



COMMUNITY DEVELOPMENT DEPARTMENT

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CITY COUNCIL STAFF REPORT

Meeting: May 31, 2022

Subject

City Manager Report regarding the Rise (Vallco) development - request for modification of approved SB 35 project pursuant to Government Code section 65913.4(g)

Recommended Action

Receive the report

Background

Summary of Modification Request

In March 2018, Sand Hill Property Company applied for approval of a housing development project pursuant to Senate Bill 35 (SB 35) (codified as amended at Government Code section 65913.4). SB 35 provides for a streamlined, ministerial local review process for 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 projects that include affordable housing.

On September 21, 2018, the City approved the Vallco Town Center SB 35 project pursuant to the streamlined, ministerial process set forth in the statute. As approved, the project would consist of 2,402 residential units (half of them affordable), 485,912 square feet of retail uses, and 1,981,447 square feet of office uses.

On March 24, 2022, the applicant initiated a request for modification of the September 2018 approval under Government Code section 65913(g). The proposed modification (renamed "the Rise") proposes increasing the residential square footage of the project from approximately 4.96 million square feet to approximately 5.12 million square feet; decreasing the office square footage from approximately 1.98 million square feet to approximately 1.97 million square feet; and decreasing the retail square footage from approximately 486,000 square feet to approximately 429,000 square feet. The number of residential units (2,402) and affordable units (1,201) remains unchanged. The

modification request proposes changes to vehicular circulation and seeks to eliminate public access easements over private open space areas within the project. Additionally, the applicant proposes reducing the project's total parking from 10,500 spaces to 7,583. (See Attachments A and B)

The affordable housing component of the proposed modification request is also subject to new state law adopted by the Legislature in September 2021. The new law (Assembly Bill 1174) provides that for projects that include 500 or more units of housing and dedicate at least 50 percent of the total number of units to households making at or below 80 percent of the area median income, the rent for 30 percent of the affordable units shall be determined based on the standard for low income household established in the Health and Safety Code, and rent for the remaining 70 percent of affordable units shall be set at a rent that is consistent with the maximum rent levels for a housing development that receives an allocation of state or federal low-income housing tax credits from the California Tax Credit Allocation Committee ["TCAC"]." (Gov. Code, § 65913.4(k)(2).) The project also remains subject to affordability requirements of State Density Bonus Law and the City's Below Market Rate ("BMR") Housing Program. A comparison of affordability levels of affordable units in the approved project and proposed modification is set forth below.

	Approved Project	Proposed Modification	Allowed Rent
Very Low Income Units (Density Bonus, BMR & SB 35)	217	160	Very Low Income Per Health & Safety Code § 50053
Very Low Income Units (Density Bonus & SB 35)	144	107	Very Low Income Per Health & Safety Code § 50053
<i>Very Low Income Subtotal</i>	<i>361</i>	<i>267</i>	
Low Income Units (BMR and SB 35)	144	107	Low Income Per Health & Safety Code § 50053
Low Income Units (SB 35)	696	827	Low Income Per TCAC ¹
<i>Low Income Subtotal</i>	<i>840</i>	<i>934</i>	
Total	1,201	1,201	

¹ Any project receiving TCAC financing may be subject to additional affordability requirements, including the provision of additional very low income units.

The applicant will be required to enter into regulatory agreements with the City documenting the affordability requirements for each of these categories of affordable units.

Overall, the proposed modification reduces the number of very low income units and will likely increase average affordable rents due to changes in state law. However, the applicant has also proposed adding 103 two- or three-bedroom affordable units and adding 230 additional one-bedroom affordable units that were not included in the approved project. The addition of larger units and the reduction in the number of studios is intended to make the project more accessible to low-income families.

Review of the Proposed Modifications

The applicant's modification request is subject to a limited scope of review under Government Code section 65913.4(g), if the modification changes the total number of residential units or total square footage of construction by 15 percent or more, not including underground space. (Gov. Code, § 65913.4(g)(3).) The scope of review of a qualified modification request under section 65913.4(g) is limited to determining whether the modified project meets the statutory criteria for SB 35 eligibility and whether the project complies with objective planning standards in effect at the time the original project application was submitted. (Gov. Code, § 65913.4(g)(1)(B).) Staff may not apply objective planning standards adopted after the March 2018 submittal date of the original Vallco SB 35 application if these requirements are met.

In addition, the City may not reconsider "prior determinations that are not affected by the modification" (Gov. Code, § 65913.4(g)(4)) and must use "the same assumptions and analytical methodology" that it used in approving the original application. (Gov. Code, § 65913.4(g)(1)(C).) These provisions mean that the review of a modification must be limited to the proposed changes to the approved project and does not extend to SB 35 eligibility criteria that are not impacted by those changes, such as the location of the project.

The modification request also includes a request for modification of the approved tentative subdivision map for the project. The streamlined approval provisions of SB 35 apply to approval of a tentative subdivision map if "(A) [t]he development has received or will receive financing or funding by means of a low-income housing tax credit," or "(B) [t]he development is subject to the requirement that prevailing wages be paid, and a skilled and trained workforce used." (Gov. Code, § 65913.4(a)(9).) A finding of compliance with prevailing wage requirements was made in connection with the approval of the original Vallco project and is not affected by the requested modification. The tentative subdivision map will be reviewed and approved in compliance with the Subdivision Map Act (Gov. Code, §§ 66410 – 66499.58). Under Government Code section

65913.4(g), review must be limited to objective subdivision standards that were in place at the time of the original application.

Under Government Code section 65913.4(g)(2), the City must complete ministerial review of the proposed modification request within 60 days. The deadline for completing review of the Vallco/Rise modification request is June 3, 2022. The determination under section 65913.4(g) will be made by the City Manager. This City Manager's report provides the City Council and public with information on staff's evaluation of the modification request and the opportunity to provide input for the City Manager to consider.

Analysis

Eligibility for Modification Request Under Government Code Section 65913.4(g)

Under Government Code section 65913.4(g)(3), a proposed project modification qualifies for limited-scope review under 65913.4(g) unless (A) "[t]he development is revised such that the total number of residential units or total square footage of construction changes by 15 percent or more, or (B) "[t]he development is revised such that the total number of residential units or total square footage of construction changes by 5 percent or more and it is necessary to subject the development to an objective standard beyond those in effect when the development application was submitted in order to mitigate or avoid a specific, adverse impact, . . . and there is no feasible alternative method to satisfactorily mitigate or avoid the adverse impact." The number of residential units is unchanged in the modified project, and the proposed modifications increase the total square footage of construction by approximately 1.3%. Thus, the modified project qualifies for review as a modification request under Government Code section 65914.4(g).

Eligibility for Streamlined Review Under SB 35

The following is an analysis to determine whether the project continues to meet the eligibility requirements of Government Code section 65913.4. The eligibility requirements are listed in the form of questions with responses based on whether this is applicable to the modification request.

- 1. Has the Department of Housing and Community Development ("HCD") determined that the local agency is subject to SB 35?*

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

In 2018, when the original application was submitted, HCD had determined that due to the type and amount of affordable housing generated in the City of Cupertino, the project was subject to SB 35 streamlining.

2. *Is the project a multifamily housing development (2 or more residential units)?*

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

The proposed project continues to be a mixed use development with 2,402 residential units and therefore, qualifies as a multifamily housing development.

3. *Has the applicant dedicated the applicable minimum percentage of units in the project to households making below 80% of the area median income?*

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

In 2018, HCD had identified the City of Cupertino as a "50% Affordable Housing jurisdiction" for purposes of SB 35 streamlining and ministerial review. The approved project and the modification request both include 50% (1,201 units) of the total (2,402 units) as affordable to very low income or low income households earning annual incomes less than 80% of the area median income.

4. *If the site is in a city, is a portion of the city designated by the United States Census Bureau as either an "urbanized area" or "urban cluster," or, if the site is in an unincorporated area, is the parcel entirely within the boundaries of "urbanized area" or "urban cluster"?*

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

In 2018, the U.S. Census data identifies the City of Cupertino as being a part of the San Jose urbanized area.

5. *Does at least 75% of the perimeter of the site adjoin parcels currently or formerly developed with "urban uses"?*

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

California Government Code section 65913.4(h)(8) defines "urban uses" to mean any current or former residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses.

The City determined in 2018 that at least 75% of the perimeter of the project site adjoin parcels currently or formerly developed with urban uses.

6. *Does the site have either zoning or a general plan designation that allows for residential use or residential mixed-use development and does the development designate at least two-thirds of the square footage for residential use?*

Residential or Mixed Use Designation

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

The 2018 Cupertino General Plan: Community Vision 2015 – 2040 identified the parcels at the project site as the Vallco Shopping District Special Area which had the following General Plan land use designation: Commercial/Office/Residential. This land use designation allows mixed-use developments with commercial, (including retail and hotel uses), office, and residential uses.

The 2018 zoning of the property was Planned Development with General Commercial uses (P(CG)) south of Vallco Parkway and Planned Development with Regional Shopping uses (P(Regional Shopping)) north of Vallco Parkway. While the zoning did not allow residential uses, the General Plan designation in effect in 2018 allowed for a mix of uses including residential.

Government Codes section 65913.4(a)(5)(B) provides that in the event an objective zoning standard (here, the 2018 zoning designation) is mutually inconsistent with an objective general plan standard (here the 2018 General Plan land use designation), the general plan designation prevails. The proposed modified project continues to propose a mixed use development with residential, commercial and office uses. Therefore, the proposed modification request is consistent with the 2018 General Plan land use designation allowing a mix of uses, including residential.

Residential Square Footage

Applicable to the modification request, since there are modifications proposed that change residential and nonresidential square footage.

Government Code section 65913.4(a)(2)(C) requires that projects qualifying for ministerial approval must show that “at least two-thirds of the square footage of the development is designated for residential use.” The residential and nonresidential square footage calculations must be performed using the “same assumptions and analytical methodology” that were used in the 2018 project approval.

In 2018, the definition of “floor area” in the 2018 Cupertino Municipal Code section 19.08.030(F) was used to determine what percentage of the proposed development is designated for residential use. The Municipal Code defines “floor area” to mean “the total

area of all floors of a building measured to the outside surfaces of exterior walls, and including the following:

1. Halls;
2. Base of stairwells;
3. Base of elevator shafts;
4. Services and mechanical equipment rooms;
5. Interior building area above fifteen feet in height between any floor level and the ceiling above;
6. Basements with lightwells that do not conform to Section 19.28.070(I);
7. Residential garages;
8. Roofed arcades, plazas, walkways, porches, breezeways, porticos, courts, and similar features substantially enclosed by exterior walls;
9. Sheds and accessory structures.

"Floor area" shall not include the following:

1. Basements with lightwells that conform to Section 19.28.070(I);
2. Lightwells;
3. Attic areas;
4. Parking facilities, other than residential garages, accessory to a permitted conditional use and located on the same site;
5. Roofed arcades, plazas, walkways, porches, breezeways, porticos, courts and similar features not substantially enclosed by exterior walls."

Cupertino Municipal Code section 19.08.030(A) defines an "attic" to mean "an area between the ceiling and roof of a structure, which is unconditioned (not heated or cooled) and uninhabitable." Therefore, mechanical electrical and other areas between the ceiling and roof are not included in the calculation of floor area.

Cupertino Municipal Code section 19.08.030(F) defines "first floor" to mean "that portion of a structure less than or equal to twenty feet in height, through which a vertical line extending from the highest point of exterior construction to the appropriate adjoining grade, passes through one story."

Based on an independent review conducted by the City's contract plan check consultant, under the supervision of City Planning and Building staff, the modification request complies with the minimum residential square footage requirement of SB 35. The proposed modification is a mixed-used residential development consistent with General Plan land use designation and Municipal Code definitions with at least two-thirds of the area designated for residential use.

7. *Does the project involve a subdivision of land and is the development subject to a requirement that prevailing wages will be paid and a skilled and trained workforce will be used?*

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

The modification requests proposes a tentative map amendment. The applicant, has certified that the project will be subject to the applicable requirements of California Government Code section 65914.3(a)(8) related to the payment of the general prevailing rate of per diem wages for all construction workers and that a skilled and trained workforce will be used.

8. *Is the project outside of each of the following areas? (The full text of the criteria listed below can be found in section 65913.4(a)(6).)*

Not applicable to the modification request, since the proposed modifications do not impact this criterion and pursuant to Govt Code section 65913.5(g), the City is prohibited from revisiting these determinations from 2018.

- Coastal zone – The project site is outside a coastal zone. The City of Cupertino’s General Plan does not identify any portions of the City within a Coastal Zone.
- Prime farmland or farmland of statewide importance – The project site is outside prime farmland or farmland of statewide importance. The City of Cupertino’s General Plan does not identify any portions within the City to be prime farmland or farmland of statewide importance.
- Wetlands as defined under federal law – The project is outside any wetlands as defined under federal law. There are no wetlands as defined under federal law identified on the project site.
- High or very high fire hazard severity zones – The project site is outside the high or very high fire hazard severity zones. The high or very high fire hazard severity zones are identified in Chapter 16.74 of the Municipal Code.
- Hazardous waste site – The site is not listed as a hazardous waste site pursuant to Health and Safety Code section 65962.5 or 25356.
- Earthquake fault zones in an official map published by the State Geologist, unless the development complies with state seismic protection building code standards and by local building standards – The project site is outside earthquake fault zones and will comply with applicable state seismic protection building code standards and local building standards.

- FEMA designated flood plain or floodway – The project site is outside a FEMA designated flood plain or floodway.
- Lands designated for conservation in a habitat conservation plan – The project site is outside lands designated for conservation in a habitat conservation plan.
- Protected species habitat – The project site is outside any protected species habitat.
- Lands under a conservation easement – The project site does not include lands under a conservation easement.
- Require demolition of (a) housing subject to recorded rent restrictions, (b) housing subject to rent control, (c) housing occupied by tenants within past 10 years, or (d) an historic structure placed on a local, state, or federal register – The project site is outside an area that would involve the demolition of any housing subject to rent restriction, rent control or occupied by tenants in the past 10 years or an historic structure placed on a local, state, or federal register. The site has historically been used and operated as a regional mall. There has never been any housing located on the project site. While the site is identified as a “Community Landmark” in the City’s General Plan, the site does not contain an historic structure that was placed on a national, state, or local historic register as referenced in SB 35.
- Land governed by the Mobilehome Residency law, the Recreational Vehicle Park Occupancy Law, the Mobilehome Parks Act, or the Special Occupancy Parks Act – The project site is not located on land governed by the Mobilehome Residency law, the Recreational Vehicle Park Occupancy Law, the Mobilehome Parks Act, or the Special Occupancy Parks Act.

9. *Has the project proponent certified that either the entire development is a “public work” for purposes of the prevailing wage law or that the construction workers will be paid at least the prevailing wage?*

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

The applicant has affirmed in its project application that all construction workers will be paid at least the prevailing wage.

10. *Has the project proponent certified that “a skilled and trained workforce” will be used to complete the development, if the requirement is applicable?*

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

California Government Code section 65914.3(a)(8)(B)(ii) defines a skilled and trained workforce for purposes of this section to have “the same meaning as provided in Chapter 2.9 (commencing with Section 2600) of Part 1 of Division 2 of the Public Contract Code.” The applicant has affirmed in the project application that it will use skilled and trained workforce to complete the development.

Compliance with Objective Standards

Density

Not applicable to the modification request, since there are no modifications proposed which impact this criterion.

The project meets the maximum allowable General Plan density for the site. The project is located on 50.822 acres, prior to dedication of required right-of-way to accommodate frontage improvements. In 2018, the City determined that the base maximum residential yield would be 1,779 units. With a 35% density bonus (as the Density Bonus provisions stood at the time the project application was made), the maximum residential yield is 2,402 units.

Objective Zoning Standards

Applicable to the modification request, since there are modifications proposed which may impact this criterion.

The General Plan related to the Vallco Shopping Center Special Area in effect in 2018 (see Attachment B) contemplated the preparation of a specific plan for the project site. The specific plan was expected to include zoning standards. The draft specific plan was being prepared and was not adopted as of the date the original project application was submitted to the City in March 2018.² Only objective planning standards in effect at the time that the original application was submitted to the City can be applied to the project or to the modification request. (Gov. Code, §§ 65913.4(a)(5), 65913.4(g)). As a result, there was no specific plan or associated zoning standards, applicable to the project application.

As determined in 2018, there are no height limits applicable to the original or modified project. However, the Community Form Diagram (Figure LU-2) in the Land Use Element of the 2018 General Plan identifies building planes the project must meet. Figure LU-2 states as a foot note: “Maintain the primary building bulk below a 1:1 slope line drawn from the arterial/boulevard curb line or lines except for the Crossroads Area” and “For the North and South Vallco Park areas (except for the Vallco Shopping District Special

² The Vallco Town Center Specific Plan was adopted on September 18, 2018. However, upon a referendum by local residents, the City Council eventually rescinded the adopted Plan in May 2019.

Area): Maintain the primary building bulk below a 1.5:1 (i.e., 1.5 feet of setback for every 1 foot of building height) slope line drawn from the Stevens Creek Blvd. and Homestead Road curb lines and below 1:1 slope line drawn from Wolfe Road and Tantau Avenue curb line.” In 2018, it was determined that the original project met this standard. The 2022 modified project continues to meet this standard by maintaining the 1:1 slope line for all proposed buildings, including the green roof deck, from the arterial/boulevard curb line.

Objective Design Review Standards

Applicable to the modification request, since there are modifications proposed which may impact this criterion.

As was determined in 2018, there are no specific “objective design review standards” for this site (e.g., architectural design standards). However, there are standard project requirements that are broadly applicable to development within the City (for example, standards that relate to streets). There have been no changes to the project which impact standard project requirements and therefore, the modification request complies with design review standards.

Density Bonus Ordinance

Density Bonus

Revisiting the density bonus received by the project is not required since there are no modifications proposed which impact the density bonus calculation.

The proposed modified project continues to request a 35% density bonus based on the level of proposed level of affordability. 15% of the base units in the project (267 units) will be affordable to very low income households (those making 50% or below of the area median income (“AMI”). Based on the number of very low income units provided, the applicant could request a density bonus of up to 50% under current State Density Bonus Law. The requested 35% density bonus is unchanged from the approved project and is consistent with state law.

Density Bonus Incentives

Revisiting the density bonus incentives awarded to the project is not required since there are no modifications proposed which impact the incentives.

The approved project was eligible for three incentives since they provided at least 15% of the base units (267 units) as affordable to very low income households. The applicant is

not proposing any changes to the incentives received for the approved project. The three incentives approved in 2018 are as follows:

1. A concession to allow the affordable units to be studios and one bedroom units instead of a mix of units comparable to the units within the development pursuant to BMR Housing Mitigation Procedure Manual section 2.3.4 (A);
2. A concession to allow the studio and one bedroom affordable units to be smaller in size than the studio and one bedroom market rate units pursuant to BMR Housing Mitigation Procedure Manual section 2.3.4 (B); and
3. A concession to allow 400,000 square feet of retail, where 600,000 square feet is required in the General Plan pursuant to Strategy LU-19.1.4.

In 2018, the City determined that these three concessions: a) would result in identifiable and actual costs to provide for affordable housing costs; b) would not result in specific, adverse impacts upon public health or safety or the physical environment or any property that is listed in the California Register of Historical Resources; and c) would not be contrary to state or federal law. (Gov. Code, § 65915(d)(1)(A)–(C).) These findings are unchanged by the proposed project modifications.

Sustainability Impact

Approval of the project will result in short-term and long-term increases in carbon emissions and other sustainability impacts due to construction and operations. However, those impacts may be offset by emissions reductions and reduced resource consumption associated with higher density, mixed-use development. The impacts have not been evaluated because the approved project and the modification request are ministerial determinations that are not subject to review under the California Environmental Quality Act.

Fiscal Impact

The building permits and construction taxes from this project will bring one time revenues to the City. Additionally, ongoing sales tax, business-to-business taxes, and property taxes will potentially bring tax revenue to the City.

Next Steps

The City Manager will make a decision on the applicant's modification request based on the criteria for ministerial approval set forth in Government Code section 65913.4(g). The 60-day review period under section 65913.4(g) expires on June 3, 2022.

Prepared by:

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Reviewed by:

Benjamin Fu, Director of Community Development

Christopher Jensen, City Attorney

Approved for Submission: Jim Throop, City Manager

Attachments:

A – Project Description

B – Plans available online at: www.cupertino.org/vallcosb35 or
<https://apps.cupertino.org/pdf/Vallco/>