

RESOLUTION NO. _____

A RESOLUTION OF THE CUPERTINO CITY COUNCIL
APPROVING A DEVELOPMENT PERMIT MODIFICATION TO THE PREVIOUSLY
APPROVED WESTPORT CUPERTINO PROJECT BY REDUCING THE UNITS OF THE
ASSISTED LIVING FACILITY (BUILDING 1) FROM 131 TO 123, AND REDUCTION
IN PARKING LOCATED AT 21267 STEVENS CREEK BOULEVARD (APN: 326-27-043)

SECTION I: PROJECT DESCRIPTION

Application No.: M-2021-003
Applicant: Related California (Cascade Zak)
Property Owner: 190 West St. James, LLC
Location: 21267 Stevens Creek Blvd. (APN #326-27-043)

SECTION II: FINDINGS FOR DEVELOPMENT PERMIT:

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

WHEREAS, The Westport Cupertino Mixed-Use Project ("Project"), including the Heart of the City Exception, is fully described and analyzed in the Initial Study and proposed 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, 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 October 15, 2021, the applicant submitted and requested the City to consider modifications to the approved Westport Development project which include adjusting unit mix in the assisted living facility (Building 1) to 123 assisted living units and 35 memory care rooms, reclassification of approximately 8,000 square feet of public dining area to private dining, reducing the underground parking to reflect adjustments in uses, and reduction of massing on the top floor to accommodate a sixth floor aqua therapy pool; and

WHEREAS, other than the changes described above, the Development Permit proposes the same development and public improvements approved in August 2020, covering 8.1 gross acres, and providing for 88 single-family units, and 48 below-market-rate units; and

WHEREAS, the proposed changes to the project would not have any new or substantially more severe significant environmental impacts; 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 on December 7, 2021, the City Council held a public hearing to consider the Heart of the City Exception; 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 Heart of the City Exception; and

1. The proposed development, at the proposed location, will not be detrimental or injurious to property or improvements in the vicinity, and will not be detrimental to the public health, safety, general welfare, or convenience;

With the conditions of approval and the approved density bonus, parking reduction, waivers, and incentive/concession, the project is consistent with the General Plan and Zoning Ordinance and has been designed to be compatible with and respectful of adjoining land uses. Additionally, all mitigation measures that are within the responsibility and jurisdiction of the City have been adopted and will be made conditions of approval in order to mitigate potential impacts to a less than significant level. The use of mechanical lifts and valet parking staff will be conducted in a safe manner as described in the application as it would maintain an adequate supply within the project parcel. Therefore, the project will not be detrimental or injurious to properties or improvements in the vicinity, and will not be detrimental to the public health, safety, general welfare, or convenience.

2. The proposed development will be located and conducted in a manner in accord with the Cupertino Comprehensive General Plan and the purpose of the City's zoning ordinances.

The General Plan land use designation for the property is Commercial/Residential. The proposed use is consistent with the General Plan. The subject property is zoned as Planned General Commercial/Residential with a further designation as a Priority Housing Element Site. Projects that propose a density above the allocation provided in the Housing Element are required to obtain a Conditional Use Permit (CUP), which the project is seeking and subject to approval, see Condition of Approval (COA) #3 in Section III. With the conditions of approval and the granting of the requested exception, the proposed development has met the applicable development standards of the Heart of the City Specific Plan and qualifies for a density bonus, density bonus parking reduction, and certain density bonus waivers and

incentives/concessions for certain general plan and zoning development standards as permitted in the City of Cupertino's Municipal Code Chapter 19.56 Density Bonus. Therefore, the proposed development is consistent with the purpose of the City's zoning ordinance.

3. The remaining sites identified in the Housing Element are adequate to meet the requirements of Section 65583.2 and to accommodate the City's share of the regional housing need. (Findings required by Government Code Section 65863(b)(2).)

The remaining sites in the housing element inventory are adequate to meet the requirements of Section 65583.2 and to accommodate the City's share of the regional lower income housing need. The proposed project does not reduce the density of the site below what was projected in the City's housing element; the housing element shows a site capacity of 200 units, whereas 267 units are proposed. However, the proposed project includes only 48 lower income units, whereas the site was projected to contain 200 lower income units. Nonetheless, the remaining sites in the inventory are adequate to accommodate the City's share of the regional lower income housing need, in that 1,242¹ lower income units have been approved by the City at the remaining housing element sites (Vallco Shopping District, Marina Plaza, the Hamptons, and the Barry Swenson site), well in excess of the 563 units that must be accommodated to meet the City's share of the regional lower income housing need. The City has approved a total of 3,209² units on these four sites, also well in excess of the City's allocation of 1,064 units to meet its total share of the regional housing need.

4. The applicant has requested a density bonus. Pursuant to Cupertino Municipal Code Section 19.56.070, before approving an application that includes a request for density bonus, incentive, parking reduction and/or waiver, the decision-making body shall make the following findings, as applicable:

- a) A finding that the residential project is eligible for the density bonus and any incentives, parking reductions or waivers requested.

The application is for a density bonus project that provides for approximately 20% of its base density as Below Market Rate Housing. Because 12% of the units on-site will be limited to Very Low Income seniors, the project is eligible for a 35% density bonus, parking reduction, waivers, and up to two (2) incentives/concessions. The site is eligible for a density bonus parking reduction under Government Code section 65915(p)(2) and Municipal Code Section 19.56.040(C) (0.5 space per bedroom), in that it includes the maximum number of very low income units and is located within one-

¹ Consisting of the following lower income units in approved projects: Vallco Shopping District, 1,201 units; Veranda affordable housing (Barry Swenson site), 18 units; Marina Plaza, 16 units; Hamptons, 7 units net.

² Consisting of the following total units in approved projects: Vallco Shopping District, 2,402 units; Veranda (Barry Swenson site), 19 units; Marina Plaza, 188 units; Hamptons, 600 net new units.

half mile of a major transit stop, with unobstructed access, as described in the staff report and Final EIR.

- b) A finding that the requested incentive(s) or concession(s) will result in identifiable and actual cost reductions based upon the documentation provided by the applicant and the findings of the peer reviewer, if incentive(s) or concession(s) are requested (other than mixed use development).

The applicant has requested as a concession that all senior BMR units be consolidated in Building 2, rather than dispersed between Building 1 and Building 2. The City proposes to expand this concession to allow the applicant to consolidate all BMR units in Building 2, rather than dispersing them throughout Building 1 and the Townhouse/Rowhouse portion. The expanded concession would result in actual cost reductions to the project. First, the age restricted Buildings 1 and 2 are required to be constructed using different methods and materials. As a state-licensed assisted living facility, Building 1 would be required to be built as a Type I building per the State of California due to the nature of the proposed residents. Building 2 is under no such restriction, however, and can be constructed as a Type IIIA Sprinklered SM building for the top five levels and Type IA Sprinklered SM for the ground floor and connected parking garage to Building 1 (Type IA). Therefore, the total cost savings by consolidating the BMR units in Building 2 would be approximately \$200,000 per BMR unit in construction costs. Second, there is a substantial on-going operating cost to provide the services associated with a state-licensed assisted living facility. These costs far exceed the BMR housing allowance for rent and utilities and represent substantial cost savings if the units were relocated to Building 2 as senior independent living units. Third, a significant source of funding for affordable housing, which is from the sale of tax credits, would not be available for the nine BMR units if they were developed in Building 1 as state-licensed assisted living units. Higher total financing cost plus the additional time and cost of delay would be incurred to fill this gap. These costs are saved by consolidating the BMR units in Building 2 as senior independent living units. Fourth, providing BMR townhouse/rowhouse units would be more expensive than providing senior BMR units in Building 1 for a number of reasons, including that the townhouse/rowhouse units are proposed to be much larger than the senior units in Building 1 and the applicant would have easier access to affordable financing if all BMR units are consolidated in a single building.

- c) If the density bonus is based all or in part on donation of land, a finding that all requirements included Section 19.56.030C have been met.

The density bonus is not based on the donation of land, so the finding is not applicable.

- d) If the density bonus is based all or in part on the inclusion of a childcare facility, a finding that all requirements included in Section 19.56.030 (D) have been met.
The density bonus is not based on the inclusion of a childcare facility, so the finding is not applicable.
- e) If the density bonus or incentive is based on a condominium conversion, a finding that all the requirements included in Section 19.56.030 (E) have been met.
The density bonus is not based on a condominium conversion, so the finding is not applicable.
- f) If the incentive includes mixed-use development, a finding that all requirements included in Section 19.56.40 (B) (2) have been met.
While the project is a mixed-use development, the density bonus is not based on the mixed-used development as an incentive, so the finding is not applicable.
- g) If a waiver is requested, a finding that that the development standards for which the waivers are requested would have the effect of physically precluding the construction of the housing development with the density bonus and incentives or concessions permitted.

BMR Unit Dispersion Waiver: *The project applicant requested a waiver of the requirement that "[t]he BMR units shall be dispersed throughout the residential project," (CMC § 19.56.050.G 1 and BMR Mitigation Manual Section 2.3.4(D)), insofar as it would have required BMR units to be dispersed in the Townhouse/Rowhouse component of the project. However, this waiver is not justified. There is no evidence that this requirement—which requires dispersion of BMR units, but does not require the BMR units to be senior BMR units—would “physically preclude” the project. Rather, enforcing this requirement would simply require the applicant to convert some of the existing townhouses/rowhouses from market rate units to BMR units. While that conversion may have financial impacts, those financial impacts are not a basis for granting a waiver under State Density Bonus Law. No change is required in the physical design of the project to disperse the BMR units. The City has proposed an expanded concession that would allow the applicant to consolidate*

all BMR units in Building 2, rather than dispersing them in the Townhouse/Rowhouse portion of the Project.

Height and Slope Setback Waivers: *According to analysis prepared by the architectural firm RRM, applying the height and slope setback limitations would physically preclude the project by: (a) decreasing the amount of proposed open space and landscaped areas below what is otherwise required by the City; (b) reducing the average size of senior units; (c) reducing commercial ceiling heights; (d) decreasing above-ground parking and increasing underground parking. Therefore, the development standards for the slope line setback and height would physically preclude the development.*

While the evidence in the record supports these waivers, there is also evidence suggesting these waivers could have been supported as concessions, and City Council's preference would have been to approve these modifications as concessions.

- h) If a reduction in off-street parking standards for an eligible housing development is requested, a finding that all the applicable requirements in Section 19.56.040.C have been met. (The project is eligible to provide 0.5 space per bedroom, which requires at least 11% very low income or 20% low income units; within one-half mile of a Major Transit Stop; and unobstructed Access to the Major Transit Stop.)

The project proposes that 12% of the units on-site will be limited to Very Low Income seniors; it is within ½ mile of a Major Transit Stop at the intersection of N. Stelling Road and Stevens Creek Boulevard, defined, as relevant for this project, as the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods; and residents will have unobstructed access to this major transit stop because they will be able to access it without encountering natural or constructed impediments. At a ratio of 0.5 spaces per bedroom, 243 spaces could be provided for the residences, but the project proponent has elected to provide 320 spaces.

- 5. Since the applicable findings required above can be made, the decision-making body may deny an application for a waiver only if one of the following written findings as applicable to each type of application, supported by substantial evidence:

- a) That the incentive or concession, or waiver would have an adverse impact on real property listed in the California Register of Historic Resources; or
There are no affected Historic Resources in the vicinity.
- b) That the incentive or concession, or waiver would have a specific, adverse impact upon public health or safety or the physical environment, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the residential project unaffordable to low- and moderate-income households. For the purpose of this subsection, "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 that the application for the residential project was deemed complete; or
As evidenced by the findings and conclusions of the Environmental Impact Report, there exists no significant, quantifiable, direct, and unavoidable impacts, based on objective, identified, written public health or safety standards, policies, or conditions as they existed on the date that the application for the residential Project was deemed complete.
- c) That the incentive or concession, or waiver is contrary to state or federal law.
The requested waivers are not contrary to state or federal law.

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 3 thereof, and those contained in all other Resolutions approved for this Project,

The application for a Development Permit, Application No. M-2021-003, is hereby approved, and that the conclusions upon which the findings and conditions specified in this Resolution are based are contained in the Public Hearing record concerning Application no. M-2021-003 as set forth in the Minutes of the City Council Meeting of December 7, 2021, and are incorporated by reference as though fully set forth herein.

SECTION III: CONDITIONS ADMINISTERED BY THE COMMUNITY DEVELOPMENT DEPARTMENT.

1. APPROVED EXHIBITS

Approval is based on the plan set dated October 1, 2021, consisting of 14 sheets labeled as Westport Cupertino Building 1: Enhanced Senior and Living Project, G00 – G1, and A10-A31, drawn by Steinberg Hart 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, including any misrepresentation related to the note on the Vesting Tentative Map that the Townhouse/Rowhouse units will be for-sale.

3. CONCURRENT AND PRIOR APPROVAL CONDITIONS

The conditions of approval contained in file nos. EXC-2021-003, and ASA-2021-007 shall be applicable to this approval. The conditions of approval contained in file nos. TR-2018-22, TM-2018-03, TM-2021-002, DP-2018-05, U-2019-03, EXC-2019-03 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. CONSULTATION WITH OTHER DEPARTMENTS

The applicant is responsible to consult with other departments and/or agencies with regard to the proposed project for additional conditions and requirements. Any misrepresentation of any submitted data may invalidate an approval by the Community Development Department.

6. DEVELOPMENT ALLOCATION

The applicant shall receive an allocation of 237 of the residential unit allocations for the Heart of the City Special Area. By requesting only one concession prior to City Council approval of these first development permits, the applicant has waived any future claim to a second concession.

7. 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.

8. 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.

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

Members of the City Council

AYES:

NOES:

ABSENT:

ABSTAIN:

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