



**COMMUNITY DEVELOPMENT DEPARTMENT  
PLANNING DIVISION**

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**CITY COUNCIL STAFF REPORT**

Meeting: October 19, 2021

**Subject**

Consider adopting amendments to the Cupertino General Plan to add clarity to existing language in Chapter 3 (Land Use) in Figure LU-2, Policy LU-1.1 and Goal LU-13, and to add emphasis to existing language in Chapter 6 (Environmental Resources and Sustainability) (Strategy ES-6.1.1), and Cupertino Municipal Code Title 17, Environmental Regulations, to add a new Chapter, Chapter 17.04, to adopt standard environmental protection requirements for construction, development and other similar or related activities. (Application No(s): GPA-2021-001, MCA-2021-004; Applicant(s): City of Cupertino; Location: citywide)

**Recommended Action**

That the City Council adopt the:

1. Resolution No. 21-XXX (Attachment A) adopting the Addendum (Addendum No. 5 to the 2014 General Plan EIR) addressing the environmental effects of the proposed changes and the proposed amendments to the Cupertino General Plan (Attachment 2); and
2. Introduce and conduct the first reading of Ordinance No. 21-XXXX (Attachment B), "An Ordinance of the City Council of the City of Cupertino adding Chapter 17.04 (Standard Environmental Protection Requirements) to the Cupertino Municipal Code."

**Discussion**

*Background:*

Changes to State law since 2017 provide that housing development projects may in some circumstances only be required to comply with objective standards in a city's general plan and zoning, as opposed to standards that are subjective and whose application involves the use of discretion. Since FY19/20, the City's Work Program includes an item to update the General Plan and Zoning Ordinance to ensure that those documents include objective standards that can be readily understood and applied to all projects. Staff and the City Attorney's Office identified certain items that could benefit from clarification. Some of these, such as clarifications in Chapter 13.04, Park

Land Dedication, and Chapter 19.80, Planned Development Zones, of the Municipal Code, were completed in late 2019.

The Planning Commission and City Council also invited members of the public to suggest areas in the General Plan and the Zoning Ordinances that could be clarified with objective standards. A large number of comments were collected from members of the public, and individual Planning Commissioners and City Council members, between June 2019 and October 2019, including at two Planning Commission meetings on June 25 and July 9, 2019 and two City Council meetings on September 18 and October 1, 2019. Additional comments were compiled during the General Plan Annual Review conducted by Planning Commission during five meetings between September 2019 and February 2020.

At its September 18, 2019, meeting, the City Council authorized staff to commence preparing amendments for the items identified by staff and the City Attorney's Office and continued the discussion on the remaining items to its October 1, 2019, meeting. However, following discussion at that meeting, the Council delegated the task of prioritizing and reviewing the remaining items to the City Manager.

It is important to note that while this evaluation process was occurring, SB 330 was enacted. SB 330 made changes to State law providing that until January 1, 2025, amendments to existing standards that will reduce the intensity of housing development may not be made on some properties, without corresponding amendments to increase the intensity of housing development elsewhere.

Staff, with direction from the City Manager and input from the City Attorney, prepared Attachment C. Attachment C indicates the timing of the various topics that have been identified as needing clarification as follows:

- Immediate Completion – Items for which staff had started to prepare updates. These are presented here.
- Current Work Program Items – Items that are part of the current Work Program and are expected to be completed or have significant progress in Fiscal Year 2020/2021.
- Completed – Items that have been completed as part of prior projects/actions.
- Housing Element Update – Items that may not be completed by themselves due to limitations of state law but may be considered as part of upzoning that may be necessary to accommodate the City's RHNA.
- Future Work Program Items – Items that the City may consider incorporating into future Work Programs based on staffing and budgetary considerations.
- On Hold – Items not recommended to be considered by the Planning Commission at this time or those that may be considered with a future comprehensive General Plan update.

The amendments proposed at this time are on the “Immediate Completion” list. In addition, Municipal Code amendments are proposed to adopt objective standards for environmental protection.

Planning Commission Review: The proposed amendments were reviewed by the Planning Commission at its September 28, 2021, regular meeting. The Commission moved to adopt Resolution Nos. 6929 and 6930 recommending that the City Council adopt the proposed amendments on a 4-0-1 (Absent: Scharf) vote.

*Analysis:*

General Plan Amendments (Attachment A)

There are two chapters in which amendments are proposed in the General Plan – Chapter 3 (Land Use) and Chapter 6 (Environmental Resources and Sustainability).

In Chapter 3, the changes are limited to Figure LU-2, Policy LU-1.1 and in the introductory language in Goal 13.

1. Figure LU-2: Edits in Figure LU-2 have been made in the footnotes to the figure and in the height and density boxes on the figure. These are described further below:

- a. Footnotes: Clarifying edits have been made to the footnotes to address concerns related to the objectivity of the existing language. Clarifications include clarifications to Building Planes footnotes to clarify the building slope line must be retained at a 1:1 slope for the building and not just the “primary building bulk.” In addition, language has been added to clarify the intent of those words, to allow “architectural feature that do not include useable area” into the slope line.

Another area of clarification is to address the language related to heights and setbacks adjacent to residential areas. Language has been amended to reference specific plans, conceptual zoning plans or land use plans and any adopted design guidelines for established height and setbacks adjacent to residential areas.

- b. Height and Density Boxes: No changes have been made which allow an increased density or any increase in heights in any of the Special Areas or neighborhoods.

Language in the Homestead, Heart of the City, South De Anza, Monta Vista Village Special Area and Neighborhoods density and height boxes have been updated to clarify the existing density in the Heart of the Special Area. Additionally, edits are proposed in the City Center Node text box to clarify the intent of the existing language – that existing, taller buildings (such as the Montebello condominiums, former Kimpton Hotel, and the tower office buildings) may retain their existing height.

2. Policy LU-1.1: A reference has been added to Figure LU-2 in Policy LU-1.1 to clarify that the figure identifies maximum residential densities allowed.
3. Goal LU-13: The policies in Goals LU-14 through LU-18 are nested policies for the Heart of the City Special Area. However, this was not clear in the General Plan. This has been clarified with amended language.
4. Strategy ES-6.1.1: Emphasis has been added to this strategy to “strongly” encourage Santa Clara County to engage with affected neighborhoods when considering changes to the mineral extraction activity and changes to restoration plans, as advised by one of the members of the City Council.

Note that the above-described amendments are intended to clarify the adopted General Plan and do not change the permitted intensity of housing development for any parcel in the City.

#### Municipal Code Amendment (Attachment B)

As previously described, staff is recommending the adoption of standards for environmental protection for construction, site improvements and other related or similar projects by adding Chapter 17.04 (Standard Environmental Protection Requirements) to the Municipal Code. The proposed language was developed with input from PlaceWorks, an environmental consulting firm, their on-staff biologists, geotechnical experts, and other staff with subject area expertise. The draft language was further reviewed and edited for clarity and objectivity by staff and City Attorney’s Office.

The proposed new Chapter is organized similarly to other Chapters in the Municipal Code. A purpose section (Section 17.04.010) is followed by a Definitions section (Section 17.04.020). The definitions section defines terms used in the new Chapter to ensure that the terms are not misinterpreted or interpreted differently by different persons.

Following the Definitions section is an Applicability and Demonstration of Compliance Section (Section 17.04.030). This section identifies which projects the standards would apply to. As proposed, all projects related to construction, ground-disturbing activities (grading, excavation, etc.) and tree removal would be subject to these standards. In addition, the proposed language identifies how an applicant must demonstrate compliance. The following table summarizes these requirements:

<b>Type of Project</b>	<b>Compliance Mechanism</b>
Non-residential project	Submittal and implementation of a Construction Management Plan and/or inclusion on permit plans
Residential development of four or more units	

Type of Project	Compliance Mechanism
Residential development with three or fewer units	On building permit plans, as required
Residential additions/remodels and Tenant Improvements	
Projects with no requirement for building and ground disturbing permits (includes tree removal permits with no other associated improvements or ground disturbing activity)	Implement all applicable requirements during permitted work

Requirements prior to project approval: Section 17.04.040 of the proposed chapter identifies the technical reports required prior to project approval. These include reports related to Air Quality, Hazardous Materials, Traffic and Vibration to address environmental protection.

1. Air Quality: Certain projects that operationally generate large amounts of diesel truck or Transport Refrigeration Units (TRUs) per day or are located within 1,000 feet of sensitive land uses (e.g. residential, schools, hospitals or nursing homes) are required to prepare an operational Health Risk Assessment (HRA). The report is required to ensure that indoor air quality for projects that are identified by the Bay Area Air Quality Management District (BAAQMD) as requiring further analysis, is managed by preparing an operational HRA. The operational HRA would be prepared in accordance with the policies and procedures of the State office of Environmental Health Hazard Assessment (OEHTA) and BAAQMD to ensure standard requirements in the preparation of the assessment. The project applicant is also required to indicate the location of the project site on the BAAQMD's Planning Healthy Places map. If the site is located in an area identified as "Implement Best Practices," the project is required to implement best practices. These include installation of higher rated air filters, ensuring that openings into the building are located as far away from emission sources as feasible and planting trees as required.
2. Soil Remediation: All projects except tree removal projects must complete and submit the applicable form of environmental assessment report, and additional testing, if required, prior to construction. Applicants are required to provide, at a minimum a Phase 1 Environmental Site Assessment (ESA) report. If the Phase I ESA report indicates the potential for contaminants, the project applicant must prepare a Phase II ESA report to identify the type and extent of the contamination. This includes steps to take if additional testing is required, and how testing must be conducted. The details of the process are described.
3. Traffic: A Vehicle Miles Traveled (VMT) analysis is required to indicate compliance with the City's previously adopted VMT standards.

4. Vibration: If it is anticipated that equipment that causes vibrations will be used during construction, the project applicant must submit a vibration study. There are certain standards prescribed to ensure that vibration effects are reduced.

Requirements prior to permit issuance: Section 17.04.050 includes the requirements related to the different environmental factors that must be met prior to permit issuance if there has not been a prior project approval. The areas where refinements are being made to previous conditions of approval or new standards have been proposed are as follows:

1. Air Quality: The City already has standard requirements related to Air Quality impacts as identified in the General Plan Environmental Impact Report (EIR) certified by the City Council in 2014. These have been further refined because BAAQMD has issued or adopted new guidance since that time. In addition, requirements have been imposed to ensure that larger projects (those that disturb more than one acre and are more than two months in duration) are required to use higher quality equipment as mitigation.

Prior to any construction permits being issued, BAAQMD's requirements must be indicated on the plans

2. Greenhouse Gas Emissions and Energy: In order to ensure that greenhouse gas emission impacts are minimized, applicants must complete the Climate Action Plan – Development Project Consistency Checklist for approval by the City.
3. Biological Resources: The requirements related to biological resources pertain to the taking, removing or destroying of eggs from active nests or the destruction/disturbance of bat roosts in abandoned buildings. There are laws and requirements that prevent the disturbance or taking of eggs from active nests per the Migratory Bird Treaty Act and the State Department of Fish and Game Code. These requirements are currently applied to all applications that have the possibility of affecting birds. The proposed requirements are to implement the requirements and spirit of that law in keeping with the size of the project. The requirements differ slightly by the size of project. For smaller projects (such as one single family home, ground disturbing activity of up to 500 square feet or the removal of up to three trees), the property owner or the tree removal contractor is authorized to conduct preconstruction surveys to identify active nests. If active nests are found, smaller projects must then retain an ornithologist or a biologist to identify a buffer at which work may proceed. However, for all other projects, a qualified ornithologist or biologist must be retained at the outset to conduct the preconstruction surveys. Repeat surveys may be necessary on a weekly basis to identify when work may proceed in the buffer area. A final report must be presented to ensure work was completed to the satisfaction of the City.

Special Status Roosting Bats are also required to be protected during any construction, or re-tenanting of abandoned or vacant structures. This is done by showing evidence that abandoned buildings were properly sealed when vacated/abandoned and conducting pre-construction surveys by a qualified biologist prior to proceeding with any work. The requirement also prescribes objective ways to address the issue in the event that there are any roosting bats in a building. A final report is required to ensure the work was completed to the satisfaction of the City.

4. Cultural Resources: Project applicants must adhere to certain requirements in order to protect cultural and tribal resources, and human remains and Native American burials as required by State law. This includes training prior to beginning construction, identifying potential cultural resources, not disturbing soil within 25 feet of any finds, retaining a qualifying archaeologist for preparation of reports and documenting significant finds, and contacting tribes if the resource is a tribal resource. In areas where there are known cultural resources, the archaeologist is required to provide information to the City for it to determine whether the resource is considered historic or is a unique archeological resource.

The requirements for protection of human resources and native American burials are the same as those required by State law and identified in the CA Health and Safety and CA Public Resources Codes. These include not disturbing remains, notifying the County Coroner's office and determining whether the remains are native American or not. If they are native American, a process prescribed by State law is identified.

5. Hazardous Materials (Soil and Groundwater Contamination): This section clarifies the responsibilities of the project applicant, including requiring the involvement of other regulatory agencies, depending on the contaminants identified in the Phase II ESA report, prior to issuance of a permit.
6. Hydrology and Water Quality: This requirement requires all applicants to demonstrate compliance with the City's Municipal Code requirements related to stormwater pollution prevention.
7. Noise and Vibration: To ensure that noise and vibration impacts are mitigated, all applicants must comply with the City's Community Noise Control Ordinance and provide notice prior to commencing construction. The noticing radius is determined by the size of the project, and ranges between 500 feet for projects on large sites and 100 feet for smaller sites and single-family homes. The City would review and approve haul routes to ensure that the effects are minimized to the greatest extent possible by avoiding the greatest number of sensitive-use areas.

Additionally, the applicant is required to prepare and implement a Construction Vibration Monitoring plan for the areas that are identified as being sensitive to the use

of identified equipment and also provide a post-survey report on any structure where either monitoring has indicated high vibration levels or complaints have been received about damage having occurred. Noticing requirements are also specified for construction involving vibratory equipment.

8. Paleontological Resources: This requirement is to ensure that paleontological resources are protected during construction. These require the retention of a qualified paleontologist, at the applicant's cost, who would assess any finds for significance and mitigation.
9. Utilities and Service Systems: The 2014 General Plan EIR identified that there were some potential issues with peak wet weather flow capacity through the City of Santa Clara's sanitary sewer system related to the contractual obligation of the Cupertino Sanitary District. To ensure that these effects are addressed, requirements have been added to ensure that reports are prepared for the City's review to ensure that this cap is not triggered, and that there are requirements specified to achieve this and to ensure that the Cupertino Sanitary District has signed off on a letter of clearance prior to issuance of permits.

Additionally, applicants are required to ensure that they obtain written approval from the appropriate water service provided for water connections, service capability and location/layout of water lines and backflow preventers, prior to issuance of any permits.

#### Tribal Consultation

The City received a request to conduct tribal consultation pursuant to SB18 (Tribal Consultation for General Plan Amendments). With this request in early July, the Native American Heritage Commission (NAHC) was contacted to obtain the names of tribes that should be contacted. Upon receipt of the list of tribes that should be contacted, letters were sent by certified mail on July 8, 2021. Tribes have 90 days (until October 6, 2021) to request consultation. On August 7, 2021, Ms. Geary, the Chairwoman of the Tamien Nation, requested consultation to which draft materials were sent. Following this, a specific request was made to consult with the City on Strategy ES-6.1.2: Recreation in Depleted Mining Areas. However, there are no changes being proposed this General Plan Strategy. This has been communicated to Chairwoman Geary on September 25, 2021. No other requests for consultation have been received so far.

#### Environmental Impacts

Pursuant to the requirements of the California Environmental Quality Act (CEQA), Addendum No. 5 (Attachment D) to the Final Environmental Impact Report (EIR) for the General Plan Amendment, Housing Element Update, and Associated Rezoning Project (State Clearinghouse No. 2014032007) has been prepared. No subsequent or



supplemental environmental review is required because none of the conditions that would require preparation of a subsequent or supplemental EIR pursuant to Public Resources Code Section 21166 and CEQA Guidelines Section 15162 have occurred.

In addition, the adoption of the General Plan Amendments and Municipal Code amendments is not a project under the requirements of the California Environmental Quality Act, Public Resources Code Section 21000 et. seq., and the State CEQA Guidelines, California Code of Regulations Section 15000 et. seq., (collectively, "CEQA") because it has no potential for resulting in physical change in the environment. Even if the project were found to be a project under CEQA, it would be subject to the CEQA exemption contained in CEQA Guidelines section 15061(b)(3) (General Rule) because it can be seen with certainty to have no possibility that the action approved may have a significant effect on the environment. CEQA applies only to actions which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. In this circumstance, the proposed action, the adoption of new Environmental Protection Standards, would have no or only a de minimis effect on the environment because it does not commit the City to any particular project. In addition, the new Standard Environmental Protection Requirements consist of previously adopted mitigation measures, City conditions of approval, existing regulatory requirements and other best practices, and are adopted for the purpose of reducing the effects of land use development and infrastructure projects on the environment.

Finally, the adoption of the Municipal Code amendments establishes regulations to assure the protection of the environment, and the proposed actions do not authorize construction activities or relaxation of standards that would allow environmental degradation. Therefore, this action is categorically exempt per CEQA guidelines Section 15308.

#### Sustainability Impacts

Adoption of these General Plan Amendments will not have any sustainability impacts. The Municipal Code amendments to adopt environmental protection standard requirements will, among other things, help to ensure better air quality during construction and during operations, it will help protect bird and bat life, will ensure that soil contamination would be adequately addressed.

### Fiscal Impacts

None. All reports must be prepared by the applicant at their own cost. Any peer reviews required and/or any actions that are required to be taken to address any of the environmental concerns must be paid for by the applicants.

### Next Steps

The second reading of the ordinance is tentatively scheduled for November 2, 2021, 30 days after which the ordinance will go into effect.

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### Approved for Submission by:

Greg Larson, Interim City Manager

### Attachments:

- A. Draft Resolution adopting Addendum No. 5 to the 2014 General Plan EIR and General Plan Amendments GPA-2021-001
- B. Draft Resolution adoption of Municipal Code Amendments MCA-2021-004
- C. Document indicating timing of all items requested have objective standards adopted
- D. Addendum No. 5 to the 2014 General Plan Final EIR