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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

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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).

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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,

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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](mailto: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)