CITY MANAGER'S OFFICE

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September 21, 2021

Via Electronic Mail

Reed Moulds
Managing Director
Vallco Property Owner LLC
965 Page Mill Road
Palo Alto, CA 94304

Katharine Van Dusen
Coblentz Patch Duffy & Bass LLP
One Montgomery Street, Suite 3000
San Francisco, CA 94104

Re: Vallco Town Center Project

Dear Mr. Moulds and Ms. Van Dusen:

I write in response to Vallco Property Owner LLC's ("Developer's") request for an extension of the project approval for the Vallco Town Center Project ("Project") pursuant to Government Code section 65913.4(f)(3), or Senate Bill 35 ("SB 35"), and to your letter dated September 17, 2021 objecting to the City of Cupertino's ("City's") meeting with the Santa Clara County Department of Environmental Health ("SCCDEH"). As explained in detail below, your extension request is moot in light of the passage of Assembly Bill 1174, and your objection to public participation in matters that directly impact the health and safety of City residents is deeply concerning and wholly unwarranted.

1. **Mootness of Extension Request**

On September 14, 2021, Ms. Van Dusen sent a letter to the City requesting an extension of the Project's entitlement under Government Code section 65913.4 (SB 35). Under the version of section 65913.4(f)(3) in effect at that time, the September 21, 2018 Project approval expired on September 21, 2021. That version of section 65913.4(f)(3) also provided that "the development proponent may request, and the local government

shall have discretion to grant, an additional one-year extension to the original three-year period." You argued that the Developer was not required to comply with this statutory requirement because the Project approval was tolled while litigation challenging the Project was pending.

As you are aware, no provision tolling the expiration of the Project approval appeared in section 65913.4(f)(3). The Department of Housing and Community Development ("HCD's") strained attempt to rewrite the statute through administrative fiat was wholly unconvincing, as was explained in detail in the City Attorney's September 7, 2021 letter enclosed herewith.

You also argued that one sentence in a lengthy May 26, 2021 letter to the City's outside counsel, which references a prior oral request for an extension of the Project approval, was sufficient to request an extension. That argument ignored the Developer's burden of documenting sufficient progress toward construction. The City requested that the Developer submit a procedurally and substantively adequate request to the Community Development Department. While your letter to the City Attorney did not comply with this request, we were prepared to overlook your unwillingness to follow regular procedures and to review your extension request on the merits.

That review is no longer necessary, however. On September 16, 2021, the Governor signed Assembly Bill 1174 ("AB 1174"). AB 1174 retroactively amends Government Code section 65913.4(f) to provide that a project approval "shall remain valid for three years from the date of the final action establishing that approval, or if litigation is filed challenging that approval, from the date of the final judgment upholding that approval." (Gov. Code, § 65913.4(f)(2).) The statute became effective immediately upon adoption and has the effect of conforming the statute to the interpretation that HCD erroneously and illegally attempted to implement through administrative fiat.[1]

Under the amended version of section 65913.4(f), the Legislature has relieved the Developer of its obligation to demonstrate progress toward construction and completion of the project by September 21, 2021. The Legislature has also provided the Developer almost two more years to address the numerous challenges facing the project, including (i) completion of necessary, long-delayed environmental investigation and remediation; (ii) design of the green roof, which impacts many aspects of the Project; (iii) addressing Project modifications that have not yet been approved by the

[1] You also complain that the City did not inform HCD of its error when the Department's SB 35 Guidelines were published. The City was under no obligation to correct HCD's misreading of the statute during the administrative process, and both HCD and the Developer could have identified the error by simply reading the statute.

City; and (iv) the Developer's objections to paying the full amount of legislatively adopted impact fees due for development of the Project. While it is regrettable that the Legislature has decided to retroactively change the rules under which this Project was approved, apparently for the benefit of a single property owner, we are compelled by the newly adopted statute to conclude that the Developer's request for an extension of its entitlement is now moot.

2. Project Review and Implementation

Despite the challenges outlined above, and despite the Developer's argumentative, irrelevant, and factually incorrect efforts to shift blame for what it perceives to be Project delays onto the City, the City continues to diligently process necessary Project approvals. The Developer chose to phase the Project in a manner that deferred path-critical site preparation work, including necessary environmental investigation work, and it has now only barely begun necessary site characterization work on the west side of Wolfe Road. (No substantial work has been performed east of Wolfe Road.) The Developer also chose to pursue ministerial approval of a large, complex mixed use project, leaving many critical details to be resolved following Project approval (as opposed to through a development agreement or conditions of approval). It is disingenuous to blame the City for these decisions.

The Developer also appears to take issue with the City's decision to engage in specific plan and zoning amendment processes that do not directly impact the current Project approval and with City staff's efforts to engage in post-approval discussions to achieve specific policy goals. With respect to the former, nothing in SB 35 restricts the City Council's right to adopt prospective legislation, and in any case these purported concerns are irrelevant to the current Project. As for the City's interest in pursuing policy goals such as transit improvements and greenhouse gas reductions, it would be an abdication of our responsibility to the residents of Cupertino to ignore those goals in ongoing discussions regarding the Project. Your characterization of advocacy that seeks improvements to the Project as delay is telling, and unfortunate.

This framing also ignores the fact that these good-faith discussions were initiated in large part because the Developer has argued that it should not be subject to objective, legislatively adopted impact fees to address the Project's impacts on transportation, housing, and recreational facilities. SB 35's commitment to comply with objective standards applies equally to the Developer and the City. To date, the Developer has not been willing to honor that commitment.

Notwithstanding these challenges, the City remains committed to processing subsequent approvals for the Project in compliance with SB 35. Rather than engaging in

finger-pointing as to the causes of any delays—which are in any event not unexpected for a Project of this scale and complexity—the City instead provides the attached Project Review and Implementation Schedule for review and acceptance by the Developer. We look forward to continuing to work with you on Project implementation issues and will continue to commit significant City resources to the review and implementation of the Project in accordance with the law.

3. **Your Unwarranted Objections to Routine Public Participation in the Site Cleanup Process**

Ms. Van Dusen chose to write separately to object to City staff's meeting with SCCDEH and to a request for a public record made to SCCDEH by the City's consultant. To be clear, City staff have the right and responsibility to coordinate with partner agencies that share responsibility for protecting the health and safety of Cupertino residents. It would be a dereliction of our duty to those residents to refuse to engage with the regulator who is overseeing the investigation and remediation of the Project site.

Nor is there anything unusual or untoward about such a meeting. Environmental regulators routinely meet with stakeholders to discuss the investigation and remediation of contaminated properties. Indeed, many agencies have extensive guidelines for public participation in the site cleanup process. (See, e.g., DTSC Public Participation Policies & Procedures.) The City's interest in ensuring that the site is thoroughly investigated and remediated is wholly appropriate, and we have confidence that SCCDEH's oversight will ensure that thorough and prompt measures to address environmental contamination are implemented. The City will continue to work with SCCDCEH and other partner agencies to ensure the Project meets applicable health and safety requirements.

Your citation to Government Code section 65913.4(h)(2) is also misguided. Section 65913.4(h)(2) prohibits local jurisdictions from imposing procedures on processing permits for SB 35 projects that "inhibit, chill, or preclude the development." This provision is irrelevant because SCCDEH is not a permitting agency subject to SB 35. Moreover, the purpose of the City's meeting was to ensure that its processing of building permit and other applications is aligned with SCCDEH's restrictions on soil disturbing activities. Rather than casting unwarranted and ill-informed aspersions on

the City's motives, you should welcome this type of coordination among partner agencies.[2]

Finally, you grossly mischaracterize a routine request for a public record made by a consultant the City has retained to provide advice regarding the site cleanup process. Like any other person, the City's consultant has the right to request and obtain public records from SCCDEH. The request was a natural outgrowth of a meeting with SCCDEH, and we are under no obligation to seek your permission to make a public records request from a partner agency. For you to suggest otherwise is absurd and counterproductive.

A far more productive approach would be to work in partnership with SCCDEH, with appropriate City involvement, to move toward an understanding of the full extent of contamination at the site—which remains poorly characterized three years after the Project approval—and to take all necessary steps to remediate that contamination. To advance that goal, the enclosed Review and Implementation Schedule describes ongoing SCCDEH oversight of the Project site west of Wolfe Road and outlines a process for extending that oversight east of Wolfe Road. We hope that you share our goal of promptly completing the investigation and remediation of the site, and we are confident that the process we have outlined is the best path forward for doing so.

Sincerely,

Greg Larson
City Manager

Christopher D. Jensen
City Attorney

Enclosures:
Letter to HCD from Cupertino City Attorney (Sept. 7, 2021) (w/o enclosure)
Project Review and Implementation Schedule

[2] For example, when the City reached out to California Water Service Company ("Cal Water") regarding the lack of progress in completing water plans, the City found out that Cal Water had stopped working on the Project due to unpaid fees. The Developer was able to correct this problem after the City pointed it out.

CITY ATTORNEY'S OFFICE

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September 7, 2021

Via Email (shannan.west@hcd.ca.gov)

Shannan West
Department of Housing and Community Development
Division of Housing Policy Development
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833

Re: Vallco Town Center Project

Dear Shannan West:

I write in response to your "Letter of Technical Assistance" dated September 1, 2021, concerning the anticipated application for an extension of Vallco Property Owner LLC's ("Developer's") entitlement to construct a 6.9 million square foot mixed-use project under Senate Bill 35 ("SB 35") at the former Vallco Mall site.

As an initial matter, your letter states the requests arises from a conversation with the former City Manager and the project applicant. Neither our current Interim City Manager Greg Larson nor I was aware of that conversation. In the future, please direct any inquiries regarding technical assistance to Mr. Larson.

Setting that aside, we understand the challenges the Department of Housing and Community Development ("HCD") faces in interpreting complex and evolving state housing legislation, including SB 35. You argue that a requirement to toll the expiration of the Developer's project approval while legal challenges to the approval are pending, which does not exist in the applicable provision of the statute, should be added to the law by administrative fiat. As you may be aware, the Developer has raised a similar

argument in conversations with the City. They are aware, as you must be, that we disagree with this interpretation of the statute.

The residential component of the Vallco project includes 2,402 units, 1,201 which will be deed-restricted affordable units. The applicable provision governing the term of the entitlement of the project is Government Code section 65913.4(f)(3), which states:

> If a local government approves a development pursuant to this section, that approval shall remain valid for three years from the date of the final action establishing that approval and shall remain valid thereafter for a project so long as vertical construction of the development has begun and is in progress. Additionally, the development proponent may request, and the local government shall have discretion to grant, an additional one-year extension to the original three-year period. The local government's action and discretion in determining whether to grant the foregoing extension shall be limited to considerations and processes set forth in this section.

Your argument that Government Code section 65913.4(f)(2) determines the term of the Developer's entitlement is wrong. As an initial matter, you completely fail to address the fact that subdivision (f)(2) applies only "[i]f a local government approves a development pursuant to this section and the project does **not** include 50 percent of the units affordable to households making at or below 80 percent of the area median income." (Gov. Code, § 65913.4(f)(2) (emphasis added).) When at least 50 percent of the units in the project are affordable, subdivision (f)(2) does not apply. Your argument to the contrary ignores the text of the statute.

Given that subdivision (f)(2) does not apply to the Vallco project, your contention that subdivision (f)(3) merely "informs the interpretation of subdivision (f)(2), rather than as one creating a separate, third timeline for the expiration of entitlements," is irrelevant, as well as being incorrect. And in any case, subdivision (f)(3) does create a separate timeline for entitlements for projects that fall within its scope (*i.e.*, SB 35 projects that do not fall within the scope of subdivision (f)(1) or (f)(2)). Just like subdivisions (f)(1) and (f)(2), subdivision (f)(3) sets the term of the entitlement, and like subdivision (f)(2), subdivision (f)(3) provides for a one-year extension of that term. The terms of subdivision (f)(3) are parallel to those of subdivision (f)(2), not an interpretation of its provisions, and any contrary reading of the statute would render subdivision (f)(3) redundant and the remaining extension provisions nonsensical where a project falls outside the scope of both subdivisions (f)(1) and (f)(2).

Indeed, to the extent the terms of one of these paragraphs "informs the interpretation" of the other, your interpretation of the statute gets it backward: subdivision (f)(3)'s standard for reviewing an extension request incorporates the "considerations and processes set forth in this section," which presumably include the standards set forth in subdivision (f)(2) (*i.e.*, "significant progress toward getting the development construction ready"). The quoted language in subdivision (f)(3) is meaningless unless that subdivision is interpreted as an independent provision that controls the term of SB 35 entitlements for projects that fall outside the scope of subdivisions (f)(1) and (f)(2)—as this project does.

In sum, the City's interpretation of the extension provisions of SB 35 is dictated by the statutory language. This interpretation is also consistent with the conditions of the project's approval. The City's September 21, 2018 approval letter states:

> As mandated by Government Code Section 65913. 4(e)(3) [now (f)(3)], this Approval shall remain valid for three years from the date of this letter (September 21, 2021) and shall remain valid so long as vertical construction of the Project has begun and is in progress as determined in Municipal Code Sections 19. 12. 180, 15. 02.150 and the California Building Code Section 105.
>
> The Project proponent may request, and the City has discretion to grant, an additional one-year extension to the original three-year period. The City' s action and discretion in determining whether to grant the extension shall be limited to considerations and process set forth in Government Code Section 65913. 4.

Neither HCD nor the Developer disputed the validity of this condition at the time of approval, and they are barred from doing so now. The permit condition is controlling. Thus, the City will process an application for an extension received based on the requirements of the permit condition stated above, which are entirely consistent with the requirements of SB 35. The City will exercise its discretion to review that application based on the criteria set forth in SB 35, including evidence that the project has made significant progress toward construction.

In anticipation of receiving a timely extension request, the City has devoted significant resources to processing subsequent approvals for the Vallco project. These approvals include building permits, public right-of-way improvements, a final subdivision map,

and affordable housing agreements. The scope, extent, and complexity of those approvals and other issues arising from the project is reflected in the recently prepared City Manager's report to the City Council, which is enclosed with this letter for your review. The report demonstrates that the City is fully engaged in work to allow the project to move forward.

That being the case, the Developer, and not the City, ultimately has the responsibility to obtain all necessary approvals and commence vertical construction within in the timeframe contemplated by SB 35. In particular, the Developer inexplicably delayed taking the necessary steps to investigate, manage, and remediate environmental contamination onsite. *The City is not responsible for any delays resulting from the Developer's mismanagement of the environmental investigation*, although of course we will continue to diligently process applications for subsequent approvals, consistent with all legal requirement and the requirements of SB 35.

Again, please feel free to contact me directly at chrisj@cupertino.org if you have any questions about this letter or if you believe further technical assistance is necessary.

Sincerely,

Christopher D. Jensen
City Attorney

cc: Greg Larson, Interim City Manager
Melinda Coy, Land Use and Planning Manager, HCD
Fidel Herrera, Senior Housing Policy Specialist, HCD
Ryan Seeley, General Counsel, HCD

Enclosure:
City Council Staff Report (Sept. 7, 2021)

VALLCO TOWN CENTER SB 35 PROJECT
PROJECT REVIEW AND IMPLEMENTATION SCHEDULE

1. Site Investigation and Remediation

Vallco Property Owner LLC ("Developer") has entered into an oversight agreement with the Santa Clara County Department of Environmental Health ("SCCDEH") covering the portion of the Vallco Town Center site ("Site") west of Wolfe Road. Excavation and shoring can only be carried out west of Wolfe Road with authorization from SCCDEH, after the property has been assessed and/or remediated to the satisfaction of SCCDEH. The City of Cupertino ("City") will require written confirmation from SCCDEH prior to developer being able to perform any work west of Wolfe Road under any excavation and shoring permit, or any other soil disturbing work west of Wolfe Road.

The Developer will request to enter an oversight agreement with SCCDEH for the portion of the site east of Wolfe Road before commencing significant soil disturbing activity on that portion of the Site.

2. Fire Station Construction

Subject to negotiating a final agreement and approval of the Santa Clara County Fire District Board, the Developer will, at its cost, construct a fire station on the Site to assure that current emergency times can be maintained in light of increased traffic volumes. The fire station will be developed in accordance with the requirements of the Santa Clara County Fire District ("Fire District"). These requirements include:

- A scope of development will be prepared in sufficient detail to be incorporated as an exhibit in legal agreements.
- A concept plan must show fire station with Central Plant.
- The Developer and the Fire District will enter into a 30-year no-cost lease agreement, with the Developer responsible for maintenance of building exterior and core systems.
- The Fire District will review and provide input on developing design and construction plans.
- The fire station will be constructed in Project first phase and completed prior to first phase occupancy.

- The Developer will consult with the Fire District regarding building standards employed for construction of the fire station.

The agreement will be fully executed prior to the approval of the first phase building permit.

3. Fire Station Access Issues/New Intersection at Wolfe Road and Street 7

The Fire District has requested the City's assistance in ensuring that emergency vehicles can turn northbound on Wolfe Road from the Project Site. At the Developer's request, the City is considering allowing an intersection at Wolfe Road and Road 7 to help accommodate this movement only for emergency vehicles. The City will require the Developer to prepare plans, including traffic signal preemption and median modifications, to accommodate the District's access request. The improvements will be completed prior to first occupancy.

4. Green Roof Emergency Access

The Fire District determined that the green roof amenity will require direct access fire lanes from the street level for fire vehicles The Fire Code requires that fire roads support aerial equipment weighing 75,000 lbs. In lieu of this weight requirement, the Fire District will authorize alternative means and methods for fire access, as permitted under the Fire Code. The green roof must support emergency response vehicles weighing up to a 10,000 pounds.

5. Green Roof Design Issues

The City Building Official will convene a working group consisting of the Developer's design team, the District and their consultant, and the City's plan checking consultant to address emergency access and structural issues related to the green roof. The City will require information to determine if the key design, green roof superstructure, supports, and foundations can resist potential sliding forces. The City will require that the access and fire lane issues be resolved prior to the issuance of the parking garage and podium building permits.

6. Transit Hub/Transportation

The Mobility Element of the General Plan required that the Vallco Developer "work with VTA [Valley Transportation Authority] / and or other transportation organizations to study and develop a transit transfer station that incorporates a hub for alternative services, such as car sharing, bike sharing and/or other services." The Developer's plans recognize the importance of such a transit hub. The Developer and the City agree

to cooperatively work with VTA to develop transportation connection and to review proposed transportation system management ("TSM") and traffic demand management ("TDM") programs. The Developer and the City will reach an agreement on the transit hub design and other transportation issues before issuance of the first building permit for vertical construction of the first phase of the Project, based on a phasing plan approved by the Developer and the City.

7. Cal Water

Before issuance of the building permit for vertical construction of the first phase of the Project, California Water Service Company ("Cal Water") will provide the City with a letter confirming that the agency can provide sufficient water for all uses, including residential, office, retail, landscape irrigation, and cooling towers. The Project's water supply, including landscaping water, is based in part on an innovative cistern recapture system. The Developer will provide proof that the cistern system is viable and will be adequate to provide year-round irrigation needs, or that water will be provided by other means such as reclaimed water. This letter will be provided to the City before issuance of the building permit for vertical construction of the first parking garage or podium building permit.

8. Final Map

The Developer proposes to record phased final maps, and the City will permit phasing provided all map conditions are satisfied. Prior to approval of the final map, the City will require clearance letters from all agencies and property owners with easements within the property and letters from agencies certifying that they will provide services to the development. All required planning and inspection fees must be paid prior to recording any map, as well as any required impact fees. The Subdivision Improvement Agreement and CC&Rs must also be recorded concurrently with recordation of the final map.

9. Below Market Rate Housing Manual

The Developer is required to implement the City's Below Market Rate Housing ("BMR") Procedural Manual. The BMR Manual will provide covenants for 840 of the affordable housing units. The template BMR Manual has been provided to the Developer. The City must approve a BMR Manual, template regulatory agreement, and a BMR program administrator prior to the issuance of building permits for the first housing units. A list of affordable units must be recorded before occupancy of any housing unit.

10. Project Modification

The development will require modifications to the approved SB 35 plans. State law contemplates a 60-day approval process for substantial changes in plans. Minor changes that are in substantial compliance with the approved plans will be addressed at the building permit stage.

11. Impact Fees

City impact fees include parkland dedication in-lieu, transportation (TIF) and housing (BMR) fees. The fees are validated through nexus studies demonstrating the connection between the amount of the fee and development project impacts. The Developer has contested the reasonableness of these fees as applied to the Project. The parties will continue to negotiate in good faith until agreement is reached and approved by the City Council, or the City imposes legislatively adopted fees in accordance with applicable requirements of the Municipal Code. The Developer agrees that the City Council has the discretion to impose or modify its impact fees. The Developer retains its right to challenge any decision made by City Council in accordance with law. Nothing in this paragraph waives any claim or defense either party may have in any action seeking a refund of or challenging the validity of any impact fees.

The parties agree any impact fees due are payable as follows:

- Parkland Dedication Fees: Parkland fees must be paid at the time of the issuance of the core and shell building permit for each building.

- Transportation Impact Fees (TIF): TIF fees must be paid prior to issuance of building permit. (CMC § 14.02.040.) The Developer will pay TIF fees at the time of the issuance of the core and shell building permit for each building.

- BMR Fees: BMR fees must be paid prior to or by date of issuance of construction permits. (Resolution 20-055, BMR Manual, § 2.2.1.) The Developer will pay BMR fees at the time of the issuance of the core and shell building permit for each building.

This Project Review and Implementation Schedule is intended to provide a road map for review and processing of subsequent permits and other work necessary to complete construction of the Project. By providing this Schedule, the City does not waive or modify any requirement of the September 21, 2018 approval letter or any requirements that have been or may lawfully be imposed by any subsequent approval. Additionally, nothing in this Schedule limits the City's obligations to process subsequent permits for the Project under Government Code section 65913.4 and other applicable law. Both

parties recognize that additional issues may arise in the course of development of the Project, and by agreeing to the procedures outlined above, neither party waives its right to raise additional issues or require compliance with any state or federal law or any City ordinance, resolution, or policy applicable to the Project under state law.

ACKNOWLEDGEMENT

On behalf of Vallco Property Owner LLC, I acknowledge receipt of the foregoing Project Review and Implementation Schedule for the Vallco Town Center SB 35 Project and consent to the process for resolution of outstanding issues set forth herein.

_____ _____

Reed Moulds Date
Managing Director, Vallco Property Owner LLC