



July 29, 2024

Benjamin T. Porter, P.E., District Manager-Engineer  
Cupertino Sanitary District  
20863 Stevens Creek Boulevard, Suite 100  
Cupertino, CA 95014

**RE: The Rise Project – Sanitary Sewer Fee Proposal for Horizontal Construction Scope**

Dear Mr. Porter:

As we've discussed, Vallco Property Owner, LLC ("VPO") is currently seeking construction permits from the City of Cupertino to commence horizontal construction work on the west side of The Rise project site. This limited horizontal construction activity is narrow in scope and limited to just rough grading, dry and wet site utilities including the joint trench, curbs and gutters, and the first lift of roadways, and the work is expected to commence in October 2024. In connection with this horizontal construction, VPO will be installing new sanitary sewer pipelines throughout the west side of the Project site. These pipelines ultimately will be dedicated to the District to be operated as part of its public system and VPO is completing this work at no cost to the District. Importantly, this phase of the work will not include any new sanitary sewer lateral connections given that the new buildings will be constructed in a subsequent phase. As such, and like with other building permits issued in connection with site improvement work performed at the project site to date, no new sewer flows will result from this horizontal construction permit scope.

Despite this limited scope of the proposed horizontal work, the District has recently indicated this work will trigger the requirement to pay the full Sewer Development and Treatment Plant Capacity Fees (referred to as the "Fees" here) required for the entire project. We understand that the Fees are estimated to total \$21.6 million (which assumes the initial phase of the project's retail component will be 100% made up of restaurant uses). This came as a surprise as we had previously understood that Fees would not be due until building permits are issued for the new Project buildings. It is not financially viable for VPO to the full Fees at this early stage. We also believe the amount is high as credit should be provided for the prior mall uses. However, we also acknowledge that it is in both VPO and the District's best interest to come to an agreement on this issue and to resolve disputes to allow the horizontal construction work to move forward.

**To that end, VPO proposes to provide \$1,000,000 to the District as a good faith deposit at the time of issuance of the main permit for the horizontal work. Thereafter, payment of Sewer Development and Treatment Plant Capacity Fees would be paid on a phased basis prior to issuance of building permit(s) for vertical construction for each Project building. We also**

**believe that credit should be provided for the prior use so the fee is only paid on the net new demand.**

**I. Sewer Development and Treatment Plant Capacity Fees Are Premature and Cannot Be Accurately Calculated at This Early Project Stage**

According to the District’s Operations Code, the purpose of the Fees is to offset costs and burdens on the District’s systems that are caused by new development. The purpose of the Sewer Development Fee is to allow the District to “recover the costs associated with providing sewer collection lines in the District,” excluding pump station costs. (§ 7200). Similarly, the purpose of the Treatment Plant Capacity Fee is to allow the District to recover its “reasonable and actual costs of purchasing treatment capacity at the San Jose-Santa Clara Regional Wastewater Facility.” (§ 7300).

Given this cost recovery purpose, it is premature to pay the Fees with the horizontal work because it will not create any new District costs or burdens. That is, there are no costs to “recover.” The Project is a large-scale, multi-phase masterplan development that requires significant up front infrastructure work prior to being able to develop any buildings. The currently proposed horizontal construction work is an important step towards eventual delivery of those buildings, but this work itself will not result in any new sanitary flows, and no flows will be generated for several years.

Moreover, it is not yet possible to calculate the Fees that will be owed to the District. The District establishes its fee rates based on the specific land uses incorporated within a project – with higher fees owed for uses that generate comparatively higher sanitary sewer flows. For example, restaurant uses pay higher fees than retail store uses. The problem is that at this stage, the mix of commercial land uses within the Project are not yet known – in fact, a significant portion of Phase 1 remains unprogrammed commercial use, which could include 100% retail uses (yielding a lesser fee payment) or a portion of which could be restaurant or other food and beverage services uses (yielding a higher fee payment). So, at this time, the actual Fees owed by the Project cannot yet be calculated, but they can certainly be more accurately calculated at the time of issuance of building permits for actual “vertical” buildings, as opposed to “horizontal” site improvements.

**II. Both the District’s Operations Code and Prior Installer’s Agreements for the Project Confirm That Fees Can be Paid at Time of Building Permit Issuance**

Fortunately, the District’s Operations Code establishes the timing for payment of Fees and expressly allows for payment at an agreed upon future date. Specifically, for the Sewer Development Fee, the Operations Code states that such payment timing can be at a time as “stipulated in the Installer’s Agreement,” and the Treatment Plant Capacity Fee is due “at the time the connection is made.” (§§ 7200, 7301.)

The District and VPO have a long history of working together to plan for and deliver new sanitary sewer improvements related to the Project, as evidenced by several draft and executed Installer’s Agreements that have been prepared for the Project over the years. In 2019, in connection with a prior iteration of the Project, the District provided VPO with a draft Installer’s Agreement (the “2019 Agreement”). Although the 2019 Agreement was not executed due to Project changes, it is relevant because the District proposed that an initial deposit would be due to the District at execution and further Fees would be due only “prior to issuance of each building permit” based on the “type of uses and sizes” of the buildings (again, rather than at the building permit for non-building “horizontal” site improvements with no such “uses and sizes”).

This payment structure makes sense given that at the time of building permit issuance, the specific land uses are far more certain, and the timing for impact of the new development is more imminent (though each “building” will require approximately 2 years or more of vertical construction before any sewer flows actually commence).

With the execution of this amendment, the Installers shall pay \$340,000. Prior to approval and issuance of each building permit by City of Cupertino, the Installers shall pay both development and treatment plant fees based on building permit application for type of uses and sizes. The \$340,000 fee deposited by the Installers will be credited to fees due at the time of building permit.

More recently in 2021, the District and VPO entered into an Installer’s Agreement for completion of certain Make Ready Utilities work (2021 Agreement). That 2021 Agreement does not give any indication that Fee would be due prior to issuance of building permits and states only that payment of Fees will be due later as detailed in a “future Installer’s Agreement.” This Make Ready Utilities work was also horizontal in nature, setting a precedent that there should be no Fees requirement at this Horizontal Construction work stage.

**5. PAYMENT OF FEES TO BE PAID BY INSTALLER:**

Installer further hereby agrees to pay:

- a) Deposits described in Section 4 of this agreement.
- b) Sewer Development & Treatment Plant Capacity fees will be required as part of a future Installer’s Agreement.

The District has not previously indicated that full payment of the Fees would be at the horizontal construction stage, and the Project cannot bear this cost until closer to when the buildings will be delivered, and revenue produced.

**III. Fee Calculations Should Recognize Credit For Prior Uses**

We understand that the District is not providing a fee credit to account for the flows from the Vallco Shopping Mall. A fee credit should be provided in order to more accurately reflect the impact of the Project on the District’s facilities. The Project site is the location of the former Vallco Shopping Mall, which totaled approximately 1.217M gross square feet of retail, restaurant, and other commercial uses. In prior environmental analysis for an earlier iteration of the Project, it was estimated that the Vallco Shopping Mall had an estimated average daily sewage generation rate of approximately 0.28 mgd.<sup>1</sup> Removal of the mall also results in removal of this sewage generation. When calculating the Fees owed by the Project, the District should take this prior use into account.

The District’s Operations Code allows for credit to be provided for both the Sewer Development and Treatment Plant Capacity Fees. For Sewer development Fee, the Operations Code states that where there is a change in size or change in land use classification, that the fee will be calculated based on the difference in size or land use classification. (§7203.) For the Treatment Plant Capacity Fee, the Operations Code has the same language for changes in land use classification, but is silent on the changes in size. (§7303.)

Providing credit is also consistent with Section 66013 of the California Mitigation Fee Act, which regulates sewer connection fees and capacity charges. In particular, that section says that such fees or charges “shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed.” (Cal. Gov. Code§ 66013(h).) If Fee credit is not provided for the removal of prior uses, the Project would overpay for its new uses because the District’s facilities already account for sewer facility capacity to service the prior uses. If the prior use is not accounted for, the Fees would “exceed the estimated reasonable cost of providing the service.”<sup>2</sup>

#### IV. Proposal and Next Steps

VPO is seeking to work with the District to achieve a solution that works for both parties. To that end, we propose to provide \$1,000,000 to the District as a good faith deposit at the time of issuance of the main permit for the horizontal work. Thereafter, payment of Sewer Development and Treatment Plant Capacity Fees would be paid on a phased basis prior to issuance of building permit for vertical construction for each Project building, consistent with the approach contemplated in a prior Installer’s Agreement for the Project. We also propose that credit is provided to recognize the prior mall uses. We believe that this approach is consistent with both past practice and the Operations Code.

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<sup>1</sup> Vallco Special Area Specific Plan, Draft Environmental Impact Report (May 2018)

<sup>2</sup> This concept is also consistent with constitutional principles under the Takings Clause that the U.S. Supreme Court has recently affirmed require that impact fees are “roughly proportional” to a project’s impact. *Sheetz v. County of El Dorado*, (2024) 601 U.S. 267. Here, the Project’s impact on the sewer system is only the net newer sewer flows, so accounting for the removal of the previous use is consistent with this “rough proportionality” test.

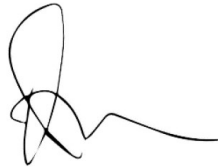
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We are quickly moving toward starting construction on this horizontal work so are anxious to work with the District to find a path forward. However, if we cannot come to terms by mid September, we would also like to explore executing an Installer’s Agreement like what we did in 2021 that contemplates another future agreement, such as prior to the first building permit. This approach may allow the work to proceed while giving us more time to work out any details.

\* \* \*

We appreciate your time and attention to this matter, and we look forward to continuing to work with the District for the years to come in delivering The Rise project.

Sincerely,

A handwritten signature in black ink, appearing to read 'Reed Moulds', with a long horizontal flourish extending to the right.

Reed Moulds  
Managing Director  
Sand Hill Property Company  
o/b/o Vallco Property Owner, LLC