

## **SB 35 Modification Legal Framework & Application Methodology**

The purpose of this document is to establish the legal framework applicable to SB 35 modification applications, generally, as well as to provide details regarding the approach to this SB 35 Modification Request application itself and the information provided therein.

### **1 SB 35 Compliance and Consistency with Objective Standards**

#### **1.1 City's Adopted SB 35 Eligibility Checklist and Application Form**

The first issue to review is the information to be included in a modification application. Pursuant to HCD's Streamlined Ministerial Approval Process Guidelines (SB 35 Guidelines), a local government subject to SB 35 must provide information to the public about the process for applying and receiving ministerial approval, materials required for an application, and relevant objective standards to be used to evaluate the application. (SB 35 Guidelines, § 300(b).) The application requirements may not be more stringent than required for a final multifamily entitlement or standard design review in its jurisdiction and may require only information that is relevant to and required to determine compliance with SB 35 and the City's objective standards. The application requirements and process shall not in any way inhibit, chill, or preclude the Streamlined Ministerial Approval Process, and must be strictly focused on assessing compliance with the SB 35 criteria. Finally, if an application is submitted that is missing materials, that is not a basis for denial provided that the "application contains sufficient information for a reasonable person to determine whether the development is consistent, compliant, or in conformity with the requisite development standards." (SB 35 Guidelines, § 301(b)(1)(A).)

On September 3, 2019, subsequent to the SB 35 Approval, the City Council adopted procedures for processing SB 35 projects, which included an SB 35 Eligibility Checklist; the City subsequently also published an SB 35 application form. Although the City's SB 35 application form does not address modifications and did not exist at the time of the original application, it provides a helpful framework for assessing SB 35 compliance so, this application includes a completed [Cupertino SB 35 Application Form](#), as well as supplemental responses, attached as [Appendix I, Supplemental Responses to City's SB 35 Application Form](#), that are tailored to the modification process and applicable legal framework pursuant to Gov Code § 65913.4(g).

#### **1.2 Consistency with Objective City Standards**

Projects subject to SB 35 must comply with "objective" standards, defined under state law as standards that "involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal." (§ 65913.4(a)(5).)

The original SB 35 Application included an Objective Standards Consistency Analysis that provided a robust analysis of the Project's consistency with the applicable objective standards, in addition to subjective General Plan policies for informational purposes. In connection with this modification request application, the Objective Standards Consistency Analysis has been updated to address the modification request and is set forth in [Appendix IV, Updated Objective Standards Consistency Analysis](#).

SB 35 establishes that a modification request must be evaluated to determine only whether such changes would modify the previously approved project's consistency with the objective planning standards. Further, because the modification does not yield a change in square footage of construction or residential units of 5 percent or greater, the modification request is subject to the same objective planning standards that were in effect at the time of submittal of the SB 35 Application on March 27, 2018. Also, because this application is submitted after the first building permit application (submitted on December 21, 2018; Permit Numbers B-2018-2171 and B-2018-2172), the project remains subject to the 2016 building codes, unless agreed to by the Applicant.

#### 1.2.1.1 Consistency with General Plan and Zoning Designation

The modification request remains consistent with the General Plan and Cupertino Municipal Code standards applicable to the Project site that were in effect at the time of the original application. The General Plan identifies the Project site as the Vallco Shopping District Special Area and has the following General Plan land use designation: Commercial/Office/Residential, and allows for mixed-used development with commercial, retail, hotel, office and residential uses. This General Plan designation is inconsistent with the Project site zoning districts of Zoned P(Regional Shopping) and P(CG). As stated in the City's 90-Day SB 35 Determination Letter dated June 22, 2018 (90-Day Letter), "[t]here is a zoning designation for the project site which is inconsistent with the General Plan land use designation [,t]herefore, under Government Code 65914.3(a)((5)(B), where there is a conflict between the General Plan and zoning, the standards in the General Plan prevail." Accordingly, as with the initial SB 35 Application, this modification request generally focuses on consistency with the General Plan. See [Appendix IV, Updated Objective Standards Consistency Analysis](#) for additional information.

## 2 SB 35 Legal Framework for Modification Application

### 2.1 Government Code § 65913.4(g)

Pursuant to subsection (h) of Gov Code § 65913.4, the City must issue subsequent permits if the application "substantially complies" with the development as approved under SB 35. Although the current design of the Project maintains all key elements of the Project as originally approved, the City has taken a narrow interpretation of "substantial compliance," so the Applicant anticipates that a modification will be required and is submitting this application pursuant to subsection (g) of Gov Code § 65913.4. Under that subsection, an applicant may request a modification to a development previously approved under SB 35 if that request is submitted before the issuance of the final building permit required for construction of the development. To date, the City has issued certain permits related to site preparation, but has not yet issued final building permits required for construction; as such, this modification request is timely under the statute.

#### 2.1.1.1 Modification Request Remains a Ministerial Approval

As with the original SB 35 Application, the modification request is a ministerial approval, subject only to determination of consistency with the same objective standards in effect at the time of the original application:

The City "shall approve a modification if it determines that the modification is consistent with the objective planning standards specified in subdivision (a) [i.e., general SB 35 framework] that were in effect when the original application was first submitted" (§ 65913.4(g)(1)(B), emphasis provided.)

### 2.1.1.2 Modification Request is Subject to Narrow Review for Consistency with Applicable Objective Standards in Effect at the Time of Original SB 35 Application

Subsection (g) establishes a narrow framework for the City's evaluation of the modification request that differs from its review of the original SB 35 Application. In reviewing a modification request, the City's review is "strictly limited" to determining whether the modification itself affects the approved project's consistency with objective planning standards. In doing so, the City may not reconsider prior determinations that are not affected by the modification. Specifically, the statute provides that:

"The local government's review of a modification request pursuant to this subdivision shall be strictly limited to determining whether the modification, including any modification to previously approved density bonus concessions or waivers, modify the development's consistency with the objective planning standards and shall not reconsider prior determinations that are not affected by the modification." (§ 65913.4(g)(4), emphasis provided.)

Regarding the direction to not reconsider prior determinations that are not affected by the modification, it should be noted that the location of the Project is unchanged, so the City may not revisit whether the Project satisfies any of the site criteria under Government Code § 65913.4(a)(6), such as whether it is in a very high fire hazard severity zone, on the Cortese List, within a special flood hazard area, or any of the other site related requirements.

When determining consistency with objective standards, SB 35 and the HCD Guidelines establish that the City shall find that the Project is consistent if there is substantial evidence that would allow a reasonable person to conclude that the Project is consistent with the applicable objective standards. (See Gov. Code § 65913.4(c)(3); HCD Guidelines, § 301(a)(3).) The HCD Guidelines further provide that the City may only find that the Project is inconsistent with one or more of these objective standards if it "finds no substantial evidence in favor of consistency and that, based on the entire record, no reasonable person could conclude that the development is consistent with the objective standards." (Id.) This "reasonable person" standard contrasts with the traditional deference given to a local jurisdiction's interpretation of its own regulations and is important for ensuring that all standards are objective. *California Renters Legal Advocacy and Education Fund v. City of San Mateo*, 68 Cal.App.5th 820 (2021) (interpreting the same standard in the Housing Accountability Act, the court noted "where a standard is truly objective, in that it is 'uniformly verifiable by reference to an external and uniform benchmark' [...], there is little to no room for reasonable persons to differ on whether a project complies with such a benchmark").

### 2.1.1.3 Applicable Objective Standards Are Those in Effect at the Time of Original SB 35 Application

For modification requests, SB 35 establishes that new objective standards adopted after the original SB 35 application was submitted may only apply in the following two instances: (1) where the total number of residential units or total square footage of construction changes by 15 percent or more or (2) where the total number of residential units or total square footage of construction changes by 5 percent or more and application of the newly adopted objective standards is necessary to mitigate or avoid a specific, adverse impact, as that term is defined under the Housing Accountability Act. For modification requests that result in less than 5 percent change in the total number of residential units or total square footage of construction, the applicable objective regulations are those in place at the time the original SB 35 application was submitted. (§ 65913.4(g)(3).) The determination of a change in square footage excludes underground areas. (Id.) Further, updated building codes can only be applied to modifications submitted before the first building permit application, unless agreed to by the applicant.

Here, the modification request yields less than a five percent change in total number of residential units and total square footage of construction, as shown in [Appendix II, Modification Request Plan Sets](#), Sheets P-0101 and P-0102, and as further detailed in [Appendix III, Modification Request Project Description](#), so is subject to the same objective standards in place at time of the original SB 35 Application submittal on March 27, 2018. It also is submitted after the first building permit application, so it remains subject to the 2016 Building Code, which is the version in effect at the time of the original SB 35 Application.

Since the time of submission of the SB 35 Application on March 27, 2018, the City has adopted certain new land use controls, which do not apply to the Project or this modification request. These newly adopted regulations include but are not limited to the General Plan and zoning amendments downzoning the Vallco Shopping District Special Area, adopted by the City Council on August 20, 2019 (Resolutions 19-109 and 19-110; Ordinances 19-2187 and 19-2188), the Reach Code, adopted January 21, 2020, and more recently, updates to Title 17 of the Cupertino Municipal Code to add new environmental site data requirements, adopted by the City Council on November 2, 2021 (Ordinance 21-2232). For reference, on August 14, 2020, the Applicant provided the City with copies of all policies in place at the time of SB 35 Application for its reference, which may be useful to the City in its review of this modification request and has been reattached here for reference as **Attachment A**.

#### **2.1.1.4 City Must Utilize the Same Assumptions and Methodology as Previously Utilized for SB 35 Approval**

The City must utilize the same “assumptions and analytical methodology [...] originally used to assess consistency for the development” when evaluating the modification request for consistency with the objective planning standards. (§ 65913.4(g)(1)(C).)

For example, since the SB 35 Approval, the City has adopted procedures for implementing SB 35 project applications, which includes a revised approach to calculating the two-thirds residential requirement that is no longer based on the “floor area” definition previously utilized for the original SB 35 Application. Therefore, when evaluating the modification request for consistency with the two-thirds residential requirement, the City must utilize the prior “floor area” definition and its prior methodology for including or excluding area or characterizing area as residential or non-residential. See [Appendix III, Modification Request Project Description](#) for further discussion of the modification request compliance with the two-thirds residential requirement.

The City has also adopted an SB 35 Application Form that requests certain information that was not required in order to process the SB 35 Approval. Because the City must follow the same assumptions and analytical methodology, the modification request includes the same approach, format and level of detail as the original application. To the extent the SB 35 Application Form requests information that was not required previously, the failure to provide such information in this modification request is not a basis for denial.

#### **2.1.1.5 City Must Review and Approve or Deny the Modification Request Within 60 Days**

SB 35 establishes a clear timeline for the City’s review of the modification request. Specifically, SB 35 states that:

“Upon receipt of the developmental proponent’s application requesting a modification, the local government shall determine if the requested modification is consistent with the objective planning standard and either approve or deny the modification request within 60 days after

submission of the modification, or within 90 days if design review is required.” (§ 65913.4(g)(2), emphasis provided.)

Here, the modification request is subject to the shorter 60-day review period because design review does not apply to the Project, as the City previously confirmed in its 90-Day Letter, which concluded that no objective design review criteria are applicable to the Project. The City has also affirmed this timeline in its September 21, 2021 letter.

This shorter review window is consistent with the statutory intent regarding modification requests, which is to provide a streamlined review of changes to projects already approved under SB 35. The shorter review window is appropriate because the City’s review is limited to determining only whether the modification request results in any change to the Project’s consistency with objective standards. To assist with the City’s review, the Applicant has prepared an **Appendix III, Modification Request Project Description** and supporting materials to highlight the key changes and provide analysis regarding the Project’s continued consistency with applicable objective standards. Also, unlike the initial approval process which contemplates the potential for hearings for “public oversight” and design review, SB 35 does not contemplate any public hearings for the modification process; as such, no public hearing should be required to process this modification request.

## 2.2 Housing Accountability Act

In addition to streamlined ministerial approval under SB 35, the Project is also subject to the Housing Accountability Act (§ 65589.5), which provides additional protections to ensure the adequate provision of housing statewide. Since the time of the original SB 35 Application, the Legislature has expressly confirmed that that the Housing Accountability Act applies to projects approved under SB 35, stating that:

“[SB 35] shall not prevent a development from also qualifying as a housing development project entitled to the protections of Section 65589.5. This paragraph does not constitute a change in, but is declaratory of, existing law.” (§ 65913.4(i)(2).)

Notably, a broad range of plaintiffs can sue to enforce the Housing Accountability Act, and the City would bear the burden of proof in any challenge. Gov. Code § 65589.5(k). As reformed in the 2017 legislative session, the Housing Accountability Act makes attorney’s fees and costs of suit presumptively available to prevailing plaintiffs and contemplates the potential for fines if the law is not followed.

## 3 Environmental Review and Compliance

The California Environmental Quality Act (“CEQA”) does not apply to the SB 35 approval process—including for modification requests pursuant to SB 35—because the approval is ministerial, and projects are judged based on compliance with objective planning standards that do not entail the exercise of discretion. See Cal. Pub. Res. Code § 21080(b)(1) (CEQA does not apply to ministerial projects); see also 14 Cal. Code. Regs § 15268(a) (“Ministerial projects are exempt from the requirements of CEQA”).

However, the Project as approved includes a range of mitigation measures intended to avoid or lessen potential environmental impacts of the Project, as detailed in the *Appendix C: Vallco Town Center Project Commitments* attached to the original SB 35 Application, which includes certain mitigation measures from the City of Cupertino Community Vision 2040 General Plan EIR as well as Applicant Proposed Measures (APMs) as proposed by the Applicant. Although the SB 35 project approval is ministerial and exempt from

CEQA, the Applicant has elected to voluntarily comply with General Plan EIR Mitigation Measures and to implement additional APMs as outlined. This modification request would continue to comply with and implement the *Appendix C: Vallco Town Center Project Commitments*. Additionally, the Project is also subject to certain conditions of approval, attached to the SB 35 Approval as *Attachment C: Standard Project Requirements and Project Implementation Requirements*, which similarly incorporate certain measures related to compliance with environmental regulations.

Although not required by the SB 35 Approval or any other legal obligation, the Applicant also has voluntarily entered into a Remediation Action Agreement with the Santa Clara County Department of Environmental Health (“SCCDEH”) regarding soil management on the Project site and is proactively working with SCCDEH to characterize the Project site and identify the protocols necessary to fully remediate the Site in a way that protects the public, workers and future residents from any historic soil contamination. The City previously requested such oversight since it lacked the expertise to address contamination issues. Since that time, the City has issued certain permits for construction on the site – including Shoring & Excavation and Foundation permits – which include conditions that SCCDEH first confirm that it is safe and/or appropriate prior to the commencement of ground disturbing activities, which the Applicant has and will continue to abide by.

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Miles Imwalle  
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mimwalle@coblentzlaw.com

August 14, 2020

**VIA E-MAIL**

Ms. Heather Minner  
Cupertino City Attorney  
20410 Town Center Lane  
Suite 210  
Cupertino, CA 95014-3230

Re: Vallco Town Center Project – Memorialization of City Regulations, Standards, and Policies

Dear Ms. Minner:

I am submitting this letter on behalf of Vallco Property Owner LLC ("Vallco"), the developer and owner of the approximately 51-acre property ("Property") on which the Vallco Town Center Project (the "Project") has been approved for development pursuant to the streamlined and ministerial SB 35 process. As we have discussed, it would be mutually beneficial to memorialize for future reference those regulations, standards and policies that were in effect on the date of the SB 35 submittal – March 27, 2018 – because under the law, the Project is only subject to the objective standards in effect on that date. (Gov. Code § 65913.4(a)(5).)<sup>1</sup> As Vallco works with the City to process the subsequent permits required to construct the Project, we believe that it will help to avoid confusion and future disputes for the parties to memorialize the applicable law. This is particularly important as the City Council has directed City Staff to prepare a number of modifications to the Zoning Code and General Plan, such as the 2019 amendments to the parkland dedication ordinance. As future amendments are adopted, unless we memorialize the law, it may become increasingly difficult to determine the law in effect in March 2018.

We have provided you an invitation to a file sharing site with what we view to be the relevant materials. On the file sharing site, we have provided the following:

- A copy of the Municipal Code downloaded from the American Legal Publishing website on August 27, 2019.

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<sup>1</sup> This concept is reinforced by the legislature's recent adoption of SB 330 amending the Housing Accountability Act, which similarly requires that qualifying housing development projects (such as Vallco) be subject only to the ordinances, policies and standards in effect at the time an application is submitted. (See Gov. Code § 65589.5(o)(1).) Further, AB 1485, amending Gov. Code 65913.4, clarified that projects subject to SB 35 are afforded protections under the Housing Accountability Act.



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- The Cupertino 2015–2040 General Plan, downloaded on September 17, 2019 from the City’s General Plan website. *NOTE: The General Plan amendments adopted by the City on August 20, 2019 are properly not included in this version.*
- The following documents relating to below market housing requirements: “Policy and Procedures Manual for Administering Deed Restricted Affordable Housing Units” and the “Below Market Rate (BMR) Housing Mitigation Program Procedural Manual.”

In order to identify changes to the Municipal Code and General Plan adopted since application submittal that do not apply to the Project, we also reviewed the resolutions and ordinances adopted by the City since March 27, 2018. We have identified relevant materials that do not apply to the Project, and have included the following on the file sharing site:

- Select City Council resolutions adopted between March 27, 2018 and August 11, 2020, downloaded from the City Records Digital Archives.
- Select City Council ordinances that were enacted between March 27, 2018 and August 11, 2020 downloaded from the City Records Digital Archives.
- Select City Council ordinances currently under consideration by the City Council, but not yet adopted as of August 11, 2020 downloaded from the City Records Digital Archives.

Notably, this list is not intended to be exhaustive, but rather representative of the types of regulations, standards and policies that would not apply to the Project under SB 35. Of course, any future regulations, standards and policies adopted by the City related to objective standards affecting development of the Project would also not apply under SB 35.

With respect to development impact fees, it is our understanding that the only fees that have been increased since the application submittal is the City's Public Art requirement and in-lieu fee found under Chapter 19.148 of the City's Municipal Code<sup>2</sup> and the Housing Mitigation In-Lieu Fee.<sup>3</sup>

We hope that this effort will be mutually beneficial for the City and Vallco as we move forward with building the Project. Please do not hesitate to contact me directly with any questions or comments regarding this correspondence, or if you have any trouble accessing the file sharing site materials.

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<sup>2</sup> Because the copy of the Municipal Code uploaded to the file sharing site incorporates the August 21, 2018 amendments to Chapter 19.148 that do not apply to the Project, we have also uploaded a copy of the redlined changes to Chapter 19.148 that was included in the agenda packet for the City Council's July 3, 2018 meeting (see Agenda Item #22). The redline establishes the version of Chapter 19.148 as it existed prior to amendment by Ordinance No. 18-2175 that applies to the Project.

<sup>3</sup> As further detailed in our letter dated December 21, 2018, on reservation of rights and protest regarding fees, Vallco reserves its rights to challenge the application of certain additional fees to the Project.



Coblentz  
Patch Duffy  
& Bass LLP

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Sincerely,

A handwritten signature in blue ink, appearing to read "Miles Imwalle". The signature is fluid and cursive, with the first name "Miles" and last name "Imwalle" clearly distinguishable.

Miles Imwalle

CC: Deborah Feng, City Manager  
Reed Moulds, Managing Director, Sand Hill Property Company