

APPENDIX III – DENSITY BONUS APPLICATION MATERIALS

I. Executive Summary

As confirmed in the SB 35 Approval and 2022 and 2024 Modifications, the Project qualifies for and has been granted a density bonus under the State Density Bonus Law (as implemented under Cupertino Municipal Code (“CMC”), Chapter 19.56). Under both the SB 35 Approval and 2022 Modification, the City granted a density bonus of 35 percent, yielding 623 additional market rate density bonus units, and granted three concessions. Due to amendments to the State Density Bonus Law (See Gov. Code § 65915 et seq.), in the 2024 Modification the City granted a density bonus of 50 percent, yielding an additional 890 market rate density bonus units (an increase of 267 units), and granted three concessions and one waiver.

This modification application maintains the request for a 50% density bonus that was approved as part of the 2024 Modification. This modification request also includes modifications to one of the three previously granted concessions and maintains the previously granted waiver request. **Section II** below provides an overview of the legal framework applicable to this request; **Section III** provides details regarding the 50% density bonus request; **Section IV** provides details regarding the concessions request; and **Section V** provides details regarding the waiver request.

II. Applicable Legal Framework for the Density Bonus Request

The State Density Bonus Law establishes a statutory right to applicants seeking additional density and relief from otherwise conflicting development standards. Since the SB 35 Approval, the Density Bonus Law has been amended to strengthen its mandates and provide clarity to both applicants and local agencies in processing density bonus applications; additionally, California courts have issued additional binding decisions that further clarify and affirm key provisions of the statute. Importantly, both the statute and case law are clear that the State Density Bonus Law must be interpreted and implemented “liberally in favor of producing the maximum number of total housing units.” (Gov. Code § 65915(r).)

As a general principle under SB 35, additional density or other concessions, incentives, or waivers of development standards granted pursuant to the Density Bonus Law are not taken into account when evaluating compliance with the City’s “objective zoning standards” and “objective design review standards.” Further, when processing a modification application, the City must utilize the same “assumptions and analytical methodology” that it used when processing the original application to assess consistency with objective planning standards. (Gov. Code § 65913.4(g)(1)(C).) The City has previously approved a density bonus in connection with the SB 35 Approval and 2022 and 2024 Modifications, so this requirement extends to its review of this density bonus application.

The following requirements apply to the City’s review of this density bonus request:

- **Density:** Under the State Density Bonus Law, the project qualifies for a 50% density bonus based on its incorporation of 15% of the “total units” as affordable to very low income (“VLI”) households. For purposes of determining the number of affordable units required to qualify for a particular density bonus or number of concessions, the statute defines the term “total units” to exclude units added by the density bonus. This 50% results in an increase of 890 market rate bonus units based on including 267 VLI units for a project total of 2,669 units. State Density Bonus Law allows the market rate bonus units to be located in geographic areas separate from the affordable units.

- **Concessions/Incentives:**¹ Under the State Density Bonus law, the Project is entitled to three concessions. The City can only deny a concession if it finds that it would not result in identifiable and actual cost reductions; would have an unmitigable/unavoidable specific, adverse impact on public health and safety or any real property listed on the California Register of Historical Resources; or would violate state or federal law. The City has already granted the requested concessions, and they remain applicable, so that determination cannot be revisited. Moreover, since the SB 35 Approval, courts have affirmed that, with respect to identifiable and actual cost reductions, applicants do not bear the burden to prove that incentives would result in actual cost reductions; rather, requested incentives are presumed to result in cost reductions, and local governments must either accept this presumption or make written findings based on substantial evidence to the contrary. (See *Schreiber v. City of Los Angeles*, 69 Cal. App. 5th 549 (2021).)
- **Waivers:** Under the State Density Bonus law, the Project is entitled to a waiver of all development standards that would physically preclude the development at the density permitted and with the concession(s) granted. Unlike concessions, waivers are not limited in number. Under the State Density Bonus law, the City can only deny a waiver if it finds that it would have an unmitigable/unavoidable specific, adverse impact on public health and safety; would have an adverse impact on real property that is listed in a qualifying historic register; or would violate state or federal law. The City has already granted the requested waiver, and it remains applicable, so that determination cannot be revisited. Recent case law has also affirmed the use of waivers; in 2022, a California appellate court clarified that density bonus projects are entitled to waive development standards that would prevent the project *as it is designed* from being built – meaning a waiver must be granted even if the project could theoretically be redesigned to comply with the relevant standard(s). (See *Bankers Hill 150 v. City of San Diego*, 74 Cal. App. 5th 755 (2022).) Accordingly, when making a request for a waiver in connection with this modification request, the Applicant need not demonstrate that the Project could be redesigned in a manner that complies with the standard from which it is seeking relief.

Although not required by state law, the City’s local density bonus code requires that the affordable units that are provided for density bonus purposes be dispersed throughout the Project. (See CMC § 19.56.050(G).) The modification request complies with this dispersal requirement by including affordable units in two standalone buildings that are distributed among the west and east side of the Project site. This approach is also substantially similar to what was approved in the 2024 Modification. This dispersal strategy allows for project financing through low-income housing tax credit programs, as well as for the provision and allocation of key services and amenities to those affordable units. Although the modified project continues to comply with this requirement, it is not obligated to because under SB 35, the requirement for the affordable units to be “dispersed throughout the project” is not objective because it involves personal judgment and there are no “uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal.”

III. Density Bonus

The 2024 Modification increased the unit count by utilizing the 50% density bonus that is authorized under the State Density Bonus Law. As part of that, a greater proportion of the increased units were located on

¹ The statute uses the terms concession and incentive interchangeably. For simplicity, this application uses the term concession.

the west side of Wolfe Road, as allowed by State Density Bonus Law, which allows the bonus units to be located in areas geographically separate from the associated affordable units. The modification request maintains both the unit count and the allocation of more bonus units on the west side.

Under the applicable General Plan Land Use Element policies, the “base density” for the Project site remains 1,779 units. Based on the Project’s base density of 1,779 units, a 50% density bonus yields 890 additional market rate density bonus units, thereby totaling 2,669 units. To achieve a 50% density bonus, the modification request includes 267 VLI units, which represents 15% of the base density of 1,779. SB 35 was updated by AB 3122 and now requires projects with at least 500 units that were submitted prior to January 1, 2019 to provide only 20% of base units as affordable, with at least 9% affordable to 50% AMI households (See Gov. Code § 65913.4(a)(4)(B)(ii)(I)(ib)). This 20% requirement now yields a total of 356 affordable units (inclusive of the 267 VLI units). (See Gov. Code § 65913.4(a)(4)(C); see also HCD Guidelines § 402(b)(3).) See **Table 1** below for a summary of the density bonus calculation under this modification request as compared to the original SB 35 Application.

Table 1: Density Bonus Summary Table

	Max Units Permitted (Base Density)	Max Units Permitted with Density Bonus	Total Units Proposed	Affordable Units by Income Level	Bonus Percentage	Concessions	Waivers	Bonus Units
Original SB 35 Approval	1,779	2,402	2,402	Very Low: 361 Low: 840	35%	3	0	623
Modification Request 3	1,779	2,669	2,669	Very Low: 267 Low: 89	50%	3	1	890

IV. Request for Three Concessions

The Project has been previously granted the following three concessions under the State Density Bonus Law based on the inclusion of 15% of the total units as affordable to VLI households:

1. A concession to allow the affordable units to deviate from the requirement that unit types be comparable to the market rate units within the development pursuant to BMR Housing Mitigation Procedure Manual Section 2.3.4(A);
2. A concession to allow the studio and one-bedroom BMR affordable units to be smaller in size than the studio and one bedroom market rate units pursuant to BMR Housing Mitigation Procedure Manual Section 2.3.4(B); and
3. A concession to allow 200,000 square feet of retail, a reduction of 400,000 square feet, where 600,000 square feet is required in the General Plan pursuant to Strategy LU-19.1.4.

This modification request seeks to maintain concession #1 and #3 with no changes and requests the following minor modifications to concession #2 as shown in ~~strike through~~/underline below:

1. [No Changes]

2. A concession to allow the ~~studio and one-bedroom~~ BMR affordable units to be smaller in size than the ~~studio and one-bedroom~~ market rate units of the same type pursuant to BMR Housing Mitigation Procedure Manual Section 2.3.4(B).
3. [No Changes]

This revision cleans up the concession language and better reflects how the Project has been designed since the first modification in 2022. When the Project was originally approved in 2018, all BMR units were either studios or one-bedrooms, so the original concession sought to allow those unit types to be smaller. However, since then, each modification of the Project has also included two- and three-bedroom BMR units, which was a change designed to enable more low-income families to be able to live and work in Cupertino. However, the approved concession inadvertently continued to refer to studio and one-bedroom units. This modification request therefore seeks to correct the description of concession #2 to align with how the Project has already been approved to include multi-bedroom BMR types.

V. Waiver Request

As previously granted under the 2024 Modification, the Project includes a Density Bonus Law waiver from the General Plan standard requiring that the “primary building bulk be maintained below a 1:1 slope line drawn from the arterial/boulevard curb line or lines.” (See General Plan, Figure LU-2: Community Form Diagram.)

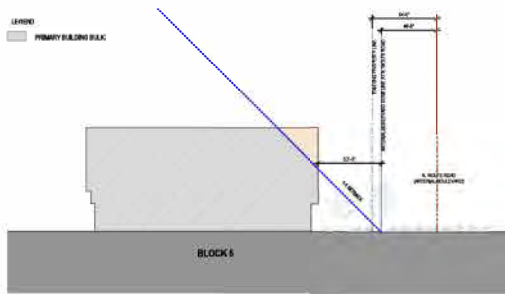
Under the modification request, certain portions of the primary bulk of the residential/retail buildings within Blocks 1, 2, 5, 8, 10, 11, and 14 located along N. Wolfe Road and Stevens Creek Boulevard and the primary bulk of the residential and office buildings within Blocks 15 and 16 along N. Wolfe Road pierce the 1:1 slope to accommodate the Project land use program, while avoiding further increased heights particularly along neighboring properties that are developed with lower intensity residential uses. Sheets 508 and 508.1 of the **Appendix IV, Modification Request Plan Sets**, as excerpted for convenience in **Attachment A (Primary Bulk Waiver Diagrams)** provide a visual depiction of where the buildings pierce the 1:1 plane. With incorporation of this waiver as authorized under the State Density Bonus Law, the modification remains consistent with this General Plan requirement.

Overall, the Project endeavors to be sensitive to the neighboring properties, especially the single-family residential neighborhood to the west of the Project and to concentrate project density along the arterials/boulevards as a design strategy to minimize the perceived building heights from neighboring properties. Within the Project site, upper floors are set back to minimize perceived bulk and height. Taller buildings have been set back from the adjacent residential community and lower rise buildings have been located adjacent to the western edge of the Project. For example, the modification request maintains townhomes along the westernmost area of the Project site adjacent to the Portal lower-density residential neighborhood and reduces the height of Blocks 8 and 13 from the 2024 Modification.

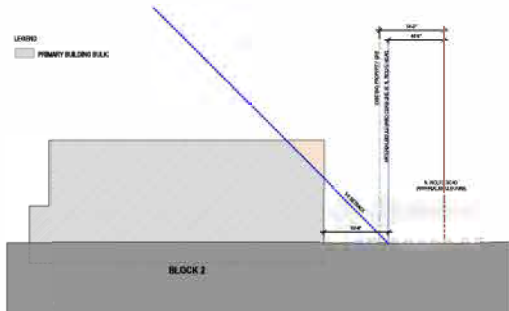
**ATTACHMENT A:
PRIMARY BULK WAIVER DIAGRAMS**

[See attached excerpts from Sheets P-0508 and P-0508.1 of Plan Set (Appendix IV)]

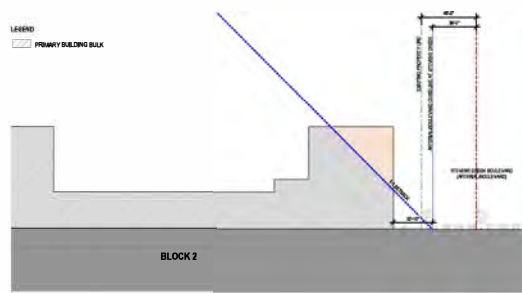
Attachment A - Preliminary Bulk Waiver Diagrams



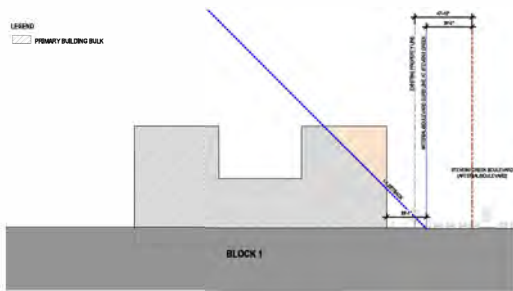
1 SETBACK DIAGRAM - BLOCK 5
SCALE: 1/8" = 1'-0"



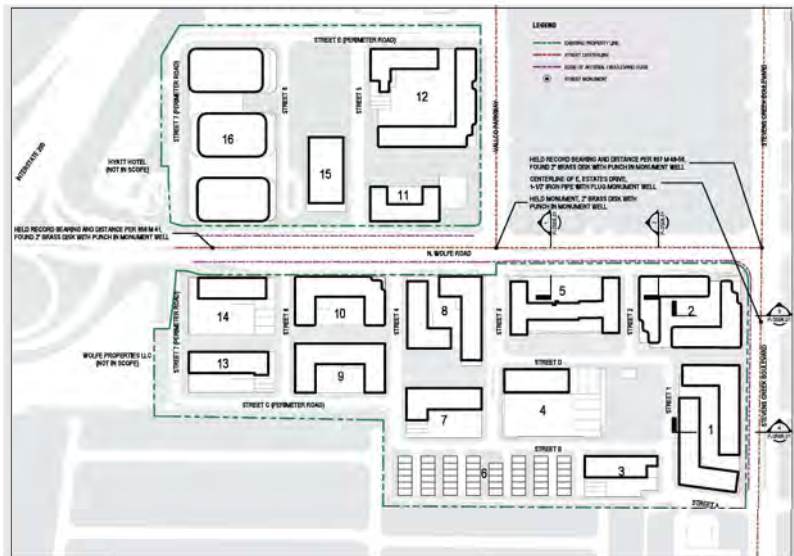
② **SETBACK DIAGRAM - BLOCK 2**
SCALE: 1/8" = 1'-0"



3 SETBACK DIAGRAM - BLOCK 2
SCALE: 1/8" = 1'-0"



4 SETBACK DIAGRAM - BLOCK 1
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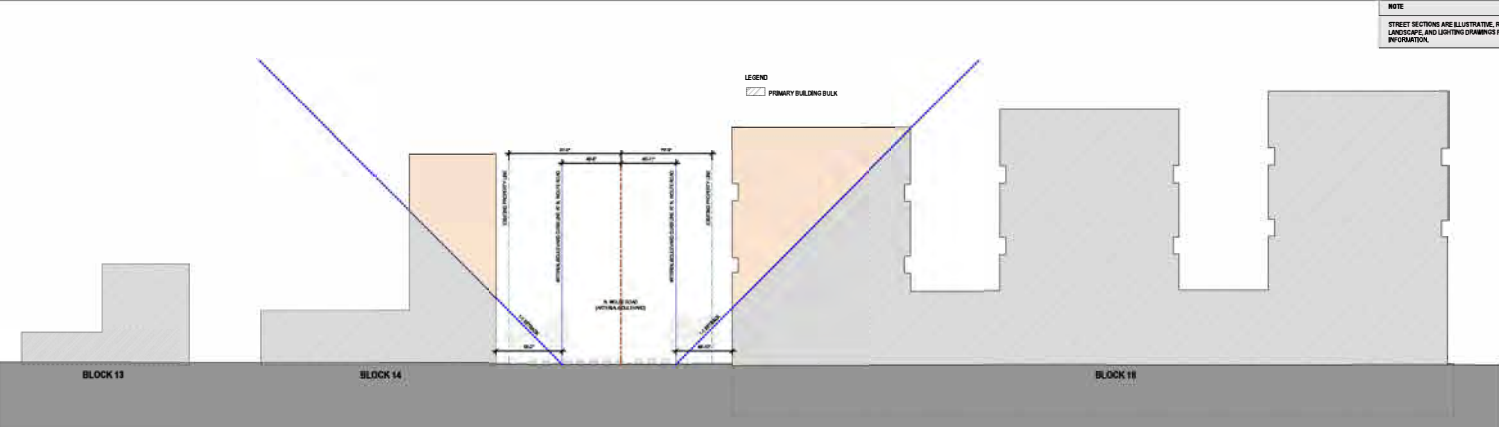


5 PLAN DIAGRAM
SCALE: 1"=100'

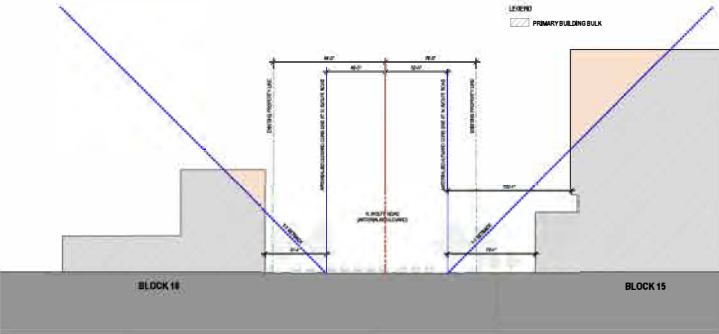
NOTE

STREET SECTIONS ARE ILLUSTRATIVE, REFER TO CIVIL, LANDSCAPE, AND LIGHTING DRAWINGS FOR SITE INFORMATION.

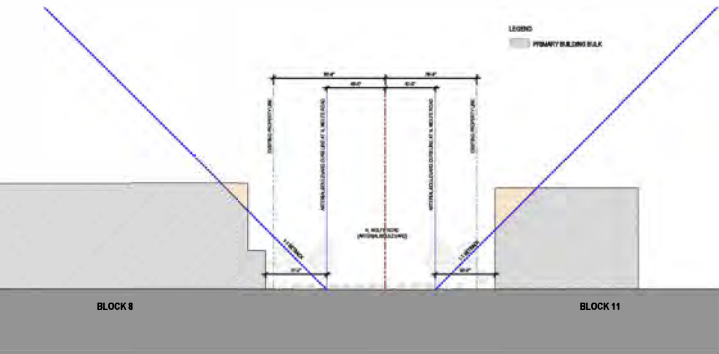
Attachment A - Preliminary Bulk Waiver Diagrams



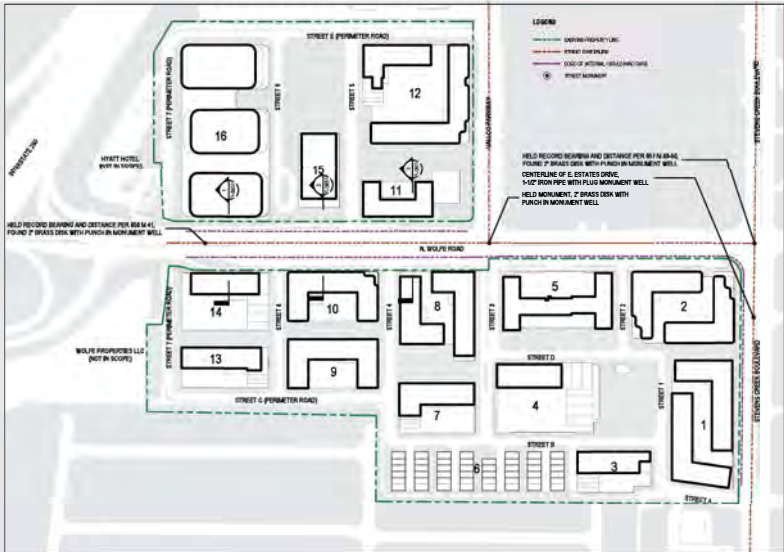
1 SETBACK DIAGRAM - BLOCKS 13 & 15
SCALE: 1/8"=1'-0"



2 SETBACK DIAGRAM - BLOCKS 10 & 14.
SCALE: 1/8"=1'-0"



3 SETBACK DIAGRAM - BLOCKS 8 & 11
NAD 180-102



④ PLAN DIAGRAM
SCALE: 1"=100'