

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CUPERTINO  
ADDING CHAPTER 17.04 (STANDARD ENVIRONMENTAL PROTECTION  
REQUIREMENTS) TO THE CUPERTINO MUNICIPAL CODE**

The City Council of the City of Cupertino finds that:

1. WHEREAS, requiring all projects involving construction, grading, excavation, or tree removal activity that require a permit or approval by the City to comply with applicable standard environmental protection requirements, based on objective standards, will reduce the environmental consequences of projects that are not subject to review under the California Environmental Quality Act; and
2. WHEREAS, amending the Cupertino Municipal Code to specify the standard environmental protection requirements that apply to projects for which City permits for or approval of construction, grading, excavation, or tree removal activity is required will provide certainty to project applicants; and
3. WHEREAS, the City Council desires to have objective standards applicable to projects that are clear and understandable to ensure there are no unacceptable risks to human health or safety or the environment; and
4. WHEREAS, the Planning Commission held a duly noticed public hearing on September 28, 2021 regarding the proposed ordinance; and
5. WHEREAS, the Planning Commission reviewed the proposed ordinance and adopted Resolution No. 6930 on a 3-2 vote (No: Madhhipatla and Wang) recommending that the City Council adopt the proposed ordinance; and
6. WHEREAS, the City of Cupertino wishes to adopt the standard environmental protection requirements.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CUPERTINO DOES  
ORDAIN AS FOLLOWS:**

**SECTION 1. Adoption.**

The City of Cupertino hereby adopts Standard Environmental Protection Requirements and amends the Cupertino Municipal Code as set forth in Attachment A.

**SECTION 2:   Severability and Continuity.**

The City Council declares that each section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance is severable and independent of every other section, sub-section, paragraph, sub-paragraph, sentence, clause and phrase of this ordinance. If any section, sub-section, paragraph, sub-paragraph, sentence, clause or phrase of this ordinance is held invalid, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, the City Council declares that it would have adopted the remaining provisions of this ordinance irrespective of such portion, and further declares its express intent that the remaining portions of this ordinance should remain in effect after the invalid portion has been eliminated. To the extent the provisions of this Ordinance are substantially the same as previous provisions of the Cupertino Municipal Code, these provisions shall be construed as continuations of those provisions and not as an amendment to or readoption of the earlier provisions.

**SECTION 3:   California Environmental Quality Act.**

This Ordinance is not a project under the requirements of the California Environmental Quality Act, Public Resources Code Section 21000 et. seq., and, together with related 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. In the event that this Ordinance is found to be a project under CEQA, it is 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, adoption of new standard environmental protection requirements, 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. The foregoing determination is made by the City Council in its independent judgment.

**SECTION 4: Effective Date.**

This Ordinance shall take effect thirty (30) days after adoption as provided by Government Code Section 36937.

**SECTION 5: Publication.**

The City Clerk shall give notice of adoption of this Ordinance as required by law. Pursuant to Government Code Section 36933, a summary of this Ordinance may be prepared by the City Clerk and published in lieu of publication of the entire text. The City Clerk shall post in the office of the City Clerk a certified copy of the full text of the Ordinance listing the names of the City Council members voting for and against the ordinance.

**INTRODUCED** at a regular meeting of the Cupertino City Council on October 19, 2021, and **ENACTED** at a regular meeting of the Cupertino City Council on November 2, 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
APPROVED AS TO FORM:  _____ Chris Jensen, City Attorney	  _____ Date

## **Attachment A – Adding Chapter 17.04 (Standard Environmental Protection Requirements)**

*The sections of the Cupertino Municipal Code set forth below are adopted as follows:*

Add new Chapter 17.04 (Standard Environmental Protection Requirements) to Title 17

### **CHAPTER 17.04 Standard Environmental Protection Requirements**

#### **Section**

17.04.010 Purpose

17.04.020 Definitions

17.04.030 Applicability

17.04.040 Standard Environmental Protection Technical Report Submittal Requirements

17.04.050 Standard Environmental Protection Permit Submittal Requirements

17.04.060 Violations

#### **17.04.010 Purpose.**

The purpose of this chapter is to identify standard environmental protection requirements that all construction projects must meet, including but not limited to environmental mitigation measures identified in any environmental documents required as part of a General Plan update.

#### **17.04.020 Definitions.**

The following words and phrases when used in this chapter shall have the following meanings set forth in this section:

- A. “Applicable Construction Document” means a construction management plan or a permit plan, which are the project plans associated with permit applications.
- B. “Approval” means issuance of permits under Title 18 or Title 19, and when permits pursuant to Title 18 or Title 19 are not required issuance of other required City permits by the City of Cupertino.
- C. “Construction Management Plan” means a document that includes the details the construction manager is required to enforce to minimize potential construction impacts related to construction crew parking, equipment staging, off-site circulation, noise, and air quality on residents and commercial operations during the construction phase.

- D. "Construction" or "Ground-disturbing activities" include any paving, excavation, soil removal, grading, utility trenching, removal of foundations and structures, regardless of whether the soils have been previously disturbed or not.
- E. "Permit" means any discretionary or ministerial permit or approval that is required pursuant to Title 14, Title 16, Title 18, or Title 19 of the Cupertino Municipal Code to allow a project.
- F. "Permit Plan" means any project plan(s) that are required for permit approval pursuant to Title 14, Title 16, Title 18, or Title 19 of the Cupertino Municipal Code to allow a project.
- G. "Project" means any construction, ground-disturbing activity, subdivision, or tree removal activity.
- H. "Project Applicant" means the project proponent or property owner.
- I. "Regulated Projects" means any development that is subject to oversight by an environmental regulatory agency, including but not limited to oversight by the State Water Resources Control Board and other similar agencies.
- J. "Sensitive Receptor" means the types of land uses, populations, and buildings or structures that are considered sensitive to air pollution, noise, and vibration.
  - 1. Air quality-sensitive population groups include children, the elderly, the acutely ill, and the chronically ill, especially those with cardiorespiratory diseases. Disadvantaged communities identified in CalEnviroScreen 3.0 (i.e., environmental justice communities), as subsequently revised, supplemented, or replaced, may be disproportionately affected by and vulnerable to poor air quality.
  - 2. Noise-sensitive receptors include land uses where quiet environments are necessary for enjoyment and public health and safety. Residences, schools, hotels, libraries, religious institutions, hospitals, and nursing homes are examples.
  - 3. Vibration-sensitive receptors include land uses residences and buildings where people normally sleep (e.g., residences and hotels, and buildings or structures that are susceptible to architectural damage (e.g., non-engineered timber and masonry buildings and historic buildings).
- K. "Tenant Improvement" means any construction activity that modifies interior space in non-residential space.
- L. "Tree" means Protected Trees and Public Trees under the Cupertino Municipal Code, unprotected trees, or any other vegetation suitable for nesting birds.

**17.04.030 Applicability and Demonstration of Compliance.**

- A. Every project within the City of Cupertino shall comply with all applicable standard environmental protection requirements identified in Section 17.04.040 and Section 17.04.050.
- B. Compliance with the requirements shall be demonstrated as follows:
1. For all non-residential projects, residential projects involving the development of four or more residential units, and mixed-use projects, compliance shall be demonstrated through submittal and implementation of a construction management plan and/or permit plans, as applicable, prior to issuance of an approval to the satisfaction of the City.
  2. For residential projects with three or fewer units, for residential additions/remodels and Tenant Improvements, compliance shall be demonstrated on permit plans to the satisfaction of the City.
  3. For projects that do not require the issuance of a permit and for tree removal projects, the property owner must demonstrate compliance by ensuring that all applicable standard environmental protection requirements are implemented.

**17.04.040 Standard Environmental Protection Technical Report Submittal Requirements.**

Every project shall implement the following standard environmental protection technical report submittal requirements, which reports are subject to third-party peer review under the direction of the City at the applicant's cost, prior to the approval of the project unless they are not applicable to the project as demonstrated by a written explanation of why any standard environmental protection technical report submittal requirement is not applicable to the project, subject to the review and approval of the Director of Community Development and/or the City Engineer, or his or her designee, as appropriate:

**A. Air Quality Technical Requirements**

1. **Control Diesel Particulate Matter from Non-Residential Projects During Operation.** Applicants for new non-residential land uses within the city that either have the potential to generate 100 or more diesel truck trips per day or have 40 or more trucks with operating diesel-powered Transport Refrigeration Units (TRUs), or are within 1,000 feet of a sensitive land use (e.g., residential, schools, hospitals, nursing homes), as measured from the property line of the project to the property line of the nearest sensitive use, shall:
  - a. Prepare and submit an operational Health Risk Assessment (HRA) for approval by the City prior to approval of the project.

- b. The HRA shall be prepared in accordance with policies and procedures of the State Office of Environmental Health Hazard Assessment (OEHHA) and the Bay Area Air Quality Management District (BAAQMD).
- c. If the HRA shows that the incremental cancer risk exceeds ten in one million (10E-06), PM<sub>2.5</sub> concentrations exceed 0.3 micrograms per cubic meter (µg/m<sup>3</sup>), or the appropriate noncancer hazard index exceeds 1.0, the project applicant shall be required to identify and demonstrate that Best Available Control Technologies for Toxics (T-BACTs) are capable of reducing potential cancer and noncancer risks to an acceptable level, including appropriate enforcement mechanisms.
- d. T-BACTs identified in the HRA shall be indicated in the appropriate applicable construction document prior to approval of the project. T-BACTs may include the following measures from BAAQMD's *Planning Healthy Places Guidebook* but are not limited to:
  - i. Restricting nonessential idling on-site to no more than two minutes.
  - ii. Providing electric charging capable truck trailer spaces to accommodate Zero Emissions (ZE) Trucks.
  - iii. Providing electric charging capable warehousing docks to accommodate ZE Transport Refrigeration Units (TRUs).
  - iv. Requiring use of Near Zero Emissions (NZE) or ZE equipment (e.g., yard trucks and forklifts) and/or vehicles.
  - v. Restricting offsite truck travel through the creation of truck routes.

## **2. Manage Indoor Air Pollution.**

- a. Applicants for residential and other sensitive land use projects (e.g., hospitals, nursing homes, day care centers) in areas identified on the Bay Area Air Quality Management District's (BAAQMD) "Conduct Further Study" on the Planning Healthy Places Map shall:
  - i. Prepare and submit an operational Health Risk Assessment (HRA) to the City prior to approval of the project.
  - ii. The HRA shall be prepared in accordance with policies and procedures of the State Office of Environmental Health Hazard Assessment (OEHHA) and BAAQMD. The latest OEHHA guidelines shall be used for the analysis, including age sensitivity factors, breathing rates, and body weights appropriate for children ages 0 to 16 years.

- iii. If the HRA shows that the incremental cancer risk exceeds ten in one million ( $10E-06$ ),  $PM_{2.5}$  concentrations exceed 0.3 micrograms per cubic meter ( $\mu g/m^3$ ), or the appropriate noncancer hazard index exceeds 1.0, the project applicant shall identify and demonstrate measures that are capable of reducing potential cancer and non-cancer risks to an acceptable level (i.e., below ten in one million or a hazard index of 1.0), including appropriate enforcement mechanisms.
- iv. Measures to reduce risk may include, but are not limited to:
  - 1. Air intakes located away from high volume roadways and/or truck loading zones.
  - 2. Heating, ventilation, and air conditioning systems of the buildings provided with appropriately sized Minimum Efficiency Reporting Value (MERV) filters.
- b. Applicants for residential and/or other sensitive land use projects (e.g., hospitals, nursing homes, day care centers) must state in the applicable construction document where the site is located on the Bay Area Air Quality Management District (BAAQMD) Planning Healthy Places Map, as subsequently revised, supplemented, or replaced. If the site is located in an area identified as "Implement Best Practices," the project applicant shall implement, and include in applicable construction documents, the following best practices identified in the BAAQMD *Planning Healthy Places Guidebook*:
  - i. Install air filters rated at a MERV 13 or higher.
  - ii. Locate operable windows, balconies, and building air intakes as far away from any emission source as is feasible.
  - iii. Incorporate solid barriers or dense rows of trees in a minimum planter width of 5 feet per row of trees between the residential and/or sensitive land use, and the emissions source into site design.
  - iv. Do not locate residential and/or sensitive land use on the ground floor units of buildings near non-elevated sources (e.g., ground level heavily traveled roadways and freeways).
- c. The project applicant shall include the applicable measures identified in subsections (a) and (b) above in the applicable construction documents prior to approval of the project. Specifically, the air intake design and MERV filter requirements shall be included on all applicable construction documents submitted to the City and verified by the City's Planning Division.



**B. Hazardous Materials**

**Manage Soil and/or Groundwater Contamination.** Projects that involve tree removal only are not subject to this Section B. For projects that involve a change of land use (e.g., commercial to residential), development of uses that will be occupied or used by sensitive receptors, development of a net new residential unit (not including a Junior Accessory Dwelling unit or Accessory Dwelling unit), new construction of non-residential and/or mixed-use development, or subdivisions, except as provided for in Section B.3, the project applicant shall complete Section B.1 and B.2, as required, prior to approval of the project.

- 1. Phase I ESA.** Retain the services of a qualified environmental consultant with experience preparing Phase I Environmental Site Assessments (ESAs) to prepare a Phase I ESA in accordance with the American Society for Testing and Materials (ASTM) Standards on Environmental Site Assessments, ASTM E 1527-13 (ASTM 1527-13) and in accordance with the U.S. Environmental Protection Agency's (EPA's) Standards and Practices for All Appropriate Inquiries (40 Code of Federal Regulations 312), published November 2005, as subsequently revised, supplemented, or replaced. The goal of an ASTM Phase I ESA is to evaluate site history, existing observable conditions, current site use, and current and former uses of surrounding properties to identify the potential presence of Recognized Environmental Conditions (RECs) as defined in ASTM E 1527-13, associated with the site. If the Phase I ESA does not identify any RECs, then no further action is needed. If the Phase I ESA identifies RECs, then a Phase II ESA shall be prepared as described in Section B.2.
- 2. Phase II ESA.** A Phase II ESA shall be prepared by a qualified environmental consultant and signed and stamped by a Professional Geologist or Professional Engineer hired by the project applicant. The Phase II ESA shall include the collection and analysis of samples designed to evaluate RECs identified in the Phase I ESA, in compliance with ASTM standards, and a health risk assessment to evaluate whether the RECs pose an unacceptable or potentially unacceptable health risk to future users of the site. Depending on the health risks identified in the Phase II ESA, the project applicant shall proceed as follows:
  - a. If the Phase II ESA identifies no unacceptable or potentially unacceptable health risk associated with the RECs, then no further action is needed.
  - b. If the Phase II ESA identifies an unacceptable or a potentially unacceptable health risk, the requirements related to soil remediation in Section 17.04.050B shall apply.

- 3. Focused Phase I and II ESAs.** Projects that are on sites which are known to have current or former orchards or other irrigated agricultural activities that were active in 1950 or later are assumed to contain RECs associated with organic pesticides and are required to prepare a Focused Phase I ESA that addresses only RECs other than those associated with organic pesticides. Depending on the contaminants found in the Focused Phase I ESA, the project applicant shall proceed as follows:
- a. If the Focused Phase I ESA identifies no other unacceptable or potentially unacceptable health risks, then the project applicant shall prepare a Focused Phase II ESA that addresses only the potential hazards associated with organic pesticides.
  - b. If the Focused Phase I ESA identifies RECs other than organic pesticides, then the project applicant shall prepare the Phase II ESA as described in Section B.2 to address both the organic pesticides RECs and all other RECs.

**C. Vehicle Miles Traveled Technical Report Requirements**

**Evaluate Vehicle Miles Traveled or VMT.** Project applicants shall prepare a vehicle miles traveled (VMT) analysis, which shall include a comparison of existing VMT and project-generated VMT, for review and approval prior to project approval, indicating that the project meets the standards in Section 17.08.040 (Vehicle Miles Traveled (VMT) Standards).

**D. Vibration Technical Report Requirements**

- 1. Manage Vibration During Construction.** The project applicant shall provide a vibration study to determine vibration levels due to construction to the City, prior to approval of the project, when the following activities would occur within the screening distance to buildings or structures: pile driving within 100 feet, vibratory roller within 25 feet, or other heavy equipment (e.g., bulldozer) within 15 feet; and for historical structures: pile driving within 135 feet, vibratory roller within 40 feet, or other heavy equipment within 20 feet. If vibration levels due to construction activities exceeds 0.2 inches per second peak particle velocity (in/sec PPV) at nearby buildings or structures, or 0.12 in/sec PPV at historical structures, the project shall implement the following alternative methods/equipment:
  - a. For pile driving, one of the following options shall be used: caisson drilling (drilled piles), vibratory pile drivers, oscillating or rotating pile installation

methods, or jetting or partial jetting of piles into place using a water injection at the tip of the pile.

- b. For paving, use a static roller in lieu of a vibratory roller.
- c. For grading and earthwork activities, off-road equipment that shall be limited to 100 horsepower or less.

#### **Section 17.04.050 Standard Environmental Protection Permit Submittal Requirements**

Every project shall implement the following standard environmental protection permit submittal requirements prior to the issuance of permits by the City unless they are not applicable to the project as demonstrated by a written explanation of why any standard environmental protection permit submittal requirement is not applicable to the project, subject to the review and approval of the Director of Community Development and/or the City Engineer, or his or her designee, as appropriate:

##### **A. Air Quality Permit Requirements**

- 1. Control Fugitive Dust During Construction.** Projects shall implement the Bay Area Air Quality Management District Basic Control Measures included in the latest version of BAAQMD's CEQA Air Quality Guidelines, as subsequently revised, supplemented, or replaced, to control fugitive dust (i.e., particulate matter PM<sub>2.5</sub> and PM<sub>10</sub>) during demolition, ground disturbing activities and/or construction. The project applicant shall include these measures in the applicable construction documents, prior to issuance of the first permit.
- 2. Control Construction Exhaust.** Projects that disturb more than one-acre and are more than two months in duration, shall implement the following measures and the project applicant shall include them in the applicable construction document, prior to issuance of the first permit:
  - a. Utilize off-road diesel-powered construction equipment that is rated by the U.S. Environmental Protection Agency (EPA) as Tier 4 or higher for equipment more than 25 horsepower. Any emissions control device used by the contractor shall achieve emissions reductions that are no less than what could be achieved by a Tier 4 interim emissions standard for a similarly sized engine, as defined by the California Air Resources Board's (CARB) regulations. Applicable construction documents shall clearly show the selected emission reduction strategy for construction equipment over 25 horsepower.
  - b. Ensure that the construction contractor shall maintain a list of all operating equipment in use on the project site for verification by the City. The

construction equipment list shall state the makes, models, and number of construction equipment on-site.

- c. Ensure that all equipment shall be properly serviced and maintained in accordance with the manufacturer's recommendations.

3. **Control Volatile Organic Compound Emissions from Paint.** Projects shall use low-VOC paint (i.e., 50 grams per liter [g/L] or less) for interior and exterior wall architectural coatings. The project applicant shall include the use of low-VOC paint in the applicable construction documents prior to issuance of the first permit.

## **B. Hazardous Materials Permit Requirements**

**Soil Remediation Required.** If a Focused or other Phase II ESA, as required pursuant to Section 17.04.040(B)(1), identifies an unacceptable or a potentially unacceptable health risk, the project applicant shall, depending on the contaminant, contact either the Environmental Protection Agency (EPA), Department of Toxic Substances Control (DTSC), Regional Water Quality Control Board (RWQCB) or local Certified Unified Program Agency (CUPA). The project applicant shall enter into a regulatory agency oversight program with an appropriate regulatory agency, or an established voluntary oversight program alternative with an appropriate regulatory agency, as determined by the City, and follow the regulatory agency's recommended response actions until the agency reaches a no further action determination, prior to issuance of any permit for a project that allows ground disturbing activity.

## **C. Greenhouse Gas Emissions and Energy Permit Requirements**

**Reduce Greenhouse Gas Emissions (GHG) and Energy Use.** The project applicant shall complete the City of Cupertino Climate Action Plan – Development Project Consistency Checklist, for review and approval by the City Environment and Sustainability Department prior to issuance of the first permit, to demonstrate how the project is consistent with the Cupertino Climate Action Plan, as subsequently revised, supplemented, or replaced, in order to reduce greenhouse gas emissions and conserve energy.

## **D. Biological Resources Permit Requirements**

1. **Avoid Nesting Birds During Construction.** For all projects that involve removal of a tree (either protected or unprotected) or other vegetation suitable for nesting birds, or construction or ground-disturbing activities defined in Section 17.04.020, the project applicant shall comply with, and the construction contractor shall indicate the following on all construction plans, when required to ensure the

following measures are performed to avoid inadvertent take of bird nests protected under the federal Migratory Bird Treaty Act and California Department of Fish and Game Code when in active use:

- a. Demolition, construction, ground-disturbing, and tree removal/pruning activities shall be scheduled to avoid the nesting season to the extent feasible. If feasible, construction, ground-disturbing, or tree removal/pruning activities shall be completed before the start of the nesting season to help preclude nesting. The nesting season for most birds and raptors in the San Francisco Bay area extends from February 1 through August 31. Preconstruction surveys (described below) are not required for construction, ground-disturbing, or tree removal/pruning activities outside the nesting period.
- b. If demolition, construction, ground-disturbing, or tree removal/pruning activities occur during the nesting season (February 1 and August 31), preconstruction surveys shall be conducted as follows:
  - i. No more than 7 days prior to the start of demolition, construction, ground-disturbing, or tree removal/pruning activities, in order to identify any active nests with eggs or young birds on the site and surrounding area within 100 feet of construction or tree removal activities.
  - ii. Preconstruction surveys shall be repeated at 14-day intervals until demolition, construction, ground-disturbing, or tree removal/pruning activities have been initiated in the area, after which surveys can be stopped. As part of the preconstruction survey(s), the surveyor shall inspect all trees and other possible nesting habitats in, and immediately adjacent to, the construction areas for active nests, while ensuring that they do not disturb the nests as follows:
    1. For projects that require the demolition or construction one single-family residence, ground disturbing activities affecting areas of up to 500 square feet, or the removal of up to three trees, the property owner or a tree removal contractor, if necessary, is permitted to conduct the preconstruction surveys to identify if there are any active nests. If any active nests with eggs or young birds are identified, the project applicant shall retain a qualified ornithologist or biologist to identify protective measures.
    2. For any other demolition, construction and ground disturbing activity or the removal of four or more trees, a qualified ornithologist or biologist shall be retained by the project applicant to conduct the preconstruction surveys.

- c. If the preconstruction survey does not identify any active nests with eggs or young birds that would be affected by demolition, construction, ground-disturbing or tree removal/pruning activities, no further mitigating action is required. If an active nest containing eggs or young birds is found sufficiently close to work areas to be disturbed by these activities, their locations shall be documented, and the qualified ornithologist or biologist shall identify protective measures to be implemented under their direction until the nests no longer contain eggs or young birds.
- d. Protective measures may include, but are not limited to, establishment of clearly delineated exclusion zones (i.e., demarcated by identifiable fencing, such as orange construction fencing or equivalent) around each nest location as determined by the qualified ornithologist or biologist, taking into account the species of birds nesting, their tolerance for disturbance and proximity to existing development. In general, exclusion zones shall be a minimum of 300 feet for raptors and 75 feet for passerines and other birds. The active nest within an exclusion zone shall be monitored on a weekly basis throughout the nesting season to identify signs of disturbance and confirm nesting status. The radius of an exclusion zone may be increased by the qualified ornithologist or biologist, if project activities are determined to be adversely affecting the nesting birds. Exclusion zones may be reduced by the qualified ornithologist or biologist only in consultation with California Department of Fish and Wildlife. The protection measures and buffers shall remain in effect until the young have left the nest and are foraging independently or the nest is no longer active.
- e. A final report on nesting birds and raptors, including survey methodology, survey date(s), map of identified active nests (if any), and protection measures (if required), shall be prepared by the qualified ornithologist or biologist and submitted to the Director of Community Development or his or her designee, through the appropriate permit review process (e.g., demolition, construction, tree removal, etc.), and be completed to the satisfaction of the Community Development Director prior to the start of demolition, construction, ground-disturbing, or tree removal/pruning activities.

## **2. Avoid Special-Status Roosting Bats During Construction Permit Requirements**

- a. For all projects that involve demolition, renovation, or re-tenanting of an abandoned or vacant building or structure, where the property owner cannot show evidence to the satisfaction of the City of Cupertino Building Inspector that the building or structure was appropriately sealed at the time the building or structure was vacated to prevent bats from roosting, the project applicant

- shall retain a qualified biologist to conduct preconstruction surveys of the on-site buildings or structures prior to commencing any demolition, renovation, or re-tenanting activities. A building or structure is not appropriately sealed unless seal holes that are more than 0.5 inches in diameter or cracks that are 0.25 by 1.5 inches or larger are filled or closed with suitable material such as caulking, putty, duct tape, self-expanding polyurethane foam, 0.25-inch mesh hardware cloth, 0.5-inch or smaller welded wire mesh, installing tighter-fitting screen doors, or steel wool.
- b. The project applicant shall comply with, and the construction contractor shall include in the applicable construction documents, the following to ensure appropriate preconstruction surveys are performed and adequate avoidance provided for any special-status roosting bats, if encountered on the site. Preconstruction surveys shall:
- i. Be conducted by a qualified biologist prior to tree removal or building demolition, renovation, or re-tenanting. Note that the preconstruction survey for roosting bats is required at any time of year since there is no defined bat roosting season as there is with nesting birds.
  - ii. Be conducted no more than 14 days prior to start of tree removal or demolition, renovation, or re-tenanting.
  - iii. Be repeated at 14-day intervals until construction has been initiated after which surveys can be stopped, unless construction activities are suspended for more than 7 consecutive days at which point the surveys shall be reinitiated.
  - iv. If no special-status bats are found during the survey(s), then no additional measures are warranted.
- c. Protective measures shall be included in the applicable construction documents and implemented prior to issuance of permits, if any special-status bat species are encountered or for any roosts detected within the existing structures, where individual bats could be inadvertently trapped and injured or killed during demolition unless passively evicted in advance of construction activities. Protective measures shall include:
- i. If no maternity roosts are detected, adult bats can be flushed out of the structure or tree cavity using a one-way eviction door placed over the exit location for a minimum 48-hour period prior to the time tree removal or building demolition is to commence.
  - ii. Confirmation by the qualified biologist that the one-way eviction door was effective, and that all bats have dispersed from the roost location, modifying

any exclusion efforts to ensure individual bats have been successfully evicted in advance of initiating tree removal or building demolition.

- iii. If a maternity roost is detected, and young are found roosting in a building identified for demolition, renovation, or re-tenanting, work shall be postponed until the young are flying free and are feeding on their own, as determined by the qualified biologist.
- iv. Once the qualified biologist has determined that any young bats can successfully function without the maternity roost, then the adults and young bats can be excluded from the structure to be demolished using the one-way eviction methods described above.
- v. Monitoring shall be provided by the qualified biologist as necessary to determine status of any roosting activity, success of any required bat exclusion, and status of any maternity roosting activity by bats, in the remote instance a maternity roost is encountered on the site.

#### **E. Cultural Resources Permit Requirements**

**1. Protect Archaeological Resources and Tribal Cultural Resources:** For all projects requiring ground-disturbing activities on land with no known archaeological or tribal cultural resources that has not been previously disturbed and/or where ground-disturbing activities would occur at a greater depth or affect a greater area than previously disturbed, the following shall be required:

**a. Areas with No Known Cultural Resources.** For all projects within areas where there are no known cultural resources, prior to soil disturbance, the project applicant shall provide written verification, including the materials provided to contractors and construction crews, to the City confirming that contractors and construction crews have been notified of basic archaeological site indicators, the potential for discovery of archaeological resources, laws pertaining to these resources, and procedures for protecting these resources as follows:

- i. Basic archaeological site indicators that may include, but are not limited to, darker than surrounding soils of a friable nature; evidence of fires (ash, charcoal, fire affected rock or earth); concentrations of stone, bone, or shellfish; artifacts of stone, bone, or shellfish; evidence of living surfaces (e.g., floors); and burials, either human or animal.
- ii. The potential for undiscovered archaeological resources or tribal cultural resources on site.



- iii. The laws protecting these resources and associated penalties, including, but not limited to, the Native American Graves Protection and Repatriation Act of 1990, Public Resources Code Section 5097, and California Health and Safety Code Section 7050 and Section 7052.
- iv. The protection procedures to follow should construction crews discover cultural resources during project-related earthwork, include the following:
  - 1. All soil disturbing work within 25 feet of the find shall cease.
  - 2. The project applicant shall retain a qualified archaeologist to provide and implement a plan for survey, subsurface investigation, as needed, to define the deposit, and assessment of the remainder of the site within the project area to determine whether the resource is significant and would be affected by the project.
  - 3. Any potential archaeological or tribal cultural resources found during construction activities shall be recorded on appropriate California Department of Parks and Recreation forms by a qualified archaeologist. If the resource is a tribal cultural resource, the consulting archaeologist shall consult with the appropriate tribe, as determined by the Native American Heritage Commission, to evaluate the significance of the resource and to recommend appropriate and feasible avoidance, testing, preservation or mitigation measures, in light of factors such as the significance of the find, proposed project design, costs, and other considerations. The archeologist shall perform this evaluation in consultation with the tribe.

**b. Areas with Known Cultural Resources.** For all projects within areas of known cultural resources as documented in the 2015 General Plan EIR Table 4.4-2, Cultural Resources in the Project Study Area and Vicinity, as subsequently revised, supplemented, or replaced by the City, and the archaeological or tribal cultural resources cannot be avoided, in addition to the requirements in Section E.1.a for all construction projects with ground-disturbing activities, the following additional actions shall be implemented prior to ground disturbance:

- i. The project applicant shall retain a qualified archaeologist to conduct a subsurface investigation of the project site, and to ascertain the extent of the deposit of any buried archaeological materials relative to the project's

area of potential effects, in consultation with a tribal representative as applicable. The archaeologist shall prepare a site record and file it with the California Historical Resource Information System and the City of Cupertino.

- ii. If the resource extends into the project's area of potential effects as determined by the archaeologist, the resource shall be evaluated by a qualified archaeologist to determine if the resource is eligible for listing on the California Register of Historical Resources. If the qualified archaeologist determines that the resource is not eligible, no further action is required unless there is a discovery of additional resources during construction (as required above for all construction projects with ground-disturbing activities). If the qualified archaeologist determines that the resource is eligible, the qualified archaeologist shall identify ways to minimize the effect which the project applicant shall implement. A written report of the results of investigations and mitigations shall be prepared by the qualified archaeologist and filed with the California Historic Resources Information System Northwest Information Center and the City of Cupertino.

**2. Protect Human Remains and Native American Burials.** The project applicant shall comply with California Health and Safety Code Section 7050.5 and California Public Resources Code Section 5097.98.

- a. In the event of discovering human remains during construction activities, there shall be no further excavation or disturbance of the site within a 100-foot radius of the remains, or any nearby area reasonably suspected to overlie adjacent remains.
- b. The Santa Clara County Coroner shall be notified immediately and shall make a determination as to whether the remains are Native American.
- c. If the Santa Clara County Coroner determines that the remains are not subject to his authority, he shall notify the Native American Heritage Commission (NAHC) within 24 hours.
- d. The NAHC shall attempt to identify descendants (Most Likely Descendant) of the deceased Native American.
- e. The Most Likely Descendant has 48 hours following access to the project site to make recommendations or preferences regarding the disposition of the remains. If the Most Likely Descendant does not make recommendations within 48 hours after being allowed access to the project site, the owner shall, with appropriate dignity, reinter the remains in an area of the property secure

from further disturbance and provide documentation about this determination and the location of the remains to the NAHC and the City of Cupertino. Alternatively, if the owner does not accept the Most Likely Descendant's recommendations, the owner or the descendent may request mediation by the NAHC. Construction shall halt until the mediation has concluded.

## **F. Hydrology and Water Quality Permit Requirements**

**Control Stormwater Runoff Contamination.** The project applicant shall demonstrate compliance with Chapter 9.18 (Stormwater Pollution Prevention and Watershed Protection) of the Cupertino Municipal Code, to the satisfaction of the City of Cupertino. All identified stormwater runoff control measures shall be included in the applicable construction documents.

## **G. Noise and Vibration Permit Requirements**

### **1. Notice and Signage:**

- a. At least 10 days prior to the start of any demolition, ground disturbing, or construction activities, the project applicant shall send notices of the planned activity by first class mail as follows:
  - i. For projects on sites that are more than 0.5 acres or four or more residential units the notices shall be sent to off-site businesses and residents within 500 feet of the project site;
  - ii. For projects on sites between 0.25 to 0.5 acres, or two or three residential units (not including Accessory Dwelling Units) notices shall be sent to off-site businesses and residents within 250 feet of the project site; or
  - iii. For projects on sites less than 0.25 acres or one residential unit, the notices shall be sent to off-site businesses and residents within 100 feet of the project site.

The notification shall include a brief description of the project, the activities that would occur, the hours when activity would occur, and the construction period's overall duration. The notification should include the telephone numbers of the contractor's authorized representatives that are assigned to respond in the event of a noise or vibration complaint. The project applicant shall provide the City with evidence of mailing of the notice, upon request. If pile driving, see additional noticing requirements in subsection 3(b) below.

- b. At least 10 days prior to the start of construction activities, a sign shall be posted at the entrance(s) to the job site, clearly visible to the public, which

includes permitted construction days and hours, as well as the telephone numbers of the City's and contractor's authorized representatives that are assigned to respond in the event of a noise or vibration complaint. If the authorized contractor's representative receives a complaint, they shall investigate, take appropriate corrective action, and report the action to the City within three business days of receiving the complaint.

**2. Manage Noise During Construction.** Projects shall implement the following measures to reduce noise during construction and demolition activity:

- a. The project applicant and contractors shall prepare and submit a Construction Noise Control Plan to the City's Planning Department for review and approval prior to issuance of the first permit. The Construction Noise Plan shall demonstrate compliance with daytime and nighttime decibel limits pursuant to Chapter 10.48 (Community Noise Control) of Cupertino Municipal Code. The details of the Construction Noise Control Plan shall be included in the applicable construction documents and implemented by the on-site Construction Manager. Noise reduction measures selected and implemented shall be based on the type of construction equipment used on the site, distance of construction activities from sensitive receptor(s), site terrain, and other features on and surrounding the site (e.g., trees, built environment) and may include, but not be limited to, temporary construction noise attenuation walls, high quality mufflers. During the entire active construction period, the Construction Noise Control Plan shall demonstrate that compliance with the specified noise control requirements for construction equipment and tools will reduce construction noise in compliance with the City's daytime and nighttime decibel limits.
- b. Select haul routes that avoid the greatest amount of sensitive use areas and submit to the City of Cupertino Public Works Department for approval prior to the start of the construction phase.
- c. Signs will be posted at the job site entrance(s), within the on-site construction zones, and along queueing lanes (if any) to reinforce the prohibition of unnecessary engine idling. All other equipment will be turned off if not in use for more than 5 minutes.
- d. During the entire active construction period and to the extent feasible, the use of noise producing signals, including horns, whistles, alarms, and bells will be for safety warning purposes only. The construction manager will use smart back-up alarms, which automatically adjust the alarm level based on the background noise level or switch off back-up alarms and replace with human spotters in compliance with all safety requirements and law.

**3. Manage Vibrations During Construction:** In the event pile driving is required, the project applicant shall:

- a. Notify all vibration-sensitive receptors within 300 feet of the project site of the schedule 10 days prior to its commencement and include the contact information for the person responsible for responding to complaints on site.
- b. The project applicant shall retain a qualified acoustical consultant or structural engineer, to prepare and implement a Construction Vibration Monitoring Plan, which is subject to third-party peer review under the direction of the City at the applicant's cost, for areas within 100 feet for pile driving, 25 feet for vibratory roller, or 15 feet for other heavy equipment (e.g., bulldozer); and for historical structures: within 135 feet for pile driving, 40 feet for vibratory roller, or 20 feet for other heavy equipment. The plan shall include surveying the condition of existing structures; and determining the number, type, and location of vibration sensors and establish a vibration velocity limit (as determined based on a detailed review of the proposed building), method (including locations and instrumentation) for monitoring vibrations during construction, location of notices displaying the contact information for on-site coordination and complaints on site, and method for alerting responsible persons who have the authority to halt construction should limits be exceeded or damaged observed.
- c. Submit final monitoring reports to the City upon completion of vibration related construction activities.
- d. Conduct a post-survey on any structure where either monitoring has indicated high vibration levels or complaints that damage has occurred are received.
- e. The project applicant shall be responsible for appropriate repairs as determined by the qualified acoustical consultant or structural engineer where damage has occurred as a result of construction activities.

**H. Paleontological Resources Permit Requirements**

**Protect Paleontological Resources During Construction.** If paleontological resources are encountered during ground disturbing and/or other construction activities, all construction shall be temporarily halted or redirected to allow a qualified paleontologist, which shall be retained by the project applicant, to assess the find for significance. If paleontological resources are found to be significant, the paleontological monitor shall determine appropriate actions, in coordination

with a qualified paleontologist, City staff, and property owner. Appropriate actions may include, but are not limited to, a mitigation plan formulated pursuant to guidelines developed by the Society of Vertebrate Paleontology and implemented to appropriately protect the significance of the resource by preservation, documentation, and/or removal, prior to recommencing activities. Measures may include, but are not limited to, salvage of unearthened fossil remains and/or traces (e.g., tracks, trails, burrows); screen washing to recover small specimens; preparation of salvaged fossils to a point of being ready for curation (e.g., removal of enclosing matrix, stabilization and repair of specimens, and construction of reinforced support cradles); and identification, cataloging, curation, and provision for repository storage of prepared fossil specimens.

## **I. Utilities and Service Systems Permit Requirements**

### **1. Manage Wastewater Inflow and Infiltration to Sewer System.** Project applicants shall implement the following measures to reduce wastewater flow:

- a. The project applicant shall demonstrate, to the satisfaction of the City of Cupertino and Cupertino Sanitary District (CSD) that the project would not exceed the peak wet weather flow capacity of the Santa Clara sanitary sewer system by implementing one or more of the following methods:
  - i. Reduce inflow and infiltration in the CSD system to reduce peak wet weather flows, or
  - ii. Increase on-site water reuse, such as increased grey water use, or reduce water consumption of the fixtures used within the proposed project, or other methods that are measurable and reduce sewer generation rates to acceptable levels, to the satisfaction of the CSD.

The project's estimated wastewater generation shall be calculated using the current generation rates used by the CSD unless alternative (i.e., lower) generation rates achieved by the project are substantiated by the project applicant based on evidence to the satisfaction of the CSD.

- b. The project applicant shall obtain a letter of clearance from the Cupertino Sanitary District and provide a copy of the letter of clearance to the City prior to issuance of the first permit.

### **2. Ensure Adequate Water Supply and Infrastructure.** The project applicant shall obtain written approval from the appropriate water service provider for water connections, service capability, and location and layout of water lines and backflow preventers, prior to issuance of the first permit.

#### **17.04.050 Violations**

Violation of any of the standard environmental protection requirements, except for any such standard environmental protection requirements that the Director of Community Development and/or the City Engineer, or his or her designee, has deemed inapplicable pursuant to Section 17.04.040 and Section 17.04.050, constitutes a violation of this Code.