

ATTACHMENT B
BASIS FOR APPROVAL

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

Under Government Code section 65913.4(h)(3), a proposed project modification qualifies for limited-scope review under 65913.4h) 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 increased in the modified project by 11.12%, and the proposed modifications decrease the total square footage of construction by approximately 11.66%. Thus, the modified project qualifies for review as a modification request under Government Code section 65914.4(h).

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 2,669 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 modification request include 50% (890 units) of the base (1,779 units) as affordable to very low income or low income households earning annual incomes less than 80% of the area median income. The additional units proposed in the project is a result of additional market rate units the project is eligible under State Density Bonus law, which are exempt from SB35 affordability requirements.

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 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.

The following table shows the square footage of various uses provided by the applicant and the square footage calculated by the City's consultant, based on plans submitted by the applicant. Any methodological differences between the applicant's

calculation and the City’s review do not impact the project’s compliance with SB 35 criteria or applicable objective standards.

	Residential	Retail	Office	Total
Approved SF (2018)	4,961,904	485,912	1,981,447	7,429,263
<i>% of Total</i>	66.8	6.5	26.7	100
Approved SF (2022 Mod.)	5,119,005	429,408	1,973,494	7,521,907
<i>% of Total</i>	68.1	5.7	26.2	100
2024 Modification Plans (SF)	4,381,608	226,386	1,954,613	6,562,607
<i>% of Total</i>	66.8	3.4	29.8	100
Consultant Calculations (SF)	4,429,637	229,469	1,971,167	6,630,273
<i>% of Total</i>	66.8	3.5	29.7	100

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 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 revised 50% density bonus (as the Density Bonus provisions stood at the time the modified application was made), the maximum residential yield is 2,669 units.

Office Allocation

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

The project meets the maximum General Plan office allocation for the site. The 2018 General Plan allowed a maximum of 2,000,000 sq. ft. of office development at the Vallco Shopping Center Special Area. Both the applicant provided calculations and the city’s

independent reviewer identified that the office development is less than this maximum. Please see the table on Page 5.

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 2018.¹ 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 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 2023 modified project has requested a Density Bonus waiver from this standard. Since the implementation of this standard would result in the loss of units in the development as designed, the City must approve this Density Bonus waiver. Slope line sections are indicated on Sheets P-0508 and P-0508.01.

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

¹ The Vallco Town Center Specific Plan was adopted on September 18, 2018. However, upon a referendum by local residents, the City Council rescinded the adopted Plan in May 2019.

requirements that are broadly applicable to development within the City (for example, standards that relate to streets). There have been changes to the project which impact standard project requirements, which have been modified to apply to the proposed modifications, and therefore, the modification request complies with design review standards.