not, are there other definitions or elements Treasury should consider? Discuss why or why not.

Question 29: The interim final rule permits certain spending cuts to cover the costs of reductions in tax revenue, including cuts in a department, agency, or authority in which the recipient government is not using Fiscal Recovery Funds. How should Treasury and recipient governments consider the scope of a department, agency, or authority for the use of funds to ensure spending cuts are not being substituted with Fiscal Recovery Funds while also avoiding an overbroad definition of that captures spending that is, in fact, distinct?

Question 30: Discuss the budget scoring methodologies currently used by States and territories. How should the interim final rule take into consideration differences in approaches? Please discuss the use of practices including but not limited to macrodynamic scoring, microdynamic scoring, and length of budget windows.

Question 31: If a recipient government has a balanced budget requirement, how will that requirement impact its use of Fiscal Recovery Funds and ability to implement this framework?

Question 32: To implement the framework described above, the interim final rule establishes certain reporting requirements. To what extent do recipient governments already produce this information and on what timeline? Discuss ways that Treasury and recipient governments may better rely on information already produced, while ensuring a consistent application of the framework.

Question 33: Discuss States' and territories' ability to produce the figures and numbers required for reporting under the interim final rule. What additional reporting tools, such as a standardized template, would facilitate States' and territories' ability to complete the reporting required under the interim final rule?

C. Other Restrictions on Use

Payments from the Fiscal Recovery Funds are also subject to pre-existing limitations provided in other Federal statutes and regulations and may not be used as non-Federal match for other Federal programs whose statute or regulations bar the use of Federal funds to meet matching requirements. For example, payments from the Fiscal Recovery Funds may not be used to satisfy the State share of Medicaid.¹⁷⁰

As provided for in the award terms, payments from the Fiscal Recovery Funds as a general matter will be subject to the provisions of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200) (the Uniform Guidance), including the cost principles and restrictions on general provisions for selected items of cost.

D. Timeline for Use of Fiscal Recovery Funds

Section 602(c)(1) and section 603(c)(1) require that payments from the Fiscal Recovery Funds be used only to cover costs incurred by the State, territory, Tribal government, or local government by December 31, 2024. Similarly, the CARES Act provided that payments from the CRF be used to cover costs incurred by December 31, 2021.¹⁷¹ The definition of “incurred” does not have a clear meaning. With respect to the CARES Act, on the understanding that the CRF was intended to be used to meet relatively short-term needs, Treasury interpreted this requirement to mean that, for a cost to be considered to have been incurred, performance of the service or delivery of the goods acquired must occur by December 31, 2021. In contrast, the ARPA, passed at a different stage of the COVID-19 public health emergency, was intended to provide more general fiscal relief over a broader timeline. In addition, the ARPA expressly permits the use of Fiscal Recovery Funds for improvements to water, sewer, and broadband

¹⁷⁰ See 42 CFR 433.51 and 45 CFR 75.306.

¹⁷¹ Section 1001 of Division N of the Consolidated Appropriations Act, 2021 amended section 601(d)(3) of the Act by extending the end of the covered period for CRF expenditures from December 30, 2020 to December 31, 2021.

infrastructure, which entail a longer timeframe. In recognition of this, Treasury is interpreting the requirement in section 602 and section 603 that costs be incurred by December 31, 2024, to require only that recipients have obligated the Fiscal Recovery Funds by such date. The interim final rule adopts a definition of “obligation” that is based on the definition used for purposes of the Uniform Guidance, which will allow for uniform administration of this requirement and is a definition with which most recipients will be familiar.

Payments from the Fiscal Recovery Funds are grants provided to recipients to mitigate the fiscal effects of the COVID-19 public health emergency and to respond to the public health emergency, consistent with the eligible uses enumerated in sections 602(c)(1) and 603(c)(1).¹⁷² As such, these funds are intended to provide economic stimulus in areas still recovering from the economic effects of the pandemic. In implementing and interpreting these provisions, including what it means to “respond to” the COVID-19 public health emergency, Treasury takes into consideration pre-pandemic facts and circumstances (e.g., average revenue growth prior to the pandemic) as well as impact of the pandemic that predate the enactment of the ARPA (e.g., replenishing Unemployment Trust balances drawn during the pandemic). While assessing the effects of the COVID-19 public health emergency necessarily takes into consideration the facts and circumstances that predate the ARPA, use of Fiscal Recovery Funds is forward looking.

As discussed above, recipients are permitted to use payments from the Fiscal Recovery Funds to respond to the public health emergency, to respond to workers performing essential work by providing premium pay or providing grants to eligible employers, and to make necessary investments in water, sewer, or broadband infrastructure, which all relate to prospective uses. In addition, sections 602(c)(1)(C) and 603(c)(1)(C) permit recipients to use Fiscal Recovery Funds for the provision of government services. This clause provides that the amount of funds that may be used for this purpose is measured by reference to the reduction in

¹⁷² Sections 602(a), 603(a), 602(c)(1) and 603(c)(1) of the Act.

revenue due to the public health emergency relative to revenues collected in the most recent full fiscal year, but this reference does not relate to the period during which recipients may use the funds, which instead refers to prospective uses, consistent with the other eligible uses.

Although as discussed above the eligible uses of payments from the Fiscal Recovery Funds are all prospective in nature, Treasury considers the beginning of the covered period for purposes of determining compliance with section 602(c)(2)(A) to be the relevant reference point for this purpose. The interim final rule thus permits funds to be used to cover costs incurred beginning on March 3, 2021. This aligns the period for use of Fiscal Recovery Funds with the period during which these funds may not be used to offset reductions in net tax revenue. Permitting Fiscal Recovery Funds to be used to cover costs incurred beginning on this date will also mean that recipients that began incurring costs in the anticipation of enactment of the ARPA and in advance of the issuance of this rule and receipt of payment from the Fiscal Recovery Funds would be able to cover them using these payments.¹⁷³

As set forth in the award terms, the period of performance will run until December 31, 2026, which will provide recipients a reasonable amount of time to complete projects funded with payments from the Fiscal Recovery Funds.

¹⁷³ Given the nature of this program, recipients will not be permitted to use funds to cover pre-award costs, *i.e.*, those incurred prior to March 3, 2021.

IV. Recoupment Process

Under the ARPA, failure to comply with the restrictions on use contained in sections 602(c) and 603(c) of the Act may result in recoupment of funds.¹⁷⁴ The interim final rule implements these provisions by establishing a process for recoupment.

Identification and Notice of Violations. Failure to comply with the restrictions on use will be identified based on reporting provided by the recipient. As discussed further in Sections III.B and VIII of this SUPPLEMENTARY INFORMATION, Treasury will collect information regarding eligible uses on a quarterly basis and on the tax offset provision on an annual basis. Treasury also may consider other information in identifying a violation, such as information provided by members of the public. If Treasury identifies a violation, it will provide written notice to the recipient along with an explanation of such amounts.

Request for Reconsideration. Under the interim final rule, a recipient may submit a request for reconsideration of any amounts identified in the notice provided by Treasury. This reconsideration process provides a recipient the opportunity to submit additional information it believes supports its request in light of the notice of recoupment, including, for example, additional information regarding the recipient's use of Fiscal Recovery Funds or its tax revenues. The process also provides the Secretary with an opportunity to consider all information relevant to whether a violation has occurred, and if so, the appropriate amount for recoupment.

The interim final rule also establishes requirements for the timing of a request for reconsideration. Specifically, if a recipient wishes to request reconsideration of any amounts identified in the notice, the recipient must submit a written request for reconsideration to the Secretary within 60 calendar days of receipt of such notice. The request must include an explanation of why the recipient believes that the finding of a violation or recoupable amount identified in the notice of recoupment should be reconsidered. To facilitate the Secretary's

¹⁷⁴ Sections 602(e) and 603(e) of the Act.

review of a recipient's request for reconsideration, the request should identify all supporting reasons for the request. Within 60 calendar days of receipt of the recipient's request for reconsideration, the recipient will be notified of the Secretary's decision to affirm, withdraw, or modify the notice of recoupment. Such notification will include an explanation of the decision, including responses to the recipient's supporting reasons and consideration of additional information provided.

The process and timeline established by the interim final rule are intended to provide the recipient with an adequate opportunity to fully present any issues or arguments in response to the notice of recoupment.¹⁷⁵ This process will allow the Secretary to respond to the issues and considerations raised in the request for reconsideration taking into account the information and arguments presented by the recipient along with any other relevant information.

Repayment. Finally, the interim final rule provides that any amounts subject to recoupment must be repaid within 120 calendar days of receipt of any final notice of recoupment or, if the recipient has not requested reconsideration, within 120 calendar days of the initial notice provided by the Secretary.

Question 34: Discuss the timeline for requesting reconsideration under the interim final rule. What, if any, challenges does this timeline present?

V. Payments in Tranches to Local Governments and Certain States

Section 603 of the Act provides that the Secretary will make payments to local governments in two tranches, with the second tranche being paid twelve months after the first payment. In addition, section 602(b)(6)(A)(ii) provides that the Secretary may withhold payment of up to 50 percent of the amount allocated to each State and territory for a period of up to twelve months from the date on which the State or territory provides its certification to the Secretary.

¹⁷⁵ The interim final rule also provides that Treasury may extend any deadlines.

Any such withholding for a State or territory is required to be based on the unemployment rate in the State or territory as of the date of the certification.

The Secretary has determined to provide in this interim final rule for withholding of 50 percent of the amount of Fiscal Recovery Funds allocated to all States (and the District of Columbia) other than those with an unemployment rate that is 2.0 percentage points or more above its pre-pandemic (i.e., February 2020) level. The Secretary will refer to the latest available monthly data from the Bureau of Labor Statistics as of the date the certification is provided. Based on data available at the time of public release of this interim final rule, this threshold would result in a majority of States being paid in two tranches.

Splitting payments for the majority of States is consistent with the requirement in section 603 of the Act to make payments from the Coronavirus Local Fiscal Recovery Fund to local governments in two tranches.¹⁷⁶ Splitting payments to States into two tranches will help encourage recipients to adapt, as necessary, to new developments that could arise over the coming twelve months, including potential changes to the nature of the public health emergency and its negative economic impacts. While the U.S. economy has been recovering and adding jobs in aggregate, there is still considerable uncertainty in the economic outlook and the interaction between the pandemic and the economy.¹⁷⁷ For these reasons, Treasury believes it will be appropriate for a majority of recipients to adapt their plans as the recovery evolves. For

¹⁷⁶ With respect to Federal financial assistance more generally, States are subject to the requirements of the Cash Management Improvement Act (CMIA), under which Federal funds are drawn upon only on an as needed basis and States are required to remit interest on unused balances to Treasury. Given the statutory requirement for Treasury to make payments to States within a certain period, these requirements of the CMIA and Treasury's implementing regulations at 31 CFR part 205 will not apply to payments from the Fiscal Recovery Funds. Providing funding in two tranches to the majority of States reflects, to the maximum extent permitted by section 602 of the Act, the general principles of Federal cash management and stewardship of Federal funding, yet will be much less restrictive than the usual requirements to which States are subject.

¹⁷⁷ The potential course of the virus, and its impact on the economy, has contributed to a heightened degree of uncertainty relative to prior periods. *See, e.g.*, Dave Altig et al., Economic uncertainty before and during the COVID-19 pandemic, *J. of Public Econ.* (Nov. 2020), *available at* <https://www.sciencedirect.com/science/article/abs/pii/S0047272720301389>

example, a faster-than-expected economic recovery in 2021 could lead a recipient to dedicate more Fiscal Recovery Funds to longer-term investments starting in 2022. In contrast, a slower-than-expected economic recovery in 2021 could lead a recipient to use additional funds for near-term stimulus in 2022.

At the same time, the statute contemplates the possibility that elevated unemployment in certain States could justify a single payment. Elevated unemployment is indicative of a greater need to assist unemployed workers and stimulate a faster economic recovery. For this reason, the interim final rule provides that States and territories with an increase in their unemployment rate over a specified threshold may receive a single payment, with the expectation that a single tranche will better enable these States and territories to take additional immediate action to aid the unemployed and strengthen their economies.

Following the initial pandemic-related spike in unemployment in 2020, States' unemployment rates have been trending back towards pre-pandemic levels. However, some States' labor markets are healing more slowly than others. Moreover, States varied widely in their pre-pandemic levels of unemployment, and some States remain substantially further from their pre-pandemic starting point. Consequently, Treasury is delineating States with significant remaining elevation in the unemployment rate, based on the net difference to pre-pandemic levels.

Treasury has established that significant remaining elevation in the unemployment rate is a net change in the unemployment rate of 2.0 percentage points or more relative to pre-pandemic levels. In the four previous recessions going back to the early 1980s, the national unemployment rate rose by 3.6, 2.3, 2.0, and 5.0 percentage points, as measured from the start of the recession to the eventual peak during or immediately following the recession.¹⁷⁸ Each of these increases can

¹⁷⁸ Includes the period during and immediately following recessions, as defined by the National Bureau of Economic Research. National Bureau of Economic Research, US Business Cycle Expansions and

therefore represent a recession’s impact on unemployment. To identify States with significant remaining elevation in unemployment, Treasury took the lowest of these four increases, 2.0 percentage points, to indicate states where, despite improvement in the unemployment rate, current labor market conditions are consistent still with a historical benchmark for a recession.

No U.S. territory will be subject to withholding of its payment from the Fiscal Recovery Funds. For Puerto Rico, the Secretary has determined that the current level of the unemployment rate (8.8 percent, as of March 2021¹⁷⁹) is sufficiently high such that Treasury should not withhold any portion of its payment from the Fiscal Recovery Funds regardless of its change in unemployment rate relative to its pre-pandemic level. For U.S. territories that are not included in the Bureau of Labor Statistics’ monthly unemployment rate data, the Secretary will not exercise the authority to withhold amounts from the Fiscal Recovery Funds.

VI. Transfer

The statute authorizes State, territorial, and Tribal governments; counties; metropolitan cities; and nonentitlement units of local government (counties, metropolitan cities, and nonentitlement units of local government are collectively referred to as “local governments”) to transfer amounts paid from the Fiscal Recovery Funds to a number of specified entities. By permitting these transfers, Congress recognized the importance of providing flexibility to governments seeking to achieve the greatest impact with their funds, including by working with other levels or units of government or private entities to assist recipient governments in carrying out their programs. This includes special-purpose districts that perform specific functions in the community, such as fire, water, sewer, or mosquito abatement districts.

Contractions, <https://www.nber.org/research/data/us-business-cycle-expansions-and-contractions> (last visited Apr. 27, 2021). Based on data from U.S. Bureau of Labor Statistics, Unemployment Rate [UNRATE], retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/UNRATE> (last visited Apr. 27, 2021).

¹⁷⁹ U.S. Bureau of Labor Statistics, Economic News Release – Table 1. Civilian labor force and unemployment by state and selected area, seasonally adjusted, <https://www.bls.gov/news.release/laus.t01.htm> (last visited Apr. 30, 2021).

Specifically, under section 602(c)(3), a State, territory, or Tribal government may transfer funds to a “private nonprofit organization . . . a Tribal organization . . . a public benefit corporation involved in the transportation of passengers or cargo, or a special-purpose unit of State or local government.”¹⁸⁰ Similarly, section 603(c)(3) authorizes a local government to transfer funds to the same entities (other than Tribal organizations).

The interim final rule clarifies that the lists of transferees in sections 602(c)(3) and 603(c)(3) are not exclusive. The interim final rule permits State, territorial, and Tribal governments to transfer Fiscal Recovery Funds to other constituent units of government or private entities beyond those specified in the statute. Similarly, local governments are authorized to transfer Fiscal Recovery Funds to other constituent units of government (e.g., a county is able to transfer Fiscal Recovery Funds to a city, town, or school district within it) or to private entities. This approach is intended to help provide funding to local governments with needs that may exceed the allocation provided under the statutory formula.

State, local, territorial, and Tribal governments that receive a Federal award directly from a Federal awarding agency, such as Treasury, are “recipients.” A transferee receiving a transfer from a recipient under sections 602(c)(3) and 603(c)(3) will be a subrecipient. Subrecipients are entities that receive a subaward from a recipient to carry out a program or project on behalf of the recipient with the recipient’s Federal award funding. The recipient remains responsible for monitoring and overseeing the subrecipient’s use of Fiscal Recovery Funds and other activities related to the award to ensure that the subrecipient complies with the statutory and regulatory requirements and the terms and conditions of the award. Recipients also remain responsible for reporting to Treasury on their subrecipients’ use of payments from the Fiscal Recovery Funds for the duration of the award.

¹⁸⁰ Section 602(c)(3) of the Act.

Transfers under sections 602(c)(3) and 603(c)(3) must qualify as an eligible use of Fiscal Recovery Funds by the transferor. Once Fiscal Recovery Funds are received, the transferee must abide by the restrictions on use applicable to the transferor under the ARPA and other applicable law and program guidance. For example, if a county transferred Fiscal Recovery Funds to a town within its borders to respond to the COVID-19 public health emergency, the town would be bound by the eligible use requirements applicable to the county in carrying out the county's goal. This also means that county A may not transfer Fiscal Recovery Funds to county B for use in county B because such a transfer would not, from the perspective of the transferor (county A), be an eligible use in county A.

Section 603(c)(4) separately provides for transfers by a local government to its State or territory. A transfer under section 603(c)(4) will not make the State a subrecipient of the local government, and such Fiscal Recovery Funds may be used by the State for any purpose permitted under section 602(c). A transfer under section 603(c)(4) will result in a cancellation or termination of the award on the part of the transferor local government and a modification of the award to the transferee State or territory. The transferor must provide notice of the transfer to Treasury in a format specified by Treasury. If the local government does not provide such notice, it will remain legally obligated to Treasury under the award and remain responsible for ensuring that the awarded Fiscal Recovery Funds are being used in accordance with the statute and program guidance and for reporting on such uses to Treasury. A State that receives a transfer from a local government under section 603(c)(4) will be bound by all of the use restrictions set forth in section 602(c) with respect to the use of those Fiscal Recovery Funds, including the prohibitions on use of such Fiscal Recovery Funds to offset certain reductions in taxes or to make deposits into pension funds.

Question 35: What are the advantages and disadvantages of treating the list of transferees in sections 602(c)(3) and 603(c)(3) as nonexclusive, allowing States and localities to transfer funds to entities outside of the list?

Question 36: Are there alternative ways of defining “special-purpose unit of State or local government” and “public benefit corporation” that would better further the aims of the Funds?

VII. Nonentitlement Units of Government

The Fiscal Recovery Funds provides for \$19.53 billion in payments to be made to States and territories which will distribute the funds to nonentitlement units of local government (NEUs); local governments which generally have populations below 50,000. These local governments have not yet received direct fiscal relief from the Federal Government during the COVID-19 public health emergency, making Fiscal Recovery Funds payments an important source of support for their public health and economic responses. Section 603 requires Treasury to allocate and pay Fiscal Recovery Funds to the States and territories and requires the States and territories to distribute Fiscal Recovery Funds to NEUs based on population within 30 days of receipt unless an extension is granted by the Secretary. The interim final rule clarifies certain aspects regarding the distribution of Fiscal Recovery by States and territories to NEUs, as well as requirements around timely payments from the Fiscal Recovery Funds.

The ARPA requires that States and territories allocate funding to NEUs in an amount that bears the same proportion as the population of the NEU bears to the total population of all NEUs in the State or territory, subject to a cap (described below). Because the statute requires States and territories to make distributions based on population, States and territories may not place additional conditions or requirements on distributions to NEUs, beyond those required by the ARPA and Treasury’s implementing regulations and guidance. For example, a State may not impose stricter limitations than permitted by statute or Treasury regulations or guidance on an NEU’s use of Fiscal Recovery Funds based on the NEU’s proposed spending plan or other policies. States and territories are also not permitted to offset any debt owed by the NEU against the NEU’s distribution. Further, States and territories may not provide funding on a reimbursement basis—e.g., requiring NEUs to pay for project costs up front before being reimbursed with Fiscal Recovery Funds payments—because this funding model would not

comport with the statutory requirement that States and territories make distributions to NEUs within the statutory timeframe.

Similarly, States and territories distributing Fiscal Recovery Funds payments to NEUs are responsible for complying with the Fiscal Recovery Funds statutory requirement that distributions to NEUs not exceed 75 percent of the NEU's most recent budget. The most recent budget is defined as the NEU's most recent annual total operating budget, including its general fund and other funds, as of January 27, 2020. Amounts in excess of such cap and therefore not distributed to the NEU must be returned to Treasury by the State or territory. States and territories may rely for this determination on a certified top-line budget total from the NEU.

Under the interim final rule, the total allocation and distribution to an NEU, including the sum of both the first and second tranches of funding, cannot exceed the 75 percent cap. States and territories must permit NEUs without formal budgets as of January 27, 2020 to self-certify their most recent annual expenditures as of January 27, 2020 for the purpose of calculating the cap. This approach will provide an administrable means to implement the cap for small local governments that do not adopt a formal budget.

Section 603(b)(3) of the Social Security Act provides for Treasury to make payments to counties but provides that, in the case of an amount to be paid to a county that is not a unit of general local government, the amount shall instead be paid to the State in which such county is located, and such State shall distribute such amount to each unit of general local government within such county in an amount that bears the same proportion to the amount to be paid to such county as the population of such units of general local government bears to the total population of such county. As with NEUs, States may not place additional conditions or requirements on distributions to such units of general local government, beyond those required by the ARPA and Treasury's implementing regulations and guidance.

In the case of consolidated governments, section 603(b)(4) allows consolidated governments (e.g., a city-county consolidated government) to receive payments under each

allocation based on the respective formulas. In the case of a consolidated government, Treasury interprets the budget cap to apply to the consolidated government's NEU allocation under section 603(b)(2) but not to the consolidated government's county allocation under section 603(b)(3).

If necessary, States and territories may use the Fiscal Recovery Funds under section 602(c)(1)(A) to fund expenses related to administering payments to NEUs and units of general local government, as disbursing these funds itself is a response to the public health emergency and its negative economic impacts. If a State or territory requires more time to disburse Fiscal Recovery Funds to NEUs than the allotted 30 days, Treasury will grant extensions of not more than 30 days for States and territories that submit a certification in writing in accordance with section 603(b)(2)(C)(ii)(I). Additional extensions may be granted at the discretion of the Secretary.

Question 37: What are alternative ways for States and territories to enforce the 75 percent cap while reducing the administrative burden on them?

Question 38: What criteria should Treasury consider in assessing requests for extensions for further time to distribute NEU payments?

VIII. Reporting

States (defined to include the District of Columbia), territories, metropolitan cities, counties, and Tribal governments will be required to submit one interim report and thereafter quarterly Project and Expenditure reports through the end of the award period on December 31, 2026. The interim report will include a recipient's expenditures by category at the summary level from the date of award to July 31, 2021 and, for States and territories, information related to distributions to nonentitlement units. Recipients must submit their interim report to Treasury by August 31, 2021. Nonentitlement units of local government are not required to submit an interim report.

The quarterly Project and Expenditure reports will include financial data, information on contracts and subawards over \$50,000, types of projects funded, and other information regarding a recipient's utilization of the award funds. The reports will include the same general data (e.g., on obligations, expenditures, contracts, grants, and sub-awards) as those submitted by recipients of the CRF, with some modifications. Modifications will include updates to the expenditure categories and the addition of data elements related to specific eligible uses, including some of the reporting elements described in sections above. The initial quarterly Project and Expenditure report will cover two calendar quarters from the date of award to September 30, 2021, and must be submitted to Treasury by October 31, 2021. The subsequent quarterly reports will cover one calendar quarter and must be submitted to Treasury within 30 days after the end of each calendar quarter.

Nonentitlement units of local government will be required to submit annual Project and Expenditure reports until the end of the award period on December 31, 2026. The initial annual Project and Expenditure report for nonentitlement units of local government will cover activity from the date of award to September 30, 2021 and must be submitted to Treasury by October 31, 2021. The subsequent annual reports must be submitted to Treasury by October 31 each year.

States, territories, metropolitan cities, and counties with a population that exceeds 250,000 residents will also be required to submit an annual Recovery Plan Performance report to Treasury. The Recovery Plan Performance report will provide the public and Treasury information on the projects that recipients are undertaking with program funding and how they are planning to ensure project outcomes are achieved in an effective, efficient, and equitable manner. Each jurisdiction will have some flexibility in terms of the form and content of the Recovery Plan Performance report, as long as it includes the minimum information required by Treasury. The Recovery Plan Performance report will include key performance indicators identified by the recipient and some mandatory indicators identified by Treasury, as well as

programmatic data in specific eligible use categories and the specific reporting requirements described in the sections above. The initial Recovery Plan Performance report will cover the period from the date of award to July 31, 2021 and must be submitted to Treasury by August 31, 2021. Thereafter, Recovery Plan Performance reports will cover a 12-month period, and recipients will be required to submit the report to Treasury within 30 days after the end of the 12-month period. The second Recovery Plan Performance report will cover the period from July 1, 2021 to June 30, 2022, and must be submitted to Treasury by July 31, 2022. Each annual Recovery Plan Performance report must be posted on the public-facing website of the recipient. Local governments with fewer than 250,000 residents, Tribal governments, and nonentitlement units of local government are not required to develop a Recovery Plan Performance report.

Treasury will provide additional guidance and instructions on the reporting requirements outlined above for the Fiscal Recovery Funds at a later date.

IX. Comments and Effective Date

This interim final rule is being issued without advance notice and public comment to allow for immediate implementation of this program. As discussed below, the requirements of advance notice and public comment do not apply “to the extent that there is involved . . . a matter relating to agency . . . grants.”¹⁸¹ The interim final rule implements statutory conditions on the eligible uses of the Fiscal Recovery Funds grants, and addresses the payment of those funds, the reporting on uses of funds, and potential consequences of ineligible uses. In addition and as discussed below, the Administrative Procedure Act also provides an exception to ordinary notice-and-comment procedures “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”¹⁸² This

¹⁸¹ 5 U.S.C. 553(a)(2).

¹⁸² 5 U.S.C. 553(b)(3)(B); *see also* 5 U.S.C. 553(d)(3) (creating an exception to the requirement of a 30-day delay before the effective date of a rule “for good cause found and published with the rule”).

good cause justification also supports waiver of the 60-day delayed effective date for major rules under the Congressional Review Act at 5 U.S.C. 808(2). Although this interim final rule is effective immediately, comments are solicited from interested members of the public and from recipient governments on all aspects of the interim final rule.

These comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

X. Regulatory Analyses

Executive Orders 12866 and 13563

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. Treasury, however, is proceeding under the emergency provision at Executive Order 12866 section 6(a)(3)(D) based on the need to act expeditiously to mitigate the current economic conditions arising from the COVID-19 public health emergency. The rule has been reviewed by the Office of Management and Budget (OMB) in accordance with Executive Order 12866. This rule is necessary to implement the ARPA in order to provide economic relief to State, local, and Tribal governments adversely impacted by the COVID-19 public health emergency.

Under Executive Order 12866, OMB must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive Order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a significant regulatory action as an action likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or Tribal governments or communities in a material way (also referred to as “economically significant” regulations);
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

- (3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This regulatory action is an economically significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866. Treasury has also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, section 1(b) of Executive Order 13563 requires that an agency:

- (1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);
- (2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- (3) Select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
- (4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and
- (5) Identify and assess available alternatives to direct regulation, including providing economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or providing information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” OMB's Office of Information and Regulatory Affairs (OIRA) has emphasized that these techniques may

include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

Treasury has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action, and is issuing this interim final rule only on a reasoned determination that the benefits exceed the costs. In choosing among alternative regulatory approaches, Treasury selected those approaches that would maximize net benefits. Based on the analysis that follows and the reasons stated elsewhere in this document, Treasury believes that this interim final rule is consistent with the principles set forth in Executive Order 13563.

Treasury also has determined that this regulatory action does not unduly interfere with States, territories, Tribal governments, and localities in the exercise of their governmental functions.

This Regulatory Impact Analysis discusses the need for regulatory action, the potential benefits, and the potential costs.

Need for Regulatory Action. This interim final rule implements the \$350 billion Fiscal Recovery Funds of the ARPA, which Congress passed to help States, territories, Tribal governments, and localities respond to the ongoing COVID-19 public health emergency and its economic impacts. As the agency charged with execution of these programs, Treasury has concluded that this interim final rule is needed to ensure that recipients of Fiscal Recovery Funds fully understand the requirements and parameters of the program as set forth in the statute and deploy funds in a manner that best reflects Congress’ mandate for targeted fiscal relief.

This interim final rule is primarily a transfer rule: it transfers \$350 billion in aid from the Federal Government to states, territories, Tribal governments, and localities, generating a significant macroeconomic effect on the U.S. economy. In making this transfer, Treasury has sought to implement the program in ways that maximize its potential benefits while minimizing its costs. It has done so by aiming to target relief in key areas according to the congressional

mandate; offering clarity to States, territories, Tribal governments, and localities while maintaining their flexibility to respond to local needs; and limiting administrative burdens.

Analysis of Benefits. Relative to a pre-statutory baseline, the Fiscal Recovery Funds provide a combined \$350 billion to State, local, and Tribal governments for fiscal relief and support for costs incurred responding to the COVID-19 pandemic. Treasury believes that this transfer will generate substantial additional economic activity, although given the flexibility accorded to recipients in the use of funds, it is not possible to precisely estimate the extent to which this will occur and the timing with which it will occur. Economic research has demonstrated that state fiscal relief is an efficient and effective way to mitigate declines in jobs and output during an economic downturn.¹⁸³ Absent such fiscal relief, fiscal austerity among State, local, and Tribal governments could exert a prolonged drag on the overall economic recovery, as occurred following the 2007-09 recession.¹⁸⁴

This interim final rule provides benefits across several areas by implementing the four eligible funding uses, as defined in statute: strengthening the response to the COVID-19 public health emergency and its economic impacts; easing fiscal pressure on State, local, and Tribal governments that might otherwise lead to harmful cutbacks in employment or government services; providing premium pay to essential workers; and making necessary investments in certain types of infrastructure. In implementing the ARPA, Treasury also sought to support disadvantaged communities that have been disproportionately impacted by the pandemic. The Fiscal Recovery Funds as implemented by the interim final rule can be expected to channel

¹⁸³ Gabriel Chodorow-Reich et al., Does State Fiscal Relief during Recessions Increase Employment? Evidence from the American Recovery and Reinvestment Act, *American Econ. J.: Econ. Policy*, 4:3 118-45 (Aug. 2012), *available at* <https://www.aeaweb.org/articles?id=10.1257/pol.4.3.118>

¹⁸⁴ *See, e.g.*, Fitzpatrick, Haughwout & Setren, Fiscal Drag from the State and Local Sector?, Liberty Street Economics Blog, Federal Reserve Bank of New York (June 27, 2012), <https://www.libertystreeteconomics.newyorkfed.org/2012/06/fiscal-drag-from-the-state-and-local-sector.html>; Jiri Jonas, Great Recession and Fiscal Squeeze at U.S. Subnational Government Level, IMF Working Paper 12/184, (July 2012), *available at* <https://www.imf.org/external/pubs/ft/wp/2012/wp12184.pdf>; Gordon, *supra* note 9.

resources toward these uses in order to achieve substantial near-term economic and public health benefits, as well as longer-term benefits arising from the allowable investments in water, sewer, and broadband infrastructure and aid to families.

These benefits are achieved in the interim final rule through a broadly flexible approach that sets clear guidelines on eligible uses of Fiscal Recovery Funds and provides State, local, and Tribal government officials discretion within those eligible uses to direct Fiscal Recovery Funds to areas of greatest need within their jurisdiction. While preserving recipients' overall flexibility, the interim final rule includes several provisions that implement statutory requirements and will help support use of Fiscal Recovery Funds to achieve the intended benefits. The remainder of this section clarifies how Treasury's approach to key provisions in the interim final rule will contribute to greater realization of benefits from the program.

- Revenue Loss: Recipients will compute the extent of reduction in revenue by comparing actual revenue to a counterfactual trend representing what could have plausibly been expected to occur in the absence of the pandemic. The counterfactual trend begins with the last full fiscal year prior to the public health emergency (as required by statute) and projects forward with an annualized growth adjustment. Treasury's decision to incorporate a growth adjustment into the calculation of revenue loss ensures that the formula more fully captures revenue shortfalls relative to recipients' pre-pandemic expectations. Moreover, recipients will have the opportunity to re-calculate revenue loss at several points throughout the program, recognizing that some recipients may experience revenue effects with a lag. This option to re-calculate revenue loss on an ongoing basis should result in more support for recipients to avoid harmful cutbacks in future years. In calculating revenue loss, recipients will look at general revenue in the aggregate, rather than on a source-by-source basis. Given that recipients may have experienced offsetting changes in revenues across sources, Treasury's approach provides a more accurate representation of the effect of the pandemic on overall revenues.

- Premium Pay: Per the statute, recipients have broad latitude to designate critical infrastructure sectors and make grants to third-party employers for the purpose of providing premium pay or otherwise respond to essential workers. While the interim final rule generally preserves the flexibility in the statute, it does add a requirement that recipients give written justification in the case that premium pay would increase a worker's annual pay above a certain threshold. To set this threshold, Treasury analyzed data from the Bureau of Labor Statistics to determine a level that would not require further justification for premium pay to the vast majority of essential workers, while requiring higher scrutiny for provision of premium pay to higher-earners who, even without premium pay, would likely have greater personal financial resources to cope with the effects of the pandemic. Treasury believes the threshold in the interim final rule strikes the appropriate balance between preserving flexibility and helping encourage use of these resources to help those in greatest need. The interim final rule also requires that eligible workers have regular in-person interactions or regular physical handling of items that were also handled by others. This requirement will also help encourage use of financial resources for those who have endured the heightened risk of performing essential work.
- Withholding of Payments to Recipients: Treasury believes that for the vast majority of recipient entities, it will be appropriate to receive funds in two separate payments. As discussed above, withholding of payments ensures that recipients can adapt spending plans to evolving economic conditions and that at least some of the economic benefits will be realized in 2022 or later. However, consistent with authorities granted to Treasury in the statute, Treasury recognizes that a subset of States with significant remaining elevation in the unemployment rate could face heightened additional near-term needs to aid unemployed workers and stimulate the recovery. Therefore, for a subset of State governments, Treasury will not withhold any funds from the first payment.

Treasury believes that this approach strikes the appropriate balance between the general reasons to provide funds in two payments and the heightened additional near-term needs in specific States. As discussed above, Treasury set a threshold based on historical analysis of unemployment rates in recessions.

- Hiring Public Sector Employees: The interim final rule states explicitly that recipients may use funds to restore their workforces up to pre-pandemic levels. Treasury believes that this statement is beneficial because it eliminates any uncertainty that could cause delays or otherwise negatively impact restoring public sector workforces (which, at time of publication, remain significantly below pre-pandemic levels).

Finally, the interim final rule aims to promote and streamline the provision of assistance to individuals and communities in greatest need, particularly communities that have been historically disadvantaged and have experienced disproportionate impacts of the COVID-19 crisis. Targeting relief is in line with Executive Order 13985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” which laid out an Administration-wide priority to support “equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”¹⁸⁵ To this end, the interim final rule enumerates a list of services that may be provided using Fiscal Recovery Funds in low-income areas to address the disproportionate impacts of the pandemic in these communities; establishes the characteristics of essential workers eligible for premium pay and encouragement to serve workers based on financial need; provides that recipients may use Fiscal Recovery Funds to restore (to pre-pandemic levels) state

¹⁸⁵ Executive Order on Advancing Racial Equity and Support for Underserved Communities through the Federal Government (Jan. 20, 2021) (86 FR 7009, January 25, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/> (last visited May 9, 2021).

and local workforces, where women and people of color are disproportionately represented;¹⁸⁶ and targets investments in broadband infrastructure to unserved and underserved areas. Collectively, these provisions will promote use of resources to facilitate the provision of assistance to individuals and communities with the greatest need.

Analysis of Costs. This regulatory action will generate administrative costs relative to a pre-statutory baseline. This includes, chiefly, costs required to administer Fiscal Recovery Funds, oversee subrecipients and beneficiaries, and file periodic reports with Treasury. It also requires States to allocate Fiscal Recovery Funds to nonentitlement units, which are smaller units of local government that are statutorily required to receive their funds through States.

Treasury expects that the administrative burden associated with this program will be moderate for a grant program of its size. Treasury expects that most recipients receive direct or indirect funding from Federal Government programs and that many have familiarity with how to administer and report on Federal funds or grant funding provided by other entities. In particular, States, territories, and large localities will have received funds from the CRF and Treasury expects them to rely heavily on established processes developed last year or through prior grant funding, mitigating burden on these governments.

Treasury expects to provide technical assistance to defray the costs of administration of Fiscal Recovery Funds to further mitigate burden. In making implementation choices, Treasury has hosted numerous consultations with a diverse range of direct recipients—States, small cities, counties, and Tribal governments—along with various communities across the United States, including those that are underserved. Treasury lacks data to estimate the precise extent to which this interim final rule generates administrative burden for State, local, and Tribal governments,

¹⁸⁶ David Cooper, Mary Gable & Algernon Austin, Economic Policy Institute Briefing Paper, The Public-Sector Jobs Crisis: Women and African Americans hit hardest by job losses in state and local governments, <https://www.epi.org/publication/bp339-public-sector-jobs-crisis> (last visited May 9, 2021).

but seeks comment to better estimate and account for these costs, as well as on ways to lessen administrative burdens.

Executive Order 13132

Executive Order 13132 (entitled Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State, local, and Tribal governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This interim final rule does not have federalism implications within the meaning of the Executive order and does not impose substantial, direct compliance costs on State, local, and Tribal governments or preempt state law within the meaning of the Executive order. The compliance costs are imposed on State, local, and Tribal governments by sections 602 and 603 of the Social Security Act, as enacted by the ARPA. Notwithstanding the above, Treasury has engaged in efforts to consult and work cooperatively with affected State, local, and Tribal government officials and associations in the process of developing the interim final rule. Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, Treasury certifies that it has complied with the requirements of Executive Order 13132.

Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., generally requires public notice and an opportunity for comment before a rule becomes effective. However, the APA provides that the requirements of 5 U.S.C. 553 do not apply “to the extent that there is involved . . . a matter relating to agency . . . grants.” The interim final rule implements statutory conditions on the eligible uses of the Fiscal Recovery Funds grants, and addresses the payment of those funds, the reporting on uses of funds, and potential consequences of ineligible uses. The rule is thus “both clearly and directly related to a federal grant program.” *National Wildlife Federation v. Snow*, 561 F.2d 227, 232 (D.C. Cir. 1976). The rule sets forth the “process necessary to maintain state . . . eligibility for federal funds,” *id.*, as well as the “method[s] by which states can

. . . qualify for federal aid,” and other “integral part[s] of the grant program,” *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 222 (D.D.C. 1976). As a result, the requirements of 5 U.S.C. 553 do not apply.

The APA also provides an exception to ordinary notice-and-comment procedures “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(3)(B); *see also* 5 U.S.C. 553(d)(3) (creating an exception to the requirement of a 30-day delay before the effective date of a rule “for good cause found and published with the rule”). Assuming 5 U.S.C. 553 applied, Treasury would still have good cause under sections 553(b)(3)(B) and 553(d)(3) for not undertaking section 553’s requirements. The ARPA is a law responding to a historic economic and public health emergency; it is “extraordinary” legislation about which “both Congress and the President articulated a profound sense of ‘urgency.’” *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984). Indeed, several provisions implemented by this interim final rule (sections 602(c)(1)(A) and 603(c)(1)(A)) explicitly provide funds to “respond to the public health emergency,” and the urgency is further exemplified by Congress’s command (in sections 602(b)(6)(B) and 603(b)(7)(A)) that, “[t]o the extent practicable,” funds must be provided to Tribes and cities “not later than 60 days after the date of enactment.” *See Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 884 (3d Cir. 1982) (finding good cause under circumstances, including statutory time limits, where APA procedures would have been “virtually impossible”). Finally, there is an urgent need for States to undertake the planning necessary for sound fiscal policymaking, which requires an understanding of how funds provided under the ARPA will augment and interact with existing budgetary resources and tax policies. Treasury understands that many states require immediate rules on which they can rely, especially in light of the fact that the ARPA “covered period” began on March 3, 2021. The statutory

urgency and practical necessity are good cause to forego the ordinary requirements of notice-and-comment rulemaking.

Congressional Review Act

The Administrator of OIRA has determined that this is a major rule for purposes of Subtitle E of the Small Business Regulatory Enforcement and Fairness Act of 1996 (also known as the Congressional Review Act or CRA) (5 U.S.C. 804(2) *et seq.*). Under the CRA, a major rule takes effect 60 days after the rule is published in the Federal Register. 5 U.S.C. 801(a)(3). Notwithstanding this requirement, the CRA allows agencies to dispense with the requirements of section 801 when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and the rule shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). Pursuant to section 808(2), for the reasons discussed above, Treasury for good cause finds that a 60-day delay to provide public notice is impracticable and contrary to the public interest.

Paperwork Reduction Act

The information collections associated with State, territory, local, and Tribal government applications materials necessary to receive Fiscal Recovery Funds (e.g., payment information collection and acceptance of award terms) have been reviewed and approved by OMB pursuant to the Paperwork Reduction Act (44 U.S.C. Chapter 35) (PRA) emergency processing procedures and assigned control number 1505-0271. The information collections related to ongoing reporting requirements, as discussed in this interim final rule, will be submitted to OMB for emergency processing in the near future. Under the PRA, an agency may not conduct or sponsor and a respondent is not required to respond to, an information collection unless it displays a valid OMB control number.

Estimates of hourly burden under this program are set forth in the table below. Burden estimates below are preliminary.

Reporting	# Respondents (Estimated)	# Responses Per Respondent	Total Responses	Hours per response	Total Burden in Hours	Cost to Respondent (\$48.80 per hour*)
Recipient Payment Form	5,050	1	5,050	.25 (15 minutes)	1,262.5	\$61,610
Acceptance of Award Terms	5,050	1	5,050	.25 (15 minutes)	1,262.5	\$61,610
Title VI Assurances	5,050	1	5,050	.50 (30 minutes)	2,525	\$123,220
Quarterly Project and Expenditure Report	5,050	4 per year after first year	20,200	25	505,000	\$24,644,000
Annual Project and Expenditure Report from NEUs	TBD	1 per year	20,000-40,000 (Estimate only)	15	300,000 – 600,000	\$14,640,000 - \$29,280,000
Annual Recovery Plan Performance report	418	1 per year	418	100	41,800	\$2,039,840
Total	5,050 – TBD	N/A	55,768 - 75,768	141	851,850 - 1,151,850	\$41,570,280 - \$56,210,280

* Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, Accountants and Auditors, on the Internet at <https://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm> (visited March 28, 2020). Base wage of \$33.89/hour increased by 44 percent to account for fully loaded employer cost of employee compensation (benefits, etc.) for a fully loaded wage rate of \$48.80.

Periodic reporting is required by section 602(c) of Section VI of the Social Security Act and under the interim final rule.

As discussed in Section VIII of this SUPPLEMENTARY INFORMATION, recipients of Fiscal Recovery Funds will be required to submit one interim report and thereafter quarterly Project and Expenditure reports until the end of the award period. Recipients must submit interim reports to Treasury by August 31, 2021. The quarterly Project and Expenditure reports

will include financial data, information on contracts and subawards over \$50,000, types of projects funded, and other information regarding a recipient's utilization of the award funds.

Nonentitlement unit recipients will be required to submit annual Project and Expenditure reports until the end of the award period. The initial annual Project and Expenditure report for Nonentitlement unit recipients must be submitted to Treasury by October 31, 2021. The subsequent annual reports must be submitted to Treasury by October 31 each year.

States, territories, metropolitan cities, and counties with a population that exceeds 250,000 residents will also be required to submit an annual Recovery Plan Performance report to Treasury. The Recovery Plan Performance report will include descriptions of the projects funded and information on the performance indicators and objectives of the award. Each annual Recovery Plan Performance report must be posted on the public-facing website of the recipient. Treasury will provide additional guidance and instructions on all the reporting requirements outlined above for the Fiscal Recovery Funds program at a later date.

These and related periodic reporting requirements are under consideration and will be submitted to OMB for approval under the PRA emergency provisions in the near future.

Treasury invites comments on all aspects of the reporting and recordkeeping requirements including: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Comments should be sent by the comment deadline to the www.regulations.gov docket with a copy to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, 725 17th Street NW, Washington, DC 20503; or email to oir_submission@omb.eop.gov.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the Administrative Procedure Act or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the Federal Register. 5 U.S.C. 603, 604.

Rules that are exempt from notice and comment under the APA are also exempt from the RFA requirements, including the requirement to conduct a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Since this rule is exempt from the notice and comment requirements of the APA, Treasury is not required to conduct a regulatory flexibility analysis.

List of Subjects in 31 CFR Part 35

Executive compensation, Public health emergency, State and local governments, Tribal governments.

For the reasons stated in the preamble, the Department of the Treasury amends 31 CFR part 35 as follows:

PART 35 - PANDEMIC RELIEF PROGRAMS

1. The authority citation for part 35 is revised to read as follows:

Authority: 42 U.S.C. 802(f); 42 U.S.C. 803(f); 31 U.S.C. 321; Division N, Title V, Subtitle B, Pub. L. 116-260, 134 Stat. 1182; Section 104A, Pub. L. 103-325, 108 Stat. 2160, as amended (12 U.S.C. 4701 *et seq.*); Pub. L. 117-2, 135 Stat. 4 (42 U.S.C. 802 *et seq.*).

2. Revise the part heading to read as set forth above.

3. Add subpart A to read as follows:

Subpart A—Coronavirus State and Local Fiscal Recovery Funds

Sec.

35.1 Purpose.

35.2 Applicability.

35.3 Definitions.

35.4 Reservation of authority, reporting.

- 35.5 Use of funds.
- 35.6 Eligible uses.
- 35.7 Pensions.
- 35.8 Tax.
- 35.9 Compliance with applicable laws.
- 35.10 Recoupment.
- 35.11 Payments to States.
- 35.12 Distributions to nonentitlement units of local government and units of general local government.

§ 35.1 Purpose.

This subpart implements section 9901 of the American Rescue Plan Act (Subtitle M of Title IX of Public Law 117-2), which amends Title VI of the Social Security Act (42 U.S.C. 801 *et seq.*) by adding sections 602 and 603 to establish the Coronavirus State Fiscal Recovery Fund and Coronavirus Local Fiscal Recovery Fund.

§ 35.2 Applicability.

This subpart applies to States, territories, Tribal governments, metropolitan cities, nonentitlement units of local government, counties, and units of general local government that accept a payment or transfer of funds made under section 602 or 603 of the Social Security Act.

§ 35.3 Definitions.

As used in this subpart:

Baseline means tax revenue of the recipient for its fiscal year ending in 2019, adjusted for inflation in each reporting year using the Bureau of Economic Analysis’s Implicit Price Deflator for the gross domestic product of the United States.

County means a county, parish, or other equivalent county division (as defined by the Census Bureau).

Covered benefits include, but are not limited to, the costs of all types of leave (vacation, family-related, sick, military, bereavement, sabbatical, jury duty), employee insurance (health, life, dental, vision), retirement (pensions, 401(k)), unemployment benefit plans (Federal and State), workers’ compensation insurance, and Federal Insurance Contributions Act taxes (which includes Social Security and Medicare taxes).

Covered change means a change in law, regulation, or administrative interpretation. A change in law includes any final legislative or regulatory action, a new or changed administrative interpretation, and the phase-in or taking effect of any statute or rule if the phase-in or taking effect was not prescribed prior to the start of the covered period.

Covered period means, with respect to a State, Territory, or Tribal government, the period that:

(1) Begins on March 3, 2021; and

(2) Ends on the last day of the fiscal year of such State, Territory, or Tribal government in which all funds received by the State, Territory, or Tribal government from a payment made under section 602 or 603 of the Social Security Act have been expended or returned to, or recovered by, the Secretary.

COVID-19 means the Coronavirus Disease 2019.

COVID-19 public health emergency means the period beginning on January 27, 2020 and until the termination of the national emergency concerning the COVID-19 outbreak declared pursuant to the National Emergencies Act (50 U.S.C. 1601 *et seq.*).

Deposit means an extraordinary payment of an accrued, unfunded liability. The term deposit does not refer to routine contributions made by an employer to pension funds as part of the employer's obligations related to payroll, such as either a pension contribution consisting of a normal cost component related to current employees or a component addressing the amortization of unfunded liabilities calculated by reference to the employer's payroll costs.

Eligible employer means an employer of an eligible worker who performs essential work.

Eligible workers means workers needed to maintain continuity of operations of essential critical infrastructure sectors, including health care; emergency response; sanitation, disinfection, and cleaning work; maintenance work; grocery stores, restaurants, food production, and food delivery; pharmacy; biomedical research; behavioral health work; medical testing and diagnostics; home- and community-based health care or assistance with activities of daily living;

family or child care; social services work; public health work; vital services to Tribes; any work performed by an employee of a State, local, or Tribal government; educational work, school nutrition work, and other work required to operate a school facility; laundry work; elections work; solid waste or hazardous materials management, response, and cleanup work; work requiring physical interaction with patients; dental care work; transportation and warehousing; work at hotel and commercial lodging facilities that are used for COVID-19 mitigation and containment; work in a mortuary; work in critical clinical research, development, and testing necessary for COVID-19 response.

(1) With respect to a recipient that is a metropolitan city, nonentitlement unit of local government, or county, workers in any additional sectors as each chief executive officer of such recipient may designate as critical to protect the health and well-being of the residents of their metropolitan city, nonentitlement unit of local government, or county; or

(2) With respect to a State, Territory, or Tribal government, workers in any additional sectors as each Governor of a State or Territory, or each Tribal government, may designate as critical to protect the health and well-being of the residents of their State, Territory, or Tribal government.

Essential work means work that:

(1) Is not performed while teleworking from a residence; and

(2) Involves:

(i) Regular in-person interactions with patients, the public, or coworkers of the individual that is performing the work; or

(ii) Regular physical handling of items that were handled by, or are to be handled by patients, the public, or coworkers of the individual that is performing the work.

Funds means, with respect to a recipient, amounts provided to the recipient pursuant to a payment made under section 602(b) or 603(b) of the Social Security Act or transferred to the recipient pursuant to section 603(c)(4) of the Social Security Act.

General revenue means money that is received from tax revenue, current charges, and miscellaneous general revenue, excluding refunds and other correcting transactions, proceeds from issuance of debt or the sale of investments, agency or private trust transactions, and intergovernmental transfers from the Federal Government, including transfers made pursuant to section 9901 of the American Rescue Plan Act. General revenue does not include revenues from utilities. Revenue from Tribal business enterprises must be included in general revenue.

Intergovernmental transfers means money received from other governments, including grants and shared taxes.

Metropolitan city has the meaning given that term in section 102(a)(4) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(4)) and includes cities that relinquish or defer their status as a metropolitan city for purposes of receiving allocations under section 106 of such Act (42 U.S.C. 5306) for fiscal year 2021.

Net reduction in total spending is measured as the State or Territory's total spending for a given reporting year excluding its spending of funds, subtracted from its total spending for its fiscal year ending in 2019, adjusted for inflation using the Bureau of Economic Analysis's Implicit Price Deflator for the gross domestic product of the United States.

Nonentitlement unit of local government means a "city," as that term is defined in section 102(a)(5) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(5)), that is not a metropolitan city.

Nonprofit means a nonprofit organization that is exempt from Federal income taxation and that is described in section 501(c)(3) of the Internal Revenue Code.

Obligation means an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment.

Pension fund means a defined benefit plan and does not include a defined contribution plan.

Premium pay means an amount of up to \$13 per hour that is paid to an eligible worker, in addition to wages or remuneration the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID-19 public health emergency. Such amount may not exceed \$25,000 with respect to any single eligible worker. Premium pay will be considered to be in addition to wages or remuneration the eligible worker otherwise receives if, as measured on an hourly rate, the premium pay is:

(1) With regard to work that the eligible worker previously performed, pay and remuneration equal to the sum of all wages and remuneration previously received plus up to \$13 per hour with no reduction, substitution, offset, or other diminishment of the eligible worker's previous, current, or prospective wages or remuneration; or

(2) With regard to work that the eligible worker continues to perform, pay of up to \$13 that is in addition to the eligible worker's regular rate of wages or remuneration, with no reduction, substitution, offset, or other diminishment of the workers' current and prospective wages or remuneration.

Qualified census tract has the same meaning given in 26 U.S.C. 42(d)(5)(B)(ii)(I).

Recipient means a State, Territory, Tribal government, metropolitan city, nonentitlement unit of local government, county, or unit of general local government that receives a payment made under section 602(b) or 603(b) of the Social Security Act or transfer pursuant to section 603(c)(4) of the Social Security Act.

Reporting year means a single year or partial year within the covered period, aligned to the current fiscal year of the State or Territory during the covered period.

Secretary means the Secretary of the Treasury.

State means each of the 50 States and the District of Columbia

Small business means a business concern or other organization that:

(1) Has no more than 500 employees, or if applicable, the size standard in number of employees established by the Administrator of the Small Business Administration for the industry in which the business concern or organization operates; and

(2) Is a small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632).

Tax revenue means revenue received from a compulsory contribution that is exacted by a government for public purposes excluding refunds and corrections and, for purposes of § 35.8, intergovernmental transfers. Tax revenue does not include payments for a special privilege granted or service rendered, employee or employer assessments and contributions to finance retirement and social insurance trust systems, or special assessments to pay for capital improvements.

Territory means the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or American Samoa.

Tribal enterprise means a business concern:

(1) That is wholly owned by one or more Tribal governments, or by a corporation that is wholly owned by one or more Tribal governments; or

(2) That is owned in part by one or more Tribal governments, or by a corporation that is wholly owned by one or more Tribal governments, if all other owners are either United States citizens or small business concerns, as these terms are used and consistent with the definitions in 15 U.S.C. 657a(b)(2)(D).

Tribal government means the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published by the Bureau of Indian Affairs on January 29, 2021, pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).

Unemployment rate means the U-3 unemployment rate provided by the Bureau of Labor Statistics as part of the Local Area Unemployment Statistics program, measured as total unemployment as a percentage of the civilian labor force.

Unemployment trust fund means an unemployment trust fund established under section 904 of the Social Security Act (42 U.S.C. 1104).

Unit of general local government has the meaning given to that term in section 102(a)(1) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(1)).

Unserved and underserved households or businesses means one or more households or businesses that are not currently served by a wireline connection that reliably delivers at least 25 Mbps download speed and 3 Mbps of upload speed.

§ 35.4 Reservation of authority, reporting.

(a) *Reservation of authority.* Nothing in this subpart shall limit the authority of the Secretary to take action to enforce conditions or violations of law, including actions necessary to prevent evasions of this subpart.

(b) *Extensions or accelerations of timing.* The Secretary may extend or accelerate any deadline or compliance date of this subpart, including reporting requirements that implement this subpart, if the Secretary determines that such extension or acceleration is appropriate. In determining whether an extension or acceleration is appropriate, the Secretary will consider the period of time that would be extended or accelerated and how the modified timeline would facilitate compliance with this subpart.

(c) *Reporting and requests for other information.* During the covered period, recipients shall provide to the Secretary periodic reports providing detailed accounting of the uses of funds, all modifications to a State or Territory's tax revenue sources, and such other information as the Secretary may require for the administration of this section. In addition to regular reporting requirements, the Secretary may request other additional information as may be necessary or appropriate, including as may be necessary to prevent evasions of the requirements of this

subpart. False statements or claims made to the Secretary may result in criminal, civil, or administrative sanctions, including fines, imprisonment, civil damages and penalties, debarment from participating in Federal awards or contracts, and/or any other remedy available by law.

§ 35.5 Use of funds.

(a) *In general.* A recipient may only use funds to cover costs incurred during the period beginning March 3, 2021, and ending December 31, 2024, for one or more of the purposes enumerated in sections 602(c)(1) and 603(c)(1) of the Social Security Act, as applicable, including those enumerated in section § 35.6, subject to the restrictions set forth in sections 602(c)(2) and 603(c)(2) of the Social Security Act, as applicable.

(b) *Costs incurred.* A cost shall be considered to have been incurred for purposes of paragraph (a) of this section if the recipient has incurred an obligation with respect to such cost by December 31, 2024.

(c) *Return of funds.* A recipient must return any funds not obligated by December 31, 2024, and any funds not expended to cover such obligations by December 31, 2026.

§ 35.6 Eligible uses.

(a) *In general.* Subject to §§ 35.7 and 35.8, a recipient may use funds for one or more of the purposes described in paragraphs (b) through (e) of this section

(b) *Responding to the public health emergency or its negative economic impacts.* A recipient may use funds to respond to the public health emergency or its negative economic impacts, including for one or more of the following purposes:

(1) *COVID-19 response and prevention.* Expenditures for the mitigation and prevention of COVID-19, including:

(i) Expenses related to COVID-19 vaccination programs and sites, including staffing, acquisition of equipment or supplies, facilities costs, and information technology or other administrative expenses;

- (ii) COVID–19-related expenses of public hospitals, clinics, and similar facilities;
- (iii) COVID-19 related expenses in congregate living facilities, including skilled nursing facilities, long-term care facilities, incarceration settings, homeless shelters, residential foster care facilities, residential behavioral health treatment, and other group living facilities;
- (iv) Expenses of establishing temporary public medical facilities and other measures to increase COVID-19 treatment capacity, including related construction costs and other capital investments in public facilities to meet COVID-19-related operational needs;
- (v) Expenses of establishing temporary public medical facilities and other measures to increase COVID-19 treatment capacity, including related construction costs and other capital investments in public facilities to meet COVID-19-related operational needs;
- (vi) Costs of providing COVID-19 testing and monitoring, contact tracing, and monitoring of case trends and genomic sequencing for variants;
- (vii) Emergency medical response expenses, including emergency medical transportation, related to COVID-19;
- (viii) Expenses for establishing and operating public telemedicine capabilities for COVID-19-related treatment;
- (ix) Expenses for communication related to COVID-19 vaccination programs and communication or enforcement by recipients of public health orders related to COVID-19;
- (x) Expenses for acquisition and distribution of medical and protective supplies, including sanitizing products and personal protective equipment;
- (xi) Expenses for disinfection of public areas and other facilities in response to the COVID-19 public health emergency;
- (xii) Expenses for technical assistance to local authorities or other entities on mitigation of COVID-19-related threats to public health and safety;
- (xiii) Expenses for quarantining or isolation of individuals;

(xiv) Expenses of providing paid sick and paid family and medical leave to public employees to enable compliance with COVID-19 public health precautions;

(xv) Expenses for treatment of the long-term symptoms or effects of COVID-19, including post-intensive care syndrome;

(xvi) Expenses for the improvement of ventilation systems in congregate settings, public health facilities, or other public facilities;

(xvii) Expenses related to establishing or enhancing public health data systems; and

(xviii) Mental health treatment, substance misuse treatment, and other behavioral health services.

(2) *Public health and safety staff.* Payroll and covered benefit expenses for public safety, public health, health care, human services, and similar employees to the extent that the employee's time is spent mitigating or responding to the COVID-19 public health emergency.

(3) *Hiring State and local government staff.* Payroll, covered benefit, and other costs associated with the recipient increasing the number of its employees up to the number of employees that it employed on January 27, 2020.

(4) *Assistance to unemployed workers.* Assistance, including job training, for individuals who want and are available for work, including those who have looked for work sometime in the past 12 months or who are employed part time but who want and are available for full-time work.

(5) *Contributions to State unemployment insurance trust funds.* Contributions to an unemployment trust fund up to the level required to restore the unemployment trust fund to its balance on January 27, 2020 or to pay back advances received under Title XII of the Social Security Act (42 U.S.C. 1321) for the payment of benefits between January 27, 2020 and [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(6) *Small businesses.* Assistance to small businesses, including loans, grants, in-kind assistance, technical assistance or other services, that responds to the negative economic impacts of the COVID-19 public health emergency.

(7) *Nonprofits.* Assistance to nonprofit organizations, including loans, grants, in-kind assistance, technical assistance or other services, that responds to the negative economic impacts of the COVID-19 public health emergency.

(8) *Assistance to households.* Assistance programs, including cash assistance programs, that respond to the COVID-19 public health emergency.

(9) *Aid to impacted industries.* Aid to tourism, travel, hospitality, and other impacted industries that responds to the negative economic impacts of the COVID-19 public health emergency.

(10) *Expenses to improve efficacy of public health or economic relief programs.* Administrative costs associated with the recipient's COVID-19 public health emergency assistance programs, including services responding to the COVID-19 public health emergency or its negative economic impacts, that are not federally funded.

(11) *Survivor's benefits.* Benefits for the surviving family members of individuals who have died from COVID-19, including cash assistance to widows, widowers, or dependents of individuals who died of COVID-19.

(12) *Disproportionately impacted populations and communities.* A program, service, or other assistance that is provided in a qualified census tract, that is provided to households and populations living in a qualified census tract, that is provided by a Tribal government, or that is provided to other households, businesses, or populations disproportionately impacted by the COVID-19 public health emergency, such as:

- (i) Programs or services that facilitate access to health and social services, including:
 - (A) Assistance accessing or applying for public benefits or services;
 - (B) Remediation of lead paint or other lead hazards; and

(C) Community violence intervention programs;

(ii) Programs or services that address housing insecurity, lack of affordable housing, or homelessness, including:

(A) Supportive housing or other programs or services to improve access to stable, affordable housing among individuals who are homeless;

(B) Development of affordable housing to increase supply of affordable and high-quality living units; and

(C) Housing vouchers and assistance relocating to neighborhoods with higher levels of economic opportunity and to reduce concentrated areas of low economic opportunity;

(iii) Programs or services that address or mitigate the impacts of the COVID-19 public health emergency on education, including:

(A) New or expanded early learning services;

(B) Assistance to high-poverty school districts to advance equitable funding across districts and geographies; and

(C) Educational and evidence-based services to address the academic, social, emotional, and mental health needs of students; and

(iv) Programs or services that address or mitigate the impacts of the COVID-19 public health emergency on childhood health or welfare, including:

(A) New or expanded childcare;

(B) Programs to provide home visits by health professionals, parent educators, and social service professionals to individuals with young children to provide education and assistance for economic support, health needs, or child development; and

(C) Services for child welfare-involved families and foster youth to provide support and education on child development, positive parenting, coping skills, or recovery for mental health and substance use.

(c) *Providing premium pay to eligible workers.* A recipient may use funds to provide premium pay to eligible workers of the recipient who perform essential work or to provide grants to eligible employers, provided that any premium pay or grants provided under this paragraph (c) must respond to eligible workers performing essential work during the COVID-19 public health emergency. A recipient uses premium pay or grants provided under this paragraph (c) to respond to eligible workers performing essential work during the COVID-19 public health emergency if it prioritizes low- and moderate-income persons. The recipient must provide, whether for themselves or on behalf of a grantee, a written justification to the Secretary of how the premium pay or grant provided under this paragraph (c) responds to eligible workers performing essential work if the premium pay or grant would increase an eligible worker's total wages and remuneration above 150 percent of such eligible worker's residing State's average annual wage for all occupations or their residing county's average annual wage, whichever is higher.

(d) *Providing government services.* For the provision of government services to the extent of a reduction in the recipient's general revenue, calculated according to paragraphs (d)(1) and (2) of this section.

(1) *Frequency.* A recipient must calculate the reduction in its general revenue using information as-of December 31, 2020, December 31, 2021, December 31, 2022, and December 31, 2023 (each, a calculation date) and following each calculation date.

(2) *Calculation.* A reduction in a recipient's general revenue equals:

$$\text{Max} \{ [\text{Base Year Revenue} * (1 + \text{Growth Adjustment})^{\left(\frac{n_t}{12}\right)}] - \text{Actual General Revenue}_{t}; 0 \}$$

Where:

Base Year Revenue is the recipient's general revenue for the most recent full fiscal year prior to the COVID-19 public health emergency;

Growth Adjustment is equal to the greater of 4.1 percent (or 0.041) and the recipient's average annual revenue growth over the three full fiscal years prior to the COVID-19 public health emergency.

n equals the number of months elapsed from the end of the base year to the calculation date.

Actual General Revenue is a recipient's actual general revenue collected during 12-month period ending on each calculation date;

Subscript t denotes the specific calculation date.

(e) *To make necessary investments in infrastructure.* A recipient may use funds to make investments in:

(1) *Clean Water State Revolving Fund and Drinking Water State Revolving Fund investments.* Projects or activities of the type that would be eligible under section 603(c) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c)) or section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j-12); or,

(2) *Broadband.* Broadband infrastructure that is designed to provide service to unserved or underserved households and businesses and that is designed to, upon completion:

(i) Reliably meet or exceed symmetrical 100 Mbps download speed and upload speeds;
or

(ii) In cases where it is not practicable, because of the excessive cost of the project or geography or topography of the area to be served by the project, to provide service meeting the standards set forth in paragraph (e)(2)(i) of this section:

(A) Reliably meet or exceed 100 Mbps download speed and between at least 20 Mbps and 100 Mbps upload speed; and

(B) Be scalable to a minimum of 100 Mbps download speed and 100 Mbps upload speed.

§ 35.7 Pensions.

A recipient may not use funds for deposit into any pension fund.

§ 35.8 Tax.

(a) *Restriction.* A State or Territory shall not use funds to either directly or indirectly offset a reduction in the net tax revenue of the State or Territory resulting from a covered change during the covered period.

(b) *Violation.* Treasury will consider a State or Territory to have used funds to offset a reduction in net tax revenue if, during a reporting year:

(1) *Covered change.* The State or Territory has made a covered change that, either based on a reasonable statistical methodology to isolate the impact of the covered change in actual revenue or based on projections that use reasonable assumptions and do not incorporate the effects of macroeconomic growth to reduce or increase the projected impact of the covered change, the State or Territory assesses has had or predicts to have the effect of reducing tax revenue relative to current law;

(2) *Exceeds the de minimis threshold.* The aggregate amount of the measured or predicted reductions in tax revenue caused by covered changes identified under paragraph (b)(1) of this section, in the aggregate, exceeds 1 percent of the State's or Territory's baseline;

(3) *Reduction in net tax revenue.* The State or Territory reports a reduction in net tax revenue, measured as the difference between actual tax revenue and the State's or Territory's baseline, each measured as of the end of the reporting year; and

(4) *Consideration of other changes.* The aggregate amount of measured or predicted reductions in tax revenue caused by covered changes is greater than the sum of the following, in each case, as calculated for the reporting year:

(i) The aggregate amount of the expected increases in tax revenue caused by one or more covered changes that, either based on a reasonable statistical methodology to isolate the impact of the covered change in actual revenue or based on projections that use reasonable assumptions and do not incorporate the effects of macroeconomic growth to reduce or increase the projected impact of the covered change, the State or Territory assesses has had or predicts to have the effect of increasing tax revenue; and

(ii) Reductions in spending, up to the amount of the State's or Territory's net reduction in total spending, that are in:

(A) Departments, agencies, or authorities in which the State or Territory is not using funds; and

(B) Departments, agencies, or authorities in which the State or Territory is using funds, in an amount equal to the value of the spending cuts in those departments, agencies, or authorities, minus funds used.

(c) *Amount and revenue reduction cap.* If a State or Territory is considered to be in violation pursuant to paragraph (b) of this section, the amount used in violation of paragraph (a) of this section is equal to the lesser of:

(1) The reduction in net tax revenue of the State or Territory for the reporting year, measured as the difference between the State's or Territory's baseline and its actual tax revenue, each measured as of the end of the reporting year; and,

(2) The aggregate amount of the reductions in tax revenues caused by covered changes identified in paragraph (b)(1) of this section, minus the sum of the amounts in identified in paragraphs (b)(4)(i) and (ii).

§ 35.9 Compliance with applicable laws.

A recipient must comply with all other applicable Federal statutes, regulations, and Executive orders, and a recipient shall provide for compliance with the American Rescue Plan Act, this subpart, and any interpretive guidance by other parties in any agreements it enters into with other parties relating to these funds.

§ 35.10 Recoupment.

(a) *Identification of violations—(1) In general.* Any amount used in violation of § 35.6 or § 35.7 may be identified at any time prior to December 31, 2026.

(2) *Annual reporting of amounts of violations.* On an annual basis, a recipient that is a State or Territory must calculate and report any amounts used in violation of § 35.8.

(b) *Calculation of amounts subject to recoupment*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, Treasury will calculate any amounts subject to recoupment resulting from a violation of § 35.6 or § 35.7 as the amounts used in violation of such restrictions.

(2) *Violations of § 35.8.* Treasury will calculate any amounts subject to recoupment resulting from a violation of § 35.8, equal to the lesser of:

- (i) The amount set forth in § 35.8(c); and,
- (ii) The amount of funds received by such recipient.

(c) *Notice.* If Treasury calculates an amount subject to recoupment under paragraph (b) of this section, Treasury will provide the recipient a written notice of the amount subject to recoupment along with an explanation of such amounts.

(d) *Request for reconsideration.* Unless Treasury extends the time period, within 60 calendar days of receipt of a notice of recoupment provided under paragraph (c) of this section, a recipient may submit a written request to Treasury requesting reconsideration of any amounts subject to recoupment under paragraph (b) of this section. To request reconsideration of any amounts subject to recoupment, a recipient must submit to Treasury a written request that includes:

- (1) An explanation of why the recipient believes all or some of the amount should not be subject to recoupment; and
- (2) A discussion of supporting reasons, along with any additional information.

(e) *Final amount subject to recoupment.* Unless Treasury extends the time period, within 60 calendar days of receipt of the recipient's request for reconsideration provided pursuant to paragraph (d) of this section, the recipient will be notified of the Secretary's decision to affirm, withdraw, or modify the notice of recoupment. Such notification will include an explanation of the decision, including responses to the recipient's supporting reasons and consideration of additional information provided.

(f) *Repayment of funds.* Unless Treasury extends the time period, a recipient shall repay to the Secretary any amounts subject to recoupment in accordance with instructions provided by Treasury:

(1) Within 120 calendar days of receipt of the notice of recoupment provided under paragraph (c) of this section, in the case of a recipient that does not submit a request for reconsideration in accordance with the requirements of paragraph (d) of this section; or

(2) Within 120 calendar days of receipt of the Secretary's decision under paragraph (e) of this section, in the case of a recipient that submits a request for reconsideration in accordance with the requirements of paragraph (d) of this section.

§ 35.11 Payments to States.

(a) *In general.* With respect to any State or Territory that has an unemployment rate as of the date that it submits an initial certification for payment of funds pursuant to section 602(d)(1) of the Social Security Act that is less than two percentage points above its unemployment rate in February 2020, the Secretary will withhold 50 percent of the amount of funds allocated under section 602(b) of the Social Security Act to such State or territory until the date that is twelve months from the date such initial certification is provided to the Secretary.

(b) *Payment of withheld amount.* In order to receive the amount withheld under paragraph (a) of this section, the State or Territory must submit to the Secretary at least 30 days prior to the date referenced in paragraph (a) the following information:

(1) A certification, in the form provided by the Secretary, that such State or Territory requires the payment to carry out the activities specified in section 602(c) of the Social Security Act and will use the payment in compliance with section 602(c) of the Social Security Act; and,

(2) Any reports required to be filed by that date pursuant to this subpart that have not yet been filed.

§ 35.12 Distributions to nonentitlement units of local government and units of general local government.

(a) *Nonentitlement units of local government.* Each State or Territory that receives a payment from Treasury pursuant to section 603(b)(2)(B) of the Social Security Act shall distribute the amount of the payment to nonentitlement units of government in such State or Territory in accordance with the requirements set forth in section 603(b)(2)(C) of the Social Security Act and without offsetting any debt owed by such nonentitlement units of local governments against such payments.

(b) *Budget cap.* A State or Territory may not make a payment to a nonentitlement unit of local government pursuant to section 603(b)(2)(C) of the Social Security Act and paragraph (a) of this section in excess of the amount equal to 75 percent of the most recent budget for the nonentitlement unit of local government as of January 27, 2020. A State or Territory shall permit a nonentitlement unit of local government without a formal budget as of January 27, 2020, to provide a certification from an authorized officer of the nonentitlement unit of local government of its most recent annual expenditures as of January 27, 2020, and a State or Territory may rely on such certification for purposes of complying with this paragraph (b).

(c) *Units of general local government.* Each State or Territory that receives a payment from Treasury pursuant to section 603(b)(3)(B)(ii) of the Social Security Act, in the case of an amount to be paid to a county that is not a unit of general local government, shall distribute the amount of the payment to units of general local government within such county in accordance with the requirements set forth in section 603(b)(3)(B)(ii) of the Social Security Act and without offsetting any debt owed by such units of general local government against such payments.

(d) *Additional conditions.* A State or Territory may not place additional conditions or requirements on distributions to nonentitlement units of local government or units of general local government beyond those required by section 603 of the Social Security Act or this subpart.

Laurie Schaffer,
Acting General Counsel.

Revenue Loss Estimation as of June 30, 2021

Include (Y/N)	Revenue Source	6/30/2016	6/30/2017	6/30/2018	6/30/2019	12/31/2020	12/31/2021	12/31/2022	12/31/2023	12/31/2020	12/31/2021	12/31/2022	12/31/2023	12/31/2020	12/31/2021	12/31/2022	12/31/2023
		Actual	Actual	Actual	Base Year	Actual	Projected	Projected	Projected	Counterfactual	Counterfactual	Counterfactual	Counterfactual	Reduction	Reduction	Reduction	Reduction
Y	05 - Sales tax	\$ 21,350,056	\$ 26,932,012	\$ 26,164,531	\$ 24,901,779	\$ 47,635,107	\$ 30,689,225	\$ 28,371,704	\$ 29,192,267	\$ 26,448,831	\$ 27,533,233	\$ 28,662,095	\$ 29,837,241	\$ (21,186,277)	\$ (3,155,992)	\$ 290,391	\$ 644,974
Y	10 - Property tax	\$ 18,139,368	\$ 20,219,077	\$ 22,433,806	\$ 25,301,094	\$ 27,063,706	\$ 26,597,062	\$ 28,306,869	\$ 29,324,566	\$ 26,872,953	\$ 27,974,744	\$ 29,121,708	\$ 30,315,698	\$ (190,753)	\$ 1,377,682	\$ 814,840	\$ 991,132
Y	15 - Transient occupancy	\$ 5,852,244	\$ 6,023,681	\$ 6,810,718	\$ 8,901,337	\$ 3,916,184	\$ 2,523,442	\$ 4,000,000	\$ 6,250,000	\$ 9,454,343	\$ 9,841,971	\$ 10,245,492	\$ 10,665,557	\$ 5,538,159	\$ 7,318,529	\$ 6,245,492	\$ 4,415,557
N	20 - Utility tax	\$ 3,370,830	\$ 3,082,408	\$ 3,146,398	\$ 3,089,921	\$ 3,141,076	\$ 3,234,580	\$ 3,256,365	\$ 3,278,251	\$ 3,281,886	\$ 3,416,443	\$ 3,556,517	\$ 3,702,335	\$ 140,810	\$ 181,864	\$ 300,152	\$ 424,084
Y	25 - Franchise fees	\$ 3,478,024	\$ 3,409,572	\$ 3,563,820	\$ 3,445,253	\$ 3,351,845	\$ 3,330,717	\$ 3,431,255	\$ 3,531,793	\$ 3,659,293	\$ 3,809,324	\$ 3,965,506	\$ 4,128,092	\$ 307,448	\$ 478,608	\$ 534,251	\$ 596,299
Y	30 - Other taxes	\$ 2,595,773	\$ 2,981,883	\$ 1,339,860	\$ 1,659,916	\$ 2,437,066	\$ 1,230,830	\$ 1,266,514	\$ 1,303,894	\$ 1,763,040	\$ 1,835,324	\$ 1,910,573	\$ 1,988,906	\$ (674,026)	\$ 604,495	\$ 644,058	\$ 685,012
Y	35 - Licenses and permits	\$ 3,073,109	\$ 2,536,924	\$ 2,757,929	\$ 4,102,665	\$ 3,343,389	\$ 18,131,599	\$ 3,148,045	\$ 3,163,786	\$ 4,357,547	\$ 4,536,207	\$ 4,722,191	\$ 4,915,801	\$ 1,014,159	\$ (13,595,392)	\$ 1,574,146	\$ 1,752,015
Y	40 - Use of money and property	\$ 1,400,899	\$ 1,210,231	\$ 1,342,626	\$ 2,680,997	\$ 3,989,396	\$ 1,247,865	\$ 1,851,635	\$ 2,519,689	\$ 2,847,557	\$ 2,964,307	\$ 3,085,843	\$ 3,212,363	\$ (1,141,839)	\$ 1,716,442	\$ 1,234,208	\$ 692,674
N	45 - Intergovernmental revenue	\$ 412,378	\$ 328,607	\$ 1,000,777	\$ 472,642	\$ 1,602,889	\$ 660,339	\$ 242,249	\$ 243,460	\$ 502,005	\$ 522,587	\$ 544,013	\$ 566,318	\$ (1,100,884)	\$ (137,752)	\$ 301,764	\$ 322,858
Y	50 - Charges for services	\$ 15,454,535	\$ 17,913,165	\$ 10,548,179	\$ 4,361,580	\$ 2,897,330	\$ 3,700,181	\$ 2,399,802	\$ 2,481,673	\$ 4,632,548	\$ 4,822,483	\$ 5,020,204	\$ 5,226,033	\$ 1,735,219	\$ 1,122,302	\$ 2,620,402	\$ 2,744,360
Y	55 - Fines and forfeitures	\$ 558,517	\$ 593,122	\$ 575,032	\$ 511,472	\$ 235,843	\$ 325,000	\$ 225,000	\$ 225,000	\$ 543,247	\$ 565,520	\$ 588,707	\$ 612,844	\$ 307,404	\$ 240,520	\$ 363,707	\$ 387,844
Y	60 - Miscellaneous	\$ 1,206,217	\$ 1,822,763	\$ 1,009,090	\$ 1,102,316	\$ 1,259,146	\$ 1,254,006	\$ 500,278	\$ -	\$ 1,170,798	\$ 1,218,801	\$ 1,268,772	\$ 1,320,791	\$ (88,348)	\$ (35,205)	\$ 768,494	\$ 1,320,791
N	65 - Transfers in	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
Y	70 - Other financing sources	\$ 580	\$ -	\$ 872,250	\$ 3,875	\$ -	\$ -	\$ -	\$ -	\$ 4,116	\$ 4,284	\$ 4,460	\$ 4,643	\$ 4,116	\$ 4,284	\$ 4,460	\$ 4,643
	Total	\$ 73,109,322	\$ 83,642,429	\$ 77,417,840	\$ 76,972,282	\$ 96,129,011	\$ 89,029,926	\$ 73,501,102	\$ 77,992,667	\$ 81,754,273	\$ 85,106,198	\$ 88,595,552	\$ 92,227,970	\$ -	\$ -	\$ 15,094,450	\$ 14,235,302

Growth Rate 14.4% -7.4% -0.6% -7.4% -17.4% 6.1% 4.1% 4.1% 4.1%

Average Growth Rate 2.1%

Growth Rate Used for Calculation 4.1%

Total Revenue Reduction \$ 29,329,752

American Rescue Plan Act of 2021 - Budget Allocation Journal		
Description	GL Account	Amount
CWP - Climate Action Plan	100-12-122 421-401	\$ 78,000
CWP - Personal Preparedness	100-12-633 421-401	\$ 10,000
Administration Overhead (Cost Allocation)	100-12-122 421-401	\$ 249,106
Administration Overhead (Cost Allocation)	100-12-633 421-401	\$ 134,039
Internal Audit	100-41-405 421-401	\$ 150,000
General Liability Insurance	100-44-412 421-401	\$ 182,112
CWP - Homeless Jobs Program	100-70-700 421-401	\$ 200,000
CWP - General Plan and Muni Code Update	100-71-702 421-401	\$ 250,000
CWP - RHNA	100-71-702 421-401	\$ 295,000
CWP - Encouraging Dark Sky Compliance	100-71-702 421-401	\$ 10,000
CWP - Development Accountability	100-71-702 421-401	\$ 10,000
CWP - Sign Ordinance Update	100-71-702 421-401	\$ 25,000
Regulating Diversified Retail Use	100-71-705 421-401	\$ 4,862
Community Funding	100-10-101 421-401	\$ 82,396
Accela Business License	100-32-308 421-401	\$ 17,500
Customer Service Solution	100-32-308 421-401	\$ 65,000
ERP exploration	100-32-308 421-401	\$ 50,000
Performance Management Application	100-32-308 421-401	\$ 13,808
Law Enforcement Services (SCC)	100-20-200 421-401	\$ 972,987
CWP - Municipal Water System	100-80-800 421-401	\$ 10,000
CWP - Revisit 5G	100-82-804 421-401	\$ 250,000
Replenish Transfer to Fund 270 for Pavement Maintenance	100-90-001 421-401	\$ 1,333,773
CWP - Mental Health Support	100-60-601 421-401	\$ 10,000
CWP - Senior Strategy	100-60-601 421-401	\$ 34,000
CWP - Dogs Off Leash Area	100-60-601 421-401	\$ 5,000
CWP - Revamping Block Leader and Neighborhood Watch	100-12-632 421-401	\$ 1,500
Library Services	100-60-636 421-401	\$ 403,304
Transfer Out of General Fund Non-Departmental	100-90-001 800-902	\$ 4,847,387



CITY OF CUPERTINO

Agenda Item

21-9759

Agenda Date: 9/7/2021
Agenda #: 10.

Subject: Consideration of a Professional Services Agreement for Plan Check Services for the Westport Cupertino Project (Continued from August 17, 2021)

That City Council consider authorizing the City Manager to sign a Professional Services Agreement with ICCI and NV5 to provide plan check services for the proposed Westport Cupertino project in the amount not-to-exceed \$300,000 and, consider approving Budget Modification #2122-161 increasing appropriations by \$300,000 and increasing revenues by \$461,000 in the Community Development Department's Building Division (100-73-714)



COMMUNITY DEVELOPMENT DEPARTMENT

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA
95014-3255 TELEPHONE: (408) 777-3308 • FAX: (408) 777-3333
CUPERTINO.ORG

CITY COUNCIL STAFF REPORT

Meeting: September 7, 2021

Subject

Supplemental Staff Report regarding the Consideration of a Professional Services Agreement for Plan Check Services for the Westport Cupertino Project and associated budget modifications.

Recommended Action

That City Council consider authorizing the City Manager to sign Professional Services Agreements with ICCI for \$210,000 and NV5 for \$90,000 to provide plan check services for the proposed Westport Cupertino project; and, consider approving Budget Modification #2122-161 increasing appropriations by \$300,000 and increasing revenues by \$461,000 in the Community Development Department's Building Division (Accounts 100-73-714 750-031 and 100-73-714 410-415 respectively; page 436-7 of the FY 2021-22 Adopted Budget).

Discussion

Several questions were brought up at the first reading of this item at the City Council meeting on August 17, 2021. The following responses have been prepared by staff address these questions.

Question 1: Include the selection of the consultants in the contract. Could the contract include the names of the third-party consultant?

Response: Two separate contracts have been prepared and attached, including the names of the selected 3rd party consultants: Independent Code Consultants, Inc. (ICCI) and NV5. There were a total of _ proposals submitted and these two were selected at the recommended funding levels based on the evaluation of the proposals.

Question 2: Amendment issues for contracts – Is the City Manager empowered to amend contracts of \$175,000 or less?

Response: Yes, the City Manager currently has authority to amend a contract if 1) the amended contract amount does not exceed \$175,000, and 2) sufficient funding is available.

In this case, the City Council is considering a budget modification to increase expenditures by \$300,000 to cover the ICCI contract for \$210,000 and the NV5 contract for \$90,000. Any increase to the ICCI contract would require City Council approval since it is already over the City Manager's contracting authority of \$175,000. The City Manager would have authority to amend the NV5 contract, but only up to the Manager's \$175,000 authority, and even then only if funding from another budgeted source were available (e.g., the City Manager Discretionary Fund). Also note that any transfer of funding for this purpose would be reported to Council as part of the quarterly budget reporting process.

Question 3: Request to see notations of expenditures and revenues in Building Plan Review Program (100-73-714)

Response: The \$300,000 of additional appropriations and \$461,000 of additional revenues were not included in the FY 21-22 Adopted Budget since the budget document was created at a point in time (7/1/2021) before these additional amounts were known. If and when the City Council approves this or any budget modification, the adopted budget is modified by the Council's action and reported out to Council in the quarterly budget reports as well as through the City's financial transparency portal at www.cupertino.org/open by selecting "Amended Budget" in the navigation panel.

In this case, the Building Plan Review Program Budget will be modified to include \$461,000 in additional "Licenses and Permits" revenues and \$300,000 in "Special Projects" expenditures (both on Budget page 437).

Question 4: How can transparency be ensured for communications related to the plan review of building permit applications for the Westport Cupertino project between the City's 3rd party consultant and the applicant?

Response: A clause in the contract was added requiring the Consultants to copy the City on any direct email correspondence related to plan review between the 3rd party consultant and the applicant.

Sustainability Impact

No sustainability impact.

Fiscal Impact Section:

This item will increase revenues and appropriations in the Community Development Department's Building Division (100-73-714). Increased plan check fee revenue of \$461,000 will be collected from Westport and increased costs of \$300,000 will be incurred for the plan check contracts with ICCI and NV5. Note that the contract costs are approximately 65% of the fees collected per the City's fee schedule.

Prepared by: Albert Salvador, Asst. Director, Community Development Department,
Reviewed by: Ben Fu, Community Development Director
Dianne Thompson, Assistant City Manager
Approved for Submission by: Greg Larson, City Manager

Attachments:

A – Draft Contract – ICCI

B – Draft Contract – NV5



PROFESSIONAL/CONSULTING SERVICES AGREEMENT

1. **PARTIES**

This Agreement is made by and between the City of Cupertino, a municipal corporation (“City”), and Independent Code Consultant, Inc (“Contractor”), a corporation for plan review services for the Westport project specifically the row house/townhouse and Building 2 senior independent living units. and is effective on the last date signed below (“Effective Date”).

2. **SERVICES**

Contractor agrees to provide the services and perform the tasks (“Services”) set forth in detail in Scope of Services, attached here and incorporated as **Exhibit A**. Contractor further agrees to carry out its work in compliance with any applicable local, State, or Federal order regarding COVID-19.

3. **TIME OF PERFORMANCE**

3.1 This Agreement begins on the Effective Date and ends on June 30, 2024 (“Contract Time”), unless terminated earlier as provided herein. Contractor’s Services shall begin on September 9, 2021, and shall be completed by June 30, 2024. The City’s appropriate department head or the City Manager may extend the Contract Time through a written amendment to this Agreement, provided such extension does not include additional contract funds. Extensions requiring additional contract funds are subject to the City’s purchasing policy.

3.2 Schedule of Performance. Contractor must deliver the Services in accordance with the Schedule of Performance, attached and incorporated here **Exhibit B**.

3.3 Time is of the essence for the performance of all the Services. Contractor must have sufficient time, resources, and qualified staff to deliver the Services on time.

4. **COMPENSATION**

4.1 Maximum Compensation. City will pay Contractor for satisfactory performance of the Services an amount that will based on actual costs but that will be capped so as not to exceed \$ 210,000 (“Contract Price”), based upon the scope of services in **Exhibit A** and the budget and rates included in **Exhibit C**, Compensation attached and incorporated here. The maximum compensation includes all expenses and reimbursements and will remain in place even if Contractor’s actual costs exceed the capped amount. No extra work or payment is permitted without prior written approval of City.

4.2 Invoices and Payments. Monthly invoices must state a description of the deliverable completed and the amount due for the preceding month. Within thirty (30) days of completion of Services, Contractor must submit a requisition for final and complete payment of costs and pending claims for City approval. Failure to timely submit a complete and accurate payment requisition relieves City of any further payment or other obligations under the Agreement.

5. INDEPENDENT CONTRACTOR

5.1 Status. Contractor is an independent contractor and not an employee, partner, or joint venture of City. Contractor is solely responsible for the means and methods of performing the Services and for the persons hired to work under this Agreement. Contractor is not entitled to health benefits, worker's compensation, or other benefits from the City.

5.2 Contractor's Qualifications. Contractor warrants on behalf of itself and its subcontractors that they have the qualifications and skills to perform the Services in a competent and professional manner and according to the highest standards and best practices in the industry.

5.3 Permits and Licenses. Contractor warrants on behalf of itself and its subcontractors that they are properly licensed, registered, and/or certified to perform the Services as required by law and have procured a City Business License, if required by the Cupertino Municipal Code.

5.4 Subcontractors. Only Contractor's employees are authorized to work under this Agreement. Prior written approval from City is required for any subcontractor, and the terms and conditions of this Agreement will apply to any approved subcontractor.

5.5 Tools, Materials, and Equipment. Contractor will supply all tools, materials and equipment required to perform the Services under this Agreement.

5.6 Payment of Benefits and Taxes. Contractor is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes. Contractor and any of its employees, agents, and subcontractors shall not have any claim under this Agreement or otherwise against City for seniority, vacation time, vacation pay, sick leave, personal time off, overtime, health insurance, medical care, hospital care, insurance benefits, social security, disability, unemployment, workers compensation or employee benefits of any kind. Contractor shall be solely liable for and obligated to pay directly all applicable taxes, fees, contributions, or charges applicable to Contractor's business including, but not limited to, federal and state income taxes. City shall have no obligation whatsoever to pay or withhold any taxes or benefits on behalf of Contractor. Should any court, arbitrator, or administrative authority, including but not limited to the California Public Employees Retirement System (PERS), the Internal Revenue Service or the State Employment Development Division, determine that Contractor, or any of its employees, agents, or subcontractors, is an employee for any purpose, then Contractor agrees to a reduction in amounts payable under this Agreement, or to promptly remit to City any payments due by the City as a result of such determination, so that the City's total expenses under this Agreement are not greater than they would have been had the determination not been made.

6. **PROPRIETARY/CONFIDENTIAL INFORMATION/SHARING OF INFORMATION**

In performing this Agreement, Contractor may have access to private or confidential information owned or controlled by the City, which may contain proprietary or confidential details the disclosure of which to third parties may be damaging to City. Contractor shall hold in confidence all City information provided by City to Contractor and use it only to perform this Agreement. Contractor shall exercise the same standard of care to protect City information as a reasonably prudent contractor would use to protect its own proprietary data.

The City of Cupertino (email address: permitcenter@cupertino.org) shall be copied on any direct email correspondence or communication sent by the Consultant to the applicant for all responses or inquiries related to the plan review of the Westport Cupertino project.

7. **OWNERSHIP OF MATERIALS**

7.1 Property Rights. Any interest (including copyright interests) of Contractor in any product, memoranda, study, report, map, plan, drawing, specification, data, record, document, or other information or work, in any medium (collectively, “Work Product”), prepared by Contractor in connection with this Agreement will be the exclusive property of the City upon completion of the work to be performed hereunder or upon termination of this Agreement, to the extent requested by City. In any case, no Work Product shall be shown to any third-party without prior written approval of City.

7.2 Copyright. To the extent permitted by Title 17 of the U.S. Code, all Work Product arising out of this Agreement is considered “works for hire” and all copyrights to the Work Product will be the property of City. Alternatively, Contractor assigns to City all Work Product copyrights. Contractor may use copies of the Work Product for promotion only with City’s written approval.

7.3 Patents and Licenses. Contractor must pay royalties or license fees required for authorized use of any third party intellectual property, including but not limited to patented, trademarked, or copyrighted intellectual property if incorporated into the Services or Work Product of this Agreement.

7.4 Re-Use of Work Product. Unless prohibited by law and without waiving any rights, City may use or modify the Work Product of Contractor or its sub-contractors prepared or created under this Agreement, to execute or implement any of the following:

- (a) The original Services for which Contractor was hired;
- (b) Completion of the original Services by others;
- (c) Subsequent additions to the original Services; and/or
- (d) Other City projects.

7.5 Deliverables and Format. Contractor must provide electronic and hard copies of the Work Product, on recycled paper and copied on both sides, except for one single-sided original.

8. RECORDS

Contractor must maintain complete and accurate accounting records relating to its performance in accordance with generally accepted accounting principles. The records must include detailed information of Contractor's performance, benchmarks and deliverables, which must be available to City for review and audit. The records and supporting documents must be kept separate from other records and must be maintained for four (4) years from the date of City's final payment.

9. ASSIGNMENT

Contractor shall not assign, sublease, hypothecate, or transfer this Agreement, or any interest therein, directly or indirectly, by operation of law or otherwise, without prior written consent of City. Any attempt to do so will be null and void. Any changes related to the financial control or business nature of Contractor as a legal entity is considered an assignment of the Agreement and subject to City approval, which shall not be unreasonably withheld. Control means fifty percent (50%) or more of the voting power of the business entity.

10. PUBLICITY/SIGNS

Any publicity generated by Contractor for the project under this Agreement, during the term of this Agreement and for one year thereafter, will reference the City's contributions in making the project possible. The words "City of Cupertino" will be displayed in all pieces of publicity, including flyers, press releases, posters, brochures, public service announcements, interviews and newspaper articles. No signs may be posted, exhibited or displayed on or about City property, except signage required by law or this Contract, without prior written approval from the City.

11. INDEMNIFICATION

11.1 To the fullest extent allowed by law, and except for losses caused by the sole and active negligence or willful misconduct of City personnel, Contractor shall indemnify, defend and hold harmless City, its City Council, boards and commissions, officers, officials, employees, agents, servants, volunteers, and consultants ("Indemnitees"), through legal counsel acceptable to City, from and against any and all liability, damages, claims, actions, causes of action, demands, charges, losses, costs, and expenses (including attorney fees, legal costs, and expenses related to litigation and dispute resolution proceedings) of every nature, arising directly or indirectly from this Agreement or in any manner relating to any of the following:

- (a) Breach of contract, obligations, representations, or warranties;
- (b) Negligent or willful acts or omissions committed during performance of the Services;
- (c) Personal injury, property damage, or economic loss resulting from the work or performance of Contractor or its subcontractors or sub-subcontractors;
- (d) Unauthorized use or disclosure of City's confidential and proprietary Information;
- (e) Claim of infringement or violation of a U.S. patent or copyright, trade secret, trademark, or service mark or other proprietary or intellectual property rights of any third party.

11.2 Contractor must pay the costs City incurs in enforcing this provision. Contractor must accept a tender of defense upon receiving notice from City of a third-party claim. At City's request,

Contractor will assist City in the defense of a claim, dispute, or lawsuit arising out of this Agreement.

11.3 Contractor's duties under this section are not limited to the Contract Price, workers' compensation payments, or the insurance or bond amounts required in the Agreement. Nothing in the Agreement shall be construed to give rise to an implied right of indemnity in favor of Contractor against City or any Indemnitee.

11.4. Contractor's payments may be deducted or offset to cover any money the City lost due to a claim or counterclaim arising out of this Agreement, a purchase order, or other transaction.

11.5. Contractor agrees to obtain executed indemnity agreements with provisions identical to those set forth here in this Section 11 from each and every subcontractor, or any other person or entity involved by, for, with, or on behalf of Contractor in the performance of this Agreement. Failure of City to monitor compliance with these requirements imposes no additional obligations on City and will in no way act as a waiver of any rights hereunder.

11.6. This Section 11 shall survive termination of the Agreement.

12. INSURANCE

Contractor shall comply with the Insurance Requirements, attached and incorporated here as **Exhibit D**, and must maintain the insurance for the duration of the Agreement, or longer as required by City. City will not execute the Agreement until City approves receipt of satisfactory certificates of insurance and endorsements evidencing the type, amount, class of operations covered, and the effective and expiration dates of coverage. Failure to comply with this provision may result in City, at its sole discretion and without notice, purchasing insurance for Contractor and deducting the costs from Contractor's compensation or terminating the Agreement.

13. COMPLIANCE WITH LAWS

13.1 General Laws. Contractor shall comply with all local, state, and federal laws and regulations applicable to this Agreement. Contractor will promptly notify City of changes in the law or other conditions that may affect the Project or Contractor's ability to perform. Contractor is responsible for verifying the employment authorization of employees performing the Services, as required by the Immigration Reform and Control Act.

13.2 Labor Laws. Contractor shall comply with all labor laws applicable to this Agreement. If the Scope of Services includes a "public works" component, Contractor is required to comply with prevailing wage laws under Labor Code Section 1720 and other labor laws.

13.3 Discrimination Laws. Contractor shall not discriminate on the basis of race, religious creed, color, ancestry, national origin, ethnicity, handicap, disability, marital status, pregnancy, age, sex, gender, sexual orientation, gender identity, Acquired-Immune Deficiency Syndrome (AIDS), or any other protected classification. Contractor shall comply with all anti-discrimination laws, including Government Code Sections 12900 and 11135, and Labor Code Sections 1735, 1777, and 3077.5. Consistent with City policy prohibiting harassment and discrimination, Contractor understands that harassment and discrimination directed toward a job applicant, an

employee, a City employee, or any other person, by Contractor or its employees or sub-contractors will not be tolerated. Contractor agrees to provide records and documentation to the City on request necessary to monitor compliance with this provision.

13.4 Conflicts of Interest. Contractor shall comply with all conflict of interest laws applicable to this Agreement and must avoid any conflict of interest. Contractor warrants that no public official, employee, or member of a City board or commission who might have been involved in the making of this Agreement, has or will receive a direct or indirect financial interest in this Agreement, in violation of California Government Code Section 1090 et seq. Contractor may be required to file a conflict of interest form if Contractor makes certain governmental decisions or serves in a staff capacity, as defined in Section 18700 of Title 2 of the California Code of Regulations. Contractor agrees to abide by the City's rules governing gifts to public officials and employees.

13.5 Remedies. Any violation of Section 13 constitutes a material breach and may result in City suspending payments, requiring reimbursements or terminating this Agreement. City reserves all other rights and remedies available under the law and this Agreement, including the right to seek indemnification under Section 11 of this Agreement.

14. PROJECT COORDINATION

City Project Manager. The City assigns Albert Salvador, Asst Director of CDD/Building Official as the City's representative for all purposes under this Agreement, with authority to oversee the progress and performance of the Scope of Services. City reserves the right to substitute another Project manager at any time, and without prior notice to Contractor.

Contractor Project Manager. Subject to City approval, Contractor assigns Abigail Obligation, President as its single Representative for all purposes under this Agreement, with authority to oversee the progress and performance of the Scope of Services. Contractor's Project manager is responsible for coordinating and scheduling the Services in accordance with the Scope of Services and the Schedule of Performance. Contractor must regularly update the City's Project Manager about the progress with the work or any delays, as required under the Scope of Services. City written approval is required prior to substituting a new Representative.

15. ABANDONMENT OF PROJECT

City may abandon or postpone the Project or parts therefor at any time. Contractor will be compensated for satisfactory Services performed through the date of abandonment, and will be given reasonable time to assemble the work and close out the Services. With City's pre-approval in writing, the time spent in closing out the Services will be compensated up to a maximum of ten percent (10%) of the total time expended to date in the performance of the Services.

16. TERMINATION

City may terminate this Agreement for cause or without cause at any time. Contractor will be paid for satisfactory Services rendered through the date of termination, but final payment will not be made until Contractor closes out the Services and delivers the Work Product.

17. GOVERNING LAW, VENUE, AND DISPUTE RESOLUTION

This Agreement is governed by the laws of the State of California. Any lawsuits filed related to this Agreement must be filed with the Superior Court for the County of Santa Clara, State of California. Contractor must comply with the claims filing requirements under the Government Code prior to filing a civil action in court. If a dispute arises, Contractor must continue to provide the Services pending resolution of the dispute. If the Parties elect arbitration, the arbitrator's award must be supported by law and substantial evidence and include detailed written findings of law and fact.

18. ATTORNEY FEES

If City initiates legal action, files a complaint or cross-complaint, or pursues arbitration, appeal, or other proceedings to enforce its rights or a judgment in connection with this Agreement, the prevailing party will be entitled to reasonable attorney fees and costs.

19. THIRD PARTY BENEFICIARIES

There are no intended third party beneficiaries of this Agreement.

20. WAIVER

Neither acceptance of the Services nor payment thereof shall constitute a waiver of any contract provision. City's waiver of a breach shall not constitute waiver of another provision or breach.

21. ENTIRE AGREEMENT

This Agreement represents the full and complete understanding of every kind or nature between the Parties, and supersedes any other agreement(s) and understanding(s), either oral or written, between the Parties. Any modification of this Agreement will be effective only if in writing and signed by each Party's authorized representative. No verbal agreement or implied covenant will be valid to amend or abridge this Agreement. If there is any inconsistency between any term, clause, or provision of the main Agreement and any term, clause, or provision of the attachments or exhibits thereto, the terms of the main Agreement shall prevail and be controlling.

22. INSERTED PROVISIONS

Each provision and clause required by law for this Agreement is deemed to be included and will be inferred herein. Either party may request an amendment to cure mistaken insertions or omissions of required provisions. The Parties will collaborate to implement this Section, as appropriate.

23. HEADINGS

The headings in this Agreement are for convenience only, are not a part of the Agreement and in no way affect, limit, or amplify the terms or provisions of this Agreement.

24. SEVERABILITY/PARTIAL INVALIDITY

If any term or provision of this Agreement, or their application to a particular situation, is found by the court to be void, invalid, illegal, or unenforceable, such term or provision shall remain in force and effect to the extent allowed by such ruling. All other terms and provisions of this Agreement or their application to specific situations shall remain in full force and effect. The Parties agree to work in good faith to amend this Agreement to carry out its intent.

25. SURVIVAL

All provisions which by their nature must continue after the Agreement expires or is terminated, including the Indemnification, Ownership of Materials/Work Product, Records, Governing Law, and Attorney Fees, shall survive the Agreement and remain in full force and effect.

26. NOTICES

All notices, requests and approvals must be sent in writing to the persons below, which will be considered effective on the date of personal delivery or the date confirmed by a reputable overnight delivery service, on the fifth calendar day after deposit in the United States Mail, postage prepaid, registered or certified, or the next business day following electronic submission:

<p>To City of Cupertino</p> <p>Attention: <u>Albert Salvador</u></p> <p>Email: <u>AlbertS@cupertino.org</u></p>	<p>To Contractor: <u>Independent Code Consultants</u></p> <p><u>5870 Stoneridge Mall Road, Suite 200</u></p> <p><u>Pleasanton, CA 94588</u></p> <p>Attention: <u>Abigail Obligation</u></p> <p>Email: <u>aobligacion@independentconsultants.com</u></p>
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27. EXECUTION

The person executing this Agreement on behalf of Contractor represents and warrants that Contractor has full right, power, and authority to enter into and carry out all actions contemplated by this Agreement and that he or she is authorized to execute this Agreement, which constitutes a legally binding obligation of Contractor. This Agreement may be executed in counterparts, each one of which is deemed an original and all of which, taken together, constitute a single binding instrument.

SIGNATURES CONTINUE ON THE FOLLOWING PAGE

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed.

CITY OF CUPERTINO
A Municipal Corporation

CONTRACTOR

By _____

By _____

Name _____

Name _____

Title _____

Title _____

Date _____

Date _____

APPROVED AS TO FORM:

CHRISTOPHER D. JENSEN
Cupertino City Attorney

ATTEST:

KIRSTEN SQUARCIA
City Clerk

DATE: _____



WESTPORT CUPERTINO

Cost Proposal for Plan Review Services

July 29, 2021
rev. August 16, 2021

SUBMITTED TO:

City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3255

Attention:

Mr. Albert Salvador | CBO

SUBMITTED BY:

Independent Code Consultants, Inc.
5870 Stoneridge Mall Road, Suite 200
Pleasanton, CA 94588

Contact:

Ms. Abigail Obligacion | President
T | 925.264.9559
E | aobligacion@independentcodeconsultants.com

July 29, 2021
(rev. August 16, 2021)

Mr. Albert Salvador | CBO
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014

Westport Cupertino | Cost Proposal for Plan Review Services

Dear Mr. Salvador:

Thank you for the opportunity for considering our team to assist you in providing building and on-site plan review services for the Westport Cupertino project. Independent Code Consultants, Inc. (ICCI) has established a team of highly qualified professionals. Our team is prepared to provide multi-discipline services to ensure the Westport Cupertino project is a success from demolition to certificate of occupancy.

It is ICCI's understanding that the Westport Cupertino project is to demolish a 71,250 square foot retail center (The Oaks) on a 8.1 acre site, and construct a mixed-use urban village. The proposed project will be construction of the following residential and commercial buildings:

- ▶ Site Improvements & Parking and Frontage Improvements.
- ▶ Building 2: 6-story building with 48 below market rate (BMR) affordable, senior, independent living, residential units and 2,400 square feet of round-floor retail/commercial.
- ▶ 70 single-family residential townhouses, 18 single-family residential rowhouses and one-level below-ground garage with 111 residential parking spaces and 80 retail parking spaces are proposed.

ICCI guarantees to complete the plan review on-time and will work alongside your team to ensure the project is a success. The following pages outline our detailed cost proposal (including a not-to-exceed amount). We look forward to working with you and feel free to contact us with any questions.

Respectfully Submitted,



Abigail Obligation | President
Independent Code Consultants, Inc.

EXHIBIT A

SUMMARY OF SERVICES

PLAN REVIEW SERVICES

The following is a summary of plan review services to be provided.

Building:

1. State and local laws and regulations
2. City of Cupertino Municipal Code and City of Cupertino's Conditions of Approval
3. Ensure drawings conform and comply with Title 24 California Code of Regulations
 - ▶ Fire and Life-Safety
 - ▶ Accessibility
 - ▶ Structural
 - ▶ Plumbing
 - ▶ Mechanical
 - ▶ Electrical
 - ▶ Energy
 - ▶ Green Building Standards
4. Substantiate structural plans meet recommendations made in the project geotechnical report
5. Ensure plans and details are consistent with product specifications and certification

On-Site Public Works/Civil Engineering Aspects:

1. State and local laws and regulations
2. City of Cupertino standards, conditions of approval, and mitigation measures relating to civil design
3. Substantiate grading plans meet recommendations made in the project geotechnical report
4. Grading plan check to include a review of the topographic survey for the existing depths of manholes and catch basins and their relationship to the proposed improvements
5. Review the existing topography to the proposed slopes and walls
6. Review on-site storm drains, sewer system and public improvements meet City requirements
7. Verify hydrology calculations match what is shown on the Improvement Plans and storm system is adequately sized for the design storm
8. Confirm stormwater treatment areas are adequately sized

Other Tasks:

1. Attendance of Design and Construction Meetings
2. Review and assist with technical problems that arise during construction
3. Will maintain a tracking system to document all plan reviews and reports, tracking of construction progress and processing of change orders, RFI's and deferred submittals

EXHIBITS B & C

RATE AND SERVICE STRUCTURE

ICCI guarantees that turnaround times will meet or exceed all project deadlines. Expedited turnaround times will be subject to discussion by all concerned parties to ensure all milestones are completed on schedule.

Building and On-Site Plan Review Services	Unit Rate	Unit
Building and On-site Plan Review Fee (first submittal plus one (1) additional subsequent submittal)	65% of Plan Review Fee	
Complete Plan Review Submittal beyond the 2nd Submittal	\$125.00	Hour
Basis of Charges	Unit Rate	
Work over 8 hours a day	Time and One-Half	
Work over 12 hours, Monday through Friday	Double Time	
Work on Saturdays	Time and One-Half	
Work over 8 hours on Saturday	Double Time	
Work on Sundays/Holidays	Double Time	
Reimbursables	Cost	

Building and Public Works / Engineering Plan Review Contract Not-to-Exceed (NTE) Amounts	
Complete Building and On-Site Plan Review	\$210,000.00

Note: Plan review services are based on the assumption no significant design changes will be done during the initial plan review and subsequent plan review submittals. Major design changes incurred during the plan review stages will be charged as deemed appropriate and negotiated by all parties for building and on-site plan review.

PLAN REVIEW TIMELINE

Independent Code Consultants will meet your plan review needs, which includes attending meetings and workshops when necessary. We also are able to meet or exceed the following timelines for plan review services:

All plan reviews, including revisions and deferred submittals	
Initial Review:	15 Days
Subsequent Reviews:	10 Days



COMMERCIAL GENERAL LIABILITY
POLICY NUMBER: 3AA438076

EVANSTON INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BLANKET ADDITIONAL INSURED

This endorsement modifies insurance provided under the following:

- COMMERCIAL GENERAL LIABILITY COVERAGE FORM
- LIQUOR LIABILITY COVERAGE FORM
- OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE FORM
- PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE FORM

SCHEDULE

Additional Premium: \$ 500 (Check box if fully earned.)

A. Who Is An Insured is amended to include as an additional insured any person or entity to whom you are obligated by valid written contract to provide such coverage, but only with respect to negligent acts or omissions of the Named Insured and only with respect to any coverage not otherwise excluded in the policy.

However:

1. The insurance afforded to such additional insured only applies to the extent permitted by law; and
2. If coverage provided to the additional insured is required by a contract or agreement, the insurance afforded to such additional insured will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

Our agreement to accept an additional insured provision in a contract is not an acceptance of any other provisions of the contract or the contract in total.

When coverage does not apply for the Named Insured, no coverage or defense will apply for the additional insured.

No coverage applies to such additional insured for injury or damage of any type to any "employee" of the Named Insured or to any obligation of the additional insured to indemnify another because of damages arising out of such injury or damage.

B. With respect to the insurance afforded to these additional insured, the following is added to limits of insurance:

If coverage provided to the additional insured is required by a contract or agreement, the most we will pay on behalf of the additional insured is the amount of insurance:

1. Required by the contract or agreement; or
2. Available under the applicable limits of insurance shown in the Declarations;

whichever is less.

This endorsement shall not increase the applicable limits of insurance shown in the Declarations.

All other terms and conditions remain unchanged.



COMMERCIAL GENERAL LIABILITY
POLICY NUMBER: 3AA438076

EVANSTON INSURANCE COMPANY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BLANKET WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SCHEDULE

Name Of Person Or Organization:

Any person(s) or organization(s) with whom the Named Insured agrees, in a written contract executed prior to the "occurrence", to waive rights of recovery

Additional Premium: \$ 250

The following is added to Condition **8**. Transfer Of Rights Of Recovery Against Others To Us under Section **IV** – Commercial General Liability Conditions:

We waive any right of recovery we may have against any person or organization shown in the Schedule of this endorsement. This waiver applies only to the person or organization shown in the Schedule of this endorsement.

All other terms and conditions remain unchanged.

**COMMERCIAL GENERAL LIABILITY
CG 20 01 04 13**

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

Primary And Noncontributory Insurance

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

(1) The additional insured is a Named Insured under such other insurance; and

(2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.



ENDORSEMENT AGREEMENT
WAIVER OF SUBROGATION
BLANKET BASIS

BROKER COPY

HOME OFFICE
SAN FRANCISCO

ALL EFFECTIVE DATES ARE
AT 12:01 AM PACIFIC
STANDARD TIME OR THE
TIME INDICATED AT
PACIFIC STANDARD TIME

EFFECTIVE JANUARY 12, 2021 AT 12.01 A.M.
AND EXPIRING JANUARY 12, 2022 AT 12.01 A.M.

9224300-21
RENEWAL
NA
1-69-33-36
PAGE 1 OF 1

INDEPENDENT CODE CONSULTANTS (A CO
6280 W LAS POSITAS BLVD STE 220
PLEASANTON, CA 94588

WE HAVE THE RIGHT TO RECOVER OUR PAYMENTS FROM ANYONE
LIABLE FOR AN INJURY COVERED BY THIS POLICY. WE WILL
NOT ENFORCE OUR RIGHT AGAINST THE PERSON OR
ORGANIZATION NAMED IN THE SCHEDULE.

THIS AGREEMENT APPLIES ONLY TO THE EXTENT THAT YOU
PERFORM WORK UNDER A WRITTEN CONTRACT THAT REQUIRES YOU
TO OBTAIN THIS AGREEMENT FROM US.

THE ADDITIONAL PREMIUM FOR THIS ENDORSEMENT SHALL BE
2.00% OF THE TOTAL POLICY PREMIUM.

SCHEDULE

PERSON OR ORGANIZATION

JOB DESCRIPTION

ANY PERSON OR ORGANIZATION
FOR WHOM THE NAMED INSURED
HAS AGREED BY WRITTEN
CONTRACT TO FURNISH THIS
WAIVER

BLANKET WAIVER OF
SUBROGATION

NOTHING IN THIS ENDORSEMENT CONTAINED SHALL BE HELD TO VARY, ALTER, WAIVE
OR EXTEND ANY OF THE TERMS, CONDITIONS, AGREEMENTS, OR LIMITATIONS OF THIS
POLICY OTHER THAN AS STATED. NOTHING ELSEWHERE IN THIS POLICY SHALL BE
HELD TO VARY, ALTER, WAIVE OR LIMIT THE TERMS, CONDITIONS, AGREEMENTS OR
LIMITATIONS OF THIS ENDORSEMENT.

COUNTERSIGNED AND ISSUED AT SAN FRANCISCO: JANUARY 2, 2021

AUTHORIZED REPRESENTATIVE

PRESIDENT AND CEO

SCIF FORM 10217 (REV.7-2014)

2572
OLD DP 217



PROFESSIONAL/CONSULTING SERVICES AGREEMENT

1. **PARTIES**

This Agreement is made by and between the City of Cupertino, a municipal corporation (“City”), and NV5 (“Contractor”), a corporation
for plan review services for the Westport Cupertino project specifically for Building 1 – assisted living with retail space
and is effective on the last date signed below (“Effective Date”).

2. **SERVICES**

Contractor agrees to provide the services and perform the tasks (“Services”) set forth in detail in Scope of Services, attached here and incorporated as **Exhibit A**. Contractor further agrees to carry out its work in compliance with any applicable local, State, or Federal order regarding COVID-19.

3. **TIME OF PERFORMANCE**

3.1 This Agreement begins on the Effective Date and ends on June 30, 2024 (“Contract Time”), unless terminated earlier as provided herein. Contractor’s Services shall begin on September 9, 2021 and shall be completed by June 30, 2024. The City’s appropriate department head or the City Manager may extend the Contract Time through a written amendment to this Agreement, provided such extension does not include additional contract funds. Extensions requiring additional contract funds are subject to the City’s purchasing policy.

3.2 Schedule of Performance. Contractor must deliver the Services in accordance with the Schedule of Performance, attached and incorporated here **Exhibit B**.

3.3 Time is of the essence for the performance of all the Services. Contractor must have sufficient time, resources, and qualified staff to deliver the Services on time.

4. **COMPENSATION**

4.1 Maximum Compensation. City will pay Contractor for satisfactory performance of the Services an amount that will be based on actual costs but that will be capped so as not to exceed \$ 90,000 (“Contract Price”), based upon the scope of services in **Exhibit A** and the budget and rates included in **Exhibit C**, Compensation attached and incorporated here. The maximum compensation includes all expenses and reimbursements and will remain in place even if Contractor’s actual costs exceed the capped amount. No extra work or payment is permitted without prior written approval of City.

4.2 Invoices and Payments. Monthly invoices must state a description of the deliverable completed and the amount due for the preceding month. Within thirty (30) days of completion of Services, Contractor must submit a requisition for final and complete payment of costs and pending claims for City approval. Failure to timely submit a complete and accurate payment requisition relieves City of any further payment or other obligations under the Agreement.

5. INDEPENDENT CONTRACTOR

5.1 Status. Contractor is an independent contractor and not an employee, partner, or joint venture of City. Contractor is solely responsible for the means and methods of performing the Services and for the persons hired to work under this Agreement. Contractor is not entitled to health benefits, worker's compensation, or other benefits from the City.

5.2 Contractor's Qualifications. Contractor warrants on behalf of itself and its subcontractors that they have the qualifications and skills to perform the Services in a competent and professional manner and according to the highest standards and best practices in the industry.

5.3 Permits and Licenses. Contractor warrants on behalf of itself and its subcontractors that they are properly licensed, registered, and/or certified to perform the Services as required by law and have procured a City Business License, if required by the Cupertino Municipal Code.

5.4 Subcontractors. Only Contractor's employees are authorized to work under this Agreement. Prior written approval from City is required for any subcontractor, and the terms and conditions of this Agreement will apply to any approved subcontractor.

5.5 Tools, Materials, and Equipment. Contractor will supply all tools, materials and equipment required to perform the Services under this Agreement.

5.6 Payment of Benefits and Taxes. Contractor is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes. Contractor and any of its employees, agents, and subcontractors shall not have any claim under this Agreement or otherwise against City for seniority, vacation time, vacation pay, sick leave, personal time off, overtime, health insurance, medical care, hospital care, insurance benefits, social security, disability, unemployment, workers compensation or employee benefits of any kind. Contractor shall be solely liable for and obligated to pay directly all applicable taxes, fees, contributions, or charges applicable to Contractor's business including, but not limited to, federal and state income taxes. City shall have no obligation whatsoever to pay or withhold any taxes or benefits on behalf of Contractor. Should any court, arbitrator, or administrative authority, including but not limited to the California Public Employees Retirement System (PERS), the Internal Revenue Service or the State Employment Development Division, determine that Contractor, or any of its employees, agents, or subcontractors, is an employee for any purpose, then Contractor agrees to a reduction in amounts payable under this Agreement, or to promptly remit to City any payments due by the City as a result of such determination, so that the City's total expenses under this Agreement are not greater than they would have been had the determination not been made.

6. **PROPRIETARY/CONFIDENTIAL INFORMATION/SHARING OF INFORMATION**

In performing this Agreement, Contractor may have access to private or confidential information owned or controlled by the City, which may contain proprietary or confidential details the disclosure of which to third parties may be damaging to City. Contractor shall hold in confidence all City information provided by City to Contractor and use it only to perform this Agreement. Contractor shall exercise the same standard of care to protect City information as a reasonably prudent contractor would use to protect its own proprietary data.

The City of Cupertino (email address: permitcenter@cupertino.org) shall be copied on any direct email correspondence or communication sent by the Consultant to the applicant for all responses or inquiries related to the plan review of the Westport Cupertino project.

7. **OWNERSHIP OF MATERIALS**

7.1 Property Rights. Any interest (including copyright interests) of Contractor in any product, memoranda, study, report, map, plan, drawing, specification, data, record, document, or other information or work, in any medium (collectively, “Work Product”), prepared by Contractor in connection with this Agreement will be the exclusive property of the City upon completion of the work to be performed hereunder or upon termination of this Agreement, to the extent requested by City. In any case, no Work Product shall be shown to any third-party without prior written approval of City.

7.2 Copyright. To the extent permitted by Title 17 of the U.S. Code, all Work Product arising out of this Agreement is considered “works for hire” and all copyrights to the Work Product will be the property of City. Alternatively, Contractor assigns to City all Work Product copyrights. Contractor may use copies of the Work Product for promotion only with City’s written approval.

7.3 Patents and Licenses. Contractor must pay royalties or license fees required for authorized use of any third party intellectual property, including but not limited to patented, trademarked, or copyrighted intellectual property if incorporated into the Services or Work Product of this Agreement.

7.4 Re-Use of Work Product. Unless prohibited by law and without waiving any rights, City may use or modify the Work Product of Contractor or its sub-contractors prepared or created under this Agreement, to execute or implement any of the following:

- (a) The original Services for which Contractor was hired;
- (b) Completion of the original Services by others;
- (c) Subsequent additions to the original Services; and/or
- (d) Other City projects.

7.5 Deliverables and Format. Contractor must provide electronic and hard copies of the Work Product, on recycled paper and copied on both sides, except for one single-sided original.

8. RECORDS

Contractor must maintain complete and accurate accounting records relating to its performance in accordance with generally accepted accounting principles. The records must include detailed information of Contractor's performance, benchmarks and deliverables, which must be available to City for review and audit. The records and supporting documents must be kept separate from other records and must be maintained for four (4) years from the date of City's final payment.

9. ASSIGNMENT

Contractor shall not assign, sublease, hypothecate, or transfer this Agreement, or any interest therein, directly or indirectly, by operation of law or otherwise, without prior written consent of City. Any attempt to do so will be null and void. Any changes related to the financial control or business nature of Contractor as a legal entity is considered an assignment of the Agreement and subject to City approval, which shall not be unreasonably withheld. Control means fifty percent (50%) or more of the voting power of the business entity.

10. PUBLICITY/SIGNS

Any publicity generated by Contractor for the project under this Agreement, during the term of this Agreement and for one year thereafter, will reference the City's contributions in making the project possible. The words "City of Cupertino" will be displayed in all pieces of publicity, including flyers, press releases, posters, brochures, public service announcements, interviews and newspaper articles. No signs may be posted, exhibited or displayed on or about City property, except signage required by law or this Contract, without prior written approval from the City.

11. INDEMNIFICATION

11.1 To the fullest extent allowed by law, and except for losses caused by the sole and active negligence or willful misconduct of City personnel, Contractor shall indemnify, defend and hold harmless City, its City Council, boards and commissions, officers, officials, employees, agents, servants, volunteers, and consultants ("Indemnitees"), through legal counsel acceptable to City, from and against any and all liability, damages, claims, actions, causes of action, demands, charges, losses, costs, and expenses (including attorney fees, legal costs, and expenses related to litigation and dispute resolution proceedings) of every nature, arising directly or indirectly from this Agreement or in any manner relating to any of the following:

- (a) Breach of contract, obligations, representations, or warranties;
- (b) Negligent or willful acts or omissions committed during performance of the Services;
- (c) Personal injury, property damage, or economic loss resulting from the work or performance of Contractor or its subcontractors or sub-subcontractors;
- (d) Unauthorized use or disclosure of City's confidential and proprietary Information;
- (e) Claim of infringement or violation of a U.S. patent or copyright, trade secret, trademark, or service mark or other proprietary or intellectual property rights of any third party.

11.2 Contractor must pay the costs City incurs in enforcing this provision. Contractor must accept a tender of defense upon receiving notice from City of a third-party claim. At City's request,

Contractor will assist City in the defense of a claim, dispute, or lawsuit arising out of this Agreement.

11.3 Contractor's duties under this section are not limited to the Contract Price, workers' compensation payments, or the insurance or bond amounts required in the Agreement. Nothing in the Agreement shall be construed to give rise to an implied right of indemnity in favor of Contractor against City or any Indemnitee.

11.4. Contractor's payments may be deducted or offset to cover any money the City lost due to a claim or counterclaim arising out of this Agreement, a purchase order, or other transaction.

11.5. Contractor agrees to obtain executed indemnity agreements with provisions identical to those set forth here in this Section 11 from each and every subcontractor, or any other person or entity involved by, for, with, or on behalf of Contractor in the performance of this Agreement. Failure of City to monitor compliance with these requirements imposes no additional obligations on City and will in no way act as a waiver of any rights hereunder.

11.6. This Section 11 shall survive termination of the Agreement.

12. INSURANCE

Contractor shall comply with the Insurance Requirements, attached and incorporated here as **Exhibit D**, and must maintain the insurance for the duration of the Agreement, or longer as required by City. City will not execute the Agreement until City approves receipt of satisfactory certificates of insurance and endorsements evidencing the type, amount, class of operations covered, and the effective and expiration dates of coverage. Failure to comply with this provision may result in City, at its sole discretion and without notice, purchasing insurance for Contractor and deducting the costs from Contractor's compensation or terminating the Agreement.

13. COMPLIANCE WITH LAWS

13.1 General Laws. Contractor shall comply with all local, state, and federal laws and regulations applicable to this Agreement. Contractor will promptly notify City of changes in the law or other conditions that may affect the Project or Contractor's ability to perform. Contractor is responsible for verifying the employment authorization of employees performing the Services, as required by the Immigration Reform and Control Act.

13.2 Labor Laws. Contractor shall comply with all labor laws applicable to this Agreement. If the Scope of Services includes a "public works" component, Contractor is required to comply with prevailing wage laws under Labor Code Section 1720 and other labor laws.

13.3 Discrimination Laws. Contractor shall not discriminate on the basis of race, religious creed, color, ancestry, national origin, ethnicity, handicap, disability, marital status, pregnancy, age, sex, gender, sexual orientation, gender identity, Acquired-Immune Deficiency Syndrome (AIDS), or any other protected classification. Contractor shall comply with all anti-discrimination laws, including Government Code Sections 12900 and 11135, and Labor Code Sections 1735, 1777, and 3077.5. Consistent with City policy prohibiting harassment and discrimination, Contractor understands that harassment and discrimination directed toward a job applicant, an

employee, a City employee, or any other person, by Contractor or its employees or sub-contractors will not be tolerated. Contractor agrees to provide records and documentation to the City on request necessary to monitor compliance with this provision.

13.4 Conflicts of Interest. Contractor shall comply with all conflict of interest laws applicable to this Agreement and must avoid any conflict of interest. Contractor warrants that no public official, employee, or member of a City board or commission who might have been involved in the making of this Agreement, has or will receive a direct or indirect financial interest in this Agreement, in violation of California Government Code Section 1090 et seq. Contractor may be required to file a conflict of interest form if Contractor makes certain governmental decisions or serves in a staff capacity, as defined in Section 18700 of Title 2 of the California Code of Regulations. Contractor agrees to abide by the City's rules governing gifts to public officials and employees.

13.5 Remedies. Any violation of Section 13 constitutes a material breach and may result in City suspending payments, requiring reimbursements or terminating this Agreement. City reserves all other rights and remedies available under the law and this Agreement, including the right to seek indemnification under Section 11 of this Agreement.

14. PROJECT COORDINATION

City Project Manager. The City assigns Albert Salvador, Asst Director of CDD/Building Official as the City's representative for all purposes under this Agreement, with authority to oversee the progress and performance of the Scope of Services. City reserves the right to substitute another Project manager at any time, and without prior notice to Contractor.

Contractor Project Manager. Subject to City approval, Contractor assigns Kevin Wedman, as its single Representative for all purposes under this Agreement, with authority to oversee the progress and performance of the Scope of Services. Contractor's Project manager is responsible for coordinating and scheduling the Services in accordance with the Scope of Services and the Schedule of Performance. Contractor must regularly update the City's Project Manager about the progress with the work or any delays, as required under the Scope of Services. City written approval is required prior to substituting a new Representative.

15. ABANDONMENT OF PROJECT

City may abandon or postpone the Project or parts therefor at any time. Contractor will be compensated for satisfactory Services performed through the date of abandonment, and will be given reasonable time to assemble the work and close out the Services. With City's pre-approval in writing, the time spent in closing out the Services will be compensated up to a maximum of ten percent (10%) of the total time expended to date in the performance of the Services.

16. TERMINATION

City may terminate this Agreement for cause or without cause at any time. Contractor will be paid for satisfactory Services rendered through the date of termination, but final payment will not be made until Contractor closes out the Services and delivers the Work Product.

17. GOVERNING LAW, VENUE, AND DISPUTE RESOLUTION

This Agreement is governed by the laws of the State of California. Any lawsuits filed related to this Agreement must be filed with the Superior Court for the County of Santa Clara, State of California. Contractor must comply with the claims filing requirements under the Government Code prior to filing a civil action in court. If a dispute arises, Contractor must continue to provide the Services pending resolution of the dispute. If the Parties elect arbitration, the arbitrator's award must be supported by law and substantial evidence and include detailed written findings of law and fact.

18. ATTORNEY FEES

If City initiates legal action, files a complaint or cross-complaint, or pursues arbitration, appeal, or other proceedings to enforce its rights or a judgment in connection with this Agreement, the prevailing party will be entitled to reasonable attorney fees and costs.

19. THIRD PARTY BENEFICIARIES

There are no intended third party beneficiaries of this Agreement.

20. WAIVER

Neither acceptance of the Services nor payment thereof shall constitute a waiver of any contract provision. City's waiver of a breach shall not constitute waiver of another provision or breach.

21. ENTIRE AGREEMENT

This Agreement represents the full and complete understanding of every kind or nature between the Parties, and supersedes any other agreement(s) and understanding(s), either oral or written, between the Parties. Any modification of this Agreement will be effective only if in writing and signed by each Party's authorized representative. No verbal agreement or implied covenant will be valid to amend or abridge this Agreement. If there is any inconsistency between any term, clause, or provision of the main Agreement and any term, clause, or provision of the attachments or exhibits thereto, the terms of the main Agreement shall prevail and be controlling.

22. INSERTED PROVISIONS

Each provision and clause required by law for this Agreement is deemed to be included and will be inferred herein. Either party may request an amendment to cure mistaken insertions or omissions of required provisions. The Parties will collaborate to implement this Section, as appropriate.

23. HEADINGS

The headings in this Agreement are for convenience only, are not a part of the Agreement and in no way affect, limit, or amplify the terms or provisions of this Agreement.

24. SEVERABILITY/PARTIAL INVALIDITY

If any term or provision of this Agreement, or their application to a particular situation, is found by the court to be void, invalid, illegal, or unenforceable, such term or provision shall remain in force and effect to the extent allowed by such ruling. All other terms and provisions of this Agreement or their application to specific situations shall remain in full force and effect. The Parties agree to work in good faith to amend this Agreement to carry out its intent.

25. SURVIVAL

All provisions which by their nature must continue after the Agreement expires or is terminated, including the Indemnification, Ownership of Materials/Work Product, Records, Governing Law, and Attorney Fees, shall survive the Agreement and remain in full force and effect.

26. NOTICES

All notices, requests and approvals must be sent in writing to the persons below, which will be considered effective on the date of personal delivery or the date confirmed by a reputable overnight delivery service, on the fifth calendar day after deposit in the United States Mail, postage prepaid, registered or certified, or the next business day following electronic submission:

To City of Cupertino	To Contractor: <u>NV5</u>
Attention: <u>Albert Salvador</u>	<u>PO Box 74008680</u>
Email: <u>AlbertS@cupertino.org</u>	<u>Chicago, IL 60674-8680</u>
	Attention: <u>Kevin Wedman</u>
	Email: <u>kevin.wedman@nv5.com</u>

27. EXECUTION

The person executing this Agreement on behalf of Contractor represents and warrants that Contractor has full right, power, and authority to enter into and carry out all actions contemplated by this Agreement and that he or she is authorized to execute this Agreement, which constitutes a legally binding obligation of Contractor. This Agreement may be executed in counterparts, each one of which is deemed an original and all of which, taken together, constitute a single binding instrument.

SIGNATURES CONTINUE ON THE FOLLOWING PAGE

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed.

CITY OF CUPERTINO

A Municipal Corporation

CONTRACTOR

By _____

By _____

Name _____

Name _____

Title _____

Title _____

Date _____

Date _____

APPROVED AS TO FORM:

CHRISTOPHER D. JENSEN
Cupertino City Attorney

ATTEST:

KIRSTEN SQUARCIA
City Clerk

DATE: _____

EXHIBIT A: SUMMARY OF SERVICES

EXHIBIT A: SUMMARY OF SERVICES

NV5 will provide the following plan review services:

- City of Cupertino Municipal Code and applicable City of Cupertino Conditions of Certification
- California Building Standards Code (CBSC) and Title 24 Code of Regulations
 - Fire and life-safety
 - Structural
 - Accessibility
 - Electrical
 - Plumbing
 - Mechanical
 - Fire-building plans (i.e., fire sprinkler system, fire alarm system, smoke control, etc.)
 - Grading and civil plans
 - Stormwater/Standard Urban Stormwater Mitigation Plans (SUSMP)
 - Technical reports (i.e., structural calculations, geotechnical/soils engineering reports, hydrology report, Title 24 energy, etc.)
 - Green Code and Energy Code

Additional tasks:

- Attend design meetings
- Work under the direction of the Building Official or designee
- Implement a method for documenting and tracking plan review and reports as well as processing of change orders, RFIs and deferred submittals

EXHIBIT B: SCHEDULE OF PERFORMANCE

EXHIBIT B: SCHEDULE OF SERVICES

NV5 will provide plan review services within the time frames shown below:

SUBMITTAL TYPE	TURNAROUND TIME*
Initial Review	15 Business Days
Subsequent Reviews	10 Business Days
Deferred Submittals	10 Business Days

*Submittals received after 12:00 pm will be processed the following business days.

RATE AND SERVICE STRUCTURE

RATE AND SERVICE STRUCTURE

NV5’s rate schedule for plan review for the Westport Cupertino project is shown below. These rates include costs of all reference materials, training, and certifications/licensing.

PLAN REVIEW FEES	
DESCRIPTION	RATE
Full Plan Review Percentage of Fee*	65% of City Plan Review Fees
Partial Plan Review (Discipline Specific)*	35% of City Plan Review Fees

*Includes the initial review plus 2 rechecks. Additional checks will be billed at the hourly rates included below.

Hourly rates will be charged for review requests that meet the following criteria:

- Subsequent reviews beyond the performance of the initial review plus two rechecks
- Deferred submittal review
- Revisions to previously approved plans

Hourly rates to be charged in these circumstances are included below.

HOURLY RATES		
DESCRIPTION	HOURLY RATE	OVERTIME RATE
Principal-In-Charge	No Charge	No Charge
Project Manager	\$155.00	\$155.00
PLAN REVIEW		
Structural Engineer	\$155.00	\$193.75
Geotechnical Engineer	\$155.00	\$193.75
Professional Engineer (Civil, Electrical, Mechanical, Fire)	\$140.00	\$175.00
Senior Plans Examiner (Building and/or Fire)	\$125.00	\$156.25
Plans Examiner (Building and/or Fire)	\$105.00	\$131.25
Certified Access Specialist (CASp)	\$150.00	\$187.50
INSPECTION		
Rates available upon request		
OTHER		
Permit Technician	\$75.00	\$93.75

Expedited plan review is available upon request and will be billed at an additional 25% of the rates shown above.

EXHIBIT D
Insurance Requirements
Design Professionals & Consultants Contracts

Consultant shall procure prior to commencement of Services and maintain for the duration of the contract, at its own cost and expense, the following insurance policies and coverage with companies doing business in California and acceptable to City.

INSURANCE POLICIES AND MINIMUMS REQUIRED

1. ***Commercial General Liability*** (CGL) for bodily injury, property damage, personal injury liability for premises operations, products and completed operations, contractual liability, and personal and advertising injury with limits no less than **\$2,000,000** per occurrence (ISO Form CG 00 01). If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location (ISO Form CG 25 03 or 25 04) or it shall be twice the required occurrence limit.
 - a. It shall be a requirement that any available insurance proceeds broader than or in excess of the specified minimum insurance coverage requirements and/or limits shall be made available to the Additional Insured and shall be (i) the minimum coverage/limits specified in this agreement; or (ii) the broader coverage and maximum limits of coverage of any insurance policy, whichever is greater.
 - b. Additional Insured coverage under Consultant's policy shall be "primary and non-contributory," will not seek contribution from City's insurance/self-insurance, and shall be at least as broad as ISO Form CG 20 10 (04/13).
 - c. The limits of insurance required may be satisfied by a combination of primary and umbrella or excess insurance, provided each policy complies with the requirements set forth in this Contract. Any umbrella or excess insurance shall contain or be endorsed to contain a provision that such coverage shall also apply on a primary basis for the benefit of City before the City's own insurance or self-insurance shall be called upon to protect City as a named insured.
2. ***Automobile Liability***: ISO CA 00 01 covering any auto (including owned, hired, and non-owned autos) with limits no less than **\$1,000,000** per accident for bodily injury and property damage.
3. ***Workers' Compensation***: As required by the State of California, with Statutory Limits and Employer's Liability Insurance of no less than **\$1,000,000** per occurrence for bodily injury or disease.
✓ Not required. Consultant has provided written verification of no employees.
4. ***Professional Liability*** for professional acts, errors and omissions, as appropriate to Consultant's profession, with limits no less than **\$2,000,000** per occurrence or **\$2,000,000** aggregate. If written on a claims made form:
 - a. The Retroactive Date must be shown and must be before the Effective Date of the Contract.
 - b. Insurance must be maintained for at least five (5) years after completion of the Services.
 - c. If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a Retroactive Date prior to the Contract Effective Date, the Consultant must purchase "extended reporting" coverage for a minimum of five (5) years after completion of the Services.

OTHER INSURANCE PROVISIONS

The aforementioned insurance shall be endorsed and have all the following conditions and provisions:

Additional Insured Status

The City of Cupertino, its City Council, officers, officials, employees, agents, servants and volunteers (“Additional Insureds”) are to be covered as additional insureds on Consultant’s CGL and automobile liability policies. General Liability coverage can be provided in the form of an endorsement to Consultant’s insurance (at least as broad as ISO Form CG 20 10 (11/ 85) or both CG 20 10 and CG 20 37 forms, if later editions are used).

Primary Coverage

Coverage afforded to City/Additional Insureds shall be primary insurance. Any insurance or self-insurance maintained by City, its officers, officials, employees, or volunteers shall be excess of Consultant’s insurance and shall not contribute to it.

Notice of Cancellation

Each insurance policy shall state that coverage shall not be canceled or allowed to expire, except with written notice to City 30 days in advance or 10 days in advance if due to non-payment of premiums.

Waiver of Subrogation

Consultant waives any right to subrogation against City/Additional Insureds for recovery of damages to the extent said losses are covered by the insurance policies required herein. Specifically, the Workers’ Compensation policy shall be endorsed with a waiver of subrogation in favor of City for all work performed by Consultant, its employees, agents and subconsultants. This provision applies regardless of whether or not the City has received a waiver of subrogation endorsement from the insurer.

Deductibles and Self-Insured Retentions

Any deductible or self-insured retention must be declared to and approved by the City. At City’s option, either: the insurer must reduce or eliminate the deductible or self-insured retentions as respects the City/Additional Insureds; or Consultant must show proof of ability to pay losses and costs related investigations, claim administration and defense expenses. The policy shall provide, or be endorsed to provide, that the self-insured retention may be satisfied by either the insured or the City.

Acceptability of Insurers

Insurers must be licensed to do business in California with an A.M. Best Rating of A-VII, or better.

Verification of Coverage

Consultant must furnish acceptable insurance certificates and mandatory endorsements (or copies of the policies effecting the coverage required by this Contract), and a copy of the Declarations and Endorsement Page of the CGL policy listing all policy endorsements prior to commencement of the Contract. City retains the right to demand verification of compliance at any time during the Contract term.

Subconsultants

Consultant shall require and verify that all subconsultants maintain insurance that meet the requirements of this Contract, including naming the City as an additional insured on subconsultant’s insurance policies.

Higher Insurance Limits

If Consultant maintains broader coverage and/or higher limits than the minimums shown above, City shall be entitled to coverage for the higher insurance limits maintained by Consultant.

Adequacy of Coverage

City reserves the right to modify these insurance requirements/coverage based on the nature of the risk, prior experience, insurer or other special circumstances, with not less than ninety (90) days prior written notice.

A waiver of subrogation applies in favor of The City of Cupertino, its City Council, officers, officials, employees, agents, servants and volunteers if required by written contract with respect to Workers' Compensation per the terms and conditions of the policy where permitted by state law. A 30-day notice of cancellation is included if required by written contract with respect to General Liability, Automobile Liability, and Workers' Compensation per the terms and conditions of the policy.



Blanket Additional Insured - Owners, Lessees or Contractors - with Products-Completed Operations Coverage Endorsement

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

It is understood and agreed as follows:

- I. WHO IS AN INSURED** is amended to include as an **Insured** any person or organization whom you are required by **written contract** to add as an additional insured on this **coverage part**, but only with respect to liability for **bodily injury, property damage** or **personal and advertising injury** caused in whole or in part by your acts or omissions, or the acts or omissions of those acting on your behalf:
- A. in the performance of your ongoing operations subject to such **written contract**; or
 - B. in the performance of **your work** subject to such **written contract**, but only with respect to **bodily injury** or **property damage** included in the **products-completed operations hazard**, and only if:
 1. the **written contract** requires you to provide the additional insured such coverage; and
 2. this **coverage part** provides such coverage.
- II.** But if the **written contract** requires:
- A. additional insured coverage under the 11-85 edition, 10-93 edition, or 10-01 edition of CG2010, or under the 10-01 edition of CG2037; or
 - B. additional insured coverage with "arising out of" language; or
 - C. additional insured coverage to the greatest extent permissible by law;
- then paragraph **I.** above is deleted in its entirety and replaced by the following:
- WHO IS AN INSURED** is amended to include as an **Insured** any person or organization whom you are required by **written contract** to add as an additional insured on this **coverage part**, but only with respect to liability for **bodily injury, property damage** or **personal and advertising injury** arising out of **your work** that is subject to such **written contract**.
- III.** Subject always to the terms and conditions of this policy, including the limits of insurance, the Insurer will not provide such additional insured with:
- A. coverage broader than required by the **written contract**; or
 - B. a higher limit of insurance than required by the **written contract**.
- IV.** The insurance granted by this endorsement to the additional insured does not apply to **bodily injury, property damage**, or **personal and advertising injury** arising out of:
- A.** the rendering of, or the failure to render, any professional architectural, engineering, or surveying services, including:
 1. the preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
 2. supervisory, inspection, architectural or engineering activities; or
 - B.** any premises or work for which the additional insured is specifically listed as an additional insured on another endorsement attached to this **coverage part**.
- V.** Under **COMMERCIAL GENERAL LIABILITY CONDITIONS**, the Condition entitled **Other Insurance** is amended to add the following, which supersedes any provision to the contrary in this Condition or elsewhere in this **coverage part**:

Primary and Noncontributory Insurance

CNA75079XX (10-16)

Policy No: 7014856125

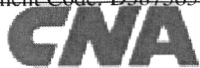
Page 1 of 2

Effective Date: 05/01/2021

Insured Name: NV5 Global, Inc

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Blanket Additional Insured - Owners, Lessees or Contractors - with Products-Completed Operations Coverage Endorsement

With respect to other insurance available to the additional insured under which the additional insured is a named insured, this insurance is primary to and will not seek contribution from such other insurance, provided that a **written contract** requires the insurance provided by this policy to be:

1. primary and non-contributing with other insurance available to the additional insured; or
2. primary and to not seek contribution from any other insurance available to the additional insured.

But except as specified above, this insurance will be excess of all other insurance available to the additional insured.

VI. Solely with respect to the insurance granted by this endorsement, the section entitled **COMMERCIAL GENERAL LIABILITY CONDITIONS is amended as follows:**

The Condition entitled **Duties In The Event of Occurrence, Offense, Claim or Suit** is amended with the addition of the following:

Any additional insured pursuant to this endorsement will as soon as practicable:

1. give the Insurer written notice of any **claim**, or any **occurrence** or offense which may result in a **claim**;
2. send the Insurer copies of all legal papers received, and otherwise cooperate with the Insurer in the investigation, defense, or settlement of the **claim**; and
3. make available any other insurance, and tender the defense and indemnity of any **claim** to any other insurer or self-insurer, whose policy or program applies to a loss that the Insurer covers under this **coverage part**. However, if the **written contract** requires this insurance to be primary and non-contributory, this paragraph **3.** does not apply to insurance on which the additional insured is a named insured.

The Insurer has no duty to defend or indemnify an additional insured under this endorsement until the Insurer receives written notice of a **claim** from the additional insured.

VII. Solely with respect to the insurance granted by this endorsement, the section entitled **DEFINITIONS is amended to add the following definition:**

Written contract means a written contract or written agreement that requires you to make a person or organization an additional insured on this **coverage part**, provided the contract or agreement:

- A. is currently in effect or becomes effective during the term of this policy; and
- B. was executed prior to:
 1. the **bodily injury or property damage**; or
 2. the offense that caused the **personal and advertising injury**;
 for which the additional insured seeks coverage.

Any coverage granted by this endorsement shall apply solely to the extent permissible by law.

All other terms and conditions of the Policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the Policy issued by the designated Insurers, takes effect on the effective date of said Policy at the hour stated in said Policy, unless another effective date is shown below, and expires concurrently with said Policy.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Person Or Organization:

Any person or organization against whom you have agreed to waive such right of recovery in a written contract or agreement.

[Empty box for additional information]

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

It is understood and agreed that the condition entitled **Transfer Of Rights Of Recovery Against Others To The Insurer** is amended by the addition of the following:

Solely with respect to the person or organization shown in the Schedule above, the Insurer waives any right of recovery the Insurer may have against such person or organization because of payments the Insurer makes for injury or damage arising out of the **Named Insured's** ongoing operations or **your work** done under a contract with that person or organization and included in the **products-completed operations hazard**.

All other terms and conditions of the Policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the Policy issued by the designated Insurers, takes effect on the effective date of said Policy at the hour stated in said Policy, unless another effective date is shown below, and expires concurrently with said Policy.



It is understood and agreed that:

If you have agreed under written contract to provide notice of cancellation to a party to whom the Agent of Record has issued a Certificate of Insurance, and if we cancel a policy term described on that Certificate of Insurance for any reason other than nonpayment of premium, then notice of cancellation will be provided to such Certificateholders at least 30 days in advance of the date cancellation is effective.

If notice is mailed, then proof of mailing to the last known mailing address of the Certificateholder on file with the Agent of Record will be sufficient to prove notice.

Any failure by us to notify such persons or organizations will not extend or invalidate such cancellation, or impose any liability or obligation upon us or the Agent of Record.

All other terms and conditions of the policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the policy issued by the designated Insurers, takes effect on the Policy Effective date of said policy at the hour stated in said policy, unless another effective date (the Endorsement Effective Date) is shown below, and expires concurrently with said policy.

Form No: CNA68021XX (02-2013)

Endorsement Effective Date: 05/01/2021

Policy No: 7014856125, 7014842659, 7014841883

CNA

CNA71526XX
(Ed. 10/12)

ADDITIONAL INSURED ENDORSEMENT - CONTRACTUAL OBLIGATION

It is understood and agreed that this endorsement amends the BUSINESS AUTO COVERAGE FORM as follows:

SCHEDULE

Name of Additional Insured Person Or Organization

AS REQUIRED BY CONTRACT

1. Paragraph A.1. Who Is An Insured of Section II - LIABILITY COVERAGE is amended to include as an additional insured the person or organization scheduled above, but only if you are required by "written contract" to make that person or organization an additional insured under this policy.

2. The insurance provided to the additional insured is limited as follows:

- a. The person or organization is an additional insured only with respect to "bodily injury" or "property damage" arising out of a covered "auto" and caused by your negligent acts or omissions or the negligent acts or omissions of someone, other than the additional insured, for whom you are legally liable.
- b. The person or organization is not an additional insured for the person or organization's own acts or omissions, nor those of anyone, other than you, for whom the person or organization is legally liable.
- c. We will not provide the additional insured any broader coverage or any higher limit of liability than the least that is:

- (1) Required by the "written contract"; or
- (2) Afforded to you under this policy.

3. Condition 2. Duties In the Event of Accident, Claim, Suit or Loss of Section IV - BUSINESS AUTO CONDITIONS

is amended to add the following conditions applicable to the additional insured:

An additional insured under this endorsement will as soon as practicable:

- a. Give us written notice of an "accident" which may result in a claim or "suit" under this insurance, and of any claim or "suit" that does result;
- b. Agree to make available any other insurance the additional insured has for a loss we cover under this policy;
- c. Send us copies of all legal papers received, and otherwise cooperate with us in the investigation, defense, or settlement of the claim or "suit"; and
- d. Tender the defense and indemnity of any claim or "suit" to any other insurer or self insurer whose policy or program applies to a loss we cover under this policy. But if the "written contract" requires this insurance to be primary and non-contributory, this provision d. does not apply to insurance on which the additional insured is a Named Insured.

We have no duty to defend or indemnify an additional insured under this endorsement until we receive from the additional insured written notice of a "suit."

4. Only for the purpose of the insurance provided by this endorsement, SECTION V - DEFINITIONS is amended to add the following definition:

"Written contract" means a written contract or written agreement that requires you to make a person or organization an additional insured under this policy, provided the contract or agreement:

1. Is currently in effect or becomes effective during the term of this policy; and
2. Was executed prior to the accident for which the additional insured seeks coverage under this policy.

All other terms and conditions of the Policy remain unchanged.

Policy No: 7014842659
Effective Date: 5/1/2021
Insured Name: NV5, Inc.

CNA71526XX (Ed. 10/12)



ADDITIONAL INSURED - PRIMARY AND NON-CONTRIBUTORY

It is understood and agreed that this endorsement amends the **BUSINESS AUTO COVERAGE FORM** as follows:

SCHEDULE

Name of Additional Insured Persons Or Organizations
AS REQUIRED BY CONTRACT

1. In conformance with paragraph **A.1.c.** of **Who Is An Insured** of Section **II - LIABILITY COVERAGE**, the person or organization scheduled above is an insured under this policy.
2. The insurance afforded to the additional insured under this policy will apply on a primary and non-contributory basis if you have committed it to be so in a written contract or written agreement executed prior to the date of the "accident" for which the additional insured seeks coverage under this policy.

All other terms and conditions of the Policy remain unchanged.

000007950670405796633



POLICY NUMBER: 7014842659

COMMERCIAL AUTO
CA 04 44 03 10

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US (WAIVER OF SUBROGATION)

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
BUSINESS AUTO PHYSICAL DAMAGE COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Named Insured: NV5 Global, Inc

Endorsement Effective Date: 05/01/2021

SCHEDULE

Name(s) Of Person(s) Or Organization(s):

ANY PERSON OR ORGANIZATION AGAINST WHOM YOU HAVE AGREED TO WAIVE SUCH RIGHT OF RECOVERY IN A WRITTEN CONTRACT OR AGREEMENT.

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

The **Transfer Of Rights Of Recovery Against Others To Us** Condition does not apply to the person(s) or organization(s) shown in the Schedule, but only to the extent that subrogation is waived prior to the "accident" or the "loss" under a contract with that person or organization.



NOTICE OF CANCELLATION TO CERTIFICATEHOLDERS

It is understood and agreed that:

If you have agreed under written contract to provide notice of cancellation to a party to whom the Agent of Record has issued a Certificate of Insurance, and if we cancel a policy term described on that Certificate of Insurance for any reason other than nonpayment of premium, then notice of cancellation will be provided to such Certificateholders at least 30 days in advance of the date cancellation is effective.

If notice is mailed, then proof of mailing to the last known mailing address of the Certificateholder on file with the Agent of Record will be sufficient to prove notice.

Any failure by us to notify such persons or organizations will not extend or invalidate such cancellation, or impose any liability or obligation upon us or the Agent of Record.

All other terms and conditions of the policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the policy issued by the designated Insurers, takes effect on the Policy Effective date of said policy at the hour stated in said policy, unless another effective date (the Endorsement Effective Date) is shown below, and expires concurrently with said policy unless another expiration date is shown below.

Form No: CC68021A (02-2013)
Endorsement Effective Date: 05/01/21

Policy No: 7014842824; 7014842810

CNA

**POLICY NO: 7014842824
WORKERS COMPENSATION**

WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS ENDORSEMENT

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule.(This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)

This agreement shall not operate directly or indirectly to benefit anyone not named in the Schedule.

Schedule

Any person or organization against whom you have agreed to waive such right of recovery in a written contract or agreement.

The premium charge for the endorsement is reflected in the Schedule of Operations. All other terms and conditions of the policy remain unchanged. This endorsement, which forms a part of and is for attachment to the policy issued by the designated Insurers, takes effect on the Policy Effective date of said policy at the hour stated in said policy, unless another effective date (the Endorsement Effective Date is shown below, and expires concurrently with said policy unless another expiration date is shown below.

Form No: WC00 03 13 (04-1984)

Endorsement Effective Date: 5/1/2021

Policy: 7014842824

CNA

WORKERS COMPENSATION

TEXAS WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS ENDORSEMENT

This endorsement applies only to the insurance provided by the policy because Texas is shown in Item 3.A. of the Information Page.

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule, but this waiver applies only with respect to bodily injury arising out of the operations described in the Schedule where you are required by a written contract to obtain this waiver from us.

This endorsement shall not operate directly or indirectly to benefit anyone not named in the Schedule.

The premium for this endorsement is shown in the Schedule.

Schedule

1. Specific Waiver
 Blanket Waiver

Any person or organization for whom the Named Insured has agreed by written contract to furnish this waiver.

2. Operations: Waiver of Subrogation Operations

Premium:

The premium charge for this endorsement shall be premium developed on payroll in connection with work performed for the above person(s) or organization(s) arising out of the operations described.

1. Advance Premium: Waiver of Subrogation Advance Premium

All other terms and conditions of the policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the policy issued by the designated Insurers, takes effect on the Policy Effective date of said policy at the hour stated in said policy, unless another effective date (the Endorsement Effective Date) is shown below, and expires concurrently with said policy unless another expiration date is shown below.

Form No:WC.:42 03 04 B (06-2014)
Endorsement Effective Date:05/01/2021
Policy No. 7014842824

CNA

UTAH WAIVER OF SUBROGATION ENDORSEMENT

This endorsement applies only to the insurance provided by the policy because Utah is shown in Item 3.A. of the Information Page.

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. (This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)

This agreement shall not operate directly or indirectly to benefit anyone not named in the Schedule. Our waiver of rights does not release your employees' rights against third parties and does not release our authority as trustee of claims against third parties.

Schedule

Any person or organization against whom you have agreed to waive such right of recovery in a written contract or agreement

All other terms and conditions of the policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the policy issued by the designated Insurers, takes effect on the Policy Effective date of said policy at the hour stated in said policy, unless another effective date (the Endorsement Effective Date) is shown below, and expires concurrently with said policy unless another expiration date is shown below.

Form No: WC 43 03 05 (07-2000)

Endorsement Effective Date: 05/01/2021

Policy No. 7014842824



BLANKET WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS

This endorsement changes the policy to which it is attached.

It is agreed that **Part One - Workers' Compensation Insurance G. Recovery From Others** and **Part Two - Employers' Liability Insurance H. Recovery From Others** are amended by adding the following:

We will not enforce our right to recover against persons or organizations. (This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)

PREMIUM CHARGE - Refer to the Schedule of Operations

The charge will be an amount to which you and we agree that is a percentage of the total standard premium for California exposure. The amount is **Blanket Waiver of Subrogation Percentage Charge%**.

All other terms and conditions of the policy remain unchanged.

This endorsement, which forms a part of and is for attachment to the policy issued by the designated Insurers, takes effect on the Policy Effective date of said policy at the hour stated in said policy, unless another effective date (the Endorsement Effective Date) is shown below, and expires concurrently with said policy unless another expiration date is shown below.

Form No: G-19160-B (11-1997)
Endorsement Effective Date: 05/01/2021

Policy No. 7014842810

Notice of Cancellation to Certificate Holder(s) Endorsement

In consideration of the premium paid for this Policy, it is understood and agreed that Section VII, Conditions, H. Notice of Cancellation, is amended by adding the following provision:

In the event this Policy is to be cancelled by you or by us, we agree to give thirty (30) days prior notice to the certificate holder(s) with mailing addresses on file with the agent of record.

This provision does not apply if cancellation is due to nonpayment of premiums to us or to a finance company authorized to cancel this Policy.

Any notification rights provided by this endorsement apply only to active certificate holder(s) who were issued a certificate of insurance applicable to the **Policy Period** stated in Declarations, Item 2.

Failure to provide such notice to the certificate holder(s) will not amend or extend the date the cancellation becomes effective, nor will it negate cancellation of the policy. Failure to send notice shall impose no liability of any kind upon us or our agents or representatives.

Whenever printed in this Endorsement, the boldface type terms shall have the same meanings as indicated in the Policy Form. All other provisions of the Policy remain unchanged.

Insured NV5 Global, Inc.	Policy Number AEC-9044114-05
Effective Date of This Endorsement 05/01/2021	Authorized Representative

Berkley Insurance Company

Change Endorsement

Other Insurance

In consideration of the premium paid for this Policy, it is understood and agreed that Section VII. Conditions, I. Other Insurance is deleted and replaced with the following:

I. Other Insurance

If there is other collectible insurance, including but not limited to other professional liability insurance or project specific insurance, that applies to a **Claim** covered by this Policy, the other insurance shall be primary and this Policy shall be excess over the other insurance, unless the other insurance is written specifically excess of this Policy. This Policy will then apply to the amount of the **Claim** that exceeds the available limits of liability and any deductibles or retention amounts of the other insurance, as well as the Deductible under this Policy. If such other insurance has a duty to defend a **Claim** or assumes the defense of a **Claim**, this Policy shall not be obligated to defend that **Claim**.

Solely as respects Insuring Agreement B — Contractor's Pollution Liability, when required in a signed, written agreement executed prior to the report date of a **Claim**, this policy shall be primary to other collectible insurance that applies to those **Claims** resulting from the performance of your **Contractor Services**. Any other collectible insurance that applies to a **Claim** covered by Insuring Agreement B shall be excess and non-contributory.

Whenever printed in this Endorsement, the boldface type terms shall have the same meanings as indicated in the Policy Form. All other provisions of the Policy remain unchanged.

Insured NV5 Global, Inc.	Policy Number AEC-9044114-05
Effective Date of This Endorsement 05/01/2021	Authorized Representative

BERKLEY INSURANCE COMPANY

2. The each Claim limit shown in Item 3A of the Declarations is the most we will pay for the sum of all Damages and Claim Expenses arising out of any single Claim. Two or more Claims considered a single Claim shall collectively be subject to the each Claim limit of liability shown in Item 3A of the Declarations.
3. The each Claim limit is the most we will pay for the sum of all Damages and Claim Expenses arising out of any single Claim regardless of how many Insuring Agreements may apply to such Claim.
4. The Policy Year Aggregate limit shown in Item 3B of the Declarations is the most we will pay for the sum of all Damages and Claim Expenses for all Claims made and reported during each Policy Year.
5. The payment of Damages and Claim Expenses will reduce the each Claim limit.

F. Deductible

You must pay the Deductible for Claim Expenses and Damages covered by this Policy before we are obligated to make any payment under the each Claim limit. The Deductible must be paid from your own account, and payments by other parties or insurers on your behalf shall not satisfy the Deductible. We have the right to determine the reasonableness of Claim Expenses that qualify to satisfy the Deductible. The Deductible for each Claim is set forth in Item 4A of the Declarations. The Policy Year Aggregate Deductible shown in Item 4B of the Declarations is the most the Named Insured must pay as a Deductible for the sum of all Claims made and reported during each Policy Year.

G. Deductible Credits

1. Mediation Credit: Your Deductible obligation may be reduced by 50%, subject to a maximum reduction of \$15,000 if you agree with our decision to use Mediation and the Claim is fully and finally resolved by such Mediation.
2. Risk Management Credit: Your Deductible obligation may be reduced by 50%, subject to a maximum reduction of \$25,000 if prior to the report date of a Claim, there is a signed, written and enforceable agreement for the Professional Services involved in the Claim, and it includes a clause limiting your liability to \$250,000 or less.
3. First Claim Deductible Credit: If the first Claim you ever report to us is made against you:
 - a. Greater than 24 months after the Knowledge Date shown on the Policy Declarations, then your Deductible obligation for that Claim may be reduced by 25%, subject to a maximum reduction of \$40,000; or
 - b. Greater than 36 months after the Knowledge Date shown on the Policy Declarations, then your Deductible obligation for that Claim may be reduced by 50%, subject to a maximum reduction of \$40,000.

If more than one Deductible Credit applies, your Deductible obligation will be reduced by 50%, subject to a maximum reduction of \$50,000.

H. Notice of Cancellation and Nonrenewal

This Policy may be canceled by the Named Insured identified in the Declarations, by surrender of the Policy to us or our authorized representative or by giving us written notice stating when, thereafter, such cancellation shall be effective. We will not cancel this Policy except for nonpayment of premium, fraud or material misrepresentation in procuring this insurance or in relation to any Claim, or changes in law affecting this Policy. If we cancel this Policy, we will mail or deliver to the first Named Insured, on behalf of all Insureds, written notice of cancellation. We will provide you at least ten (10) days-notice before the effective date of cancellation if we cancel for nonpayment of premium. If we cancel for any other reason, we will provide at least sixty (60) days-notice before the effective date of cancellation.

If this Policy is canceled, we will send the first Named Insured any premium refund due. The refund will be pro rata. The cancellation will be effective even if we have not made or offered a refund.

We will give you written notice sixty (60) days prior to the expiration of this Policy if we do not intend to renew this insurance subject to any state requirements. The notice will include our reason for nonrenewal. Proof of mailing will be sufficient proof of notice.

I. Other Insurance

If there is other collectible insurance, including but not limited to other professional liability insurance or project specific insurance, that applies to a Claim covered by this Policy, the other insurance shall be primary and this Policy shall be excess over the other insurance, unless the other insurance is written specifically excess of this Policy. This Policy will then apply to the amount of the Claim that exceeds the available limits of liability and any deductibles or retention amounts of the other insurance, as well as the Deductible under this Policy. If such other insurance has a duty to defend a Claim or assumes the defense of a Claim, this Policy shall not be obligated to defend that Claim.

J. Subrogation

In the event of any payment under this Policy, we shall be subrogated to all of your rights of recovery against any person or organization. You must do everything reasonably necessary to secure such rights and must do nothing after a Claim is made to jeopardize them. We hereby waive our subrogation rights against a client of yours to the extent that you had, prior to a Claim or Circumstance, entered into a written agreement to waive such rights. Any recovery shall first be paid to us up to the extent of any Damages or Claim Expenses paid by us and the balance shall be paid to you.

K. First Named Insured as Sole Agent

The first Named Insured in Item 1 of the Declarations will be the sole agent and will act on behalf of all Insureds for the payment or return of premium, receipt and acceptance of any endorsements, notices or provisions of this Policy, giving or receiving notice of cancellation or nonrenewal, the payment of any Deductibles, and to exercise the rights provided in Section Q Extended Reporting Period Option.

L. Alteration and Assignment



CITY OF CUPERTINO

Agenda Item

21-9338

Agenda Date: 9/7/2021
Agenda #: 11.

Subject: Consider approving a Vesting Tentative Map to replace a previously approved Vesting Tentative Map (TM-2018-03) for the Westport Cupertino development project to create a separate parcel for the age restricted senior below market rate building. City approval would be a Vesting Tentative Map; (Application No(s): TM-2021-002; Applicant(s): KT Urban (Mark Tersini); Location: 21267 Stevens Creek Boulevard; APN #326-27-042, -043

City Council consider the evidence presented and determine whether the project can be approved in accordance with the Resolution No. 21-081 to approve the Vesting Tentative Map (TM-2021-002).



COMMUNITY DEVELOPMENT DEPARTMENT

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA
95014-3255 TELEPHONE: (408) 777-3308 • FAX: (408) 777-3333
CUPERTINO.ORG

CITY COUNCIL STAFF REPORT

Meeting: September 7, 2021

Subject

Consider approving a Vesting Tentative Map to replace a previously approved Vesting Tentative Map (TM-2018-03) for the Westport Cupertino development project to create a separate parcel for the age restricted senior below market rate building. City approval would be a Vesting Tentative Map; (Application No(s): TM-2021-002; Applicant(s): KT Urban (Mark Tersini); Location: 21267 Stevens Creek Boulevard; APN #326-27-042, -043

Recommended Action

Staff recommends that the City Council consider the evidence presented and determine whether the project can be approved in accordance with the draft resolution (Attachment A) to approve the Vesting Tentative Map (TM-2021-002).

Discussion

Planning Commission Hearing on July 27, 2021

The Planning Commission conducted a public hearing on June 22, 2021, and moved (3-0, Saxena and Madhhipatla absent) that the item shall be postponed to a later date for further clarification on the following:

- Legal review on the conformance of the parcellation of Building 2 with the General Plan, as well as justifying its decoupling from the Parcel B.
- Removing the requirement for the developer to provide a Class IV bike lane on the southern side of Stevens Creek Boulevard, adjacent to De Anza College.

The project was reviewed at the July 27, 2021, Planning Commission Hearing clarifying the issues raised by the Commissioners at the prior hearing. The Planning Commission moved to recommend approval (4-0-1, Chair Wang absent). Please review Resolution No.6927 (Attachment B).

Project Data:

General Plan Land Use Designation	Commercial/Residential
--	------------------------

Special Planning Area	Heart of the City Specific Plan (West Stevens Creek subarea)	
Zoning Designation	P(CG, Res)	
Net/gross lot area	7.9 acres/8.1 acres ¹	
Project Consistency with:		
General Plan:	Yes	
Zoning:	Yes	
Project Comparison	Project Approval August 18, 2020	Current Application
Residential Units	267	No change
Height of Structures	Building 1 - 79.5 feet	
	Building 2 – 74.5 feet	
	Townhouses – 30 feet	
	Rowhouses – 30 feet	
Setbacks		
Front	35 feet from the face of curb	No change
Side	17.6 feet	
Parking	463	
Common Open Space per Heart of the City		
Residential	44,945 s.f.	No change
Commercial (Retail)	2,915 s.f.	
Retail Frontage		
Stevens Creek Boulevard frontage	60%	No change
Rear of building	26%	
Building Area	544,435 s.f.	

Background:

Site and Location Description

¹ The net acreage is a result of the subtraction of an existing Public Roadway Easement along the property’s Mary Avenue frontage.

The project site is known as the Oaks Shopping Center and is located in the Heart of the City Specific Plan Special Area within the Oaks Gateway of the West Stevens Creek subarea. The shopping center is on an approximately 8.1 gross-acre site bounded by Stevens Creek Boulevard to the south, Mary Avenue to the east and north, and Highway 85 to the west. The surrounding uses are the Glenbrook Apartments to the north, De Anza College to the south (across Stevens Creek Boulevard), and the Cupertino Senior Center to the east (See Figure 1).



Figure 1 Location of The Oaks Shopping Center and the proposed Westport Cupertino redevelopment.

Westport Cupertino Development

The Cupertino City Council, on August 18, 2020, approved permits to allow construction of a mixed-use development on an 8.1 gross-acre site currently occupied by the Oaks Shopping Center. The primary components of the project are listed below.

- Two residential/commercial buildings:
 - Building 1 is a six-story building with 131 senior licensed assisted living units, 27 memory care residences, and 17,600 square-feet of ground-floor retail/commercial space.
 - Building 2 is a six-story building with 48 BMR senior independent living units and 2,400 square feet of ground-floor retail/commercial.
- 70 single-family residential townhouses and 18 single-family residential rowhouse condominiums.
- A one-level, below-ground garage with 191 parking spaces.
- 44,945 square feet of Residential Common Open Space
- 2,915 square feet of Commercial Common Open Space
- 386 onsite and offsite tree replacements, for the 73 protected development trees proposed to be removed and/or relocated.

The approval included a vesting tentative map (VTM) (TM-2018-03) that would divide the property into two separate parcels [one 4.7 acre and one 3.1-acre parcel]. The applicant is now requesting a revised VTM to divide the property into three parcels, separating the BMR building (Building 2) in its own individual parcel.

Vesting Tentative Map

The project is currently approved with two separate parcels (see Figure 2). The approved VTM for the Westport Cupertino project created one 4.7 acre and one 3.1-acre parcel. The 4.7-acre parcel (Parcel A) includes the 88 townhome and rowhouse condominiums and the 3.1-acre parcel (Parcel B, outlined in red in Figure 2) includes all the senior housing and retail portions of the projects.

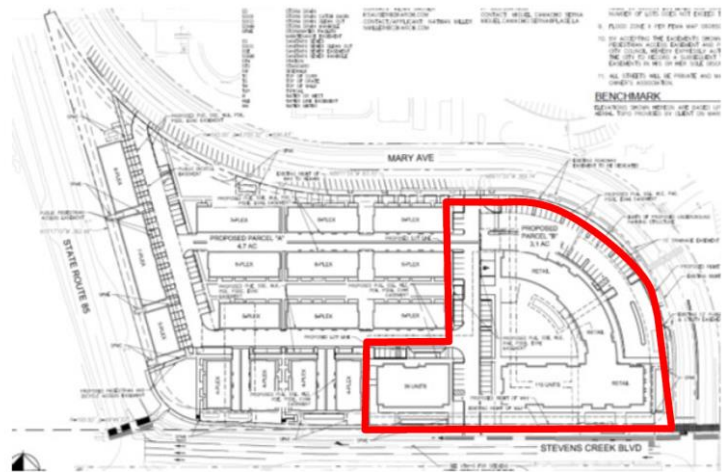


Figure 2 Approved Vesting Tentative Map (TM-2018-02) with Parcel B outlined in red.

The applicant, Mark Tersini of KT Urban, is requesting that Building 2 be separated from Parcel B into a new Parcel C (see Figure 3). The purpose of the request is to decouple the construction financing and schedule of Building 2, the affordable senior apartment building, from Building 1. The resultant Parcel C will be 0.6 acres and the revised Parcel B will be 2.5 acres. Please refer to Attachment 2 for the revised VTM plan sheets.

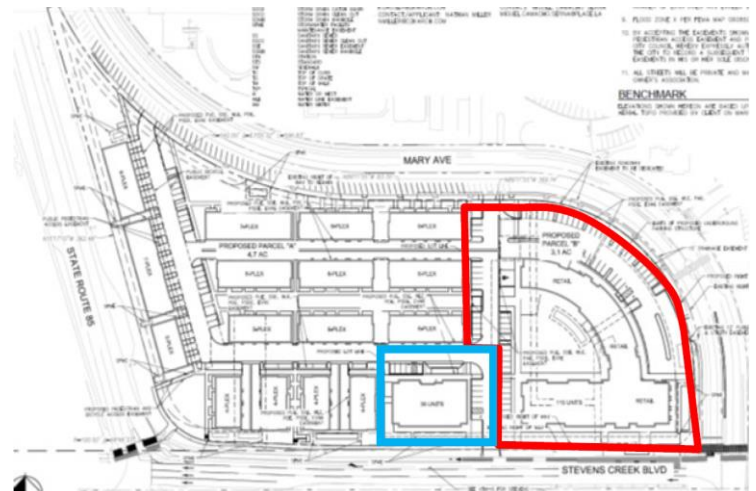


Figure 3 Proposed Parcel C (blue) and revised Parcel B.

The applicant and its affordable housing partner, The Pacific Companies, have submitted justification letters (Attachments D and E) supporting their request to add a third parcel. These are included the following reasons:

- Under California law BMR projects relying on tax credits must be owned by single-asset entities: the owner must own only the BMR project; the BMR building must therefore be on its own lot so that the master developer may convey it to the BMR developer. Moreover, lenders and investors will not provide financing unless the project is on its own parcel.
- Condition III.11 (*Concurrent Development of BMR and Market-Rate Housing*) of Development Permit Resolution No. 20-106, part of the original project approval,

states: "...Developer has transferred the parcel on which the senior BMR housing will be constructed to an affordable housing developer or its affiliate...". This must be completed before the City may issue Certificates of Occupancy for the BMR building and the townhome/rowhouse portions of the development. Again, the BMR must be on its own lot for the required conveyance.

The points presented by the applicant and its partner are consistent with staff's understanding of tax credit requirements. Further, the Development Permit condition outlined above anticipated that Building 2 would be developed separately from Building 1 and the townhome/rowhouses on Parcel A.

The City Council, on August 18, 2020, had found that the Vesting Tentative Map (TM-2018-03) was consistent with the City's General Plan because the development project site is permitted to have up to 30 dwelling units an acre, and that it qualified for a density bonus. Further, the development was consistent with the intent of the policies of the General Plan for a high-density mixed-use development on this site. The current proposal does not propose any revisions to the approved project and nor does it seek to increase any density on the site. Therefore, the proposed revised VTM is equally consistent with the General Plan.

Bike Improvements and Transportation Impact Fees (TIF)

The August 2020 project approval included a Condition IV.2 to Resolution No. 20-106, requiring installation of bike improvements along the south side of Stevens Creek Boulevard in lieu of payment of the transportation impact fee (TIF). It provided that "[t]he value of the improvements shall be equivalent to the Transportation Impact Fee required of the project."

The City calculated the TIF based on the adopted fee schedule for the project's multifamily residential and retail uses. For the senior living and assisted housing components of the project, the City calculated the TIF based on the per trip fee in the adopted fee schedule and project-specific calculations of proposed PM peak-hour trips. Please refer to the Attachments F - H for the Trip Generation Memoranda that have been submitted to the city throughout the project entitlement process. Credit was given for trips generated by existing retail uses, consistent with CMC Chapter 14.02. In lieu of paying part of the fee, the applicant will be required to construct bicycle improvements listed in the Traffic Impact Nexus Study, up to the amount of the TIF due for the project. The credit will be calculated based on the estimate cost of the project improvements in the Nexus Study.

The bicycle improvements along the project frontage on the north side of Stevens Creek Boulevard will be constructed with the project. The Applicant has declined to construct the bicycle improvements on the south side of Stevens Creek Blvd, as was previously proposed, and therefore will pay the TIF instead of receiving TIF credit for these facilities. Should the applicant be unable to obtain Caltrans approval for the improvements on the north side of Stevens Creek Blvd., within Caltrans jurisdiction, at the time of project completion, the applicant may be required to deposit fees to the City that are equivalent to the value of the required work to ensure that this work can be completed at a future date.

Parkland Dedication Fee

The residential units within the project are subject to the payment of parkland fees in-lieu of parkland dedication per CMC Chapter 13.08 and Chapter 18.24.

The Below Market Rate (BMR) program manual, which was last amended by City Council May 19, 2020 per Resolution 20-055, authorizes the waiver of park fees for BMR units. Consistent with past practices, staff recommends that the parkland dedication in-lieu fees for the 48 BMR units, proposed with this project, be waived.

Other Department/Agency Review

The City’s Public Works Department has reviewed and added conditions to the project.

Environmental Review

An Initial Study was prepared and a Final EIR (State Clearinghouse 2019070377) was certified for the project, The Final EIR identifies mitigation measures to reduce the potentially significant environmental impacts of the project to less than significant levels. These mitigation measures were adopted and made conditions of project approval. The proposed changes to the project would not have any new or substantially more severe significant environmental impacts, because the creation of a new lot on the project site and the decision not to construct certain improvements would not have an adverse physical effect on the environment.

Public Outreach and Noticing

The following table is a summary of the noticing done for this project:

Notice of Public Hearing, Site Notice & Legal Ad	Agenda
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<ul style="list-style-type: none"> ▪ Site Signage (<i>10 days prior to the hearing</i>) ▪ Legal ad placed in newspaper (<i>at least 10 days prior to the hearing</i>) ▪ Public hearing notices were mailed to property owners within 300' (<i>10 days prior to the hearing</i>) 	<ul style="list-style-type: none"> ▪ Posted on the City's official notice bulletin board (<i>one week prior to the hearing</i>) ▪ Posted on the City of Cupertino's website (<i>one week prior to the hearing</i>)
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Fiscal Impacts

The project as approved on August 18, 2020, will most likely generate an enhanced source of property tax due to the property improvements that will result in a higher assessed value.

Sustainability Impacts

Consistent with the prior approval, as an infill redevelopment priority housing development in a designated Priority Development Area and Transportation Planning Area, the proposed project would be consistent with the overall intent of the City's Climate Action Plan (CAP) to support reductions in GHG emissions, and the proposed project would not conflict any goals or measures to reduce GHG emissions in the CAP and impacts would be less than significant as analyzed in the EIR.

Next Steps

The City Council's decision will be final unless reconsidered within 10 days of the decision.

Prepared by: Gian Paolo Martire, Senior Planner

Reviewed by: Piu Ghosh, Planning Manager

Approved by: Benjamin Fu, Director of Community Development

Approved for Submission by: Greg Larson, Interim City Manager

ATTACHMENTS:

A – Draft Resolution for TM-2021-002

B – Planning Commission Resolution No. 6927

C – Project Plans

D – Letter from Mike Kelly, The Pacific Company, to the Planning Commission, titled Westport Cupertino – Parcel Requirement, dated June 28, 2021.

E – Letter from Mark Tersini, KT Urban, to the Planning Commission, titled Westport Project Tentative Map Application No: TM-2021-002, dated June 28, 2021.

F – Memorandum from Frederick Venter, P.E. and Anthony Nuti, Kimley Horn and Associates to Mark Tersini, KT Urban, titled Westport Cupertino – Transportation Analysis, dated November 27, 2018.

G – Memorandum from Frederick Venter, P.E. of Kimley Horn and Associates to Mark Tersini, KT Urban, titled Westport Cupertino – Alternative Proposal: Trip Generation Corporation, dated March 27, 2020.

H - Memorandum from Frederick Venter, P.E. and Anthony Nuti, Kimley Horn and Associates to Mark Tersini, KT Urban, titled Approved Westport Trip Generation, dated June 7, 2021.

RESOLUTION NO. _____

A RESOLUTION OF THE CUPERTINO CITY COUNCIL
APPROVING OF A VESTING TENTATIVE MAP TO REPLACE A
PREVIOUSLY APPROVED VESTING TENTATIVE MAP (TM-2018-03)
FOR THE WESTPORT CUPERTINO DEVELOPMENT PROJECT TO
CREATE A SEPARATE PARCEL FOR THE AGE RESTRICTED SENIOR
BELOW MARKET RATE BUILDING LOCATED AT 21267 STEVENS
CREEK BOULEVARD (APN: 326-27-042, -043)

SECTION I: PROJECT DESCRIPTION

Application No.: TM-2021-002
Applicant: KT Urban (Mark Tersini)
Property Owner: 190 West St. James, LLC
Location: 21267 Stevens Creek Blvd. (APN #326-27-042, -043)

SECTION II: FINDINGS FOR A TENTATIVE MAP:

WHEREAS, the City of Cupertino received an application for a Vesting Tentative Map as described in Section I of this resolution; and

WHEREAS, The Westport Cupertino Mixed-Use Project (“Project”), including the Vesting Tentative Map, is fully described and analyzed in the Initial Study and Final Environmental Impact Report (State Clearinghouse No. 2019070377) (“EIR” or “Final EIR”) for the Project; and

WHEREAS, on August 18, 2020, after consideration of substantial evidence contained in the entire administrative record, the City Council approved the Westport Cupertino project, by adopting resolutions including the Development Permit Resolution No 20-106, the Vesting Tentative Map Resolution No. 20-109, and Resolution No. 20-105 certifying the EIR, adopting and requiring as conditions of approval all of the mitigation measures for the Project that are identified in the EIR and are within the responsibility and jurisdiction of the City , and adopting the Mitigation Monitoring and Reporting Program for the Project; and

WHEREAS, on April 21, 2021, the applicant submitted and requested the City to consider a revised Vesting Tentative Map to decouple the senior below market rate building (Building 2) from the market rate senior housing development (Building 1) by creating a third parcel to be occupied by Building 2, and to remove certain bicycle improvements not required by the August 2020 approval; and

WHEREAS, other than the changes described above, the Vesting Tentative Map proposes the same development and public improvements approved in August 2020, covering 8.1 gross acres and providing for 88 single-family units and 179 senior units, 48 of which will be limited to below-market-rate rents; and

WHEREAS, the proposed changes to the project would not have any new or substantially more severe significant environmental impacts; and

WHEREAS, on July 27, 2021 the Planning Commission recommended on a 4-0-1 (Chair Wang absent) vote that the City Council approve the Vesting Tentative Map (TM-2021-002), in substantially similar form to the Resolution presented (Resolution No. 6927)and

WHEREAS, all necessary public notices having been given as required by the Procedural Ordinance of the City of Cupertino and the Government Code, and the Planning Commission held at least one public hearing in regard to this application, and on August 18, 2020, the City Council held a public hearing to consider the Vesting Tentative Map; and

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

WHEREAS, the applicant has met the burden of proof required to support the application for a Tentative Map; and

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

- a. That the proposed subdivision map is consistent with the City of Cupertino General Plan.

The subject property is consistent with the General Plan because the property is permitted to have up to 30 dwelling units an acre and qualifies for a density bonus. The proposed development is consistent with the intent of the policies of the General Plan for a high density mixed-use development on this site.

- b. That the design and improvements of the proposed subdivision are consistent with the General Plan.

The off-site improvements are consistent with the City's General Plan policies related to pedestrian and bicycle safety etc. by improving Stevens Creek Boulevard, minimizing curb-cuts, and requiring an urban canopy within the public right-of-way. The project is also consistent with the General Plan's design requirements, since the project qualifies for waivers for height and slope setback.

- c. That the site is physically suitable for the type of development contemplated under the approved subdivision.

The proposed subdivision is compatible with the adjoining land uses and no physical constraints are present that would conflict with anticipated land use development. There are

no topographical anomalies that differentiate this property from adjacent properties. The site is located on the valley floor, and is not listed within any environmentally sensitive zone.

- d. That the site is physically suitable for the intensity of development contemplated under the approved subdivision.

The subject property is physically suitable in size and shape in conformance to development standards and is appropriately configured to accommodate a multi-unit mixed-used development.

- e. That the design of the subdivision or the proposed improvements are not likely to cause substantial environmental damage nor substantially and avoidably injure fish and wildlife or their habitat.

The design of the subdivision and proposed improvements are not likely to substantially injure fish and wildlife or their habitat because the property is already a developed site and located in an urbanized area where residential land use is allowed. The EIR concluded that all potential environmental impacts will be mitigated to a less than significant level.

- f. That the design of the subdivision or the type of improvements associated therewith are not likely to cause serious public health problems.

The proposed subdivision design and improvements are not likely to cause serious public health problems. The proposed development is consistent with the intent of the policies of the General Plan for a high density mixed-use development on this site, and the on-site and off-site improvements improve neighborhood walkability through improved sidewalk construction with size-appropriate driveway cuts and both street and private-land tree planting.

- g. That the design of the subdivision and its associated improvements will not conflict with easements acquired by the public at large for access through or use of property within the proposed subdivision.

No easement or right-of-way exists currently that would be impeded or conflict with the proposed subdivision.

NOW, THEREFORE, BE IT RESOLVED:

That after careful consideration of maps, facts, exhibits, testimony and other evidence submitted in this matter and the EIR and the Mitigation Monitoring and Reporting Program for the Project (EA-2018-04), subject to the conditions which are enumerated in this Resolution beginning on PAGE 2 thereof, and those contained in all other Resolutions approved for this Project,

1. The City Council hereby exercises its independent judgment and determines that approval of the Vesting Tentative Map, which creates a new lot on the project site

and does not include certain previously-proposed improvements would not have any new or substantially more severe significant environmental impacts beyond those identified in the Final EIR (State Clearinghouse 2019070377) previously certified for the Westport Cupertino development project. The Final EIR identifies mitigation measures to reduce the potentially significant environmental impacts of the project to less than significant levels. These mitigation measures were adopted and made conditions of project approval.

2. The application for a Vesting Tentative Map, Application No. TM-2021-002, is hereby approved, subject to the conditions which are enumerated in this Resolution beginning on PAGE 4 thereof, and those contained in all other Resolutions approved for this Project in August 2020 other than Resolution No. 20-106 which is superseded by this resolution, and the subconclusions upon which the findings and conditions specified in this Resolution are based are contained in the Public Hearing record concerning Application No. TM-2021-002 as set forth in the Minutes of the City Council Meeting of September 7, 2021 Meeting, and are incorporated by reference as though fully set forth herein.

SECTION III: CONDITIONS ADMINISTERED BY THE COMMUNITY DEVELOPMENT DEPT.

1. APPROVED EXHIBITS

Approval is based on the plan set dated December 09, 2020, consisting of 6 sheets labeled as Westport, VTM-1-VTM-6, and Kimley Horn except as may be amended by conditions in this resolution.

2. ACCURACY OF PROJECT PLANS

The applicant/property owner is responsible to verify all pertinent property data including but not limited to property boundary locations, building setbacks, property size, building square footage, any relevant easements and/or construction records. Any misrepresentation of any property data may invalidate this approval and may require additional review.

3. PRIOR APPROVAL CONDITIONS

The conditions of approval contained in file nos. TR-2018-22, EXC-2019-03, U-2019-03, ASA-2018-05, DP-2018-05 and EA-2018-04 shall be applicable to this approval unless in conflict with the conditions of approval of this resolution.

4. ANNOTATION OF THE CONDITIONS OF APPROVAL

The conditions of approval set forth shall be incorporated into and annotated on the first page of the building plans.

5. RESIDENTIAL CONDOMINIUM MAP REQUIRED

Prior to issuance of a Temporary Certificate of Occupancy for of any units proposed for condominium purposes, the applicant must file and receive approval of a Condominium Map with the Department of Real Estate.

6. BUS STOP DUCKOUT

The applicant will work with the Public Works staff to relocate the bus stop to a location along Stevens Creek Boulevard that will not conflict with the intersection of Mary Avenue and Stevens Creek Boulevard.

7. RECIPROCAL INGRESS/EGRESS EASEMENT

The applicant shall record a private reciprocal ingress and egress easement for vehicular and pedestrian access over the drive aisles and sidewalks onsite to facilitate movement between the parcels. Easements shall be reserved on the Final Map or created by separate instrument recorded at the time of Final Map recordation.

8. CONSULTATION WITH OTHER DEPARTMENTS

The applicant is responsible to consult with other departments and/or agencies with regard to the proposed project for additional conditions and requirements. Any misrepresentation of any submitted data may invalidate an approval by the Community Development Department.

9. INDEMNIFICATION

To the fullest extent permitted by law, the applicant shall agree to indemnify, defend with the attorneys of the City's choice, and hold harmless the City, its City Council, and its officers, employees, and agents (collectively, the "indemnified parties") from and against any liability, claim, action, cause of action, suit, damages, judgment, lien, levy, or proceeding (collectively referred to as "proceeding") brought by a third party against one or more of the indemnified parties or one or more of the indemnified parties and the applicant related to any Ordinance, Resolution, or action approving the project, the related entitlements, environmental review documents, finding or determinations, or any other permit or approval authorized for the project. The indemnification shall include but not be limited to damages, fees, and costs awarded against the City, if any, and cost of suit, attorneys' fees, and other costs, liabilities, and expenses incurred in connection with such proceeding whether incurred by the Applicant, the City, or the parties initiating or bringing such proceeding.

The applicant shall agree to (without limitation) reimburse the City its actual attorneys' fees and costs incurred in defense of the litigation. Such attorneys' fees and costs shall include amounts paid to the City's outside counsel and shall include City

Attorney time and overhead costs and other City staff overhead costs and any costs directly related to the litigation reasonably incurred by City. The applicant shall likewise agree to indemnify, defend, and hold harmless the indemnified parties from and against any damages, attorneys' fees, or costs awards, including attorneys' fees awarded under Code of Civil Procedure section 1021.5, assessed or awarded against the indemnified parties. The Applicant shall cooperate with the City to enter a Reimbursement Agreement to govern any such reimbursement.

The Applicant shall agree to (without limitation) reimburse the City for all costs incurred in additional investigation or study of, or for supplementing, redrafting, revising, or amending, any document (such as an Environmental Impact Report, negative declaration, specific plan, or general plan amendment) if made necessary by proceedings challenging the project approvals and related environmental review, if the applicant desires to continue to pursue the project.

The Applicant shall agree that the City shall have no liability to the Applicant for business interruption, punitive, speculative, or consequential damages.

10. NOTICE OF FEES, DEDICATIONS, RESERVATIONS, OR OTHER EXACTIONS

The Conditions of Project Approval set forth herein may include certain fees, dedication requirements, reservation requirements, and other exactions.

SECTION IV: CONDITIONS ADMINISTERED BY THE PUBLIC WORKS DEPT.

11. STREET IMPROVEMENTS & DEDICATION

Provide street dedication in fee title and frontage improvements along the project frontage to the satisfaction of the Director of Public Works. The street improvement plans must be submitted and approved by the City prior to the Final Map recordation. Final Map recordation will not be contingent upon Caltrans approval for the proposed improvements within Caltrans right of way, however the developer shall provide adequate sureties (equivalent to 200% of the value of the improvements) for frontage improvements prior to Final Map recordation. The Applicant will be required to coordinate with Caltrans, in cooperation with the City, for approval of work located within Caltrans' jurisdiction. If, at the time of project completion, the Applicant is unable to obtain approval from Caltrans for improvements within their jurisdiction, the Director of Public Works, at his/her sole discretion, may require the Applicant to deposit fees to the City that are equivalent to the value of the work, as determined by the City, as an option to fulfilling street improvement completion requirements.

Street improvements may include, but are not limited to, sidewalk, curb & gutter, ADA ramps, city standard driveways, storm drain and sanitary sewer system, street

tree installations, street lights (new and/or relocate), bus stop, concrete bus pad, bus shelter and other related bus improvements, upgrade the existing pedestrian warning device at the mid-block crossing on Mary Avenue to rectangular rapid flashing beacons (RRFB), pavement, signs and pavement markings, installation of a Class IV Separated Bikeway between Mary Ave and Hwy 85 NB on-ramp per the approved Cupertino Bicycle Transportation Plan Implementation along project frontage on Stevens Creek Blvd. The installation will require traffic signal modifications at the intersection of Stevens Creek Blvd & Hwy 85. The Applicant will be required to coordinate with Caltrans, in cooperation with the City, for work located within Caltrans' jurisdiction.

At the street improvement plan stage, the proposed bus stop design (shown on VTM-6) on Stevens Creek Blvd., west of Mary Ave. shall be further reviewed and the final design must be approved by the City of Cupertino prior to issuance of Final Map. The City may require a bus duck out. As a result, additional easement area may be required for the proposed bus shelter.

Project shall adhere to the Heart of the City Specific Plan for streetscape design guidelines.

12. TRANSPORTATION

Prior to the Final Map recordation, the Applicant shall provide plans for improvements along the project frontage and shall construct the proposed improvements or provide security bonds to the satisfaction of the City Engineer. The project shall construct Bicycle Transportation Plan improvements in the vicinity of the property, including construction of a portion of the separated bicycle lanes along the north side of Stevens Creek Blvd. between Hwy 85 & Mary Ave, or other related work as determined by the Director of Public Works. The value of the improvements shall be credited toward the Transportation Impact Fee required for the project. The Applicant will be responsible for paying any Transportation Impact Fees in excess of fee credits for improvements constructed.

13. PEDESTRIAN AND BICYCLE IMPROVEMENTS

The Applicant shall provide pedestrian and bicycle related improvements, including but not limited to, pedestrian and Class III bike paths and bicycle racks throughout the project site, and RRFB on Mary Ave consistent with the Cupertino Bicycle Transportation Plan and the Pedestrian Transportation Guidelines, and as approved by the Director of Public Works.

14. FINAL MAP

Prior to recordation of final map, all building(s) that straddle new property lines must be removed. No structures are permitted to cross property lines.

Project is required to dedicate at the time of Final Map approval Public Access Easements to facilitate on-site Class III bike and pedestrian paths as identified in the Cupertino Bicycle Transportation Plan and Pedestrian Transportation Plan. Public Access Easements will be required at the northwestern and southwestern property corners, along the west side of the project site connecting north to south between Stevens Creek Boulevard and Mary Avenue, and throughout the project site connecting east to west.

15. GATEWAY MONUMENT SIGN

As part of the street improvement plans, the Applicant shall design and show placement of a gateway monument sign in the median of Stevens Creek Boulevard, east of Hwy 85. Prior to project completion, the Applicant shall fabricate and install a gateway monument sign. The precise location, design and size of the gateway monument sign shall be to the satisfaction of the Director of Public Works.

16. STREET LIGHTING INSTALLATION

As part of the street improvement plans, street lighting shall be designed to the satisfaction of the Director of Public Works. Street lights shall be installed as designed prior to project completion. Lighting fixtures shall be positioned so as to preclude glare and other forms of visual interference to adjoining properties, and shall be no higher than the maximum height permitted by the zone in which the site is located.

17. GRADING

Grading shall be performed to the satisfaction of the Director of Public Works in accordance with Chapter 16.08 of the Cupertino Municipal Code. 401 Certifications and 404 permits maybe required. Please contact Army Corp of Engineers and/or Regional Water Quality Control Board as appropriate.

18. STORM DRAINAGE

Prior to the Final Map approval, the Applicant shall address and mitigate the storm drainage impact as the result of the environmental impact study.

Drainage shall be provided to the satisfaction of the Director of Public Works. Hydrology and pre- and post-development hydraulic calculations must be provided to indicate whether additional storm water control measures are to be constructed or renovated. The storm drain system may include, but is not limited to, subsurface storage of peak stormwater flows (as needed and identified in the environmental study), bioretention basins, and Low Impact Development measures to reduce the amount of runoff from the site and improve water quality.

All storm drain inlets shall be clearly marked with the words “No Dumping – Flows to Creek” using permanently affixed metal medallions or equivalent, as approved by the Environmental Programs Division.

Project will be required to install stormwater trash capture facilities that meet the requirements established by Municipal Regional Permit. Trash capture devices shall be located onsite and shall be situated so as to ensure trash carried by storm water is collected onsite and does not flow directly to the City storm drain system. Applicant’s engineer shall design and size the trash capture devices to ensure that in the event the devices cause an obstruction to onsite stormwater flow, onsite flooding does not occur.

19. C.3 REQUIREMENTS

C.3 regulated improvements are required for all projects creating and/or replacing 10,000 S.F. or more of impervious surface (collectively over the entire project site). The developer shall reserve a minimum of 4% of developable surface area for the placement of low impact development measures, for storm water treatment, unless an alternative storm water treatment plan, that satisfies C.3 requirements, is approved by the Director of Public Works.

The Applicant must include the use and maintenance of site design, source control and storm water treatment Best Management Practices (BMPs), which must be designed per approved numeric sizing criteria. A Storm Water Management Plan and Stormwater Management Facilities Operation, Maintenance, and Easement Agreement are each required prior to issuance of building permits for site improvements or as otherwise required at the City’s sole discretion.

All storm water management plans are required to obtain certification from a City approved third party reviewer.

20. SUBDIVISION AGREEMENT

The project developer shall enter into a subdivision agreement with the City of Cupertino providing for payment of fees, including but not limited to checking and inspection fees, storm drain fees, park dedication fees and fees for under grounding of utilities. Said agreement shall be executed prior to recordation of Final Map.

Fees:

- a. Checking & Inspection Fees: Per current fee schedule (\$4,898.00 or 5% of improvement costs)
- b. Grading Permit: Per current fee schedule (\$3,647.00 or 6% of improvement costs)
- c. Transportation Impact Fee Per current fee schedule

(As applicable):	(\$6,862/PM peak-hour trip; Multi-Family - \$4,215/unit; and Commercial -\$10.94/sf)
d. Storm Drainage Fee:	Per current fee schedule (multi-family-\$3,871 per AC+\$293/unit; Commercial-10,423/AC)
e. Park Fee:	Per current fee schedule Senior - \$30,000/DU Other Residential – \$105,000, \$60,000 and/or \$54,000/DU depending on density
f. Map Review Fee:	Per current fee schedule (\$12,184 -Tract Map)
g. Storm Management Plan Fee:	Per current fee schedule (\$1,521)
h. Street Tree	By Developer
j. Power Cost:	**

** Based on the latest effective PG&E rate schedule approved by the PUC

Bonds:

- Faithful Performance Bond: 100% of Off-site and On-site Improvements
- Labor & Material Bond: 100% of Off-site and On-site Improvement
- On-site Grading Bond: 100% of site improvements.

-The fees described above are imposed based upon the current fee schedule adopted by the City Council. However, the fees imposed herein may be modified at the time of recordation of a final map or issuance of a building permit. In the event of said change or changes, the fees charged at that time will reflect the then current fee schedule.

21. TRASH, RECYCLING AND COMPOST ENCLOSURES

Trash enclosure plans must be designed in accordance with the City’s “Public Works Guidelines posted at www.cupertino.org/nowaste, and to the satisfaction of the Environmental Programs Manager. Clearance by the Public Works Department is required prior to obtaining a building permit. (CMC 9.18.210 H & K)

Applicant shall enter into an agreement with the City that indemnifies and holds harmless both the City and the refuse and recycling collection company (Recology) from and against any harm, damage or maintenance that may occur or become necessary to onsite paving stone driveway surfaces.

22. OPERATIONS & MAINTENANCE AGREEMENT

Developer shall enter into an Operations & Maintenance Agreement with the City prior to acceptance of street improvements, or as otherwise required at sole discretion of the City. The Agreement shall include the operation and maintenance for appurtenances in the public right-of-way, including non-standard facilities that may include, but is not limited to, street trees, landscaping, sidewalk, and pavers.

23. UNDERGROUND UTILITIES

Developer shall comply with the requirements of the Underground Utilities Ordinance No. 331 and other related Ordinances and regulations of the City of Cupertino, and shall coordinate with affected utility providers for installation of underground utility devices. Developer shall submit detailed plans showing utility underground provisions. Said plans shall be subject to prior approval of the affected Utility provider and the Director of Public Works.

24. TRANSFORMERS & CABINETS

Electrical transformers, telephone cabinets and similar equipment shall be placed in underground vaults. The developer must receive written approval from both the Public Works Department and the Community Development Department prior to installation of any above ground equipment. Should above ground equipment be permitted by the City, equipment and enclosures shall be screened with fencing and landscaping such that said equipment is not visible from public street areas, as determined by the Community Development Department. Transformers shall not be located in the front or side building setback area.

25. WATER BACKFLOW PREVENTERS

Domestic and Fire Water Backflow preventers and similar above ground equipment shall be placed away from the public right of way and site driveways to a location approved by the Cupertino Planning Department, Santa Clara County Fire Department and the water company.

26. BEST MANAGEMENT PRACTICES

Utilize Best Management Practices (BMPs), as required by the State Water Resources Control Board, for construction activity, which disturbs soil. BMP plans shall be included in grading and street improvement plans.

27. NPDES CONSTRUCTION GENERAL PERMIT

When and where it is required by the State Water Resources Control Board (SWRCB), the developer must obtain a Notice of Intent (NOI) from the SWRCB, which encompasses preparation of a Storm Water Pollution Prevention Plan (SWPPP), use of construction Best Management Practices (BMPs) to control storm water runoff quality, and BMP inspection and maintenance.

28. EROSION CONTROL PLAN

Developer must provide an approved erosion control plan by a Registered Civil Engineer prior to issuance of permits for construction operations for the project. This plan should include all erosion control measures used to retain materials on site. Erosion control notes shall be stated on the plans.

29. WORK SCHEDULE

Every 6 months, the developer shall submit a work schedule to the City to show the timetable for all grading/erosion control work in conjunction with this project.

30. TRAFFIC CONTROL PLAN

The developer must submit a traffic control plan by a Registered Traffic Engineer to be approved by the City prior to issuance of permits for any work within the public right of way. The plan shall include a temporary traffic control plan for work in the right of way as well as a routing plan for all vehicles used during construction. All traffic control signs must be reviewed and approved by the City prior to commencement of work. The City has adopted Manual on Uniform Traffic Control Devices (MUTCD) standards for all signage and striping work throughout the City.

31. STREET TREES

Prior to completion of the project, street trees shall be planted within the Public Right of Way to the satisfaction of the Director of Public Works and shall be of a type approved by the City in accordance with Ordinance No. 125.

32. FIRE PROTECTION

Fire sprinklers shall be installed in any new construction to the approval of the City.

33. SANTA CLARA COUNTY FIRE DEPARTMENT

A letter of clearance for the project shall be obtained from the Santa Clara County Fire Department prior to issuance of building permits. Clearance should include written approval of the location of any proposed Fire Backflow Preventers, Fire Department Connections and Fire Hydrants (typically Backflow Preventers should be located on private property adjacent to the public right of way, and fire department connections must be located within 100' of a Fire Hydrant).

34. FIRE HYDRANT

Fire hydrants shall be located as required by the City and Santa Clara County Fire Department as needed.

35. SAN JOSE WATER COMPANY CLEARANCE

Provide San Jose Water Company approval for water connection, service capability and location and layout of water lines and backflow preventers prior to recordation of Final Map or issuance of building permits, whichever comes first.

36. DEDICATION OF UNDERGROUND WATER RIGHTS

Developer shall “quit claim” to the City all rights to pump, take or otherwise extract water from the underground basin or any underground strata in the Santa Clara Valley.

37. SANITARY DISTRICT

A letter of clearance for the project shall be obtained from the Cupertino Sanitary District prior to recordation of Final Map or issuance of building permits, whichever comes first.

38. UTILITY EASEMENTS

Clearance approvals from the agencies with easements on the property (including PG&E, AT&T, and California Water Company, and/or equivalent agencies) will be required prior to recordation of Final Map or issuance of building permits, whichever comes first. Provide letters from PG&E and AT&T to state their concurrence with the proposed easement relocation.

39. PARKLAND DEDICATION

The residential units within the project are subject to the payment of parkland fees in-lieu of parkland dedication per CMC Chapter 13.08 and Chapter 18.24.

The Below Market Rate (BMR) program manual, which was last amended by City Council on May 19, 2020 per Resolution 20-055, authorizes the waiver of park fees for BMR units. Pursuant to Resolution 20-055, Parkland Dedication in-lieu fees for the 48 BMR units proposed for this project are hereby waived.

CITY ENGINEER'S CERTIFICATE OF
ACCEPTANCE OF ENGINEERING/SURVEYING CONDITIONS
(Section 66474.18 California Government Code)

I hereby certify that the engineering and surveying conditions specified in Section IV. of this Resolution conform to generally accepted engineering practices.

Chad Mosley, Assistant Director of Public Works
City Engineer CA License 66077

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this 7th day of September, 2021, by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

SIGNED: _____ Darcy Paul, Mayor City of Cupertino	 _____ Date
ATTEST: _____ Kirsten Squarcia, City Clerk	 _____ Date

1396402.1

CITY OF CUPERTINO
10300 Torre Avenue
Cupertino, California 95014

RESOLUTION NO. 6927

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF CUPERTINO RECOMMENDING APPROVAL OF A VESTING TENTATIVE MAP TO REPLACE A PREVIOUSLY APPROVED VESTING TENTATIVE MAP (TM-2018-03) FOR THE WESTPORT CUPERTINO DEVELOPMENT PROJECT TO CREATE A SEPARATE PARCEL FOR THE AGE RESTRICTED SENIOR BELOW MARKET RATE BUILDING LOCATED AT 21267 STEVENS CREEK BOULEVARD (APN: 326-27-042, -043)

The Planning Commission recommends that the City Council approve the Vesting Tentative Map, in substantially similar form to the Draft Resolution attached hereto as Exhibit TM:

PASSED AND ADOPTED at a Regular Meeting of the Planning Commission of the City of Cupertino the 27th day of July 2021, by the following roll call vote:

AYES: COMMISSIONERS:
NOES: COMMISSIONERS:
ABSTAIN: COMMISSIONERS:
ABSENT: COMMISSIONERS:

ATTEST:

Piu Ghosh
Piu Ghosh
Planning Manager

APPROVED:

Steven Scharf
Steven Scharf
Vice Chair, Planning Commission

RESOLUTION NO. _____

A RESOLUTION OF THE CUPERTINO CITY COUNCIL
 APPROVING OF A VESTING TENTATIVE MAP TO REPLACE A
 PREVIOUSLY APPROVED VESTING TENTATIVE MAP (TM-2018-03)
 FOR THE WESTPORT CUPERTINO DEVELOPMENT PROJECT TO
 CREATE A SEPARATE PARCEL FOR THE AGE RESTRICTED SENIOR
 BELOW MARKET RATE BUILDING LOCATED AT 21267 STEVENS
 CREEK BOULEVARD (APN: 326-27-042, -043)

SECTION I: PROJECT DESCRIPTION

Application No.: TM-2021-002
 Applicant: KT Urban (Mark Tersini)
 Property Owner: 190 West St. James, LLC
 Location: 21267 Stevens Creek Blvd. (APN #326-27-042, -043)

SECTION II: FINDINGS FOR A TENTATIVE MAP:

WHEREAS, the City of Cupertino received an application for a Vesting Tentative Map as described in Section I of this resolution; and

WHEREAS, The Westport Cupertino Mixed-Use Project (“Project”), including the Vesting Tentative Map, is fully described and analyzed in the Initial Study and Final Environmental Impact Report (State Clearinghouse No. 2019070377) (“EIR” or “Final EIR”) for the Project; and

WHEREAS, on August 18, 2020, after consideration of substantial evidence contained in the entire administrative record, the City Council approved the Westport Cupertino project, by adopting resolutions including the Development Permit Resolution No 20-106, the Vesting Tentative Map Resolution No. 20-109, and Resolution No. 20-105 certifying the EIR, adopting and requiring as conditions of approval all of the mitigation measures for the Project that are identified in the EIR and are within the responsibility and jurisdiction of the City , and adopting the Mitigation Monitoring and Reporting Program for the Project; and

WHEREAS, on April 21, 2021, the applicant submitted and requested the City to consider a revised Vesting Tentative Map to decouple the senior below market rate building (Building 2) from the market rate senior housing development (Building 1) by creating a third parcel to be occupied by Building 2, and to remove certain bicycle improvements not required by the August 2020 approval; and

WHEREAS, other than the changes described above, the Vesting Tentative Map proposes the same development and public improvements approved in August 2020, covering 8.1

gross acres and providing for 88 single-family units and 179 senior units, 48 of which will be limited to below-market-rate rents; and

WHEREAS, the proposed changes to the project would not have any new or substantially more severe significant environmental impacts; and

WHEREAS, on July 27, 2021 the Planning Commission recommended on a X-X vote that the City Council approve the Vesting Tentative Map (TM-2021-002), in substantially similar form to the Resolution presented (Resolution No. _____)and

WHEREAS, all necessary public notices having been given as required by the Procedural Ordinance of the City of Cupertino and the Government Code, and the Planning Commission held at least one public hearing in regard to this application, and on August 18, 2020, the City Council held a public hearing to consider the Vesting Tentative Map; and

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

WHEREAS, the applicant has met the burden of proof required to support the application for a Tentative Map; and

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

- a. That the proposed subdivision map is consistent with the City of Cupertino General Plan.

The subject property is consistent with the General Plan because the property is permitted to have up to 30 dwelling units an acre and qualifies for a density bonus. The proposed development is consistent with the intent of the policies of the General Plan for a high density mixed-use development on this site.

- b. That the design and improvements of the proposed subdivision are consistent with the General Plan.

The off-site improvements are consistent with the City's General Plan policies related to pedestrian and bicycle safety etc. by improving Stevens Creek Boulevard, minimizing curb-cuts, and requiring an urban canopy within the public right-of-way. The project is also consistent with the General Plan's design requirements, since the project qualifies for waivers for height and slope setback.

- c. That the site is physically suitable for the type of development contemplated under the approved subdivision.

The proposed subdivision is compatible with the adjoining land uses and no physical constraints are present that would conflict with anticipated land use development. There are no topographical anomalies that differentiate this property from adjacent properties. The site is located on the valley floor, and is not listed within any environmentally sensitive zone.

- d. That the site is physically suitable for the intensity of development contemplated under the approved subdivision.

The subject property is physically suitable in size and shape in conformance to development standards and is appropriately configured to accommodate a multi-unit mixed-used development.

- e. That the design of the subdivision or the proposed improvements are not likely to cause substantial environmental damage nor substantially and avoidably injure fish and wildlife or their habitat.

The design of the subdivision and proposed improvements are not likely to substantially injure fish and wildlife or their habitat because the property is already a developed site and located in an urbanized area where residential land use is allowed. The EIR concluded that all potential environmental impacts will be mitigated to a less than significant level.

- f. That the design of the subdivision or the type of improvements associated therewith are not likely to cause serious public health problems.

The proposed subdivision design and improvements are not likely to cause serious public health problems. The proposed development is consistent with the intent of the policies of the General Plan for a high density mixed-use development on this site, and the on-site and off-site improvements improve neighborhood walkability through improved sidewalk construction with size-appropriate driveway cuts and both street and private-land tree planting.

- g. That the design of the subdivision and its associated improvements will not conflict with easements acquired by the public at large for access through or use of property within the proposed subdivision.

No easement or right-of-way exists currently that would be impeded or conflict with the proposed subdivision.

NOW, THEREFORE, BE IT RESOLVED:

That after careful consideration of maps, facts, exhibits, testimony and other evidence submitted in this matter and the EIR and the Mitigation Monitoring and Reporting Program for the Project (EA-2018-04), subject to the conditions which are enumerated in this Resolution beginning on PAGE 2 thereof, and those contained in all other Resolutions approved for this Project,

1. The City Council hereby exercises its independent judgment and determines that approval of the Vesting Tentative Map, which creates a new lot on the project site and does not include certain previously-proposed improvements would not have any new or substantially more severe significant environmental impacts beyond those identified in the Final EIR (State Clearinghouse 2019070377) previously

certified for the Westport Cupertino development project. The Final EIR identifies mitigation measures to reduce the potentially significant environmental impacts of the project to less than significant levels. These mitigation measures were adopted and made conditions of project approval.

2. The application for a Vesting Tentative Map, Application No. TM-2021-002, is hereby approved, subject to the conditions which are enumerated in this Resolution beginning on PAGE 4 thereof, and those contained in all other Resolutions approved for this Project in August 2020 other than Resolution No. 20-106 which is superseded by this resolution, and the subconclusions upon which the findings and conditions specified in this Resolution are based are contained in the Public Hearing record concerning Application No. TM-2021-002 as set forth in the Minutes of the City Council Meeting of July 20, 2021 Meeting, and are incorporated by reference as though fully set forth herein.

SECTION III: CONDITIONS ADMINISTERED BY THE COMMUNITY DEVELOPMENT DEPT.

1. APPROVED EXHIBITS

Approval is based on the plan set dated December 09, 2020, consisting of 6 sheets labeled as Westport, VTM-1-VTM-6, and Kimley Horn except as may be amended by conditions in this resolution.

2. ACCURACY OF PROJECT PLANS

The applicant/property owner is responsible to verify all pertinent property data including but not limited to property boundary locations, building setbacks, property size, building square footage, any relevant easements and/or construction records. Any misrepresentation of any property data may invalidate this approval and may require additional review.

3. PRIOR APPROVAL CONDITIONS

The conditions of approval contained in file nos. TR-2018-22, EXC-2019-03, U-2019-03, ASA-2018-05, DP-2018-05 and EA-2018-04 shall be applicable to this approval unless in conflict with the conditions of approval of this resolution.

4. ANNOTATION OF THE CONDITIONS OF APPROVAL

The conditions of approval set forth shall be incorporated into and annotated on the first page of the building plans.

5. RESIDENTIAL CONDOMINIUM MAP REQUIRED

Prior to the issuance of building permits for the any building to be divided into condominium units, the applicant must record a Final Condominium Map covering the area of the building with the County of Santa Clara after approval by the Director of Public Works.

6. BUS STOP DUCKOUT

The applicant will work with the Public Works staff to relocate the bus stop to a location along Stevens Creek Boulevard that will not conflict with the intersection of Mary Avenue and Stevens Creek Boulevard.

7. RECIPROCAL INGRESS/EGRESS EASEMENT

The applicant shall record a private reciprocal ingress and egress easement for vehicular and pedestrian access over the drive aisles and sidewalks onsite to facilitate movement between the parcels. Easements shall be reserved on the Final Map or created by separate instrument recorded at the time of Final Map recordation.

8. CONSULTATION WITH OTHER DEPARTMENTS

The applicant is responsible to consult with other departments and/or agencies with regard to the proposed project for additional conditions and requirements. Any misrepresentation of any submitted data may invalidate an approval by the Community Development Department.

9. INDEMNIFICATION

To the fullest extent permitted by law, the applicant shall agree to indemnify, defend with the attorneys of the City's choice, and hold harmless the City, its City Council, and its officers, employees, and agents (collectively, the "indemnified parties") from and against any liability, claim, action, cause of action, suit, damages, judgment, lien, levy, or proceeding (collectively referred to as "proceeding") brought by a third party against one or more of the indemnified parties or one or more of the indemnified parties and the applicant related to any Ordinance, Resolution, or action approving the project, the related entitlements, environmental review documents, finding or determinations, or any other permit or approval authorized for the project. The indemnification shall include but not be limited to damages, fees, and costs awarded against the City, if any, and cost of suit, attorneys' fees, and other costs, liabilities, and expenses incurred in connection with such proceeding whether incurred by the Applicant, the City, or the parties initiating or bringing such proceeding.

The applicant shall agree to (without limitation) reimburse the City its actual attorneys' fees and costs incurred in defense of the litigation. Such attorneys' fees and costs shall include amounts paid to the City's outside counsel and shall include City Attorney time and overhead costs and other City staff overhead costs and any costs

directly related to the litigation reasonably incurred by City. The applicant shall likewise agree to indemnify, defend, and hold harmless the indemnified parties from and against any damages, attorneys' fees, or costs awards, including attorneys' fees awarded under Code of Civil Procedure section 1021.5, assessed or awarded against the indemnified parties. The Applicant shall cooperate with the City to enter a Reimbursement Agreement to govern any such reimbursement.

The Applicant shall agree to (without limitation) reimburse the City for all costs incurred in additional investigation or study of, or for supplementing, redrafting, revising, or amending, any document (such as an Environmental Impact Report, negative declaration, specific plan, or general plan amendment) if made necessary by proceedings challenging the project approvals and related environmental review, if the applicant desires to continue to pursue the project.

The Applicant shall agree that the City shall have no liability to the Applicant for business interruption, punitive, speculative, or consequential damages.

10. NOTICE OF FEES, DEDICATIONS, RESERVATIONS, OR OTHER EXACTIONS

The Conditions of Project Approval set forth herein may include certain fees, dedication requirements, reservation requirements, and other exactions.

SECTION IV: CONDITIONS ADMINISTERED BY THE PUBLIC WORKS DEPT.

11. STREET IMPROVEMENTS & DEDICATION

Provide street dedication in fee title and frontage improvements along the project frontage to the satisfaction of the Director of Public Works. The street improvement plans must be submitted and approved by the City prior to the Final Map recordation. Final Map recordation will not be contingent upon Caltrans approval for the proposed improvements within Caltrans right of way, however the developer shall provide adequate sureties (equivalent to 200% of the value of the improvements) for frontage improvements prior to Final Map recordation. The Applicant will be required to coordinate with Caltrans, in cooperation with the City, for approval of work located within Caltrans' jurisdiction. If, at the time of project completion, the Applicant is unable to obtain approval from Caltrans for improvements within their jurisdiction, the Director of Public Works, at his/her sole discretion, may require the Applicant to deposit fees to the City that are equivalent to the value of the work.

Street improvements may include, but are not limited to, sidewalk, curb & gutter, ADA ramps, city standard driveways, storm drain and sanitary sewer system, street tree installations, street lights (new and/or relocate), bus stop, concrete bus pad, bus shelter and other related bus improvements, upgrade the existing pedestrian warning

device at the mid-block crossing on Mary Avenue to rectangular rapid flashing beacons (RRFB), pavement, signs and pavement markings, installation of a Class IV Separated Bikeway between Mary Ave and Hwy 85 NB on-ramp per the approved Cupertino Bicycle Transportation Plan Implementation along project frontage on Stevens Creek Blvd. The installation will require traffic signal modifications at the intersection of Stevens Creek Blvd & Hwy 85. The Applicant will be required to coordinate with Caltrans, in cooperation with the City, for work located within Caltrans' jurisdiction.

At the street improvement plan stage, the proposed bus stop design (shown on VTM-6) on Stevens Creek Blvd., west of Mary Ave. shall be further reviewed and the final design must be approved by both VTA and City of Cupertino prior to issuance of Final Map. The City may require a bus duckout. As a result, additional easement area may be required for the proposed bus shelter.

Project shall adhere to the Heart of the City Specific Plan for streetscape design guidelines.

12. TRANSPORTATION

The City will not record any Final Map before it has approved plans for any improvements required along the project frontage including Bicycle Transportation Plan improvements envisioned in the Bicycle and Pedestrian Transportation Plans and the Applicant has provided security therefor. The improvements shall include construction of a portion of the Stevens Creek Blvd Separated Bicycle Lanes along the north side of Stevens Creek Blvd. between Hwy 85 & Mary Ave, or other related frontage work as determined by the Director of Public Works.

13. PEDESTRIAN AND BICYCLE IMPROVEMENTS

The Applicant shall provide pedestrian and bicycle related improvements, including but not limited to, pedestrian and Class III bike paths and bicycle racks throughout the project site, and RRFB on Mary Ave consistent with the Cupertino Bicycle Transportation Plan and the Pedestrian Transportation Guidelines, and as approved by the Director of Public Works.

14. FINAL MAP

Prior to recordation of final map, all building(s) that straddle new property lines must be removed. No structures are permitted to cross property lines.

Project is required to dedicate at the time of Final Map approval Public Access Easements to facilitate on-site Class III bike and pedestrian paths as identified in the Cupertino Bicycle Transportation Plan and Pedestrian Transportation Plan. Public Access Easements will be required at the northwestern and southwestern property

corners, along the west side of the project site connecting north to south between Stevens Creek Boulevard and Mary Avenue, and throughout the project site connecting east to west.

15. GATEWAY MONUMENT SIGN

As part of the street improvement plans, the Applicant shall design and show placement of a gateway monument sign in the median of Stevens Creek Boulevard, east of Hwy 85. Prior to project completion, the Applicant shall fabricate and install a gateway monument sign. The precise location, design and size of the gateway monument sign shall be to the satisfaction of the Director of Public Works.

16. STREET LIGHTING INSTALLATION

As part of the street improvement plans, street lighting shall be designed to the satisfaction of the Director of Public Works. Street lights shall be installed as designed prior to project completion. Lighting fixtures shall be positioned so as to preclude glare and other forms of visual interference to adjoining properties, and shall be no higher than the maximum height permitted by the zone in which the site is located.

17. GRADING

Grading shall be performed to the satisfaction of the Director of Public Works in accordance with Chapter 16.08 of the Cupertino Municipal Code. 401 Certifications and 404 permits maybe required. Please contact Army Corp of Engineers and/or Regional Water Quality Control Board as appropriate.

18. STORM DRAINAGE

Prior to the Final Map approval, the Applicant shall address and mitigate the storm drainage impact as the result of the environmental impact study.

Drainage shall be provided to the satisfaction of the Director of Public Works. Hydrology and pre- and post-development hydraulic calculations must be provided to indicate whether additional storm water control measures are to be constructed or renovated. The storm drain system may include, but is not limited to, subsurface storage of peak stormwater flows (as needed and identified in the environmental study), bioretention basins, and Low Impact Development measures to reduce the amount of runoff from the site and improve water quality.

All storm drain inlets shall be clearly marked with the words "No Dumping – Flows to Creek" using permanently affixed metal medallions or equivalent, as approved by the Environmental Programs Division.

Project will be required to install stormwater trash capture facilities that meet the requirements established by Municipal Regional Permit. Trash capture devices shall

be located onsite and shall be situated so as to ensure trash carried by storm water is collected onsite and does not flow directly to the City storm drain system. Applicant's engineer shall design and size the trash capture devices to ensure that in the event the devices cause an obstruction to onsite stormwater flow, onsite flooding does not occur.

19. C.3 REQUIREMENTS

C.3 regulated improvements are required for all projects creating and/or replacing 10,000 S.F. or more of impervious surface (collectively over the entire project site). The developer shall reserve a minimum of 4% of developable surface area for the placement of low impact development measures, for storm water treatment, unless an alternative storm water treatment plan, that satisfies C.3 requirements, is approved by the Director of Public Works.

The Applicant must include the use and maintenance of site design, source control and storm water treatment Best Management Practices (BMPs), which must be designed per approved numeric sizing criteria. A Storm Water Management Plan, Storm Water Facilities Easement Agreement, Storm Water Facilities Operation and Maintenance Agreement, and certification of ongoing operation and maintenance of treatment BMPs are each required.

All storm water management plans are required to obtain certification from a City approved third party reviewer.

20. SUBDIVISION AGREEMENT

The project developer shall enter into a subdivision agreement with the City of Cupertino providing for payment of fees, including but not limited to checking and inspection fees, storm drain fees, park dedication fees and fees for under grounding of utilities. Said agreement shall be executed prior to recordation of Final Map.

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- | | |
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| c. Transportation Impact Fee
(As applicable): | Per current fee schedule (\$6,695/PM peak-hour trip; Multi-Family - \$4,112/unit, Single-Family-\$6,631/unit, and Commercial -\$10.67/sf) |
| d. Storm Drainage Fee: | Per current fee schedule (\$10,169per AC) |
| e. Park Fee: | Per current fee schedule |

	Senior - \$30,000/DU
	Other Residential – \$105,000, \$60,000 and/or \$54,000/DU depending on density
f. Map Review Fee:	Per current fee schedule (\$11,527-Tract Map)
g. Storm Management Plan Fee:	Per current fee schedule (\$1,484)
h. Street Tree	By Developer
j. Power Cost:	**

** Based on the latest effective PG&E rate schedule approved by the PUC

Bonds:

Faithful Performance Bond: 100% of Off-site and On-site Improvements

Labor & Material Bond: 100% of Off-site and On-site Improvement

On-site Grading Bond: 100% of site improvements.

-The fees described above are imposed based upon the current fee schedule adopted by the City Council. However, the fees imposed herein may be modified at the time of recordation of a final map or issuance of a building permit. In the event of said change or changes, the fees charged at that time will reflect the then current fee schedule.

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Trash enclosure plans must be designed in accordance with the City's "Public Works Guidelines" posted at www.cupertino.org/nowaste, and to the satisfaction of the Environmental Programs Manager. Clearance by the Public Works Department is required prior to obtaining a building permit. (CMC 9.18.210 H & K)

Applicant shall enter into an agreement with the City that indemnifies and holds harmless both the City and the refuse and recycling collection company (Recology) from and against any harm, damage or maintenance that may occur or become necessary to onsite paving stone driveway surfaces.

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Developer shall enter into an Operations & Maintenance Agreement with the City prior to recordation of Final Map or issuance of building permits, whichever comes first. The Agreement shall include the operation and maintenance for non-standard appurtenances in the public road right-of-way that may include, but is not limited to, sidewalk, pavers, and street lights.

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Developer shall comply with the requirements of the Underground Utilities Ordinance No. 331 and other related Ordinances and regulations of the City of Cupertino, and shall coordinate with affected utility providers for installation of underground utility devices. Developer shall submit detailed plans showing utility underground provisions. Said plans shall be subject to prior approval of the affected Utility provider and the Director of Public Works.

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Electrical transformers, telephone cabinets and similar equipment shall be placed in underground vaults. The developer must receive written approval from both the Public Works Department and the Community Development Department prior to installation of any above ground equipment. Should above ground equipment be permitted by the City, equipment and enclosures shall be screened with fencing and landscaping such that said equipment is not visible from public street areas, as determined by the Community Development Department. Transformers shall not be located in the front or side building setback area.

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When and where it is required by the State Water Resources Control Board (SWRCB), the developer must obtain a Notice of Intent (NOI) from the SWRCB, which encompasses preparation of a Storm Water Pollution Prevention Plan (SWPPP), use of construction Best Management Practices (BMPs) to control storm water runoff quality, and BMP inspection and maintenance.

28. EROSION CONTROL PLAN

Developer must provide an approved erosion control plan by a Registered Civil Engineer prior to issuance of permits for construction operations for the project. This plan should include all erosion control measures used to retain materials on site. Erosion control notes shall be stated on the plans.

29. WORK SCHEDULE

Every 6 months, the developer shall submit a work schedule to the City to show the timetable for all grading/erosion control work in conjunction with this project.

30. TRAFFIC CONTROL PLAN

The developer must submit a traffic control plan by a Registered Traffic Engineer to be approved by the City prior to issuance of permits for any work within the public right of way. The plan shall include a temporary traffic control plan for work in the right of way as well as a routing plan for all vehicles used during construction. All traffic control signs must be reviewed and approved by the City prior to commencement of work. The City has adopted Manual on Uniform Traffic Control Devices (MUTCD) standards for all signage and striping work throughout the City.

31. STREET TREES

Prior to completion of the project, street trees shall be planted within the Public Right of Way to the satisfaction of the Director of Public Works and shall be of a type approved by the City in accordance with Ordinance No. 125.

32. FIRE PROTECTION

Fire sprinklers shall be installed in any new construction to the approval of the City.

33. SANTA CLARA COUNTY FIRE DEPARTMENT

A letter of clearance for the project shall be obtained from the Santa Clara County Fire Department prior to issuance of building permits. Clearance should include written approval of the location of any proposed Fire Backflow Preventers, Fire Department Connections and Fire Hydrants (typically Backflow Preventers should be located on private property adjacent to the public right of way, and fire department connections must be located within 100' of a Fire Hydrant).

34. FIRE HYDRANT

Fire hydrants shall be located as required by the City and Santa Clara County Fire Department as needed.

35. SAN JOSE WATER COMPANY CLEARANCE

Provide San Jose Water Company approval for water connection, service capability and location and layout of water lines and backflow preventers prior to recordation of Final Map or issuance of building permits, whichever comes first.

36. DEDICATION OF UNDERGROUND WATER RIGHTS

Developer shall “quit claim” to the City all rights to pump, take or otherwise extract water from the underground basin or any underground strata in the Santa Clara Valley.

37. SANITARY DISTRICT

A letter of clearance for the project shall be obtained from the Cupertino Sanitary District prior to recordation of Final Map or issuance of building permits, whichever comes first.

38. UTILITY EASEMENTS

Clearance approvals from the agencies with easements on the property (including PG&E, AT&T, and California Water Company, and/or equivalent agencies) will be required prior to recordation of Final Map or issuance of building permits, whichever comes first. Provide letters from PG&E and AT&T to state their concurrence with the proposed easement relocation.

CITY ENGINEER'S CERTIFICATE OF
ACCEPTANCE OF ENGINEERING/SURVEYING CONDITIONS
(Section 66474.18 California Government Code)

I hereby certify that the engineering and surveying conditions specified in Section IV. of this Resolution conform to generally accepted engineering practices.

Chad Mosley, Assistant Director of Public Works
City Engineer CA License 66077

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this 18th day of August, 2021, by the following vote:

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

SIGNED:	
---------	--

<hr/> Darcy Paul, Mayor City of Cupertino	<hr/> Date
ATTEST: <hr/> Kirsten Squarcia, City Clerk	<hr/> Date

1396402.1

VESTING TENTATIVE MAP NO. 2021-002 FOR CONDOMINIUM PURPOSES CITY OF CUPERTINO, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA

LEGAL DESCRIPTION

REAL PROPERTY IN THE CITY OF CUPERTINO, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL ONE:
PARCEL 1 AS SHOWN ON LOT LINE OF ADJUSTMENT, AS EVIDENCED BY DOCUMENT RECORDED FEBRUARY 09, 2015 AS INSTRUMENT NO. 22847965 OF OFFICIAL RECORDS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEING A PORTION OF PARCEL A, AS SHOWN ON THAT CERTAIN PARCEL MAP, FILED FOR RECORD ON AUGUST 19, 2010, IN BOOK 838 OF MAPS AT PAGES 24 AND 25, RECORDS OF SANTA CLARA COUNTY, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

- BEGINNING AT THE NORTHWESTERLY CORNER OF SAID PARCEL A (838 M 24 & 25); THENCE LEAVING SAID CORNER AND ALONG THE SOUTHWESTERLY LINE OF SAID PARCEL A, THE FOLLOWING TWO (2) COURSES AND DISTANCES:
- SOUTH 16°25'54" EAST, 245.50 FEET;
 - SOUTH 15°17'10" EAST, 224.86 FEET TO A POINT ON SAID SOUTHWESTERLY LINE OF SAID PARCEL A;
 - THENCE LEAVING SAID SOUTHWESTERLY LINE OF SAID PARCEL A, THE FOLLOWING ELEVEN (11) COURSES AND DISTANCES:
 - NORTH 73°34'16" EAST, 148.24 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 20.00 FEET;
 - SOUTHEASTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 107°05'50"; FOR AN ARC LENGTH OF 37.38 FEET;
 - NORTH 00°40'06" EAST, 45.98 FEET TO THE BEGINNING OF A NON-TANGENT CURVE, CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 20.00 FEET, FROM CENTER OF SAID CURVE A RADIAL LINE BEARS SOUTH 11°37'41" EAST;
 - NORTHEASTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 74°19'16"; FOR AN ARC LENGTH OF 25.94 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE WEST, HAVING A RADIUS OF 350.00 FEET;
 - NORTHERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 07°25'08"; FOR AN ARC LENGTH OF 45.32 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE SOUTHWEST, HAVING A RADIUS OF 23.00 FEET;
 - NORTHWESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 79°41'27"; FOR AN ARC LENGTH OF 31.99 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 34.50 FEET;
 - WESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 56°00'15"; FOR AN ARC LENGTH OF 33.72 FEET;
 - NORTH 47°50'35" WEST, 46.65 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 32.00 FEET;
 - NORTHWESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 31°24'51"; FOR AN ARC LENGTH OF 17.54 FEET;
 - NORTH 16°25'44" WEST, 16.94 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 79.00 FEET;
 - NORTHERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 25°43'40"; FOR AN ARC LENGTH OF 35.47 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE WEST, HAVING A RADIUS OF 350.00 FEET;
 - SOUTH 15°17'10" EAST, 224.86 FEET TO A POINT ON SAID SOUTHWESTERLY LINE OF SAID PARCEL A, SAID POINT BEING ALSO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION; THENCE LEAVING SAID POINT AND SAID SOUTHWESTERLY LINE OF SAID PARCEL A, THE FOLLOWING ELEVEN (11) COURSES AND DISTANCES:
 - SOUTH 16°25'54" EAST, 245.50 FEET;
 - SOUTH 15°17'10" EAST, 224.86 FEET TO A POINT ON SAID SOUTHWESTERLY LINE OF SAID PARCEL A, SAID POINT BEING ALSO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION; THENCE LEAVING SAID POINT AND SAID SOUTHWESTERLY LINE OF SAID PARCEL A, THE FOLLOWING ELEVEN (11) COURSES AND DISTANCES:
 - NORTH 73°34'16" EAST, 148.24 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 20.00 FEET;
 - SOUTHEASTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 107°05'50"; FOR AN ARC LENGTH OF 37.38 FEET;
 - NORTH 00°40'06" EAST, 45.98 FEET TO THE BEGINNING OF A NON-TANGENT CURVE, CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 20.00 FEET, FROM CENTER OF SAID CURVE A RADIAL LINE BEARS SOUTH 11°37'41" EAST;
 - NORTHEASTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 74°19'16"; FOR AN ARC LENGTH OF 25.94 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE WEST, HAVING A RADIUS OF 350.00 FEET;
 - NORTHERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 07°25'08"; FOR AN ARC LENGTH OF 45.32 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE SOUTHWEST, HAVING A RADIUS OF 23.00 FEET;
 - NORTHWESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 79°41'27"; FOR AN ARC LENGTH OF 31.99 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 34.50 FEET;
 - WESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 56°00'15"; FOR AN ARC LENGTH OF 33.72 FEET;
 - NORTH 47°50'35" WEST, 46.65 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 32.00 FEET;
 - NORTHWESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 31°24'51"; FOR AN ARC LENGTH OF 17.54 FEET;
 - NORTH 16°25'44" WEST, 16.94 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 79.00 FEET;
 - NORTHERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 25°43'40"; FOR AN ARC LENGTH OF 35.47 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE WEST, HAVING A RADIUS OF 350.00 FEET;

EXCEPTING THEREFROM THE UNDERGROUND WATER RIGHTS, WITHOUT RIGHTS OF SURFACE ENTRY, AS CONVEYED TO THE CITY OF CUPERTINO BY DEED RECORDED MARCH 27, 1972 IN BOOK 9760, PAGE 685 OF OFFICIAL RECORDS.

PARCEL TWO:
PARCEL 2 AS SHOWN ON LOT LINE OF ADJUSTMENT, AS EVIDENCED BY DOCUMENT RECORDED FEBRUARY 09, 2015 AS INSTRUMENT NO. 22847965 OF OFFICIAL RECORDS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEING A PORTION OF PARCEL A AND PARCEL B, AS SHOWN ON THAT CERTAIN PARCEL MAP, FILED FOR RECORD ON AUGUST 19, 2010, IN BOOK 838 OF MAPS AT PAGES 24 AND 25, RECORDS OF SANTA CLARA COUNTY, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

- BEGINNING AT THE NORTHWESTERLY CORNER OF SAID PARCEL A (838 M 24 & 25); THENCE LEAVING SAID CORNER AND ALONG THE SOUTHWESTERLY LINE OF SAID PARCEL A, THE FOLLOWING TWO (2) COURSES AND DISTANCES:
- SOUTH 16°25'54" EAST, 245.50 FEET;
 - SOUTH 15°17'10" EAST, 224.86 FEET TO A POINT ON SAID SOUTHWESTERLY LINE OF SAID PARCEL A, SAID POINT BEING ALSO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION; THENCE LEAVING SAID POINT AND SAID SOUTHWESTERLY LINE OF SAID PARCEL A, THE FOLLOWING ELEVEN (11) COURSES AND DISTANCES:
 - NORTH 73°34'16" EAST, 148.24 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 20.00 FEET;
 - SOUTHEASTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 107°05'50"; FOR AN ARC LENGTH OF 37.38 FEET;
 - NORTH 00°40'06" EAST, 45.98 FEET TO THE BEGINNING OF A NON-TANGENT CURVE, CONCAVE TO THE NORTHWEST, HAVING A RADIUS OF 20.00 FEET, FROM CENTER OF SAID CURVE A RADIAL LINE BEARS SOUTH 11°37'41" EAST;
 - NORTHEASTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 74°19'16"; FOR AN ARC LENGTH OF 25.94 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE WEST, HAVING A RADIUS OF 350.00 FEET;
 - NORTHERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 07°25'08"; FOR AN ARC LENGTH OF 45.32 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE SOUTHWEST, HAVING A RADIUS OF 23.00 FEET;
 - NORTHWESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 79°41'27"; FOR AN ARC LENGTH OF 31.99 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE SOUTHEAST, HAVING A RADIUS OF 34.50 FEET;
 - WESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 56°00'15"; FOR AN ARC LENGTH OF 33.72 FEET;
 - NORTH 47°50'35" WEST, 46.65 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 32.00 FEET;
 - NORTHWESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 31°24'51"; FOR AN ARC LENGTH OF 17.54 FEET;
 - NORTH 16°25'44" WEST, 16.94 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 79.00 FEET;
 - NORTHERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 25°43'40"; FOR AN ARC LENGTH OF 35.47 FEET TO THE BEGINNING OF A COMPOUND CURVE, CONCAVE TO THE WEST, HAVING A RADIUS OF 350.00 FEET;
 - SOUTH 15°17'10" EAST, 224.86 FEET TO A POINT ON SAID SOUTHWESTERLY LINE OF SAID PARCEL A, SAID POINT BEING ALSO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION; THENCE LEAVING SAID POINT AND SAID SOUTHWESTERLY LINE OF SAID PARCEL A, THE FOLLOWING SEVEN (7) COURSES:
 - SOUTHEASTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 31°45'38"; FOR AN ARC LENGTH OF 300.44 FEET;
 - SOUTH 89°11'55" EAST, 83.73 FEET;
 - NORTH 00°48'05" EAST, 12.00 FEET;
 - SOUTH 89°11'55" EAST, 169.68 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 280.00 FEET;
 - SOUTHEASTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 90°00'00"; FOR AN ARC LENGTH OF 439.82 FEET;
 - SOUTH 00°48'05" WEST, 90.07 FEET;
 - SOUTH 45°46'13" WEST, 24.05 FEET TO THE SOUTHERLY LINE OF SAID PARCEL B; THENCE ALONG SAID SOUTHERLY LINE OF SAID PARCEL B, THE FOLLOWING TWO (2) COURSES:
 - NORTH 89°15'40" WEST, 617.40 FEET;
 - NORTH 84°03'28" WEST, 139.63 FEET TO THE BEGINNING OF A TANGENT CURVE TO THE RIGHT, HAVING A RADIUS OF 100.00 FEET; NORTHWESTERLY ALONG SAID CURVE, THROUGH A CENTRAL ANGLE OF 68°46'18" FOR AN ARC LENGTH OF 120.03 FEET; THENCE, NORTH 15°17'10" WEST, 137.64 FEET TO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION

EXCEPTING THEREFROM THE UNDERGROUND WATER RIGHTS, WITHOUT RIGHTS OF SURFACE ENTRY, AS CONVEYED TO THE CITY OF CUPERTINO BY DEED RECORDED MARCH 27, 1972 IN BOOK 9760, PAGE 685 OF OFFICIAL RECORDS.

PARCEL THREE:
A NON-EXCLUSIVE EASEMENT APPURTENANT TO THAT PORTION OF PARCELS ONE AND TWO LYING WITHIN PARCEL A OF THE PARCEL MAP FOR CUPERTINO OAKS FILED IN BOOK 838 OF MAPS AT PAGES 24 AND 25 OF SANTA CLARA COUNTY RECORDS FOR DRIVEWAY PURPOSES AS PROVIDED FOR IN THAT CERTAIN EASEMENT GRANT DATED APRIL 20, 2012 AND RECORDED APRIL 25, 2012 AS INSTRUMENT NO. 21637501, OF OFFICIAL RECORDS OF SANTA CLARA COUNTY, OVER THE FOLLOWING DESCRIBED PARCEL:

BEING A PORTION OF PARCEL B OF THE PARCEL MAP FOR CUPERTINO OAKS FILED IN BOOK 838 OF MAPS AT PAGES 24 AND 25 OF SANTA CLARA COUNTY RECORDS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

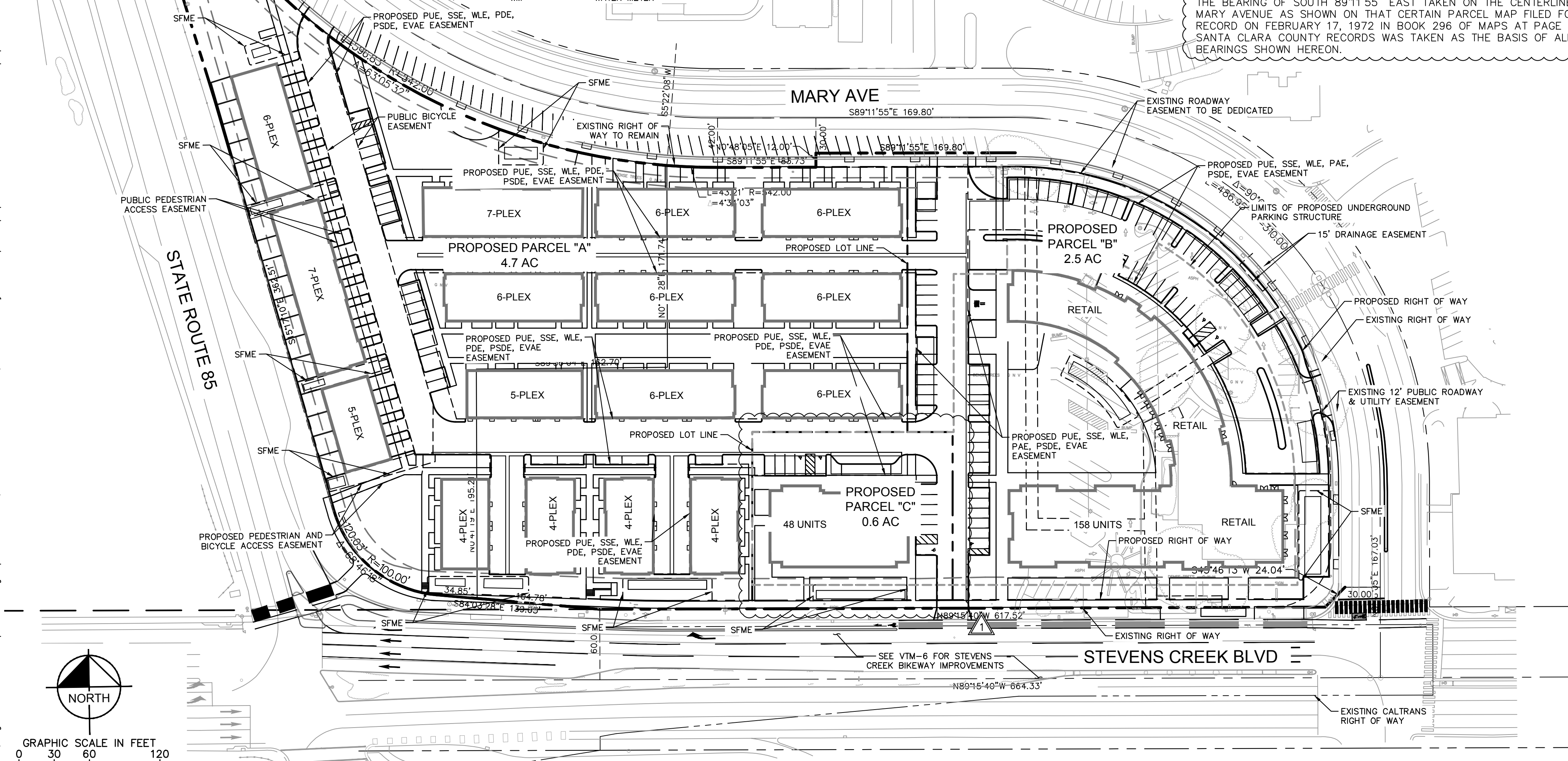
BEGINNING AT THE MOST SOUTHWESTERLY CORNER OF SAID PARCEL B, SAID POINT ALSO BEING ON THE NORTHERLY LINE OF STEVENS CREEK BOULEVARD; THENCE FROM SAID POINT OF BEGINNING ALONG THE WESTERLY LINE OF SAID PARCEL B NORTH 00° 41' 16" EAST 195.21 FEET; THENCE CONTINUING ALONG THE PARCEL LINE OF SAID PARCEL B SOUTH 89° 36' 04" EAST 50.00 FEET; THENCE LEAVING THE PARCEL LINE OF SAID PARCEL B SOUTH 00° 41' 19" WEST 199.81 FEET TO A POINT ON THE SOUTHERLY LINE OF SAID PARCEL B, SAID POINT ALSO BEING ON THE NORTHERLY LINE OF STEVENS CREEK BOULEVARD; THENCE NORTH 84° 03' 28" WEST 50.21 FEET ALONG SAID NORTHERLY LINE OF STEVENS CREEK BOULEVARD TO THE POINT OF BEGINNING.



LOCATION MAP

ABBREVIATIONS

AC	ACRE OR ASPHALT CONCRETE	INV.	INVERT ELEVATION
AVE	AVENUE	LF	LINEAR FEET
BLVD	BOULEVARD	LP	LOW POINT
BW	BACK OF WALK	LS	LANDSCAPE
CB	CATCH BASIN	MAX	MAXIMUM
CD	CENTER LINE	MH	MANHOLE
CI	DROP INLET	MIN	MINIMUM
DR	DRIVEWAY	N	NORTH
E	EAST	OC	ON CENTER
EE	ELECTRICAL/ELEVATION	PAE	PUBLIC ACCESS EASEMENT
ELEV	ELEVATION	PB	PULL BOX
EVAE	ELEVATION VEHICLE ACCESS EASEMENT	PDE	PRIVATE DRIVEWAY EASEMENT
EX	EXISTING	PE	PEDESTAL
FC	FINISH FLOOR	PIP	PROTECT IN PLACE
FG	FINISH GRADE	PL	PROPERTY LINE
FW	FLOWLINE	POC	POINT OF CONNECTION
FS	FINISH SURFACE	PUC	PUBLIC UTILITY EASEMENT
FW	FINISH WATER	PSDE	PRIVATE STORM DRAIN EASEMENT
GB	GRADE BREAK	PSSE	PUBLIC SANITARY SEWER EASEMENT
GR	GRATE	PVC	POLYVINYL CHLORIDE
HP	HIGH POINT	R	RADIUS
		RCP	REINFORCED CONCRETE PIPE
		RIM	RIM ELEVATION
		R/W	RIGHT OF WAY
		SD	STORM DRAIN
		SDCB	STORM DRAIN CATCH BASIN
		SDCO	STORM DRAIN CLEAN OUT
		SDMH	STORM DRAIN MANHOLE
		SFME	STORMWATER FACILITY MAINTENANCE EASEMENT
		SS	SANITARY SEWER
		SSCO	SANITARY SEWER CLEAN OUT
		SSE	SANITARY SEWER EASEMENT
		SSMH	SANITARY SEWER MANHOLE
		STA	STATION
		STD	STANDARD
		SW	SIDEWALK
		TC	TOP OF CURB
		TG	TOP OF GRATE
		TW	TOP OF WALK
		TYP.	TYPICAL
		W	WEST
		WLE	WATER LINE EASEMENT
		WM	WATER METER



GRAPHIC SCALE IN FEET

SHEET INDEX

SHEET NUMBER	SHEET TITLE
VTM-1	COVER SHEET
VTM-2	EXISTING CONDITIONS
VTM-3	GRADING AND DRAINAGE PLAN
VTM-4	UTILITY PLAN
VTM-5	SECTIONS
VTM-6	CLASS IV BIKEWAY DESIGN

ASSESSOR'S PARCEL NUMBERS

326-27-039
326-27-040
326-27-041

PROJECT TEAM

CLIENT KT URBAN 21710 STEVENS CREEK BLVD #200 CUPERTINO, CA 95104 P: 408.257.2100 CONTACT: MARK TERSINI	CIVIL KIMLEY-HORN 4637 CHABOT DRIVE SUITE 300 PLEASANTON, CA 94588 P: 925.965.7701 CONTACT: MARK FALGOUT MARK.FALGOUT@KIMLEY-HORN.COM
ARCHITECT C2K ARCHITECTURE INC. 1645 NW HOYT ST PORTLAND, OR 97209 P: 503.244.2100 CONTACT: KEVIN SAUSER KSAUSER@C2KARCH.COM CONTACT/APPLICANT: NATHAN MILLER NMILLER@C2KARCH.COM	LANDSCAPE PLACE 735 NW 18TH AVE PORTLAND, OR 97209 P: 503.334.1630 CONTACT: MIGUEL CAMACHO SERNA MIGUEL.CAMACHO.SERNA@PLACE.LA

GENERAL NOTES

- GROSS OWNERSHIP ACREAGE: 8.10 ACRES
- TOTAL PROPOSED 3 LOTS, CONTAINING:
88 FOR SALE CONDOMINIUMS
131 SENIOR RESIDENTIAL UNITS
48 BELOW MARKET RATE SENIOR RESIDENTIAL UNITS
20,000 SQFT RETAIL
- ZONING
EXISTING: GENERAL COMMERCIAL, RESIDENTIAL
PROPOSED: GENERAL COMMERCIAL, RESIDENTIAL
- UTILITIES:
SEWER: CUPERTINO SANITARY DISTRICT
WATER: CUPERTINO WATER SERVICE
STORM DRAIN: CITY OF CUPERTINO
GAS AND ELECTRIC: PACIFIC GAS & ELECTRIC COMPANY
TELEPHONE: AT&T
FIRE: SANTA CLARA COUNTY FIRE DEPARTMENT
SCHOOL DISTRICT: CUPERTINO UNION SCHOOL DISTRICT
- THIS IS A MULTI-UNIT SUBDIVISION ORDER OF FILING, FINAL MAPS MAY VARY. MULTIPLE FINAL MAPS MAY BE FILED PURSUANT TO SECTION 66456.1 OF THE SUBDIVISION MAP ACT.
- FINAL MAP WILL DEDICATE UTILITY, EASEMENT, AND ACCESS EASEMENTS TO INTERNAL LOTS.
- ALL EASEMENTS, SEWER, AND WATER FACILITIES WILL BE DEDICATED TO THE PUBLIC AGENCY HAVE JURISDICTION OVER THEM.
- ALL LOT LINES ARE APPROXIMATE. FINAL MAP WILL RESERVE THE RIGHT TO ADJUST LOT LINES AND CONFIGURATION AS LONG AS TOTAL NUMBER OF LOTS DOES NOT EXCEED THE APPROVE NUMBER.
- FLOOD ZONE X PER FEMA MAP 06085C0208H.
- BY ACCEPTING THE EASEMENTS SHOWN ON THIS MAP AS PUBLIC PEDESTRIAN ACCESS EASEMENT AND PUBLIC BICYCLE EASEMENT, THE CITY COUNCIL HEREBY EXPRESSLY AUTHORIZES THE CITY MANAGER OF THE CITY TO RECORD A SUBSEQUENT TERMINATION OF THESE EASEMENTS IN HIS OR HER SOLE DISCRETION.
- ALL STREETS WILL BE PRIVATE AND MAINTAINED BY THE HOME OWNER'S ASSOCIATION.

BENCHMARK

THE BEARING OF SOUTH 89°11'55" EAST TAKEN ON THE CENTERLINE OF MARY AVENUE AS SHOWN ON THAT CERTAIN PARCEL MAP FILED FOR RECORD ON FEBRUARY 17, 1972 IN BOOK 296 OF MAPS AT PAGE 41, SANTA CLARA COUNTY RECORDS WAS TAKEN AS THE BASIS OF ALL BEARINGS SHOWN HEREON.

NO.	REVISIONS	DATE	BY

Kimley-Horn
© 2017 KIMLEY-HORN AND ASSOCIATES, INC.
765 THE CITY DRIVE, SUITE 200, ORANGE, CA 92668
PHONE: 714-939-1030 FAX: 714-939-9488
WWW.KIMLEY-HORN.COM

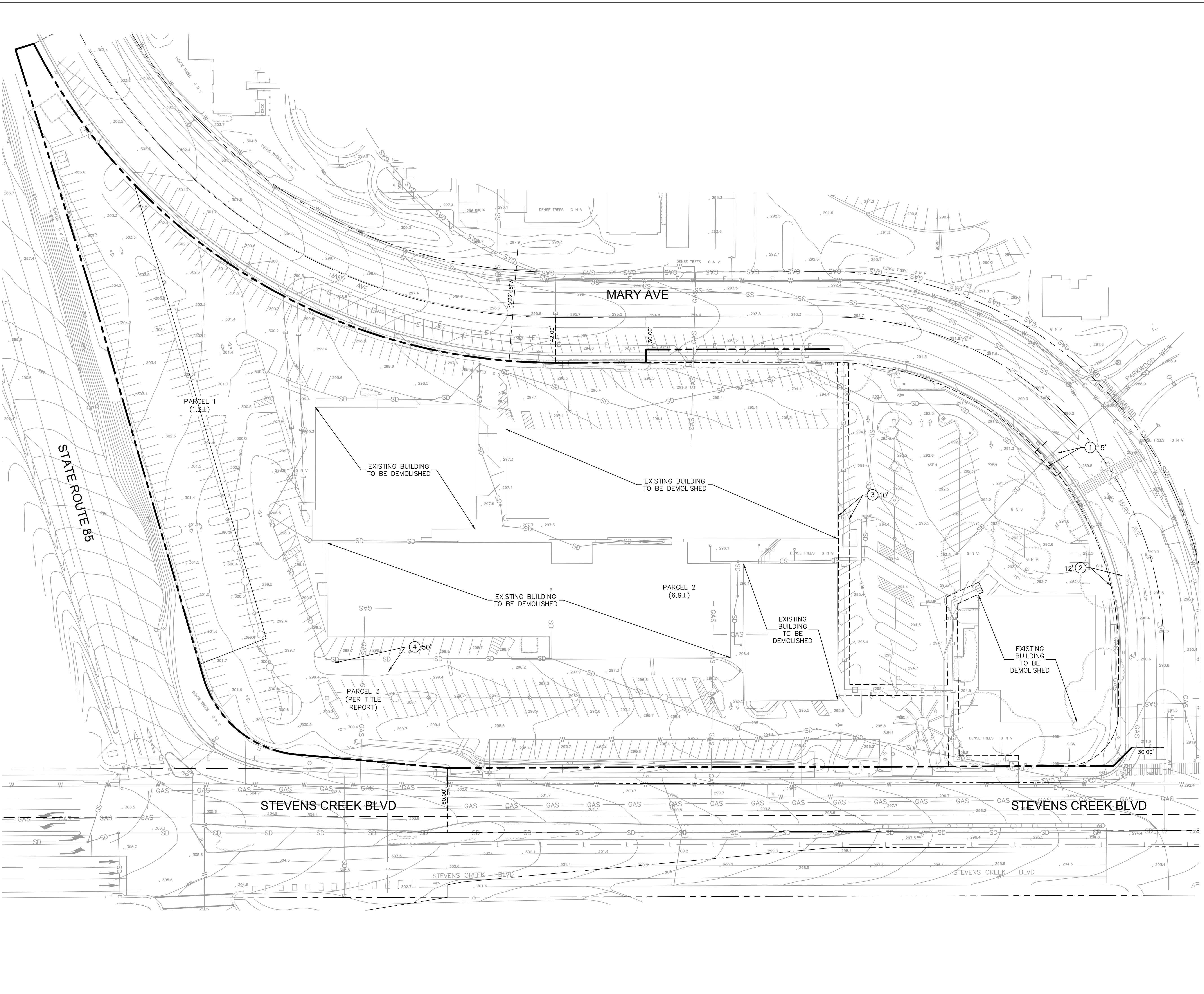
KHA PROJECT	097817001
DATE	12/09/2020
SCALE	AS SHOWN
DESIGNED BY	BH/KN
DRAWN BY	NM
CHECKED BY	MF

COVER SHEET

WESTPORT
PREPARED FOR
KT URBAN
CUPERTINO

SHEET NUMBER	VTM-1
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Plotted By: Alarcon, Austin Sheet Set: Ktrg Layout: VTM-2 EXISTING CONDITIONS June 15, 2021 12:33:12pm K:\BAY_IDEV\097817009 - Westport - MAF\08 CADD\Plan Sheets\Entitlements\Tentative Map\02 Existing Conditions_VTM - 097817001.dwg
 This document, together with the concepts and designs presented herein, is intended only for the specific purpose and client for which it was prepared. Reuse of and improper reliance on this document without written authorization and adaptation by Kimley-Horn and Associates, Inc. shall be without liability to Kimley-Horn and Associates, Inc.



LEGEND

—SS—	SANITARY SEWER
—SD—	STORM DRAIN
—W—	WATER
—	LOT LINE
- - - -	EASEMENT
—	PROPERTY LINE

- NOTES**
- BASED UPON TITLE REPORT NO. NCS-758530-SC, DATED OCTOBER 13, 2015 AND PREPARED BY FIRST AMERICAN TITLE COMPANY.
- EASEMENT FOR DRAINAGE PURPOSES RECORDED OCTOBER 16, 1964 IN BOOK 6704, PAGE 688 O.R., RELINQUISHMENT OF EASEMENT RIGHTS TO THE CITY OF CUPERTINO RECORDED AUGUST 6, 1968 IN BOOK 8217, PAGE 613 O.R.
 - EASEMENT FOR PUBLIC ROADWAY AND UTILITIES RECORDED FEBRUARY 16, 1972 IN BOOK 9706, PAGE 155, O.R.
 - EASEMENT FOR PACIFIC GAS & ELECTRIC CO. AND PACIFIC TELEPHONE AND TELEGRAPH CO. RECORDED AUGUST 24, 1972 IN BOOK 9988, PAGE 71, O.R., NOTICE OF FINAL DESCRIPTION RECORDED MARCH 6, 1975 INK BOOK B307, PAGE 583, O.R.
 - DOCUMENT ENTITLED 'EASEMENT GRANT' RECORDED APRIL 25, 2012 AS INST. NO. 21637501, O.R.

SEPARATE PARCEL FOR THE AFFORDABLE HOUSING SITE	12/09/2020	KAB
REMOVED IMPROVEMENTS ON SOUTH SIDE OF CENTER MEDIAN	06/15/2021	AJA
No.	REVISIONS	DATE

Kimley-Horn

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 765 THE CITY DRIVE, SUITE 200, ORANGE, CA 92668
 PHONE: 714-939-1030 FAX: 714-939-9488
 WWW.KIMLEY-HORN.COM

KHA PROJECT	097817001
DATE	12/09/2020
SCALE	AS SHOWN
DESIGNED BY	BH/KN
DRAWN BY	MM
CHECKED BY	MF

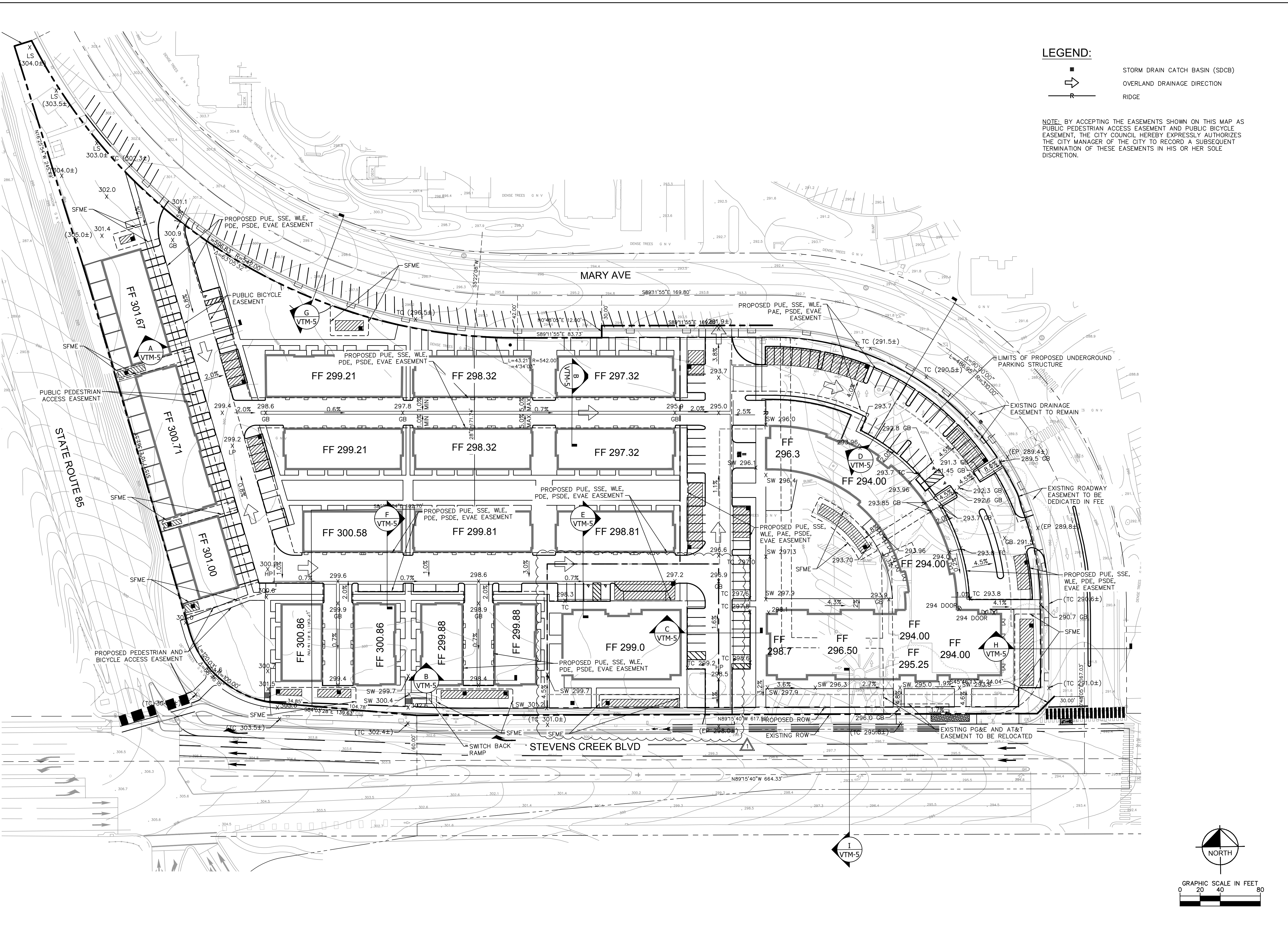
**EXISTING
 CONDITIONS**

WESTPORT
 PREPARED FOR
 KT URBAN

CUPERTINO CA

SHEET NUMBER
VTM-2

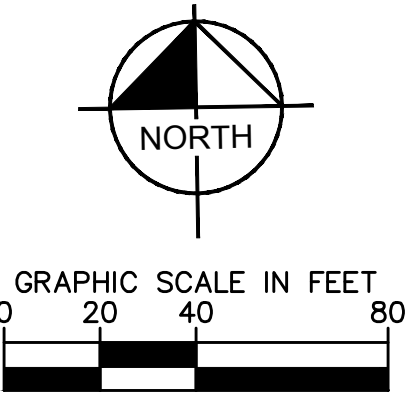
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LEGEND:

- STORM DRAIN CATCH BASIN (SDCB)
- ➔ OVERLAND DRAINAGE DIRECTION
- +— RIDGE

NOTE: BY ACCEPTING THE EASEMENTS SHOWN ON THIS MAP AS PUBLIC PEDESTRIAN ACCESS EASEMENT AND PUBLIC BICYCLE EASEMENT, THE CITY COUNCIL HEREBY EXPRESSLY AUTHORIZES THE CITY MANAGER OF THE CITY TO RECORD A SUBSEQUENT TERMINATION OF THESE EASEMENTS IN HIS OR HER SOLE DISCRETION.



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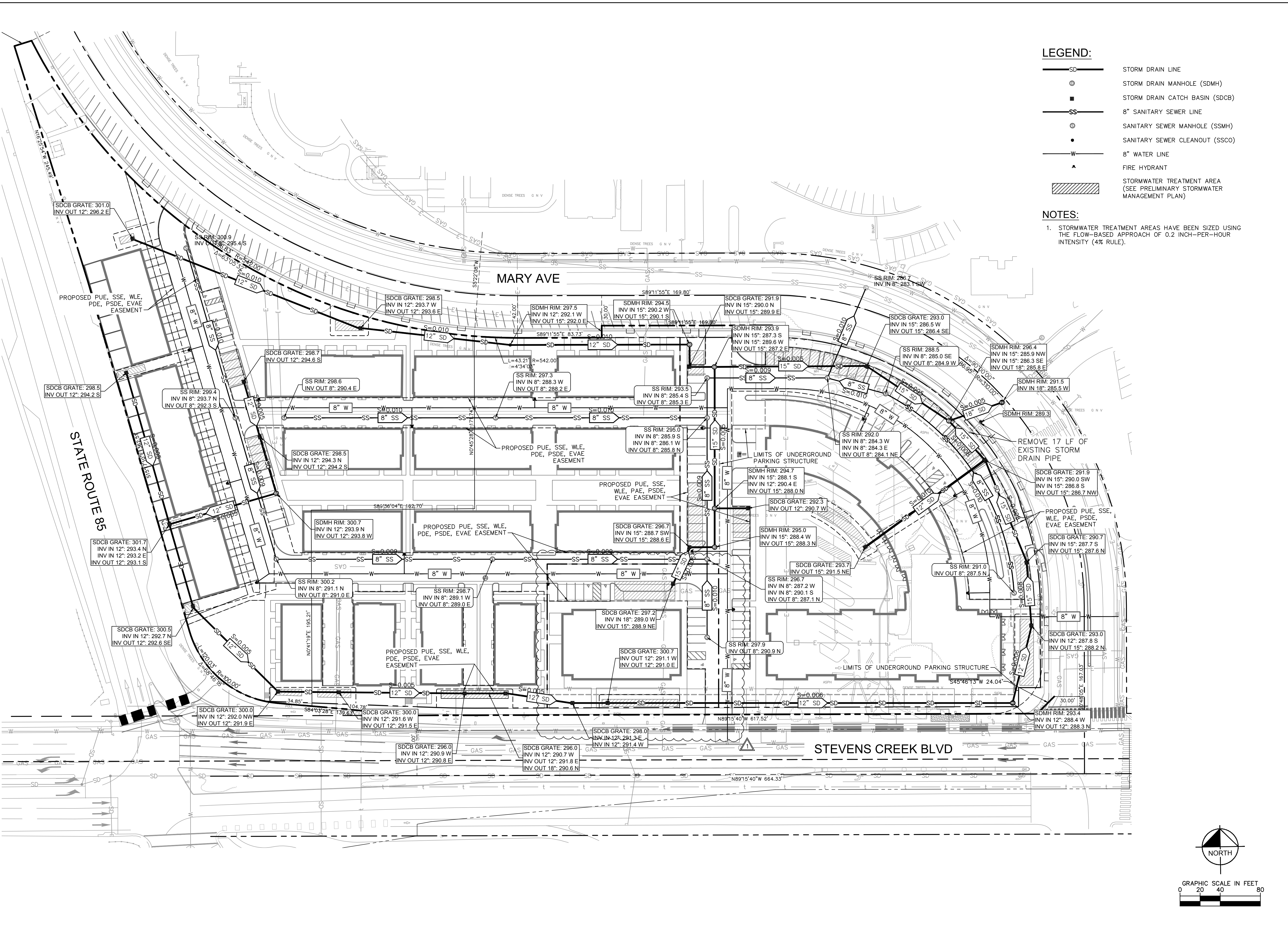
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DATE	12/09/2020
SCALE	AS SHOWN
DESIGNED BY	BH/KN
DRAWN BY	MM
CHECKED BY	MF

GRADING AND DRAINAGE PLAN

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CUPERTINO CA
 SHEET NUMBER
VTM-3

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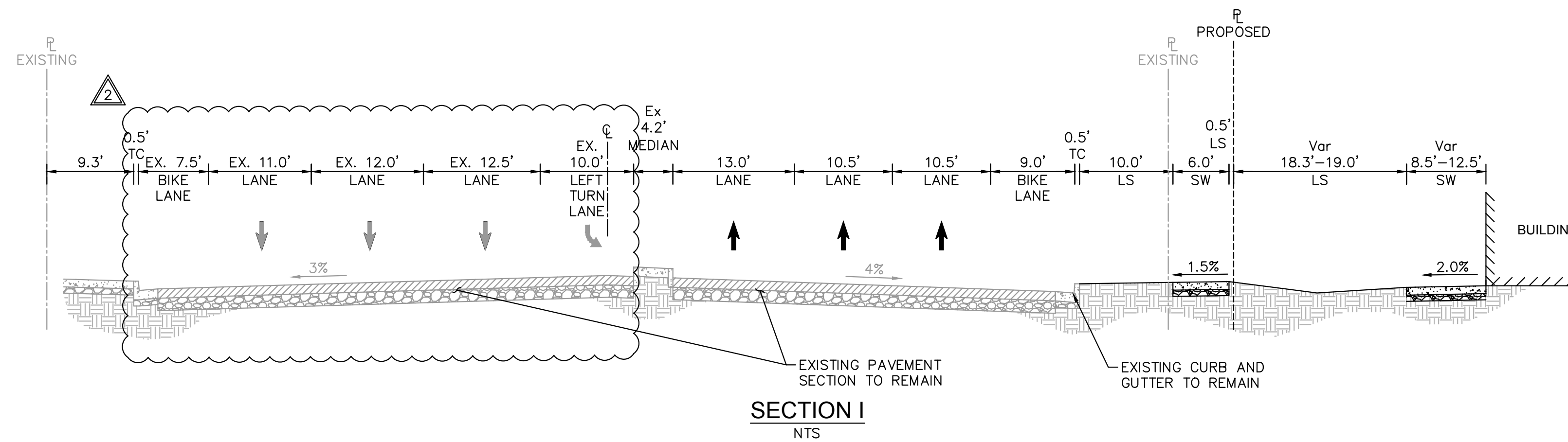
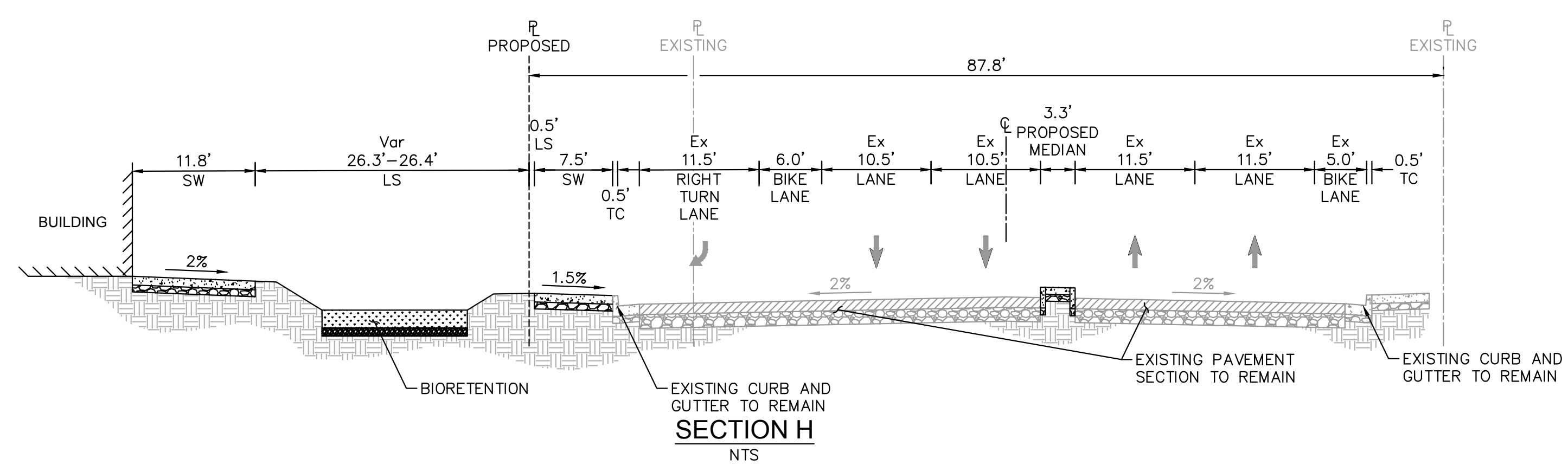
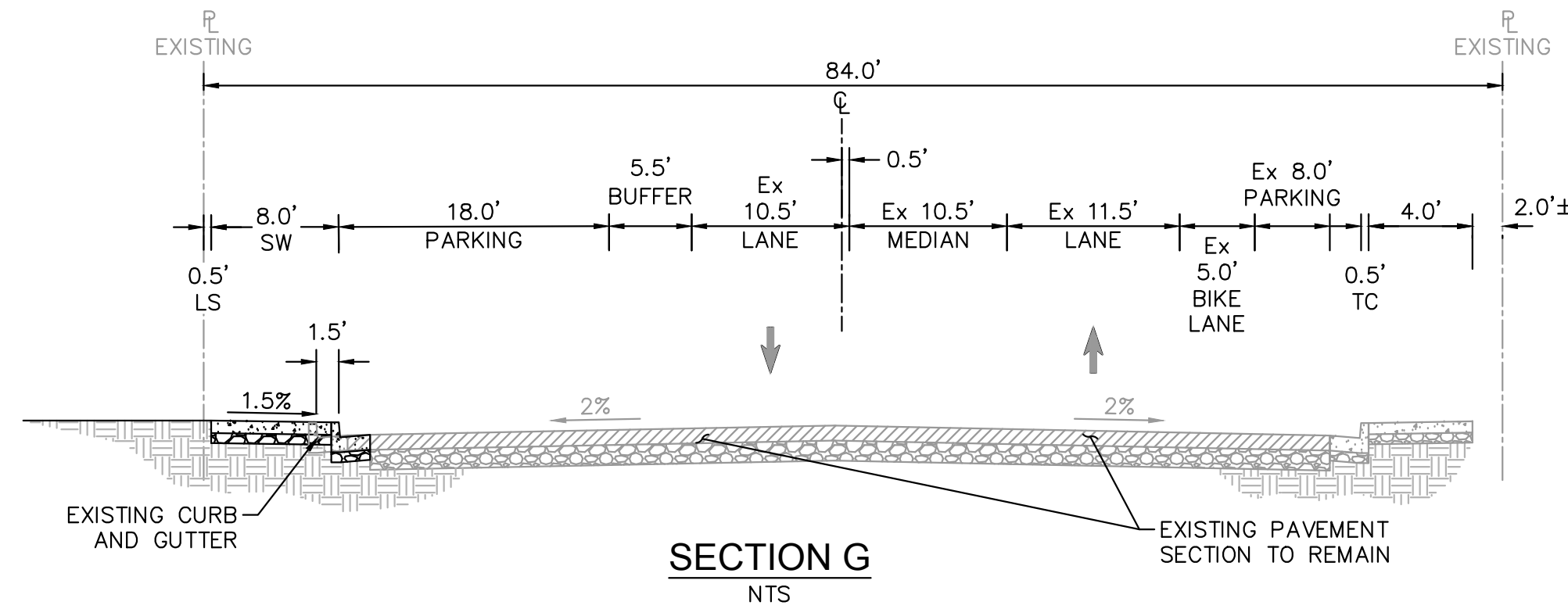
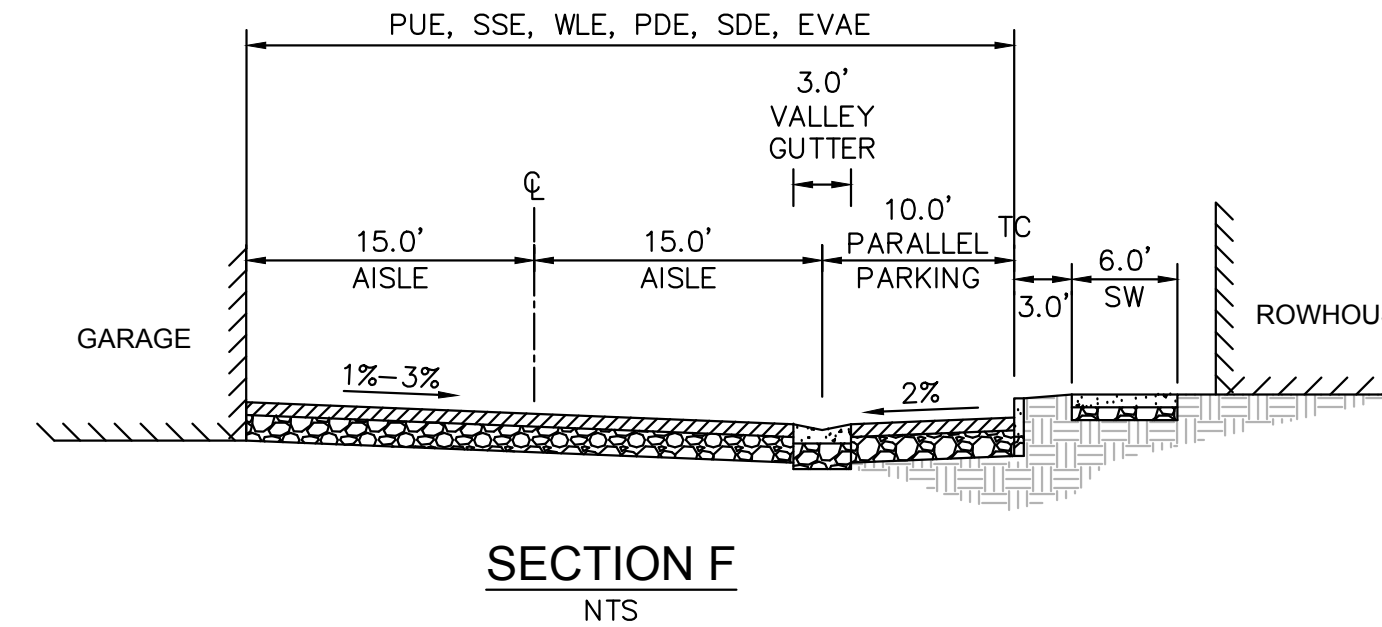
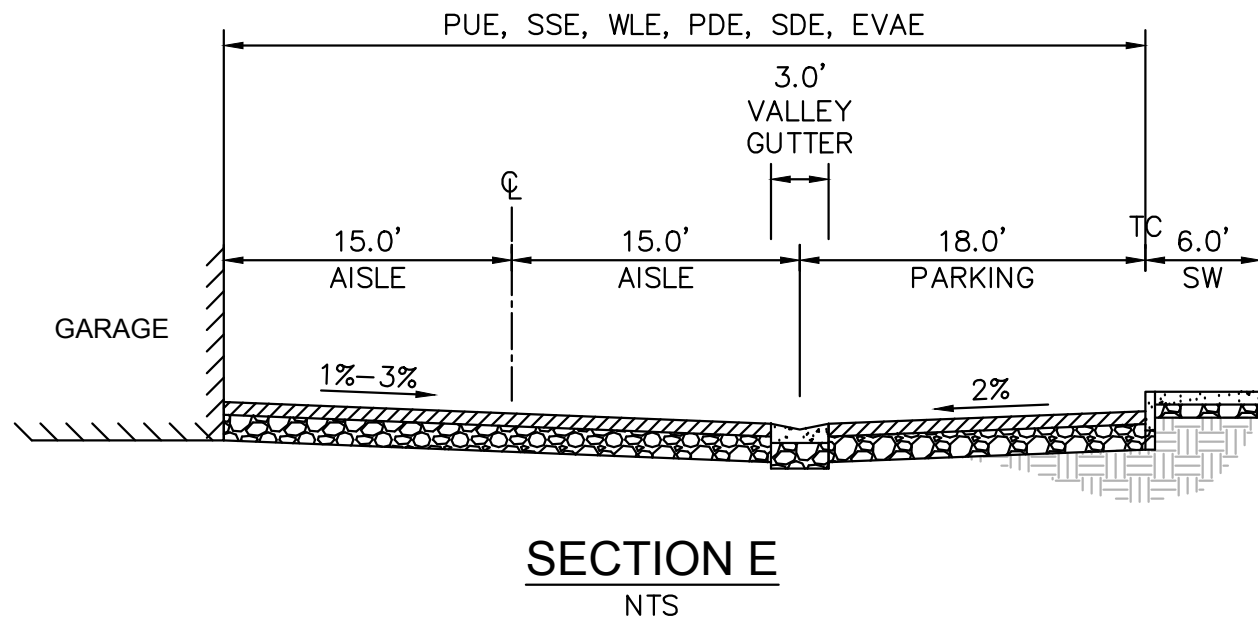
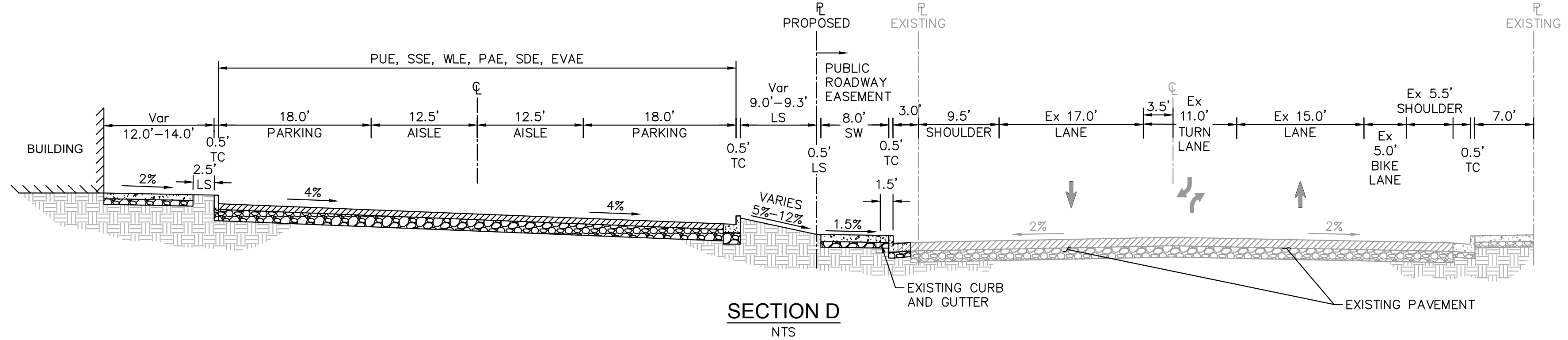
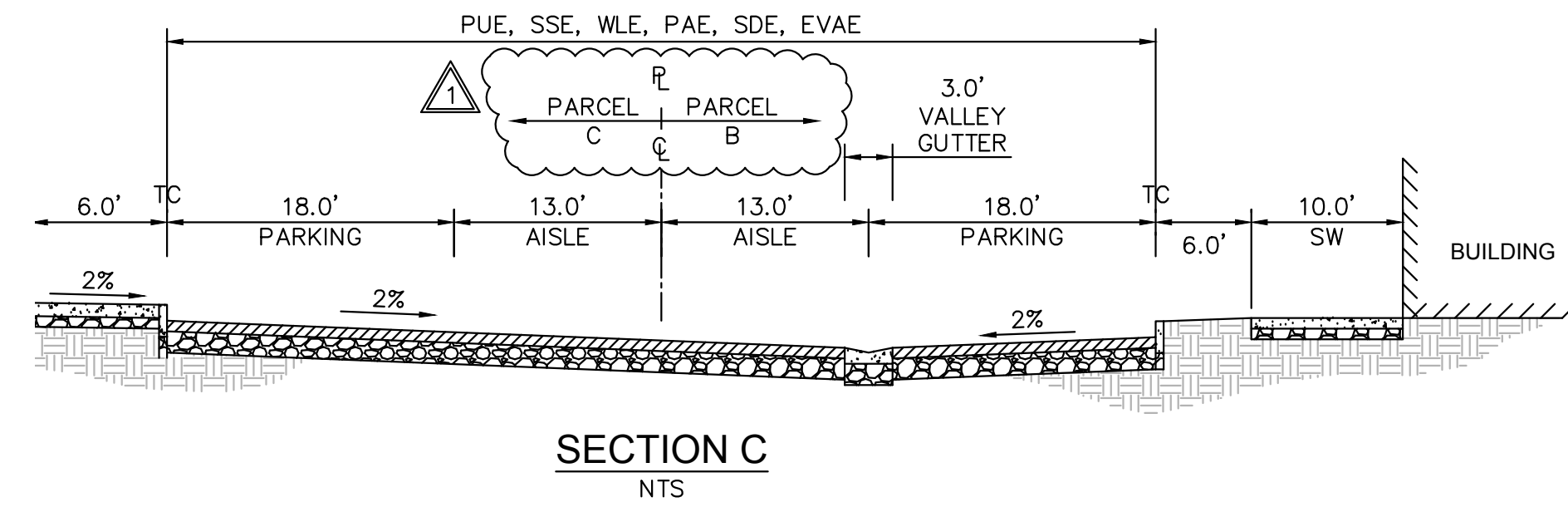
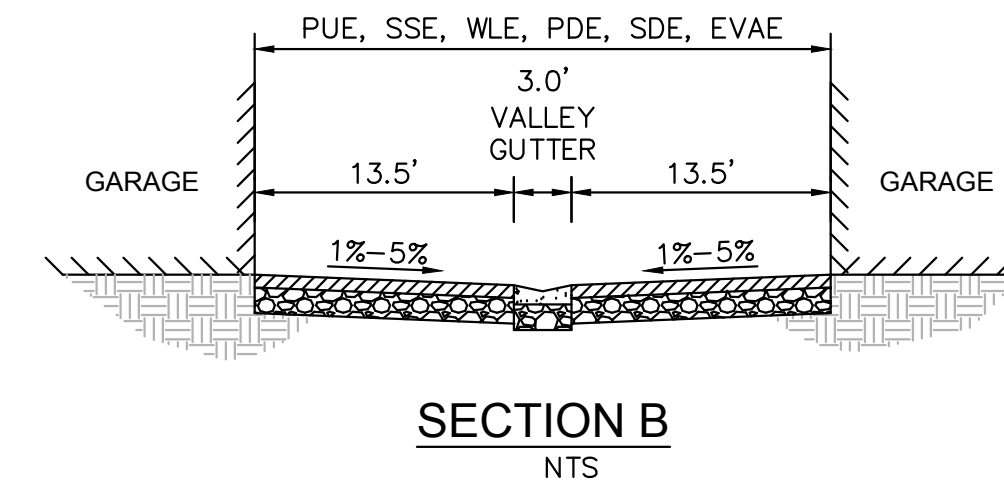
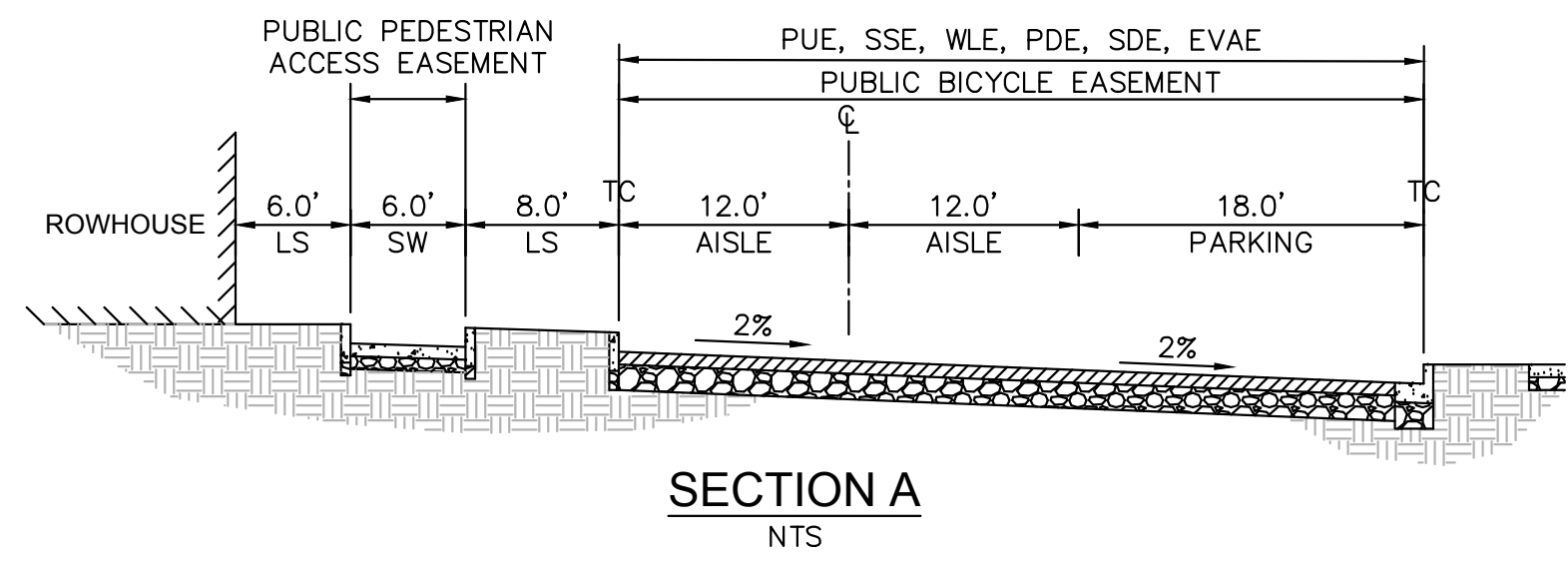
UTILITY PLAN

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CUPERTINO CA

SHEET NUMBER
VTM-4

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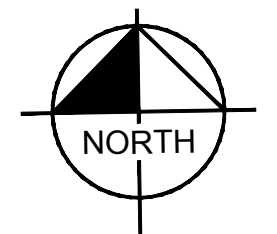
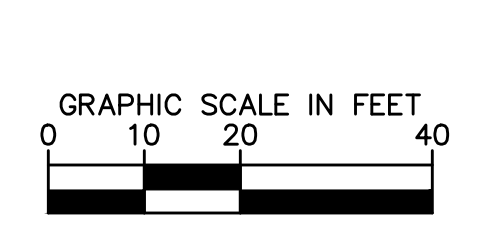
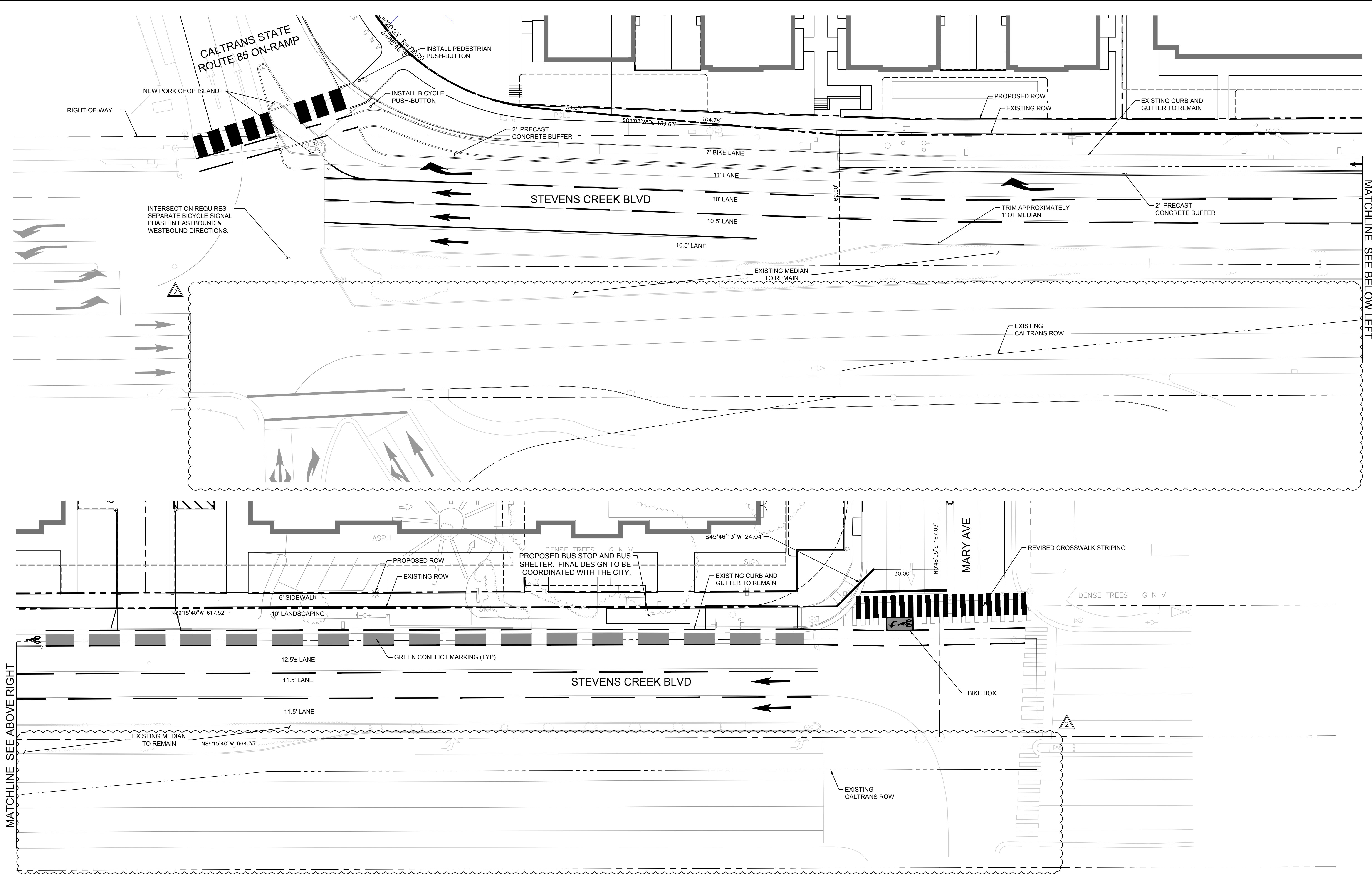
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SECTIONS

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CLASS IV BIKEWAY DESIGN

WESTPORT
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 KT URBAN

CUPERTINO CA
 SHEET NUMBER
VTM-6



June 28, 2021

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

[Via email]

RE: Westport Cupertino – Parcel Requirement

Dear Chairman Wang and Commissioners:

We recently received an inquiry about the requirement to have a parcel created specifically for the Westport Cupertino Affordable project.

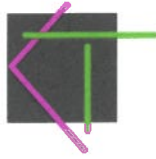
The requirement is dictated by California State Law that we need to have a legal lot conveyed and the Subdivision Map is the most efficient way to do so. We have produced over 150 affordable housing projects and every single project has its own parcel. This is driven by the fact that the financing for these projects require that they be single-asset entities. No debt or equity provider will provide financing unless the project has its own parcel. This is standard.

I hope this is helpful and should you have any additional questions, please feel free to contact me at (916) 834-5986.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike Kelley".

Mike Kelley



KT URBAN

June 28, 2021

[VIA EMAIL ONLY]

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

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

Dear Chairman Wang and Commissioners:

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

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

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

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

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

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

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

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

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

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

That condition reads:

11. CONCURRENT DEVELOPMENT OF BMR AND MARKET-RATE HOUSING

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

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

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

Rowhouse/Townhouse Units.

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

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

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

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

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

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

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

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

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

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

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

(A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a “specific, adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

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

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

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

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

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

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

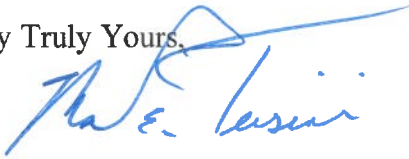
To my knowledge there are no objective standards that would justify the City in denying the requested map. As the City found in approving the Project in August, the Project complies fully with all objective General Plan and Zoning standards (subject to application of the Density Bonus Law). Any policies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

Chair Wang and Planning Commissioners
June 28, 2021

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

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

Very Truly Yours,



Mark E. Tersini
KT Urban

Cc: [via email]
Greg Larson, Interim City Manager
Heather Minner, City Attorney
Gian Martire, Senior Planner
Piu Ghosh, Planning Manager
Laura Worthington-Forbes, Kimley-Horn
Mark Falgout, Kimley-Horn
Andrew Faber, Berliner Cohen

MEMORANDUM

From: Frederik Venter, P.E. and Anthony Nuti, Kimley-Horn and Associates

To: Mark Tersini, KT Urban

Date: November 27, 2018

Re: Westport Cupertino – Transportation Analysis

The purpose of this memorandum is to present traffic analysis findings for the proposed redevelopment of the Oaks Shopping Center, referred to as the “Westport Cupertino” Project. Trip generation, Distribution, and Assignment for the project are presented below as well as a level of service analysis for the intersection of Mary Avenue and Stevens Creek Boulevard.

1. Introduction

The existing site is 71,254 square feet of shopping center use (The Oaks), which includes specialty restaurants, retailers, and other commercial space.

The proposed project would demolish the existing buildings and construct a mixed-use urban village with 203 multifamily residential units (88 low-rise and 115 mid-rise), 39 senior residential units, and 20,000 square feet of general retail. The proposed site provides a total of 525 parking spaces (293 at-grade spaces and 232 below-grade parking spaces) and 40 spaces for bike parking. **Figure 1** shows the project vicinity and the surrounding street network. **Figure 2** shows the proposed site plan.

The proposed project land uses are consistent with the City of Cupertino General Plan Buildout.

2. Analysis Methodology

The Santa Clara Valley Transportation Authority (VTA) Traffic Impact Analysis Guidelines, dated October 2014, and the City of Cupertino guidelines and criteria were utilized in this analysis to determine project requirements and potential impacts. Intersection delay and level of service (LOS) calculations were performed using Highway Capacity Manual (HCM) 2000 methodology in Synchro Version 9, which is consistent with TRAFFIX software. Synchro was used instead of TRAFFIX because it provides improved signal timing evaluation at the intersection of Mary Avenue and Stevens Creek Boulevard. Vehicle miles traveled (VMT) was calculated using CalEEMod. The City of Cupertino 2040 General Plan Amendment Draft EIR states that at signalized intersections, a LOS D is acceptable for both the AM and PM peak hour.

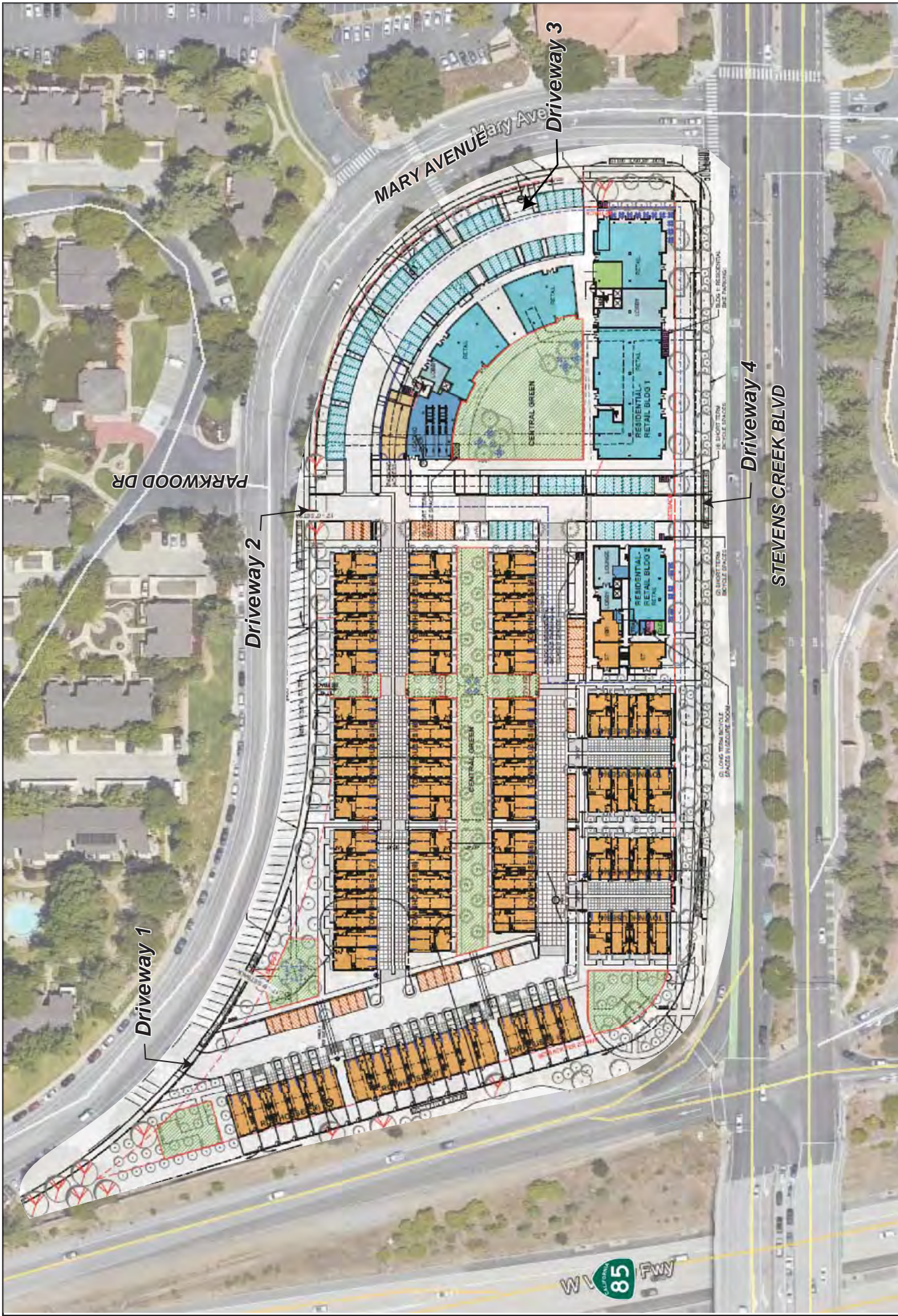
3. Existing Conditions

The existing site is 71,254 square feet of shopping center use (The Oaks), which includes specialty restaurants, retailers, and other commercial space. Existing trips distribute to the east and west on Stevens Creek Boulevard, and onto SR-85. A few trips also distribute into the adjacent neighborhoods.



Westport
Figure 1
Project Vicinity Map

 N
NOT TO SCALE



PROPOSED PROJECT SITE



NOT TO SCALE

Surrounding the site is Mary Avenue to the north and east, Stevens Creek Boulevard to the south, and SR-85 to the west. Along Mary Avenue and Stevens Creek Boulevard there are Class II bike lanes. West of Driveway 4, the westbound Class II bike lane transitions across the outside lane that becomes a right turn only lane onto northbound SR-85.

VTA bus stops are located near the project site, within one-half mile, at the following locations:

- East of the intersection of Mary Avenue and Stevens Creek Boulevard (approximately 550 feet from the project site)
- North Stelling Rd and Stevens Creek Boulevard (approximately 1,500 feet from the project site)
- De Anza College, a major transit station (approximately 1,100 feet from the project site)
- N. Stelling Road (approximately 1,760 feet from the project site)
- South Stelling Road (approximately 1,950 feet from the project site)

The presence of several bus lines within proximity to the site, render the site a transit-rich location. Major land uses near the site are De Anza College to the south, Garden Gate Elementary School to the north, and Cupertino Memorial Park to the east. The site is otherwise surrounded by residential uses.

To the north of the project site along Mary Avenue, an informal Park-and-Ride facility exists for private shuttles. Vehicles park on both sides of the street during the day and shuttles transport passengers to major employment centers all over the Bay Area.

Based on the existing count data, the heaviest movement at the intersection of Mary Avenue and Stevens Creek Boulevard occurs in the eastbound direction in the PM peak hour. The eastbound AM peak hour volume is only 69% of the PM peak hour volume, and thus, the PM peak hour volume is most critical.

In the westbound direction, the AM and PM peak hour volumes are approximately the same (the AM is 94% of the PM peak hour volume). The westbound PM peak hour volume is only 59% of the eastbound PM peak hour volume. The total entering PM peak hour volumes are higher than the AM volumes at the intersection by 25%. Thus, the PM peak hour is critical for analysis.

4. Trip Generation

To determine the change in the number of daily, AM peak hour, and PM peak hour trips with construction of the proposed Project, trip generation for both existing (trip credits) and proposed conditions was calculated. The *Institute of Transportation Engineers (ITE) Trip Generation Manual*, 10th Edition, was used to develop trip generation estimates.

The existing shopping center has been approximately 85% occupied over the last 2 years. At 85% occupancy, the existing shopping center generates approximately 2,287 daily trips, 57 AM peak hour trips (36 IN / 21 OUT), and 230 PM peak hour trips (110 IN / 120 OUT). It should be noted that if full occupancy was assumed for the existing shopping center, the trips credited would have been even higher. This is a conservative estimate since ITE is based on gross lease area, which typically includes unoccupied units between 5% and 15%.

The proposed project is anticipated to generate approximately 2,174 gross daily trips, 108 gross AM peak hour trips (35 IN / 73 OUT), and 186 gross PM peak hour trips (104 IN / 82 OUT).

Trip Credits

Internal trip capture was then applied using the *National Cooperative Highway Research Program Report 684* (NCHRP 684), dated 2011. This methodology estimates the number of trips that have both the origin and destination within the proposed development. These internal trips are then subtracted from the total gross trips. After applying internal capture to the proposed project, reductions of 9% daily trips, 2% AM (3% IN / 1 % OUT), and 15% PM (13% IN / 17% OUT) were applied to gross trips.

VTA defines a major bus stop as a stop where six or more buses per hour stop during the peak period and is also referred to as a high-quality transit area. A major bus stop is located at De Anza College approximately 1900 feet from the project site. The residents of the proposed project are expected to use the crosswalk at Mary Avenue and Stevens Creek Boulevard to access this major stop. According to VTA TIA Guidelines, a 2% trip reduction can be used for housing within 2000 feet (0.38 miles) of a major bus stop. Applying the 2% trip reduction results in a reduction of -28 daily trips, -2 AM peak hour trips (-1 IN / -1 OUT), and -2 PM peak hour trips (-1 IN / -1 OUT). This trip reduction was only taken for residential trips.

Table 1 shows the current bus routes located in the study area.

Table 1 - Bus Routes Near Westport¹

Route	From	To	Weekdays			Weekends		Distance from Oaks Site (mi)	High Quality Transit Area		High Quality Area (Y/N)
			Operating Hours ²	Headway ² (minutes)		Operating Hours ^{2,3}	Head-way ³ (minutes)		High Quality Line	High Quality Stop	
				Peak	Mid-day						
Local Bus											
23	De Anza College	Alum Rock Transit Center	5:30 AM - 1:00 AM	10	10	5:30 AM - 1:00 AM	20	0.25	Y	Y	Y
25	De Anza College	Alum Rock Transit Center	5:00 AM - 11:30 PM	10	10	7:40 AM - 12:00 AM	30	0.4	Y	Y	Y
53	De Anza College	Sunnyvale Transit Center	6:50 AM - 7:10 PM	60	60	-	-	0.4	N	Y	Y
54	De Anza College	Lockheed Martin Transit Center	6:00 AM - 9:30 PM	30	30	8:30 AM - 7:30 PM	60	0.4	N	Y	Y
55	De Anza College	Great America	5:30 AM - 11:00 PM	30	30	8:20 AM - 8:30 PM	60	0.4	N	Y	Y
81	Moffett Field Ames Center	San Jose State University	6:00 AM - 9:00 PM	30	30	9:30 AM - 6:20 PM	60	0.25	N	Y	Y
Limited Bus Stop Routes											
323	Downtown San Jose	De Anza College	7:00 AM - 10:30 PM	20	20	8:00 AM - 10:30 PM	15	0.4	N	Y	Y

Notes:

¹ Bus data taken from VTA Bus and Rail Map F dated January 2016

² Operating Hours rounded to the nearest 5 minutes for weekdays and weekends.

³ Headways are defined as the time between transit vehicles on the same route.

⁴ Operating hours for Sundays may have different schedule or flexible schedule compared to Saturdays.

⁵ Private Busses (ie. Apple, LinkedIn, etc) pickup/drop off north of the site

Pass-by trip credits for the shopping center were applied only to the PM peak hour based on average rates from Appendix E of the *ITE Trip Generation Handbook*, 3rd Edition. A pass-by trip is a trip that already exists on the network that will now visit the project site. Since the project is not producing these trips, pass-by trips are removed from the gross trip generation. This reduction was calculated to be -26 PM Peak hour trips (-12 IN / -14 OUT).

Therefore, the net new project trips are anticipated to be -275 daily trips, +47 AM peak hour trips (-3 IN / +50 OUT), and -22 PM peak hour trips (+4 IN / -26 OUT) after applying existing shopping center trip credits, as well as internal capture, VTA reductions, and pass-by reductions.

Per VTA TIA Guidelines, as adopted by the City of Cupertino, a complete TIA for Congestion Management Plan (CMP) purposes is required for any project in Santa Clara County that is expected to generate 100 or more net new weekday trips during any peak hour. The proposed Project is anticipated to generate fewer trips than the 100 peak hour trips required by VTA (36 AM peak and -109 PM peak), therefore a comprehensive TIA is not required, based on VTA guidelines.

Table 2 below summarizes the trip generation calculations.

Table 2 - Project Trip Generation

Land Uses	ITE Land Use Code	Project Size		WEEKDAY	AM PEAK HOUR			PM PEAK HOUR		
				Daily Trips	Total Peak Hour	IN	OUT	Total Peak Hour	IN	OUT
Multifamily Housing (Low Rise)	220	-	Dwelling Unit(s)	7.32	0.46	23%	77%	0.56	63%	37%
Multifamily Housing (Mid-Rise)	221	-	Dwelling Unit(s)	5.44	0.38	26%	74%	0.44	61%	39%
Senior Adult Housing-Attached	252	-	Dwelling Unit(s)	3.70	0.20	35%	65%	0.26	55%	45%
Shopping Center	820	-	1,000 Sq Ft GLA	37.75	0.94	62%	38%	3.81	48%	52%
Existing Conditions										
Shopping Center (100% Occupancy)	820	71.254	1,000 Sq Ft GLA	2690	67	42	25	271	130	141
Shopping Center (85% Occupancy) ¹	820	60.566	1,000 Sq Ft GLA	2287	57	36	21	230	110	120
<i>Pass-By Trips for Shopping Center (PM = 34%)^{3,4}</i>				(78)	0	0	0	(78)	(37)	(41)
TOAL EXISTING TRIP CREDIT				2209	57	36	21	152	73	79
Proposed Conditions										
Multifamily Housing (Low-Rise)	220	88	Dwelling Unit(s)	646	40	9	31	49	31	18
Multifamily Housing (Mid-Rise)	221	115	Dwelling Unit(s)	626	41	11	30	51	31	20
Senior Adult Housing-Attached	252	39	Dwelling Unit(s)	146	8	3	5	10	6	4
Shopping Center	820	20.000	1,000 Sq Ft GLA	756	19	12	7	76	36	40
Gross Trips Generated before Internal Capture				2,174	108	35	73	186	104	82
Internal Capture Trips										
Multifamily Housing (Low-Rise)	220	88	Dwelling Unit(s)	(44)	(1)	0	(1)	(6)	(4)	(2)
Multifamily Housing (Mid-Rise)	221	115	Dwelling Unit(s)	(42)	0	0	0	(7)	(5)	(2)
Senior Adult Housing-Attached	252	39	Dwelling Unit(s)	(10)	0	0	0	(1)	(1)	0
Shopping Center	820	20.000	1,000 Sq Ft GLA	(90)	(1)	(1)	0	(14)	(4)	(10)
Internal Capture Reduction				(186)	(2)	(1)	(1)	(28)	(14)	(14)
Trip Reductions due to Internal Capture⁶				9%	2%	3%	1%	15%	13%	17%
Additional Project Trip Reductions										
<i>VTA Major Bus Stop (Daily, AM, PM = 2%)²</i>				(28)	(2)	(1)	(1)	(2)	(1)	(1)
<i>Pass-By Trips for Shopping Center (PM = 34%)^{3,4}</i>				(28)	0	0	0	(28)	(12)	(14)
Project Trips				1,934	104	33	71	130	77	53
Existing Trip Credit				(2209)	(57)	(36)	(21)	(152)	(73)	(79)
Total Project Trips				1934	104	33	71	130	77	53
Net New Project Trips				(275)	47	(3)	50	(22)	4	(26)
Notes:										
1. Assume current retail is 85% occupied										
2. Per VTA Transportation Impact Analysis guidelines, a 2% vehicle trip reduction for housing trips can be applied for a nearby major bus stop										
3. Pass-By trip reduction applied to shopping center PM peak hour trips and based on average rates from Appendix E ITE Trip Generation Handbook 3rd Edition										
4. Daily pass-by trips only represent PM peak hour pass-by trips because no daily pass-by trip is resented in the ITE Trip Generation Handbook.										
5. Trips reductions due to internal capture was calculated using NCHRP 684 methodology										
6. Trip generation land uses based on average rates from ITE Trip Generation 10th Edition										

5. Trip Distribution and Assignment

Due to the nature of the proposed redevelopment of the project site into a mixed-use urban village, trip assignment was split into two groups: retail and residential trips. Separate trip distribution and assignments were calculated for the retail and residential land use types. Distribution assumptions for residential and retail trips are discussed below. The volumes indicated at the driveways represent the actual driveway volume that would be observed and include the gross volumes minus the internal capture and minus the VTA bus stop trip credits. The driveway volumes do not include the existing land use credits or pass-by trip reductions, which are incorporated in the analysis for the Mary Avenue and Stevens Creek Boulevard intersection only.

Residential Trips

Residential project trips were distributed among project Driveways 1, 2, and 4. Residential trips are not anticipated to use the project Driveway 3, which will be used by retail only. Trips were distributed throughout the roadway network with approximately 8% (AM and PM Peak) of trips to/from the north on Mary Avenue and approximately 68% (AM and PM Peak) of trips to/from the west on Stevens Creek Boulevard and approximately 24% (AM and PM Peak) of trips to/from the east on Stevens Creek Boulevard.

The distribution for residential trips are illustrated in **Figure 3**. **Figure 4** shows the project trip assignment for AM and PM peak hour periods at the project driveways for residential trips. The volumes shown account for internal capture and VTA reductions only.

Retail Trips

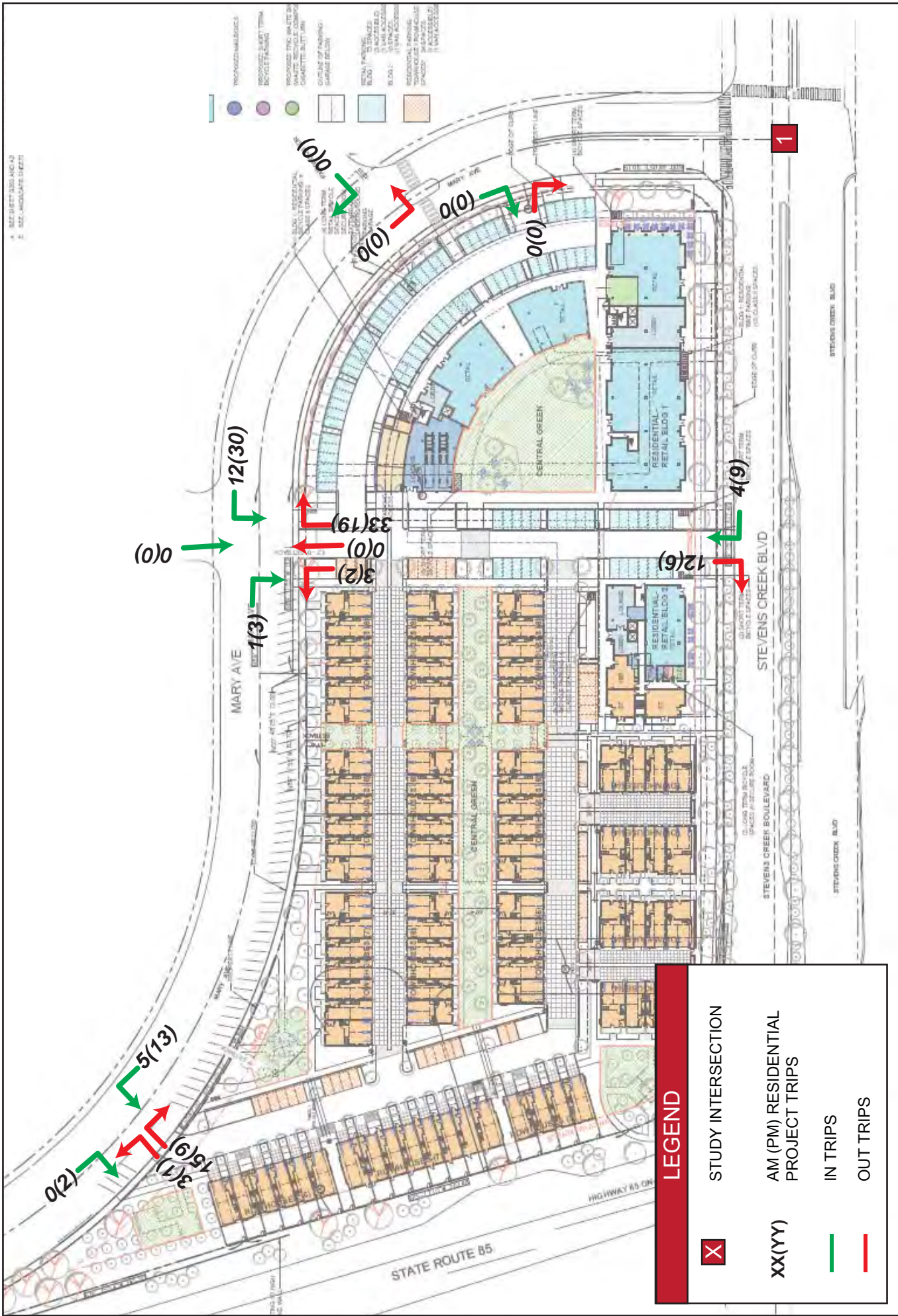
Retail project trips were distributed among project Driveways 2, 3, and 4. Retail trips are not expected to use project Driveway 1, because there is no retail in this section of proposed site. Trips were distributed throughout the roadway network with approximately 35% (AM and PM Peak) of trips to/from the north on Mary Avenue and approximately 30% (AM and PM Peak) of trips to/from the west on Stevens Creek Boulevard and approximately 30% (AM and PM Peak) of trips to/from the east on Stevens Creek Boulevard. Approximately 5% (AM and PM Peak) of the trips are anticipated to use Parkwood Drive (just north of the site). No trips were distributed at the driveway entrance to the senior center and park since retail visitors are expected to walk to the stores using the crosswalk with a flashing beacon on Mary Avenue.

The trips distributed along Mary Avenue are expected to already be on the roadway and are not new trips for the Project, since the existing site is used for retail purposes.

The distribution estimates for retail trips are illustrated in **Figure 5**. **Figure 6** shows the project trip assignment for AM and PM peak hour periods at the project driveway for retail trips. The volumes shown account for internal capture only.

The trip distribution is based on existing travel patterns at the intersection of Mary Avenue and Stevens Creek Boulevard.

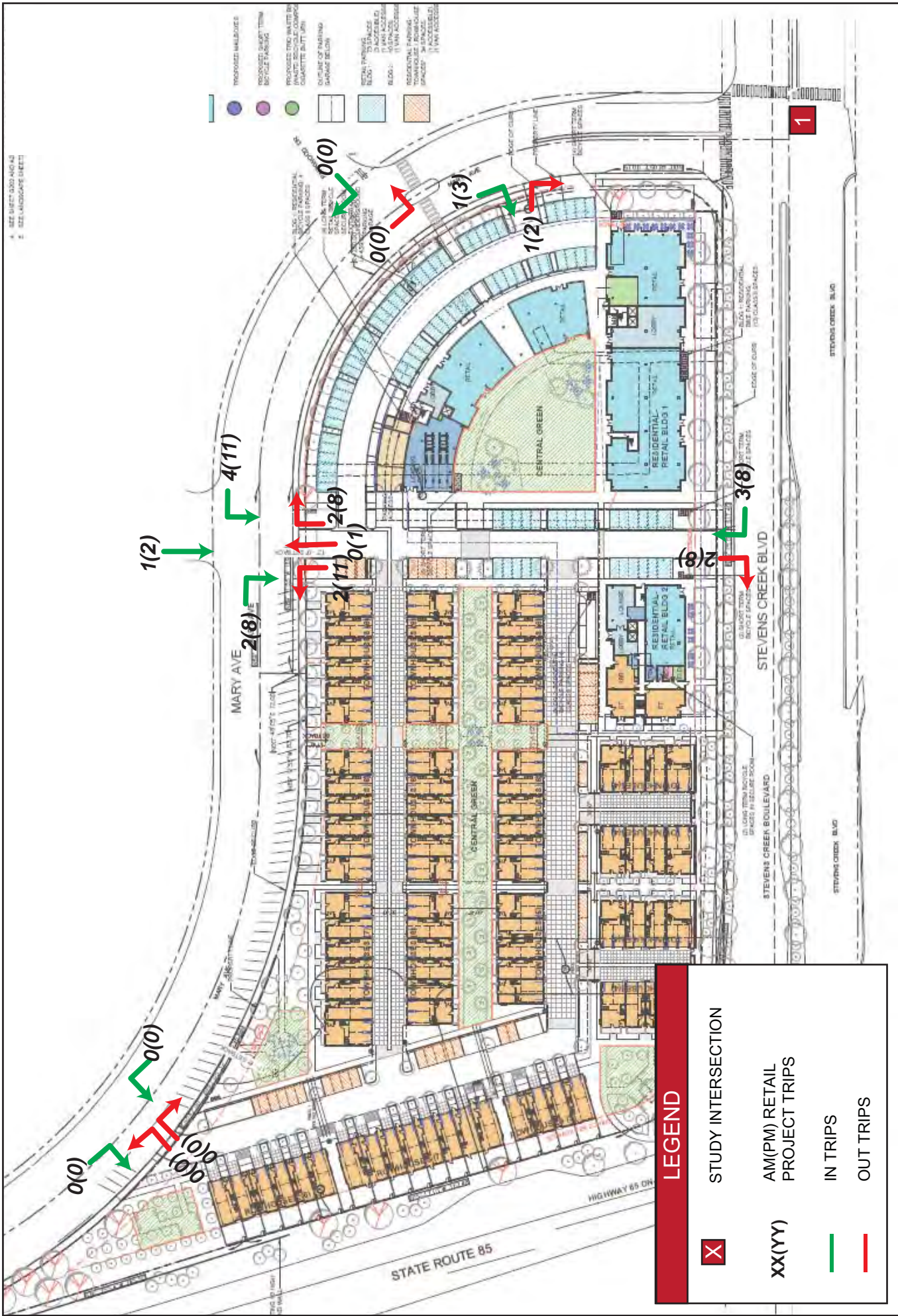
Project driveway volumes for both residential and retail land uses, as well as through volumes on Mary Avenue, are relatively low. Therefore, LOS analyses at the Project driveways are not warranted.



Westport
Figure 4

Proposed Residential Trip Assignment





Westport
Figure 6

Proposed Retail Trip Assignment



NOT TO SCALE

6. Traffic Analysis at Mary Avenue and Stevens Creek Boulevard

Analysis of intersections is based on the concept of Level of Service (LOS). The LOS of an intersection is a qualitative measurement used to describe operational conditions. LOS ranges from A (best), which represents minimal delay, to F (worst), which represents heavy delay and a facility that is operating at or near its functional capacity. The City of Cupertino 2040 General Plan Amendment Draft EIR states that at signalized intersections, a LOS D is acceptable for both the AM and PM peak hour. The Mary Avenue and Stevens Creek Boulevard intersection is signalized, and therefore, a LOS D or better is required at this intersection.

The intersection of SR-85 Northbound Ramps and Stevens Creek Boulevard was not selected for analysis because only 30% (approximately 44 vehicles) of the net AM outbound traffic would distribute to the intersection. Two-thirds of this westbound arriving traffic (30 vehicles) are expected to travel north onto SR-85 via a free right turn movement. The remaining westbound through traffic on Stevens Creek Boulevard does not warrant analysis, because the VTA CMP threshold of 10 vehicles per lane at the intersection is not met.

Intersection LOS for this study has been determined using methods defined in the HCM 2000 and Synchro traffic analysis software. The analysis has been conducted for the weekday AM and PM peak hours.

6.1 Existing Conditions

Existing Conditions traffic operations were evaluated using existing lane geometry, traffic control, and peak hour traffic volumes. Peak hour traffic volumes were collected by National Data & Surveying Services (NDS) on Wednesday April 25, 2018. **Table 3** illustrates the LOS and delay under Existing Conditions. The existing intersection was determined to be an acceptable LOS C in both the AM peak hour period (31.5-second delay) and PM peak hour period (34.9-second delay).

Table 3 - Existing Conditions Level of Service

Intersection	LOS Criteria	Jurisdiction ¹	Control	Existing (2018)			
				AM Peak		PM Peak	
				LOS	Delay (s)	LOS	Delay (s)
1 Mary Avenue and Stevens Creek Boulevard	D	CUP	Signal	C	31.5	C	34.9

¹CUP = City of Cupertino

6.2 Existing Plus Project Conditions

Existing Plus Project Conditions traffic operations were evaluated using existing lane geometry, traffic control, and existing peak hour traffic volumes plus net new project volumes. **Figure 7** shows the intersection volumes and **Table 4** shows the LOS and delay at the intersection of Mary Avenue and Stevens Creek Boulevard under Existing Plus Project Conditions. Under Existing Plus Project conditions, the study intersection would remain at an acceptable LOS C during AM (32.6-second delay) and PM peak hours (34.8-second delay). The increase in the AM is approximately 1.1 seconds.

Figure 7 – Existing Plus Project Intersection Volumes

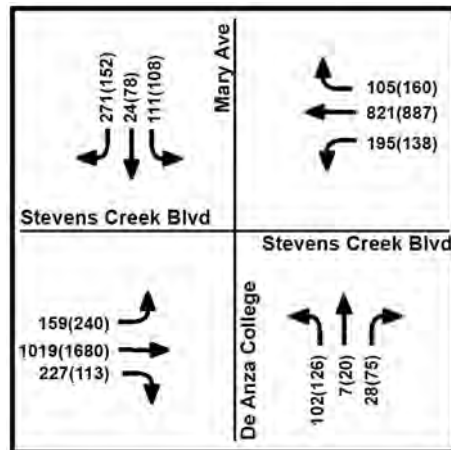


Table 4 - Existing Plus Project Conditions Level of Service

Intersection	LOS Criteria	Jurisdiction ¹	Control	Existing (2018) +Project			
				AM Peak		PM Peak	
				LOS	Delay (s)	LOS	Delay (s)
1 Mary Avenue and Stevens Creek Boulevard	D	CUP	Signal	C	32.6	C	34.8

¹CUP = City of Cupertino

6.2 Background Plus Project Conditions

No Background Plus Project Conditions were evaluated for the proposed project at the Mary Avenue and Stevens Creek Boulevard intersection, because, for PM peak hour conditions, the net added project volumes would decrease. Therefore, the proposed project would result in no impact. In addition, the PM peak hour presents the worst-case analysis because of the higher existing volumes.

Under Existing Conditions in the AM peak hour, the increase in delay would be less than 1.1-seconds at the intersection of Mary Avenue and Stevens Creek Boulevard. Under Background Plus Project Conditions this increase would be less, because the percentage of project traffic related to background traffic is smaller. This marginal increase in delay does not meet VTA or City of Cupertino standards for generating impacts and the project would have no impact under Background Plus Project Conditions.

6.3 Cumulative Conditions

Traffic operations were evaluated for 2040 Cumulative Conditions based on data presented in the Sandis Traffic Impact Analysis Report, dated February 2017, which references the City of Cupertino General Plan EIR, 2014. It is assumed that the Cumulative Conditions intersection geometry of Mary Avenue and Stevens Creek Boulevard would be the same as Existing Conditions. **Table 5** shows the LOS and delay for the traffic signal at Stevens Creek Boulevard and Mary Avenue for cumulative conditions. Under Cumulative Conditions, the intersection would

operate at an acceptable LOS D during the AM peak hour (47.7-second delay) and PM peak hour (46.3-second delay).

Table 5 - Cumulative Conditions Level of Service

Intersection	LOS Criteria	Jurisdiction ¹	Control	Cumulative (2040)			
				AM Peak		PM Peak	
				LOS	Delay (s)	LOS	Delay (s)
1 Mary Avenue and Stevens Creek Boulevard	D	CUP	Signal	D	47.7	D	46.3

¹CUP = City of Cupertino

5.4 Cumulative Plus Project Conditions

Cumulative Plus Project Conditions traffic operations were evaluated using cumulative lane geometry, traffic control, and cumulative peak hour traffic volumes plus net new project volumes. It is assumed that the Cumulative Conditions intersection geometry of Mary Avenue and Stevens Creek Boulevard would be the same as Existing Conditions. **Figure 8** shows the intersection volumes and **Table 6** shows the LOS and delay signalized study intersection at Mary Avenue and Stevens Creek Boulevard. The intersection operates at an acceptable LOS D in both the AM (49.1-second delay) and PM (46.3-second delay) peak hours, as presented in the Cupertino 2040 General Plan Amendment Draft EIR.

Figure 8 – Cumulative Plus Project Intersection Volumes

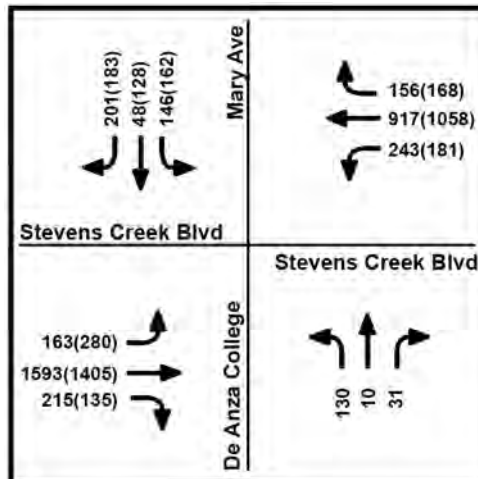


Table 6 - Cumulative Plus Project Conditions Level of Service

Intersection	LOS Criteria	Jurisdiction ¹	Control	Cumulative (2040) + Project			
				AM Peak		PM Peak	
				LOS	Delay (s)	LOS	Delay (s)
1 Mary Avenue and Stevens Creek Boulevard	D	CUP	Signal	D	49.1	D	46.3

¹CUP = City of Cupertino

7. Parking Requirements

Parking requirements for the site were calculated based on on-site supply only and the Park-and-Ride on-street parking along Mary Avenue was not included in the parking analysis. The Mary Avenue on-street parking is public and is not anticipated to be impacted by the site uses or activities. Furthermore, the project has no jurisdiction over the public parking and usage along Mary Avenue. **Table 7** provides the project parking supply and City requirements.

Table 7 – Vehicle Parking Requirements

Land Use	Project Size	City Municipal Code ¹	City Requirement	Project Supply	Surplus (Deficiency)
Row Home / Town Home	2-3 bedrooms: 88	2-3 bedrooms: 2	176	210	34
Building 1					
Retail	17,600 SQFT	1 spaces per 250 SQFT	71	73	2
Multifamily Housing	0-1 bedrooms: 45 2-3 bedrooms: 70	0-1 bedrooms: 1 2-3 bedrooms: 2	185	193	8
Building 2					
Retail	2,400 SQFT	1 spaces per 250 SQFT	10	10	0
Senior Housing	0-1 bedrooms: 39	0-1 bedrooms: 1	39	39	0
Total			481	525	44

¹City requirements are based on City of Cupertino Municipal Code Chapter 19.124, Section 19.56.040A and Table 19.56.040B

Table 8 provides the bicycle parking requirements for the short-term bicycle parking, **Table 9** provides the bicycle parking requirements for long-term retail bicycle parking, and **Table 10** provides the bicycle parking requirements for long-term residential bicycle parking.

Table 8 – Short-Term Bicycle Parking Requirements

Land Use	Project Size	Code Requirements ¹	City Requirement	Project Supply
Building 1	Retail: 17,600 SQFT Residential: 115 DU	Residential: 1/10 units (Class II) Retail: 1/1,250 SF (Class II)	Retail: 14.08 Residential: 11.5	Retail: 16 Residential: 12
Building 2	Retail: 2,400 SQFT Residential: 39 DU		Retail: 1.92 Residential: 3.9	Retail: 2 Residential: 4

¹Short term requirements based on City of Cupertino Municipal Code Chapter 19.124

Table 9 – Long-Term Bicycle Parking Requirements for Retail Only

Land Use	Code Requirements ¹	Vehicle Spaces	Requirement	Project Supply
Building 1 - Retail Only	5% of vehicle spaces (Class I)	73	3.6	4
Building 2 - Retail Only	5% of vehicle spaces (Class I)	10	0.5	2

¹Long term requirements based on Green Building Standards Non-Residential Mandatory Measure 5.106.4

Table 10 – Long-Term Bicycle Parking Requirements for Multifamily Housing and Senior Apartments

Land Use	Code Requirements ¹	Requirement	Project Supply
Building 1 - 115 DU	1 space per 2 residential units	58	58
Building 2 - 39 DU		20	20

For the parking layouts, refer to Sheet Set A200, A201, and G202 of the C2K Westport plan set for the most up-to-date site plans with parking requirements. Based on the City of Cupertino Municipal code, the proposed project parking is sufficient.

8. Pedestrian Mobility

Continuous sidewalks exist along both Mary Avenue and Stevens Creek Boulevard and the project does not propose to change these sidewalks. The project would connect to the public sidewalks and provide ADA-compliant sidewalk facilities, walkways and paths throughout the site per 2010 ADA Standards for Accessible Design. The Mary Avenue and Stevens Creek Boulevard intersection provides marked crosswalks for pedestrians and bikes on the intersection’s north, east, and south legs. Additionally, a marked crosswalk with a flashing beacon on Mary Avenue provides access to the project site from the Cupertino Memorial Park and Cupertino Senior Center.

De Anza College can be accessed via sidewalks on Mary Avenue and crosswalks at Mary Avenue and Stevens Creek Boulevard. Garden Gate Elementary school can be accessed via residential sidewalks along Mary Avenue and the residential streets.

As such, employees, patrons, and residents choosing to walk to and from the site would not be adversely impacted based on pedestrian mobility and accessibility.

9. Bicycle Mobility

Existing Class II bicycle lanes along Stevens Creek Boulevard and Mary Avenue provide bicycle access to the proposed project site with a long transition to the through lanes across the SR-85 bridge crossing. In the future, the City of Cupertino plans to convert the existing Class II bike lanes to Class IV bikeways on Stevens Creek Boulevard.

To the north, a Class I multi-use bridge over I-280 exists. This path can be accessed from the Mary Avenue Class II bike lanes.

Students have the option to bike to Garden Gate Elementary school by using the Class II bike lane on Mary Avenue and sidewalks along various residential streets.

As such, employees, patrons, and residents choosing to bike to the site would not be adversely impacted based on bicyclist mobility and accessibility.

10. Vehicle Miles Traveled (VMT)

Based on the State's future requirement to conduct vehicle miles traveled (VMT) analysis for projects, a VMT analysis was performed. The VMT was determined by using CalEEMod and was calculated for Existing and Existing Plus Project Conditions. The existing 71,250 SF of commercial space, with 85% occupancy, would produce an approximate annual VMT of 2,782,747 miles, while the proposed project would reduce the annual VMT to 2,662,683 miles.

11. Conclusions

The proposed Project was evaluated to determine if significant impacts would occur at adjacent intersections or Westport Cupertino Project site driveways. The evaluation determined that the proposed Project would generate -275 daily, +47 AM peak hour (-3 IN / 50 OUT), and -22 PM peak hour (4 IN / -26 OUT) net new trips. This trip generation is below the VTA standard of 100 or more net new weekday trips; therefore, a full TIA is not required. This trip generation is also low compared to baseline volumes at adjacent study intersections and roadways, and LOS at Mary Avenue and Stevens Creek Boulevard would not degrade below acceptable levels with the addition of the Project traffic. The PM peak hour volumes are higher than the AM peak hour and present a worst-case scenario. The proposed project would result in a net reduction in PM peak hour trips and daily VMT. During the AM peak hour, the proposed project would add very few trips and would not cause impacts at the intersection of Mary Avenue and Stevens Creek Boulevard. Very few trips would be added to the SR-85 and Stevens Creek Boulevard intersections and would not cause significant impacts.

Based on the analyses conducted in this study, no potentially significant impacts are anticipated to occur due to the proposed Project. There are also no potentially significant impacts triggered by the land plan that have not already been evaluated under the City's General Plan 2040 for redevelopment of the project site.

HCM Signalized Intersection Capacity Analysis

4: MARY AVE & STEVENS CREEK BLVD

Existing
Timing Plan: AM PEAK



Movement	EBL	EBT	EBR	WBL	WBT	WBR	NBL	NBT	NBR	SBL	SBT	SBR
Lane Configurations	↗	↑↑↑		↗	↑↑↑		↗↗	↑		↗	↑	↗
Traffic Volume (vph)	152	1019	227	195	822	106	102	7	28	99	24	239
Future Volume (vph)	152	1019	227	195	822	106	102	7	28	99	24	239
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.5	7.0		6.5	6.5		6.5	6.5		6.5	6.5	6.5
Lane Util. Factor	1.00	0.91		1.00	0.91		0.97	1.00		1.00	1.00	1.00
Frbp, ped/bikes	1.00	0.98		1.00	0.99		1.00	0.95		1.00	1.00	0.85
Flpb, ped/bikes	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Frt	1.00	0.97		1.00	0.98		1.00	0.88		1.00	1.00	0.85
Flt Protected	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (prot)	1770	4867		1770	4953		3433	1549		1770	1863	1347
Flt Permitted	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (perm)	1770	4867		1770	4953		3433	1549		1770	1863	1347
Peak-hour factor, PHF	0.86	0.86	0.86	0.86	0.86	0.86	0.54	0.54	0.54	0.85	0.85	0.85
Adj. Flow (vph)	177	1185	264	227	956	123	189	13	52	116	28	281
RTOR Reduction (vph)	0	28	0	0	12	0	0	49	0	0	0	256
Lane Group Flow (vph)	177	1421	0	227	1067	0	189	16	0	116	28	25
Confl. Peds. (#/hr)			26			23			36			87
Turn Type	Prot	NA		Prot	NA		Prot	NA		Prot	NA	Perm
Protected Phases	5	2		1	6		3	8		7	4	
Permitted Phases												4
Actuated Green, G (s)	15.1	38.6		18.1	42.1		10.7	8.0		13.3	10.6	10.6
Effective Green, g (s)	13.1	36.6		16.1	40.1		8.7	6.0		11.3	8.6	8.6
Actuated g/C Ratio	0.14	0.38		0.17	0.42		0.09	0.06		0.12	0.09	0.09
Clearance Time (s)	4.5	5.0		4.5	4.5		4.5	4.5		4.5	4.5	4.5
Vehicle Extension (s)	3.0	3.0		3.0	3.0		3.0	3.0		3.0	3.0	3.0
Lane Grp Cap (vph)	240	1845		295	2058		309	96		207	166	120
v/s Ratio Prot	0.10	c0.29		c0.13	c0.22		0.06	0.01		c0.07	0.02	
v/s Ratio Perm												c0.02
v/c Ratio	0.74	0.77		0.77	0.52		0.61	0.17		0.56	0.17	0.21
Uniform Delay, d1	40.0	26.3		38.4	21.0		42.3	42.9		40.3	40.6	40.8
Progression Factor	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Incremental Delay, d2	11.2	2.0		11.4	0.2		3.6	0.8		3.4	0.5	0.9
Delay (s)	51.3	28.3		49.9	21.2		45.8	43.7		43.7	41.1	41.7
Level of Service	D	C		D	C		D	D		D	D	D
Approach Delay (s)		30.8			26.2			45.3			42.2	
Approach LOS		C			C			D			D	

Intersection Summary

HCM 2000 Control Delay	31.5	HCM 2000 Level of Service	C
HCM 2000 Volume to Capacity ratio	0.70		
Actuated Cycle Length (s)	96.5	Sum of lost time (s)	26.5
Intersection Capacity Utilization	67.5%	ICU Level of Service	C
Analysis Period (min)	15		
c Critical Lane Group			

HCM Signalized Intersection Capacity Analysis

4: MARY AVE & STEVENS CREEK BLVD

Existing
Timing Plan: PM PEAK



Movement	EBL	EBT	EBR	WBL	WBT	WBR	NBL	NBT	NBR	SBL	SBT	SBR
Lane Configurations	↗	↑↑↑		↗	↑↑↑		↗↘	↑		↗	↑	↗
Traffic Volume (vph)	225	1680	113	138	892	165	126	20	75	123	78	138
Future Volume (vph)	225	1680	113	138	892	165	126	20	75	123	78	138
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.5	7.0		6.5	7.0		6.5	6.0		6.5	6.0	6.0
Lane Util. Factor	1.00	0.91		1.00	0.91		0.97	1.00		1.00	1.00	1.00
Frbp, ped/bikes	1.00	1.00		1.00	0.97		1.00	0.79		1.00	1.00	0.83
Flpb, ped/bikes	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Frt	1.00	0.99		1.00	0.98		1.00	0.88		1.00	1.00	0.85
Flt Protected	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (prot)	1770	5037		1770	4836		3433	1297		1770	1863	1313
Flt Permitted	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (perm)	1770	5037		1770	4836		3433	1297		1770	1863	1313
Peak-hour factor, PHF	0.80	0.90	0.90	0.93	0.93	0.93	0.88	0.88	0.88	0.80	0.84	0.84
Adj. Flow (vph)	281	1867	126	148	959	177	143	23	85	154	93	164
RTOR Reduction (vph)	0	5	0	0	16	0	0	80	0	0	0	147
Lane Group Flow (vph)	281	1988	0	148	1120	0	143	28	0	154	93	17
Confl. Peds. (#/hr)						86			140			87
Turn Type	Prot	NA		Prot	NA		Prot	NA		Prot	NA	Perm
Protected Phases	5	2		1	6		3	8		7	4	
Permitted Phases												4
Actuated Green, G (s)	22.7	55.0		14.8	47.1		10.1	8.7		15.1	13.7	13.7
Effective Green, g (s)	20.7	53.0		12.8	45.1		8.1	6.7		13.1	11.7	11.7
Actuated g/C Ratio	0.19	0.47		0.11	0.40		0.07	0.06		0.12	0.10	0.10
Clearance Time (s)	4.5	5.0		4.5	5.0		4.5	4.0		4.5	4.0	4.0
Vehicle Extension (s)	3.0	3.0		3.0	3.0		3.0	3.0		3.0	3.0	3.0
Lane Grp Cap (vph)	328	2392		203	1954		249	77		207	195	137
v/s Ratio Prot	c0.16	c0.39		0.08	0.23		0.04	0.02		c0.09	c0.05	
v/s Ratio Perm												0.01
v/c Ratio	0.86	0.83		0.73	0.57		0.57	0.36		0.74	0.48	0.13
Uniform Delay, d1	44.0	25.4		47.7	25.8		50.1	50.4		47.6	47.1	45.3
Progression Factor	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Incremental Delay, d2	19.2	2.6		12.3	0.4		3.2	2.9		13.5	1.8	0.4
Delay (s)	63.2	28.0		60.0	26.2		53.3	53.3		61.1	48.9	45.7
Level of Service	E	C		E	C		D	D		E	D	D
Approach Delay (s)		32.4			30.1			53.3			52.2	
Approach LOS		C			C			D			D	

Intersection Summary		
HCM 2000 Control Delay	34.9	HCM 2000 Level of Service C
HCM 2000 Volume to Capacity ratio	0.85	
Actuated Cycle Length (s)	111.6	Sum of lost time (s) 26.0
Intersection Capacity Utilization	73.8%	ICU Level of Service D
Analysis Period (min)	15	
c Critical Lane Group		

Westport Cupertino
4: MARY AVE & STEVENS CREEK BLVD

Existing Plus Project
Timing Plan: AM PEAK



Movement	EBL	EBT	EBR	WBL	WBT	WBR	NBL	NBT	NBR	SBL	SBT	SBR
Lane Configurations	↖	↕↕↗		↖	↕↕↗		↖↖	↗		↖	↕	↗
Traffic Volume (vph)	159	1019	227	195	821	105	102	7	28	111	24	271
Future Volume (vph)	159	1019	227	195	821	105	102	7	28	111	24	271
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.5	7.0		6.5	6.5		6.5	6.5		6.5	6.5	6.5
Lane Util. Factor	1.00	0.91		1.00	0.91		0.97	1.00		1.00	1.00	1.00
Frbp, ped/bikes	1.00	0.98		1.00	0.99		1.00	0.94		1.00	1.00	0.85
Flpb, ped/bikes	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Frt	1.00	0.97		1.00	0.98		1.00	0.88		1.00	1.00	0.85
Flt Protected	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (prot)	1770	4866		1770	4953		3433	1548		1770	1863	1345
Flt Permitted	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (perm)	1770	4866		1770	4953		3433	1548		1770	1863	1345
Peak-hour factor, PHF	0.86	0.86	0.86	0.86	0.86	0.86	0.54	0.54	0.54	0.85	0.85	0.85
Adj. Flow (vph)	185	1185	264	227	955	122	189	13	52	131	28	319
RTOR Reduction (vph)	0	28	0	0	12	0	0	48	0	0	0	279
Lane Group Flow (vph)	185	1421	0	227	1065	0	189	17	0	131	28	40
Confl. Peds. (#/hr)			26			23			36			87
Turn Type	Prot	NA		Prot	NA		Prot	NA		Prot	NA	Perm
Protected Phases	5	2		1	6		3	8		7	4	
Permitted Phases												4
Actuated Green, G (s)	15.6	38.9		18.1	41.9		10.7	8.8		13.4	11.5	11.5
Effective Green, g (s)	13.6	36.9		16.1	39.9		8.7	6.8		11.4	9.5	9.5
Actuated g/C Ratio	0.14	0.38		0.16	0.41		0.09	0.07		0.12	0.10	0.10
Clearance Time (s)	4.5	5.0		4.5	4.5		4.5	4.5		4.5	4.5	4.5
Vehicle Extension (s)	3.0	3.0		3.0	3.0		3.0	3.0		3.0	3.0	3.0
Lane Grp Cap (vph)	246	1837		291	2022		305	107		206	181	130
v/s Ratio Prot	0.10	c0.29		c0.13	0.22		0.06	0.01		c0.07	0.02	
v/s Ratio Perm												c0.03
v/c Ratio	0.75	0.77		0.78	0.53		0.62	0.16		0.64	0.15	0.31
Uniform Delay, d1	40.4	26.7		39.1	21.8		42.9	42.7		41.2	40.4	41.0
Progression Factor	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Incremental Delay, d2	12.2	2.1		12.7	0.2		3.7	0.7		6.3	0.4	1.4
Delay (s)	52.6	28.8		51.8	22.0		46.6	43.4		47.5	40.8	42.4
Level of Service	D	C		D	C		D	D		D	D	D
Approach Delay (s)		31.5			27.2			45.8			43.7	
Approach LOS		C			C			D			D	

Intersection Summary		
HCM 2000 Control Delay	32.6	HCM 2000 Level of Service C
HCM 2000 Volume to Capacity ratio	0.72	
Actuated Cycle Length (s)	97.7	Sum of lost time (s) 26.5
Intersection Capacity Utilization	67.5%	ICU Level of Service C
Analysis Period (min)	15	
c Critical Lane Group		

HCM Signalized Intersection Capacity Analysis

4: MARY AVE & STEVENS CREEK BLVD

Existing Plus Project
Timing Plan: PM PEAK



Movement	EBL	EBT	EBR	WBL	WBT	WBR	NBL	NBT	NBR	SBL	SBT	SBR
Lane Configurations	↗	↗↗↗		↗	↗↗↗		↗↗	↗		↗	↗	↗
Traffic Volume (vph)	240	1680	113	138	887	160	126	20	75	108	78	152
Future Volume (vph)	240	1680	113	138	887	160	126	20	75	108	78	152
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.5	7.0		6.5	6.5		6.5	6.5		6.5	6.5	6.5
Lane Util. Factor	1.00	0.91		1.00	0.91		0.97	1.00		1.00	1.00	1.00
Frbp, ped/bikes	1.00	1.00		1.00	0.96		1.00	0.79		1.00	1.00	0.83
Flpb, ped/bikes	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Frt	1.00	0.99		1.00	0.98		1.00	0.88		1.00	1.00	0.85
Flt Protected	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (prot)	1770	5037		1770	4756		3433	1299		1770	1863	1314
Flt Permitted	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (perm)	1770	5037		1770	4756		3433	1299		1770	1863	1314
Peak-hour factor, PHF	0.80	0.90	0.90	0.93	0.93	0.93	0.88	0.88	0.88	0.80	0.84	0.84
Adj. Flow (vph)	300	1867	126	148	954	172	143	23	85	135	93	181
RTOR Reduction (vph)	0	5	0	0	16	0	0	80	0	0	0	163
Lane Group Flow (vph)	300	1988	0	148	1110	0	143	28	0	135	93	18
Confl. Peds. (#/hr)						86			140			87
Turn Type	Prot	NA		Prot	NA		Prot	NA		Prot	NA	Perm
Protected Phases	5	2		1	6		3	8		7	4	
Permitted Phases												4
Actuated Green, G (s)	23.8	54.9		14.8	46.4		10.1	9.0		13.9	12.8	12.8
Effective Green, g (s)	21.8	52.9		12.8	44.4		8.1	7.0		11.9	10.8	10.8
Actuated g/C Ratio	0.20	0.48		0.12	0.40		0.07	0.06		0.11	0.10	0.10
Clearance Time (s)	4.5	5.0		4.5	4.5		4.5	4.5		4.5	4.5	4.5
Vehicle Extension (s)	3.0	3.0		3.0	3.0		3.0	3.0		3.0	3.0	3.0
Lane Grp Cap (vph)	347	2398		203	1900		250	81		189	181	127
v/s Ratio Prot	c0.17	c0.39		0.08	0.23		0.04	0.02		c0.08	c0.05	
v/s Ratio Perm												0.01
v/c Ratio	0.86	0.83		0.73	0.58		0.57	0.35		0.71	0.51	0.14
Uniform Delay, d1	43.2	25.2		47.5	26.1		49.8	49.9		48.0	47.7	45.9
Progression Factor	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Incremental Delay, d2	19.5	2.5		12.3	0.5		3.1	2.6		12.1	2.5	0.5
Delay (s)	62.7	27.7		59.8	26.6		53.0	52.5		60.0	50.1	46.4
Level of Service	E	C		E	C		D	D		E	D	D
Approach Delay (s)		32.3			30.4			52.8			51.7	
Approach LOS		C			C			D			D	

Intersection Summary

HCM 2000 Control Delay	34.8	HCM 2000 Level of Service	C
HCM 2000 Volume to Capacity ratio	0.86		
Actuated Cycle Length (s)	111.1	Sum of lost time (s)	26.5
Intersection Capacity Utilization	74.2%	ICU Level of Service	D
Analysis Period (min)	15		
c Critical Lane Group			

HCM Signalized Intersection Capacity Analysis

4: MARY AVE & STEVENS CREEK BLVD

Cumulative
Timing Plan: AM PEAK



Movement	EBL	EBT	EBR	WBL	WBT	WBR	NBL	NBT	NBR	SBL	SBT	SBR
Lane Configurations	↗	↗↗↗		↗	↗↗↗		↗↗	↗		↗	↗	↗
Traffic Volume (vph)	156	1593	215	243	918	157	130	10	31	134	48	169
Future Volume (vph)	156	1593	215	243	918	157	130	10	31	134	48	169
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.5	7.0		6.5	6.5		6.5	6.5		6.5	6.5	6.5
Lane Util. Factor	1.00	0.91		1.00	0.91		0.97	1.00		1.00	1.00	1.00
Frbp, ped/bikes	1.00	0.99		1.00	0.99		1.00	0.94		1.00	1.00	0.83
Flpb, ped/bikes	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Frt	1.00	0.98		1.00	0.98		1.00	0.89		1.00	1.00	0.85
Flt Protected	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (prot)	1770	4937		1770	4910		3433	1559		1770	1863	1320
Flt Permitted	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (perm)	1770	4937		1770	4910		3433	1559		1770	1863	1320
Peak-hour factor, PHF	0.86	0.86	0.86	0.86	0.86	0.86	0.54	0.54	0.54	0.85	0.85	0.85
Adj. Flow (vph)	181	1852	250	283	1067	183	241	19	57	158	56	199
RTOR Reduction (vph)	0	13	0	0	16	0	0	53	0	0	0	184
Lane Group Flow (vph)	181	2089	0	283	1234	0	241	23	0	158	56	15
Confl. Peds. (#/hr)			26			23			36			87
Turn Type	Prot	NA		Prot	NA		Prot	NA		Prot	NA	Perm
Protected Phases	5	2		1	6		3	8		7	4	
Permitted Phases												4
Actuated Green, G (s)	15.8	47.5		20.3	52.5		12.1	9.1		13.1	10.1	10.1
Effective Green, g (s)	13.8	45.5		18.3	50.5		10.1	7.1		11.1	8.1	8.1
Actuated g/C Ratio	0.13	0.42		0.17	0.47		0.09	0.07		0.10	0.07	0.07
Clearance Time (s)	4.5	5.0		4.5	4.5		4.5	4.5		4.5	4.5	4.5
Vehicle Extension (s)	3.0	3.0		3.0	3.0		3.0	3.0		3.0	3.0	3.0
Lane Grp Cap (vph)	225	2070		298	2285		319	102		181	139	98
v/s Ratio Prot	0.10	c0.42		c0.16	c0.25		0.07	0.01		c0.09	c0.03	
v/s Ratio Perm												0.01
v/c Ratio	0.80	1.01		0.95	0.54		0.76	0.22		0.87	0.40	0.15
Uniform Delay, d1	46.0	31.5		44.6	20.7		48.0	48.1		48.0	47.9	47.0
Progression Factor	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Incremental Delay, d2	18.5	22.1		38.3	0.3		9.8	1.1		33.9	1.9	0.7
Delay (s)	64.5	53.6		82.9	21.0		57.8	49.2		82.0	49.8	47.7
Level of Service	E	D		F	C		E	D		F	D	D
Approach Delay (s)		54.4			32.4			55.7			61.1	
Approach LOS		D			C			E			E	
























Intersection Summary

HCM 2000 Control Delay	47.7	HCM 2000 Level of Service	D
HCM 2000 Volume to Capacity ratio	0.94		
Actuated Cycle Length (s)	108.5	Sum of lost time (s)	26.5
Intersection Capacity Utilization	80.9%	ICU Level of Service	D
Analysis Period (min)	15		
c Critical Lane Group			

HCM Signalized Intersection Capacity Analysis

4: MARY AVE & STEVENS CREEK BLVD

Cumulative
Timing Plan: PM PEAK

												
Movement	EBL	EBT	EBR	WBL	WBT	WBR	NBL	NBT	NBR	SBL	SBT	SBR
Lane Configurations		 			 							
Traffic Volume (vph)	265	1405	135	181	1063	173	251	37	96	180	128	169
Future Volume (vph)	265	1405	135	181	1063	173	251	37	96	180	128	169
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.5	7.0		6.5	7.0		6.5	6.0		6.5	6.0	6.0
Lane Util. Factor	1.00	0.91		1.00	0.91		0.97	1.00		1.00	1.00	1.00
Frbp, ped/bikes	1.00	1.00		1.00	0.97		1.00	0.79		1.00	1.00	0.82
Flpb, ped/bikes	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Frt	1.00	0.99		1.00	0.98		1.00	0.89		1.00	1.00	0.85
Flt Protected	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (prot)	1770	5018		1770	4853		3433	1317		1770	1863	1294
Flt Permitted	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (perm)	1770	5018		1770	4853		3433	1317		1770	1863	1294
Peak-hour factor, PHF	0.80	0.90	0.90	0.93	0.93	0.93	0.88	0.88	0.88	0.80	0.84	0.84
Adj. Flow (vph)	331	1561	150	195	1143	186	285	42	109	225	152	201
RTOR Reduction (vph)	0	8	0	0	16	0	0	70	0	0	0	173
Lane Group Flow (vph)	331	1703	0	195	1313	0	285	81	0	225	152	28
Confl. Peds. (#/hr)						86			140			87
Turn Type	Prot	NA		Prot	NA		Prot	NA		Prot	NA	Perm
Protected Phases	5	2		1	6		3	8		7	4	
Permitted Phases												4
Actuated Green, G (s)	27.7	50.3		18.5	41.1		14.9	13.0		20.4	18.5	18.5
Effective Green, g (s)	25.7	48.3		16.5	39.1		12.9	11.0		18.4	16.5	16.5
Actuated g/C Ratio	0.21	0.40		0.14	0.33		0.11	0.09		0.15	0.14	0.14
Clearance Time (s)	4.5	5.0		4.5	5.0		4.5	4.0		4.5	4.0	4.0
Vehicle Extension (s)	3.0	3.0		3.0	3.0		3.0	3.0		3.0	3.0	3.0
Lane Grp Cap (vph)	378	2016		242	1578		368	120		270	255	177
v/s Ratio Prot	c0.19	c0.34		0.11	0.27		0.08	0.06		c0.13	c0.08	
v/s Ratio Perm												0.02
v/c Ratio	0.88	0.84		0.81	0.83		0.77	0.68		0.83	0.60	0.16
Uniform Delay, d1	45.7	32.6		50.3	37.5		52.2	52.9		49.4	48.7	45.7
Progression Factor	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Incremental Delay, d2	19.7	3.4		17.5	3.9		9.8	14.0		19.3	3.7	0.4
Delay (s)	65.4	36.0		67.8	41.4		62.0	66.9		68.7	52.4	46.1
Level of Service	E	D		E	D		E	E		E	D	D
Approach Delay (s)		40.8			44.8			63.7			56.6	
Approach LOS		D			D			E			E	
Intersection Summary												
HCM 2000 Control Delay			46.3				HCM 2000 Level of Service				D	
HCM 2000 Volume to Capacity ratio			0.88									
Actuated Cycle Length (s)			120.2				Sum of lost time (s)			26.0		
Intersection Capacity Utilization			86.8%				ICU Level of Service			E		
Analysis Period (min)			15									
c Critical Lane Group												

Westport Cupertino
4: MARY AVE & STEVENS CREEK BLVD

Cumulative Plus Project
Timing Plan: AM PEAK



Movement	EBL	EBT	EBR	WBL	WBT	WBR	NBL	NBT	NBR	SBL	SBT	SBR
Lane Configurations	↘	↑↑↑		↘	↑↑↑		↘↘	↑		↘	↑	↘
Traffic Volume (vph)	163	1593	215	243	917	156	130	10	31	146	48	201
Future Volume (vph)	163	1593	215	243	917	156	130	10	31	146	48	201
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.5	7.0		6.5	6.5		6.5	6.5		6.5	6.5	6.5
Lane Util. Factor	1.00	0.91		1.00	0.91		0.97	1.00		1.00	1.00	1.00
Frbp, ped/bikes	1.00	0.99		1.00	0.99		1.00	0.94		1.00	1.00	0.83
Flpb, ped/bikes	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Frt	1.00	0.98		1.00	0.98		1.00	0.89		1.00	1.00	0.85
Flt Protected	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (prot)	1770	4937		1770	4911		3433	1559		1770	1863	1319
Flt Permitted	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (perm)	1770	4937		1770	4911		3433	1559		1770	1863	1319
Peak-hour factor, PHF	0.86	0.86	0.86	0.86	0.86	0.86	0.54	0.54	0.54	0.85	0.85	0.85
Adj. Flow (vph)	190	1852	250	283	1066	181	241	19	57	172	56	236
RTOR Reduction (vph)	0	13	0	0	16	0	0	53	0	0	0	218
Lane Group Flow (vph)	190	2089	0	283	1231	0	241	23	0	172	56	18
Confl. Peds. (#/hr)			26			23			36			87
Turn Type	Prot	NA		Prot	NA		Prot	NA		Prot	NA	Perm
Protected Phases	5	2		1	6		3	8		7	4	
Permitted Phases												4
Actuated Green, G (s)	16.4	47.6		20.3	52.0		12.1	9.4		13.1	10.4	10.4
Effective Green, g (s)	14.4	45.6		18.3	50.0		10.1	7.4		11.1	8.4	8.4
Actuated g/C Ratio	0.13	0.42		0.17	0.46		0.09	0.07		0.10	0.08	0.08
Clearance Time (s)	4.5	5.0		4.5	4.5		4.5	4.5		4.5	4.5	4.5
Vehicle Extension (s)	3.0	3.0		3.0	3.0		3.0	3.0		3.0	3.0	3.0
Lane Grp Cap (vph)	234	2067		297	2254		318	105		180	143	101
v/s Ratio Prot	0.11	c0.42		c0.16	c0.25		0.07	0.01		c0.10	c0.03	
v/s Ratio Perm												0.01
v/c Ratio	0.81	1.01		0.95	0.55		0.76	0.22		0.96	0.39	0.18
Uniform Delay, d1	45.9	31.7		44.9	21.3		48.2	48.0		48.7	47.8	47.0
Progression Factor	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Incremental Delay, d2	18.9	22.5		39.4	0.3		9.9	1.0		53.7	1.8	0.9
Delay (s)	64.8	54.1		84.3	21.5		58.1	49.1		102.3	49.6	47.9
Level of Service	E	D		F	C		E	D		F	D	D
Approach Delay (s)		55.0			33.1			55.9			68.3	
Approach LOS		E			C			E			E	

Intersection Summary		
HCM 2000 Control Delay	49.1	HCM 2000 Level of Service D
HCM 2000 Volume to Capacity ratio	0.95	
Actuated Cycle Length (s)	108.9	Sum of lost time (s) 26.5
Intersection Capacity Utilization	81.0%	ICU Level of Service D
Analysis Period (min)	15	
c Critical Lane Group		

Westport Cupertino
4: MARY AVE & STEVENS CREEK BLVD

Cumulative Plus Project
Timing Plan: PM PEAK



Movement	EBL	EBT	EBR	WBL	WBT	WBR	NBL	NBT	NBR	SBL	SBT	SBR
Lane Configurations	↖	↕↕↕		↖	↕↕↕		↖↖	↖		↖	↕	↖
Traffic Volume (vph)	280	1405	135	181	1058	168	251	37	96	162	128	183
Future Volume (vph)	280	1405	135	181	1058	168	251	37	96	162	128	183
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.5	7.0		6.5	7.0		6.5	6.0		6.5	6.0	6.0
Lane Util. Factor	1.00	0.91		1.00	0.91		0.97	1.00		1.00	1.00	1.00
Frbp, ped/bikes	1.00	0.99		1.00	0.96		1.00	0.79		1.00	1.00	0.82
Flpb, ped/bikes	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Frt	1.00	0.99		1.00	0.98		1.00	0.89		1.00	1.00	0.85
Flt Protected	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (prot)	1770	4972		1770	4774		3433	1316		1770	1863	1293
Flt Permitted	0.95	1.00		0.95	1.00		0.95	1.00		0.95	1.00	1.00
Satd. Flow (perm)	1770	4972		1770	4774		3433	1316		1770	1863	1293
Peak-hour factor, PHF	0.80	0.90	0.90	0.93	0.93	0.93	0.88	0.88	0.88	0.80	0.84	0.84
Adj. Flow (vph)	350	1561	150	195	1138	181	285	42	109	202	152	218
RTOR Reduction (vph)	0	8	0	0	15	0	0	70	0	0	0	189
Lane Group Flow (vph)	350	1703	0	195	1304	0	285	81	0	203	152	29
Confl. Peds. (#/hr)			26			86			140			87
Turn Type	Prot	NA		Prot	NA		Prot	NA		Prot	NA	Perm
Protected Phases	5	2		1	6		3	8		7	4	
Permitted Phases												4
Actuated Green, G (s)	29.2	51.2		18.6	40.6		14.9	13.6		19.1	17.8	17.8
Effective Green, g (s)	27.2	49.2		16.6	38.6		12.9	11.6		17.1	15.8	15.8
Actuated g/C Ratio	0.23	0.41		0.14	0.32		0.11	0.10		0.14	0.13	0.13
Clearance Time (s)	4.5	5.0		4.5	5.0		4.5	4.0		4.5	4.0	4.0
Vehicle Extension (s)	3.0	3.0		3.0	3.0		3.0	3.0		3.0	3.0	3.0
Lane Grp Cap (vph)	399	2030		243	1529		367	126		251	244	169
v/s Ratio Prot	c0.20	c0.34		0.11	0.27		0.08	0.06		c0.11	c0.08	
v/s Ratio Perm												0.02
v/c Ratio	0.88	0.84		0.80	0.85		0.78	0.65		0.81	0.62	0.17
Uniform Delay, d1	45.0	32.1		50.4	38.3		52.4	52.5		50.1	49.5	46.5
Progression Factor	1.00	1.00		1.00	1.00		1.00	1.00		1.00	1.00	1.00
Incremental Delay, d2	19.0	3.2		17.2	4.8		9.9	10.8		17.2	4.9	0.5
Delay (s)	64.0	35.3		67.5	43.1		62.3	63.3		67.3	54.4	47.0
Level of Service	E	D		E	D		E	E		E	D	D
Approach Delay (s)		40.2			46.3			62.6			56.2	
Approach LOS		D			D			E			E	

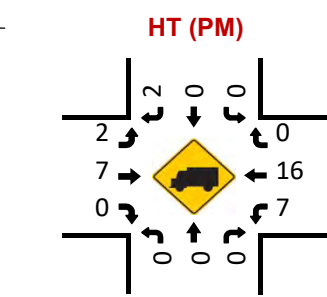
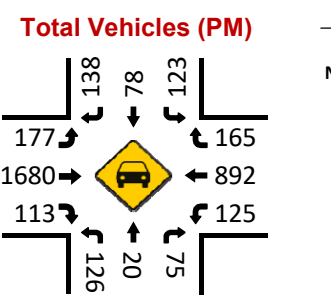
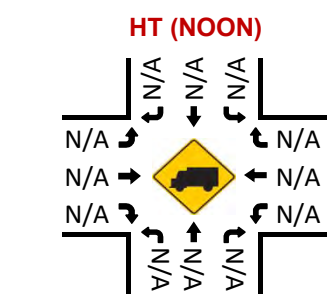
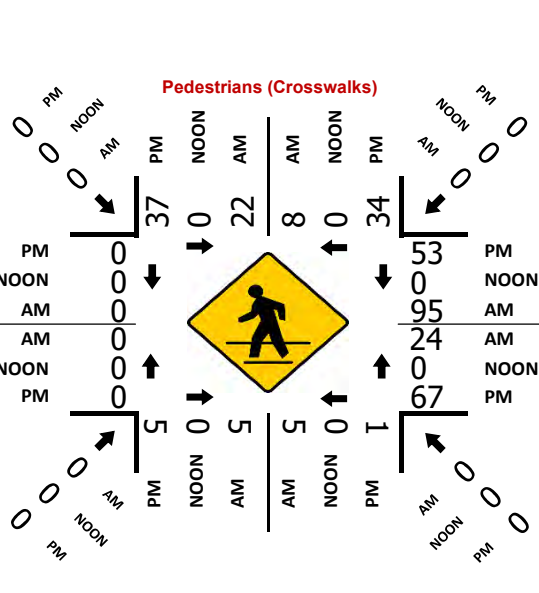
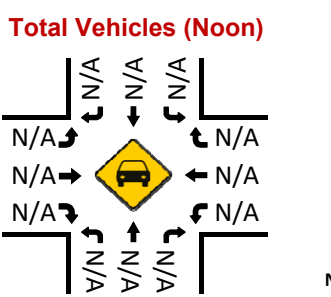
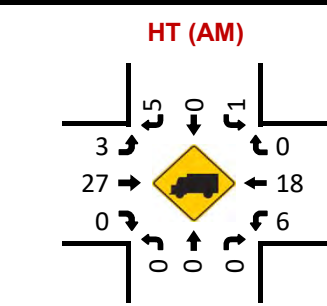
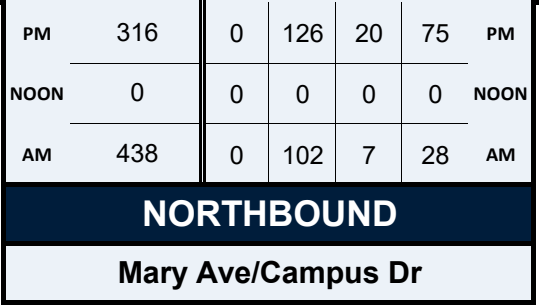
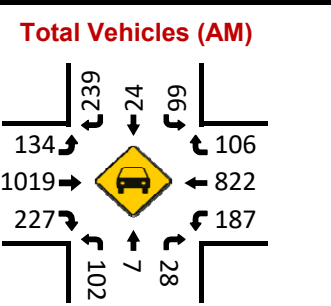
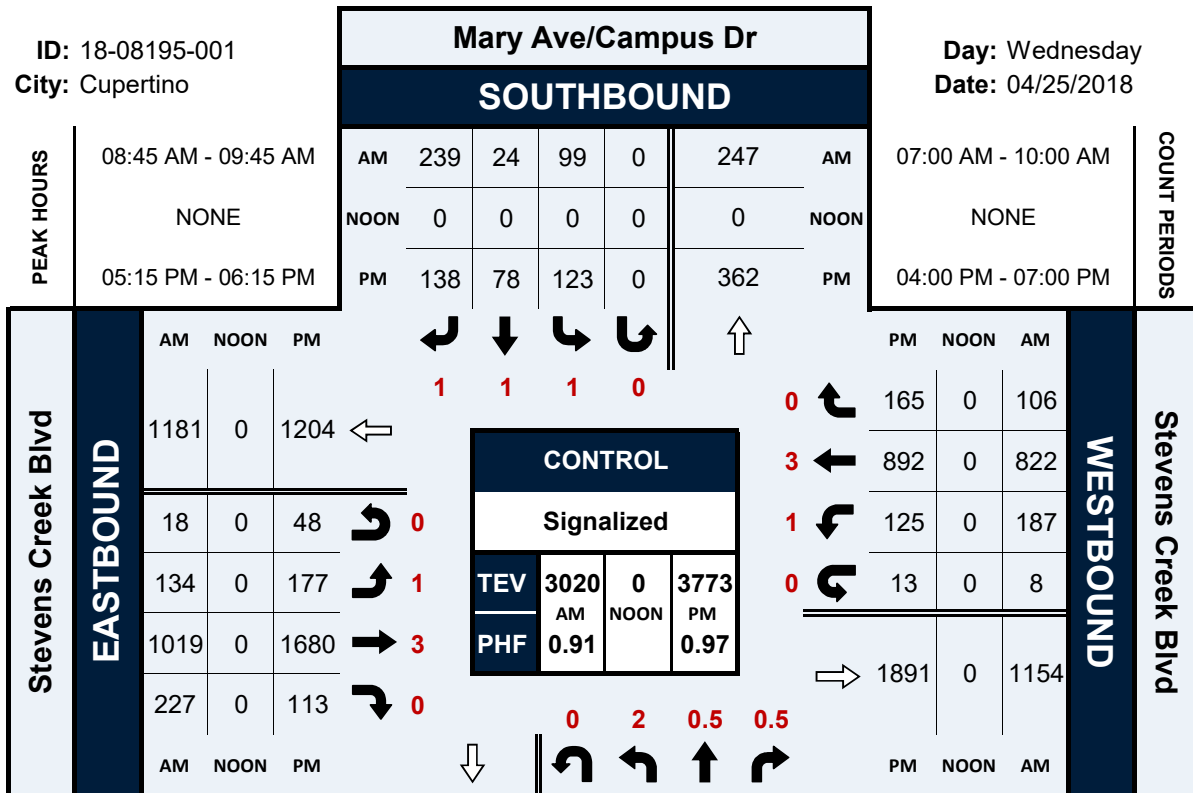
Intersection Summary		
HCM 2000 Control Delay	46.3	HCM 2000 Level of Service
HCM 2000 Volume to Capacity ratio	0.88	D
Actuated Cycle Length (s)	120.5	Sum of lost time (s)
Intersection Capacity Utilization	86.1%	26.0
Analysis Period (min)	15	ICU Level of Service
c Critical Lane Group		E

Mary Ave/Campus Dr & Stevens Creek Blvd

Peak Hour Turning Movement Count

ID: 18-08195-001
City: Cupertino

Day: Wednesday
Date: 04/25/2018



MEMORANDUM

From: Frederik Venter, P.E. and Anthony Nuti, Kimley-Horn and Associates
To: Winnie Pagan and Chad Mosely, City of Cupertino Public Works
Date: September 18, 2019
Re: **Westport Cupertino – Stevens Creek Boulevard & SR 85 On Ramp Signalization Analysis**

The purpose of this memorandum is to present traffic analysis findings for the reconfiguration of the westbound right turn lane at the intersection of Stevens Creek Boulevard and SR 85 Northbound Ramp Terminal for pedestrian and bicycle crossing maneuvers. Level of service and queue analysis for the westbound right turn movement and the overall intersection are discussed in this memo. The effect of the Westport Cupertino mixed-use urban village project (hereinafter referred to as “Westport”) on the westbound right turn movement and level of service at the intersection also were evaluated. The Westport project would demolish the existing shopping center (i.e., The Oaks Shopping Center) and construct 203 multi-family residential units, 39 senior units, and 20,000 square feet of retail space.

1. Introduction

The City of Cupertino is planning to reconfigure the existing westbound right turn movement from Stevens Creek Boulevard onto the Northbound State Route 85 On Ramp. This reconfiguration will include the following:

- Convert the existing westbound “free” right turn lane to a signal controlled right turn movement to allow for an exclusive protected phase for pedestrians and cyclists to cross the on-ramp leg.

The purpose of this reconfiguration is to increase pedestrian and bicycle opportunities to cross the on-ramp leg.

For this analysis, the following study intersection was analyzed:

1. Stevens Creek Boulevard & State Route 85 Northbound Ramp Terminal

Figure 1 shows the location of the study intersection.

Figure 2 shows the reconfiguration of the Stevens Creek and Northbound State Route 85 On/Off Ramps provided by Toole Design Group. The planned intersection configuration is in the conceptual design stage.

Figure 3 shows the proposed site plan for the Westport project.

A Simtraffic microsimulation model was prepared for the analysis. The model included the Stevens Creek Boulevard/Mary Avenue intersection to the east and the Stevens Creek Boulevard/SR 85 southbound ramp terminal intersection to the west, to have accurate arrival patterns for the analysis of the study intersection, particularly the westbound right turn movement. No analysis results were reported for these adjacent intersections, since the operations at these locations will remain unaffected with the planned reconfiguration.



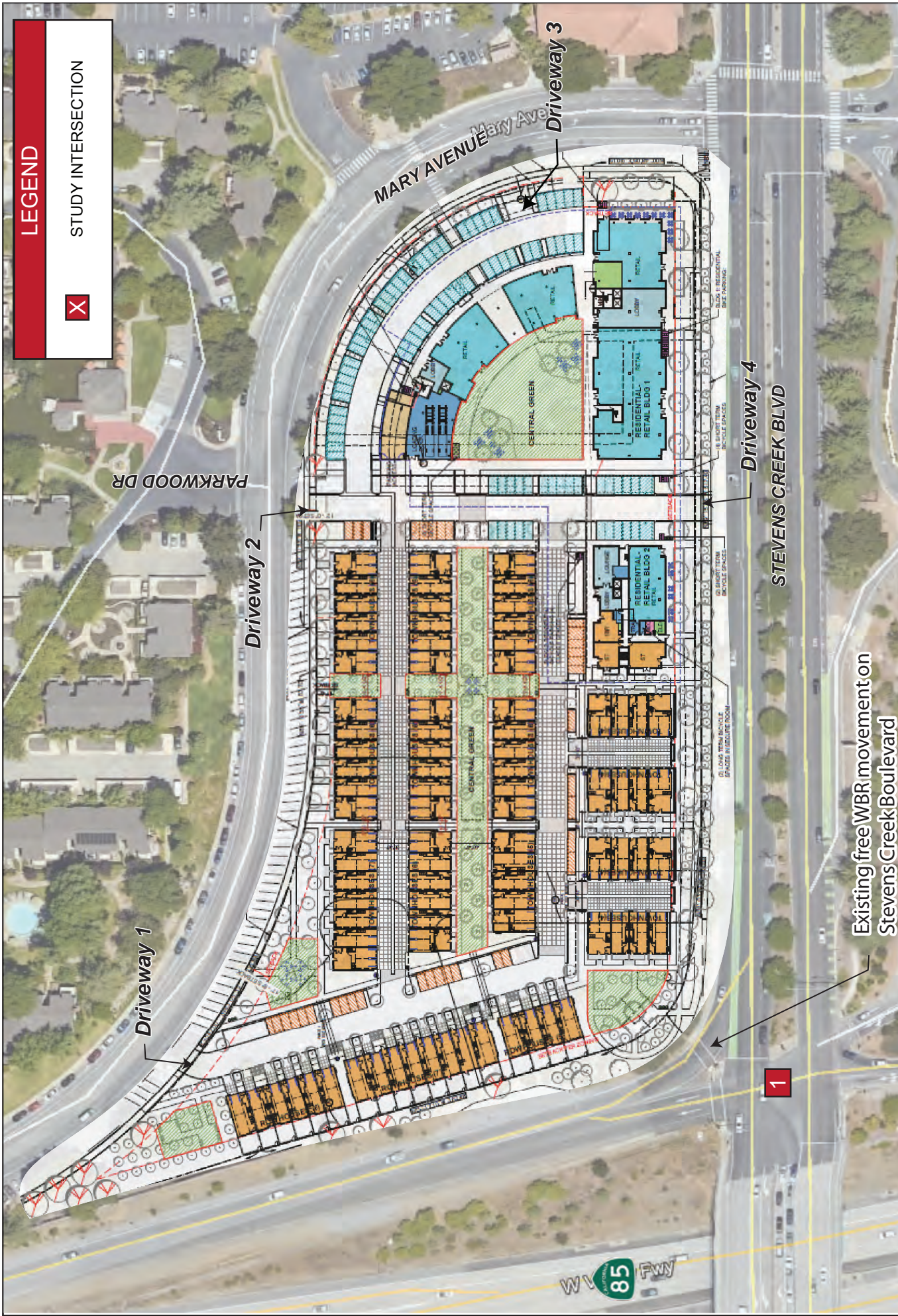
Stevens Creek Blvd & SR 85 Northbound Ramp Terminal Analysis
 Figure 1
Project Vicinity

 N
 NOT TO SCALE



Source: City and Toole Design Group

Note: The proposed layout and median island may have to be modified to comply with Caltrans requirements



LEGEND

STUDY INTERSECTION



Existing free WBR movement on Stevens Creek Boulevard

Stevens Creek Blvd & SR 85 NB Ramp Terminal Analysis
Figure 3
Proposed Westport Project Site

2. Analysis Methodology

The Santa Clara Valley Transportation Authority (VTA) Traffic Impact Analysis Guidelines (October 2014), City of Cupertino guidelines, and industry criteria were utilized in this analysis to determine project requirements and potential impacts.

Analysis of the study intersection is based on the concept of Level of Service (LOS). The LOS of an intersection is a qualitative measurement used to describe operational conditions. LOS ranges from A (best), which represents minimal delay, to F (worst), which represents heavy delay and a facility that is operating at or near its functional capacity.

Intersection delay and level of service (LOS) calculations were performed using Highway Capacity Manual (HCM) 2000 methodology in Synchro Version 9, which is consistent with TRAFFIX software. Synchro was used instead of TRAFFIX because it provides improved signal timing evaluation at the intersection of Stevens Creek and Northbound State Route 85 On/Off Ramps.

The VTA Congestion Management Plan (CMP) (December 2017) states a LOS E, except for facilities grandfathered in at LOS F, is acceptable for both the AM and PM peak hour at the study intersection. The study intersection is not identified as an intersection operating at LOS F, so a minimum of LOS E is acceptable for the study intersection.

The following scenarios were analyzed for this report in the AM and PM peak hours:

- Existing (2019) Conditions
- Existing (2019) Plus Westport and Signalized Conditions for the Westbound Right Turn Movement
- Cumulative (2040) Conditions
- Cumulative (2040) Plus Westport and Signalized Conditions for the Westbound Right Turn Movement

3. Traffic Analysis

The following section discusses traffic operations at the study intersection of Stevens Creek Boulevard and Northbound State Route 85 Ramp Terminal.

3.1 Existing (2019) Conditions LOS Analysis

Existing Conditions traffic operations were evaluated using existing lane geometry, traffic control, and peak hour traffic, pedestrian, and bicycle volumes. Counts were collected on the following days:

- AM Peak Period: May 23, 2019 (7:00 AM - 10:00 AM)
- PM Peak Period: May 22, 2019 (4:00 PM – 7:00 PM)

Counts were collected when school was in session and the weather was fair.

Current operations at the study intersection include the following:

- Protected left turns on all approaches
- No right turn on red for the Northbound State Route 85 Off Ramp right turn onto Stevens Creek Boulevard
- No right turns allowed for the De Anza Community College approach
- “Free” movements for the westbound right turn from Stevens Creek Boulevard onto the northbound on ramp of State Route 85
- The north leg has a two-stage crosswalk that allows a pedestrian or cyclist to cross the “free” westbound right turn lane when there is a gap in traffic or traffic stops for them and wait on the small refuge island provided. Then they cross the on-ramp lanes using the pedestrian signal-controlled crosswalk.

Even though right turns are not permitted for the De Anza Community College approach, some vehicles were observed performing this movement. In Synchro these vehicles were modeled as through movements since a right turn is an illegal movement.

Figure 4 shows the Existing Conditions Geometry at the study intersection.

Figure 5 shows the vehicle count data, Figure 6 shows the pedestrian count data, and Figure 7 shows the bike count data.

Table 1 illustrates the LOS and delay under Existing Conditions.

The 95th percentile queue for the westbound right turn is zero in Existing (2019) Conditions. The movement is a “free” right turn, and cars can perform the movement without stopping. Vehicles currently yield to pedestrians using the crosswalk at the northbound on-ramp; however, the low bicycle and pedestrian volumes do not generate queues when vehicles yield to them as they cross the westbound right turn movement.

The existing intersection currently operates at an acceptable level of service.

Figure 4 – Existing (2019) Conditions Geometry

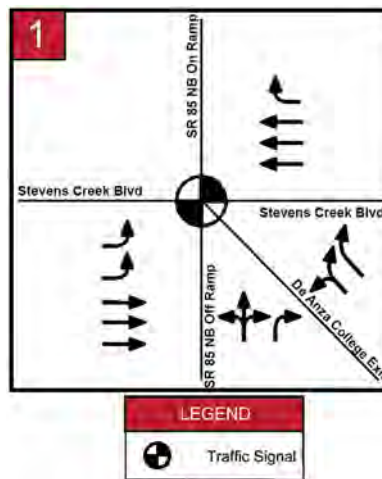


Figure 5 – Existing (2019) Conditions Peak Hour Intersection Volumes

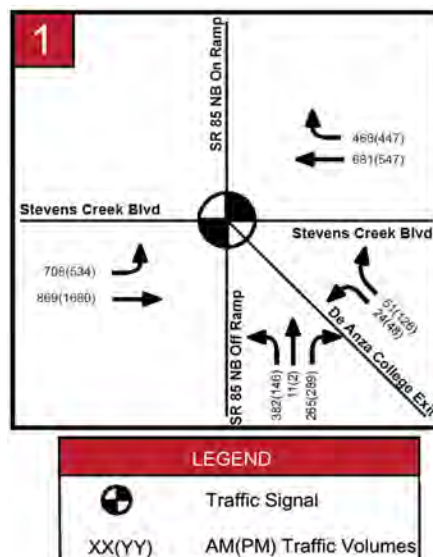


Figure 6 - Existing Peak Hour Pedestrian Count Data

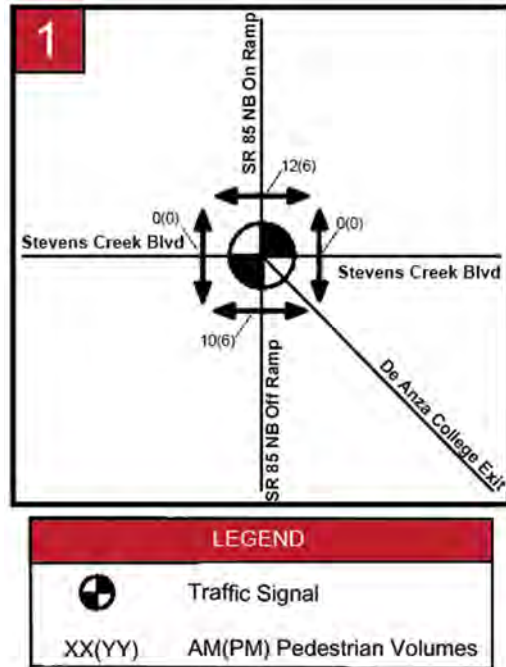


Figure 7 - Existing Peak Hour Bicycle Count Data

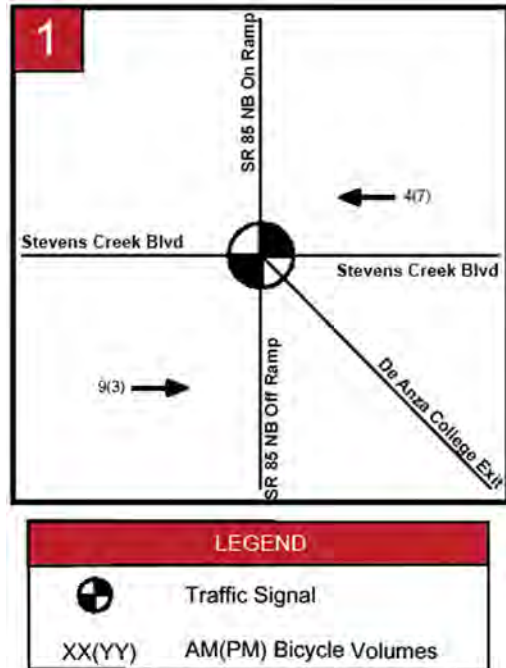


Table 1 - Existing (2019) Conditions Level of Service

	Intersection	LOS Criteria	Jurisdiction	Control	Existing (2019)			
					AM Peak		PM Peak	
					LOS	Delay	LOS	Delay
1	Stevens Creek Boulevard and NB SR 85 On/Off Ramps	E	Caltrans	Signal	C	30.0	C	24.7

Notes:

1. Analysis performed using Synchro 10 with HCM 2000 methodologies
2. Delay indicated in seconds/vehicle
3. CMP level of service (LOS) standard for the County is E
4. Intersections that fall below City standards are shown in **bold**

3.2 Trip Generation Estimates and Distribution for the Westport Project

The Westport project would generate -275 net new daily trips, 47 net new AM peak hour trips, and -22 net new PM peak hour trips, consistent with the analysis completed in the Westport Cupertino – Transportation Analysis Memo (November 27, 2018).

Figure 8 illustrates the distribution for the retail uses of the Westport project, while **Figure 9** illustrates the distribution for the residential uses.



SR 85 Interchange Analysis
Figure 6
Retail Trip Distribution





SR 85 Interchange Analysis
Figure 7

Residential Trip Distribution



3.3 Existing (2019) Plus Westport Project and Signalized Conditions for the Westbound Right Turn (WBR) Conditions

Traffic operations were evaluated with Synchro and SimTraffic software using the proposed signalized westbound right turn configuration with existing peak hour traffic volumes and adding the Westport project trips.

Figure 10 shows the intersection volumes with the Westport Project implemented. It was also estimated that bicycle and pedestrian volumes would increase by 20% at the crosswalk. This is based on the assumption that the improved facility and the added residential units from the Westport project would generate more pedestrian and bicycle demand. The new pedestrian and bicycle crossing volumes are shown on **Figure 11** and **Figure 12**, respectively.

To be conservative, only a pedestrian signal was analyzed because a pedestrian crossing time is longer than a bicycle crossing time. A shorter bicycle crossing time would produce shorter vehicle queues in the westbound right turn lane than would occur with a longer pedestrian crossing time.

Currently, the westbound right turn movement operates independently from the existing intersection as a “free” right turn. With the addition of signal control for the westbound right turn movement, the cars would have a continuous green right-turn arrow until a cyclist or pedestrian arrives and activates the pedestrian or bike crossing signal, at which time a red right-turn arrow would stop the cars. This pedestrian/bicycle signal call could only occur on the east-west signal phasing plan of the intersection when there are no other conflicting movements with the pedestrian and/or bicycle phase. Queues would only form in the westbound right turn pocket when the right turn arrow is red.

SimTraffic software cannot accurately simulate this signal timing plan because of the random nature of pedestrian and bicycle arrivals/crossings. Thus, an equivalent simulation was developed that is more conservative and assumes a pedestrian or bicycle call with every green east-west phase. In addition, a pedestrian crossing time was used in the simulation, which is higher compared to a bicycle crossing time.

Queues would be generated by the vehicles stopping and waiting for a pedestrian or bicycle to cross when the right turn arrow is red. Queue results after five SimTraffic simulations and HCM 2000 LOS results for the westbound right turn lane are reported in **Table 2**.

Under Existing (2019) Plus Westport and Signalized Conditions, queues for the westbound right turn movement would increase by approximately nine cars in the AM peak hour and ten cars in the PM peak hour compared to existing conditions with no signal control. The overall intersection LOS would also remain at LOS C in both the AM and PM peak hours.

Figure 13 shows the estimated queue lengths and demonstrates that no operational issues would occur.

Note that the queues reported in Table 2 and shown on Figure 13 are the 95th percentile vehicle queues. The 95th percentile queue length value indicates that a queue of this length or less would occur on 95 percent of the signal cycles that include a pedestrian or bicycle call.

It is anticipated that no median will be provided at this location, consistent with the latest Caltrans and VTA policies, and that the curb return would be squared up and the radii sufficient to accommodate truck turns. A pedestrian and cyclist would then cross the on-ramp in one phase (i.e., the current two-stage crossing procedure would be eliminated). The total crosswalk length was determined to be 85 feet, which requires approximately 25 seconds (at a walking speed of 3.5 feet per second) for the pedestrian clearance interval. Right turn on red would not be allowed for the westbound right turn movement to prevent cars from yielding (instead of stopping) to pedestrians.

Figure 10 – Existing (2019) Plus Westport and Signalized Conditions Peak Hour Intersection Volumes

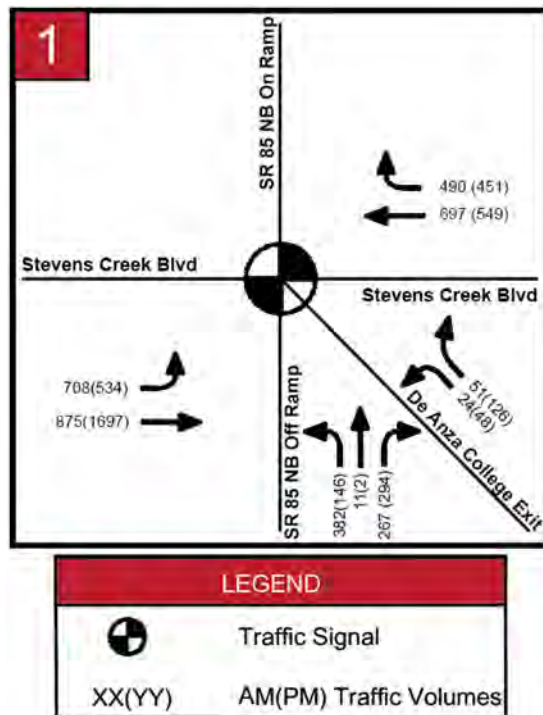


Figure 11 – Existing (2019) Plus Westport and Signalized Conditions Peak Hour Pedestrian Volumes



Figure 12 – Existing (2019) Plus Westport and Signalized Conditions Peak Hour Bicycle Volumes

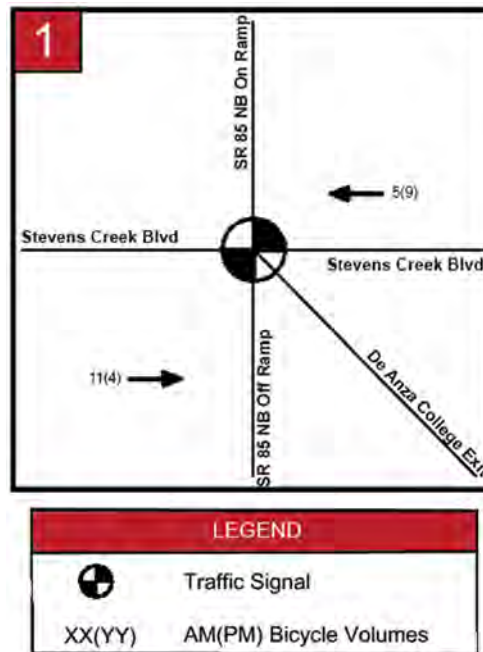


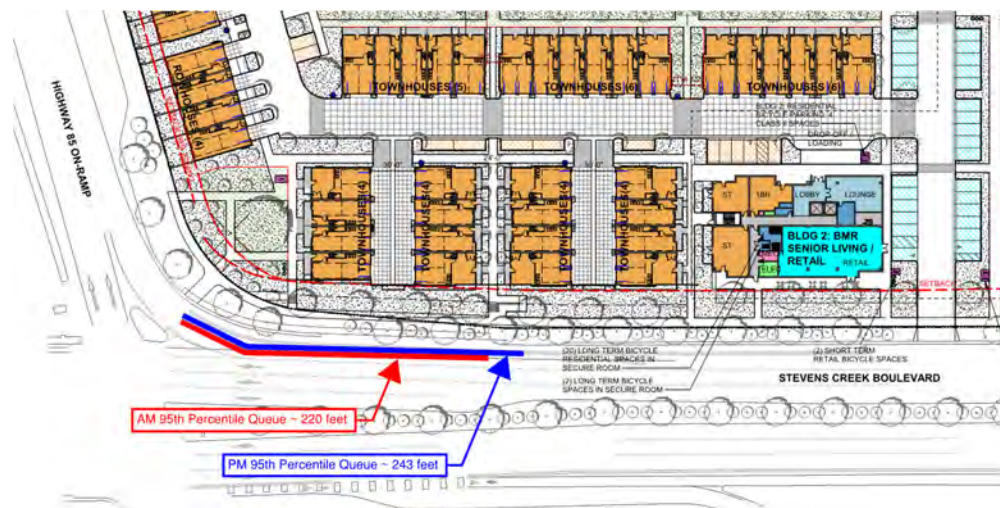
Table 2 - Existing (2019) Plus Westport and Signalized Conditions Queues

Intersection	MVMT	Existing (2019) + Westport +Signal					
		AM Peak			PM Peak		
		Delay	LOS ¹	95 th Percentile Queue ²	Delay	LOS ¹	95 th Percentile Queue ²
1 Stevens Creek Boulevard and NB SR 85 On/Off Ramps	WBRT	7.6	A	220 ft (9 cars)	8.0	A	243 ft (10 cars)

Notes

1. Analysis performed using Synchro 10 with HCM 2000 methodologies
2. Analysis completed using Simtraffic simulation software

Figure 13 - Existing (2019) Plus Westport and Signalized Conditions Queue Lengths



3.4 Cumulative (2040) Conditions

Traffic operations were evaluated for 2040 Cumulative Conditions based on data obtained from the City of Cupertino General Plan EIR, 2014 (June 6, 2014).

It is assumed that the Cumulative Conditions intersection geometry of State Route 85 and Stevens Creek Boulevard would be the same as Existing Conditions. Accordingly, vehicles would yield to pedestrians and cyclists using the crosswalk at the northbound on-ramp; however, the low bicycle and pedestrian volumes would not generate queues when vehicles yield to them as they cross the intersection.

Figure 14 shows the Cumulative (2040) volumes while **Table 3** shows the LOS and delay for the traffic signal at the study intersection. The queues for the westbound right turn are assumed to be zero because in Cumulative (2040) Conditions, the movement would be “free”, and cars would perform this movement without stopping. Vehicles would yield to pedestrians and cyclists using the crosswalk at the northbound on-ramp; however, the low bicycle and pedestrian volumes would not generate queues when vehicles yield to them as they cross the westbound right turn movement.

Under Cumulative (2040) Conditions the intersection would operate at an acceptable level of service.

It should be noted that for the intersection, the PM peak hour reported delay improved with Cumulative (2040) Conditions. The reason for this occurrence is because the trips were predominately added to non-critical movements, which had a lower movement delay than the average intersection delay, and thereby decreases the overall average delay.

Figure 14 – Cumulative (2040) Conditions Peak Hour Intersection Volumes

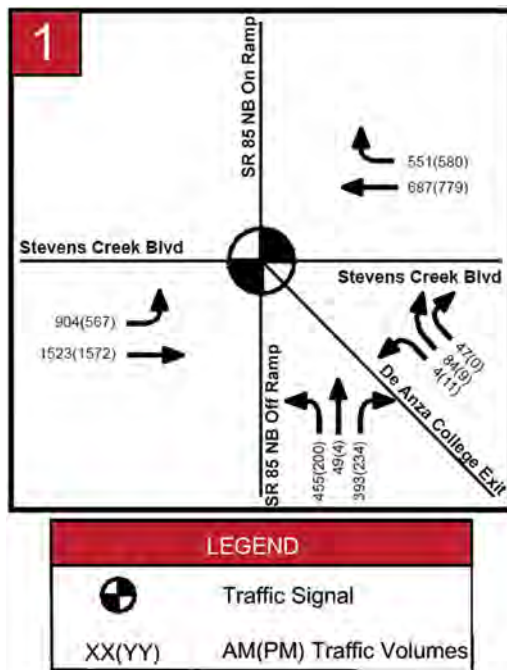


Table 3 – Cumulative (2040) Conditions Level of Service

	Intersection	LOS Criteria	Jurisdiction	Control	Cumulative (2040)			
					AM Peak		PM Peak	
					LOS	Delay	LOS	Delay
1	Stevens Creek Boulevard and NB SR 85 On/Off Ramps	E	Caltrans	Signal	D	46.1	C	20.3

Notes:

1. Analysis performed using Synchro 10 with HCM 2000 methodologies
2. Delay indicated in seconds/vehicle
3. CMP level of service (LOS) standard for the County is E
4. Intersections that fall below City standards are shown in **bold**

3.5 Cumulative (2040) Plus Westport Project and Signalized Conditions for the Westbound Right Turn (WBR) Conditions

Traffic operations were evaluated with Synchro and SimTraffic software using the proposed signalized westbound right turn configuration with Cumulative (2040) peak hour traffic volumes and adding the Westport project trips.

Figure 15 shows the intersection volumes with the Westport Project implemented. It was also assumed that bicycle and pedestrian volumes would increase by 20% at the crosswalk. The new pedestrian and bicycle crossing volumes are shown on **Figure 16** and **Figure 17**, respectively.

The signal phasing conditions would be the same as for Existing Plus Project conditions. Queues were analyzed for the Cumulative (2040) Plus Westport Project and Signalized WBR Conditions to determine the extent of vehicle queuing that would occur along westbound Stevens Creek Boulevard as a result of the new signal control. Queue results after five SimTraffic simulations and HCM 2000 LOS results for the westbound right turn lane are reported in **Table 4**.

Under Cumulative (2040) Plus Westport and Signalized Conditions, queues for the westbound right turn movement would increase by approximately ten cars in the AM peak hour and twelve cars in the PM peak hour compared to existing conditions with no signal control. The overall intersection LOS would also remain at LOS D in the AM peak hour and LOS C in the PM peak hour.

Figure 18 shows the estimated queue lengths and demonstrates that no operational issues would occur.

Figure 15 - Cumulative (2040) Plus Westport and Signalized Conditions Peak Hour Intersection Volumes

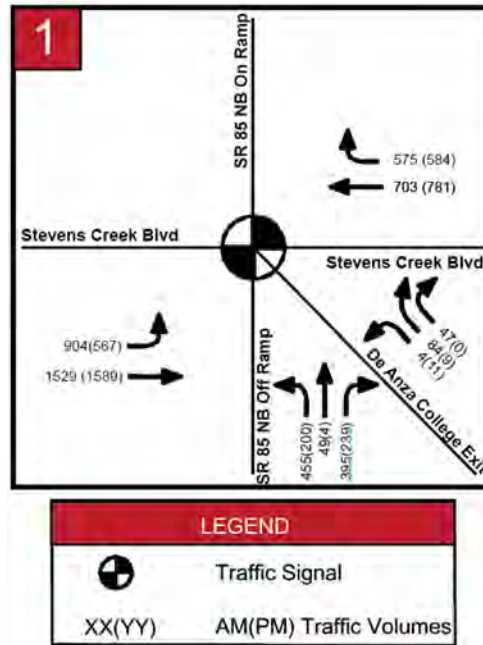


Figure 16 - Cumulative (2040) Plus Westport and Signalized Conditions Peak Hour Pedestrian Volumes

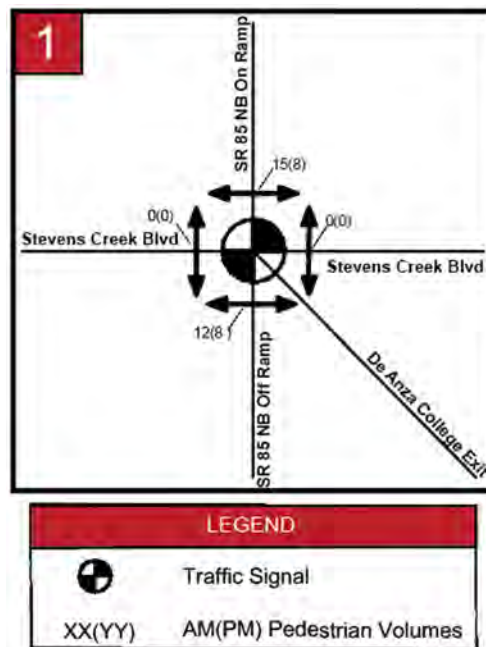


Figure 17 - Cumulative (2040) Plus Westport and Signalized Conditions Peak Hour Bicycle Volumes

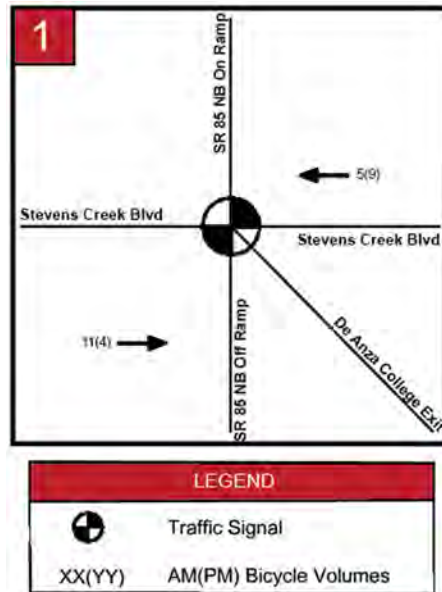


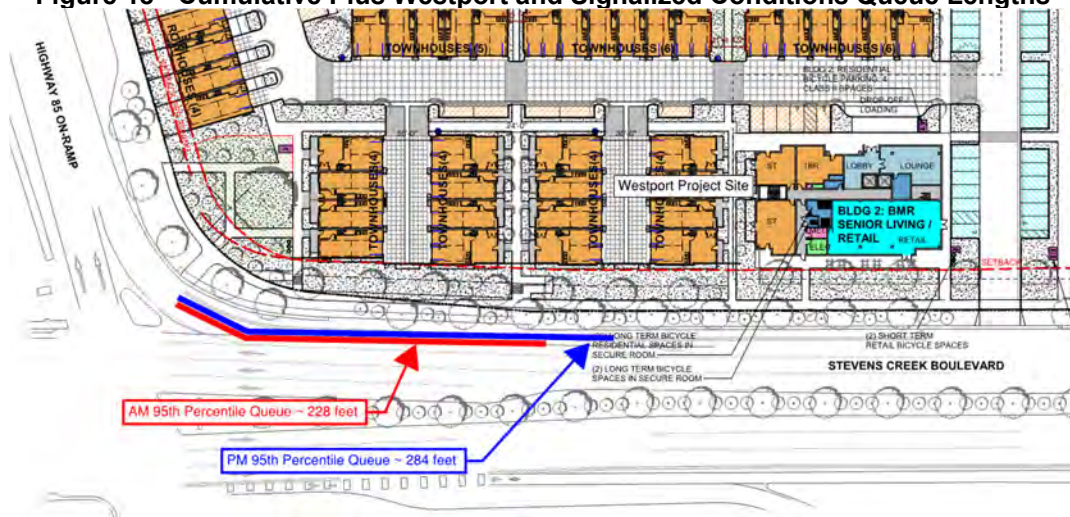
Table 4 - Cumulative (2040) Plus Westport and Signalized Conditions Queues

Intersection	MVMT	Cumulative (2040) + Westport + Signal					
		AM Peak			PM Peak		
		Delay	LOS ¹	95 th Percentile Queue ²	Delay	LOS ¹	95 th Percentile Queue ²
1 Stevens Creek Boulevard and NB SR 85 On/Off Ramps	WBRT	8.2	A	246 ft (10 cars)	11.1	B	284 ft (12 cars)

Notes

1. Analysis performed using Synchro 10 with HCM 2000 methodologies
2. Analysis completed using Simtraffic simulation software

Figure 18 - Cumulative Plus Westport and Signalized Conditions Queue Lengths



4. Conclusions

Table 5 provides a summary for the analysis of the proposed bike and pedestrian signal control phase at the intersection of Stevens Creek Boulevard and Northbound State Route 85 On/Off Ramps. With the Westport project and signalization of the westbound right turn movement, the westbound right turn queues would increase during the AM and PM peak hours of traffic. However, the increases would be minimal and would not be substantial enough to cause any operational issues along Stevens Creek Boulevard.

Table 5 - Summary Table

Scenario	Type	AM Peak	PM Peak
Existing (2019) Conditions	Intersection Delay (s)	30.0	24.7
	Intersection LOS	C	C
	WBR 95 th Percentile Queue	0 feet	0 feet
Existing (2019) Plus Westport and Signalized Conditions	Intersection Delay (s)	34.3	23.0
	Intersection LOS	C	C
	WBR Delay (s)	7.6	8.0
	WBR LOS	A	A
	WBR 95 th Percentile Queue	220 ft (9 cars)	243 ft (10 cars)
Cumulative (2040) Conditions	Intersection Delay (s)	46.1	20.3
	Intersection LOS	D	C
	WBR 95 th Percentile Queue	0 feet	0 feet
Cumulative (2040) Plus Westport and Signalized Conditions	Intersection Delay (s)	47.6	24.7
	Intersection LOS	D	C
	WBR Delay (s)	8.2	11.1
	WBR LOS	A	B
	WBR 95 th Percentile Queue	246 ft (10 cars)	284 ft (12 cars)

5. APPENDIX

A1: Existing Turning Movement Counts

A2: Existing Conditions Synchro Outputs

A3: Existing Plus Westport and Signal Conditions Synchro Outputs

A4: Cumulative Conditions Synchro Outputs

A5: Cumulative Plus Westport and Signal Conditions Synchro Outputs

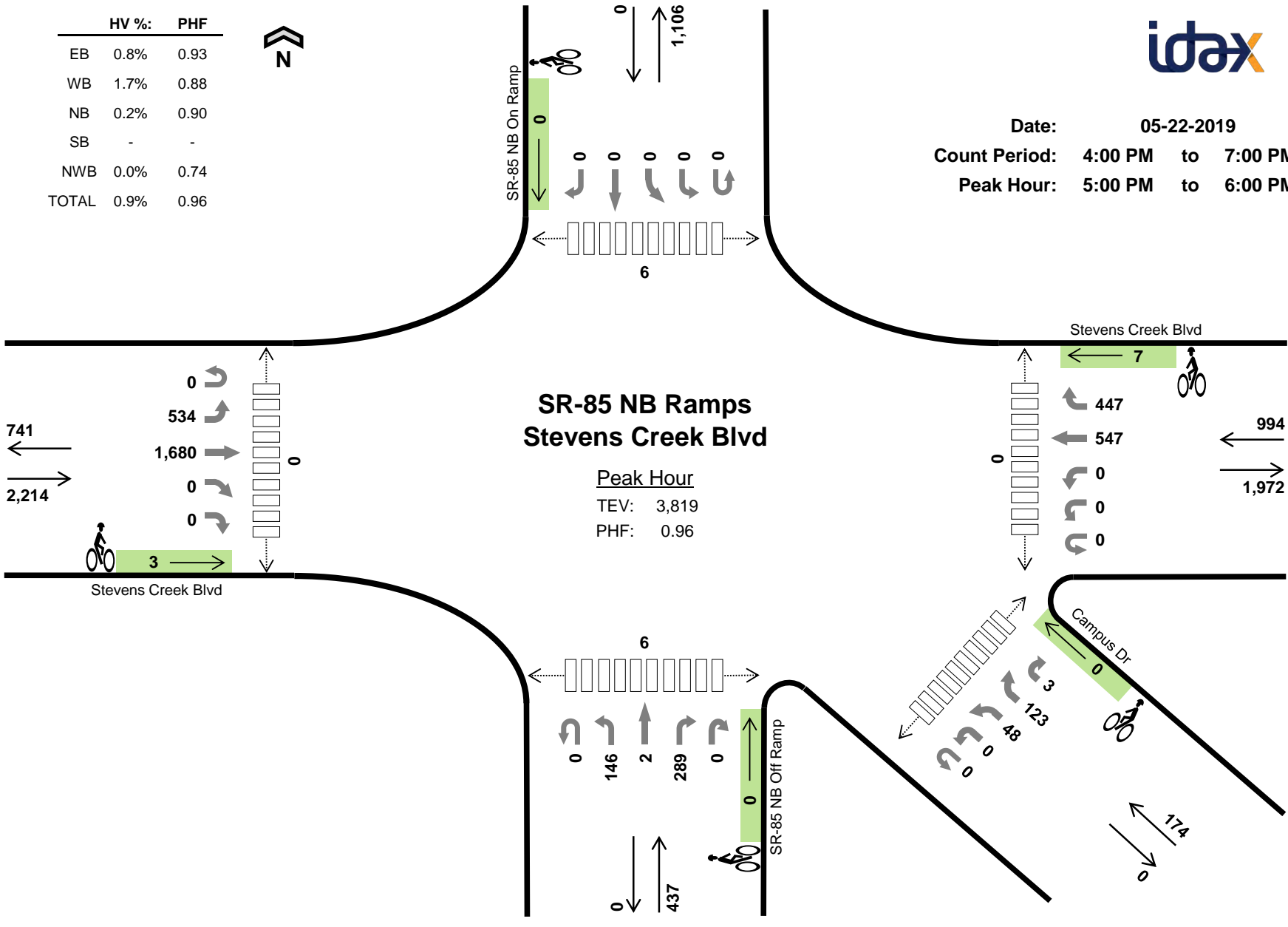
A6: Westport Trip Generation

A1: Existing Turning Movement Counts



Date: 05-22-2019
 Count Period: 4:00 PM to 7:00 PM
 Peak Hour: 5:00 PM to 6:00 PM

	HV %:	PHF
EB	0.8%	0.93
WB	1.7%	0.88
NB	0.2%	0.90
SB	-	-
NWB	0.0%	0.74
TOTAL	0.9%	0.96



Three-Hour Count Summaries

Interval Start	Stevens Creek Blvd					Stevens Creek Blvd					SR-85 NB Off Ramp					SR-85 NB On Ramp					Campus Dr					15-min Total	Rolling One Hour
	Eastbound					Westbound					Northbound					Southbound					Northwestbound						
	UT	LT	TH	BR	RT	UT	HL	LT	TH	RT	UT	LT	TH	RT	HR	UT	LT	BL	TH	RT	UT	HL	BL	BR	HR		
4:00 PM	0	115	377	0	0	0	0	0	133	106	0	35	0	38	0	0	0	0	0	0	0	14	26	1	845	0	
4:15 PM	0	94	424	0	0	0	0	0	114	103	0	55	0	87	0	0	0	0	0	0	0	9	14	1	901	0	
4:30 PM	0	147	445	0	0	0	0	0	111	102	0	23	0	37	0	0	0	0	0	0	0	8	20	2	895	0	
4:45 PM	0	113	387	0	0	0	0	0	121	97	0	39	0	47	0	0	0	0	0	0	0	7	19	1	831	3,472	
5:00 PM	0	135	417	0	0	0	0	0	111	110	0	33	1	60	0	0	0	0	0	0	0	6	32	1	906	3,533	
5:15 PM	0	128	467	0	0	0	0	0	138	102	0	35	0	82	0	0	0	0	0	0	0	10	28	1	991	3,623	
5:30 PM	0	129	370	0	0	0	0	0	128	122	0	47	0	74	0	0	0	0	0	0	0	16	43	0	929	3,657	
5:45 PM	0	142	426	0	0	0	0	0	170	113	0	31	1	73	0	0	0	0	0	0	0	16	20	1	993	3,819	
6:00 PM	0	133	348	0	0	0	0	0	111	108	0	43	0	74	0	0	0	0	0	0	0	19	56	1	893	3,806	
6:15 PM	0	131	342	0	0	0	0	0	146	118	0	44	1	75	0	0	0	0	0	0	0	11	39	2	909	3,724	
6:30 PM	0	135	254	0	0	0	0	0	157	122	0	36	1	59	0	0	0	0	0	0	0	13	20	3	800	3,595	
6:45 PM	0	147	247	0	0	0	0	0	111	121	0	41	0	38	0	0	0	0	0	0	0	11	25	5	746	3,348	
Count Total	0	1,549	4,504	0	0	0	0	0	1,551	1,324	0	462	4	744	0	0	0	0	0	0	0	140	342	19	10,639	0	
Peak Hour	All	0	534	1,680	0	0	0	0	547	447	0	146	2	289	0	0	0	0	0	0	0	48	123	3	3,819	0	
	HV	0	7	11	0	0	0	0	15	2	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	36	0
	HV%	-	1%	1%	-	-	-	-	3%	0%	-	0%	0%	0%	-	-	-	-	-	-	-	-	0%	0%	0%	1%	0

Note: Three-hour count summary volumes include heavy vehicles but exclude bicycles in overall count.

Interval Start	Heavy Vehicle Totals						Bicycles						Pedestrians (Crossing Leg)						
	EB	WB	NB	SB	NWB	Total	EB	WB	NB	SB	NWB	Total	East	West	North	South	Southeast	Total	
4:00 PM	5	2	0	0	0	7	0	0	0	0	0	0	0	0	0	3	4	3	10
4:15 PM	1	4	0	0	0	5	1	3	0	0	0	4	0	0	2	0	0	2	
4:30 PM	4	2	0	0	0	6	0	2	0	0	0	2	0	0	0	2	2	4	
4:45 PM	4	5	0	0	0	9	3	2	0	0	0	5	0	0	2	3	3	8	
5:00 PM	5	4	0	0	0	9	2	0	0	0	0	2	0	0	3	2	2	7	
5:15 PM	5	6	0	0	0	11	0	4	0	0	0	4	0	0	1	2	2	5	
5:30 PM	6	3	1	0	0	10	0	1	0	0	0	1	0	0	1	2	2	5	
5:45 PM	2	4	0	0	0	6	1	2	0	0	0	3	0	0	1	0	0	1	
6:00 PM	4	1	0	0	5	10	2	1	0	0	2	5	0	0	1	3	3	7	
6:15 PM	2	3	0	0	0	5	0	0	0	0	0	0	0	0	1	1	1	3	
6:30 PM	2	3	0	0	0	5	0	2	0	0	0	2	0	0	1	2	2	5	
6:45 PM	9	3	0	0	0	12	0	1	0	0	0	1	0	0	2	2	2	6	
Count Total	49	40	1	0	5	95	9	18	0	0	2	29	0	0	18	23	22	63	
Peak Hr	18	17	1	0	0	36	3	7	0	0	0	10	0	0	6	6	6	18	

Three-Hour Count Summaries - Heavy Vehicles

Interval Start	Stevens Creek Blvd					Stevens Creek Blvd					SR-85 NB Off Ramp					SR-85 NB On Ramp					Campus Dr					15-min Total	Rolling One Hour
	Eastbound					Westbound					Northbound					Southbound					Northwestbound						
	UT	LT	TH	BR	RT	UT	HL	LT	TH	RT	UT	LT	TH	RT	HR	UT	LT	BL	TH	RT	UT	HL	BL	BR	HR		
4:00 PM	0	1	4	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	7	0	
4:15 PM	0	1	0	0	0	0	0	0	3	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	
4:30 PM	0	1	3	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	6	0	
4:45 PM	0	1	3	0	0	0	0	0	3	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9	27	
5:00 PM	0	3	2	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9	29	
5:15 PM	0	2	3	0	0	0	0	0	6	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	11	35	
5:30 PM	0	1	5	0	0	0	0	0	2	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	10	39	
5:45 PM	0	1	1	0	0	0	0	0	3	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	6	36	
6:00 PM	0	1	3	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	5	0	0	10	37	
6:15 PM	0	2	0	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	31	
6:30 PM	0	0	2	0	0	0	0	0	2	1	0	0	0	0	0	0	2	0	0	0	0	0	0	0	5	26	
6:45 PM	0	1	8	0	0	0	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	12	32	
Count Total	0	15	34	0	0	0	0	0	30	10	0	0	0	1	0	0	0	0	0	0	0	0	5	0	95	0	
Peak Hour	0	7	11	0	0	0	0	0	15	2	0	0	0	1	0	0	0	0	0	0	0	0	0	0	36	0	

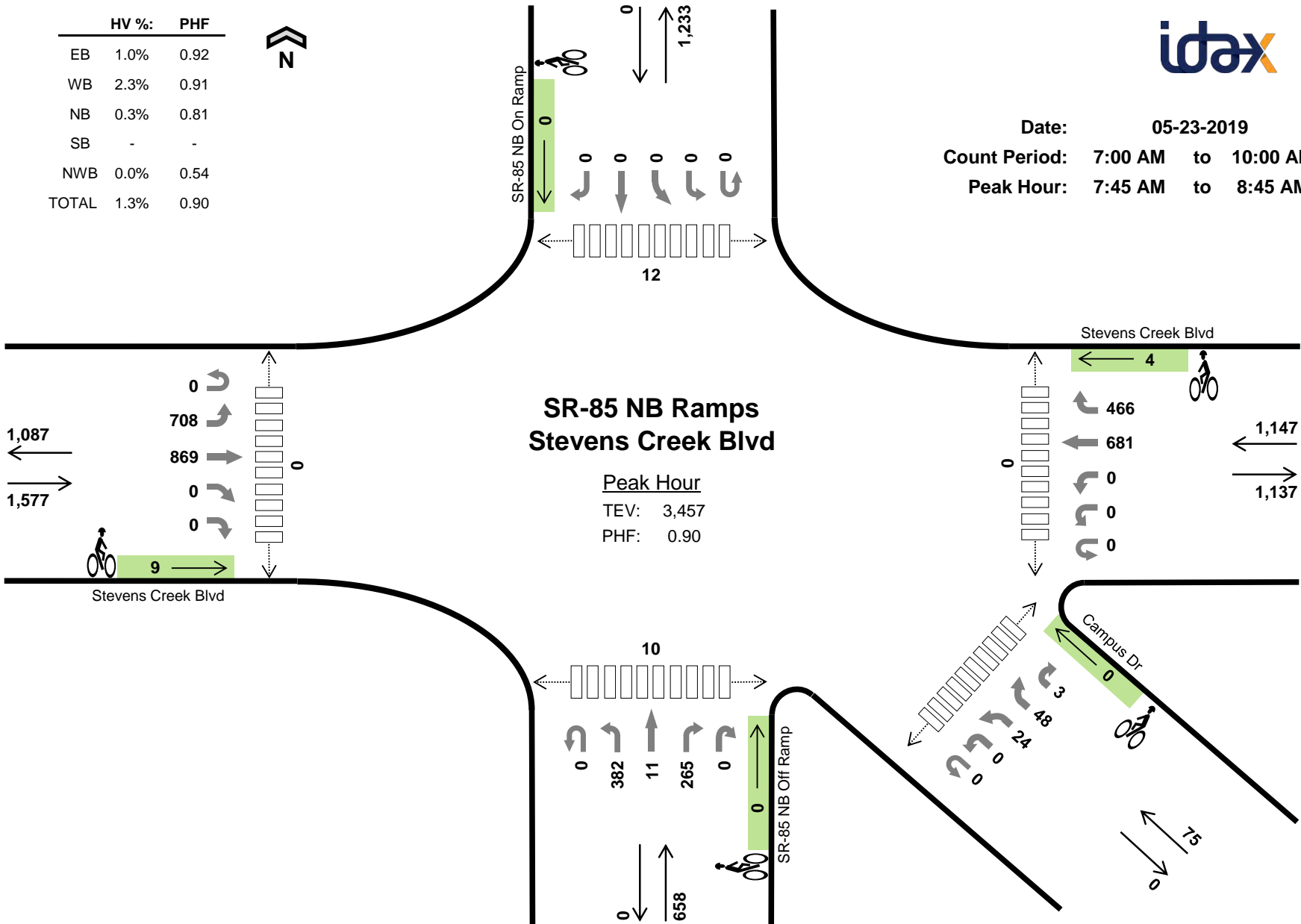
Three-Hour Count Summaries - Bikes

Interval Start	Stevens Creek Blvd					Stevens Creek Blvd					SR-85 NB Off Ramp					SR-85 NB On Ramp					Campus Dr					15-min Total	Rolling One Hour
	Eastbound					Westbound					Northbound					Southbound					Northwestbound						
	UT	LT	TH	BR	RT	UT	HL	LT	TH	RT	UT	LT	TH	RT	HR	UT	LT	BL	TH	RT	UT	HL	BL	BR	HR		
4:00 PM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4:15 PM	0	0	1	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	0
4:30 PM	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0
4:45 PM	0	0	3	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	11
5:00 PM	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	13
5:15 PM	0	0	0	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	13
5:30 PM	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	12
5:45 PM	0	0	1	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	10
6:00 PM	0	0	2	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	5	13
6:15 PM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9
6:30 PM	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	10
6:45 PM	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	8
Count Total	0	0	9	0	0	0	0	0	18	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	29	0
Peak Hour	0	0	3	0	0	0	0	0	7	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	10	0	



Date: 05-23-2019
 Count Period: 7:00 AM to 10:00 AM
 Peak Hour: 7:45 AM to 8:45 AM

	HV %:	PHF
EB	1.0%	0.92
WB	2.3%	0.91
NB	0.3%	0.81
SB	-	-
NWB	0.0%	0.54
TOTAL	1.3%	0.90



Three-Hour Count Summaries

Interval Start	Stevens Creek Blvd					Stevens Creek Blvd					SR-85 NB Off Ramp					SR-85 NB On Ramp					Campus Dr					15-min Total	Rolling One Hour
	Eastbound					Westbound					Northbound					Southbound					Northwestbound						
	UT	LT	TH	BR	RT	UT	HL	LT	TH	RT	UT	LT	TH	RT	HR	UT	LT	BL	TH	RT	UT	HL	BL	BR	HR		
7:00 AM	0	86	96	0	0	0	0	0	50	82	0	44	1	45	0	0	0	0	0	0	0	2	0	406	0		
7:15 AM	0	106	147	0	0	0	0	0	70	103	0	40	0	35	0	0	0	0	0	0	0	2	11	514	0		
7:30 AM	0	149	127	0	0	0	0	0	138	126	0	54	1	38	0	0	0	0	0	0	0	2	8	643	0		
7:45 AM	0	187	206	0	0	0	0	0	188	112	0	75	1	38	0	0	0	0	0	0	0	2	12	821	2,384		
8:00 AM	0	163	212	0	0	0	0	0	157	126	0	106	3	95	0	0	0	0	0	0	0	2	4	869	2,847		
8:15 AM	0	163	265	0	0	0	0	0	201	115	0	94	4	78	0	0	0	0	0	0	0	13	21	955	3,288		
8:30 AM	0	195	186	0	0	0	0	0	135	113	0	107	3	54	0	0	0	0	0	0	0	7	11	812	3,457		
8:45 AM	0	139	167	0	0	0	0	0	138	127	0	104	3	67	0	0	0	0	0	0	0	8	11	764	3,400		
9:00 AM	0	126	193	0	0	0	0	0	110	109	0	56	0	44	0	0	0	0	0	0	0	3	15	658	3,189		
9:15 AM	0	145	283	0	0	0	0	0	107	131	0	21	1	49	0	0	0	0	0	0	0	12	34	783	3,017		
9:30 AM	0	191	187	0	0	0	0	0	114	163	0	24	1	20	0	0	0	0	0	0	0	12	32	744	2,949		
9:45 AM	0	169	186	0	0	0	0	0	97	140	0	30	0	29	0	0	0	0	0	0	0	8	18	677	2,862		
Count Total	0	1,819	2,255	0	0	0	0	0	1,505	1,447	0	755	18	592	0	0	0	0	0	0	0	71	179	5	8,646	0	
Peak Hour	All	0	708	869	0	0	0	0	681	466	0	382	11	265	0	0	0	0	0	0	0	24	48	3	3,457	0	
	HV	0	4	12	0	0	0	0	13	13	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	44	0
	HV%	-	1%	1%	-	-	-	-	2%	3%	-	0%	9%	0%	-	-	-	-	-	-	-	0%	0%	0%	1%	0	

Note: Three-hour count summary volumes include heavy vehicles but exclude bicycles in overall count.

Interval Start	Heavy Vehicle Totals						Bicycles						Pedestrians (Crossing Leg)					
	EB	WB	NB	SB	NWB	Total	EB	WB	NB	SB	NWB	Total	East	West	North	South	Southeast	Total
7:00 AM	5	8	2	0	0	15	1	0	0	0	0	1	0	0	3	0	0	3
7:15 AM	6	7	1	0	0	14	2	0	0	0	0	2	0	0	0	1	1	2
7:30 AM	4	2	0	0	0	6	0	2	0	0	0	2	0	0	2	1	1	4
7:45 AM	5	9	0	0	0	14	1	2	0	0	0	3	0	0	1	0	0	1
8:00 AM	2	8	0	0	0	10	3	0	0	0	0	3	0	0	4	4	4	12
8:15 AM	3	6	1	0	0	10	2	2	0	0	0	4	0	0	6	3	3	12
8:30 AM	6	3	1	0	0	10	3	0	0	0	0	3	0	0	1	3	3	7
8:45 AM	6	9	1	0	0	16	0	0	0	0	0	0	0	0	5	1	1	7
9:00 AM	5	8	1	0	0	14	0	0	1	0	0	1	0	0	1	6	6	13
9:15 AM	5	7	0	0	0	12	2	0	0	0	0	2	0	0	1	5	5	11
9:30 AM	9	4	1	0	0	14	2	3	0	0	0	5	0	0	6	2	2	10
9:45 AM	5	7	0	0	1	13	0	0	0	0	0	0	0	0	2	4	4	10
Count Total	61	78	8	0	1	148	16	9	1	0	0	26	0	0	32	30	30	92
Peak Hr	16	26	2	0	0	44	9	4	0	0	0	13	0	0	12	10	10	32

Three-Hour Count Summaries - Heavy Vehicles

Interval Start	Stevens Creek Blvd					Stevens Creek Blvd					SR-85 NB Off Ramp					SR-85 NB On Ramp					Campus Dr					15-min Total	Rolling One Hour
	Eastbound					Westbound					Northbound					Southbound					Northwestbound						
	UT	LT	TH	BR	RT	UT	HL	LT	TH	RT	UT	LT	TH	RT	HR	UT	LT	BL	TH	RT	UT	HL	BL	BR	HR		
7:00 AM	0	0	5	0	0	0	0	0	3	5	0	0	0	2	0	0	0	0	0	0	0	0	0	15	0		
7:15 AM	0	1	5	0	0	0	0	0	3	4	0	1	0	0	0	0	0	0	0	0	0	0	0	14	0		
7:30 AM	0	1	3	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	6	0		
7:45 AM	0	2	3	0	0	0	0	0	5	4	0	0	0	0	0	0	0	0	0	0	0	0	0	14	49		
8:00 AM	0	1	1	0	0	0	0	0	4	4	0	0	0	0	0	0	0	0	0	0	0	0	0	10	44		
8:15 AM	0	0	3	0	0	0	0	0	2	4	0	1	0	0	0	0	0	0	0	0	0	0	0	10	40		
8:30 AM	0	1	5	0	0	0	0	0	2	1	0	0	1	0	0	0	0	0	0	0	0	0	0	10	44		
8:45 AM	0	5	1	0	0	0	0	0	4	5	0	1	0	0	0	0	0	0	0	0	0	0	0	16	46		
9:00 AM	0	5	0	0	0	0	0	0	5	3	0	1	0	0	0	0	0	0	0	0	0	0	0	14	50		
9:15 AM	0	1	4	0	0	0	0	0	4	3	0	0	0	0	0	0	0	0	0	0	0	0	0	12	52		
9:30 AM	0	3	6	0	0	0	0	0	2	2	0	1	0	0	0	0	0	0	0	0	0	0	0	14	56		
9:45 AM	0	1	4	0	0	0	0	0	3	4	0	0	0	0	0	0	0	0	0	0	0	1	0	13	53		
Count Total	0	21	40	0	0	0	0	0	38	40	0	5	1	2	0	0	0	0	0	0	0	0	1	0	148	0	
Peak Hour	0	4	12	0	0	0	0	0	13	13	0	1	1	0	0	0	0	0	0	0	0	0	0	44	0		

Three-Hour Count Summaries - Bikes

Interval Start	Stevens Creek Blvd					Stevens Creek Blvd					SR-85 NB Off Ramp					SR-85 NB On Ramp					Campus Dr					15-min Total	Rolling One Hour
	Eastbound					Westbound					Northbound					Southbound					Northwestbound						
	UT	LT	TH	BR	RT	UT	HL	LT	TH	RT	UT	LT	TH	RT	HR	UT	LT	BL	TH	RT	UT	HL	BL	BR	HR		
7:00 AM	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	
7:15 AM	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	
7:30 AM	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	
7:45 AM	0	0	1	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	8	
8:00 AM	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	10	
8:15 AM	0	0	2	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	12	
8:30 AM	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	13	
8:45 AM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	10	
9:00 AM	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	1	8	
9:15 AM	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	6	
9:30 AM	0	0	2	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	8	
9:45 AM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8	
Count Total	0	0	16	0	0	0	0	0	9	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	26	0	
Peak Hour	0	0	9	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	13	0		

A2: Existing Conditions Synchro Outputs



Movement	EBL	EBT	WBT	WBR	NBL	NBT	NBR	NWL	NWR
Lane Configurations									
Traffic Volume (vph)	708	869	681	466	382	11	265	24	51
Future Volume (vph)	708	869	681	466	382	11	265	24	51
Ideal Flow (vphpl)	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.0	6.0	6.0	6.0		6.0	6.0	6.0	6.0
Lane Util. Factor	*0.83	*1.00	*1.00	*0.92		*0.92	*0.92	*0.92	*1.00
Frbp, ped/bikes	1.00	1.00	1.00	0.98		1.00	1.00	1.00	1.00
Flpb, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Frt	1.00	1.00	1.00	0.85		1.00	1.00	1.00	1.00
Flt Protected	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (prot)	3123	5644	5588	1433		1731	1731	1748	1900
Flt Permitted	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (perm)	3123	5644	5588	1433		1731	1731	1748	1900
Peak-hour factor, PHF	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Adj. Flow (vph)	708	869	681	466	382	11	265	24	51
RTOR Reduction (vph)	0	0	0	0	0	0	0	0	0
Lane Group Flow (vph)	708	869	681	466	0	420	238	39	36
Confl. Peds. (#/hr)	12			12					
Confl. Bikes (#/hr)				4					
Heavy Vehicles (%)	1%	1%	2%	2%	1%	1%	1%	0%	0%
Turn Type	Prot	NA	NA	Free	Split	NA	Perm	Prot	Prot
Protected Phases	7	4	8		2	2		1	1
Permitted Phases				Free			2		
Actuated Green, G (s)	26.7	45.8	15.1	93.2		29.8	29.8	5.6	5.6
Effective Green, g (s)	24.7	43.8	13.1	93.2		27.8	27.8	3.6	3.6
Actuated g/C Ratio	0.27	0.47	0.14	1.00		0.30	0.30	0.04	0.04
Clearance Time (s)	4.0	4.0	4.0			4.0	4.0	4.0	4.0
Vehicle Extension (s)	3.0	3.0	3.0			3.0	3.0	3.0	3.0
Lane Grp Cap (vph)	827	2652	785	1433		516	516	67	73
v/s Ratio Prot	c0.23	0.15	c0.12			c0.24		0.02	0.02
v/s Ratio Perm				c0.33			0.14		
v/c Ratio	0.86	0.33	0.87	0.33		0.81	0.46	0.58	0.49
Uniform Delay, d1	32.6	15.5	39.2	0.0		30.3	26.6	44.1	43.9
Progression Factor	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Incremental Delay, d2	8.7	0.1	10.0	0.6		9.5	0.7	12.2	5.2
Delay (s)	41.2	15.5	49.2	0.6		39.8	27.3	56.3	49.1
Level of Service	D	B	D	A		D	C	E	D
Approach Delay (s)		27.1	29.4			35.3		52.8	
Approach LOS		C	C			D		D	
Intersection Summary									
HCM 2000 Control Delay			30.0			HCM 2000 Level of Service			C
HCM 2000 Volume to Capacity ratio			0.84						
Actuated Cycle Length (s)			93.2			Sum of lost time (s)			24.0
Intersection Capacity Utilization			101.6%			ICU Level of Service			G
Analysis Period (min)			15						
c Critical Lane Group									



Movement	EBL	EBT	WBT	WBR	NBL	NBT	NBR	NWL	NWR
Lane Configurations									
Traffic Volume (vph)	534	1680	547	447	146	2	289	48	126
Future Volume (vph)	534	1680	547	447	146	2	289	48	126
Ideal Flow (vphpl)	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	7.0	7.0	7.0	6.0		7.0	7.0	7.0	7.0
Lane Util. Factor	*0.83	*1.00	*1.00	*0.92		*0.92	*0.92	*0.92	*1.00
Frbp, ped/bikes	1.00	1.00	1.00	0.98		1.00	1.00	1.00	1.00
Flpb, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Frt	1.00	1.00	1.00	0.85		1.00	1.00	1.00	1.00
Flt Protected	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (prot)	3123	5644	5588	1434		1731	1731	1748	1900
Flt Permitted	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (perm)	3123	5644	5588	1434		1731	1731	1748	1900
Peak-hour factor, PHF	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Adj. Flow (vph)	534	1680	547	447	146	2	289	48	126
RTOR Reduction (vph)	0	0	0	0	0	0	0	0	0
Lane Group Flow (vph)	534	1680	547	447	0	226	211	90	84
Confl. Peds. (#/hr)	6			6					
Confl. Bikes (#/hr)				7					
Heavy Vehicles (%)	1%	1%	2%	2%	1%	1%	1%	0%	0%
Turn Type	Prot	NA	NA	Free	Split	NA	Perm	Prot	Prot
Protected Phases	7	4	8		2	2		1	1
Permitted Phases				Free			2		
Actuated Green, G (s)	21.6	42.5	15.9	87.6		18.2	18.2	11.9	11.9
Effective Green, g (s)	19.6	40.5	13.9	87.6		16.2	16.2	9.9	9.9
Actuated g/C Ratio	0.22	0.46	0.16	1.00		0.18	0.18	0.11	0.11
Clearance Time (s)	5.0	5.0	5.0			5.0	5.0	5.0	5.0
Vehicle Extension (s)	3.0	3.0	3.0			3.0	3.0	3.0	3.0
Lane Grp Cap (vph)	698	2609	886	1434		320	320	197	214
v/s Ratio Prot	0.17	c0.30	0.10			c0.13		0.05	0.04
v/s Ratio Perm				c0.31			0.12		
v/c Ratio	0.77	0.64	0.62	0.31		0.71	0.66	0.46	0.39
Uniform Delay, d1	31.8	18.0	34.4	0.0		33.5	33.1	36.3	36.1
Progression Factor	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Incremental Delay, d2	5.0	0.6	1.3	0.6		6.9	4.9	1.7	1.2
Delay (s)	36.8	18.6	35.7	0.6		40.4	38.0	38.0	37.2
Level of Service	D	B	D	A		D	D	D	D
Approach Delay (s)		23.0	19.9			39.2		37.6	
Approach LOS		C	B			D		D	
Intersection Summary									
HCM 2000 Control Delay			24.7			HCM 2000 Level of Service			C
HCM 2000 Volume to Capacity ratio			0.72						
Actuated Cycle Length (s)			87.6			Sum of lost time (s)			28.0
Intersection Capacity Utilization			88.5%			ICU Level of Service			E
Analysis Period (min)			15						
c Critical Lane Group									

Intersection: 2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD

Movement	EB	EB	EB	EB	EB	WB	WB	WB	WB	B19	B19	NB
Directions Served	L	L	T	T	T	T	T	T	R	T	T	LTR
Maximum Queue (ft)	358	360	175	176	201	125	223	208	245	13	57	514
Average Queue (ft)	286	295	78	74	84	42	109	91	93	1	3	485
95th Queue (ft)	396	402	147	149	163	99	199	181	220	8	27	591
Link Distance (ft)	346	346	346	346	346	176	176	176	176	591	591	436
Upstream Blk Time (%)	8	11					2	1	3			68
Queuing Penalty (veh)	33	44					7	3	8			0
Storage Bay Dist (ft)												
Storage Blk Time (%)												
Queuing Penalty (veh)												

Intersection: 2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD

Movement	NB	B27	NW	NW
Directions Served	R	T	LR	R
Maximum Queue (ft)	485	601	74	65
Average Queue (ft)	234	433	43	19
95th Queue (ft)	483	812	81	53
Link Distance (ft)	436	559	69	69
Upstream Blk Time (%)	1	57	7	1
Queuing Penalty (veh)	0	0	4	0
Storage Bay Dist (ft)				
Storage Blk Time (%)				
Queuing Penalty (veh)				

2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD PEAK



Movement	EBL	EBT	WBT	WBR	NBL	NBT	NBR	NWL	NWR
Lane Configurations									
Traffic Volume (vph)	708	875	697	490	382	11	267	24	51
Future Volume (vph)	708	875	697	490	382	11	267	24	51
Ideal Flow (vphpl)	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.0	6.0	6.0	6.0		6.0	6.0	6.0	6.0
Lane Util. Factor	*0.83	*1.00	*1.00	*0.92		*0.92	*0.92	*0.92	*1.00
Frbp, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Flpb, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Frt	1.00	1.00	1.00	0.85		1.00	1.00	1.00	1.00
Flt Protected	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (prot)	3123	5644	5588	1457		1731	1731	1748	1900
Flt Permitted	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (perm)	3123	5644	5588	1457		1731	1731	1748	1900
Peak-hour factor, PHF	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Adj. Flow (vph)	708	875	697	490	382	11	267	24	51
RTOR Reduction (vph)	0	0	0	0	0	0	0	0	0
Lane Group Flow (vph)	708	875	697	490	0	420	240	39	36
Confl. Peds. (#/hr)	12			12					
Confl. Bikes (#/hr)				5					
Heavy Vehicles (%)	1%	1%	2%	2%	1%	1%	1%	0%	0%
Turn Type	Prot	NA	NA	custom	Split	NA	Prot	Prot	Prot
Protected Phases	1!	6	2	1 7 8!	8	8!	8	7	7!
Permitted Phases									
Actuated Green, G (s)	22.1	44.8	18.7	59.2		23.1	23.1	6.0	6.0
Effective Green, g (s)	20.1	42.8	16.7	57.2		21.1	21.1	4.0	4.0
Actuated g/C Ratio	0.23	0.50	0.19	0.67		0.25	0.25	0.05	0.05
Clearance Time (s)	4.0	4.0	4.0			4.0	4.0	4.0	4.0
Vehicle Extension (s)	3.0	3.0	3.0			3.0	3.0	3.0	3.0
Lane Grp Cap (vph)	730	2812	1086	970		425	425	81	88
v/s Ratio Prot	c0.23	0.16	c0.12	c0.34		c0.24	0.14	0.02	0.02
v/s Ratio Perm									
v/c Ratio	0.97	0.31	0.64	0.51		0.99	0.56	0.48	0.41
Uniform Delay, d1	32.6	12.8	31.8	7.2		32.3	28.4	39.9	39.8
Progression Factor	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Incremental Delay, d2	25.7	0.1	1.3	0.4		40.1	1.7	4.5	3.1
Delay (s)	58.3	12.9	33.2	7.6		72.4	30.1	44.4	42.9
Level of Service	E	B	C	A		E	C	D	D
Approach Delay (s)		33.2	22.6			57.0		43.7	
Approach LOS		C	C			E		D	

Intersection Summary

HCM 2000 Control Delay	34.3	HCM 2000 Level of Service	C
HCM 2000 Volume to Capacity ratio	0.89		
Actuated Cycle Length (s)	85.9	Sum of lost time (s)	24.0
Intersection Capacity Utilization	103.1%	ICU Level of Service	G
Analysis Period (min)	15		

! Phase conflict between lane groups.

c Critical Lane Group

Intersection: 2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD

Movement	EB	EB	EB	EB	EB	WB	WB	WB	WB	B19	B19	NB
Directions Served	L	L	T	T	T	T	T	T	R	T	T	LTR
Maximum Queue (ft)	264	276	280	257	251	125	200	167	248	40	82	246
Average Queue (ft)	167	163	165	149	141	33	79	52	102	1	5	154
95th Queue (ft)	253	262	250	240	233	89	171	125	243	32	38	224
Link Distance (ft)	346	346	346	346	346	176	176	176	176	591	591	436
Upstream Blk Time (%)			0			0	1	0	4			
Queuing Penalty (veh)			0			0	3	0	10			
Storage Bay Dist (ft)												
Storage Blk Time (%)												
Queuing Penalty (veh)												

Intersection: 2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD

Movement	NB	NW	NW
Directions Served	R	LR	R
Maximum Queue (ft)	191	91	78
Average Queue (ft)	97	66	41
95th Queue (ft)	171	89	77
Link Distance (ft)	436	69	69
Upstream Blk Time (%)		30	5
Queuing Penalty (veh)		15	2
Storage Bay Dist (ft)			
Storage Blk Time (%)			
Queuing Penalty (veh)			

2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD



Movement	EBL	EBT	WBT	WBR	NBL	NBT	NBR	NWL	NWR
Lane Configurations									
Traffic Volume (vph)	534	1697	549	451	146	2	294	48	126
Future Volume (vph)	534	1697	549	451	146	2	294	48	126
Ideal Flow (vphpl)	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.0	6.0	6.0	6.0		6.0	6.0	6.0	6.0
Lane Util. Factor	*0.83	*1.00	*1.00	*0.92		*0.92	*0.92	*0.92	*1.00
Frbp, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Flpb, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Frt	1.00	1.00	1.00	0.85		1.00	1.00	1.00	1.00
Flt Protected	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (prot)	3123	5644	5588	1457		1731	1731	1748	1900
Flt Permitted	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (perm)	3123	5644	5588	1457		1731	1731	1748	1900
Peak-hour factor, PHF	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Adj. Flow (vph)	534	1697	549	451	146	2	294	48	126
RTOR Reduction (vph)	0	0	0	0	0	0	0	0	0
Lane Group Flow (vph)	534	1697	549	451	0	230	212	90	84
Confl. Peds. (#/hr)	8			8					
Confl. Bikes (#/hr)				9					
Heavy Vehicles (%)	1%	1%	2%	2%	1%	1%	1%	0%	0%
Turn Type	Prot	NA	NA	custom	Split	NA	Prot	Prot	Prot
Protected Phases	1!	6	2	1 7 8!	8	8!	8	7	7!
Permitted Phases									
Actuated Green, G (s)	16.4	38.0	17.6	46.9		16.3	16.3	6.2	6.2
Effective Green, g (s)	14.4	36.0	15.6	44.9		14.3	14.3	4.2	4.2
Actuated g/C Ratio	0.20	0.50	0.22	0.62		0.20	0.20	0.06	0.06
Clearance Time (s)	4.0	4.0	4.0			4.0	4.0	4.0	4.0
Vehicle Extension (s)	3.0	3.0	3.0			3.0	3.0	3.0	3.0
Lane Grp Cap (vph)	620	2802	1202	902		341	341	101	110
v/s Ratio Prot	c0.17	c0.30	0.10	c0.31		0.13	0.12	0.05	0.04
v/s Ratio Perm									
v/c Ratio	0.86	0.61	0.46	0.50		0.67	0.62	0.89	0.76
Uniform Delay, d1	28.1	13.1	24.8	7.6		26.9	26.6	33.9	33.7
Progression Factor	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Incremental Delay, d2	11.8	0.4	0.3	0.4		5.2	3.5	56.0	26.4
Delay (s)	39.9	13.5	25.0	8.0		32.1	30.1	90.0	60.1
Level of Service	D	B	C	A		C	C	F	E
Approach Delay (s)		19.8	17.4			31.2		75.5	
Approach LOS		B	B			C		E	

Intersection Summary

HCM 2000 Control Delay	23.0	HCM 2000 Level of Service	C
HCM 2000 Volume to Capacity ratio	0.77		
Actuated Cycle Length (s)	72.5	Sum of lost time (s)	24.0
Intersection Capacity Utilization	83.4%	ICU Level of Service	E
Analysis Period (min)	15		

! Phase conflict between lane groups.

c Critical Lane Group

A4: Cumulative Conditions Synchro Outputs



Movement	EBL	EBT	WBT	WBR	NBL	NBT	NBR	NWL	NWR	NWR2
Lane Configurations										
Traffic Volume (vph)	904	1523	687	551	455	49	393	4	84	47
Future Volume (vph)	904	1523	687	551	455	49	393	4	84	47
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.0	6.0	6.0	6.0		6.0	6.0	6.0	6.0	
Lane Util. Factor	*0.83	*1.00	*1.00	*0.92		*0.92	*0.92	*0.92	*1.00	
Frbp, ped/bikes	1.00	1.00	1.00	0.98		1.00	1.00	1.00	1.00	
Flpb, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Frt	1.00	1.00	1.00	0.85		1.00	1.00	1.00	1.00	
Flt Protected	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Satd. Flow (prot)	3123	5644	5588	1433		1731	1731	1748	1900	
Flt Permitted	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Satd. Flow (perm)	3123	5644	5588	1433		1731	1731	1748	1900	
Peak-hour factor, PHF	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Adj. Flow (vph)	904	1523	687	551	455	49	393	4	84	47
RTOR Reduction (vph)	0	0	0	0	0	0	0	0	64	0
Lane Group Flow (vph)	904	1523	687	551	0	543	354	68	3	0
Confl. Peds. (#/hr)	12			12						
Confl. Bikes (#/hr)				4						
Heavy Vehicles (%)	1%	1%	2%	2%	1%	1%	1%	0%	0%	0%
Turn Type	Prot	NA	NA	Free	Split	NA	Perm	Prot	Prot	
Protected Phases	7	4	8		2	2		1	1	
Permitted Phases				Free			2			
Actuated Green, G (s)	29.0	48.0	15.0	100.0		34.0	34.0	6.0	6.0	
Effective Green, g (s)	27.0	46.0	13.0	100.0		32.0	32.0	4.0	4.0	
Actuated g/C Ratio	0.27	0.46	0.13	1.00		0.32	0.32	0.04	0.04	
Clearance Time (s)	4.0	4.0	4.0			4.0	4.0	4.0	4.0	
Vehicle Extension (s)	3.0	3.0	3.0			3.0	3.0	3.0	3.0	
Lane Grp Cap (vph)	843	2596	726	1433		553	553	69	76	
v/s Ratio Prot	c0.29	0.27	c0.12			c0.31		c0.04	0.00	
v/s Ratio Perm				0.38			0.20			
v/c Ratio	1.07	0.59	0.95	0.38		0.98	0.64	0.99	0.04	
Uniform Delay, d1	36.5	20.0	43.2	0.0		33.7	29.1	48.0	46.1	
Progression Factor	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Incremental Delay, d2	52.3	0.3	21.1	0.8		33.5	2.5	102.6	0.2	
Delay (s)	88.8	20.3	64.2	0.8		67.2	31.6	150.6	46.3	
Level of Service	F	C	E	A		E	C	F	D	
Approach Delay (s)		45.8	36.0			53.1		98.8		
Approach LOS		D	D			D		F		

Intersection Summary	
HCM 2000 Control Delay	46.1 HCM 2000 Level of Service D
HCM 2000 Volume to Capacity ratio	1.01
Actuated Cycle Length (s)	100.0 Sum of lost time (s) 24.0
Intersection Capacity Utilization	122.4% ICU Level of Service H
Analysis Period (min)	15
c Critical Lane Group	

2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD PEAK



Movement	EBL	EBT	WBT	WBR	NBL	NBT	NBR	NWL	NWR
Lane Configurations									
Traffic Volume (vph)	567	1572	779	580	200	4	234	11	9
Future Volume (vph)	567	1572	779	580	200	4	234	11	9
Ideal Flow (vphpl)	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	7.0	7.0	7.0	6.0		7.0	7.0	7.0	7.0
Lane Util. Factor	*0.83	*1.00	*1.00	*0.92		*0.92	*0.92	*0.92	*1.00
Frbp, ped/bikes	1.00	1.00	1.00	0.98		1.00	1.00	1.00	1.00
Flpb, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Frt	1.00	1.00	1.00	0.85		1.00	1.00	1.00	1.00
Flt Protected	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (prot)	3123	5644	5588	1434		1731	1731	1748	1900
Flt Permitted	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (perm)	3123	5644	5588	1434		1731	1731	1748	1900
Peak-hour factor, PHF	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Adj. Flow (vph)	567	1572	779	580	200	4	234	11	9
RTOR Reduction (vph)	0	0	0	0	0	0	0	0	0
Lane Group Flow (vph)	567	1572	779	580	0	230	208	12	8
Confl. Peds. (#/hr)	6			6					
Confl. Bikes (#/hr)				7					
Heavy Vehicles (%)	1%	1%	2%	2%	1%	1%	1%	0%	0%
Turn Type	Prot	NA	NA	Free	Split	NA	Perm	Prot	Prot
Protected Phases	7	4	8		2	2		1	1
Permitted Phases				Free			2		
Actuated Green, G (s)	22.1	47.8	20.7	84.0		18.3	18.3	2.9	2.9
Effective Green, g (s)	20.1	45.8	18.7	84.0		16.3	16.3	0.9	0.9
Actuated g/C Ratio	0.24	0.55	0.22	1.00		0.19	0.19	0.01	0.01
Clearance Time (s)	5.0	5.0	5.0			5.0	5.0	5.0	5.0
Vehicle Extension (s)	3.0	3.0	3.0			3.0	3.0	3.0	3.0
Lane Grp Cap (vph)	747	3077	1243	1434		335	335	18	20
v/s Ratio Prot	c0.18	0.28	c0.14			c0.13		0.01	0.00
v/s Ratio Perm				c0.40			0.12		
v/c Ratio	0.76	0.51	0.63	0.40		0.69	0.62	0.67	0.40
Uniform Delay, d1	29.7	12.0	29.5	0.0		31.5	31.0	41.4	41.3
Progression Factor	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Incremental Delay, d2	4.4	0.1	1.0	0.8		5.7	3.6	66.1	12.6
Delay (s)	34.1	12.2	30.5	0.8		37.2	34.6	107.5	53.9
Level of Service	C	B	C	A		D	C	F	D
Approach Delay (s)		18.0	17.8			36.0		86.0	
Approach LOS		B	B			D		F	

Intersection Summary				
HCM 2000 Control Delay		20.3	HCM 2000 Level of Service	C
HCM 2000 Volume to Capacity ratio		0.74		
Actuated Cycle Length (s)		84.0	Sum of lost time (s)	28.0
Intersection Capacity Utilization		99.6%	ICU Level of Service	F
Analysis Period (min)		15		
c	Critical Lane Group			

Intersection: 2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD

Movement	EB	EB	EB	EB	EB	WB	WB	WB	WB	B19	B19	B19
Directions Served	L	L	T	T	T	T	T	T	R	T	T	T
Maximum Queue (ft)	361	359	354	369	363	207	234	224	242	118	23	107
Average Queue (ft)	320	322	217	227	227	88	141	116	104	8	1	7
95th Queue (ft)	426	417	358	385	390	178	229	208	246	55	15	51
Link Distance (ft)	346	346	346	346	346	166	166	166	166	591	591	591
Upstream Blk Time (%)	19	18	0	1	2	3	9	4	4			
Queuing Penalty (veh)	104	97	2	7	12	9	27	11	14			
Storage Bay Dist (ft)												
Storage Blk Time (%)												
Queuing Penalty (veh)												

Intersection: 2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD

Movement	NB	NB	B27	NW	NW
Directions Served	LTR	R	T	LR	R>
Maximum Queue (ft)	521	433	594	66	77
Average Queue (ft)	505	234	543	42	55
95th Queue (ft)	518	419	694	73	85
Link Distance (ft)	436	436	559	58	58
Upstream Blk Time (%)	66	0	57	11	25
Queuing Penalty (veh)	0	0	0	6	13
Storage Bay Dist (ft)					
Storage Blk Time (%)					
Queuing Penalty (veh)					

2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD PEAK



Movement	EBL	EBT	WBT	WBR	NBL	NBT	NBR	NWL	NWR	NWR2
Lane Configurations										
Traffic Volume (vph)	904	1529	703	575	455	49	395	4	84	47
Future Volume (vph)	904	1529	703	575	455	49	395	4	84	47
Ideal Flow (vphp)	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.0	6.0	6.0	6.0		6.0	6.0	6.0	6.0	
Lane Util. Factor	*0.83	*1.00	*1.00	*0.92		*0.92	*0.92	*0.92	*1.00	
Frbp, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Flpb, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Frt	1.00	1.00	1.00	0.85		1.00	1.00	1.00	1.00	
Flt Protected	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Satd. Flow (prot)	3123	5644	5588	1457		1731	1731	1748	1900	
Flt Permitted	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Satd. Flow (perm)	3123	5644	5588	1457		1731	1731	1748	1900	
Peak-hour factor, PHF	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Adj. Flow (vph)	904	1529	703	575	455	49	395	4	84	47
RTOR Reduction (vph)	0	0	0	0	0	0	0	0	0	0
Lane Group Flow (vph)	904	1529	703	575	0	544	355	68	67	0
Confl. Peds. (#/hr)	12			12						
Confl. Bikes (#/hr)				5						
Heavy Vehicles (%)	1%	1%	2%	2%	1%	1%	1%	0%	0%	0%
Turn Type	Prot	NA	NA	custom	Split	NA	Prot	Prot	Prot	
Protected Phases	1!	6	2	1 7 8!	8	8!	8	7	7!	
Permitted Phases										
Actuated Green, G (s)	40.1	68.9	24.8	98.2		43.1	43.1	7.0	7.0	
Effective Green, g (s)	38.1	66.9	22.8	96.2		41.1	41.1	5.0	5.0	
Actuated g/C Ratio	0.29	0.51	0.17	0.73		0.31	0.31	0.04	0.04	
Clearance Time (s)	4.0	4.0	4.0			4.0	4.0	4.0	4.0	
Vehicle Extension (s)	3.0	3.0	3.0			3.0	3.0	3.0	3.0	
Lane Grp Cap (vph)	908	2882	972	1069		543	543	66	72	
v/s Ratio Prot	c0.29	0.27	c0.13	0.39		c0.31	0.21	c0.04	0.04	
v/s Ratio Perm										
v/c Ratio	1.00	0.53	0.72	0.54		1.00	0.65	1.03	0.93	
Uniform Delay, d1	46.4	21.5	51.1	7.6		45.0	38.8	63.0	62.8	
Progression Factor	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	
Incremental Delay, d2	28.6	0.2	2.7	0.5		39.1	2.8	119.5	82.0	
Delay (s)	75.0	21.7	53.8	8.2		84.0	41.6	182.5	144.9	
Level of Service	E	C	D	A		F	D	F	F	
Approach Delay (s)		41.5	33.3			67.3		163.8		
Approach LOS		D	C			E		F		

Intersection Summary	
HCM 2000 Control Delay	47.6
HCM 2000 Volume to Capacity ratio	0.94
Actuated Cycle Length (s)	131.0
Intersection Capacity Utilization	123.9%
Analysis Period (min)	15
HCM 2000 Level of Service	D
Sum of lost time (s)	24.0
ICU Level of Service	H

! Phase conflict between lane groups.
 c Critical Lane Group

Intersection: 2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD

Movement	EB	EB	EB	EB	EB	WB	WB	WB	WB	B19	B19	B19
Directions Served	L	L	T	T	T	T	T	T	R	T	T	T
Maximum Queue (ft)	334	331	299	308	292	228	204	209	265	39	8	188
Average Queue (ft)	197	205	159	142	140	85	93	81	155	1	0	20
95th Queue (ft)	312	321	278	264	257	174	182	170	284	19	6	100
Link Distance (ft)	346	346	346	346	346	176	176	176	176	591	591	591
Upstream Blk Time (%)	0	0	0	0	0	1	1	1	8			
Queuing Penalty (veh)	2	1	0	0	0	3	5	3	30			
Storage Bay Dist (ft)												
Storage Blk Time (%)												
Queuing Penalty (veh)												

Intersection: 2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD

Movement	NB	NB	B27	NW	NW
Directions Served	LTR	R	T	LR	R
Maximum Queue (ft)	336	243	96	61	41
Average Queue (ft)	178	91	12	20	3
95th Queue (ft)	318	195	121	55	21
Link Distance (ft)	436	436	559	69	69
Upstream Blk Time (%)	3		0	0	0
Queuing Penalty (veh)	0		0	0	0
Storage Bay Dist (ft)					
Storage Blk Time (%)					
Queuing Penalty (veh)					

2: NORTHBOUND SR 85 RAMPS & DE ANZA COLLEGE DWY & STEVENS CREEK BLVD PEAK



Movement	EBL	EBT	WBT	WBR	NBL	NBT	NBR	NWL	NWR
Lane Configurations									
Traffic Volume (vph)	567	1589	781	584	200	4	239	11	9
Future Volume (vph)	567	1589	781	584	200	4	239	11	9
Ideal Flow (vphpl)	1900	1900	1900	1900	1900	1900	1900	1900	1900
Total Lost time (s)	6.0	6.0	6.0	6.0		6.0	6.0	6.0	6.0
Lane Util. Factor	*0.83	*1.00	*1.00	*0.92		*0.92	*0.92	*0.92	*1.00
Frbp, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Flpb, ped/bikes	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Frt	1.00	1.00	1.00	0.85		1.00	1.00	1.00	1.00
Flt Protected	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (prot)	3123	5644	5588	1457		1731	1731	1748	1900
Flt Permitted	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Satd. Flow (perm)	3123	5644	5588	1457		1731	1731	1748	1900
Peak-hour factor, PHF	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Adj. Flow (vph)	567	1589	781	584	200	4	239	11	9
RTOR Reduction (vph)	0	0	0	0	0	0	0	0	0
Lane Group Flow (vph)	567	1589	781	584	0	233	210	12	8
Confl. Peds. (#/hr)	8			8					
Confl. Bikes (#/hr)				9					
Heavy Vehicles (%)	1%	1%	2%	2%	1%	1%	1%	0%	0%
Turn Type	Prot	NA	NA	custom	Split	NA	Prot	Prot	Prot
Protected Phases	1!	6	2	1 7 8!	8	8!	8	7	7!
Permitted Phases									
Actuated Green, G (s)	16.2	39.4	19.2	48.9		18.6	18.6	6.1	6.1
Effective Green, g (s)	14.2	37.4	17.2	46.9		16.6	16.6	4.1	4.1
Actuated g/C Ratio	0.19	0.49	0.23	0.62		0.22	0.22	0.05	0.05
Clearance Time (s)	4.0	4.0	4.0			4.0	4.0	4.0	4.0
Vehicle Extension (s)	3.0	3.0	3.0			3.0	3.0	3.0	3.0
Lane Grp Cap (vph)	582	2773	1262	897		377	377	94	102
v/s Ratio Prot	c0.18	c0.28	0.14	c0.40		0.13	0.12	0.01	0.00
v/s Ratio Perm									
v/c Ratio	0.97	0.57	0.62	0.65		0.62	0.56	0.13	0.08
Uniform Delay, d1	30.8	13.7	26.5	9.4		26.9	26.5	34.3	34.2
Progression Factor	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00
Incremental Delay, d2	30.6	0.3	0.9	1.7		3.0	1.8	0.6	0.3
Delay (s)	61.4	14.0	27.4	11.1		29.9	28.3	34.9	34.5
Level of Service	E	B	C	B		C	C	C	C
Approach Delay (s)		26.4	20.4			29.1		34.8	
Approach LOS		C	C			C		C	

Intersection Summary	
HCM 2000 Control Delay	24.7
HCM 2000 Volume to Capacity ratio	0.86
Actuated Cycle Length (s)	76.1
Intersection Capacity Utilization	93.5%
Analysis Period (min)	15
HCM 2000 Level of Service	C
Sum of lost time (s)	24.0
ICU Level of Service	F

! Phase conflict between lane groups.
 c Critical Lane Group

A6: Westport Trip Generation

Table 1													
Project													
TRIP GENERATION - WESTPORT													
Land Uses	ITE Land Use Code	Project Size		WEEKDAY	AM PEAK HOUR			PM PEAK HOUR					
				Daily Trips	Total Peak Hour	IN	/	OUT	Total Peak Hour	IN	/	OUT	
Multifamily Housing (Low Rise)	220	-	Dwelling Unit(s)	7.32	0.46	23%	/	77%	0.56	63%	/	37%	
Multifamily Housing (Mid-Rise)	221	-	Dwelling Unit(s)	5.44	0.36	26%	/	74%	0.44	61%	/	39%	
Senior Adult Housing-Attached	252	-	Dwelling Unit(s)	3.70	0.20	35%	/	65%	0.26	55%	/	45%	
Shopping Center	820	-	1,000 Sq Ft GLA	37.75	0.94	62%	/	38%	3.81	48%	/	52%	
Existing Conditions													
Shopping Center (100% Occupancy)	820	71.254	1,000 Sq Ft GLA	2690	67	42	/	25	271	130	/	141	
Shopping Center (85% Occupancy) ¹	820	60.566	1,000 Sq Ft GLA	2287	57	36	/	21	230	110	/	120	
				<i>Pass-By Trips for Shopping Center (PM = 34%)^{3,4}</i>	(78)	0	0	/	0	(78)	(37)	/	(41)
TOAL EXISTING TRIP CREDIT				2209	57	36	/	21	152	73	/	79	
Proposed Conditions													
Multifamily Housing (Low-Rise)	220	88	Dwelling Unit(s)	646	40	9	/	31	49	31	/	18	
Multifamily Housing (Mid-Rise)	221	115	Dwelling Unit(s)	626	41	11	/	30	51	31	/	20	
Senior Adult Housing-Attached	252	39	Dwelling Unit(s)	146	8	3	/	5	10	6	/	4	
Shopping Center	820	20.000	1,000 Sq Ft GLA	756	19	12	/	7	76	36	/	40	
Gross Trips Generated before Internal Capture				2,174	108	35	/	73	186	104	/	82	
Internal Capture Trips													
Multifamily Housing (Low-Rise)	220	88	Dwelling Unit(s)	(44)	(1)	0	/	(1)	(6)	(4)	/	(2)	
Multifamily Housing (Mid-Rise)	221	115	Dwelling Unit(s)	(42)	0	0	/	0	(7)	(5)	/	(2)	
Senior Adult Housing-Attached	252	39	Dwelling Unit(s)	(10)	0	0	/	0	(1)	(1)	/	0	
Shopping Center	820	20.000	1,000 Sq Ft GLA	(90)	(1)	(1)	/	0	(14)	(4)	/	(10)	
Internal Capture Reduction				(186)	(2)	(1)	/	(1)	(28)	(14)	/	(14)	
Trip Reductions due to Internal Capture⁵				9%	2%	3%	/	1%	15%	13%	/	17%	
Additional Project Trip Reductions													
				<i>VTA Major Bus Stop (Daily, AM, PM = 2%)²</i>	(28)	(2)	(1)	/	(1)	(2)	(1)	/	(1)
				<i>Pass-By Trips for Shopping Center (PM = 34%)^{3,4}</i>	(26)	0	0	0	(26)	(12)	/	(14)	
Project Trips				1,934	104	33	/	71	130	77	/	53	
Existing Trip Credit				(2209)	(57)	(36)	/	(21)	(152)	(73)	/	(79)	
Total Project Trips				1934	104	33	/	71	130	77	/	53	
Net New Project Trips				(275)	47	(3)	/	50	(22)	4	/	(26)	
Notes:													
1. Assume current retail is 85% occupied													
2. Per VTA Transportation Impact Analysis guidelines, a 2% vehicle trip reduction for housing trips can be applied for a nearby major bus stop													
3. Pass-By trip reduction applied to shopping center PM peak hour trips and based on average rates from Appendix E ITE Trip Generation Handbook 3rd Edition													
4. Daily pass-by trips only represent PM peak hour pass-by trips because no daily pass-by trip is resented in the ITE Trip Generation Handbook.													
5. Trips reductions due to internal capture was calculated using NCHRP 684 methodology													
6. Trip generation land uses based on average rates from ITE Trip Generation 10th Edition													

MEMORANDUM

From: Frederik Venter, P.E.

To: Mark Tersini, KT Urban

Cc: Gian Martire, Senior Planner, City of Cupertino

Date: March 27, 2020

Re: Westport Cupertino – Alternative Proposal: Trip Generation Comparison

1. Introduction

This memorandum summarizes the trip generation findings that result from the alternative proposal for the Westport Mixed-Use project. The purpose of this memorandum is to provide a comparison between the total trips generated by the originally proposed project, as documented in the Kimley-Horn Technical Memorandum dated December 12, 2019, and the alternative proposal provided to Kimley-Horn by KT Urban on February 5, 2020. Daily, AM peak hour, and PM peak hour trips for the Alternative Proposal, taking credits for the for the existing land uses (trip credits) are calculated. The Institute of Transportation Engineers (ITE) Trip Generation Manual, 10th Edition, was used to develop trip generation estimates.

2. Existing Trips

The existing site is 71,254 square feet of shopping center use (The Oaks), which includes specialty restaurants, retailers, and other commercial space. The existing shopping center has been approximately 85% occupied over the last 2 +years. At 85% occupancy, the existing shopping center generates approximately 2,287 daily trips, 57 AM peak hour trips (36 IN / 21 OUT), and 230 PM peak hour trips (110 IN / 120 OUT). It should be noted that if full occupancy was assumed for the existing shopping center, the trips credited would have been even higher. This is a conservative estimate since ITE is based on gross lease area, which typically includes unoccupied units between 5% and 15%.

3. Alternative Proposal Project Trips

The trip generation for the Alternative Proposal was calculated using the same methodology and trip reduction credits as for the originally Proposed Project. The Multi-Family (mid-rise) land use was removed and Assisted Living, Continuing Care (Life Guidance / Memory Support), and Medical Office land users were added.

The Alternative Proposal would demolish the existing buildings and construct a mixed-use urban village with 88 low-rise multifamily residential units, 39 senior residential units, 140 assisted living units, and 27 life guidance/memory care units, 8,040 square feet of general retail and 2,140 square feet of medical office.

Internal trip capture was then applied using the National Cooperative Highway Research Program Report 684 (NCHRP 684), dated 2011. This methodology estimates the number of trips that have both the origin and destination within the alternative proposed site development. These internal trips are then subtracted from the total gross trips. After applying internal capture to the proposed project, reductions of 7% daily trips, 2% AM, and 12% PM were applied to gross trips.

Additional trip reductions were applied because the site is in a high-quality transit area. According to VTA TIA Guidelines, a 2% trip reduction can be used for housing within 2,000 feet (0.38 miles) of a major bus stop. A major bus stop meeting VTA's high-quality transit area definition of 6 buses per hour is located at De Anza College approximately 1900 feet from the project site. Applying the 2% trip reduction results in a reduction of -24 daily trips, -2 AM peak hour trips, and -2 PM peak hour trips. This trip reduction was only taken for residential trips. Lastly, pass-by reductions were applied to retail trips resulting in 8 fewer new trips during the PM peak. The net change between the originally Proposed Project and the Alternative Proposal results in 472 fewer daily trips.

Table 1 below summarizes the trip generation calculations.

Table 1 – Alternative Project, Original Project and Existing Conditions Trip Generation

Land Uses	ITE Land Use Code	Project Size		WEEKDAY	AM PEAK HOUR			PM PEAK HOUR				
				Daily Trips	Total Peak Hour	IN	/	OUT	Total Peak Hour	IN	/	OUT
Multifamily Housing (Low Rise)	220	-	Dwelling Unit(s)	7.32	0.46	23%	/	77%	0.56	63%	/	37%
Multifamily Housing (Mid-Rise)	221	-	Dwelling Unit(s)	5.44	0.36	26%	/	74%	0.44	61%	/	39%
Senior Adult Housing-Attached	252	-	Dwelling Unit(s)	3.70	0.20	35%	/	65%	0.26	55%	/	45%
Shopping Center	820	-	1,000 Sq Ft GLA	37.75	0.94	62%	/	38%	3.81	48%	/	52%
Existing Conditions												
Shopping Center (100% Occupancy)	820	71.254	1,000 Sq Ft GLA	2690	67	42	/	25	271	130	/	141
Shopping Center (85% Occupancy) ¹	820	60.5659	1,000 Sq Ft GLA	2287	57	36	/	21	230	110	/	120
<i>Pass-By Trips for Shopping Center (PM = 34%)^{3,4}</i>				(78)	0	0	/	0	(78)	(37)	/	(41)
TOAL EXISTING TRIP CREDIT				2209	57	36	/	21	152	73	/	79
Proposed Alternative Project Conditions												
Multifamily Housing (Low-Rise)	220	88	Dwelling Unit(s)	646	40	9	/	31	49	31	/	18
Senior Adult Housing-Attached	252	39	Dwelling Unit(s)	146	8	3	/	5	10	6	/	4
Assisted Living	254	140	Bed(s)	364	27	17	/	10	36	14	/	22
Continuing Care Retirement Community	255	27	Unit(s)	66	4	3	/	1	4	2	/	2
Medical-Dental Office Building	720	2.14	1,000 Sq Ft	76	6	5	/	1	7	2	/	5
Shopping Center	820	8.04	1,000 Sq Ft GLA	304	8	5	/	3	31	15	/	16
Gross Trips Generated before Internal Capture				1,602	93	42	/	51	137	70	/	67
Internal Capture Trips for Alternative Project Conditions												
Multifamily Housing (Low-Rise)	220	88	Dwelling Unit(s)	(22)					(4)	(2)	/	(1)
Senior Adult Housing-Attached	252	39	Dwelling Unit(s)	(4)					0			
Assisted Living	254	140	Bed(s)	(12)					(2)	(1)	/	(1)
Continuing Care Retirement Community	255	27	Unit(s)	(2)					0			
Medical-Dental Office Building	720	2.14	1,000 Sq Ft	(16)	(1)	(1)			(2)	(1)	/	(1)
Shopping Center	820	8.04	1,000 Sq Ft GLA	(52)	(1)	(1)			(7)	(3)	/	(4)
Internal Capture Reduction				(108)	(2)	(2)			(15)	(7)	/	(8)
Trip Reductions due to Internal Capture⁵				7%	2%	5%			11%	10%	/	12%
Additional Project Trip Reductions												
<i>VTA Major Bus Stop (Daily, AM, PM = 2%)²</i>				(24)	(1)	(1)			(2)	(1)	/	(1)
<i>Pass-By Trips for Shopping Center (PM = 34%)^{3,4}</i>				(8)					(8)	(4)	/	(4)
Project Trips				1,462	39	39	#	0	112	58	/	54
Existing Trip Credit				2209	57	36	/	21	152	73	/	79
Total Alternative Project Trips				1462	39	39	#	0	112	58	/	54
Net New Alternative Project Trips				(747)	(18)	3	/	(21)	(40)	(15)	/	(25)
Originally Proposed Project				(275)	47	(3)	/	50	(22)	4	/	(26)
Net Change Originally Proposed Project/ Alternative Proposal				(472)	(65)	6	/	(71)	(18)	(19)	/	1
Notes:												
1. Assume current retail is 85% occupied												
2. Per VTA Transportation Impact Analysis guidelines, a 2% vehicle trip reduction for housing trips can be applied for a nearby major bus stop												
3. Pass-By trip reduction applied to shopping center PM peak hour trips and based on average rates from Appendix E ITE Trip Generation Handbook 3rd Edition												
4. Daily pass-by trips only represent PM peak hour pass-by trips because no daily pass-by trip is resented in the ITE Trip Generation Handbook.												
5. Trips reductions due to internal capture was calculated using NCHRP 684 methodology												
6. Trip generation land uses based on average rates from ITE Trip Generation 10th Edition												

4. Conclusions

Based on a comparison of the Proposed Project, the Alternative Proposal would result in 472 fewer daily trips, 65 fewer AM peak hour trips, and 18 fewer PM peak hour trips, and therefore project impacts would be less than those previously analyzed under the originally proposed project.

MEMORANDUM

From: Frederik Venter, P.E. and Anthony Nuti, Kimley-Horn and Associates

To: Mark Tersini, KT Urban

Date: June 7, 2021

Re: **Approved Westport Trip Generation**

This memorandum summarizes the updated trip generation for the approved Westport project.

The existing site is a shopping center that is currently 85% occupied. With pass-by trips applied to the current land use, it was determined that there is a total of 2,209 Daily trips, 57 AM peak hour trips (36 IN / 21 OUT), and 152 PM peak hour trips (73 IN / 79 OUT).

The proposed Project consists of the following:

- Multifamily Housing (Low-Rise) – 88 Dwelling Units
- Senior Adult Housing-Attached – 48 Dwelling Units
- Assisted Living – 158 Beds
- Shopping Center – 20,000 SQFT

With reductions applied, the net project trip generation results in -454 Daily trips, 38 AM peak hour trips (6 IN / 32 OUT), and -29 PM peak hour trips (-10 IN / -19 OUT).

Note that the City's proposed traffic impact fee program is based on the PM peak hour trip generation and as such, the Westport Project will not pay any fees because the Project results in a net decrease in PM peak hour trips.

Table 1 Trip Generation Table

Land Uses	ITE Land Use Code	Project Size		WEEKDAY	AM PEAK HOUR			PM PEAK HOUR				
				Daily Trips	Total Peak Hour	IN	/	OUT	Total Peak Hour	IN	/	OUT
Multifamily Housing (Low Rise)	220	-	Dwelling Unit(s)	7.32	0.46	23%	/	77%	0.56	63%	/	37%
Senior Adult Housing-Attached	252	-	Dwelling Unit(s)	3.70	0.20	35%	/	65%	0.26	55%	/	45%
Assisted Living	254	-	Bed(s)	2.60	0.19	63%	/	37%	0.26	38%	/	62%
Shopping Center	820	-	1,000 Sq Ft GLA	37.75	0.94	62%	/	38%	3.81	48%	/	52%
Existing Conditions												
Shopping Center (100% Occupancy)	820	71.254	1,000 Sq Ft GLA	2,690	67	42	/	25	271	130	/	141
Shopping Center (85% Occupancy) ¹	820	60.5659	1,000 Sq Ft GLA	2,287	57	36	/	21	230	110	/	120
<i>Pass-By Trips for Shopping Center (PM = 34%)^{3,4}</i>				(78)	0	0	/	0	(78)	(37)	/	(41)
TOTAL EXISTING TRIP CREDIT				2,209	57	36	/	21	152	73	/	79
Proposed Alternative Project Conditions												
Multifamily Housing (Low-Rise)	220	88	Dwelling Unit(s)	646	40	9	/	31	49	31	/	18
Senior Adult Housing-Attached	252	48	Dwelling Unit(s)	178	10	4	/	6	12	7	/	5
Assisted Living	254	158	Bed(s)	412	30	19	/	11	41	16	/	25
Shopping Center	820	20	1,000 Sq Ft GLA	756	19	12	/	7	76	36	/	40
Gross Trips Generated before Internal Capture				1,992	99	44	/	55	178	90	/	88
Internal Capture Trips for Alternative Project Conditions												
Multifamily Housing (Low-Rise)	220	88	Dwelling Unit(s)	(48)	(1)	(1)	/	0	(7)	(6)	/	(2)
Senior Adult Housing-Attached	252	48	Dwelling Unit(s)	(12)	(0)	(0)	/	0	(2)	(1)	/	(0)
Assisted Living	254	158	Bed(s)	(30)	0	0	/	0	(5)	(3)	/	(2)
Shopping Center	820	20	1,000 Sq Ft GLA	(90)	(1)	0	/	(1)	(14)	(4)	/	(10)
Internal Capture Reduction				(180)	(2)	(1)	/	(1)	(28)	(14)	/	(14)
Trip Reductions due to Internal Capture⁵				9%	2%	2%	/	2%	16%	16%	/	16%
Additional Project Trip Reductions												
<i>VTA Major Bus Stop (Daily, AM, PM = 2%)²</i>				(36)	(2)	(1)	/	(1)	(6)	(2)	/	(4)
<i>Pass-By Trips for Shopping Center (PM = 34%)^{3,4}</i>				(21)	0	0	/	0	(21)	(11)	/	(10)
Project Trips				1,755	95	42	/	53	123	63	/	60
Existing Trip Credit				2,209	57	36	/	21	152	73	/	79
Total Alternative Project Trips				1,755	95	42	/	53	123	63	/	60
Net New Alternative Project Trips				(454)	38	6	/	32	(29)	(10)	/	(19)

Notes:

1. Assume current retail is 85% occupied
2. Per VTA Transportation Impact Analysis guidelines, a 2% vehicle trip reduction for housing trips can be applied for a nearby major bus stop
3. Pass-By trip reduction applied to shopping center PM peak hour trips and based on average rates from Appendix E ITE Trip Generation Handbook 3rd Edition
4. Daily pass-by trips only represent PM peak hour pass-by trips because no daily pass-by trip is resented in the ITE Trip Generation Handbook.
5. Trips reductions due to internal capture were calculated using NCHRP 684 methodology
6. Trip generation land uses based on average rates from ITE Trip Generation 10th Edition



CITY OF CUPERTINO

Agenda Item

21-9789

Agenda Date: 9/7/2021
Agenda #: 12.

Subject: Status Report on the Vallco Town Center SB 35 Development Project

Accept report



CITY MANAGER'S OFFICE

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

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.

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.

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

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.