
FINAL EIR

ENVIRONMENTAL IMPACT REPORT

0 Seely Avenue Mixed-Use Project

SCH No. 2022020565

The City of San José
Planning, Building and Code Enforcement
San José, CA 95113

June 2024

This page intentionally left blank

Table of Contents

VOLUME 1 – RESPONSE TO COMMENTS DOCUMENT

TABLE OF CONTENTS1-3

- Volume 1 – Response to Comments Document 1-3
- Volume 1 – Appendices..... 1-3
- Volume 2 – 0 Seely Avenue Mixed-Use Project Draft Environmental Impact Report and Appendices 1-3

1.0 INTRODUCTION1-4

- 1.1 Purpose of the Final EIR 1-4
- 1.2 Project Overview 1-5
- 1.3 Contents of the Final EIR 1-6

2.0 RESPONSE TO COMMENTS2-7

- 2.1 Introduction..... 2-7
- 2.2 List of Commenters 2-7
 - 2.2.1 Topical Responses..... 2-8
 - 2.2.2 Individual Responses 2-25

3.0 DEIR TEXT REVISIONS 3-133

- 3.1 Introduction..... 3-133
 - 3.1.1 Text Revisions 3-133

4.0 MITIGATION, MONITORING, AND REPORTING PROGRAM..... 4-153

VOLUME 1 – APPENDICES

- Appendix A – Transportation RTC Memorandum
- Appendix B – Noise RTC Memorandum
- Appendix C – Biological Resources RTC Memorandum
- Appendix D – Hydrology RTC Memorandum

VOLUME 2 – 0 SEELY AVENUE MIXED-USE PROJECT DRAFT ENVIRONMENTAL IMPACT REPORT AND APPENDICES

1.0 INTRODUCTION

The City of San José (“the City”) prepared a draft environmental impact report (“DEIR”) for the Seely Avenue Mixed-Use Project (“Project”), pursuant to the California Environmental Quality Act (“CEQA”) (Public Resources Code Section 21000 et seq.). The EIR was released for public review on January 16, 2024, for a 45-day circulation period, which was then extended to 60 days, and again on March 19, 2024 for an additional 45-day circulation period due to a procedural error wherein not all appendices and reference materials were uploaded correctly to the City’s website and the State Clearinghouse website. During both circulation periods, paper copies of this document were available at Dr. Martin Luther King Jr. Library located at 150 E. San Fernando Street, San José, CA 95112, at the San José City Hall Permit Center located at 200 E Santa Clara Street, San José, CA 95113, and at Educational Park Library located 1772 Educational Park Drive, San José, CA 95112. The document is also available online at:

<https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review>.

The City received 19 comment letters on the EIR. This Response to Comments document responds to those written comments and provides clarification to the text in the EIR. The City is the lead agency under CEQA for consideration of certification of this EIR and has principal responsibility for approving the Project.

1.1 Purpose of the Final EIR

Per CEQA Guidelines Section 15086, the City is required to consult with public agencies with jurisdiction related to the Project and provide the general public an opportunity to review and comment on the EIR. As the lead agency, the City is also required to address comments received during circulation that raise issues with the environmental analysis.

This document includes responses to 160 enumerated comments raised during the 45-day public review period from January 16, 2024, to March 4, 2024, and the 45-day public review period between March 19, 2024, to May 3, 2024. This document also describes appropriate changes, additions, clarifications, amplifications, or correction to the information presented in the DEIR as a result of some comments. Responses and revisions in this document are intended to substantiate and confirm or correct analyses and conclusions presented in the EIR. The changes do not constitute “significant new information,” which would require recirculation of the DEIR. “Significant new information” is defined in Section 15088.5(a) of the State CEQA Guidelines as follows.

- A new significant environmental impact would result from the Project or from a new mitigation measure proposed to be implemented.
- A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.

- A feasible Project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the Project, but the Project’s proponents decline to adopt it.
- The DEIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

None of these circumstances defined in State CEQA Guidelines Section 15088.5(a) has arisen from comments on the DEIR; therefore, recirculation is not required.

Comments that express an opinion about the merits of the Project or Project alternatives (rather than the adequacy of the DEIR) are not examined in detail in this document. Additionally, this document does not respond to comments regarding financial concerns or Project design that do not result in a physical environmental impact. However, these comments are noted, and are now part of the administrative record and will be considered by decision-makers during the Project approval process.

Together, the Response to Comments document (“Volume 1”) and the EIR (“Volume 2”) constitute the Final EIR (“FEIR”) for the Project. Accordingly, the FEIR is provided for consideration and certification by the City’s decision-makers.

1.2 Project Overview

The development would include demolition of two existing residences, a fruit stand, and agricultural land to construct 1,472 residential units, approximately 18,965 gross square-feet of ground-floor retail space and a 2.51-acre public park on an approximately 22-acre site within the limits of in the City. The project would also include dedication of a 0.11-acre parcel, located in the northeastern corner of the project site to San José Municipal Water (“SJMW”). SJMW will be responsible for the construction, ownership, and maintenance of the new municipal well.

The proposed buildings will be restricted by a 15-foot setback from the top of the Coyote Creek Levee. The 15-foot setback will be free from vegetation, utilities, and structures to allow for adequate protection of the levee and repairs and monitoring when required. This setback from the levee is required by Santa Clara Valley Water District (“Valley Water”) and the United States (“U.S.”) Army Corps of Engineers as specified in an October 13, 2022 memorandum from Valley Water to the City, and is separate from the 100-foot setback required by the City’s Riparian Corridor Protection and Bird-Safe Design Policy discussed further in Section 3.4, Biological Resources of the DEIR. Table 2-1 on page 16 of the DEIR provides the lot areas for each planned component of construction. Table 2-2 on page 17 of the DEIR provides maximum building heights ranging from 30 feet to 85 feet. The Project will not exceed the maximum building height of 270 feet for this area, which is established by the Transit Employment Residential Overlay (“TERO”).

1.3 Contents of the Final EIR

CEQA Guidelines Section 15132 require a FEIR to consist of the following elements:

- a) The EIR or a revision of the DEIR
- b) Comments and recommendations received on the EIR either verbatim or in summary
- c) A list of persons, organizations, and public agencies that commented on the EIR
- d) The responses of the lead agency to significant environmental points raised in the review and consultation process
- e) Any other information added by the lead agency.

The FEIR will be posted on the City's webpage and a link to the FEIR will be provided to those who provided comments on the EIR. A copy of the administrative record is available by appointment at the San José City Hall Permit Center located at 200 E Santa Clara Street, San José, CA 95113.

The following components of this Response to Comments document, in combination with the DEIR, constitute the FEIR for the Project:

- **Section 1.0, Introduction.** This section presents the purpose of this document, provides an overview of the Project, and describes the elements of the FEIR.
- **Section 2.0, Response to Comments.** This section contains copies of the written comments received on the DEIR, "Topical Responses" that have been prepared to address common issues or themes identified in several of the written comments, and individual responses to the comments.
- **Section 3.0, EIR Text Revisions.** This section contains text changes to the DEIR that reflect additions, corrections, amplifications, and clarifications resulting from preparing responses to comments on the DEIR and/or staff-initiated changes. These changes are incorporated into the DEIR as part of the FEIR.
- **Section 4.0, Mitigation Monitoring and Reporting Program.** Pursuant to CEQA Guidelines Section 15097, this section contains the Mitigation Monitoring and Reporting Program ("MMRP") for the Project. The MMRP includes all proposed mitigation measures, the party responsible for implementation, the party responsible for monitoring, the timing of the mitigation, and the monitoring action to ensure compliance.

2.0 RESPONSE TO COMMENTS

2.1 Introduction

This section lists the agencies, organizations and individuals who provided comments on the DEIR, provides copies of written comments received, and responses to comments in conformance with CEQA Guidelines Sections 15088(a) and 15132.

Multiple comments received on the EIR raised the same topic or concern. Rather than repeat responses to such comments, the City provided comprehensive Topical Responses in **Subsection 2.2.1, Topical Responses** below. Individual, point-by-point responses to each comment are provided in **Subsection 2.2.2, Individual Responses** below.

2.2 List of Commenters

The City received 19 comment letters on the DEIR from public agencies, local organizations, and individuals. Eleven comments were received during the first circulation period and eight comment letters were received during the second circulation period. **Table 2-1** provides an index of all the comment letters received and assigned a number to each letter.

An alpha-numeric indicator was assigned to each comment letter. The alpha indicator describes the commenter’s organization (i.e., A = Regional Agency and B = Local Organization) and the numeric indicator reflects the order the comment letter is addressed. Each individual comment (within a comment letter) is numbered to correspond to the alpha-numeric indicator (i.e., A-1.1, A-1.2, A-1.3, etc.). Accordingly, each response within this section corresponds to the comment letter’s alpha-numeric indicator. For example, Letter A-1, Comment A-1.1 is addressed in response A-1.1.

Table 2-1 Index of Comment Letters

Number	Date of Letter	Commenter
Regional Agencies		
A-1	February 26, 2024	County of Santa Clara Roads and Airports Department
A-2	February 27, 2024	Pacific Gas and Electric Company
A-3	February 29, 2024	State Water Resources Control Board
A-4	February 29, 2024	Valley Water
A-5	March 11, 2024	Santa Clara Valley Transportation Authority

Number	Date of Letter	Commenter
A-6	March 11, 2024	Santa Clara Unified School District
A-7	May 2, 2024	Caltrans, District 4
A-8	March 19, 2024	The Amah Mutsun Tribal Band of San Juan Bautista and A.M.T.B. Inc.
Local Organizations		
B-1	March 4, 2024	Preservation Action Council San José
B-2	March 11, 2024	River Oaks Neighborhood Association
B-3	March 21, 2024	River Oaks Neighborhood Association
Individuals		
C-1	January 19, 2024	Adams Broadwell
C-2	March 5, 2024	Adams Broadwell
C-3	March 11, 2024	Adams Broadwell
C-4	March 19, 2024	Ed Ketchum
C-5	March 18, 2024	Craig Scoffone
C-6	April 2, 2024	Adams Broadwell
C-7	May 2, 2024	Adams Broadwell
C-8	March 26, 2024	Craig Scoffone

Source: Circlepoint, 2024

2.2.1 TOPICAL RESPONSES

Topical Responses provide comprehensive responses to address multiple, similar comments that have been raised on key topics during the DEIR public review period. Consequently, a particular topical response may provide more information than requested by any individual comment. Where appropriate, references to the topical responses are provided within the individual responses to comments prepared in this Section, which is described below. The Topical Responses in this section include the following:

Topical Response 1 – Circulation of DEIR

Nine of the comments received during circulation of the DEIR noted missing, incorrect, or inconsistent documents posted on the City’s website and/or the State Clearinghouse website, and requested a restart of the 45-day circulation period.

The DEIR was circulated between January 18, 2024, to March 11, 2024. A Notice of Availability was published in the San José Mercury News to inform the public of the DEIR's availability. During this time, hard copies of the DEIR appendices were available at City Hall and electronically posted to the City's website: <https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/active-eirs/0-seely-ave-mixed-use-project/-fsiteid-1#!/>. However, not all appendices and reference materials were uploaded correctly to the City's website. Additionally, not all technical appendices were correctly uploaded to the State Clearinghouse website. The DEIR released for public circulation, however, correctly relied on the most recent information from all technical appendices. The following DEIR appendices issues occurred:

- Appendix B – Air Quality Assessment did not include the attachments to the technical report.
- Appendix D - Biological Resources Evaluation the current December 2022 version was not posted.
- Appendix E - Historic Resources Evaluation was posted without attachments.
- Appendix K - Phase I, Parcel 1 Environmental Site Assessment (“ESA”) the incorrect version of Appendix K was posted (Phase 1 Parcel 2 was posted instead of Phase 1 Parcel 1).
- Appendix P - Transportation Analysis was posted without attachments.

To provide the public and agencies ample opportunity to review a complete set of appendices and reference materials (provided upon request) for the DEIR, the City restarted the circulation period on March 19, 2024, for an additional 45-day comment period. All documents were reuploaded to the City and the State Clearinghouse websites, including the correct versions of the appendices listed above. No changes were made to the DEIR and supporting technical appendices between the two public review periods. The comment period for the second circulation of the DEIR ended on May 3, 2024. All comments received during both circulation periods are responded to in the FEIR.

Topical Response 2 – Traffic Signal

Nine of the comments received during circulation of the DEIR expressed opposition to the installation of a traffic signal and new crosswalks, turn lanes, and revised striping at the Seely Avenue and Montague Expressway intersection, and/or based their comments on their belief that the Project and associated analysis assumed the Project included these improvements.

The Project as described in Section 2, Project Description, of the DEIR does not include installation of a traffic signal and new crosswalks, turn lanes, and revised striping at the Seely Avenue/Montague Expressway intersection. A new traffic signal is not included as a Project component in the DEIR analysis.

During early stages of the Project development, the Project included the installation of a traffic signal and new crosswalks, turn lanes, and revised striping at the Seely Avenue/Montague Expressway intersection. However, these improvements were ultimately removed from the Project at the request of Santa Clara County. The Transportation Analysis (Appendix P, prepared by Hexagon Transportation Consultants, Inc., dated September 6, 2023, of the DEIR) had already included an analysis of the Project with the improvements mentioned above. For efficiency purposes, rather than remove the analysis, the Transportation Analysis, simply added a “New Project” scenario in Section 6, which assumes no improvements to the Seely Avenue/Montague Expressway intersection. Under this “New Project” scenario in the Transportation Analysis report, the Seely Avenue/Montague Expressway intersection configuration would remain unchanged from existing conditions, allowing only right turns to and from Seely Avenue. Additionally, the “New Project” scenario includes other refinements that were made to the Project including the removal of the supermarket, and addition of general neighborhood retail space. The analysis presented in the DEIR is based on the “New Project” scenario described in Section 6 of the Transportation Analysis, which is identical to the Project as described in Section 2, Project Description, of the DEIR.

Topical Response 3 – Project Connection to Coyote Creek

Three of the comments received during circulation of the DEIR noted there is no mention of a connection between the proposed development and the Coyote Creek Trail.

A pedestrian connection to Coyote Creek trail is dependent on design feasibility and coordination with the City of San José Department of Parks, Recreation & Neighborhood Services and Valley Water for permitting and access; therefore, it is not listed in Section 2, Project Description, of the DEIR as a proposed feature of the Project. Section 3.16, Recreation, of the DEIR lists only the proposed public park as an offset of the Project’s impacts on recreational facilities, and a trail connection was not counted toward offsetting recreational impacts.

A trail connection to Coyote Creek is listed under mitigation measure (“MM”) MM TR-1.1 within Section 3.17.2.3, Project Impacts on page 241, of the DEIR, as one of several potential pedestrian network improvements the Project can construct to mitigate vehicle mile travel (“VMT”), but if coordination with the City and Valley Water cannot lead to approval for a trail connection, the Project still will be able to build a trail connection up to the Valley Water property and the Project is conditioned to provide other pedestrian improvements that would offset VMT impacts. The Project’s VMT impact would not change if the proposed on-site pedestrian trail connections are not connected to the Coyote Creek trail.

In response to commenters, the Coyote Creek Trail is a multi-use trail (Class I bikeway) that runs along both sides of Coyote Creek and is separate from motor vehicle traffic. The Coyote Creek Trail extends from the northern extent of McCarthy Boulevard south to Zanker Road in San José. Trail access is provided via Montague Expressway at the southern boundary of the Project site

and Iris Chang Park on Epic Way at the northern boundary of the Project site. The Project site is also about 1.2 miles east of the Guadalupe River bike trail. This trail runs from Alviso to south San José. The trail can be accessed from Trimble Road. This was disclosed in Section 3.17.2.3, Project Impacts on page 237, of the DEIR.

Section 3.17.2.3, Project Impacts, page 237, of the DEIR has been updated to reflect a potential connection to Coyote Creek trail is a possibility but not a requirement. Section 3.16.1.2, Existing Conditions, page 226, of the DEIR has also been updated to provide more information regarding the trail connection (see Section 3.0, Text Revisions in this FEIR). These updates do not change the analysis or impact conclusions made in the DEIR.

According to City's Department of Parks Recreation and Neighborhood Services ("SJPRNS"), the DEIR does not include a connection to the Coyote Creek Trail system because that is not part of this Project. The Project does not conflict with the trail systems.

Topical Response 4 – Project Consistency with Envision San José 2040 General Plan

Eleven of the comments received during circulation of the DEIR asserted that the Project conflicted with various Envision San José 2040 General Plan policies, including those adopted for the purpose of avoiding or mitigating effects related to agricultural, biological, and historic resources, noise, and transportation.

CEQA Guidelines Section 15125(d) requires that a DEIR discuss inconsistencies with applicable plans. A Project is consistent with a general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. Generally, a Project need not be in perfect conformity with each general plan policy. The relevant question under CEQA is not whether a Project is consistent or inconsistent with any adopted land use plan, policy, or regulation, but whether any inconsistencies would result in a physical environmental issue that would cause a significant environmental impact. As stated in Section 3.2.2.2, Project Impacts on page 58 and Section 3.11.1.2, Existing Setting on page 188, the Project site is currently utilized for agriculture in the form of orchards and a fruit stand but is designated as Industrial Park in the Envision San José 2040 General Plan. The Industrial Park designation allows for a broad range of industrial uses including research, manufacturing, assembly, testing, and offices. The Project site is also included in the TERO overlay zone which supports residential development as an alternative use as a minimum average density of 75 dwelling units per acre, with a Floor Area Ratio ("FAR") of 2.0 to 12.0 and 5 to 25 stories. This designation also permits the development of commercial uses on the first two floors of mixed-use projects including residential and commercial uses. As stated in Section 3.11.2.2, Project Impacts under threshold b), the Project would be comprised of infill mixed-use development with a density of approximately 81 dwelling units per acre and a FAR of 2.93, consistent with what is permitted in the TERO overlay zone.

Under the Regulatory Framework subheading for each resource, the DEIR lists the Envision San José 2040 General Plan policies. The table below details the Project’s consistency with Envision San José 2040 General Plan policies mentioned in the comments received and explains why any inconsistencies will not cause a significant environmental impact.

The DEIR has been revised in Section 3.4.1.1, page 105, and Section 3.17.1.1, page 229, to include the newly analyzed Biological Resources and Transportation policies that were not previously referenced in the DEIR (see Section 3.0, Text Revisions in this FEIR).

Project Consistency with the Envision San José 2040 General Plan

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
Aesthetics	
<p>Policy CD-1.26: Apply the Historic Preservation Goals and Policies of this Plan to proposals that modify historic resources or include development near historic resources.</p>	<p>The City of San Jose's Historic Preservation Policies (LU-13.1 through LU-16.7) call for, among other things, the preservation of candidate or designated landmark buildings, structures and historic objects physical and historical integrity and fabric.</p> <p>As documented in Section 3.5.2.2, Project Impacts on pages 127 and 128, of the DEIR, the Project would be required to implement multiple mitigation measures aimed at preserving the eligible historic district and individually significant buildings on the property. Nonetheless, the DEIR concluded that even with adherence to these measures, relocation of the significant buildings and structures on-site would remain a significant unavoidable impact because they would be permanently lost or moved. Relocation of the structures, while preserving them in a different location, would result in a loss of connection to their historical development at the current location.</p> <p>Accordingly, the Project would not be consistent with Policy CD-1.26, and the Project, as disclosed in the DEIR, would have a significant and unavoidable impact on historic resources. However, the impact to historic resources would not be considered a significant impact to aesthetics, as the historic resources are not within a state scenic highway.</p> <p>CEQA Guidelines Section 15091(a) stipulates that no public agency shall approve or carry out a project for which an EIR has been certified that identifies one or more significant environmental effects of the project, unless the public agency makes one or more written findings. If the lead agency approves a project even though it would result in significant adverse environmental impacts that cannot be mitigated to a less-than-significant level, the agency must state the reasons for its action in writing. This “statement of</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
	overriding considerations” must be included in the record of project approval.
Agricultural and Forestry Resources	
<p>Policy LU-12.3: Protect and preserve the remaining farmlands within San José’s sphere of influence that are not planned for urbanization in the timeframe of the Envision General Plan through the following means:</p> <ul style="list-style-type: none"> • Limit residential uses in agricultural areas to those which are incidental to agriculture. • Restrict and discourage subdivision of agricultural lands. • Encourage contractual protection for agricultural lands, such as Williamson Act contracts, agricultural conservation easements, and transfers of development rights. • Prohibit land uses within or adjacent to agricultural lands that would compromise the viability of these lands for agricultural uses. • Strictly maintain the Urban Growth Boundary in accordance with other goals and policies in this Plan 	<p>The policy is intended for lands that are not planned for urbanization. As documented in Section 3.2.2.2, Project Impacts, page 58, of the DEIR, the Project site is designated Industrial Park within a TERO zone in the City’s General Plan Land Use Map. Therefore, this policy is not applicable to the Project.</p>
Biological Resources	
<p>Policy ER-2.1: Ensure that new public and private development adjacent to riparian corridors in San José are consistent with the provisions of the City’s Riparian Corridor Policy Study and any adopted Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan (“HCP/NCCP”).</p>	<p>As documented in Section 3.4.2.2, Project Impacts on pages 108 and 114 of the DEIR, the Project will comply with all applicable requirements in the City’s Riparian Corridor Protection and Bird-Safe Design Policy and the Santa Clara Valley Habitat Plan (“SCVHP”).</p> <p>For the reasons outlined above, the Project is consistent with Policy ER-2.1.</p>
<p>Policy ER-2.2: Ensure that a 100-foot setback from riparian habitat is the standard to be achieved in all but a limited number of instances, only where no significant environmental impacts would occur.</p>	<p>As shown on Figure 3-11 of the DEIR on page 117, a small sliver (less than 5-foot wide) of the Project site overlaps with the 100-foot setback area. The only work that would occur within this overlap is the replacement of an existing chain link fence with a new 4-foot-high wood and wire mesh fence. The replacement fence will be in the same location as the existing chain link fence, and will not extend any further into the riparian setback area. The replacement of the</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
	<p>existing chain link fence was accounted for in Appendix D, Biological Resource Analysis (“BRA”), prepared by Johnson Marigot Consulting, LLC (now Integral Consulting Inc), dated December 2022, of the DEIR, and by extension the DEIR (refer to pages 107-111), and was found to have no impact on the riparian habitat present in the area. Accordingly, as Policy ER-2.2 allows for reduced setbacks where no significant environmental impacts would occur, the Project is consistent with Policy ER-2.2.</p>
<p>Policy ER-2.3: Design new development to protect adjacent riparian corridors from encroachment of lighting, exotic landscaping, noise and toxic substances into the riparian zone.</p>	<p>As stated in Section 3.4.2.2, Project Impacts on page 108 of the DEIR, the Project will comply with applicable requirements of the City’s Riparian Corridor Protection and Bird-Safe Design Policy (City Council Policy 6-34). The final Project plans would include measures to reduce impacts to the riparian corridor from on-site structures and site occupation, including avoidance of bright colors and glossy and/or glare producing building finishes on structures facing the riparian corridor. All outdoor lighting would conform to the Council Policy 4-3 Outdoor Lighting on Private Development and be shielded to direct low-intensity exterior lighting downward and away from the riparian corridor to the greatest extent feasible.</p> <p>For the reasons outlined above, the Project is consistent with Policy ER-2.3.</p>
<p>Policy ER-2.4: When disturbances to riparian corridors cannot be avoided, implement appropriate measures to restore, and/or mitigate damage and allow for fish passage during construction.</p>	<p>As documented in Section 3.4.2.2, Project Impacts on pages 108 and 114 of the DEIR, the Project will comply with all applicable requirements in the City’s Riparian Corridor Protection (City Council Policy 6-34) and Bird-Safe Design Policy and the SCVHP.</p> <p>For the reasons outlined above, the Project is consistent with Policy ER-2.4.</p>
<p>Policy ER-2.5: Restore riparian habitat through native plant restoration and removal of nonnative/invasive plants along riparian corridors and adjacent areas.</p>	<p>As documented in Section 3.4.2.2, Project Impacts on pages 108 and 114 of the DEIR, the Project will comply with all applicable requirements in the City’s Riparian Corridor Protection and Bird-Safe Design Policy and the SCVHP.</p> <p>For the reasons outlined above, the Project is consistent with Policy ER-2.5.</p>
<p>Policy ER-4.1: Preserve and restore, to the greatest extent feasible, habitat areas that support special-status species. Avoid development in such habitats unless no feasible alternatives exist, and mitigation is provided of equivalent value.</p>	<p>As documented in Section 3.4.2.2, Project Impacts on pages 107 and 108, of the DEIR, a literature search and a site visit were conducted for the Project site to determine the potential for suitable habitat for special-status species (presence of habitat components necessary to support the species) and sensitive habitat types. The Project site is characterized by agricultural uses (orchards and a fruit</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
	stand) as well as vacant residential buildings, ornamental vegetation, and fallow fields. No special-status habitats such as waters of the U.S./State or riparian habitat occur on the Project site. Therefore, this policy is not applicable to the Project.
Policy ER-4.4: Require that development projects incorporate mitigation measures to avoid and minimize impacts to individuals of special-status species.	As documented in Section 3.4.2.2, Project Impacts on pages 107 and 108, of the DEIR, a literature search and a site visit were conducted for the Project site to determine the potential for suitable habitat for special-status species (presence of habitat components necessary to support the species) and sensitive habitat types. The Project site is characterized by agricultural uses (orchards and a fruit stand) as well as vacant residential buildings, ornamental vegetation, and fallow fields. No special-status habitats such as waters of the U.S./State or riparian habitat occur on the Project site. Therefore, this policy is not applicable to the Project.
Policy ER-5.2: Require that development projects incorporate measures to avoid impacts to nesting migratory birds.	<p>As documented in Section 3.4.2.2, Project Impacts on pages 107 and 108, of the DEIR, Project construction, including the removal of vegetation, shrubs/trees, and structures, that would occur during the migratory bird nesting season could result in a significant impact to nesting bird species.</p> <p>With implementation of the mitigation measure MM BIO-1, the Project’s impact to migratory nesting birds will be less than significant.</p> <p>For the reasons outlined above, the Project is consistent with Policy ER-5.2.</p>
Cultural Resources	
Policy LU-13.2: Preserve candidate or designated landmark buildings, structures and historic objects, with first priority given to preserving and rehabilitating them for their historic use, second to preserving and rehabilitating them for a new use, or third to rehabilitation and relocation on-site. If the City concurs that no other option is feasible, candidate or designated landmark structures should be rehabilitated and relocated to a new site in an appropriate setting.	<p>The Project includes the demolition of structures and site features that are collectively and individually eligible for listing in the CRHR and the San José Historic Resources Inventory as a Candidate City Landmark and Candidate City Landmark District. While MM CR-1.4: Relocation and Salvage provides a process for relocation of the historic structures on-site as called for in Policy LU-13.2, the structures may ultimately be salvaged and/or demolished if no third parties relocate the site’s historic structures.</p> <p>Accordingly, the proposed Project would not be consistent with Policy LU-13.2, and the Project, as disclosed Section 3.5.2.2 Project Impacts, page 129, in the DEIR, would have a significant and unavoidable impact on historic resources.</p> <p>Additionally, a number of alternatives with the potential to reduce or eliminate impacts to historic resources were</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
	<p>considered in the DEIR (see Section 8.0, Alternatives, of the DEIR). These alternatives included two that were considered but rejected due to infeasibility (Location Alternative and an Off-Site Relocation Alternative), an avoidance alternative (Alternative 3), and two on-site relocation alternatives (Alternatives 4 and 5). Alternative 3, which was identified as the environmentally superior alternative, would eliminate impacts to historic resources, but would not meet Project objective 2. Alternative 4 would reduce impacts to historic resources to a less-than-significant level and would meet all Project objectives but would result in greater (but still less-than-significant) parks and recreation impacts. Alternative 5 would reduce the severity of the significant unavoidable historic resource impacts identified in this EIR, but the impacts would remain significant and unavoidable.</p> <p>CEQA Guidelines Section 15091(a) stipulates that no public agency shall approve or carry out a project for which an EIR has been certified that identifies one or more significant environmental effects of the project, unless the public agency makes one or more written findings. If the lead agency approves a project even though it would result in significant adverse environmental impacts that cannot be mitigated to a less-than-significant level, the agency must state the reasons for its action in writing. This “statement of overriding considerations” must be included in the record of project approval.</p>
<p>Policy LU-13.4: Require public and private development projects to conform to the adopted City Council Policy on the Preservation of Historic Landmarks.</p>	<p>The City Council Policy on the Preservation of Historic Landmarks requires the following:</p> <ol style="list-style-type: none"> 1) Early Public Notification of Proposals to Alter or Demolish a Candidate or Designated Landmark Structure, or to Impact the Integrity of a Historic District. 2) Public Input and City Council Review 3) Preparation of Complete Information regarding Opportunities for Preservation of the Landmark Structure, and/or the Integrity of the Landmark District 4) Findings Justifying Alteration or Demolition of a Landmark Structure, or Impact to the Integrity of a Landmark District 5) Financial Resources for Preservation <p>The City determined that the Project site is eligible for listing in the San José Historic Resource Inventory as a Candidate City Landmark District under Criteria 1, 2, 3, and</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
	<p>4 (see Section 3.5.2.2, Project Impacts on pages 125 and 126, of the DEIR). In addition, the “Sakauye House” on the Project site was determined to be individually eligible for listing on the California Register of Historical Resources (“CRHR”) and individually eligible for listing on the San José Historic Resources Inventory under Criterion 3 as a Candidate City Landmark for its association with Spanish Colonial Revival architecture with a period of significance of circa 1920.</p> <p>Because the Project includes the proposed demolition of all existing buildings and structures on the Project site, the Project was referred to the Historic Landmarks Commission in conformance with the City Council Policy on the Preservation of Historic Landmarks on June 7, 2023 and again on April 3, 2024. The Project was referred to allow early notification and greater public input into decisions affecting historic buildings. The Historic Landmarks Commission and the public reviewed and commented on information to be included in the analysis of the Seely Avenue Mixed-Use Project and on the Cultural Resources and Alternatives Sections of the Seely Avenue Mixed-Use Project Draft Environmental Impact Report. Project analysis included complete historic, architectural, and cultural documentation of the significance of the candidate landmark structure and historic district, and the feasibility to preserve the structure/s was discussed in the DEIR, which included a thorough examination of Project alternatives (see discussion above regarding Policy LU-13.2).</p> <p>As documented above, the Project thus far has satisfied the first three requirements of the City Council Policy on the Preservation of Historic Landmarks. As required by Requirement #4, the final decision to alter or demolish the historic structures on-site will be accompanied by the Final EIR, which documents that it is not reasonably feasible for any interested party to retain the candidate or designated landmark structure, and records the overriding considerations which warrant the loss of the candidate or designated landmark structure. Post-decision, the City as required by Requirement 5 will identify City, State, and Federal funding resources to support and encourage the preservation and adaptive reuse of candidate or designated landmark structures, sites, or districts.</p> <p>For the reasons outlined above, the Project is consistent with the City Council Policy on the Preservation of Historic Landmarks, and by extension Policy LU-13.4.</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
Noise	
<p>Policy EC-1.1: Locate new development in areas where noise levels are appropriate for the proposed uses. Consider federal, state and City noise standards and guidelines as a part of new development review. Applicable standards and guidelines for land uses in San José include:</p> <p>Interior Noise Levels</p> <p>The City’s standard for interior noise levels in residences, hotels, motels, residential care facilities, and hospitals is 45 decibels using the A-weighted sound level (“dBA”) Day Night Level (“DNL”). Include appropriate site and building design, building construction and noise attenuation techniques in new development to meet this standard. For sites with exterior noise levels of 60 dBA DNL or more, an acoustical analysis following protocols in the City-adopted California Building Code is required to demonstrate that development projects can meet this standard. The acoustical analysis shall base required noise attenuation techniques on expected Envision General Plan traffic volumes to ensure land use compatibility and General Plan consistency over the life of this plan.</p> <p>Exterior Noise Levels</p> <p>The City’s acceptable exterior noise level objective is 60 dBA DNL or less for residential and most institutional land uses (refer to Table EC-1 in the General Plan). Residential uses are considered “normally acceptable” with exterior noise exposures of up to 60 dBA DNL and “conditionally compatible” where the exterior noise exposure is between 60 and 75 dBA DNL such that the specified land use may be permitted only after detailed analysis of the noise reduction requirements and needed noise insulation features are included in the design.</p>	<p>As documented in Section 3.13.3, Non-CEQA Effects, pages 208 and 209 of the DEIR, the future exterior and interior noise environments were analyzed for both the residential land uses and public land uses proposed by the Project. The analysis determined that future exterior noise levels would be consistent with City standards and that future interior noise environments have the potential to exceed City thresholds. As discussed in Section 3.13.3, Non-CEQA Effects, on pages 212 and 213, the Project would incorporate conditions of approval for the residential and commercial land uses which include specific design requirements to reduce interior noise levels below the City threshold. Therefore, the Project will comply with the policies set forth in the 2040 General Plan with the goal of minimizing the impact of noise on people through noise reduction and suppression techniques, and through appropriate land use policies in the City and is to be consistent with Policy EC-1.1.</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
<p>Policy EC-1.2: Minimize the noise impacts of new development on land uses sensitive to increased noise levels (Land Use Categories 1, 2, 3 and 6 in Table EC-1 in the General Plan) by limiting noise generation and by requiring use of noise attenuation measures such as acoustical enclosures and sound barriers, where feasible. The City considers significant noise impacts to occur if a project would:</p> <p>Cause the DNL at noise sensitive receptors to increase by five dBA DNL or more where the noise levels would remain “Normally Acceptable”; or Cause the DNL at noise sensitive receptors to increase by three dBA DNL or more where noise levels would equal or exceed the “Normally Acceptable” level.</p>	<p>Section 3.13.2.2, Project Impacts, pages 205, second paragraph, of the DEIR, noise levels associated with the public park, outdoor rooftop decks, and emergency generator would all be below the City’s criteria of 65 dBA DNL and 60 dBA DNL for neighborhood parks residential outdoor uses, respectively, and will not affect other nearby land uses offsite.</p>
<p>Policy EC-1.6: Regulate the effects of operational noise from existing and new industrial and commercial development on adjacent uses through noise standards in the City’s Municipal Code.</p>	<p>As documented in Section 3.13.2.2, Project Impacts on pages 204 and 205, of the DEIR, operational noise levels associated with the commercial uses will not be notable to adjacent residential uses. All other adjacent uses are either industrial or commercial in nature. Therefore, this policy is not applicable to the Project.</p>

<p align="center">Envision San José 2040 General Plan Policy</p>	<p align="center">Project Consistency with the Envision San José 2040 General Plan</p>
<p>Policy EC-1.7: Require construction operations within San José to use best available noise suppression devices and techniques and limit construction hours near residential uses per the City’s Municipal Code. The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would:</p> <p>Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months.</p> <p>For such large or complex project s, a construction noise logistics plan that specifies hours of construction, noise and vibration minimization measures, posting or notification of construction schedules, and designation of a noise disturbance coordinator who would respond to neighborhood complaints will be required to be in place prior to the start of construction and implemented during construction to reduce noise impacts on neighboring residents and other uses.</p>	<p>As documented in Section 3.13.2.2, Project Impacts on pages 203 and 204, of the DEIR, the Project will comply with construction-operations by implementing the following mitigation measure: MM NSE-1, Construction Noise Logistics Plan. With the implementation of the MM NSE-1, temporary construction noise impacts will be less than significant and in accordance with Envision San José 2040 General Plan Policy EC-1.7.</p> <p>For the reasons outlined above, the Project is consistent with Policy EC-1.7.</p>
<p>Population and Housing</p>	
<p>Policy H-2.1: Facilitate the production of extremely low-, very low-, low-, and moderate-income housing by maximizing use of appropriate policies and financial resources at the federal, state, and local levels; and various other programs.</p>	<p>Section 3.15.1.1, Regulatory Framework on page 214 and 215, of the DEIR, discusses the regional and local frameworks for which the Project would follow. The project would provide a 178-unit affordable housing apartment building which would qualify the project for a Density Bonus under the State (California Government Code Section 65915) and the City (Municipal Code Chapter 29.190). Accordingly, as the project would directly facilitate the construction of housing at the moderate-income level or below and would utilize density bonuses to maximize the amount of affordable housing that can be constructed at the project site, the project is consistent with Policy H-2.1.</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
Transportation	
<p>Policy TR-1.1: Accommodate and encourage use of non-automobile transportation modes to achieve San José’s mobility goals and reduce vehicle trip generation and VMT.</p>	<p>As documented in Section 3.17.2.3, Project Impacts on pages 241 to 243, of the DEIR, the City will implement the following mitigation measure:</p> <ul style="list-style-type: none"> •MM TR-1.1, consists of a Voluntary Travel Behavior Change Program, which targets individual attitudes and behaviors or apartment residents towards travel and provides information and tools for residents to analyze and alter their travel behavior. Voluntary Travel Behavior Change programs include mass communication campaigns and travel feedback programs, such as travel diaries or feedback on calories burned from alternative modes of travel. This strategy encourages the use of shared ride modes, transit, walking, and biking, thereby reducing drive-alone vehicle trips and VMT. All residents/households will be provided with the information/tools necessary to fully participate in the Voluntary Travel Behavior Change program. As well as, Information Board/Online Kiosk, which provides an online kiosk with information regarding non-auto transportation alternatives within the Apartment buildings. The online kiosk shall update key transportation information included in the welcome brochures. Transportation news and commuter alerts should be posted online. The website shall be operational as soon as the new buildings are ready for leasing. <p>Additionally, it is estimated that the increased transit demand generated by the Project could be accommodated by the current available ridership capacities of the Santa Clara Valley Transportation Authority (“VTA”) bus in the study area.</p> <p>For the reasons outlined above, the Project is consistent with Policy TR-1.1.</p>
<p>Policy TR-1.2: Consider impacts on overall mobility and all travel modes when evaluating transportation impacts of new developments or infrastructure projects.</p>	<p>As documented in Section 3.17.2.3, Project Impacts, pages 241 to 243, of the DEIR, the Project will implement MM TR-1.1, which is based on the Appendix P, Transportation Analysis, of the DEIR, where impacts to overall mobility and all travel modes are analyzed. For this reason, the Project is consistent with Policy TR-1.2.</p>
<p>Policy TR-1.4: Through the entitlement process for new development, projects shall be required to fund or construct needed transportation improvements for all transportation modes giving first consideration to improvement of bicycling,</p>	<p>As documented in Section 3.17.2.3, Project Impacts, pages 241 to 243, of the DEIR, based on the City’s VMT Evaluation Tool, the City will implement the following mitigation measures:</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
<p>walking and transit facilities and services that encourage reduced vehicle travel demand. Development proposals shall be reviewed for their impacts on all transportation modes through the study of VMT, Envision San José 2040 General Plan policies, and other measures enumerated in the City Council Transportation Analysis Policy and its Local Transportation Analysis. Projects shall fund or construct proportional fair share mitigations and improvements to address their impacts on the transportation systems. The City Council may consider adoption of a statement of overriding considerations, as part of an EIR, for projects unable to mitigate their VMT impacts to a less than significant level. At the discretion of the City Council, based on CEQA Guidelines Section 15021, projects that include overriding benefits, in accordance with Public Resources Code Section 21081 and are consistent with the General Plan and the Transportation Analysis Policy 5-1 may be considered for approval. The City Council will only consider a statement of overriding considerations for (i) market-rate housing located within General Plan Urban Villages; (ii) commercial or industrial projects; and (iii) 100 percent deed-restricted affordable housing as defined in General Plan Policy IP-5.12. Such projects shall fund or construct multimodal improvements, which may include improvements to transit, bicycle, or pedestrian facilities, consistent with the City Council Transportation Analysis Policy 5-1. Area Development Policy. An “area development policy” may be adopted by the City Council to establish special transportation standards that identifies development impacts and mitigation measures for a specific geographic area. These policies may take other names or forms to accomplish the same purpose.</p>	<ul style="list-style-type: none"> • MM TR-1.1, where the Project applicant shall prepare Project construction plans that illustrate the design of the Project site enhancements, and shall coordinate with the City Parks, Recreation, & Neighborhood Services, Department of Transportation, and the Department of Public Works to incorporate improvements that comply with Policy TR-1.4. • MM TR-1.2, requires on-site Transportation Demand Management (“TDM”) Coordinator and annual monitoring. <p>These mitigation measures would lower the Project VMT to 10.11 per capita, which will reduce the Project impact to less than significant (i.e., below the City’s threshold of 10.12 VMT per capita).</p> <p>For the reasons outlined above, the Project is consistent with Policy TR-1.4.</p>
<p>Policy TR-5.3: Development projects’ effects on the transportation network will be evaluated during the entitlement process and will be required to fund or construct improvements in proportion to their impacts</p>	<p>The proposed Project’s impacts on the transportation network were evaluated (see Section 3.17.2.3, Project Impacts, of the DEIR). MM TR-1.1 requires that the Project fund or construct improvements in proportion to their impacts on the transportation system. Additionally, the</p>

Envision San José 2040 General Plan Policy	Project Consistency with the Envision San José 2040 General Plan
<p>on the transportation system. Improvements will prioritize multimodal improvements that reduce VMT over automobile network improvements.</p>	<p>improvements identified in MM TR-1.1 prioritize multimodal improvements (e.g., pedestrian improvements) in lieu of automobile network improvements (e.g., roadway expansion). Therefore, the Project is consistent with Policy TR-5.3.</p>
<p>Policy TR-9.1: Enhance, expand and maintain facilities for walking and bicycling, particularly to connect with and ensure access to transit and to provide a safe and complete alternative transportation network that facilitates non-automobile trips.</p>	<p>As documented in Section 3.17.2.3, Project Impacts, page 241, of the DEIR, the Project will not remove any bicycle facilities, nor will it conflict with any adopted plans or policies for new bicycle facilities. The Project will construct a raised Class IV separated bikeway along the east side of Seely Avenue (along the Project frontage). The City has indicated that the Project will also be required to construct a standard Class II bike lane along the west side of Seely Avenue.</p> <p>The existing and planned networks of pedestrian and bicycle facilities exhibit good connectivity and will provide residents, visitors, and retail employees of the Project with safe routes to transit stops and other points of interest in the Project vicinity.</p> <p>For the reasons outlined above, the Project is consistent with Policy TR-9.1</p>
<p>Policy TR-9.2: Serve as a model city for VMT reduction by implementing programs and policies that reduce VMT for City of San José employees.</p>	<p>As documented in Section 3.17.2.3, pages 241 to 243, Project Impacts, of the DEIR, mitigation measures MM TR-1.1 and MM TR-1.2 mitigate VMT impacts to 10.11 per capita, which will reduce the Project impact to less than significant (i.e., below the City’s threshold of 10.12 VMT per capita).</p> <p>For the reasons outlined above, the Project is consistent with Policy TR-9.2.</p>
<p>Policy TR-9.3: Enhance the overall travel experience of transit riders, pedestrians, bicyclists, and shared micromobility users to encourage mode shift.</p>	<p>As documented in Section 3.17.2.3 on pages 241 and 242, Project Impacts, of the DEIR, mitigation measure MM TR-1.1, where the Project applicant shall prepare Project construction plans that illustrate the design of the Project site enhancements, and shall coordinate with the City Parks, Recreation, & Neighborhood Services, Department of Transportation, and the Department of Public Works to incorporate improvements. Therefore, the Project is consistent considered to be consistent with Policy TR-9.3.</p>

Source: City of San José, 2022; Circlepoint, 2024

As described above, the Project is inconsistent with the following policies: Policy LU-13.2 (Section 3.5.2.2 Project Impacts, page 129, of the DEIR) due to the demolition of structures that are eligible for listing under in the CRHR and the San José Historic Resources Inventory as a Candidate City Landmark, and Policy CD-1.26 (Section 3.5.2.2 Project Impacts, page 127 and 128,

of the DEIR) where the relocation of the significant buildings and structures on-site would remain a significant unavoidable impact because they would be permanently lost or moved. Significant and unavoidable impacts associated with these inconsistencies were disclosed in the DEIR.

CEQA Guidelines Section 15091(a) stipulates that no public agency shall approve or carry out a project for which an EIR has been certified that identifies one or more significant environmental effects of the Project, unless the public agency makes one or more written findings. If the lead agency approves a project even though it would result in significant adverse environmental impacts that cannot be mitigated to a less-than-significant level, the agency must state the reasons for its action in writing. This “statement of overriding considerations” must be included in the record of project approval.

Topical Response 5 – Disagreement among Experts

During the circulation period, 23 comments were forwarded to the City from third-party party experts in the areas of biological resources, noise and vibration, and transportation. These comments identified disagreements with the information, methodology, and/or conclusions included in the DEIR and supporting technical documentation prepared by experts in these fields. Pursuant to CEQA Guidelines Sections 15064(f)(7) and 15151, disagreement among experts concerning the significance of a proposed Project’s environmental effect does not require a lead agency to follow alternative evidence nor does a disagreement among experts render an EIR inadequate, so long as the main points of the disagreement are summarized and the lead agency’s choice of expert opinions is explained. The City is entitled to rely on its experts and other sources of substantial evidence to draw conclusions about the significance of environmental impacts even if commenter and commenter's experts disagree with those conclusions.

The City has provided a good faith effort to analyze the environmental impacts of the Project using methodologies applicable to the Project, with the assistance of experts in environmental analysis. As noted in CEQA Guidelines Section 15003 (g), the City is not required to generate paper to perform additional analysis due to disagreement between experts that use different methodologies, and different thresholds of significance. The City has properly weighed comments from all sources and either made appropriate clarifications in the DEIR or explained in good faith why it disagrees with the comment. Responses to comments from these third-party experts have been provided in Section 2.2.2 below, that includes a summary of the comments and the main points of disagreement, and an explanation for the lead agency’s choice of expert opinion.¹

¹ Authority cited: Sections 21083, 21083.05, Public Resources Code. Reference: Sections 21003, 21065, 21068, 21080, 21082, 21082.1, 21082.2, 21083, 21083.05, and 21100, Public Resources Code; No Oil, Inc. v. City of Los Angeles

2.2.2 INDIVIDUAL RESPONSES

This subsection addresses individual comments. The original comment letters are provided below and responses to each comment letter immediately follows.

Agency Comments

The City received comments from the following agencies on the DEIR:

- County of Santa Clara Roads and Airports Department
- Pacific Gas and Electric Company
- State Water Resources Control Board
- Valley Water
- Santa Clara Valley Transportation Authority
- Santa Clara Unified School District
- Caltrans, District 4
- The Amah Mutsun Tribal Band of San Juan Bautista and A.M.T.B. Inc.

(1974) 13 Cal.3d 68; San Joaquin Raptor/Wildlife Center v. County of Stanislaus (1996) 42 Cal.App.4th 608; Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359; Laurel Heights Improvement Assn. v. Regents of the University of California (1993) 6 Cal.4th 1112; Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98; Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal. App. 4th 1099; and Rominger v. County of Colusa (2014) 229 Cal.App.4th 690.



County of Santa Clara
Roads and Airports Department

101 Skyport Drive
San Jose, California 95110-1302
1-408-573-2400

February 26, 2024

Bethelhem Telahun,
City of San Jose
200 East Santa Clara St
San Jose, CA 95112
408-535-5624
bethelhem.telahun@sanjoseca.gov

SUBJECT: Public Notice of Availability of the Draft Environmental Impact Report for the 0 Seely Avenue Mixed-Use Project

The County of Santa Clara Roads and Airports Department (The County) appreciates the opportunity to review the Public Notice of Public Notice of Availability of the Draft Environmental Impact Report for the 0 Seely Avenue Mixed-Use Project. We submit the following comments:

- A-1.1 • The County will not permit a new traffic signal on Montague expressway. A signal at this location does not meet county standards and conflicts with County and City plans for Montague and Trimble. This position is consistent with County correspondence to the City in response to the notice of preparation. Remove the option from the EIR.
- A-1.2 • The City should identify and provide fair share contribution for the following two interchanges as identified in the North San Jose Settlement agreement:
 - Montague Expressway and 880 Interchange and
 - McCarthy Boulevard-O’Toole Avenue and Montague Expressway interchange
- A-1.3 • The turn pocket described below is actually SB left from River Oaks to EB Montague. If no signal is installed at Montague/Seely, the project should recommend alternative mitigation measures to address the queuing issue at Montague/River Oaks. A possible alternative would be constructing the project as described in TIA Chapter 6 - New Project analysis, which assumes no new



A-1.3
Cont.

traffic signal (i.e., no left-turn access) at the Seely Avenue/Montague Expressway intersection and a reduction in retail space compared to the originally proposed larger project.

- It is stated that *The queuing analysis indicates that the maximum vehicle queues for the westbound left-turn movement at the Montague Expressway/River Oaks Parkway intersection currently exceed the existing vehicle storage capacity and would continue to do so under background and project alternative conditions during both the AM and PM peak hours of traffic.*

A-1.4

- The maximum westbound left-turn vehicle queue under project alternative conditions would block access to the existing commercial driveway on River Oaks Parkway. The driveway is situated approximately 400 feet from Montague Expressway. The westbound left-turn pocket cannot be extended due to the presence of back-to-back left-turn pockets.
- The project would actually reduce the westbound left-turn vehicle queue at the Montague Expressway/River Oaks Parkway intersection due to the reassignment of existing vehicle trips that would result from installing a new traffic signal at the Seely Avenue/Montague Expressway intersection.

A-1.5

- Appendices are not provided in the current draft of EIR. It is unclear whether planned improvements at Trimble, McCarthy, and 880 were included in the traffic analysis.

A-1.6

- Installation of crosswalk crossing Montague at Seely was not included in the initial traffic analysis. Is this a signal-controlled crosswalk at the new signal?

A-1.7

- The proposed single eastbound left turn storage lane at Seely is 300 ft, which will cut into existing westbound left lanes at Trimble and a potential future flyover.

A-1.8

- Please include queuing analysis at westbound right at Montague Expressway and Seely Ave for both AM and PM peak hours.

A-1.9

- Please include queuing analysis at northbound right at Montague Expressway and Trimble Rd for both AM and PM peak hours.

- Please include queuing analysis at turning movements at 880 ramps.

- Some vehicles may cut through the nearby office park to access Trimble instead. Did TIA consider this, and are there any impacts?

Comments on Pedestrian and Bike Circulation

A-1.10

- The project has identified in San Jose's Better Bike Plan 2025 future Class IV separated bikeway improvements along Montague. We wanted to mention that the County's draft Active Transportation Plan calls for a Class I – Shared Use Path. Since the project has identified to make a fair-share monetary contribution toward the future Class IV separated bikeway improvements that are planned along Montague Expressway as described in the San Jose Better Bike Plan 2025, we ask that the fair-share be utilized for the more updated recommendation out of the County's Active Transportation Plan so that it is consistent with County policy and ROW on Montague Expressway. If possible, the County recommends the project to dedicate some ROW for proposed bike improvements.

Comments on Maintenance

A-1.11

- Maintenance of non-standard improvements in the County's right of way will be subject to a maintenance indemnification agreement between the encroachment permit applicant and the County unless otherwise coordinated between the City and County.

Thank you again for your continued outreach and coordination with the County. If you have any questions or concerns about these comments, please feel free to contact me at ben.aghegnehu@rda.sccgov.org

Thank you,

**Response to Comment Letter A1: Santa Clara County Roads and Airports Department
(Dated January 26, 2024)****Response A-1.1:**

The commenter states that a new traffic signal is not permitted by the County at Montague Expressway because it does not meet County and City's plans and standards. Commenter recommends removing the option from the DEIR.

In response to the commenter, please see Topical Response 2 – Traffic Signal, which confirms that the Project does not include a new traffic signal at Montague Expressway and Seely Avenue.

Response A-1.2:

The commenter is requesting for the City to identify and provide fair share contributions for specific interchanges outlined in the North San José Settlement agreement. They specifically mention two interchanges: the Montague Expressway and 880 Interchange, as well as the McCarthy Boulevard-O'Toole Avenue and Montague Expressway interchange.

This comment does not raise any environmental concern with the analysis or adequacy of the EIR. Therefore, no response is required. As stated in Section 3.17.2.2, Project Impacts on page 245, to address the intersection level-of-service adverse effects, the development permit for the Project includes a condition of approval for the applicant to provide a voluntary, monetary fair-share contribution in the amount of \$200,000 towards the improvements outlined in the North San Jose Settlement agreement.

Freeway and intersection analysis at Montague Expressway and Interstate 880 ("I-880") was not required according to Congestion Management Program guidelines or the City's Transportation Analysis Handbook because the Project is not estimated to add trips meeting the thresholds for study analysis. Intersection study analysis is not a CEQA related issue since VMT is now the metric to evaluate and mitigate traffic related impacts under CEQA.

Response A-1.3:

The commenter proposes addressing queuing issues at Montague Expressway and River Oaks Parkway by recommending alternative mitigation measures if no signal is installed at Montague Expressway and Seely Avenue. One option suggested is to follow the Traffic Impact Analysis Chapter 6, which includes no new traffic signal at Seely Avenue and Montague Expressway and reducing retail space in the Project.

This comment does not raise any environmental concern with the analysis or adequacy of the EIR. Therefore, no response is required. As described in Section 2, Existing Transportation Conditions, on page 21 of Appendix P, of the DEIR, the vehicle queuing at the Montague Expressway and River Oaks Parkway intersection is an existing issue and is not created by the Project. As documented in Table 16 in Appendix P, of the DEIR, while implementation of the

Project would result in additional vehicle queuing at the Montague Expressway and River Oaks Parkway intersection, it would not result in a significant impact based on the City's Intersection Operations criteria. Furthermore, vehicle queuing is an operational issue and not a CEQA related issue. The Project is not proposing a new traffic signal. Please see Topical Response 2 – Traffic Signal. The “New Project”, as recommended by the commenter, is the currently proposed Project as described in Section 2, Project Description, of the DEIR.

Response A-1.4:

The commenter highlights that the queuing analysis shows the westbound left-turn queues at Montague Expressway and River Oaks Parkway exceed storage capacity. This would block access to a nearby commercial driveway. They note extending the left-turn pocket is not possible. However, they suggest that the Project would reduce these queues due to trip reassignment resulting from a new traffic signal installation at Seely Avenue and Montague Expressway.

In response to the commenter, see Response A-1.3.

Response A-1.5:

The commenter points out that the current draft of the DEIR does not include appendices. They state it is unclear whether planned improvements at Trimble, McCarthy, and 880 were considered in the traffic analysis.

In response to the commenter, please see Topical Response 1 – Circulation of DEIR, which addresses the appendices that were not posted correctly during the first circulation of the DEIR between January 18, 2024, to March 11, 2024. Since the Valley Transportation Plan, which identifies these improvements, is currently in the process of being updated, the planned improvements at Trimble Road, McCarthy Avenue, and I--880 are not currently funded and are therefore not included in Appendix P, Transportation Analysis, of the DEIR or in Appendix A, Transportation RTC Memorandum, of the FEIR.

Response A-1.6:

The commenter notes that the initial traffic analysis did not include the installation of a crosswalk crossing Montague Expressway at Seely Avenue. They inquire whether the crosswalk at the new signal will be signal-controlled.

In response to the commenter, as described in Section 2, Project Description, of the DEIR, a crosswalk crossing Montague Expressway is not part of the Project. Please see Topical Response 2 – Traffic Signal, which describes how the “New Project” analysis presented in Appendix P of the DEIR does not include changes (i.e., crosswalk) to the Seely Avenue and Montague Expressway intersection .

Response A-1.7:

The commenter highlights that the proposed single eastbound left turn storage lane at Seely Avenue is 300-feet in length, which will encroach upon existing westbound left lanes at Trimble Road and a potential future flyover.

In response to the commenter, please see Topical Response 2 – Traffic Signal. Given that a traffic light is no longer proposed at Seely Avenue and Montague Expressway, an eastbound left turn pocket at Seely Avenue and Montague Expressway will not be constructed.

Response A-1.8:

The commenter requests a queuing analysis at westbound Montague Expressway and Seely Avenue, northbound Montague Expressway and Trimble Road, and at the turning movements at I-880 ramps.

In response to the commenter, please see Topical Response 2 – Traffic Signal and refer to Response A-1.7. As described in Section 2, Project Description, of the DEIR, the Project does not include the construction of a traffic signal, therefore, no conflict will occur with the right-turn movement from westbound Montague Expressway to northbound Seely Avenue and no vehicle queues for this westbound right-turn movement will occur as a result of the Project. Note that all the metering lights at the I-880 on-ramps from Montague Expressway have been either decommissioned or removed.²

Response A-1.9:

The commenter notes that some vehicles might choose to cut through the nearby office park to access Trimble Road instead. They inquire whether the Traffic Impact Analysis considered this possibility and if there are any resulting impacts.

In response to the commenter, the Transportation Analysis, Appendix P, of the DEIR did not assume any existing traffic or that traffic generated from the Project would cut through the Cadence Design Systems office park, as the traffic model analyzes and predicts the potential flow of traffic within the roadway system available to the public. Private property is not intended to act as a thoroughfare for circulation, and as such should not be included in the traffic model. Further, there are other less circuitous routes that are available to access the surrounding roadway network.³ As documented in Appendix A, Transportation RTC Memorandum, of the FEIR, prepared by Hexagon Transportation Consultants, dated April 19, 2024, outbound Project generated vehicle trips were assigned to eastbound Montague Expressway via River Oaks Parkway. It is assumed that drivers exiting the Project site and

² A field visit conducted on April 11, 2024, confirmed that some metering lights have been removed and the remaining metering lights are inactive. Source: Hexagon Transportation Consultants. Appendix A: Transportation Responses to Comments Memorandum. April 19, 2024.

³ Ibid.

traveling eastbound on Montague Expressway, would first travel northbound on Seely Avenue, turn left onto River Oaks Parkway, and then turn left onto Montague Expressway.

Furthermore, the comment does not identify any specific deficiencies with the modeling of vehicle trips, or provide any evidence that cut-through trips would a) occur and b) would change the significance conclusions of the DEIR. Therefore, no further response is required.

Response A-1.10:

The commenter highlights that the Project has identified future Class IV separated bikeway improvements along Montague Expressway as outlined in San José's Better Bike Plan 2025. The commenter notes that the County's draft Active Transportation Plan calls for a Class I Shared Use Path instead. The commenter suggests that the fair-share monetary contribution planned for the Class IV bikeway improvements be directed towards the updated recommendation from the County's Active Transportation Plan for consistency with County policy and the right-of-way ("ROW") on Montague Expressway. Additionally, the commenter recommends dedicating some ROW for proposed bike improvements if possible.

The Project is not conditioned to provide a voluntary fair share contribution towards Class IV bike lanes along Montague Expressway. The Project applicant is conditioned to coordinate and obtain encroachment permits with the County of Santa Clara for any public improvements along Montague Expressway. This is not a comment on the adequacy or content of the environmental analysis in the DEIR, therefore no further response is necessary.

Response A-1.11:

The commenter points out that maintaining non-standard improvements within the County's right of way will require a maintenance indemnification agreement between the encroachment permit applicant and the County unless coordination between the City and County dictates otherwise.

The Project applicant is conditioned to coordinate and obtain encroachment permits with the County of Santa Clara for any public improvements along County ROW. This comment does not raise any concerns regarding adequacy or content of the environmental analysis in the DEIR. Therefore, no further response is necessary.



February 27, 2024

Bethelhem Telahun
City of San Jose
200 E Santa Clara St, 3rd Flr
San Jose, CA 95113

Re: ER21-284
0 Seely Avenue Mixed Use

Dear Bethelhem Telahun,

Thank you for providing PG&E the opportunity to review the proposed plans for ER21-284 dated 1/16/2024. Our review indicates the proposed improvements do not appear to directly interfere with existing PG&E facilities or impact our easement rights.

Please note this is our preliminary review and PG&E reserves the right for additional future review as needed. This letter shall not in any way alter, modify, or terminate any provision of any existing easement rights. If there are subsequent modifications made to the design, we ask that you resubmit the plans to the email address listed below.

If the project requires PG&E gas or electrical service in the future, please continue to work with PG&E's Service Planning department: <https://www.pge.com/cco/>.

As a reminder, before any digging or excavation occurs, please contact Underground Service Alert (USA) by dialing 811 a minimum of 2 working days prior to commencing any work. This free and independent service will ensure that all existing underground utilities are identified and marked on-site.

If you have any questions regarding our response, please contact the PG&E Plan Review Team at pgeplanreview@pge.com.

Sincerely,

PG&E Plan Review Team
Land Management

A-2.1

Response to Comment Letter A-2: Pacific Gas and Electric Company (“PG&E”) (Dated February 27, 2024)**Response A-2.1**

The commenter suggests that the proposed improvements do not directly interfere with existing PG&E facilities or impact their easement rights. However, the commenter emphasizes that this is an initial assessment and reserves the right for additional future review if necessary. The commenter clarifies that their letter does not alter, modify, or terminate any provisions of existing easement rights. If there are subsequent modifications to the design, the commenter requests resubmission of the plans for review. Additionally, the commenter advises continued collaboration with PG&E's Service Planning department for any future gas or electrical service requirements. Commenter provides a reminder about contacting Underground Service Alert (“USA”) before any digging or excavation to ensure the identification and marking of all existing underground utilities.

In response to the commenter, should there be any changes to the Project design, the Project applicant will re-submit the plans to the email identified in the comment letter and will continue to collaborate with PG&E's Service Planning department for any future gas or electrical service requirements. The reminder raised by the commenter about contacting the USA before the commencement of any construction activities involving digging or excavation is part of the administrative record. The City appreciates the information provided by the commenter. No further response is necessary.



State Water Resources Control Board

Comment Letter A-3

February 29, 2024

City of San Jose
Attn: Bethelhem Telahun
200 E. Santa Clara Street, 3rd Floor
San Jose, CA 95113

CITY OF SAN JOSE (CITY), ENVIRONMENTAL IMPACT REPORT (EIR) FOR THE SEELY AVENUE MIXED USE PROJECT (PROJECT); STATE CLEARINGHOUSE # 2022020565

Dear Ms. Bethelhem Telahun:

Thank you for the opportunity to review the EIR for the proposed Project. The State Water Resources Control Board, Division of Drinking Water (State Water Board, DDW) is responsible for issuing water supply permits pursuant to the Safe Drinking Water Act. This Project is within the jurisdiction of the State Water Board, DDW’s Santa Clara District. DDW Santa Clara District issues domestic water supply permit amendments to the public water systems serviced with a new or modified source of domestic water supply or new domestic water system components pursuant to Waterworks Standards (Title 22 CCR chapter 16 et. seq.). A public water system requires a water supply permit amendment when changes are made to a domestic water supply source, storage, or treatment and for the operation of new water system components- as specified in the Waterworks Standards. City of San Jose- NSJ/Alviso will need to apply for a water supply permit amendment for this Project.

The State Water Board, DDW, as a responsible agency under the California Environmental Quality Act (CEQA), has the following comments on the City’s EIR:

A-3.1

- Under “2.5 Project-Related Approvals, Permits, and Clearances” please include “Water Supply Permit- State Water Resources Control Board, Division of Drinking Water.”

A-3.2

- Under 3.10.1.2 Existing Conditions, Water Quality, the IS/MND indicates “No existing potable water supply infrastructure is located within the project site.” This does not appear to be the case as the IS/MND mentioned the six Valley Water wells would need to be decommissioned (PDF page 298). Please update this section to reflect this and also discuss the existing water quality of the site.
 - Is there any further indication from past monitoring of the six wells that the groundwater water is contaminated with diesel fuel?

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

A-3.3

- Please discuss if any treatment will be required for the new well. If treatment is required, please include the treatment infrastructure in the Project description and a discussion of impacts associated with construction and operation of the system, as warranted.

A-3.4

When the CEQA review process is completed, please forward the following items with your permit application to the State Water Board, DDW Santa Clara District Office at DWPDIST17@waterboards.ca.gov:

- Copy of the EIR and Mitigation Monitoring and Reporting Plan (MMRP);
- Copy of all comment letters received and the lead agency responses as appropriate;
- Copy of the Resolution or Board Minutes adopting the EIR and MMRP; and
- Copy of the date stamped Notice of Determination filed at the Santa Clara County Clerk’s Office and the Governor’s Office of Planning and Research, State Clearinghouse.

Please contact Lori Schmitz of the State Water Board at (916) 449-5285 or Lori.Schmitz@waterboards.ca.gov, if you have any questions regarding this comment letter.

Sincerely,

 Digitally signed by Lori Schmitz
Date: 2024.02.29 09:58:44 -08'00'

Lori Schmitz

Lori Schmitz
Environmental Scientist
Division of Financial Assistance
Special Project Review Unit
1001 I Street, 16th floor
Sacramento, CA 95814

Cc:

Office of Planning and Research, State Clearinghouse

Van Tsang
District Engineer
Santa Clara District

Response to Comment Letter A-3: State Water Resources Control Board (Dated February 29, 2024)

Response A-3.1:

The commenter suggests adding a "Water Supply Permit-State Water Resources Control Board, Division of Drinking Water," under Section 3.5, Project-Related Approvals, Permits, and Clearances of the DEIR.

In response to the commenter, Section 2.5, Project-Related Approvals, Permits, and Clearance, page 40, of the DEIR has been revised to include Water Supply Permit - State Water Resources Control Board, Division of Drinking Water in the DEIR (see Section 3.0, Text Revisions in this FEIR).

Response A-3.2:

The commenter observes a discrepancy in Section 3.10.1.2, Existing Conditions, Water Quality, of the DEIR, noting that the Initial Study/Mitigated Negative Declaration ("IS/MND") states there is no existing potable water supply infrastructure within the Project site. However, the commenter points out that the IS/MND mentions the need to decommission six Valley Water wells. The commenter suggests updating this section to reflect the presence of the wells and to discuss the existing water quality of the site. Additionally, the commenter inquires whether past monitoring of the six wells indicates contamination of groundwater with diesel fuel.

In response to the commenter, to clarify, an EIR was prepared for the Project, not an IS/MND. Section 3.10.1.2, Existing Conditions, page 177, of the DEIR has been revised to indicate that there are five water supply wells that provide potable water on the Project site, instead of six water supply wells(see Section 3.0, Text Revisions in this FEIR). Regarding the commenters inquiry as to whether past monitoring of the five wells indicates that the groundwater contains contamination from diesel fuel, as stated in Section 3.9.1.2, Existing Conditions, of the DEIR, groundwater sampling results all came back below San Francisco Regional Water Quality Control Board priority environmental screening levels ("ESLs"), except one isolated sample, which detected Total Petroleum Hydrocarbon-diesel particles in concentrations that were slightly above the ESLs. With implementation of MM HAZ-1.1, MM HAZ-1.2, MM HAZ-2, and MM HAZ-3, soil vapor, lead, and arsenic levels from diesel fuel will be below their relevant ESLs and the Project site will be safe for construction workers and the public.

The underground storage tank ("UST") and aboveground storage tank ("ASTs") would be removed; the Project applicant would perform all subsequent investigation and remediation as required under Santa Clara County Department of Environmental Health ("SCCDEH") oversight to meet regulatory requirements and ensure the Project site is safe for the development as required under MM HAZ-1.1. MM HAZ-1.2 will require that, prior to the issuance of any demolition or grading permits, the Project applicant will prepare a Removal Action Plan, a Soil Management Plan, or other similarly titled report that describes the remediation efforts will be prepared and implemented to document the removal of any contaminated soils from the Project site. MM HAZ-2 will determine if potential vapor intrusion risks exist from the identified

Volatile Organic Compounds and then, as necessary, evaluate and/or mitigate any such potential vapor intrusion risks through the installation of vapor mitigation measures. MM HAZ-3 will obtain regulatory oversight of the mitigation of contaminated soil to ensure the Project site is safe for construction workers and the public after development. A Removal Action Plan, Soil Management Plan ("SMP") or other similarly titled report describing the remediation must be prepared and implemented to document the removal and/or capping of contaminated soil. The full text of these mitigation measures are discussed in Section ES4, Summary of Significant Impacts and Mitigation Measures, under Table ES-1 on pages xxvi, xxvii, and xxviii of the DEIR. Therefore, with the inclusion of the aforementioned mitigation measures, impacts related to historic agricultural chemicals and/or waste will be reduced to a less-than-significant level.

Response A-3.3:

The commenter requests a discussion regarding whether any treatment will be necessary for the new well. If treatment is required, the commenter asks for inclusion of the treatment infrastructure in the Project description, along with a discussion of the impacts associated with the construction and operation of the system, as appropriate.

In response to the commenter, the well description provided in Section 2.3.4, Well, page 19, of the DEIR, includes anticipated infrastructure of the well. No treatment infrastructure is anticipated. Additionally, according to SJMW, the location of the new well has been reviewed and approved by the State Water Resources Control Board Division of Drinking Water.⁴

Response A-3.4:

The commenter requests that the following items be sent to the State Water Board Division of Drinking Water Santa Clara Office when the CEQA process is complete: (1) A copy of the EIR and MMRP (2) Copies of all comment letters received and the lead agency responses as appropriate (3) A copy of the Resolution or Board Minutes adopting the EIR and MMRP (4) A copy of the stamped Notice of Determination filed at the Santa Clara County Clerk's Office and the Governor's Office of Planning and Research, State Clearinghouse

In response to the commenter, the comment has been added to the administrative record and the request will be forwarded to decision makers. The comment does not raise any issues regarding the adequacy of the DEIR; therefore, no further response is required.

⁴ Lewis, Scott. P.G, Luhdorff & Scalmanini Consulting Engineers, Email correspondence. RE: Muni Water-Hanover Meeting, December 16, 2021.

From: Kevin Thai <KThai@valleywater.org>
Sent: Thursday, February 29, 2024 6:54 PM
To: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Cc: Metra Richert <mrichert@valleywater.org>; Michael Martin <MichaelMartin@valleywater.org>; Vanessa De La Piedra <vdelapiedra@valleywater.org>
Subject: Notice of Availability of the Draft Environmental Impact Report for the Seely Avenue Mixed-Use Project (PDC21-035, PD22-002, and ER21-284)

[External Email]

You don't often get email from kthai@valleywater.org. [Learn why this is important](#)

Dear Bethelhem Telahun:

The Santa Clara Valley Water District (Valley Water) has reviewed Draft Environmental Impact Report (DEIR) for the Seely Avenue Mixed-Use Project, received on January 16, 2024. Valley Water has the following comments:

- A-4.1 1. **Well 06S01W24H015 must be protected during the project construction:** Well 06S01W24H015 is located on Valley Water property (not on the Project site) and is a deep, artesian monitoring well owned by Valley Water. While located on Valley Water property, this well is very close to the access road immediately adjacent to the project. This well has a flush mount to land surface and is protected by a Christy box. This well is a critically important monitoring well used by Valley Water to evaluate land subsidence conditions. Valley Water's Well Information App can be used to locate well 06S01W24H015: <https://www.valleywater.org/contractors/doing-business-with-the-district/wells-well-owners/well-information-app>.
- A-4.2 2. **Page 16, Section 2.3 Proposed Development:** The document notes the proposed buildings would be restricted by a 15-foot setback from the toe of the Coyote Creek levee. Valley Water is in discussions with the developer to obtain an easement for the setback area.
- A-4.3 3. **Page 39, Section 2.5 Project-Related Approvals, Permits, and Clearances:** All new wells require a Valley Water Well permit and should be included in the list of permits required for project-related approvals. Valley Water should also be listed

- A-4.3 Cont. | correctly on page 40 as “Santa Clara Valley Water District”.
- A-4.4 | 4. **Figure 3-11, Floodplain Map:** The figure is incorrectly labeled as “floodplain map”. It should be revised as a riparian corridor exhibit.
5. **Abandoned wells on Page 163, section 3.9.1.2 Existing Conditions, part d about existing wells on the property:** The sentence “One water supply well was observed on the project site during ENGEO’s reconnaissance and five water supply wells (two active and three standby) were identified during agency file review.” It is unclear whether there are five or six wells on the project site. Valley Water’s Well Information App can be used to help locate wells on the Project site:
<https://www.valleywater.org/contractors/doing-businesses-with-the-district/wells-well-owners/well-information-app>. The App indicates five wells on the project site: two active water supply wells (06S01W24H010 and 06S01W24H014) and three standby water supply wells (06S01W24H006, 06S01W24H005, and 06S01W24H007) on the Project site. However, there could be additional unknown abandoned wells on the Project site. Please coordinate the planned well abandonment activity with Valley Water’s Well Permitting and Inspections Hotline: 408-630-2660 (<https://www.valleywater.org/contractors/doing-businesses-with-the-district/wells-well-owners>). If any other abandoned wells are identified during the project, they should also be properly destroyed by in coordination with Valley Water.
- A-4.5 | 6. **Page 169, Decommissioning of Existing Wells:** The first sentence of this paragraph indicates there are “...six on-site supply wells at the project site”. Please see our previous comment that Valley Water’s Well Information App indicates five wells on the project site. However, the Project site may have wells that are not accurately reflected in the App. Please coordinate the planned well abandonment activity with Valley Water. Please also note Valley Water’s first comment that well 06S01W24H015 is located on Valley Water property (not on the project site but immediately adjacent) and must be protected during all project activities.
- A-4.6 | 7. **Page 172, Section 3.10.1.1 Regulatory Framework:** Valley Water recommends adding a short section on California’s Sustainable Groundwater Management Act (SGMA), including Valley Water’s role as the Groundwater Sustainability Agency (GSA) for the Santa Clara Subbasin where the project is located. Details about Valley Water role as a GSA are available on this webpage:
<https://www.valleywater.org/your-water/where-your-water-comes/groundwater/sustainable>
- A-4.7 | 8. **Page 174, Municipal Regional Stormwater Permit, first paragraph:** The document should reference the latest San Francisco Bay Regional Water Quality Control Board (RWQCB) National Pollutant Discharge Elimination (NPDES) permit (Permit Order No. R2-2022-0018, NPDES Permit No. CAS612008), effective July 1, 2022, which requires post-development controls for 5,000 square feet, not 10,000 square feet as noted in the document.
- A-4.8 | 9. **Page 174, Municipal Regional Stormwater Permit, third paragraph:** the document notes the project would not create an acre or more of impervious surface or create an increase in total impervious surface from pre-project conditions. This statement is inaccurate as most of the project site is located in agricultural land, which is mostly pervious.
- A-4.9 | 10. **Page 176, Flood Zone section:** Please clarify what the 90 – 350 feet range along the northern boundary of Coyote Creek is in reference to.
- A-4.10 | 11. **Page 176, Groundwater section:** These sentences about the Guadalupe River Watershed seem more appropriate in the prior section about Surface Water. Valley Water recommends adding more relevant groundwater information in this Groundwater section. For example, the project site is located within the confined zone of the Santa Clara Subbasin. The project site is an area of relatively shallow groundwater in the shallow aquifer above the confining unit. Additional details about the Santa Clara Subbasin are available in Valley Water’s 2021 Groundwater Management Plan, which is linked on this page: <https://www.valleywater.org/your-water/where-your-water-comes/groundwater/sustainable>
- A-4.11 |

- A-4.12 12. **Page 179, first paragraph:** Valley Water agrees with the statements made in this paragraph. Any rainfall that infiltrates the pervious areas of the project will recharge the shallow aquifer, which is not the primary groundwater supply. Water supply wells in the area are screened in the principal aquifer, beneath the confining unit. Recharge into the shallow aquifer will eventually flow as shallow groundwater laterally toward Coyote Creek.
- A-4.13 13. **Page 179, second paragraph, first sentence:** The well would be located within the Santa Clara Subbasin, not the Llagas Subbasin. Please correct the first sentence to read “A new well would be constructed as part of the project, which would result in additional use of groundwater within the Santa Clara Subbasin.”
- A-4.14 14. **Page 179, second paragraph, second sentence:** The sentence describes groundwater depths ranging from 17 to 39 feet below land surface. Based on Valley Water groundwater monitoring and maps, the depth to water could be even shallower. Valley Water’s depth to first groundwater map (<https://gis.valleywater.org/GroundwaterElevations/index.php>) indicates the project is located in an area of 10 to 20 ft depth to first water.
- A-4.15 15. **Page 179, third paragraph:** The propose well will pump an estimated 1,452 AFY. Current average pumping in the Santa Clara Plain is about 75,000 AFY (based on the 2021 Groundwater Management Plan). Therefore, the proposed project will increase pumping by about 2% per year in the Santa Clara Plain. This pumping is likely to be balanced by Valley Water’s managed recharge operations in most years, and thus not impede sustainable groundwater management of the subbasin.
- A-4.16 16. **Page 224, Section 3.16 Recreational Facilities:** This section does not mention the proposed Coyote Creek trail connection.
- A-4.17 17. **Page 237, Pedestrian and Bicycle Facilities, third and fifth paragraph:** The project proposes a new trail connection within close proximity of the Montague Expressway trail head. Valley Water has previously worked with the City of San Jose to develop the locations of the midblock trail access along Coyote Creek (see North San Jose Access and Ramp Study – Guadalupe River and Coyote Creek Trails) to minimize the number of connections and best locate those access points. This document identifies the only midblock access as the one at Iris Chang Park. The proposed trail connection is not consistent with this City document and additionally, the developer has not discussed this connection with Valley Water.
- A-4.18 18. **Page 256, Existing Water Supply System:** When considering water supply and San Jose Municipal Water’s Urban Water Management Plan, it is important to recognize the projections of future water supply and availability assume substantial increases in water conservation and demand management measures. For the proposed project to meet its fair share to these water conservation assumptions, Valley Water suggests that all available water conservation measures be required by using recycled water, incorporating on-site reuse for both storm and graywater, and requiring water conservation measures above State standards (i.e., CALGreen). To reduce or avoid adverse impacts to water supply, the City and applicant should consider the following:
- a. Require landscaping that exceeds the requirements of the City’s water efficient landscape regulations;
 - b. Weather- or soil-based irrigation controllers;
 - c. Dedicated landscape meters;
 - d. The installation of dual plumbing to facilitate and maximize the use of alternative water sources for irrigation, toilet flushing, cooling towers, and other non-potable water uses. In addition, onsite reuse of water may be appropriate now or in the future.
 - e. Maximize the use of alternative water sources for non-potable uses including stormwater, rainwater, and graywater.
 - f. Installation of separate submeters for each residential unit and individual spaces within commercial buildings to encourage efficient water use.

- A-4.19 19. **Page 257, Recycled Water:** The DEIR notes there is a recycled water line adjacent to the site but does not discuss the proposed tie-in to the stub at / adjacent to the levee. Per discussions with the developer, Valley Water understands the project includes a new tie-in. As discussed with the developer, the tie-in will require a Valley Water encroachment permit if the work occurs on Valley Water property or requires access on Valley Water property. Issuance of a Valley Water encroachment permit is a discretionary act and requires Valley Water to be considered a responsible agency under CEQA.
- A-4.20 20. **Appendix Q, Water Supply Assessment, Page 6, section 3.3 Local Groundwater, second paragraph in this section:** Please correct the following sentence to read “The Alternative Plan was approved by DWR in 2019.” The original sentence incorrectly stated it was 2017. Additional details about Valley Water’s role as a GSA and the Alternative Plan are available on this website:
<https://www.valleywater.org/your-water/where-your-water-comes/groundwater/sustainable>
- A-4.21 21. **Appendix Q, Water Supply Assessment, Page 6, section 3.3 Local Groundwater, third paragraph in this section:** Valley Water has several programs other than “...in-lieu recharge programs that maintain adequate storage...”. Valley Water recommends adding to the sentence that Valley Water also has a managed recharge program to maintain groundwater storage, as well as various programs to protect groundwater quality.

Valley Water appreciate your consideration for the review of the DEIR. Please contact Mr. Kevin Thai at kthai@valleywater.org or (408) 630-3157 if you have any questions or concerns about items discussed in this letter.

Sincerely,

KEVIN THAI

ASSOCIATE ENGINEER - CIVIL
Community Projects Review Unit
Tel. (408) 630-3157 / CPRU Hotline: (408) 630-2650

Santa Clara Valley Water District is now known as:



Clean Water • Healthy Environment • Flood Protection

5750 Almaden Expressway, San Jose CA 95118
www.valleywater.org

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Response to Comment Letter A-4: Santa Clara Valley Water District (Dated February 29, 2024)

Response A-4.1:

The commenter highlights the importance of protecting Well 06S01W24H015 during Project construction since it is a monitoring well owned by Valley Water and is located near the Project's access road on Valley Water property. The commenter identifies this well as crucial for assessing land subsidence. The commenter describes that the well features a flush mount and is protected by a Christy box. A Christy box refers to a brand of utility connection coverings, typically made of concrete, that are used to protect utility connection and access points from damage or degradation from external factors including weather and construction activities. The commenter then describes that access to further details regarding Well 06S01W24H015 is available via Valley Water's Well Information App at the provided link.

In response to the commenter, Valley Water well regulations require a permit for new construction or modification of wells to ensure no adverse effects on neighboring wells or land subsidence. The application process includes detailed inspections to ensure compliance with construction standards and groundwater protection measures. Prior to the start of construction activities, the Project applicant will coordinate with Valley Water, including a field preconstruction meeting, to develop adjacency procedures with neighboring Valley Water facilities including Well 06S01W24H015.

Response A-4.2:

The commenter highlights that Section 2.3, Proposed Development, of the DEIR states that the proposed buildings will observe a 15-foot setback from the top of the Coyote Creek levee. The commenter mentions ongoing discussions between Valley Water and the developer to acquire an easement for this setback area.

In response to the commenter, the Project applicant and Valley Water are in ongoing discussions about acquiring a maintenance easement for this setback area as mentioned by the commenter. The City appreciates the information provided by the commenter. The easement negotiation does not raise any concerns regarding adequacy or content of the environmental analysis in the DEIR.

Response A-4.3:

The commenter points out in Section 2.5, Project-Related Approvals, Permits, and Clearances, of the DEIR, that all new wells require a Valley Water well permit and should be included in the list of permits needed for Project-related approvals. Additionally, the commenter recommends accurately listing Valley Water as "Santa Clara Valley Water District" on page 40.

In response to the commenter, Section 2.5, Project-Related Approvals, Permits, and Clearances, on pages 39 and 40, of the DEIR, has been revised to include the Valley Water Well permit and to correct the erroneous reference from "Santa Clara Valley Water Agency" to Valley Water's

official agency name, "Santa Clara Valley Water District" (see Section 3.0, Text Revisions in this FEIR).

Response A-4.4:

The commenter notes an inconsistency in Figure 3-11, labeled as "Floodplain Map." The commenter suggests revising it to accurately reflect a riparian corridor exhibit.

In response to the commenter, Figure 3-11 in Section 3.4.2, Impacts and Mitigations, of the DEIR has been revised to be labeled as "Coyote Creek Riparian Corridor (see Section 3.0, Text Revisions in this FEIR)

Response A-4.5:

The commenter observes in Section 3.9.1.2, Existing Conditions, of the DEIR, that there is ambiguity in the statement about the number of existing wells on the Project site. The commenter suggests using the Valley Water's Well Information App to locate wells, which indicates five wells on the site: two active water supply wells and three standby water supply wells. However, the commenter suggests there could be additional unknown abandoned wells on the site. The commenter advises coordinating planned well abandonment activities with Valley Water's Well Permitting and Inspections Hotline and emphasizes the importance of properly destroying any other abandoned wells identified during the Project in coordination with Valley Water.

In response to the commenter, Appendix K, the Phase I, Parcel I ESA, prepared by ENGEO, dated March 8, 2021, of the DEIR, specifies in Section 5, Findings and Conclusions, that there were five water supply wells that were identified on the Project site during agency file review. Section 3.9.2.2, Project Impacts, page 169 of the DEIR, Section 3.19.1.2, Existing Conditions, page 256, of the DEIR, and Section 3.19.2.2, Project Impacts, page 260 of the DEIR, have been revised to indicate that there are five water supply wells that were identified during the agency review of the Project site. Additionally, the Project applicant is required to comply with Valley Water regulations for properly abandoning wells in accordance with Ordinance 90-1. District Ordinance 90-1 requires permitting for any person digging, boring, drilling, deepening, refurbishing, or destroying a water well, cathodic protection well, observation well, monitoring well, exploratory boring (45 feet or deeper), or other deep excavation that intersects the groundwater aquifers of Santa Clara County. Anyone who plans such a project must first obtain a permit from the district's Wells and Water Production Unit. The project applicant will coordinate with Valley Water ahead of construction, including a field preconstruction meeting, to coordinate on any adjacency procedures with neighboring Valley Water facilities.

Response A-4.6:

The commenter notes an inconsistency in Section 3.9.2.2, Project Impacts, of the DEIR, regarding the decommissioning of existing wells, where the first sentence indicates there are "six on-site supply wells at the Project site." The commenter refers to their previous comment,

mentioning that Valley Water's Well Information App indicates only five wells on the Project site. However, the commenter acknowledges the possibility of additional wells not accurately reflected in the app. The commenter advises coordinating planned well abandonment activities with Valley Water. Additionally, the commenter refers to Valley Water's previous comment emphasizing the need to protect well 06S01W2 4H015, located on Valley Water property but adjacent to the Project site, during all Project activities.

In response to the commenter, see Response A-4.1 and A-4.5.

Response A-4.7:

The commenter suggests including a brief section on California's Sustainable Groundwater Management Act ("SGMA"), highlighting Valley Water's role as the Groundwater Sustainability Agency ("GSA") for the Santa Clara Subbasin where the Project is situated, in Section 3.10.1.1, Regulatory Framework, of the DEIR. The commenter recommends providing details about Valley Water's role as a GSA.

In response to the commenter, Section 3.10.1.1, Regulatory Framework, page 173, of the DEIR, has been revised to include a discussion about the SGMA and Valley Water's role as the GSA for the Santa Clara Subbasin (see Section 3.0, Text Revisions in this FEIR).

Response A-4.8:

The commenter recommends a revision to Section 3.10.1.1, Regulatory Framework, of the DEIR regarding the Municipal Regional Stormwater Permit, to add a reference to the latest San Francisco Bay Regional Water Quality Control Board National Pollutant Discharge Elimination System ("NPDES") permit (Permit Order No. R2-2022-0018, NPDES Permit No. CAS612008), which became effective on July 1, 2022. The commenter notes that this permit requires post-development controls for 5,000 square feet, not the 10,000 square feet mentioned in the DEIR.

In response to the commenter, Section 3.10.1.1, Regulatory Framework, page 174, of the DEIR has been revised to correctly reference the new Permit Order No. R2-2022-0018, NPDES Permit No. CAS612008 and correct the last sentence of the first paragraph to 5,000 square feet (see Section 3.0, Text Revisions in this FEIR). This revision does not change any of the analysis or impact conclusions made in the DEIR.

Response A-4.9:

The commenter notes an inaccuracy in the DEIR. Specifically, the commenter refers to an inaccuracy in Section 3.10.1.1, Regulatory Framework, of the DEIR, regarding the requirements of the Municipal Regional Stormwater Permit. The commenter states that the DEIR incorrectly describes that the Project would not permanently add one or more acres of impervious surface or cause an increase in total amount of impervious surface compared to pre- Project conditions. The commenter states that this is inaccurate because the majority of the Project site is situated in agricultural land, which is comprised of predominantly pervious surfaces, not impervious surfaces.

In response to the commenter, Section 3.10.1.1, Regulatory Framework, page 173, of the DEIR, has been revised to state that the Project would create more than one acre of impervious surfaces compared to pre- Project conditions (see Section 3.0, Text Revisions in this FEIR). This revision does not change any of the analysis or impact conclusions made in the DEIR.

Response A-4.10:

The commenter requests clarification on information presented in Section 3.10.1.2, Existing Conditions, of the DEIR, specifically in the Flood Zone section, regarding the reference to the 90 to 350 feet range along the northern boundary of Coyote Creek. The commenter seeks clarity on what this range pertains to.

In response to the commenter, the 90 to 350 feet range identified by the commenter is referring to the approximate distance between the northern boundary of the Project site and the riparian canopy and/or low flow channel of Coyote Creek. Section 3.10.1.2, Existing Conditions, page 176, of the DEIR, has been revised to clarify that the 90 to 350-foot range is in reference to the northern boundary of the Project site and not the northern boundary of the riparian canopy and/or low flow channel of Coyote Creek (see Section 3.0, Text Revisions in this FEIR).

Response A-4.11:

The commenter states that the text in Section 3.10.1.2, Existing Conditions, Groundwater, 1st paragraph, of the DEIR, regarding the Guadalupe River Watershed, seems more suitable for the subsection on Surface Water. The commenter recommends adding “more relevant” groundwater information, such as the Project site's location within the confined zone of the Santa Clara Subbasin and its positioning in an area of relatively shallow groundwater above the confining unit.

In response to the commenter, the reorganization of the text will not affect the conclusions of Section 3.10.2.2, Project Impacts, of the DEIR, and the commenter does not identify any omitted information that will affect the conclusions in Section 3.10.2.2. The information specifically identified by the commenter, including groundwater depth and the Project site's location within the confined zone of the Santa Clara Subbasin, are discussed on page 177, paragraph 1, and page 179, paragraph 1, respectively, and were factored into the analysis provided in the DEIR. Therefore, no further response is necessary.

Response A-4.12:

The commenter states that they agree with the statements made in Page 179, paragraph 1, and acknowledges that any rainfall infiltrating the pervious areas of the Project will recharge the shallow aquifer, which is not the primary groundwater supply. The commenter explains that water supply wells in the area are screened in the principal aquifer, located beneath the confining unit. Additionally, the commenter notes that recharge into the shallow aquifer will eventually flow as shallow groundwater laterally toward Coyote Creek.

In response to the commenter, the City appreciates the information provided by the comment, which does not raise any issues regarding the adequacy of the DEIR. Therefore, no further response is necessary.

Response A-4.13:

The commenter suggests a correction to Section 3.10.2.2, Project Impacts, of the DEIR. The commenter notes that the well would be situated within the Santa Clara Subbasin, not the Llagas Subbasin. Therefore, the commenter proposes revising the sentence to read, "A new well would be constructed as part of the Project, which would result in additional use of groundwater within the Santa Clara Subbasin."

In response to the commenter, Section 3.10.2.2, Project Impacts, page 179, of the DEIR has been updated to eliminate the mention of the "Llagas Subbasin" as the designated area for the construction of the new well that will be done as part of the Project (see Section 3.0, Text Revisions in this FEIR).

Response A-4.14:

The commenter suggests in Section 3.10.1.2, Existing Conditions, of the DEIR, that groundwater depths, ranging from 17 to 39 feet below the land surface, could be shallower based on Valley Water's groundwater monitoring and maps. The commenter refers to Valley Water's depth to first groundwater map, indicating that the Project is in an area where the depth to first water ranges from 10 to 20 feet.

In response to the commenter, Section 3.10.2.2, Project Impacts, page 177, of the DEIR, has been updated to state that, based on Valley Water's own data and Appendix I of the DEIR, the recorded groundwater depth at the project site since 1979 is 12 to 19 feet below ground surface (bgs). This text edit has been made for purely informational purposes and would not affect the analysis or impact conclusions made in the DEIR.⁵

Response A-4.15:

The commenter highlights that the proposed Project's well is expected to pump approximately 1,452-acre feet per year, which is a 2 percent increase per year in the Santa Clara Plain. However, the commenter suggests that the Valley Water's recharge operations will likely offset this increase, ensuring sustainable groundwater management in the subbasin.

In response to the commenter, the City appreciates the information provided by the comment. This is not a comment on the adequacy or content of the environmental analysis in the DEIR but is part of the administrative record and will be forwarded to the decision-makers. No further response is necessary.

⁵ Valley Water. "Historical Groundwater Elevation Data". Accessed June 13, 2024.
<https://gis.valleywater.org/GroundwaterElevations/map.php>

Response A-4.16:

The commenter observes that in Section 3.16, Recreation, of the DEIR, there is no mention of the proposed Coyote Creek trail connection.

In response to the commenter, Section 3.16.2.2, Project Impacts, page 226, of the DEIR, has been revised to address the proposed Coyote Creek trail connection (see Section 3.0, Text Revisions in this FEIR). Additionally, see Topical Response 3 – Project Connection to Coyote Creek.

Response A-4.17:

The commenter notes in page 237, Pedestrian and Bicycle Facilities, third and fifth paragraph of the DEIR, the Project proposes a new trail connection near the Montague Expressway trailhead. The commenter highlights Valley Water's prior collaboration with the City to determine the locations of midblock trail access along Coyote Creek, aiming to minimize connections and optimally position access points, as outlined in the North San José Access and Ramp Study. Commenter notes that the DEIR identifies only one midblock access point at Iris Chang Park and the proposed trail connection diverges from this City document, stating that the developer has not initiated discussions regarding this connection with Valley Water.

In response to the commenter, Section 3.17.2.3, Project Impacts, page 237, of the DEIR, has been revised to include the various Coyote Creek Trail connections consistent with Valley Water Projects (see Section 3.0, Text Revisions in this FEIR). Additionally, please see Topical Response 3 – Project Connection to Coyote Creek.

Response A-4.18:

The commenter highlights the importance of considering water supply projections and the necessity for substantial increases in water conservation measures. The commenter recommends that the Project meet its fair share of water conservation assumptions by implementing various measures, including using recycled water, incorporating on-site reuse for storm and graywater, and requiring water conservation measures beyond State standards. To mitigate adverse impacts on water supply, the commenter suggests several actions, such as landscaping regulations, using weather- or soil-based irrigation controllers, using dedicated landscape meters, implementing dual plumbing for alternative water sources, maximizing alternative non-potable water use, and installing separate submeters for efficient water use in residential and commercial buildings.

In response to the commenter, Appendix Q, Water Supply Assessment (“WSA”), prepared by Luhdorff & Scalmanini Consulting Engineers, dated August 2023, of the DEIR, was prepared to assess whether the total projected water supplies available for the Project during normal, single dry, and multiple dry water years during a 20-year projection period will meet the projected water demand associated with the proposed Project. The Project will include a connection to an existing recycled water line either on the northeast side of the Project site or within Epic Way

for landscape irrigation, including irrigation associated with the public park. The City will take the water conservation recommendations stated by the commenter into consideration. However, consistent with the conclusions made in the DEIR, adequate water supply is available to serve the Project in compliance with CEQA Guidelines Section 15155 and impacts would be less than significant and no mitigation is necessary.

Response A-4.19:

The commenter points out that, while the DEIR acknowledges a recycled water line adjacent to the site, it fails to discuss the proposed tie-in to the stub at or adjacent to the levee. Acknowledging discussions with the developer, Valley Water understands that the Project includes a new tie-in. The commenter clarifies that obtaining a Valley Water encroachment permit will be necessary if the work occurs on Valley Water property or requires access to it. Additionally, the commenter notes that issuing such a permit is a discretionary act, requiring Valley Water to be considered a responsible agency under CEQA.

In response to the commenter, Section 2.3.5.2, Other Utilities, of the DEIR, describes the connection to the recycled water line within the Coyote Creek levee. Additionally, Section 3.10.2.2, Project Impacts, of the DEIR, states that a minimum 15-foot setback from the levee is proposed for all development associated with the Project, consistent with Valley Water requirements. Section 2.5, Project-Related Approvals, Permits, and Clearances, of the DEIR, states that Valley Water is a responsible agency for issuing an encroachment permit for work within the levee area and within Valley Water property.

Response A-4.20:

The commenter specifies a correction needed on page 6, Section 3.3, Local Groundwater, Appendix Q, of the DEIR. The commenter highlights the second paragraph, urging a revision to state, "The Alternative Plan was approved by DWR in 2019," as the original sentence inaccurately cited approval in 2017. Additionally, the commenter has provided a link to the website for further details on Valley Water's role as a GSA and the Alternative Plan.

In response to the commenter, it has been noted that Section 3.3, Local Groundwater, of Appendix Q, of the DEIR incorrectly states that the California Department of Water Resources ("DWR") approved Valley Water's 2016 Alternative Groundwater Sustainability Plan in 2017 when the Alternative Plan was approved by DWR in 2019. The City appreciates the corrected information provided by the commenter; however, it does not change any of the conclusions made in the EIR. No further response is necessary.

Response A-4.21:

The commenter, addressing Appendix Q, highlights a suggestion for page 6, Section 3.3, Local Groundwater, of the DEIR, specifically the third paragraph. The commenter proposes expanding the sentence to acknowledge Valley Water's additional programs, such as a managed recharge

program to maintain groundwater storage, along with various initiatives aimed at safeguarding groundwater quality, beyond just in-lieu recharge programs.

In response to the commenter, Section 3.10.2.2, Project Impacts, pages 179 and 184, of the DEIR, Section 4.1.19.1, Water Supply, page 275, of the DEIR have been revised to acknowledge additional Valley Water groundwater recharge programs (see Section 3.0, Text Revisions in this FEIR). Text edits do not provide new information that would require additional analysis or change any of the conclusions made in the DEIR.

March 11, 2024

City of San José Planning, Building, and Code Enforcement
200 E. Santa Clara St., 3rd Floor
San José, CA 95113

Attn: Bethelhem Telahun
By Email: bethelhem.telahun@sanjoseca.gov

Dear Bethelhem,

VTA appreciates the opportunity to comment on the Draft EIR for the Seely Avenue Mixed-Use Project at 0 Seely Avenue. VTA has reviewed the document and has the following comments:

Pedestrian Network

VTA disagrees with the statement on Page 238 of the DEIR that states, "The existing and planned networks of pedestrian and bicycle facilities exhibit good connectivity and would provide residents, visitors, and retail employees of the project with safe routes to transit stops and other points of interest in the project vicinity." VTA generally sees the VMT mitigation measures as reasonable, but several parts of the DEIR are conflicting and do not seem to go far enough to positively impact pedestrian connectivity. For example, the TIA and DEIR are inconsistent on the construction of a new crosswalk at the intersection of Seely Avenue and Montague Expressway. The new crosswalk is not shown on the DEIR Site Plan and we have no information about whether crosswalks would be provided across Montague Expressway. Providing a safe and comfortable crossing of Montague Expressway at Seely Avenue will be critical to helping the project generate transit ridership and VMT reduction. Page 239 of the DEIR states that this project would generate 45 new transit trips per peak hour (10 percent transit mode share), which would be nearly impossible without improving the pedestrian crossings across and along Montague Expressway. Right now, if a resident of this new development were starting at the project site and wanted to take VTA bus Route 20, they would need to cross Montague Expressway on one leg of their trip. Currently, the only opportunities to cross Montague Expressway are at Trimble Road, a very unfriendly intersection where someone would have to cross between 10 and 12 lanes of traffic depending on the leg, at McCarthy Boulevard (also unfriendly), or the Coyote Creek Trail under Montague Expressway, which has major sidewalk gaps on the south side. Because of these reasons, the developer should contribute to pedestrian crossing improvements at Montague Expressway and Seely Avenue, which would include coordinating with the County.

A-5.1

VTA has previously commented that the project should provide a sidewalk from the end of the cul-de-sac at the south end of the proposed Comice Way to Montague Expressway, but it is unclear if that pedestrian connection is provided in the site plan.

A-5.2

Bicycle Network

VTA appreciates the TIA's recommendation for this project to contribute toward separated bikeway

A-5.3

facilities on Montague Expressway to be compliant with the city's Better Bike Plan 2025. However, given this project's adjacency to the Coyote Creek Trail, VTA is dismayed to not see any connections between the proposed development and this major commute corridor. In 2021, the VTA Board of Directors adopted the Bicycle Superhighway Implementation Plan, recognizing the Coyote Creek Trail as a possible bicycle superhighway. In previous comments on this development, VTA said the project should provide excellent connections to the trail as well as contribute to paving portions of the trail. The environmental documents provided indicate no such connections or contributions. We strongly encourage the city to rectify this to make the site more enjoyable and enticing for future residents and visitors.

A-5.3
Cont.

Vehicle Miles Traveled Mitigation

VTA recognizes that the DEIR identifies that the project would generate residential VMT per capita above the City's threshold, requiring mitigation (Impact TR-1). As stated previously, the set of mitigation measures seems generally reasonable, and we specifically support the proposal for unbundling parking. We do want to note that per the City's VMT Tool which is based on industry research, "Surrounding streets must have parking restrictions in place, such as metered parking, time limits restricting overnight parking, and residential parking permits (RPP) for which Project residents are not eligible." However, right now, it looks like parking on Seely Avenue is completely unrestricted.

A-5.4

The section on TDM monitoring on Page 25 of the LTA is more detailed and stronger than in the DEIR on Page 243. VTA recommends the monitoring to be done by a third-party rather than just self-reporting.

A-5.5

General Comment

VTA notes that Regulatory Framework sections should reference Plan Bay Area 2050, not Plan Bay Area 2040.

A-5.6

Thank you again for the opportunity to review this project. If you have any questions, please do not hesitate to contact me at lola.torney@vta.org.

Sincerely,



Lola Torney
Senior Transportation Planner
SJ1809

Response to Comment Letter A-5: Santa Clara Valley Transportation Authority (Dated March 11, 2024)

Response A-5.1:

The commenter disagrees with a statement in Section 3.17.2.3, Project Impacts, of the DEIR, regarding the Pedestrian Network, highlighting concerns about pedestrian connectivity. While the commenter states the VMT mitigation measures seem reasonable, they perceive inconsistencies between the TIA and DEIR on whether a crosswalk would be provided at the intersection of Seely Avenue and Montague Expressway. The commenter goes on to state that the projected number of transit trips would be impossible without the crosswalk improvement and stresses the importance of safe pedestrian crossings for transit ridership and VMT reduction, the commenter emphasizes the need for improvements, given the anticipated increase in transit trips. The commenter points out the challenges residents will face accessing VTA bus Route 20 due to limited crossing opportunities on Montague Expressway and urges the developer to contribute to pedestrian crossing enhancements at the intersection, stressing the importance of coordination with the County.

In response to the commenter, please see Topical Response 2 – Traffic Signal, which clarifies the Project does not include signalization and other improvements to the Seely Avenue/Montague Expressway intersection.

The Project includes pedestrian improvements, as called for in mitigation measure MM TR-1.1 described on page 241, of the DEIR. The Project includes the construction of new sidewalks along the frontages of Seely Avenue and Epic Way, as well as within the Project site, to help facilitate pedestrian movement within and around the Project site. Most segments of Montague Expressway have sidewalks on one side of the street. Additionally, the Project will include the construction of Class II bicycle lanes on the southbound side of Seely Avenue. The Project also includes a Transportation Demand Management (“TDM”) program to reduce parking and provide additional incentives to residents to use alternative forms of transportation.

The implementation of MM TR-1.1 as described above would lower the Project VMT to 10.11 per capita, which is below the City’s relevant residential VMT threshold, reducing the Project’s VMT impact. To ensure mitigation measures are effective at reducing VMT, technical experts insert project specific information into the City’s VMT tool to analyze the efficacy of the Project’s pedestrian improvements. The VMT tool reduces the VMT based on various calculations which is not controlled by the technical experts or the applicant. Based on the City’s VMT tool, if the Project were to provide a pedestrian crossing, it would not reduce VMT any more than currently anticipated. Additionally, residents can access VTA bus Route 20 at the intersection of McCarthy Boulevard and Montague Expressway, which is less than 1,500 feet north of the Seely Avenue/Montague Expressway intersection. This intersection provides pedestrians access to existing crosswalks. Bus stops for both east- and westbound Route 20 are less than 0.5 miles from the Project site.

For the reasons outlined above, signalization and other multimodal improvements to the Seely Avenue/Montague Expressway intersection are not necessary to further reduce VMT to a less than significant level or ensure transit ridership. Therefore, no further response is warranted.

Response A-5.2:

The commenter notes that VTA has previously stressed the need for a sidewalk extending from the cul-de-sac at the south end of Comice Way to Montague Expressway. However, the commenter states that it remains uncertain if this pedestrian connection is included in the site plan.

In response to the commenter, a pedestrian connection between Comice Way and Montague is not proposed as it is infeasible due to the grade differential and a ramp necessary to make the connection will conflict with the proposed well site. This is not a comment on the adequacy or content of the environmental analysis in the DEIR but is part of the administrative record and will be forwarded to the decision-makers. No further response is necessary.

Response A-5.3:

The commenter begins by stating their appreciation that the "TIA" recommends that the Project contribute toward separated bikeway facilities on Montague Expressway. However, the commenter expresses their dismay over the lack of connections between the proposed development and the Coyote Creek trail. The commenter highlights the 2021 Bicycle Superhighway Implementation Plan, which designates the Coyote Creek Trail as a potential bicycle superhighway. The commenter reiterates their previous suggestions that the Project provide connections to the trail and contribute to its paving, and states that the environmental documents do not indicate any such connections. The commenter strongly urges the City to address this gap to enhance the site's appeal for future residents and visitors.

In response to the comments regarding the Project's connections to the Coyote Creek trail, please see Topical Response 3 – Project Connection to Coyote Creek. The commenter's recommendations as regards the Project's construction of connections to Coyote Creek trail and contribution to paving portions of the trail are part of the administrative record and will be forwarded to decision-makers. However, as Comment A-5.3 does not raise any issues regarding the adequacy of the DEIR, no further response is necessary.

Response A-5.4:

The commenter acknowledges the DEIR's recognition of the Project's exceeding the City's threshold for residential VMT per capita, necessitating mitigation (Impact TR-1). While generally supporting the proposed mitigation measures and specifically endorsing the unbundling parking proposal, the commenter notes that the discussion of TDM monitoring in Appendix P is more detailed than what is provided in the DEIR. The commenter highlights that the City's VMT Tool requires surrounding streets to have parking restrictions, such as metered parking, time limits on overnight parking, and residential parking permits ineligible to Project residents. However,

the commenter observes that currently, parking on Seely Avenue appears to be completely unrestricted.

In response to the commenter, technical reports typically contain more detail than an EIR. The DEIR relied on the details provided in Appendix P to inform the development of its mitigation measures and conclusions.

Regarding the commenters point about the parking on Seely Avenue being completely unrestricted, Seely Avenue currently has street parking; however, all street parking along the Project frontage on Seely Avenue and along the west side of Seely Avenue will be removed once the future bicycle facility improvement (Class IV bikeway along the Project frontage and Class II bike lanes along the west side of Seely Avenue) are implemented by the Project. The removal of parking on Seely Avenue was considered when evaluating VMT using the City's VMT Tool, and achieved the same result as parking restrictions would.⁶

Response A-5.5:

The commenter notes a disparity between the TDM monitoring sections of the Local Transportation Analysis ("LTA") and DEIR, highlighting that the LTA provides more detailed and robust information on page 25 compared to the DEIR's on page 243. The commenter recommends third-party monitoring instead of relying solely on self-reporting.

In response to the commenter, technical reports typically contain more detail than an EIR. The DEIR relied on this LTA detail to support its conclusions; therefore, the DEIR had the necessary information with which to conduct its analysis. Moreover, the Project complies with the City's TDM policy measures in place at the time the Project application was deemed complete. The Project's required Annual Monitoring Report will be conducted in consultation with the traffic engineering firm responsible for the Project's Transportation Demand Management Plan and City Staff.

Response A-5.6:

The commenter suggests that Regulatory Framework sections should reference Plan Bay Area 2050 instead of Plan Bay Area 2040.

In response to the commenter, Sections 3.8.1.1, Regulatory Framework, page 150 of the DEIR Section 3.14.1.1, Regulatory Framework, page 215 of the DEIR and Section 3.17.1.1, Regulatory Framework, page 228 of the DEIR, have been revised to reflect the Plan Bay Area 2050 as opposed to the Plan Bay Area 2040 (see Section 3.0, Text Revisions in this FEIR).

⁶ Gary Black. Hexagon Transportation Consultants, Email correspondence. RE: 0 Seely Avenue - FEIR Clarifying Questions, June 4, 2024.

March 11, 2024

City of San Jose
Planning Department
Bethelhem Telahun
200 E. Santa Clara St.
San Jose, Ca 95113
bethelhem.telahun@sanjoseca.gov

RE: 0 Seely Avenue, Mixed Use Project: PDC21-035, PD22-002, PT22-003 & ER21-284

Dear Bethelhem Telahun,

Please accept this letter as public comment in response to the 0 Seely Avenue Mixed Use Project CEQA EIR. The proposed project is on the following parcels within the Santa Clara Unified School District attendance area: 097-15-033 , 097-15-034, and 097-66-004.

The project is a Planned Development Rezoning to an Industrial Park IP(PD) Planned Development Zoning District and a Planned Development Permit to allow the demolition of existing residential and agricultural buildings for the development of 1,472 residential units consisting of a mix of three-story townhomes and six- to seven-story apartment buildings, 18,965 square feet of general neighborhood retail space, and a 2.5-acre public park.

EIR Section 3.15.1.2 Existing Conditions notes that Vision 2040 anticipated an increase in residential development, however, the vast majority of it was not anticipated for North San Jose in the Santa Clara Unified School District attendance boundaries. The proposed project is in the Agnew Elementary School attendance boundary and this school is currently at capacity. There are available seats at nearby elementary schools within the District and students from this development may be overloaded to other schools. Because these parcels are currently agriculture, the development of this property into residential units was not considered when the Agnew Elementary attendance boundaries were created.

The current Statutory Development Fees do not cover 100% of the cost of providing school facilities for the number of students generated from the project.

The District requests the developers to reach out to the District to discuss the students who will be residing in this project and the impacts to the District. There is student capacity at Dolores Huerta Middle School and Kathleen MacDonald High School.

Sincerely,

Michal Healy

Michal Healy
Director, Facility Development and Planning

Response to Comment Letter A-6: Santa Clara Unified School District (Dated March 11, 2024)**Response A-6.1:**

The commenter highlights concern about school capacity and development impact. The commenter notes that the proposed Project falls within the Agnew Elementary School attendance boundary, which is already at capacity. The commenter observes that, despite available seats at nearby schools, students from this development may need to be transferred to other schools due to overloading. Additionally, the commenter mentions that the current development fees do not fully cover the cost of providing school facilities for projected students. The commenter requests that developers reach out and discuss the impacts on student enrollment and mention available capacity at nearby schools.

In response to the portion of the comment regarding what the Envision San José 2040 General Plan assumed, it is noted that Project site was included as a TERO area in both the Envision San José 2040 General Plan and the 2022 North San José Area Development Policy update, meaning the Project's units were included within the residential capacity under both plans and associated analysis of the potential impact of buildout of these plans on school facilities. Although the commenter asserts that the current Statutory Development Fees do not cover the entire cost of providing services to students generated by new development, as discussed on page 218 of the DEIR, Section 3.15.1.1, California Government Code Section 65996 stipulates that payment of school impact fees provides full and complete school facilities mitigation under CEQA. Further, the commenter themselves note that there are other elementary schools within their district that can accommodate the increase in students generated by the Project. Therefore, as disclosed on page 222 of the DEIR, Section 3.15.2.2 Project Impacts, the Project would have a less-than-significant impact on school facilities, and no revision to the DEIR is required in response to this comment.

As requested by the commenter, a meeting was held on April 11, 2024, with the Santa Clara Unified School District ("SCUSD") regarding school capacities and development impacts that could result with implementation of the Project.⁷

For the reasons outlined above, no further response is required.

⁷ Michal Healy, SCUSD Director of Facility Development and Planning. Email correspondence. Re: 0 Seely Avenue project, North SJ. April 11, 2024.

California Department of Transportation

DISTRICT 4
OFFICE OF REGIONAL AND COMMUNITY PLANNING
P.O. BOX 23660, MS-10D | OAKLAND, CA 94623-0660
www.dot.ca.gov



Comment Letter A-7

May 2, 2024

SCH #: 2022020565
GTS #: 04-SCL-2021-01271
GTS ID: 24693
Co/Rt/Pm: SCL/880/6.485

Bethelhem Telahun, Planner
City of San Jose
200 East Santa Clara St., 3rd Floor
San Jose, CA 95113

Re: Seely Avenue Mixed-Use Project – Draft Environmental Impact Report (DEIR)

Dear Bethelhem Telahun:

Thank you for including the California Department of Transportation (Caltrans) in the environmental review process for the Seely Avenue Mixed-Use Project. The Local Development Review (LDR) Program reviews land use projects and plans to ensure consistency with our mission and state planning priorities. The following comments are based on our review of the March 2024 DEIR.

Please note this correspondence does not indicate an official position by Caltrans on this project and is for informational purpose only.

Project Understanding

This mixed-use development project would construct up to 1,473 residential units consisting of apartments and townhomes including 172 affordable units. The site would additionally include 55,000 of retail space and 2.5-acres of public park space. This 22-acre project site is close to State Route (SR)-880, located in the Priority Development Areas and Transit-Rich Areas identified in Plan Bay Area 2050.

Travel Demand Analysis

With the enactment of Senate Bill (SB) 743, Caltrans is focused on maximizing efficient development patterns, innovative travel demand reduction strategies, and multimodal improvements. For more information on how Caltrans assesses Vehicle Miles Traveled (VMT) analysis for land use projects, please review Caltrans' Transportation Impact Study Guide ([link](#)).

A-7.2 Cont. | The project VMT analysis and significance determination are undertaken in a manner consistent with City's VMT Evaluation Tool. Per the DEIR, this project is found to have a less than significant VMT impact with mitigation, therefore working towards meeting the State's VMT reduction goals.

Construction-Related Impacts

A-7.3 | Project work that requires movement of oversized or excessive load vehicles on State roadways requires a transportation permit that is issued by Caltrans. To apply, please visit Caltrans Transportation Permits ([link](#)). Prior to construction, coordination may be required with Caltrans to develop a Transportation Management Plan (TMP) to reduce construction traffic impacts to the State Transportation Network (STN).

Lead Agency

A-7.4 | As the Lead Agency, the City is responsible for all project mitigation, including any needed improvements to the STN. The project's fair share contribution, financing, scheduling, implementation responsibilities and lead agency monitoring should be fully discussed for all proposed mitigation measures.

Equitable Access

A-7.5 | If any Caltrans facilities are impacted by the project, those facilities must meet American Disabilities Act (ADA) Standards after project completion. As well, the project must maintain bicycle and pedestrian access during construction. These access considerations support Caltrans' equity mission to provide a safe, sustainable, and equitable transportation network for all users.

Thank you again for including Caltrans in the environmental review process. Should you have any questions regarding this letter, please contact Marley Mathews, Transportation Planner, via LDR-D4@dot.ca.gov. For future early coordination opportunities or project referrals, please contact LDR-D4@dot.ca.gov.

Sincerely,



YUNSHENG LUO
Branch Chief, Local Development Review
Office of Regional and Community Planning

c: State Clearinghouse

Response to Comment Letter A-7: Caltrans, District 4 (Dated May 2, 2024)**Response A-7.1:**

The commenter describes a mixed-use development project that proposes constructing up to 1,473 residential units, including 172 affordable units, alongside 55,000 square feet of retail space and 2.5 acres of public park space. The commenter states that the 22-acre Project site is near State Route 880 and is in Priority Development Areas and Transit-Rich Areas identified in Plan Bay Area 2050.

In response to the commenter, the City appreciates the information provided by the comment, which does not raise any specific inadequacies of the DEIR. Therefore, no further response is necessary.

Response A-7.2:

The commenter states that Caltrans is focused on maximizing efficient development patterns, innovative travel demand reduction strategies and multi-modal improvements. The commenter then provides a link to the Caltrans' Transportation Impact Study Guide which provides additional information about how Caltrans assesses VMT analyses for land use projects. The commenter then concludes that the Project's VMT analysis and significance determination are consistent with the City's VMT evaluation tool and that the Project's less than significant VMT impact with mitigation determination is working towards meeting the States VMT reduction goals.

In response to the commenter, the City appreciates the information provided by the comment, which does not raise any specific inadequacies of the DEIR. Therefore, no further response is necessary.

Response A-7.3:

The commenter states that construction work associated with the Project which requires movement of oversized or excessive load vehicles on State roadways requires a transportation permit and provides a link to their website where additional information about relevant permits can be found and permit application can be initiated. The commenter concludes that coordination may be required prior to construction to develop a Transportation Management Plan (TMP) to reduce construction traffic impacts to the State Transportation Network ("STN").

In response to the commenter, the Project would comply with all applicable State and Federal requirements pertaining to the movement of oversized load vehicles on State roadways. The commenters point that coordination may be required to develop a TMP to reduce traffic impacts to the STN is noted. The commenter does not raise any specific inadequacies of the DEIR. Therefore, no further response is necessary.

Response A-7.4:

The commenter states that the City, as the lead agency, is responsible for all Project mitigation including any improvements to the STN. The commenter concludes that the Project's fair share contribution, financing, scheduling, implementation responsibilities and lead agency monitoring should be fully discussed for all proposed mitigation measures.

In response to the commenter, Appendix P of the DEIR did not identify any potential impacts to the STN and therefore, a fair share contribution towards improvements to the STN would not be required. Regarding the commenters statement that the Projects fair share contribution, financing, scheduling, implementation responsibilities and lead agency monitoring should be discussed for all the mitigation measures, CEQA Guidelines Section 15097 only specifies that the lead agency shall adopt a program for monitoring or reporting on the implementation of the mitigation measures included in the DEIR. CEQA does not require that this program include the discussion of topics related to financing of the mitigation measures or fair share contributions made as part of the Project. The discussion of the scheduling, implementation responsibilities, and lead agency monitoring for all proposed mitigation measures are included in Table 4-1, Mitigation Monitoring and Reporting Program of this FEIR document (see Chapter 4, Mitigation Monitoring, and Reporting Program of this FEIR). The commenter does not raise any specific inadequacies of the DEIR. Therefore, no further response is necessary.

Response A-7.5:

The commenter states that if any Caltrans facilities are impacted by the Project, those facilities must meet American Disabilities Act ("ADA") standards after Project completion. The commenter adds that bicycle and pedestrian access throughout the site must be maintained during construction and that these access considerations support Caltrans' mission to provide a safe, sustainable, and equitable transportation network.

In response to the commenter, it is noted that the Project does not include any work on or adjacent to Caltrans facilities, including I-880, which is over 2,000 feet east of the Project site, and therefore would not impact any Caltrans facilities or impede bicycle and pedestrian access to Caltrans facilities. This comment does not raise any issues regarding the adequacy of the DEIR, and no further response is required.

**The Amah Mutsun Tribal Band of San Juan Bautista
&
A.M.T.B. Inc.**

Letter of Response

To whom it may concern:

A-8.1 | It is our pride and privilege to be of service for any Native American Cultural Resource Monitoring, Consulting and/ or Sensitivity Training you may need or require. We take our Heritage and History seriously and are diligent about preserving as much of it as we can. Construction is a constant in the Bay Area and with that new discoveries are bound to happen. If you choose our services, we will gladly guide all personnel through proper procedures to safely protect and preserve: Culture, Heritage, and History.

A-8.2 | It is highly recommended, if not previously done, to search through Sacred Lands Files (SLF) and California Historical Resource Information Systems (CHRIS) as well as reaching out to the Native American Heritage Commission (NAHC) In order to determine whether you are working in a Cultural and/ or Historic sensitivity.

A-8.3 | If you have received any positive cultural or historic sensitivity within 1 mile of the project area here are A.M.T.B Inc's and Amah Mutsun Tribal Band of San Juan Bautista's recommendations:

- All Crews, Individuals and Personnel who will be moving any earth be Cultural Sensitivity Trained.
- A Qualified California Trained Archaeological Monitor is present during any earth movement.
- A Qualified Native American Monitor is present during any earth movement.

If further Consultation, Monitoring or Sensitivity Training is needed please feel free to contact A.M.T.B. Inc. or Myself Directly. A.M.T.B. Inc. 650 851 7747

Irenne Zwiierlein

Irenne Zwiierlein

**Amah Mutsun Tribal Band of San Juan Bautista
&
AMTB Inc.**

3030 Soda Bay Road Lakeport, CA 95453

Our rates for 2024 are

\$275.00 per hour.

4 hours minimum

Cancellations not 48 hours (about 2 days) prior will be charged as a 4-hour minimum. There is a round trip mileage charge if canceled after they have traveled to site.

Anything over 8 hours a day is charged as time and a half.

Weekends are charged at time and a half.

Holidays are charged at double the time.

For fiscal year (FY) 2024, standard per diem rate of \$412. (\$333. lodging, \$79 M&IE).

M&IE Breakdown FY 2023

M&IE Total¹	Continental Breakfast/ Breakfast²	Lunch²	Dinner²	Incidental Expenses	First & Last Day of Travel³
\$79.00	\$18.00	\$20.00	\$36.00	\$5.00	\$59.25

Beginning 2024, the standard mileage rates for the use of a car round trip (also vans, pickups or panel trucks) will be: \$.67 cents per mile driven for business use or what the current federal standard is at the time.

Our Payment terms are 5 days from date on invoice.

Our Monitors are Members of the Amah Mutsun Tribal Band of Mission San Juan Bautista.

If you have any questions, please feel free to contact the A.M.T.B. Inc. at the below contact information.

Sincerely,

Irenne Zwielerlein

Irenne Zwielerlein

3030 Soda Bay Rd, Lakeport
CA 95453
amtbin21@gmail.com
(650)851-7747

Response to Comment Letter A-8: The Amah Mutsun Tribal Band of San Juan Bautista and A.M.T.B. Inc (Dated March 19, 2024)**Response A-8.1:**

The commenter offers Native American Cultural Resource Monitoring, Consulting, and Sensitivity Training services, emphasizing their dedication to preserving Heritage and History. They note the frequent construction in the Bay Area and the likelihood of new discoveries, assuring that their services will guide personnel through proper procedures to protect cultural heritage.

In response to the commenter, Section 3.5.2.2, Project Impacts, of the DEIR, discusses the implementation of MM CR-2.3, Native American Monitoring, where a qualified Native American Monitor, registered with the Native American Heritage Commission (“NAHC”) for the City of San José and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3, in collaboration with a qualified Archeologist shall also be present during applicable earthmoving activities such as, but not limited to, trenching, initial or full grading, boring onsite, or major landscaping.

Response A-8.2:

The commenter highly recommends checking the Sacred Lands Files and California Historical Resource Information Systems (“CHRIS”) and contacting the NAHC to determine if the Project area has cultural or historical sensitivity.

In response to the commenter, Appendix E, Historical Assessment, of the DEIR, prepared by Evans & DeShazo, Inc., dated October 18, 2023, describes how the methods used to complete the assessment included extensive research and a historic architectural survey of the property. The research consisted of a review of information obtained in a record search from the Northwest Information Center of the CHRIS provided to Evans & DeShazo, Inc. by Basin Research, which is completing an archaeological study of the property.

Additionally, Appendix H, Cultural Resources Assessment Report, prepared by ESA, dated September 2023 of the DEIR, required a due diligence-level review and included a records search through the CHRIS- Northwest Information Center housed at Sonoma State University and a Sacred Lands Files search from the NAHC.

Response A-8.3:

The commenter recommends that if cultural or historic sensitivity is detected within 1 mile of the Project area, all personnel involved in earth movement should receive Cultural Sensitivity Training. Additionally, a qualified California-trained archaeological monitor and a qualified Native American monitor should be present during any earth movement.

In response to the commenter, Section 3.5.2.2, Project Impacts, of the DEIR, describes the impact to Native American and historic-era archaeological deposits during excavation and

construction activities and mitigation measures that would be implemented to reduce this potentially significant impact to a less-than-significant level. These mitigation measures include: MM CR-2.1 Retention of a Qualified Archaeologist, MM CR-2.2 Tribal Cultural Resources Awareness Training, MM CR-2.3 Native American Monitoring, and MM 2.4 Final Disposition of Cultural Materials.

Organization Comments

The following organizations provided comments during the comment period:

- Preservation Action Council San José
- River Oaks Neighborhood Association



March 4, 2024

Bethelhem Telahun
Environmental Project Manager
City of San José Department of Planning, Building and Code Enforcement
200 East Santa Clara Street, 3rd Floor Tower
San José CA 95113-1905
VIA EMAIL (Bethelhem.telahun@sanjoseca.gov)

RE: 0 SEELY AVENUE MIXED-USE PROJECT (PDC21-035/PD22-022/ER21-284)
Draft EIR COMMENTS

Dear Ms. Telahun,

The Preservation Action Council of San Jose (PAC* SJ) appreciates the opportunity to provide Draft EIR comments for the proposed 0 Seely Avenue Mixed-Use Project. The 22-acre agricultural site is currently located in the Industrial Park (IP) zoning district. The project is a Planned Development Rezoning to an Industrial Park IP(PD) Planned Development Zoning District and a Planned Development Permit to allow demolition of existing residential and agricultural buildings and removal of 584 trees for development of 1,472 residential units and 18,965 square feet of retail space with associated parking, and a 2.5-acre public park.

Cultural Resource Determinations

Based on the *Historical Resource Evaluation (Appendix E)*, prepared by qualified historical consultants Evans & De Shazo, PAC* SJ concurs with the City's determination that the project site, including seven contributing structures and the associated landscape including fruit trees, planted rows of vegetables, and dirt roads, is eligible for listing on the California Register as well as on the City's Historic Resources Inventory as a historic district, for its association with Japanese farming and with early twentieth century agriculture in the Santa Clara Valley; and for its association with Eiichi "Ed" Sakauye, a noted community leader and person of historical significance. PAC* SJ further concurs that the "Sakauye House" on the project site is individually eligible for listing on the California Register as well as on the City's Historic Resources Inventory as a Candidate City Landmark for its association with Spanish Colonial Revival architecture. The site should be listed on the City's HRI database, particularly if the project does not move forward as currently proposed.

PAC* SJ BOARD

President &
VP Advocacy
Mike Sodergren

VP Fundraising
Patt Curia

Secretary
Lynne Stephenson

Treasurer
John Frolli

Continuity Editor
Gayle Frank

Sylvia Carroll

**Clare Gordon
Bettencourt**

Carl Foisy

Cici Green

André Luthard

Gratia Rankin

PAC* SJ STAFF

Executive Director
Ben Leech

Office Associate
Jennifer Roman



PRESERVATION ACTION
COUNCIL OF SAN JOSE

42A South First Street
San Jose, CA 95113

Phone: 408-998-8105

www.preservation.org

B-1.1 Cont. | Because the project proposes the complete demolition of all historical buildings, structures, and landscaping on the project site, PAC* SJ is in agreement that the project would have a significant impact on historical resources under CEQA.

Historic Landmarks Commission

B-1.2 | As a procedural point, because of the significance of the proposed losses, we are disappointed that this Draft EIR was not placed on the Historic Landmarks Commission agenda so the Commission could not only gain expertise in environmental documents addressing historical resource impacts, but also provide valuable input to the decision makers regarding the proposed project alternatives and mitigation measures.

Section 3: Environmental Setting, Impacts, and Mitigation

We provide comments on the following subsections, as they relate to historical resources:

B-1.3 | In **3.1 Aesthetics**, the document states that “The 2040 General Plan includes several policies that are relevant to an evaluation of the visual quality of the project site. Policies and objectives applicable to the project are identified in Table 3-1.” However, because the project does not propose to modify or include development near historic resources, but proposes to simply demolish historic resources, *Policy CD-1.26 Apply the Historic Preservation Goals and Policies of this Plan to proposals that modify historic resources or include development near historic resources*, as listed, is not addressed, and this section should note that the project is not in compliance with the policy.

B-1.4 | In **3.2, Agricultural and Forestry Resources**, the document notes that the site does not contain any land proposed for removal that has been designated as Prime Farmland, Unique Farmland, or Farmland of Statewide Importance, and therefore the permanent removal of the Sakauye farm will not result in any impact under CEQA. It should be clarified that because the site has been mapped as Farmland of Local Importance, the project is not in compliance with Policy LU-12.3 for protecting San Jose’s remaining farmlands, including “Restrict and discourage subdivision of agricultural lands. Encourage contractual protection for agricultural lands, such as Williamson Act contracts, agricultural conservation easements, and transfers of development rights.” These are land management tools that have been used throughout the State for the conservation and reuse of remaining farmlands in conjunction with the preservation of historic resources, to retain the character of an area while allowing for infill housing. The decision makers should be made aware that the project has chosen not to take advantage of any of these tools.

B-1.5

In **3.6 Energy**, we believe the California Green Building Standards Code (CALGreen) mandatory measures for embodied carbon reduction should be noted. Because buildings are a significant source of greenhouse gas pollution, with about 40% of annual global CO₂ emissions via building operations (27%) and embodied carbon (13%); effective July 1, 2024, CALGreen, Part 11, Title 24, will limit embodied carbon emissions in the “construction, remodel, or adaptive reuse of commercial buildings larger than 100,000 square feet and school projects over 50,000 square feet.” These projects will need to comply through one of three pathways: Building Reuse of at least 45% of an existing structure; Performance measures; or Prescriptive measures.

Subsection 3.5 Cultural Resources

Envision San José 2040 Cultural Resource Policies

The Envision San Jose 2040 General Plan acknowledges the importance of historic resources in the Land Use and Transportation chapter: “The preservation of appropriate remnants of a city’s past provides multiple benefits important to the health and progress of the city. Historical resources: Are instructive, telling the story of a community’s past; Provide a sense of civic identity and unique character; Are typically an interesting and pleasing aesthetic in the urban environment; Can generate economic advantage for a property or neighborhood; Give a community a sense of permanency.”

B-1.6

As listed in Table 3-17, numerous General Plan policies have been adopted for the purpose of reducing or avoiding impacts related to cultural resources. The project would conflict with many of these, most specifically Policy LU:13-2: Preserve candidate or designated landmark buildings, structures and historic objects, with first priority given to preserving and rehabilitating them for their historic use, second to preserving and rehabilitating them for a new use, or third to rehabilitation and relocation on-site; and Policy LU:13-4: Require public and private development projects to conform to the adopted City Council Policy on the Preservation of Historic Landmarks.

We would point out that preservation incentives also exist to encourage reuse of historic places giving meaning and architectural interest to cities throughout the State, including the California Historical Building Code, Mills Act Historical Property Contracts, Federal and State Preservation Tax Credits. In the case of historical farm properties, preservation incentives have been used together with Williamson Act contracts, agricultural conservation easements, and transfers of development rights, by landowners alone or in partnership with land trusts.

Subsection 3.5.2: Cultural Resources Mitigation

We appreciate the mitigation measures required to lessen, while not mitigating to less than significant, the impacts of the proposed project should it proceed as presented. However, given the magnitude of the proposed impacts, we believe a more robust mitigation program is warranted and appropriate.

Public Event. We would propose the additional requirement that the developer hold a public event on the site during the noticing period, to allow for public appreciation and education, as well as for an opportunity to provide further information about the importance of the site and the availability of historic resources for relocation. The event, together with relocation opportunities, should be advertised on the site and online, including on the PAC* SJ website and those of other appropriate stakeholder organizations. We note again that the developer should be required to offer funds in the amount equal to the cost of demolition to anyone relocating a building. (see illustrative edits, attached)

B-1.7

Relocation. As we know, relocation of historic buildings, either on- or off-site to a compatible location providing adequate context, can retain the connection to their historical development and avoid the significant impact of demolition, as illustrated in the Alternatives section of the document. Therefore, relocation as mitigation should be differentiated from relocation required to avoid the significant impact of demolition. If relocation is to lessen, while not mitigating to less than significant, the impacts, then strict conformance to the Secretary of the Interiors Standards would not be required, and more flexibility should be allowed in order to encourage relocation. (see illustrative edits, attached)

Cumulative Impact Mitigation. DEIR Section 4.1.5 (p. 217) clearly and correctly identifies cumulative negative impacts associated with the project, namely the loss of historic resources associated with the late nineteenth and early twentieth-century agricultural history of the City. Conditions of approval should therefore also include funding or support for a Citywide survey of comparable surviving agricultural resources, i.e. extant historic orchard parcels, to be proactively added to the City's Historic Resource Inventory.

Alternatives

PAC* SJ appreciates the inclusion of Alternative 3, that incorporates all of the contributors to the eligible historic district within the 2.5-acres of the park/flex space, as we requested in our scoping comment letter.

B-1.8



PAC*SJ
PRESERVATION ACTION
COUNCIL OF SAN JOSE

PRESERVATION ACTION
 COUNCIL OF SAN JOSE

42A South First Street
 San Jose, CA 95113

Phone: 408-998-8105

www.preservation.org

B-1.9

However, given its clear historical and architectural significance, PAC*SJ believes strongly that the Sakauye House merits preservation, and we are pleased to see **Alternative 5: On-Site Relocation of Individual Historical Resource (Sakauye House Only)**. This alternative would move the historical house a short distance and incorporate it into the proposed lower scale townhome development. While the document states that, as illustrated, Alternative 5 would provide four fewer dwelling units than the project, this alternative would still have a density of approximately 81 du/acre, and would therefore meet the project objectives, including Objective 2, by meeting the minimum density requirements for the North San José TERO. We continue to believe that the relocated and repurposed building could serve as residential units, or office or community space, and/or that the lost units could be placed in another part of the project, resulting in no net loss of units.

B-1.10

Conclusion
 In conclusion, PAC*SJ strongly supports the adoption of Preservation Alternative 5, which clearly demonstrates the feasibility of incorporating the Candidate City Landmark Sakauye House into the proposed project while still meeting all stated project goals. While Alternative 5 specifically addresses the on-site relocation of the Sakauye House into the area of the project controlled by the developer, we also stress the applicability of this finding for another alternative not addressed directly in this DEIR—the relocation of the Sakauye House to the project area designated as a public park. This 2.5-acre park area has 109,546 sq. ft. of available space that would make placement of the Sakauye House less than 10% of the total park dedication. PAC*SJ looks forward to continued discussion and collaboration with all project stakeholders to ensure that one of these feasible preservation alternatives is adopted.

Sincerely,

Ben Leech
 Executive Director
 Preservation Action Council of San Jose

Dana Peak, Historic Preservation Officer, San José Historic Landmarks Commission
 Scott Youdall, The Hanover Company
 Councilmember David Cohen, District 4

MM CR-1.4: Relocation and Salvage. Prior to issuance of any demolition permits or any other approval that would allow ground disturbance on the project site, the Permittee shall separately advertise the availability of all individually significant and contributing buildings, structures and site features to the eligible historic district for relocation and then salvage by a third party.

[Public Event. The Permittee shall advertise and host a public Event on the site to allow for the public to See and provide information on the history Of the site as outlined in the Historic Resource Evaluation. This event shall include advertising structures and features that Will be available for relocation and then salvage. This event Shall be advertised online, including the Preservation Action Council of San Jose \(PAC* SJ\) and the Japanese American Museum of San Jose websites, and notice visible from the public right-of-way on the project site.](#)

Relocation. The Permittee shall advertise the availability of the buildings for relocation for a period of no less than 60 days, [offering the cost of demolition towards the relocation.](#) The

advertisements must include a newspaper of general circulation, a website, [including the Preservation Action Council of San Jose \(PAC* SJ\) and the Japanese American Museum of San Jose websites,](#) and notice visible from the public right-of-way on the project site. The Permittee must submit evidence (i.e., receipts, date and time stamped photographs, etc.) to the Director of Planning, Building and Code Enforcement or the Director's designee that this condition has been met. If a third party agrees to relocate any of the buildings, the following measures must be followed:

1. The City's Director of Planning, Building and Code Enforcement or the Director's designee, based on consultation with the City's Historic Preservation Officer, must determine that the receiver site is suitable for the buildings.
2. Prior to relocation, the third party shall hire a qualified historic preservation architect and a qualified structural engineer to undertake an

Deleted: .

existing conditions study. The purpose of the study shall be to establish the baseline condition of the building/s prior to relocation. The documentation shall outline how to protect and preserve the buildings and their character-defining features from damage during the relocation process. The documentation shall be reviewed and approved by the City's Historic Preservation Officer prior to relocation.

3. To protect the building during relocation, the third party shall engage a building mover who has experience moving historic structures. A qualified structural engineer shall also be engaged to determine if the building/s needs to be reinforced/stabilized before the move.

4. Once relocated, the building/s shall be repaired and restored, as needed, by the third party in conformance with the Secretary of the Interior's Standards for the Treatment of Historic Properties [to the extent feasible](#). In particular, the character-defining features ~~should~~ be restored in a manner that preserves their historic integrity for long-term preservation. Upon completion of the work, a qualified historic resources consultant or equivalent professional meeting the qualifications in the Secretary of the Interior's Professional Qualification Standards shall prepare a written report outlining [to what extent](#) the work was conducted in conformance with the Secretary of the Interior's Standards for the Treatment of Historic Properties and the Permittee shall submit the report to the City's Historic Preservation Officer.

Salvage. If at the end of the 60-day period minimum relocation advertisement period no third party relocates the significant buildings, the historic building materials shall be made available for salvage and reuse. The Permittee shall advertise the availability of the buildings for salvage for a period of no less than 30 days. The advertisements must include a newspaper of general circulation, a website, [including the Preservation Action Council of San Jose \(PAC* SJ\) and](#)

Deleted: all

Deleted: how

[the Japanese American Museum of San Jose websites](#), and notice visible from the public right-of-way on the project site. The Permittee shall submit evidence (i.e., receipts, date and time stamped photographs, etc.) to the City's Director of Planning, Building and Code Enforcement or the Director's designee that this condition has been met.

MM CR-1.5: Commemoration and Public Interpretation Concepts. Prior to issuance of any building permits, the Permittee shall retain a qualified historic resources consultant or equivalent professional meeting the qualifications in the Secretary of the Interior's Professional Qualification Standards to initiate the design development of a commemorative and interpretive program, exhibit, and/or display including, but not limited to [salvaged features](#), interpretive text and historic photographs, art or sculpture, video, interactive media, and/or documentation of oral histories, that is integral to the project. The preliminary design concepts for commemoration and public interpretation shall be submitted to the City Historic Preservation Officer for review and approval.

MM CR-1.6: Commemoration and Public Interpretation Implementation. The specific design and details of the commemorative and interpretive program shall be fully developed in close coordination with the City [and the Japanese American Museum of San Jose](#) as the project is implemented. The final design shall be reviewed and approved by the City's Historic Preservation Officer prior to production. The commemoration and public interpretation program shall be completed and made accessible to the public. If the approved program includes a physical installation, it shall be placed in a suitable publicly accessible location on the project site as determined by the City and subject to the following timing:

- 1) For commemoration and interpretation elements constructed

within, on, or adjacent to an apartment building, prior to issuance of a certificate of occupancy for that building.

2) For commemoration and interpretation elements constructed by the Permittee within the City park, prior to City acceptance of the public park.

Even with implementation of the identified mitigation measures, demolition, relocation or salvage of the significant buildings and structures on-site would remain a significant unavoidable impact because they would be permanently lost or moved. [Relocation of the structures, fully meeting the Secretary of the Interiors Standards either on- or off-site to a compatible location providing adequate context, could retain the connection to their historical development and mitigate significant impacts, as illustrated in the Alternatives Section of this document. However, off-site relocation of the structures, not fully meeting the Secretary of the Interiors Standards to a non-compatible location,](#) while preserving them in a different location, would result in a loss of connection to their historical development at the current location.

Specifically, the property would no longer represent its association with Japanese farming in the Santa Clara Valley during a period of significance from 1907 and 1941 and association with early twentieth century agriculture in the Santa Clara Valley during a period of significance from 1900 and 1940). Although the mitigation measures listed above would reduce the magnitude of the impact, the residual effect of removal of historic resources from their historic context on the project site would represent a significant and unavoidable impact. **Significant and Unavoidable Impact.**

(p 129)

Deleted: R

Deleted: ¶

Response to Comment Letter B-1: Preservation Action Council San José (Dated March 4, 2024)**Response B-1.1:**

The commenter concurs with the conclusions of the Historical Resource Evaluation (Appendix E to the DEIR), and states that the site should be listed on the City's Historic Resource Inventory ("HRI") database. The commenter agrees that the Project's proposal to completely demolish all historical buildings, structures, and landscaping on the Project site will have a significant impact on historical resources under CEQA.

The City appreciates the information provided by the commenter. The Project was considered for the HRI by the Historic Landmarks Commission at a meeting on April 3, 2024, which ultimately decided not to place the site on the HRI. Please see Response B-1.2 for additional context regarding the site's review by the Historic Landmarks Commission. No further response is necessary.

Response B-1.2:

The commenter expresses disappointment that the DEIR was not placed on the City's Historic Landmark Commission's ("HLC") agenda. The commenter believes their expertise in environmental documents addressing historical resource impacts could have been beneficial. Additionally, the commenters feel the commissioners could have provided valuable input to decision makers regarding proposed Project alternatives and mitigation measures.

For clarification, the Project was reviewed by the HLC on June 7, 2023. The HLC provided comments and recommendations on the information to be included in the analysis of the Project under the City Council Policy on the Preservation of Historic Landmarks. While no formal action was taken by the HLC, multiple commissioners and public participants voiced their comments and recommendations for the Project to consider. These recommendations included things such as identifying additional ways to incorporate the sites history into the development, incorporating the orchards into the proposed public park, and the inclusion of a mural that could incorporate the property's history into the Project. In response to the commenter HLC reviewed the Project a second time on April 3, 2024. At that meeting the HLC provided comments on the Cultural Resources (Section 3.5, Cultural Resources, pages 118 to 132) and Alternatives Sections (Section 8, Alternatives, pages 283 to 301) of the DEIR under the City Council Policy on the Preservation of Historic Landmarks. At the April 3, 2024 HLC meeting, the Commissioners and the public provided comments on the Project alternatives and mitigation measures and also asked questions and provided suggestions and recommendations for design improvements as they pertain to the preservation of historical resources under CEQA on the site. The recommendations made by the HLC included discussions about the feasibility of preserving the orchard or finding a way to incorporate it into the proposed public park, preserving or relocating some of the existing historic structures so that they could be incorporated into the Project's design, and the further exploration of Alternatives 4 and 5 which seek to preserve or relocate

the historic structures rather than demolish them. The agendas for both of these meetings can be accessed online at

<https://sanjose.legistar.com/DepartmentDetail.aspx?ID=33270&GUID=652B9C94-9FF8-4DC9-9165-8D89997C5EE5>.

Response B-1.3:

The commenter notes a discrepancy in Section 3.1, Aesthetics, of the DEIR regarding Policy CD-1.26 from the 2040 General Plan. The commenter highlights that, while the DEIR mentions relevant policies for evaluating the visual quality of the Project site, Policy CD-1.26, which pertains to proposals modifying or including development near historic resources, is not addressed. The commenter suggests that the section should acknowledge the Project's non-compliance with this policy, as it proposes to demolish historic resources without modification or inclusion of development near them.

In response to the commenter, please see Topical Response 4 – Project Consistency with Envision San José 2040 General Plan, for a discussion of the Project's inconsistency with Policy CD-1.26. As noted in Topical Response 4 – Project Consistency with Envision San José 2040 General Plan, the relevant question under CEQA is not whether a Project is consistent or inconsistent with any adopted land use plan, policy, or regulation, but whether any inconsistencies would result in a physical environmental issue that would cause a significant environmental impact. The DEIR correctly disclosed that the Project would have significant and unavoidable impacts on historic resources, and that the demolition or relocation of the historic resources would not result in a significant impact on aesthetics as the Project site and historic resources are not within, adjacent, or visible from a state scenic highway. Therefore, no further response is required.

Response B-1.4:

The commenter notes that Section 3.2, Agricultural and Forestry Resources, of the DEIR, is correct that the removal of the Sakauye farm will not result in an impact under CEQA as the site is not designated as Prime Farmland, Unique Farmland, or Farmland of Statewide Importance, but asserts that the Project is not compliant with Policy LU-12.3. The commenter goes on to state that decision makers should be made aware that the Project has chosen not to take advantage of land management tools for the conservation and reuse of remaining farmlands.

In response to the commenter, as documented in Topical Response 4 – Project Consistency with Envision San José 2040 General Plan, Policy LU-12.3 is not applicable. Therefore, no further response is necessary.

Response B-1.5:

The commenter suggests that the California Green Building Standards Code ("CALGreen") mandatory measures for embodied carbon reduction should be included in Section 3.6, Energy, of the DEIR. The commenter emphasizes the significance of buildings as a source of greenhouse

gas pollution, with around 40 percent of annual global carbon dioxide emissions coming from building operations and embodied carbon. The commenter highlights that effective July 1, 2024, CALGreen will limit embodied carbon emissions for certain projects noting that these projects must comply through one of three pathways: Building Reuse, Performance measures, or Prescriptive measures.

In response to the commenter, as stated in Table 3-7, 2017 CAP Applicable Control Measures, on page 75 of the DEIR, the Project will be required to comply with CALGreen, the City's Green Building Policy, and the most current California Building Code. The Project must comply with the applicable requirements that are in place at the time the building permit application is accepted. Section 3.6.2.2, Project Impacts, page 139, of the DEIR, highlights that the Project will incorporate several efficiency measures to minimize the consumption of energy, such as the Project will be built to the most recent California Building Code standards and Title 24 energy efficiency standards (or subsequently adopted standards during the one-year construction term), and CALGreen code which encompasses mandatory measures.

Response B-1.6:

The commenter highlights discrepancies with Envision San José 2040 General Plan policies regarding historic resources in Subsection 3.5, Cultural Resources. The commenter emphasizes the importance of preserving landmark buildings and adhering to city council policies on historic preservation, noting conflicts with Policy LU-13.2 and Policy LU-13.4. Additionally, the commenter highlights preservation incentives, such as the California Historical Building Code and Mills Act Historical Property Contracts, which encourage the reuse of historic places.

In response to the commenter, please see Topical Response 4 – Project Consistency with Envision San José 2040 General Plan. As the commenter does not raise any issues regarding the adequacy of the DEIR, no further response is required.

Response B-1.7:

The commenter expresses their appreciation for the inclusion of the proposed mitigation measures to lessen the impacts of the Project to cultural resources, specifically historic resources, but notes that the mitigation measures will not reduce impacts to a less than significant threshold. The commenter notes that a more robust mitigation program is warranted and appropriate given the impacts of the proposed Project. The commenter provides examples of additional mitigation measures, which include a public event, the relocation of the historic resources, and the funding or support of a Citywide survey to identify surviving agricultural resources within the City.

In response to the commenter, MM CR-1.5 and MM CR-1.6 would not preclude the development and implementation of a public event by the permittee as part of the commemoration and public Interpretation program for the CEQA historical resources. The possibility for relocation of the historic resources is available with MM CR-1.4. Regarding funding by the permittee for a Citywide survey to identify surviving agricultural resources in San

Jose, the seven structures and associated landscape including fruit trees, planted rows of vegetables, and dirt roads are primarily significant for their association with Japanese farming in Santa Clara Valley from ca. 1907 to 1941 and Eiichi “Ed” Sakauye’s from ca. 1925 to 2010, rather than general agricultural history in the Santa Clara Valley. As a result, it is unlikely that there are any other comparable properties with equivalent historical significance in San Jose to survey. Therefore, the general preservation of other agricultural resources would not substantially lessen the specific loss of the Sakuaye farm which is irreplaceable and funding to support a survey of agricultural resources would lack the “essential nexus” and “roughly proportional” requirements for mitigation measures. Additionally, please see Topical Response 4 – Project Consistency with Envision San José 2040 General Plan for additional discussion regarding the Project’s compliance with Envision San José 2040 General Plan policies.

Response B-1.8:

The commenter expresses their appreciation for the inclusion of Alternative 3, which incorporates all the contributors to the eligible historic district within the 2.5-acre park as requested in their scoping comment letter.

In response to the commenter, the commenters’ appreciation of the inclusion of Alternative 3 has been included in the administrative record and will be forwarded to decision makers. No further response is necessary.

Response B-1.9:

The commenter is pleased to see Alternative 5 included as it will relocate the Sakauye house and incorporate the historic resource into the lower scale townhome development. The commenter notes that this alternative would result in fewer residential units, but would still equal approximately 81 dwelling units per acre and therefore would still meet the Project objectives by meeting the minimum density requirements for the North TERO land use designation. The commenter states that the relocated or repurposed building could serve as residential units, office, or community space and that the lost units could be relocated in another part of the Project.

In response to the commenter, it is noted that the San José Department of Parks, Recreation and Neighborhood Services notified Preservation Action Council of San José that the City would not accept ownership of the historic resource as part of the public park and would not reduce the size of the park to accommodate the resource. Accordingly, while the commenter is correct that Alternative 5 would satisfy all Project objectives, Alternative 5 is not a feasible alternative. Please see Response B-1.10 for more on Alternative 5.

Response B-1.10:

The commenter expresses their support for the adoption of “Preservation” Alternative 5, which will incorporate the Candidate City Landmark into the proposed Project while still meeting all of

the Project's objectives. The commenter also suggests that the Sakauye house could be relocated within the 2.5-acre park area that is being proposed by the Project.

In response to the commenter, the commenters' support for "Preservation" Alternative 5 has been included in the administrative record and will be forwarded to decision makers. As stated In Section 8.5.5, Alternative 5: On-Site Relocation of Individual Historic Resource Alternative (Sakauye House Only) on page 294 of the DEIR, Alternative 5 would include the on-site relocation of the Sakauye house into the northern portion of the Project site and as a result would provide four fewer townhomes than what is proposed by the Project. However, Alternative 5 would not reduce the severity of Impact CR-1 since the Project would still remove six other structures that contribute to the eligibility of the historic district; therefore, the impact would remain significant and unavoidable.

Regarding the commenters suggestion to relocate the Sakauye house within the proposed 2.5-acre park; on Tuesday August 8, 2023, the Department of Parks, Recreation and Neighborhood Services notified Preservation Action Council of San José that the City would not accept ownership of the historic resource as part of the public park and also would not reduce the size of the park to accommodate the resource. Therefore, this was not a viable alternative that needed to be analyzed in the DEIR and no further action is required.

----- Forwarded message -----

From: **Jean Marlowe** <jean@jeanmarlowe.com>

Date: Mon, Mar 11, 2024 at 4:41 PM

Subject: 0 SEELY AVE MIXED-USE PROJECT

To: <bethelhem.telahun@sanjoseca.gov>

I have previously made comments regarding this project and they can be found in the project documents under Appendix A - NOP comments. What I said before still holds. I would like to point out that the current EIR has a couple of false assumptions.

B-2.1

1. There is no Trimble Flyover and there are no future plans in the works. The EIR makes assumptions based on there being a flyover.

2. There will not be a light at Seely and Montague, per Santa Clara County. The EIR is based on there being an intersection with a signal on Seely and Montague.

These two assumptions falsely project traffic mitigation that will not happen.

B-2.2

I feel the EIR needs to be updated to accurately reflect the real impact that this project will have regarding traffic, noise, and pollution on the surrounding neighborhood.

Real traffic mitigation needs to happen based on what will actually happen as opposed to plans that will never happen.

River Oaks Parkway is a two lane road and this project will have a serious impact that has not been properly studied.

Sincerely,

Jean Marlowe, President of the River Oaks Neighborhood Association

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Response to Comment Letter B-2: River Oaks Neighborhood Association (Dated March 11, 2024)**Response B-2.1:**

The commenter notes that there are two false assumptions in the DEIR. First, the commenter notes that there is no Trimble Flyover or future plans for a Trimble Flyover and assumptions are made in the DEIR based on a constructed flyover. Second, the commenter states that there will be no stoplight at Seely and Montague Expressway per Santa Clara County. The commenter concludes that these two assumptions falsely Project traffic mitigation that will not happen.

In response to the commenter, the Trimble Road flyover is listed as an Expressway Project in the draft Valley Transportation Plan 2050 projects list. The Trimble Road flyover is a potential future project that is not a part of the Project or a Project requirement. Since a funding source for this Expressway project has not yet been identified, the Trimble Road flyover was not assumed in the Project analysis. Moreover, the Project is no longer proposing a new traffic signal at Seely Avenue and Montague Expressway (see Topical Response 2 – Traffic Signal). The “New Project” scenario of the Transportation Analysis (“TA”), Appendix P, of the DEIR, presents the currently proposed Project. As stated in Section 3.17.2.3, Project Impacts of the DEIR, mitigation measures MM TR-1.1 and MM TR-1.2 will reduce the significant VMT impact identified under the New Project scenario to a less-than-significant level, based on the City of San José’s VMT Evaluation Tool, which satisfies CEQA requirements. For clarity, the Project’s traffic analysis did not count on either the Trimble flyover nor a signal at Montague Expressway and Seely Avenue to evaluate the traffic impacts.

Response B-2.2:

The commenter states that the DEIR should be revised to accurately reflect the real impacts that the Project will have on the environment. The commenter specifically refers to revisions regarding traffic, noise, and pollution impacts on the surrounding area. The commenter also notes that the proposed traffic mitigation needs to occur based on what will actually happen, rather than being based on plans that will never be incorporated. The commenter also states that River Oaks Parkway is a two-lane road, and this Project will have an impact that has not been properly studied.

In response to the commenter, the LTA scope, which supports the VMT analysis, delves into various crucial aspects pertinent to understanding the traffic impacts of new developments. This comprehensive analysis includes evaluating AM and PM peak hour traffic conditions at eight signalized intersections, with two located along River Oaks Parkway. The LTA thoroughly examined scenarios ranging from existing conditions to background conditions and the integration of Project conditions. Additionally, the LTA encompasses a detailed vehicle queuing analysis, evaluates bicycle, pedestrian, and transit facilities, and scrutinizes site access, on-site circulation, and parking demand, all of which is outside of CEQA. As stated on page 228, of the

DEIR, the threshold of significance used for the VMT analysis aligns with the City's Transportation Analysis Policy.

Regarding noise impacts specifically along River Oaks Parkway, Table 3-33, Project-Generated Traffic Noise Increase in Section 3.13.2.2, Project Impacts, of the DEIR, states that the most significant increase will occur on Seely Avenue between River Oaks Parkway and Montague Expressway, with noise levels expected to rise by 2 dBA, DNL. As described in Section 3.12.2.2, Project Impacts on page 205, of the DEIR, Policy EC-1.2 of the 2040 Envision San José General Plan states that a significant permanent noise increase would occur if the Project would increase noise levels at noise-sensitive receptors by 3 dBA DNL or more where ambient noise levels exceed the "normally acceptable" noise level standards. Since the Project is not expected to result in a permanent noise increase of 3 dBA DNL or more at noise-sensitive receptors in the Project vicinity, the impact is less than significant. Please see Topical Response 4 – Project Consistency with Envision San José 2040 General Plan for additional discussion regarding the Project's compliance with City noise thresholds.

In regard to Project emission impacts, Section 4.1.3, Air Quality, of the DEIR, states that the BAAQMD CEQA Air Quality Guidelines, air pollution by its nature is largely a cumulative impact. No single project is sufficient in size to, by itself, result in nonattainment of ambient air quality standards. Instead, a project's individual emissions contribute to existing cumulatively significant adverse air quality impacts. If a project's contribution to the cumulative impact is considerable, then the Project's impact on air quality is considered significant. In this case, because the Project will not exceed the identified significance thresholds, its emissions would not be cumulatively considerable, therefore, the cumulative impact would be less than significant. Additionally, according to Section 3.9.2.2, Project Impacts, of the DEIR, all potentially friable asbestos containing materials shall be removed in accordance with National Emission Standards for Air Pollution guidelines prior to demolition or renovation activities that may disturb asbestos containing materials. All demolition activities shall be undertaken in accordance with Cal/OSHA standards contained in CCR, Title 8, Section 1529, to protect workers from asbestos exposure. Lastly, Section 10.2.2, Project Impacts, of the DEIR, states that BMPs would be implemented as standard permit conditions to prevent stormwater pollution and minimize potential sedimentation during construction.

From: mbertram@pacbell.net <mbertram@pacbell.net>
Sent: Thursday, March 21, 2024 10:43 AM
To: 'tina.garg@sanjoseca.gov' <tina.garg@sanjoseca.gov>; 'Bethelhem.Telahun@sanjoseca.gov' <Bethelhem.Telahun@sanjoseca.gov>
Cc: Jean Marlowe (Jean@jeanmarlowe.com) <Jean@jeanmarlowe.com>
Subject: Possible problems with Seely EIR (ER21-284)

Mss. Garg and Bethelhem,

In reviewing the Draft EIR for the Seely project, we may have found a significant problem.

The Transportation Appendix P by Hexagon Transportation Consultants still is based on a project design that has a light at Seely and Montague (pg. 30) and a Grocery Store (pg. 60). Based on information we received from Manuel Atienza at the end of this past June, the county denied the light and the developer submitted a new plan with out the light and changed commercial usage to not include a grocery and rebalance residential and commercial usage.

"I hope you've been well. I have a few project updates for you. The major update is the proposed signal at the intersection of Seely Avenue and Montague Expressway. Santa Clara County has denied the installation of a traffic signal at the intersection of Montague Expressway and Seely Avenue. Santa Clara County controls Montague Expressway and made the decision to not allow the intersection to be signalized based on their spacing requirements for traffic signals along expressways. The applicant just resubmitted updated plans on June 20th to reflect this decision. The EIR will also be updated to reflect these changes to the plans. See the attached updated plan set and tentative map.

Given that the traffic signal has been removed from the project, the applicant has indicated that the development can no longer support a grocery store as a commercial anchor as originally proposed in Building A. Therefore, the applicant has reduced the commercial space in Building A and added residential units. See below for the breakdown:

- *Previous Submittal - 1,443 residential units and 55,534 square feet of commercial area*
- *Current Submittal - 1,472 residential units and 18,695 square feet of commercial area"*

B-3.1
Cont.

signal at the intersection of Seely Avenue and Montague Expressway. Santa Clara County has denied the installation of a traffic signal at the intersection of Montague Expressway and Seely Avenue. Santa Clara County controls Montague Expressway and made the decision to not allow the intersection to be signalized based on their spacing requirements for traffic signals along expressways. The applicant just resubmitted updated plans on June 20th to reflect this decision. The EIR will also be updated to reflect these changes to the plans. See the attached updated plan set and tentative map.

Given that the traffic signal has been removed from the project, the applicant has indicated that the development can no longer support a grocery store as a commercial anchor as originally proposed in Building A. Therefore, the applicant has reduced the commercial space in Building A and added residential units. See below for the breakdown:

- Previous Submittal - 1,443 residential units and 55,534 square feet of commercial area*
- Current Submittal - 1,472 residential units and 18,695 square feet of commercial area”*

Surprisingly, the appendix Executive Summary reflects the new residential unit count but does not seem to reflect the removal of the light and reduction of commercial usage. The removal of the light is a fundamental change to the traffic flow and should have been reflected in the analysis. It is also possible the new balance of residential and commercial usage affects traffic demand. If we are understanding the situation correctly, we think this needs to be corrected as soon as possible by updating the traffic analysis and starting a new EIR review cycle.

We have not completed our review of the rest of the EIR, so cannot say if the updated proposal from the developer properly reflected in other sections of the EIR. We did want to get this potential find to you as soon as we found it.

Michael Bertram
VP River Oaks Neighborhood Association
408-318-2443

References

From page 30: **Signalization of Seely Avenue/Montague Expressway.** The project is proposing to reconfigure and signalize the intersection of Seely Avenue and Montague Expressway in order to provide left turns to and from Seely Avenue.

From page 60: The project site plan was reviewed for truck access using truck turning-movement templates for SU-30 and WB-67 truck types. The SU-30 truck type represents single-unit small to medium-sized emergency vehicles, garbage trucks, moving trucks, and delivery trucks. The WB-67 truck type includes CA Legal size semi-trailer trucks that would access the grocery store on-site (Building 2).

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Response to Comment Letter B-3: River Oaks Neighborhood Association (Dated March 21, 2024)**Response B-3.1:**

The commenter notes that Appendix P, of the DEIR, is based on previous designs of the Project that included a stop light at the intersection of Seely Avenue and Montague Expressway, as well as space for a grocery store. The commenter explains that, based on the information received, these elements are no longer included in the Project and there was an additional balancing between the residential and commercial usage proposed in the Project. The commenter also notes that the Executive Summary reflects the new residential unit count but still includes the stoplight at the intersection of Seely Avenue and Montague Expressway, as well as space for a grocery store. The commenter states that the DEIR must be revised, and a new EIR review cycle must be conducted.

In response to the commenter, please see Topical Response 2 – Traffic Signal, which confirms the Project includes no traffic signal at the intersection of Seely Avenue and Montague Expressway. Section 2.3, Proposed Development, of the DEIR, discusses what the Project applicant proposes to develop which is the basis of the DEIR. Note that a grocery is not included in Section 2.3 or analyzed in the DEIR as the Project applicant is no longer pursuing a grocery store as part of the Project. Therefore, under CEQA Guidelines Section 15073.5, a new DEIR review cycle is not warranted.

Individual Comments

During the comment period, the City received comments from the following individuals:

- Ariana Abedifard of Adams Broadwell Joseph & Cardozo
- Ed Ketchum
- Craig Scoffone

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

jlaurain@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

ARIANA ABEDIFARD
KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARION N. JOHNSTON
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

January 19, 2024

Ms. Toni Taber
City Clerk
City of San Jose
City Clerk
200 E. Santa Clara Street
San Jose, CA 95113
Toni.Taber@sanjoseca.gov

Mr. Chris Burton
Director of Planning
City of San Jose
200 E. Santa Clara Street, Tower 3rd
Floor
San Jose, CA 95113
cburton@sanjoseca.gov

Via email only:
Bethelhem Telahun, Planner
Bethelhem.Telahun@sanjoseca.gov

Re: Request for Immediate Access to All Documents Referenced in the DEIR – Seely Avenue Mixed-Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565)

Dear Ms. Taber, Mr. Burton, and Ms. Telahun:

We are writing on behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”) to request *immediate access* to any and all documents referenced or relied upon in the Draft Environmental Impact Report (“DEIR”) for the Seely Avenue Mixed-Use Project, PDC21-035, PD22-002, ER21-284, SCH# 2022020565, (“Project”) proposed by The Hanover Company (“Applicant”). This request *excludes* the DEIR and any appendices already made available on the City’s website.

The Project proposes construction of 1,472 residential units and approximately 18,965 square feet of general neighborhood retail space, and a 2.5-acre public park. The project site is located at 0 Seely Avenue in San Jose and is identified as APNs 097-15-033 & 097-15-034 and a portion of 097-66-004.

5905-003j

C-1.1

January 19, 2024

Page 2

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The Association includes the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of San Jose and Santa Clara County. Silicon Valley Residents have a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members.

C-1.1
Cont.

This request for all documents referenced or relied upon in the DEIR is made pursuant to the California Environmental Quality Act ("CEQA"), which requires that all documents referenced, incorporated by reference, and relied upon in an environmental review document be made available to the public for the entire comment period.¹

If you have any questions, please email me at jlaurain@adamsbroadwell.com or call me at (650) 589-1660. Thank you for your assistance with this matter.

Sincerely,



Janet Laurain
Paralegal

JML:ljl

¹ See Pub. Resources Code, § 21092, subd. (b)(1); 14 Cal. Code Reg. § 15087(c)(5).
5905-003j

Response to Comment Letter C-1: Adams Broadwell (Dated January 19, 2024)**Response C-1.1:**

The commenter requests access to any and all documents referenced or relied upon in the DEIR and notes that CEQA requires that all referenced documents be made available to the public during the entire comment period.

In response to the commenter, the City provided the documents referenced in the DEIR to the commenter on January 26, 2024.

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

aabedifard@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

ARIANA ABEDIFARD
KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARION N. JOHNSTON
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

March 5, 2024

Via Email and Overnight Delivery

Mr. Chris Burton
Director of Planning
City of San Jose
200 E. Santa Clara Street, Tower 3rd
Floor
San Jose, CA 95113
Email: cburton@sanjoseca.gov

Ms. Toni Taber
City Clerk
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113
Email: Toni.Taber@sanjoseca.gov

Via Email Only

Bethelhem Telahun, Planner
Email: Bethelhem.Telahun@sanjoseca.gov

**Re: Request to Restart the Public Review and Comment Period for
the Draft Environmental Impact Report – Seely Avenue Mixed-
Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565)**

Dear Ms. Taber, Mr. Burton, and Ms. Telahun:

On behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”), we respectfully request that City of San Jose (“City”) restart the public review and comment period for the Draft Environmental Impact Report (“DEIR”) prepared for the Seely Avenue Mixed-Use Project, PDC21-035, PD22-002, ER21-284, SCH# 2022020565, (“Project”) proposed by The Hanover Company (“Applicant”). **The current public comment period ends on March 11, 2024.** We are continuing to review the DEIR and appendices that have been made available to date by the City. However, we cannot prepare meaningful comments on the adequacy of the DEIR until the City provides complete and accurate versions of the operative DEIR and supporting appendices.

C-2.1 As demonstrated in this letter, a restart of the 45-day comment period is necessary under the California Environmental Quality Act (“CEQA”)¹ because the City failed to make available all DEIR documents, as required by CEQA.² **We request that the City restart the 45-day public review and comment period on the DEIR to ensure the public is properly informed about the Project.**

We expressly reserve the right to file comments on the DEIR at a later date, and to supplement these comments at any later hearings and proceedings related to this Project following our receipt and review of the documents referenced in the DEIR.³

I. The DEIR Was Not Properly Uploaded to the State Clearinghouse Website

C-2.2 The Project’s DEIR and its appendices can be viewed both on the State Clearinghouse website⁴ and through the City’s website.⁵ Because members of the public can access either website, it’s crucial that both platforms accurately and uniformly present this information. Any discrepancies would result in an unequal distribution of information, leaving some members of the public insufficiently informed, which, as demonstrated herein and further below, is precisely what occurred here.

On February 29, 2024, just days before the comment deadline, the City asked the State Clearinghouse to “add the Draft Environmental Impact Report to the documents” uploaded on the State Clearinghouse site because “[t]he document was not uploaded correctly by the submitter.”⁶ There is no further explanation of this issue, making it unclear whether the DEIR was not uploaded to the State Clearinghouse site at all, an incorrect version of the DEIR was uploaded, or otherwise. This means that members of the public relying on the State Clearinghouse website may not have had proper access to the DEIR. The State Clearinghouse’s re-upload of the DEIR should have prompted a restart of the

¹ Public Resources Code (“PRC”) §21000 et seq.; California Code of Regulations (“CCR”), Title 14, Division 6, Chapter 3, Sections 15000 et seq.

² PRC § 21092(b)(1); 14 CCR § 15087(c)(5).

³ See *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1118-21.

⁴ Available at: <https://ceqanet.opr.ca.gov/2022020565/2>

⁵ Available at: <https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/active-eirs/0-seely-ave-mixed-use-project>

⁶ Letter from Christopher Burton, City to State Clearinghouse, re: “Update Documents for Published Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project” (February 29, 2024), available at: <https://files.ceqanet.opr.ca.gov/276489-2/attachment/so4O7OYL5ZlmuJ2mHbQeSHnzsUmrBZ-PGgOFMG5d11vmlGEqbZbJtZcgI-8KcVvDAdN5lHt0gTXkLB-0>

C-2.2
Cont.

comment period because members of the public were unable to view the proper DEIR on the State Clearinghouse website for almost the entirety of the review and comment period. The City should restart the comment period now to ensure all members of the public have proper access to the DEIR.

II. The State Clearinghouse and City's Websites Provide Conflicting Appendices

CEQA requires that "all documents referenced" – and the CEQA Guidelines require that "all documents incorporated by reference" – in a draft environmental impact report shall be "readily accessible to the public during the lead agency's normal working hours" during the entire public comment period.⁷ Further, an EIR may not rely on hidden studies or documents that are not provided to the public.⁸ The City is in violation of these requirements because the City has failed to provide Silicon Valley Residents and the public with access to the DEIR's correct appendices.

C-2.3

For example, two different versions of Appendix D, the Biological Resources Evaluation, appear on the City's webpage and the State Clearinghouse website. On the City's website, it is a 106-page document titled "Biological Resource Analysis, 0 Seely Avenue Mixed-Use Project" by Johnson Marigot Consulting, LLC.⁹ However, on the State Clearinghouse site, it is a 26-page document titled "Revised Brief Biological Constraints Analysis, 681 E Trimble Road Property" by the same consultant.¹⁰ It is unclear which document is the correct biological resource evaluation that the DEIR relied on. This also means that some members of the public relied on one Appendix D while others relied on an entirely different one. It is imperative that the City clarify which document is the correct Appendix D and the public needs adequate time to review the appropriate document.

Additionally, several appendices are incompletely uploaded, depending on which website is viewed. Specifically, Appendix B, the Air Quality Assessment, and Appendix P, the Transportation Analysis, are both missing their own appendices/attachments on the State Clearinghouse website. On the State

⁷ Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15072(g)(4); see *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

⁸ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

⁹ See Appendix D uploaded on the City's website at:

<https://www.sanjoseca.gov/home/showpublisheddocument/109310/638441364765770000> (last accessed March 5, 2024).

¹⁰ See Appendix D uploaded on the State Clearinghouse website at:

<https://ceqanet.opr.ca.gov/2022020565/2/Attachment/LPAEnB> (last accessed March 5, 2024).

C-2.3
Cont.

Clearinghouse page, Appendix B (Air Quality Assessment) only includes Attachment 1, but the Assessment also refers to Attachments 2, 3, 4 and 5, which are not provided.¹¹ Similarly, Appendix P (Transportation Analysis) is missing all of its appendices on the State Clearinghouse site.¹² The Table of Contents specifies that there are several appendices for the Transportation Analysis, Appendices A through G,¹³ but the document contains only cover pages for each appendix and does not provide the content.¹⁴ After identifying these issues for the City,¹⁵ Appendix B and P were reuploaded *on the City's website*, but remain incomplete on the State Clearinghouse webpage. Further, the City never notified the general public of the re-uploaded documents. Thus, not only do many members of the public remain unaware of the document changes, but the deficiencies persist on the State Clearinghouse webpage.

Furthermore, since our last notification to the City about the incomplete appendices, we have identified additional inconsistencies. First, like Appendices B and P, Appendix E (Historical Resources Evaluation) does not include any of its appendices on the State Clearinghouse website.¹⁶ Second, Appendix K (Phase I, Parcel 1 ESA) is not the same document between the State Clearinghouse website and City's website. On the State Clearinghouse website, it is 3,443 pages, dated July 12, 2021, and, per the Executive Summary, is based on parcel number 097-15-034.¹⁷ However, on the City's website, the document is 3,070 pages, dated March 8,

¹¹ See Appendix B uploaded on the State Clearinghouse website at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/Jjf-I2OPDn4Y912-0LqpxJgF7NzuV0gS7y7JA6TaMoonvUcxanJKirG8uSXQbajtRg0MtoNh8_u7DM10 (last accessed March 5, 2024).

¹² See Appendix P uploaded on the State Clearinghouse website at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/xyNIhGGSkS85iA8iqVQsmas6epdpfkpF9PrwRNBd5QGNPMTz4S9_WX3bRO5lfysk5FO7i13MCEqHm5E0 (last accessed March 5, 2024).

¹³ Appendix P, as uploaded on the State Clearinghouse website, pg. ii.

¹⁴ Appendix P, as uploaded on the State Clearinghouse website PDF pp. 98-105.

¹⁵ **Exhibit A:** Email from Janet Laurain, Adams, Broadwell, Joseph & Cardozo ("ABJC") to City re: "0 Seely Avenue Project - Appendix B and missing attachments" (February 1, 2024, 1:43 PM); **Exhibit B:** Email from Janet Laurain, ABJC to City re: "0 Seely Avenue Project by Hanover Company (5905)" (February 21, 2024, 8:09 AM)

¹⁶ The Appendix E on the City's webpage is 186 pages long and includes its own Appendices A and B after page 83. See Appendix E on the City's website here: <https://www.sanjoseca.gov/home/showpublisheddocument/109312/638441364788870000> (last accessed March 5, 2024). However, Appendix E on the State Clearinghouse website is only 90 pages and only has cover pages for its Appendices A and B. See Appendix E on the State Clearinghouse's webpage here: <https://ceqanet.opr.ca.gov/2022020565/2/Attachment/KKZoqq> (last accessed March 5, 2024).

¹⁷ See Appendix K uploaded on the State Clearinghouse website at: https://ceqanet.opr.ca.gov/2022020565/2/Attachment/eAdF_J (last accessed March 5, 2024). See Executive Summary, pg. 1.

C-2.3
Cont.

2021, and is regarding a different parcel number (097-15-033).¹⁸ Third, on February 29, 2024, the City requested that Appendixes G and H be made confidential on the State Clearinghouse website.¹⁹ This means that the public had access to those appendices if viewing the DEIR on the State Clearinghouse website, but not if viewing via the City's webpage for the Project. The City ultimately needs to address these discrepancies and ensure the completeness and consistency of all documents across both platforms.

Without access to these critical DEIR reference documents, the public is unable to fully evaluate the DEIR's analysis, conclusions, and mitigation measures which rely on these studies and documents. Silicon Valley Residents and other members of the public are precluded from having the meaningful opportunity to review and comment on the DEIR, as required by CEQA. Indeed, because of the inconsistencies described above, different members of the public and state agencies may not even be reviewing and commenting on the same Project documents.

The courts have held that the failure to provide even a few pages of a CEQA documents for a portion of the CEQA review period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.²⁰ It is also well settled that an EIR may not rely on hidden studies or documents that are not provided to the public.²¹ By failing to make all documents referenced in the DEIR "readily available" during the current comment period, the City is violating the clear procedural mandates of CEQA, to the detriment of East Bay Residents and other members of the public who wish to meaningfully review and comment on the DEIR.

Accordingly, we request that the City provide immediate access to the correct DEIR reference documents, as required by CEQA, and restart the public review and comment period on the DEIR for at least 45 days from the date on which the City releases all correct reference documents for public review.

¹⁸ See Appendix K uploaded on the City's website at: <https://www.sanjoseca.gov/home/showpublisheddocument/109314/638441364852470000> (last accessed March 5, 2024). See Executive Summary, pg. 1.

¹⁹ Letter from Christopher Burton, City to State Clearinghouse, re: "Update Documents for Published Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project" (February 29, 2024), available at: <https://files.ceqanet.opr.ca.gov/276489-2/attachment/so4O7OYL5ZlmuJ2mHbQeSHnzsUmrBZ-PGgOFMG5d11vmlGEqbZbJtZcgI-8KcVvDAdN5lHt0gTXkLB-0>

²⁰ *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

²¹ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

III. The City's One-Week Extension is Not Sufficient

On February 26, 2024, the City requested that the State Clearinghouse extend the public review period by one week, from March 4, 2024 to March 11, 2024 (referred to on the State Clearinghouse website as "Notice to Extend Review Period").²² The State Clearinghouse then released a Memorandum stating that the lead agency added "additional information," noting that one can refer to the City's Notice to Extend Review Period for more details.²³ However, the City's letter provides no information on why the review period was extended and what specific additional information was provided.²⁴

C-2.4

Nevertheless, for the reasons mentioned above, the one-week extension is not adequate to provide the public with time to meaningfully review the DEIR and its appendices. As it stands, some members of the public have completed a different review than others due to the inconsistent breadth of information provided between the State Clearinghouse and the City's website. As demonstrated above, the missing documents are substantial; some members of the public have missed out on hundreds of pages of analysis that were incorporated in the DEIR. The City must restart the review period to ensure that the public has an equal opportunity to review and comment.

IV. Conclusion

Silicon Valley Residents respectfully requests that the City restart the public review and comment period on the DEIR for at least 45 days from the date on which the City releases all complete DEIR reference documents for public review.

C-2.5

²² Letter from Christopher Burton, City to State Clearinghouse, re: "Extend Circulation Period, Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project" (February 26, 2024), available at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/sNoLG_7EtOIBTlbV_PmKv8IeALAbDqeQt3S711-uIXoeACJcabyVZzGbC8fFwdoKQXMMJK9xrKIzemSJ0

²³ Memorandum from Samuel Assefa, Director, California Governor's Office of Planning and Research, State Clearinghouse and Planning Unit to All Reviewing Agencies, RE: SCH # 2022020565 Seely Avenue Mixed-Use Project (February 27, 2024), available at:

https://files.ceqanet.opr.ca.gov/276489-2/attachment/t0rvhrccAtP11Km3Ron8mx220V_c8WeegrkNCxwBzl68wzkegTnDTbYAZ3hKhmDTtFHSwRWmE8XiUQP-0

²⁴ See footnote 21. The entire body of the letter merely reads: "The City of San José is requesting that the State Clearinghouse extend the public review period to end on March 11, 2024."

C-2.5
Cont.

Given the limited time left in the DEIR public comment period, we respectfully request a response to this letter by close of business on Wednesday, March 6, 2024.

Sincerely,



Ariana Abedifard

Attachments
AA:acp

EXHIBIT A

From: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Sent: Friday, February 2, 2024 3:23 PM
To: Janet M. Laurain <jlaurain@adamsbroadwell.com>
Subject: RE: 0 Seely Avenue Project - Appendix B and missing attachments

Good Afternoon,

Thanks for pointing that error out. I have updated the Appendix to the full version. Here's the link:

<https://www.sanjoseca.gov/home/showpublisheddocument/108775/638424838390837159>

Best,

Bethelhem Telahun

Planner | Environmental Review

From: Janet M. Laurain <jlaurain@adamsbroadwell.com>
Sent: Thursday, February 1, 2024 1:43 PM
To: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Subject: 0 Seely Avenue Project - Appendix B and missing attachments

[External Email]

You don't often get email from jlaurain@adamsbroadwell.com. [Learn why this is important](#)

Hi Telahun,

In reviewing the DEIR for the 0 Seely Avenue Project, we found that Appendix B (Air Quality Assessment) is missing several attachments. It only includes Attachment 1, but the Assessment mentions Attachments 2, 3, 4 and 5. Can you please send those to me?

Thank you.

Janet Laurain

Janet M. Laurain, Paralegal
Adams Broadwell Joseph & Cardozo
(650) 589-1660
jlaurain@adamsbroadwell.com

This e-mail may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

EXHIBIT B

From: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Sent: Wednesday, February 21, 2024 6:31 PM
To: Janet M. Laurain <jlaurain@adamsbroadwell.com>
Cc: Alexandra E. Stukan <astukan@adamsbroadwell.com>
Subject: RE: 0 Seely Avenue Project by Hanover Company (5905)

Hi Janet,

Thank you for pointing that out! I have updated the Transportation Analysis that was posted.

Best,
Bethelhem Telahun
Planner | Environmental Review

From: Janet M. Laurain <jlaurain@adamsbroadwell.com>
Sent: Wednesday, February 21, 2024 8:09 AM
To: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Cc: Alexandra E. Stukan <astukan@adamsbroadwell.com>
Subject: 0 Seely Avenue Project by Hanover Company (5905)

[External Email]

You don't often get email from jlaurain@adamsbroadwell.com. [Learn why this is important](#)

Good Morning Bethelhem,

In reviewing the DEIR for the 0 Seely Avenue Project, we found that Appendix P (Transportation Analysis) is missing all of its appendices. The Table of Contents specifies that there are several appendices for the Transportation Analysis: Appendices A through G (see pg.

ii). PDF Pages 98-105 all contain cover pages for each appendix but don't provide the content. Can you please provide us with the full Appendix P, including all of its appendices?

Thank you.

Janet Laurain
Janet M. Laurain, Paralegal
Adams Broadwell Joseph & Cardozo
(650) 589-1660
jlaurain@adamsbroadwell.com

This e-mail may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Response to Comment Letter C-2: Adams Broadwell (Dated March 5, 2024)**Response C-2.1:**

The commenter states that a restart of the 45-day comment period is necessary because the City failed to make all of the DEIR documents available as required by CEQA. The commenter also expresses that they withhold the right to file comments on the DEIR at a later date and to supplement the comments at any later hearings or proceedings related to the Project.

In response to the commenter, please see Topical Response 1 – Circulation of DEIR, regarding the submittal and circulation process of the DEIR. The remaining comments are part of the administrative record, no further response is necessary.

Response C-2.2:

The commenter further notes that on February 29, 2024, the City requested that the State Clearinghouse add the DEIR to the documents on the State Clearinghouse website, and that no clarification was provided as to whether the wrong version of the DEIR was uploaded, or whether the DEIR was not uploaded, or otherwise. The commenter asserts that the reupload of the DEIR to the State Clearinghouse website should have triggered a restart of the comment period.

In response to the commenter, please see Topical Response 1 – Circulation of DEIR, regarding the submittal and circulation process of the DEIR.

Response C-2.3:

The commenter states that the version of the DEIR that is posted on the City's website is not consistent with the version that was posted on the State Clearinghouse website. The commenter specifically identifies inconsistencies in the following DEIR appendices: Appendix D, the Biological Resources Analysis ("BRA"); Appendix P, the Transportation Analysis; Appendix B, the Air Quality Assessment, prepared by Illingworth & Rodkin, Inc., dated July 15, 2022; Appendix E, the Historic Resources Evaluation; and Appendix K, the Phase I, Parcel 1 ESA. The commenter also requests that the City provide immediate access to the correct versions of the DEIR and all relevant documents and restart the public review and comment period for at least 45 days from the date which the City releases all the documents for recirculation.

In response to the commenter, please see Topical Response 1 – Circulation of DEIR, regarding the submittal and circulation process of the DEIR.

Response C-2.4:

The commenter states that the City's request to extend the public review period by one week is not sufficient to provide the public with adequate time to review the DEIR and its relevant documents. The commenter notes that the City must restart the review period to ensure that the public has adequate time to review and comment on the DEIR.

In response to the commenter, please see Topical Response 1 – Circulation of DEIR, regarding the submittal and circulation process of the DEIR.

Response C-2.5:

The commenter requests that the City restart the public review and comment period for at least 45 days and requested a response to this request by close of business on Wednesday March 6, 2024.

In response to the commenter, please see Topical Response 1 – Circulation of DEIR, regarding the submittal and circulation process of the DEIR.

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

aabedifard@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

ARIANA ABEDIFARD
KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARION N. JOHNSTON
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel

MARC D. JOSEPH
DANIEL L. CARDOZO

March 11, 2024

Via Email and Overnight Mail

Mr. Chris Burton
Director of Planning
City of San Jose
200 E. Santa Clara Street, 3rd Floor
San Jose, CA 95113
christopher.burton@sanjoseca.gov

Via Email Only

Bethelhem Telahun, Planner,
Bethelhem.Telahun@sanjoseca.gov

Re: Comments on Draft Environmental Impact Report for the 0 Seely Ave Mixed-Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565)

We are writing on behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”) to comment on the Draft Environmental Impact Report (“DEIR”) prepared by the City of San Jose (“City”) for the 0 Seely Ave Mixed-Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565) (“Project”) proposed by The Hanover Company (“Applicant”). We reserve the right to supplement these comments at later hearings and proceedings on the Project.¹

The Project proposes demolition of existing residential and agricultural buildings and removal of 584 trees (261 ordinance-size trees and 323 non-ordinance-size trees) for development of 1,472 residential units consisting of a mix of three-story townhomes and six- to seven-story apartment buildings, 18,965 square feet of general neighborhood retail space, and a 2.5-acre public park. The Project also includes the dedication of an approximately 0.11-acre site to the San Jose Municipal Water System for the development of a domestic water well.

¹ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

C-3.1

C-3.2 Based on our review of the DEIR and available supporting documentation, we conclude that the DEIR fails to comply with the requirements of the California Environmental Quality Act (“CEQA”).² The DEIR lacks an adequate Project baseline, fails to adequately disclose and analyze the Project’s significant impacts, and fails to include substantial evidence supporting conclusions that mitigation measures will reduce the Project’s impacts to less than significant levels, as required by CEQA. The City may not approve the Project until it revises the DEIR to adequately analyze and mitigate the Project’s significant impacts and incorporate all feasible mitigation measures to avoid or minimize these impacts to the greatest extent feasible.

C-3.3 We reviewed the DEIR, its technical appendices, and available reference documents with the assistance of biological resources expert Scott Cashen,³ transportation expert Norman Marshall,⁴ and noise and vibration expert Neil Shaw.⁵ The City must respond to the expert comments separately and fully.⁶

I. STATEMENT OF INTEREST

C-3.4 Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential environmental impacts associated with Project development. Silicon Valley Residents includes San Jose resident Jeremy Malave, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, along with their members and their families, and other individuals that live and/or work in the City of San Jose.

Individual members of Silicon Valley Residents and its member organizations live, work, recreate, and raise their families in the City and surrounding communities. Accordingly, they would be directly affected by the Project’s environmental and health and safety impacts. Individual members may also work

² Pub. Resources Code §§ 21000 et seq.; 14 Cal. Code Regs (“CEQA Guidelines”) §§ 15000 et seq. (“CEQA Guidelines”).

³ See March 8, 2024 letter from Scott Cashen to Ariana Abedifard re “Comments on the Draft Environmental Impact Report for the Seely Avenue Mixed-Use Project” (“Cashen Comments”) and Scott Cashen’s curriculum vitae, attached hereto as Exhibit A.

⁴ See February 29, 2024 letter from Norman Marshall to Ariana Abedifard re “Seely Ave Mixed Use Project” (“Marshall Comments”) and Norman Marshall’s resume, attached hereto as Exhibit B.

⁵ See February 29, 2024 letter from Neil Shaw to Ariana Abedifard re “Seely Avenue Mixed-Use Project DEIR SCH No. 2022020565– Acoustic Review” (“Shaw Comments”) and Neil Shaw’s resume, attached hereto as Exhibit C.

⁶ 14 Cal. Code Regs. (“CCR”) §§ 15088(a), (c).

on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.⁷ “The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”⁸

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.⁹ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”¹⁰ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹¹ As the CEQA Guidelines explain, “[t]he

⁷ PRC § 21100.

⁸ *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

⁹ Pub. Resources Code § 21061; CEQA Guidelines §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 (“*Sierra Club*”) (“[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”).

¹⁰ *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

¹¹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”) (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).

C-3.4
Cont.

C-3.5

EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”¹²

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.¹³ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”¹⁴ If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment” to the greatest extent feasible and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹⁵

While courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”¹⁶ As the courts have explained, a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.”¹⁷ “The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”¹⁸

¹² CEQA Guidelines § 15003(b).

¹³ CEQA Guidelines § 15002(a)(2), (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at p. 564.

¹⁴ CEQA Guidelines § 15002(a)(2).

¹⁵ PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

¹⁶ *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

¹⁷ *Berkeley Jets*, 91 Cal.App.4th at p. 1355; *see also San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards*, 60 Cal.App.4th at p. 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

¹⁸ *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

III. THE CITY FAILED TO PROVIDE TIMELY ACCESS TO DEIR REFERENCE DOCUMENTS

CEQA compels a lead agency to make all documents referenced in an environmental impact report “available for review” during the entire public comment period.¹⁹ The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the public review period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.²⁰ It is also well settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.²¹

The City failed to make all documents referenced or relied upon in the DEIR available for public review during the DEIR’s entire public comment period, thereby truncating the public comment period in violation of CEQA. As a result, Silicon Valley Residents has been unable to fully analyze the DEIR and its supporting documents during the current public comment period.

On March 5, 2024, Silicon Valley Residents submitted a letter to the City requesting that the City restart the public comment period due to the City’s failure to provide access to all of the DEIR reference documents.²² The request was made pursuant to CEQA, which requires that “all documents referenced in the draft environmental impact report” be available for review and “readily accessible” during the entire comment period.²³ As explained in detail in the letter, the City re-uploaded a copy of the DEIR to the State Clearinghouse website days before the comment deadline, without any explanation, making it unclear whether the DEIR was not uploaded to the State Clearinghouse site at all, an incorrect version of the DEIR was uploaded, or otherwise.

The City also failed to provide uniform appendices between both the State Clearinghouse and City websites. For example, Appendix D is entirely different

¹⁹ Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15087(c)(5); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442, as modified (Apr. 18, 2007).

²⁰ *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

²¹ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).

²² Exhibit D: Letter from Ariana Abedifard, Adams Broadwell Joseph & Cardozo, to City re “Request to Restart the Public Review and Comment Period for the Draft Environmental Impact Report – Seely Avenue Mixed-Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565)” (March 5, 2024).

²³ PRC §§ 21092(b)(1); 14 Cal. Code Regs. (“CCR”) § 15087(c)(5).

C-3.6

depending on which website one is reviewing; on the State Clearinghouse website, it's the "Revised Brief Biological Constraints Analysis," a 26-page analysis prepared by Johnson Marigot Consulting, dated November 2021, whereas on the City's website, it's the "Biological Resource Analysis," a 106-page analysis also prepared by Johnson Marigot Consulting, dated December 2022. It is unclear which analysis the DEIR relied on, as the DEIR cites both documents.²⁴ Similarly, Appendix K (Phase I, Parcel 1 ESA) appears entirely differently on the State Clearinghouse website and the City's website. On the State Clearinghouse website, it is 3,443 pages, dated July 12, 2021, and, per the Executive Summary, is based on parcel number 097-15-034. However, on the City's website, the document is 3,070 pages, dated March 8, 2021, and is regarding a different parcel number (097-15-033).

The City never responded to our request and has not changed the comment deadline. Without knowing the correct appendices that the DEIR relied on, it is impossible to fully evaluate the accuracy of the City's impact analyses and the efficacy of the City's proposed mitigation measures, and effectively comment on the DEIR by the current deadline of March 11, 2024. We therefore provide these preliminary comments on the DEIR and reserve our right to submit supplemental comments on the DEIR at a future date.²⁵

IV. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE EXISTING BASELINE

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.²⁶ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.²⁷ Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that "[b]efore the impacts of a project can be assessed and mitigation measures

²⁴ See DEIR, pg. 101 (stating the DEIR relies on the December 2022 Biological Resource Analysis) vs. DEIR, pg. 312 (list of references citing the Revised Biological Constraints Analysis).

²⁵ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

²⁶ See, e.g., *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 316.

²⁷ CEQA Guidelines § 15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

C-3.6
Cont.

C-3.7

considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”²⁸

Here, the DEIR fails to accurately describe the baseline conditions against which it must measure the Project’s environmental impacts. Specifically, it fails to identify the extent of wildlife on the project site and the baseline ambient noise at the project site, therefore resulting in an incomplete and inaccurate assessment of the Project’s biological resources and noise impacts.

A. The DEIR Fails to Fully Disclose The Extent Of Wildlife Species At The Project Site

The DEIR fails to accurately disclose the baseline environmental conditions related to the Project’s biological impacts; namely, the state of wildlife resources at the project site. As a result, the DEIR lacks the necessary baseline information against which to measure the Project’s environmental impacts with regard to biological resources.

First, as Mr. Cashen explains, “Although the DEIR provides a list of plant species observed during reconnaissance level surveys of the Project site, it does not list (or otherwise identify) the wildlife species that were observed during the surveys. This precludes understanding of the wildlife resources that could be directly impacted by the Project.”²⁹ Similarly, the DEIR also does not provide any information on the wildlife species that occur or could occur in the Coyote Creek riparian corridor, thus precluding any understanding of potential indirect Project impacts on wildlife.³⁰

Second, the DEIR’s Biological Resources Analysis (Appendix D) (“BRA”)³¹ did not conduct the surveys needed to determine presence of burrowing owls. Instead, it erroneously dismisses the potential presence of burrowing owls due to the absence of ground squirrel burrows.³² However, this overlooks alternative nesting and

²⁸ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

²⁹ Cashen Comments, pg. 7.

³⁰ *Id.*

³¹ As discussed above in Section III, the City provided two different Appendix Ds—the “Biological Resource Analysis” and the “Revised Biological Constrains Analysis.” This section references the December 2022 Biological Resource Analysis uploaded to the City’s website.

³² *See id.*; see also Appendix D: Biological Resources Analysis, Table 3.

C-3.10 | roosting habitats such as debris piles within the Project site, which could support
Cont. | burrowing owl populations.³³

C-3.11 | Third, the DEIR dismisses the presence of golden eagle because it states that
| the Project doesn't provide the necessary habitat for golden eagles. However, as Mr.
| Cashen states, that conclusion is inconsistent with Appendix C, the Arborist Report,
| which identifies the presence of several large trees at the Project site.³⁴ The
| California Department of Fish & Wildlife ("CDFW") also highlighted the potential
| for golden eagle nesting and foraging habitat within the project area.³⁵ Thus, the
| DEIR overlooks the habitat suitability and viability for golden eagles, thereby
| potentially missing potential impacts to the species.

C-3.12 | Fourth, the DEIR's assertion that the Crotch Bumble Bee is unlikely to occur
| at the project site contradicts available evidence. As highlighted by Mr. Cashen,
| despite the BRA's claim that the species' range excludes the project area, recent
| occurrence records and CDFW survey guidelines suggest otherwise.³⁶

C-3.13 | Finally, the DEIR's characterization that oak trees on the site are not part of
| a sensitive natural community is flawed. Mr. Cashen points out data from the
| Arborist Report that indicates clustering of oak trees that meet the criteria for
| woodland classification.³⁷ Therefore, the DEIR's conclusion that the Project will not
| have a significant impact on sensitive natural communities is unsupported.

C-3.14 | In summary, the DEIR's inadequate and inaccurate disclosure of the
| presence of wildlife species and sensitive natural communities results in an
| unreliable baseline against which to evaluate environmental impacts.

B. The DEIR Fails to Properly Document Baseline Ambient Noise Measurements

C-3.15 | The DEIR fails to accurately disclose the baseline environmental conditions
| regarding noise. Mr. Shaw identified significant shortcomings in the methodology
| used to calculate existing noise levels, including the lack of details regarding sound
| level meter settings, microphone height, equipment specifications, calibration

³³ Cashen Comments, pg. 7.

³⁴ Cashen Comments, pg. 8; *see also* Appendix C: Arborist Report and Tree Mitigation Memorandum.
³⁵ *Id.*

³⁶ Cashen Comments, pg. 9.

³⁷ Cashen Comments, pp. 9-10.

C-3.15
Cont. records, and the use of field calibrators.³⁸ This information is critical and must be disclosed according to standard practices outlined in guides such as ASTM's Standard Guide for Applying Environmental Noise Measurement Methods and Criteria.³⁹ Without such information, the data regarding existing ambient noise levels are unverifiable.⁴⁰ Thus, the City's noise analysis fails to support the measured data for existing noise levels. As a result, the DEIR lacks the necessary baseline information against which to measure the Project's environmental impacts with regard to noise impacts.

C-3.16

V. THE DEIR FAILS TO DISCLOSE, ANALYZE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS

An EIR must fully disclose all potentially significant impacts of a Project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.⁴¹ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁴²

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.⁴³ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.⁴⁴ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will 'determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.'⁴⁵

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not

³⁸ Shaw Comments, pg. 4.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 14 CCR § 15064(b).

⁴² *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

⁴³ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁴⁴ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁴⁵ *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

C-3.16
Cont. | ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’⁴⁶

Here, the DEIR fails to properly analyze, disclose, and mitigate the Project’s impacts on biological resources, transportation, and noise.

A. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project’s Biological Resources Impacts

C-3.17 | As highlighted by biological resources expert Scott Cashen, the DEIR falls short in adequately assessing the Project’s impacts on biological resources, including wildlife resources and riparian habitat. Moreover, the proposed mitigation measures are insufficient to address the potential adverse effects.

1. The DEIR Fails to Identify Potentially Significant Impacts To Special-Status Bats and Crotch Bumble Bee

C-3.18 | In answering whether the Project would have a substantial adverse effect on any species identified as a candidate, sensitive, or special status species, the DEIR identifies a potentially significant impact on roosting bat habitat.⁴⁷ However, as described below, the Project could have a significant impact on special-status bats beyond what is discussed in the DEIR. Furthermore, the Project could have an impact on the candidate species Crotch Bumble Bee, but the DEIR did not identify or address this potentially significant impact.

C-3.19 | First, with respect to the DEIR’s analysis on special-status bats, Mr. Cashen underscores the importance of considering the full extent of direct and indirect impacts on special-status bats, beyond the DEIR’s limited focus on habitat during maternity roosting seasons.⁴⁸ As Mr. Cashen states, “Significant impacts also could occur if roost sites are removed when bats are hibernating because the metabolic cost of waking bats from hibernation can be very high and enough to reduce their energy supply to the point where survival is not possible.”⁴⁹ Because bats spend over half their lives at roosts, and when bats are evicted from a roost (as proposed in the DEIR), recovery or recolonization is slow if it occurs at all.⁵⁰ Indeed, as Mr.

⁴⁶ *Berkeley Jets*, 91 Cal.App.4th at 1355.

⁴⁷ DEIR, pp. 107-108.

⁴⁸ Cashen Comments, pg. 10.

⁴⁹ *Id.*

⁵⁰ *Id.*

Cashen points out, the greatest threat to bats in the south coast ecoregion is urban/suburban expansion and its associated impacts to roosts and foraging habitat.⁵¹

Ultimately, the DEIR provides no analysis of, or mitigation for, the Project's direct and indirect impacts on habitat for special-status bats. As a result, the Project's potentially significant impacts on habitat for special-status bats remain unmitigated.

Similarly, the DEIR fails to address and mitigate potentially significant impacts to Crotch Bumble Bee, which is a candidate for listing under the California Endangered Species Act ("CESA").⁵² As Mr. Cashen explains, at least some of the ecological features that Crotch Bumble Bee inhabit occur at the Project site.⁵³ Consequently, ground disturbance activities associated with construction of the Project could destroy bumble bee nests, and they would remove floral resources needed for persistence of the bumble bee colony.⁵⁴ Despite these concerns, the DEIR fails to address or mitigate these potentially significant impacts.

In summary, Mr. Cashen's analysis sheds light on the DEIR's failure to support with substantial evidence its conclusions concerning special-status bats and the Crotch Bumble Bee, emphasizing the need for a more comprehensive assessment of these impacts.

2. The DEIR Fails to Identify A Potentially Significant Impact to Wildlife Nursery Sites

In answering whether the project would impede the use of native wildlife nursery sites, the DEIR concludes that "[t]he project site includes partially developed land and does not support native resident or wildlife species."⁵⁵ However, as Mr. Cashen points out,

[T]his statement is inconsistent with the DEIR's determination that the Project could support nesting birds protected under the Migratory Bird Treaty Act, and that it could contain maternity (nursery) roosts of four special-status bat species. Bird nests and bat roosts qualify as wildlife nursery sites. The permanent loss

⁵¹ *Id.*

⁵² Cashen Comments, pg. 9.

⁵³ Cashen Comments, pg. 11.

⁵⁴ *Id.*

⁵⁵ DEIR, p. 111.

C-3.22
Cont. of these nursery (nest or roost) sites due to Project construction is a potentially significant impact that is not mitigated by the mitigation measures incorporated in the DEIR. In addition, the severity of the impact has not been disclosed to the public because no surveys were conducted to identify the bird and bat species that are using the Project area as a nursery site. As a result, the Project's permanent impacts to wildlife nursery sites are not mitigated and remain potentially significant.⁵⁶

C-3.23 Because the DEIR fails to adequately identify and address the presence of wildlife nursery sites, the DEIR's conclusion that impacts to wildlife nursery sites are less than significant are unsupported.

3. The DEIR's Conclusions Regarding Impacts On Coyote Creek and Its Associated Riparian Habitat are Unsupported

C-3.24 The Project proposes a domestic well that would pump groundwater supply directly for the Project.⁵⁷ Coyote Creek, a river adjacent to the Project, has been designated as critical habitat for the steelhead Central California Coast Evolutionary Significant Unit (ESU).⁵⁸ Additionally, Coyote Creek's riparian corridor is a sensitive natural community⁵⁹ and includes wetlands.⁶⁰ In their comments on the Notice of Preparation (NOP) of the DEIR, the California Department of Fish & Wildlife ("CDFW") commented that the Project's well operation could result in diversion of water from Coyote Creek, thereby potentially adversely affecting surface or subsurface flow or riparian resources in Coyote Creek.⁶¹ CDFW highlighted the need for the Project to conduct a hydrological analysis to evaluate impacts of the well on Coyote Creek and its surrounding habitat, with a written report of results.⁶² However, the DEIR failed to do so. The DEIR concludes that the well will have a less than significant impact on riparian

⁵⁶ Cashen Comments, pg. 11.

⁵⁷ DEIR, pg. 19.

⁵⁸ Appendix D: Biological Resource Analysis, pg. 14.

⁵⁹ Appendix D: Biological Resource Analysis, pg. 16 ("riparian habitat is generally identified as a sensitive natural community by [the California Department of Fish & Wildlife]").

⁶⁰ See National Wetlands Inventory Wetlands Mapper, classifying 10.5 acres of land along Coyote Creek as wetlands, with the code "R3UBH", available at:

<https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>.

⁶¹ Shannon Hill, California Department of Fish and Wildlife ("CDFW"), "Re: 0 Seely Avenue Mixed-Use Project, Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2022020565, City of San José, Santa Clara County" (April 4, 2022) pg. 8, available in Appendix A: NOP Comments ["CDFW NOP Comments"].

⁶² CDFW NOP Comments, pg. 8.

habitat⁶³ and no impact on the surface/subsurface flow of Coyote Creek.⁶⁴ No study was done to confirm these conclusions and, as demonstrated below, the DEIR fails to provide any substantial evidence supporting these conclusions. Accordingly, the DEIR's conclusions that the impacts on Coyote Creek will be less than significant are unsupported.

a. Impacts on Coyote Creek Surface and Subsurface Flow

The DEIR concludes there would be a less than significant impact on state or federally protected wetlands in part because the well will not draw water nor have any impact on surface or subsurface flow in and from Coyote Creek.⁶⁵ This conclusion is unsupported because no hydrology analysis was completed for the Project. In support for this statement, the DEIR merely states a general directive to “see Section 3.10.” However, nothing in Section 3.10 addresses the impact of the well or Project generally on the surface or subsurface flow of Coyote Creek. The only time Coyote Creek is mentioned in Section 3.10 is when the DEIR addresses the flood runoff potential to Coyote Creek.⁶⁶

C-3.24
Cont. Further, the DEIR states that the discussion in Section 3.10 “is based in part on a water quality assessment prepared by Luhdorff and Scalmanini Consulting Engineers dated March 2022. This report is provided in Appendix M.”⁶⁷ This is unfounded. The only study from Luhdorff and Scalmanini Consulting is the Water Supply Assessment, Appendix Q, dated August 2023. Further, Appendix M is the Phase II ESA. The DEIR's appendices do not include a March 2022 water quality assessment. Because the City did not provide access to the March 2022 Luhdorff and Scalmanini study, the DEIR's conclusions with respect to the well's impact on Coyote Creek remain unsupported.

Similarly, the BRA states, “Luhdorff and Scalmanini Consulting Engineers prepared a Water Supply Assessment for the Project and concluded that the installation and use of the proposed well would not draw water from or have any impact on surface or subsurface flow in/from Coyote Creek.”⁶⁸ However, nowhere in

⁶³ DEIR, pg. 110-11.

⁶⁴ DEIR, pg. 111.

⁶⁵ DEIR, pg. 111.

⁶⁶ See DEIR, pg. 180 (“The project site is adjacent to Coyote Creek. Although the creek is bordered by an engineered levee, runoff could flow into the Creek, degrading water quality.”) & pg. 182 (discussing whether the Project would impede or redirect flood flows).

⁶⁷ DEIR, pg. 172.

⁶⁸ Appendix D: Biological Resource Analysis, pg. 16.

C-3.24
Cont. the Water Supply Assessment is this issue discussed. The Water Supply Assessment simply demonstrates the projected Project demand and supply from the proposed well.⁶⁹ Indeed, the purpose of the Water Supply Assessment as a whole is to “assess whether the total projected water supplies available for a project . . . will meet the projected water demand associated with the proposed project.”⁷⁰ The Assessment does not have any analysis regarding the impacts of the well on the nearby Coyote Creek and therefore no support for the conclusion that the proposed well would not have significant impact. The DEIR lacks any support for its conclusions regarding the Project’s groundwater well’s surface and subsurface flow impacts. This lack of analysis and disclosure directly contravenes CEQA’s fundamental purpose of disclosure and transparency.

The DEIR should be revised to adequately analyze and assess how the well will impact Coyote Creek and related riparian habitat.

b. Impacts on Coyote Creek Riparian Habitat

C-3.25 The DEIR concludes the Project would have a less than significant impact on riparian habitat.⁷¹ The conclusion is unsupported for several reasons. First, like with the conclusions regarding Coyote Creek’s surface and subsurface flow, no hydrology study was done to determine the scope of impacts on Coyote Creek’s riparian habitat.

C-3.26 Second, the DEIR concludes that compliance with the City’s Riparian Corridor Protection and Bird-Safe Design Policy would ensure a less than significant impact.⁷² However, as demonstrated by Mr. Cashen’s comments, these measures will not be sufficient because the Project does not actually comply with these policies.⁷³ Most notably, the Project fails to comply with the policies’ 100-foot riparian setback requirement.⁷⁴ As Mr. Cashen demonstrates, considerably more of the Project would lie within the 100-foot setback if the setback is properly measured in accordance with the terms of the Riparian Corridor Protection and Bird-Safe Design Policy.⁷⁵ Mr. Cashen explains, “This is important because a setback (buffer) of *at least* 100 feet is needed to protect water quality, riparian biotic communities,

⁶⁹ See Appendix Q: Water Supply Assessment, pg. 14.

⁷⁰ Appendix Q: Water Supply Assessment, pg. 1.

⁷¹ DEIR, pp.110-11.

⁷² DEIR, pg. 111.

⁷³ See Cashen Comments, pp. 13-16.

⁷⁴ Cashen Comments, pp. 2-6.

⁷⁵ *Id.*

and habitat values of riparian corridors—larger buffers are needed in areas with steep slopes or high intensity land uses.”⁷⁶

Third, the DEIR claims that “project plans would include measures to reduce impacts to the riparian corridor from on-site structures and site occupation, including avoidance of bright colors and glossy and/or glare producing building finishes on structures facing the riparian corridor and directing low-intensity exterior lighting downward and away from the riparian corridor to the greatest extent feasible.”⁷⁷ However, these measures are ineffective in reducing impacts to the corridor, as demonstrated by Mr. Cashen’s analysis.⁷⁸ Namely, these measures do not eliminate significant impacts associated with ecological light pollution and do not address indoor lighting pollution and vehicle-generated light pollution.⁷⁹ Further, the DEIR “does [not] analyze how lighting would affect wildlife movement in areas where it is not feasible to direct lighting away from the riparian corridor.”⁸⁰

Because no hydrology study was done and because the measures delineated do not mitigate any potential impact, the City has failed to adequately support its conclusion. A revised and recirculated DEIR is necessary to fully disclose, analyze and mitigate impacts of the Project’s potentially significant impacts to Coyote Creek and associated riparian habitat.

4. The DEIR’s Proposed Mitigation Measures are Insufficient to Reduce Biological Resource Impacts

Mr. Cashen’s analysis reveals that the DEIR’s proposed mitigation measures, Mitigation Measure (“MM”) BIO-1 and MM BIO-2, fail to adequately address the Project’s potential impacts on nesting birds and bats.

First, MM BIO-1, which calls for avoiding construction during nesting season, is incapable of implementation because construction would begin in June 2024 (i.e., during the avian nesting season) and would occur continuously through October 2028 (i.e., during four additional nesting seasons).⁸¹ Further, MM BIO-1 fails to establish standards for nest searching techniques, minimum survey effort, and qualifications of surveyors, rendering it incapable of ensuring the identification and

⁷⁶ Cashen Comments, pg. 3.

⁷⁷ DEIR, pg. 111.

⁷⁸ Cashen Comments, pp. 11-13.

⁷⁹ *Id.*

⁸⁰ Cashen Comments, pg. 17.

⁸¹ DEIR, Table 2-4.

C-3.26
Cont.

C-3.27

C-3.27
Cont. protection of all nests.⁸² Additionally, MM BIO-1’s proposed buffer sizes for active nests are smaller than those specified by the City’s consultants in the BRA and for other development projects in San Jose, as well as CDFW guidance.⁸³ Accordingly, the DEIR lacks evidence to support that MM BIO-1 will reduce impacts to a less than significant level.

C-3.28 Second, MM BIO-2, which addresses bats, does not require implementation of the techniques necessary to locate bats that roost in concealed locations.⁸⁴ It also fails to identify when the site surveys would be conducted in relation to construction activities or how the surveys should be conducted. As a result, the mitigation measure is too vague to ensure impacts to bat roosts are avoided.⁸⁵ Further, MM BIO-2 doesn’t implement the proper technique to minimize impacts to tree-roosting bats. As Mr. Cashen explains, “minimizing impacts to tree-roosting bats requires ‘soft-felling,’ whereby all potential bat roost features in trees are felled in one piece and carefully lowered to the ground by rope, then left in-situ on the ground for at least 24 hours before being removed.”⁸⁶ Because MM BIO-2 fails to do so, the mitigation measure is inadequate and the Project’s impacts on special-status bats remain potentially significant.

C-3.29 The DEIR concludes that both mitigation measures would reduce the impacts on the species’ habitats. However, neither mitigation measure addresses the Project’s permanent impacts on habitat (i.e., habitat loss). As Mr. Cashen points out, habitat loss is the primary threat to most bird and bat populations.⁸⁷ “Indeed, because habitat loss has a permanent (negative) effect on population recruitment, the Project’s permanent impacts to habitat are much more significant than its impacts to bird nests or bat roosts during an individual reproductive cycle.”⁸⁸ Therefore, it is imperative that the mitigation measures properly address the Project’s permanent destruction of bird and bat habitat, an impact that the DEIR is

⁸² Cashen Comments, pp. 17-18.

⁸³ Cashen Comments, pp. 18-19.

⁸⁴ Cashen Comments, pg. 19.

⁸⁵ *Id.*

⁸⁶ Cashen Comments, pg. 20.

⁸⁷ Cashen Comments, pg. 21.

⁸⁸ *Id.*

C-3.29
Cont. required to evaluate and mitigate.⁸⁹ For this reason, Project impacts to habitat for special-status bat species and migratory birds remain potentially significant.

B. The DEIR Fails to Adequately Disclose, Analyze And Mitigate The Project's Transportation Impacts

The DEIR's transportation impacts analysis fails to accurately describe and address the Project's impacts, most notably with respect to the Project's vehicle miles traveled ("VMT") impacts.

1. The DEIR's Transportation Analysis Fails to Analyze or Disclose the Project's True Significant and Unmitigated VMT Levels

C-3.30 As explained in detail in transportation expert Norman Marshall's comments, the DEIR's VMT analysis contains a crucial flaw that led to an underestimation of the Project's significant impacts.

The DEIR acknowledges that the project would lead to a significant VMT impact, with projected VMT per capita exceeding the city's established threshold.⁹⁰ To mitigate this impact, the DEIR proposes MM TR-1.1, which would implement a series of mitigation measures, with the most significant reduction attributed to the "Voluntary Travel Behavior Change Program."⁹¹

However, Mr. Marshall highlights why the DEIR overestimates the efficacy of this mitigation strategy. Particularly, he explains the flaw in assuming 100% participation in the Voluntary Travel Behavior Change Program. First, Mr. Marshall highlights that the Voluntary Travel Behavior Change Program's travel diary requirement⁹² will decrease participation due to the burdensome nature of travel diaries.⁹³ Mr. Marshall emphasizes how uncommon such a requirement is, stating that he has been unable to find any recent voluntary travel reduction programs with travel diaries documented anywhere in the United States.⁹⁴ Second,

⁸⁹ See DEIR, pg. 107 (answering whether the Project would have a "substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species ...")

⁹⁰ DEIR, pg. 241.

⁹¹ DEIR, pp. 241-242.

⁹² See DEIR, pg. 242 ("Voluntary Travel Behavior Change programs include mass communication campaigns and travel feedback programs, such as travel diaries or feedback on calories burned from alternative modes of travel." (emphasis added)).

⁹³ Marshall Comments, pg. 3.

⁹⁴ *Id.*

Mr. Marshall points out that simply providing information to residents or employers will not yield the projected 4% reduction in VMT as assumed in the DEIR.⁹⁵ Instead, “A more realistic participation rate is 10%, with the VMT reduction reduced proportionally to 0.4% as shown in Figure 12. **The resulting VMT per capita with all six measures would be 10.71, i.e., 5.8% higher than the City’s threshold of 10.12.**”⁹⁶

In light of these findings, the DEIR lacks substantial evidence supporting the conclusion that the proposed mitigation measures will mitigate the Project’s VMT impacts to less than significant levels. The analysis provided by Mr. Marshall calls into question the accuracy of the projected reductions and highlights the need for a more realistic and comprehensive analysis that addresses the significant VMT impact associated with the Project. Indeed, if the analysis was done accurately, the DEIR would have identified a significant VMT impact. Therefore, the DEIR should be revised to accurately disclose the Project’s VMT, and to include all feasible mitigation.

2. The DEIR Fails to Adequately Analyze and Address the Project’s Traffic Hazards

The DEIR concludes that the Project would not substantially increase hazards due to a geometric design feature (such as dangerous intersections).⁹⁷ However, as demonstrated by Mr. Marshall, the Project will indeed result in hazards due to a dangerous intersection.⁹⁸ As Mr. Marshall explains, “With the proposed project and DEIR intersection design, the DEIR estimates that queues would extend into the upstream intersection during the AM peak hour . . . The Project therefore will result in traffic blockages.”⁹⁹ Therefore, it is imperative that the DEIR analyze, disclose and mitigate the risks made evident in the DEIR’s own traffic analysis.

C. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project’s Noise Impacts

Noise and vibration expert Neil Shaw’s analysis shows that the DEIR inadequately addresses the Project's noise impacts by failing to consider new

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ DEIR, pg. 243.

⁹⁸ Marshall Comments, pp. 5-8.

⁹⁹ Marshall Comments, pg.8.

sensitive receptors introduced by the Project, proposing insufficient mitigation measures, underestimating construction noise levels, and failing to provide a quantitative significance threshold. Accordingly, the DEIR must be revised and recirculated to fully analyze and mitigate the Project's noise impacts.

1. The DEIR Fails to Account for Noise Impacts on New Sensitive Receptors as a Result of the Project

According to the DEIR's Project Phasing timeline, residents will move into some of the completed buildings while the other buildings are still being constructed.¹⁰⁰ For example, occupancy for the Townhomes begins in January 2026, but all other buildings will still be under construction until October 2026, 2027, and 2028.¹⁰¹ Therefore, the Project will be introducing new sensitive receptors—the new residents living in direct proximity to all other Project construction. However, the DEIR did not account for these new sensitive receptors; instead, the DEIR's noise analysis only identified sensitive receptors *near* the Project site, not within it.¹⁰² But as Mr. Shaw explains, “the Project can have a significant impact on these new residents as construction will be ongoing and . . . the construction noise levels will be significant and insufficiently mitigated.”¹⁰³ Therefore, the DEIR must analyze how ongoing construction noise levels will impact the sensitive receptors introduced as part of the Project. The failure to do so is a violation of CEQA and requires that the DEIR be revised and recirculated.

2. The Proposed Mitigation Measure is Insufficient to Mitigate Significant Noise Impacts

The DEIR concludes that because construction could last longer than 12 months and would require work on Saturday, the Project would result in a potentially significant temporary construction noise impact.¹⁰⁴ To reduce the potentially significant construction impact to less than significant, the DEIR includes MM NSE-1.¹⁰⁵ However, as detailed by Mr. Shaw, MM NSE-1 is not

¹⁰⁰ See Table 2-4, Project Phasing, DEIR, pg. 35.

¹⁰¹ *Id.*; see also Shaw Comments, Attachment A, pg. 9 (visual demonstration of the construction periods)

¹⁰² See Appendix O: Noise and Vibration Study, pg. 26 (“The nearest sensitive receptors to the project site are the residents of the existing apartment building about 60 feet northwest of the project site, as well as workers and customers at the existing commercial/office buildings located about 150 feet to the west of the site.”); see also Shaw Comments, pg. 2.

¹⁰³ Shaw Comments, pg. 2.

¹⁰⁴ DEIR, pg. 203.

¹⁰⁵ DEIR, pg. 203.

C-3.32
Cont.

C-3.33

sufficient to adequately mitigate the noise impact. Further, the calculated construction noise impact is understated; without an accurate understanding of the construction noise, the effectiveness of MM NSE-1 is further diminished.

a. Mitigation Measure NSE-1 Is Insufficient

The proposed mitigation measure outlined in the DEIR is insufficient to address the significant construction noise impacts anticipated by the project. MM NSE-1 proposes a Construction Noise Logistics Plan, which would include construction of solid 8-foot plywood fences or similar barriers along the northwest boundary of the site adjacent to existing adjacent residences to shield them from ground-level construction equipment and activities.¹⁰⁶ The DEIR claims the 8-foot noise barrier would result in a 5 dBA noise reduction.¹⁰⁷ However, as demonstrated by Mr. Shaw, this measure is not adequate to reduce the noise levels to less than significant levels.

Specifically, the purported 5 dBA noise reduction may only be achieved when the barrier effectively blocks the line of sight between the noise source and the receiver.¹⁰⁸ However, certain sources have their acoustic source higher than the barrier height, rendering it ineffective for sensitive receivers located above the barrier height, such as the upper floors of existing sensitive receivers or the upper floors of the Townhomes, Building A, and Building B, for which no fence is proposed.¹⁰⁹ Additionally, barrier effectiveness is contingent upon noise frequency, with barriers being more effective for higher frequency noises and less effective for low-frequency noises such as engine and exhaust noise.¹¹⁰ Therefore, the reduction anticipated from the noise barriers included in the Construction Noise Logistics Plan is inaccurate and inadequate.

Further, despite the Construction Noise Logistics Plan calling for other noise-reducing components beyond the 8-foot barriers, these measures fail to compensate for the lack of effectiveness of the barriers.¹¹¹ Consequently, the proposed mitigation measures are inadequate to adequately mitigate the significant construction noise impacts associated with the project.

¹⁰⁶ DEIR, pg. 204.

¹⁰⁷ *Id.*

¹⁰⁸ Shaw Comments, pg. 4.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

C-3.33
Cont.

b. The DEIR Underestimates Construction Noise Levels, Further Undermining the Proposed Mitigation Measures

As highlighted by Mr. Shaw, the construction noise levels identified in the DEIR are underestimated due to a crucial oversight in the calculations. Mr. Shaw points out that the Noise Analysis only considers the noise generated by the two loudest pieces of construction equipment, disregarding the higher quantity of equipment actually anticipated to be used during project construction.¹¹² As Mr. Shaw explains:

*A project of this scope will have more than just two noisy pieces of equipment in use at one time; the Tables themselves show this. For example, as shown in Table 10, the Site Preparation phase will use a total of 13 pieces of equipment, and in Table 11, the Paving phase will use 5 pieces of equipment. The noise levels presented are therefore underestimated.*¹¹³

In summary, as elucidated by Mr. Shaw, the construction noise levels presented in the DEIR are underestimated due to the omission of multiple pieces of equipment from the noise calculation, resulting in a failure to accurately assess the true impact of noise impacts. This oversight undermines the effectiveness of the proposed mitigation measure and underscores the need for a more comprehensive evaluation and response to mitigate the adverse effects of the Project's construction noise.

3. The DEIR Fails to Identify Construction Noise Level Significance Thresholds

In evaluating the Project's construction noise levels, the DEIR fails to identify any noise thresholds against which it purports to measure the Project's impacts. In answering whether the Project would "result in generation of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies"¹¹⁴ the DEIR notes that "[t]he City does not currently have an established quantitative noise standard for construction noise."¹¹⁵ However, the threshold question allows standards from other

¹¹² Shaw Comments, pg. 3.

¹¹³ *Id.* (emphasis added).

¹¹⁴ DEIR, pg. 199 (emphasis added).

¹¹⁵ DEIR, pg. 203.

C-3.33
Cont.

C-3.34

agencies. Indeed, the City’s Noise and Vibration Study (Appendix O) relied on noise limits established by the Federal Transit Administration (FTA).¹¹⁶ But the DEIR failed to do the same. As explained by Mr. Shaw:

Notably, while the Appendix proposes this as a threshold, the DEIR does not mention these numeric FTA thresholds. However, Table 10 and 11 of the Appendix show that the construction will exceed these thresholds. As summarized by the Appendix, “Construction noise levels would exceed the exterior threshold of 80 dBA Leq at residential land uses to the west when activities occur within about 90 feet.” (page 41). Because these thresholds were not included in the DEIR, the DEIR fails to identify this significant impact.¹¹⁷

The DEIR’s failure to include any quantitative threshold is a blatant violation of CEQA. CEQA requires agencies to conduct noise analyses for projects that consider both the absolute noise levels expected, and the degree to which noise levels are expected to increase. Here, the DEIR does neither.

In *King & Gardiner Farms, LLC v. County of Kern*, the Court of Appeal held that an agency cannot simply rely on compliance with local noise regulations to conclude there will be no significant noise impacts without considering the impacts of increases in noise.¹¹⁸ The County approved an EIR for proposed zoning amendments to streamline oil and gas permitting.¹¹⁹ The EIR included an analysis of noise impacts that determined significance based solely on whether the 65 decibel day-night average (“dBA DNL”) threshold in the County General Plan would be exceeded.¹²⁰ The Court of Appeal reasoned that the County General Plan did not conclude that all increases in the magnitude of noise are insignificant until the 65 dBA DNL threshold is exceeded, so the General Plan “does not constitute substantial evidence that the magnitude of an increase in ambient noise is irrelevant.”¹²¹ Rather, an EIR’s noise analysis should consider both the increase in noise level and the absolute noise level associated with a project in determining the significance of the project’s noise impacts.¹²² The Court of Appeal concluded that an agency cannot exclusively rely on “a single cumulative DNL metric for determining

¹¹⁶ Appendix O: Noise and Vibration Study, pg. 36.

¹¹⁷ Shaw Comments, pp. 2-3.

¹¹⁸ *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894.

¹¹⁹ *Id.* at 829.

¹²⁰ *Id.* at 830, 889.

¹²¹ *Id.* at 894.

¹²² *Id.*

C-3.34
Cont.

the significance of the project's noise impacts” while deciding “the magnitude of the increase in ambient noise is irrelevant.”¹²³

In *Berkeley Jets*, the Court of Appeal invalidated the Port of Oakland’s EIR for expansion of the Oakland Airport because of its reliance on an improper noise standard.¹²⁴ The EIR evaluated the significance of noise impacts based on whether the estimated level of sound would exceed 65 dB Community Noise Equivalent Level (“CNEL”).¹²⁵ However, as the Court of Appeal explained, the CNEL metric—which averages noise over the course of a day—could not be the sole indicator of significant effects from noise because it does not provide a meaningful analysis of the “degree single overflights will create noise levels over and above the existing ambient noise level at a given location, and the community reaction to aircraft noise, including sleep disturbance.”¹²⁶ Therefore, the Court concluded, a revised EIR with additional study of noise impacts from flights was necessary.¹²⁷

C-3.34
Cont.

Here, the DEIR lacks any quantitative noise thresholds—either absolute or ambient-based—against which the Project’s construction noise impacts can be evaluated. The City ignores the suggestion by its own noise consultants that it utilize the noise limits established by the FTA. This omission is especially glaring since the DEIR’s analysis shows that construction noise levels would exceed those thresholds. The City must revise the DEIR to address compliance with absolute noise limits, such as those set by the FTA, and include an evaluation of the impact of increased noise levels attributable to Project construction and operations.

D. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project’s Public Services Impacts

C-3.35

Under the DEIR’s analysis of Public Services impacts, in answering whether the project would result in substantial adverse physical impacts associated with the need for new or physically altered governmental facilities in order to maintain acceptable service ratios, response times or other performance objectives for Parks, the DEIR states:

¹²³ *Id.*

¹²⁴ *Berkeley Jets*, 91 Cal.App.4th at 1381–1382.

¹²⁵ *Id.* at 1373.

¹²⁶ *Id.* at 1381–1382.

¹²⁷ *Id.* at 1382.

*The project will add more residents, which may increase demand on local parks. However, the project includes a new 2.5-acre City-owned public park on the project site. The City's [Parkland Dedication Ordinance] and [Park Impact Ordinance] require residential developers to dedicate public park land or pay in-lieu fees (or both) to compensate for the increase in demand for neighborhood parks. The amount of proposed development represents a small fraction of the total growth identified in the 2040 General Plan. However, because the project would add more residents that would utilize park services, the applicant is required to comply with the PDO/PIO. The project, by itself, would not require the construction of new or expanded parks, resulting in less than significant impact. Less Than Significant Impact.*¹²⁸

C-3.35
Cont.

The DEIR incorrectly asserts that the Project's proposed 2.5-acre park is sufficient so as to not require any more construction of parkland or trigger any other parkland obligations. To the contrary, since the Project will be proposing parkland less than what the City itself has deemed necessary to meet demand, it is likely to cause a significant impact.

The City's Parkland Dedication Ordinance ("PDO")¹²⁹ and Park Impact Ordinance ("PIO")¹³⁰ require new residential housing construction projects to address the impact residents will have on existing park facilities and provide new facilities to future residents.¹³¹ This is referred to as a "parkland obligation." The parkland obligation is calculated by using the estimated occupancy per housing unit (based on U.S. Census housing types/data), the number of new units, and the obligation to dedicate three acres of land for every 1,000 new residents.¹³² Accordingly, the amount of land to be dedicated shall be determined pursuant to the following formula: Minimum acreage dedication = .003 acres × Number of dwelling units × Average number of persons per dwelling unit.¹³³ Residential projects can comply with this obligation through land dedication, paying an in-lieu fee,

¹²⁸ DEIR, pp. 222-223 (emphasis added).

¹²⁹ San Jose Municipal Code ("SJMC"), chapter 19.38.

¹³⁰ SJMC, chapter 14.25

¹³¹ City of San Jose, Developers Page, Parkland Obligation, available at:

<https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/in-the-works/developers-page#obl> ["San Jose Developers Page"].

¹³² *Id.*; see also SJMC § 14.25.300.

¹³³ SJMC § 19.38.310.

developing parkland, improving existing recreational facilities, or a combination of these methods.¹³⁴

As the DEIR states that the Project will have an average of 2.91 persons per household, the parkland obligation would be calculated as: $.003 \times 1472 \times 2.91 = 12.85$ acres. **But the Project is only proposing to construct 2.5 acres of parkland, less than 20% of what is required under the PIO/PDO.**¹³⁵ Thus, the Project is inconsistent with the required parkland obligation set by the City.

There is also no discussion as to whether the Applicant plans to take advantage of credits that may reduce the parkland obligation. Projects with deed restricted residential units that meet the City's affordable housing guidelines qualify for a 50% credit towards park impact fees.¹³⁶ Additionally, projects can obtain Private Recreation Credits to receive up to 50% credit towards the required parkland obligation by providing a variety of public and private residential on-site amenities as part of the project.¹³⁷ This includes children play lots, picnic areas, hard game courts, turf playing fields, publicly accessible plazas and gardens, pet yards, swimming pools, community and recreational rooms—all with specific design guidelines.¹³⁸

The DEIR provides no discussion as to whether its recreational facilities will meet these guidelines such that it can qualify for a Private Recreation Credit. Additionally, as described below in Section VI, the Project does not comply with the City's affordable housing guidelines and therefore cannot qualify for the 50% credit from providing affordable housing. Consequently, the DEIR's conclusion that the Project, by itself, would not require the construction of new or expanded parks,

¹³⁴ See <https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/in-the-works/fees-that-support-parkland-development> & <https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/general-information/policies-reports/developers>.

¹³⁵ DEIR, pg. xii.

¹³⁶ San Jose City Council Resolution No. 75540, available at: <https://records.sanjoseca.gov/Resolutions/RES75540.PDF>; San Jose City Council Resolution No. 79369, available at: <https://records.sanjoseca.gov/Resolutions/RES79369.pdf>; San Jose City Council Resolution No. 79913, available at: <https://records.sanjoseca.gov/Resolutions/RES79913.pdf>

¹³⁷ San Jose Developers page, *supra* n. 131.

¹³⁸ San Jose City Council Resolution No. 73587, available at: <https://records.sanjoseca.gov/Resolutions/RES73587.PDF> ; See Design Guidelines here: <https://www.sanjoseca.gov/home/showpublisheddocument/88757/637965184122970000>

C-3.35
Cont.

C-3.35
Cont.

resulting in less than significant impact, is unsupported by any analysis or evidence.

Based on the information set forth in the DEIR, the Project clearly does not meet the City's parkland requirements and the conclusion of no significant impact is completely without support. The DEIR should be revised to adequately disclose, analyze and mitigate the impact on local parks.

VI. THE PROJECT FAILS TO COMPLY WITH THE CITY'S AFFORDABLE HOUSING ORDINANCE

The City has a city-wide inclusionary housing ordinance ("IHO") that sets a series of requirements for affordable housing in San Jose.¹³⁹ As the project proposes more than 10 dwelling units, the Project is subject to the IHO.¹⁴⁰ Indeed, one of the Project's stated objectives is to "[d]eliver affordable housing consistent with the goals set forth in the City's recently amended Inclusionary Housing Ordinance."¹⁴¹ However, as demonstrated below, the Project fails to demonstrate compliance with the IHO's requirements.

C-3.36

CEQA Guidelines section 15125(d) requires that an environmental impact report "discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans," which includes regional housing plans.¹⁴² Therefore, the Project's inconsistency with affordable housing goals, objectives, and policies is a violation of CEQA.

A. The Project Does Not Propose A Sufficient Number Of Affordable Housing Units

According to the DEIR, the Project aims to build 178 affordable units out of a total of 1,472 residential units, representing 12 percent of the housing designated as affordable.¹⁴³ This percentage is too low to comply with the IHO, which requires a minimum of **15 percent** of residential units built on-site to be affordable, or pay an in lieu fee.¹⁴⁴ The Project's 12 percent allocation is insufficient, and the DEIR does not describe any plans to take advantage of an in-lieu fee so as to make up for the

¹³⁹ SJMC, chapter 5.08.

¹⁴⁰ *Id.*

¹⁴¹ DEIR, pg. 39.

¹⁴² See also *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal. App. 5th 467, 543.

¹⁴³ Table 2-1, DEIR, pg. 16.

¹⁴⁴ SJMC § 5.08.400.

C-3.36 | 3% difference. The Project is therefore inconsistent with the IHO and its own stated
Cont. | objective.

B. The Proposed Inclusionary Units Are Not Comparable To The Market Rate Units

C-3.37 | The IHO requires all inclusionary housing units to have a comparable square footage and the same bedroom count and bedroom count ratio as the Market Rate Units.¹⁴⁵ The affordable housing building are proposed to consist of Studio, 1-bedroom, and 2-bedroom units, while all the Market Rate buildings contain Studio, 1-bedroom, 2-bedroom, and 3-bedroom units.¹⁴⁶ Consequently, the bedroom count and ratio between the two types of units are inherently mismatched. Furthermore, the DEIR lacks detailed information on the individual square footage of the units and whether they would be comparable to the market rate units.

C. The DEIR Does Not Describe How The Project Will Comply The IHO's Partnership For Clustered Units Requirements

C-3.38 | The IHO, through its "Partnership for Clustered Units" requirement, allows construction of clustered rental affordable housing on the site of the Residential Development in lieu of constructing the affordable units *within* the Residential Development, so long as the project meets certain conditions.¹⁴⁷ Because the Project is not proposing affordable housing within the residential buildings but rather is constructing a distinct affordable housing building, the Project must comply with the Partnership for Clustered Units requirements. The IHO delineates specific criteria concerning location/proximity, financing, percentage of inclusionary Units and affordability, among others, for this type of inclusionary housing plan.¹⁴⁸ The DEIR fails to lay out these policies in its Regulatory Background and analyze whether the Project will comply with these key requirements. The DEIR must be revised to discuss and analyze its compliance with the IHO.

¹⁴⁵ SJMC § 5.08.470(F).

¹⁴⁶ Table 2-3, DEIR, pg. 17-18.

¹⁴⁷ SJMC § 5.08.590. The clustered Inclusionary Units must comply with the standards established by SJMC § 5.08.470, with the same percentages and levels of affordability as required by the IHO for on-site rental units.

¹⁴⁸ SJMC § 5.08.590

VII. THE CITY CANNOT MAKE THE REQUISITE FINDINGS TO APPROVE THE PROJECT

C-3.39 The Project requires that the City issue discretionary approvals, including a Vesting Tentative Subdivision Map and a Planned Development Permit.¹⁴⁹ Under SJMC section 19.13.010, the Vesting Tentative Map must be consistent with the General Plan.¹⁵⁰ Similarly, the Planned Development Permit requires that the City make certain findings, including that the permit as issued complies with all applicable General Plan policies.¹⁵¹ The City must also find that “[t]he environmental impacts of the project, including, but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, *even if insignificant for purposes of the California Environmental Quality Act (CEQA)*, will not have an unacceptable negative effect on adjacent property or properties.”¹⁵²

As an initial matter, the City may not make the required finding for the Planned Development Permit that the Project will not result in unacceptable negative environmental impacts. As demonstrated above, the DEIR fails to disclose, analyze or effectively mitigate the Project’s potentially significant impacts on transportation, noise, and biological resources. Accordingly, the Project will have an unacceptable negative effect on adjacent property, since even “insignificant” impacts under CEQA can be deemed so.

C-3.40 These impacts also create inconsistencies with the General Plan policies which the DEIR fails to disclose and mitigate. The Project’s inadequate affordable housing also results in inconsistency with the General Plan. Specifically, our analysis of the DEIR reflected in these comments show that the Project fails to comply with several key goals and policies in the Envision San José 2040 General Plan,¹⁵³ including the following.

Transportation

TR-1.1	Accommodate and encourage use of non-automobile transportation modes to achieve San José’s mobility goals and reduce vehicle trip generation and vehicle miles traveled (VMT)
--------	---

¹⁴⁹ DEIR, pg. 39.

¹⁵⁰ SJMC § 19.13.010.

¹⁵¹ SJMC § 20.100.940 (A)(1).

¹⁵² SJMC § 20.100.940 (A)(5) (emphasis added).

¹⁵³ Available at:

<https://www.sanjoseca.gov/home/showpublisheddocument/22359/637928744399330000>

C-3.40
Cont.

TR-1.2	Consider impacts on overall mobility and all travel modes when evaluating transportation impacts of new developments or infrastructure projects
TR-1.4	Through the entitlement process for new development, projects shall be required to fund or construct needed transportation improvements for all transportation modes giving first consideration to improvement of bicycling, walking and transit facilities and services that encourage reduced vehicle travel demand. . . Development proposals shall be reviewed for their impacts on all transportation modes through the study of Vehicle Miles Traveled (VMT), Envision San José 2040 General Plan policies, and other measures enumerated in the City Council Transportation Analysis Policy and its Local Transportation Analysis. Projects shall fund or construct proportional fair share mitigations and improvements to address their impacts on the transportation systems
TR-5.3	Development projects' effects on the transportation network will be evaluated during the entitlement process and will be required to fund or construct improvements in proportion to their impacts on the transportation system. Improvements will prioritize multimodal improvements that reduce VMT over automobile network improvements
TR-9.1	Enhance, expand and maintain facilities for walking and bicycling to provide neighborhoods with safe and direct access to transit and key destinations, a particularly to provide neighborhoods with safe and direct access to transit and key destinations, a complete alternative transportation network that facilitates non-automobile trips, and enjoyable outdoor open space.
TR-9.2	Serve as a model city for VMT reduction by implementing programs and policies that reduce VMT for City of San José employees
TR-9.3	Enhance the overall travel experience of transit riders, pedestrians, bicyclists, and shared micromobility users to encourage mode shift.

The DEIR's inadequate disclosure and analysis of the Project's transportation impacts directly conflict with the General Plan policies. For example, policies such as TR-1.1, TR-1.4, TR-5.3, and TR-9.2 underscore the City's commitment to reducing VMT, a goal undermined by the DEIR's flawed VMT analysis and proposed insufficient mitigation measures highlighted by Mr. Marshall's analysis. By failing to accurately assess and address the significant VMT impact and traffic hazards associated with the Project, the DEIR falls short of meeting these critical General Plan policies, undermining the city's efforts to reduce VMT and promote sustainable transportation and mobility.

Biological Resources

C-3.41

Goal ER-2	Preserve, protect, and restore the City's riparian resources in an environmentally responsible manner to protect them for habitat value and recreational purposes.
ER-2.1	Ensure that new public and private development adjacent to riparian corridors in San José are consistent with the provisions of the City's Riparian Corridor Policy Study and any adopted Santa Clara Valley Habitat Conservation Plan/ Natural Communities Conservation Plan (HCP/NCCP).
ER-2.2	Ensure that a 100-foot setback from riparian habitat is the standard to be achieved in all but a limited number of instances, only where no significant environmental impacts would occur
ER-2.3	Design new development to protect adjacent riparian corridors from encroachment of lighting, exotic landscaping, noise and toxic substances into the riparian zone.
ER-2.4	When disturbances to riparian corridors cannot be avoided, implement appropriate measures to restore, and/or mitigate damage and allow for fish passage during construction.
ER-2.5	Restore riparian habitat through native plant restoration and removal of nonnative/invasive plants along riparian corridors and adjacent areas.
ER-4.1	Preserve and restore, to the greatest extent feasible, habitat areas that support special-status species. Avoid development in such habitats unless no feasible alternatives exist and mitigation is provided of equivalent value.
ER-4.4	Require that development projects incorporate mitigation measures to avoid and minimize impacts to individuals of special-status species
ER-5.2	Require that development projects incorporate measures to avoid impacts to nesting migratory birds.

The DEIR's deficient analysis and mitigation strategies concerning the Project's biological resources impacts directly contradict several critical General Plan policies aimed at preserving and protecting San Jose's natural habitats and wildlife. For example, the General Plan includes a general goal aimed at the preservation of riparian resources (Goal ER-2) that includes several policies that underscore the importance of maintaining and restoring ecological balance in riparian corridors (such as ER-2.1, ER-2.2, ER-2.3, and ER-2.4). However, the DEIR's minimal analysis and mitigation of the impacts of the Project on the nearby riparian corridor fail to comply with these policies. Notably, as Mr. Cashen pointed

out, the Project fails to comply with the 100-foot riparian setback, thereby directly contravening Policy ER-2.2.

Moreover, the DEIR's shortcomings in identifying and mitigating impacts on special-status species and habitats directly conflict with policies aimed at protecting wildlife species and their habitats, such as ER-4.1, which mandates the preservation, to the greatest extent feasible, habitat areas that support special-status species. Furthermore, because the proposed mitigation measures (MM BIO-1 and MM BIO-2) are insufficient, the Project is inconsistent with policies requiring the incorporation of effective measures to mitigate impacts on special-status species and nesting birds (ER-4.4, ER-5.2).

Overall, the DEIR's failure to adequately disclose, analyze, and mitigate the Project's biological resources impacts undermines and violates several key General Plan policies aimed at preserving the City's biodiversity.

Noise

EC-1.1	<p>Locate new development in areas where noise levels are appropriate for the proposed uses. Consider federal, state and City noise standards and guidelines as a part of new development review. Applicable standards and guidelines for land uses in San José include:</p> <p><u>Interior Noise Levels</u></p> <p>The City's standard for interior noise levels in residences, hotels, motels, residential care facilities, and hospitals is 45 dBA DNL. Include appropriate site and building design, building construction and noise attenuation techniques in new development to meet this standard. For sites with exterior noise levels of 60 dBA DNL or more, an acoustical analysis following protocols in the City-adopted California Building Code is required to demonstrate that development projects can meet this standard. The acoustical analysis shall base required noise attenuation techniques on expected Envision General Plan traffic volumes to ensure land use compatibility and General Plan consistency over the life of this plan.</p> <p><u>Exterior Noise Levels</u></p> <p>The City's acceptable exterior noise level objective is 60 dBA DNL or less for residential and most institutional land uses (refer to Table EC-1 in the General Plan. Residential uses are considered "normally acceptable" with exterior noise exposures of up to 60 dBA DNL and "conditionally compatible" where the exterior noise exposure is between 60 and 75 dBA</p>
--------	--

C-3.41
Cont.

C-3.42

C-3.42
Cont.

	DNL such that the specified land use may be permitted only after detailed analysis of the noise reduction requirements and needed noise insulation features are included in the design.
EC-1.2	Minimize the noise impacts of new development on land uses sensitive to increased noise levels (Land Use Categories 1, 2, 3 and 6 in Table EC-1 in the General Plan by limiting noise generation and by requiring use of noise attenuation measures such as acoustical enclosures and sound barriers, where feasible. The City considers significant noise impacts to occur if a project would: Cause the DNL at noise sensitive receptors to increase by five dBA DNL or more where the noise levels would remain “Normally Acceptable”; or 0 Seely Avenue Mixed-Use Project 0 Seely Avenue Mixed-Use Project 195 Draft EIR City of San José January 2024 Cause the DNL at noise sensitive receptors to increase by three dBA DNL or more where noise levels would equal or exceed the “Normally Acceptable” level.
EC-1.6	Regulate the effects of operational noise from existing and new industrial and commercial development on adjacent uses through noise standards in the City’s Municipal Code.
EC-1.7	Require construction operations within San José to use best available noise suppression devices and techniques and limit construction hours near residential uses per the City’s Municipal Code. The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would: Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months. For such large or complex projects, a construction noise logistics plan that specifies hours of construction, noise and vibration minimization measures, posting or notification of construction schedules, and designation of a noise disturbance coordinator who would respond to neighborhood complaints will be required to be in place prior to the start of construction and implemented during construction to reduce noise impacts on neighboring residents and other uses.

The DEIR's failure to adequately address noise impacts from the Project directly contradicts several key General Plan policies aimed at safeguarding against adverse noise effects. Specifically, EC-1.1 mandates the location of new development in areas with appropriate noise levels and requires adherence to noise standards,

C-3.42
Cont.

such as for interior and exterior noise levels. However, as Mr. Shaw's comments explain, the Project will exceed the 45 dBA interior noise limit, and the DEIR fails to include measures that will adequately reduce these levels.¹⁵⁴ Further, as Mr. Shaw highlights, the calculated future exterior noise levels are unsupported, and therefore the DEIR fails to demonstrate that the Project meets the policy's exterior noise limit.¹⁵⁵

Moreover, the proposed mitigation measure, Mitigation Measure NSE-1, fails to adequately reduce noise impacts as required by EC-1.2, which aims to minimize noise impacts on sensitive land uses. In summary, the DEIR's inadequate analysis and mitigation of noise impacts demonstrate a clear inconsistency with the General Plan's policies aimed at protecting against adverse noise impacts.

Affordable Housing

C-3.43

H-2.1	Facilitate the production of extremely low-, very low-, low-, and moderate-income housing by maximizing use of appropriate policies and financial resources at the federal, state, and local levels; and various other programs.
-------	--

The Project's failure to comply with the City's affordable housing ordinance (the IHO) directly contradicts this General Plan policy, which aims to facilitate the production of affordable housing by maximizing the use of appropriate policies, such as the IHO. As demonstrated above, the Project falls short of meeting the IHO requirements in several ways, thereby undermining the goals of affordable housing outlined in the General Plan.

As a result of the Project's inconsistencies with these policies, the City is precluded from making required findings pursuant to SJMC sections 19.13.010 (for issuance of a Vesting Tentative Map) and 20.100.940(A)(1) (for issuance of a Planned Development Permit) because it cannot find that the Project complies with and is consistent with applicable General Plan policies.

VIII. CONCLUSION

C-3.44

For the reasons discussed above, the DEIR for the Project is wholly inadequate under CEQA. It must be revised to provide legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. These

¹⁵⁴ Shaw Comments, pp. 5-6.

¹⁵⁵ Shaw Comments, pg. 5.

March 11, 2024
Page 34

C-3.44
Cont.

revisions will necessarily require that the DEIR be recirculated for additional public review and comment. Until the DEIR has been revised and recirculated, the City may not lawfully approve the Project.

Thank you for your consideration of these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Ariana Abedifard

Attachment
AA:acp

EXHIBIT A

March 8, 2024

Ms. Ariana Abedifard
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080

**Subject: Comments on the Draft Environmental Impact Report for the Seely Avenue
Mixed-Use Project**

Dear Ms. Abedifard:

This letter contains my comments on the Draft Environmental Impact Report (“DEIR”) prepared by the City of San Jose (“City”) for the Seely Avenue Mixed-Use Project (“Project”). The Hanover Company (Applicant) proposes development of 1,472 residential units, 18,965 square feet of general neighborhood retail space, a 2.5-acre public park, and a domestic water well on 22 acres of land in the City of San Jose. The project site is north of Montague Expressway, east of Seely Avenue, and west of the Coyote Creek riparian corridor.

I am an environmental biologist with 30 years of professional experience in wildlife biology and natural resources management. I have served as a biological resources expert for over 200 projects in California. My experience and scope of work in this regard has included assisting various clients with evaluations of biological resource issues; preparation and peer review of environmental compliance documents prepared pursuant to the California Environmental Quality Act (“CEQA”) and the National Environmental Policy Act (“NEPA”); and preparation of written comments that address deficiencies with CEQA and NEPA documents. My work has included written and oral testimony for the California Energy Commission, California Public Utilities Commission, and Federal courts. My educational background includes a B.S. in Resource Management from the University of California at Berkeley, and a M.S. in Wildlife and Fisheries Science from the Pennsylvania State University. A copy of my current curriculum vitae is attached hereto.

The comments herein are based on my review of the environmental documents prepared for the Project (including the Biological Resource Analysis [“BRA”] and the Biological Constraints Analysis [“BCA”]),¹ a review of scientific literature pertaining to biological resources known to occur in the Project area, and the knowledge and experience I have acquired during my 30-year career in the field of natural resources management.

¹ I downloaded the Project documents from the City’s website on 7 February 2024. At that time, Appendix D of the DEIR was the *Revised Brief Biological Constraints Analysis* (prepared by Johnson Marigot Consulting and dated November 2021). The City subsequently removed that version of Appendix D from its website and replaced it with the *Biological Resource Analysis* (prepared by Johnson Marigot Consulting and dated December 2022). However, the DEIR still references both studies. See DEIR, pg. 101 (stating the DEIR relies on the December 2022 Biological Resource Analysis) vs. DEIR, pg. 312 (references citing the Biological Constraints Analysis). Given the lack of clarity as to which study the DEIR relied on, for purposes of this comment letter, I assumed the DEIR’s analysis relied on both studies.

The following bullet points summarize my main conclusions pertaining to the adequacy of the DEIR:

- The DEIR fails to provide an adequate description of Project lighting.
- The DEIR fails to provide information on the wildlife resources that occur on the Project site and in the adjacent riparian corridor. This precludes understanding of the wildlife resources that would be directly and indirectly impacted by the Project.
- The DEIR improperly concludes that there is no potential for the Crotch bumble bee, burrowing owl, or golden eagle to occur at the Project site.
- Although the DEIR determined the Project site could contain maternity or winter roosts for several special-status bat species, no bat surveys were conducted. This precludes understanding of the severity of Project impacts (on bats) and the adequacy of the proposed mitigation in reducing impacts to less-than-significant levels.
- The 100-foot riparian corridor setback was not measured properly.
- The Project, as currently proposed, would significantly degrade the ecological functions and values of the Coyote Creek riparian corridor.
- The Project, as currently proposed, does not comply with Citywide design standards and guidelines for bird safety, nor does the DEIR incorporate mitigation requiring adherence to Citywide design standards and guidelines.
- Through failure to comply with Citywide bird safety standards, the Project represents a significant collision hazard to birds. The DEIR fails to incorporate mitigation to reduce the hazard.
- The Project would have significant impacts in the form of habitat loss and degradation. The DEIR fails to incorporate mitigation for these impacts.
- The two biological resource mitigation measures proposed in the DEIR are vague and do not ensure significant impacts to nesting birds and roosting bats would be minimized.

PROJECT DESCRIPTION

Compliance with the Riparian Setback Requirement

The City's Riparian Corridor Protection and Bird-Safe Design Policy establishes 100 feet as the minimum setback for new buildings, roads, and parking facilities. The setback is measured from the outside dripline of the Riparian Corridor vegetation or top-of-bank, whichever is greater.² The City's policy is consistent with the Santa Clara Valley Habitat Plan ("SCVHP"), which requires a 100-foot stream setback (measured from the top of bank) for projects in the Urban Service Area.³

² DEIR, p. 105.

³ ICF International. 2012. Final Santa Clara Valley Habitat Plan. Table 6-7. Available at: <<https://www.scv-habitatagency.org/178/Santa-Clara-Valley-Habitat-Plan>>.

The Riparian Corridor Policy Study provides the following definitions of “riparian” and “riparian corridor:”

“pertaining to the banks and other adjacent terrestrial (as opposed to aquatic) environs of freshwater bodies, watercourses, estuaries, and surface-emergent aquifers (springs, seeps, oases), whose transported freshwaters provide soil moisture sufficiently in excess of that otherwise available through local precipitation to potentially support growth of mesic vegetation ... For purposes of this study, a riparian corridor includes any defined channels including the area up to the bank full-flow line, as well as all riparian (streamside) vegetation in contiguous adjacent uplands.”⁴

According to the DEIR:

“The riparian canopy and/or low-flow channel of the site-adjacent segment of Coyote Creek range between 90 and 350 feet east of the northeastern project boundary ... A small portion of the project site overlaps with the 100-foot setback boundary of the top of the bank of the Coyote Creek Riparian Corridor. Although there is a slight overlap, the proposed development has been designed so that no new buildings would be placed within the 100-foot setback as shown in Figure 3-9. The overlap sliver currently contains undeveloped land and a chain link fence separating the project site from Coyote Creek Trail. As part of the project, the existing chain link fence would be replaced with a new 4-foot-high wood and wire mesh fence. No other development would occur within this sliver.”⁵

The measurements that were taken to make the determination that only a sliver of the Project overlaps with the 100-foot setback are flawed because they were taken from either the low flow channel or riparian tree canopy along the eastern side of the Coyote Creek corridor⁶—not the top of bank or edge of riparian vegetation (whichever is greater) on the west side of the corridor (Figures 1 through 3, below). As illustrated in Figure 4 (below), considerably more of the Project would lie within the 100-foot setback if the setback is measured in accordance with the terms of the Riparian Corridor Protection and Bird-Safe Design Policy and SCVHP. This is important because a setback (buffer) of *at least* 100 feet is needed to protect water quality, riparian biotic communities, and habitat values of riparian corridors—larger buffers are needed in areas with steep slopes or high intensity land uses.⁷

⁴ City of San Jose (1999 rev.). Riparian Corridor Policy Study. p. 3.

⁵ DEIR, pp. 110 and 111.

⁶ DEIR, Appendix D, Biological Constraints Analysis, p. 13 and Figure 6.

⁷ City of San Jose. 1999 (rev.). Riparian Corridor Policy Study. Chapter 3. *See also* McElfish JM Jr, Kihslinger RL, Nichols S. 2008. Setting Buffer Sizes for Wetlands. National Wetlands Newsletter 30(2):6-17.

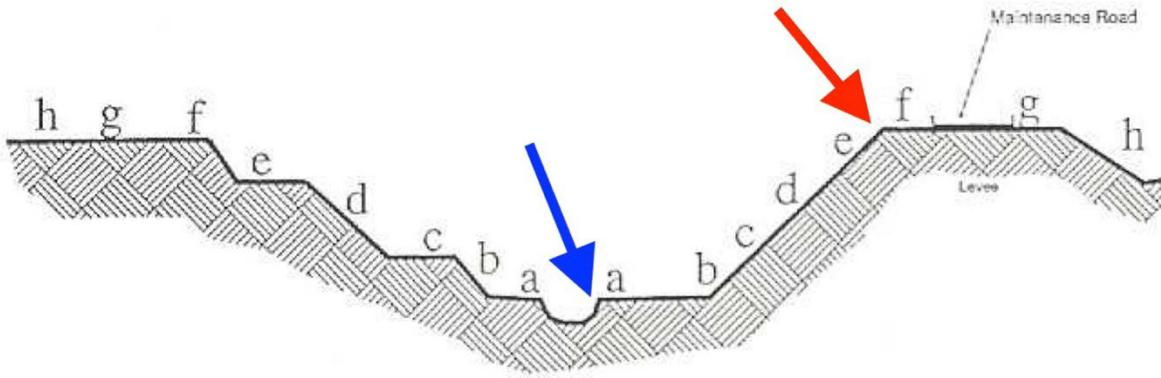


Figure 1. Stream profile. Blue arrow points to edge of low flow channel; red arrow points to top of bank. One-hundred-foot setback should have been measured from the top of bank (red arrow) but was instead measured from the low flow channel (blue arrow).



Figure 2. Project site (yellow line) in relation to water level (red line) on February 22, 2017. The “top of bank” coincides with, or is west of, the water line.⁸ The riparian corridor setback measurements provided in the DEIR were taken from the blue line (derived from DEIR Figure 3-10).

⁸ Although the Biological Constraints Analysis (p. 1) states that the site assessment including mapping the top of bank, no figures depicting the top of bank were provided.



Figure 3. Project site (yellow line) in relation to edge of riparian vegetation (red arrows) on the west bank of Coyote Creek. The green color tone of the vegetation indicates it receives soil moisture sufficiently in excess of that otherwise available through local precipitation, and thus the vegetation qualifies as “riparian.” The riparian corridor setback measurements provided in the DEIR were taken from the blue line (derived from DEIR Figure 3-10). Imagery dated 10 March 2022.



Figure 4. Project boundary (yellow line) in relation to 100-foot setback (red line). Setback was measured from the water line, which coincides with, or is east of, the top of bank.

Lighting

The Sierra Club Loma Prieta Chapter and the Santa Clara Valley Audubon Society submitted a comment letter in response to the Project’s Notice of Preparation. The comment letter asked the City to: “describe lighting on the site in detail that is sufficient for the public to review and comment, and analyze compliance with Council Policy 6-34, Citywide Design Guidelines and standards, and General Plan policies.”⁹ The DEIR fails to satisfy this request. Although the DEIR acknowledges the Project includes exterior lighting in an area that currently has “no substantial sources of outdoor light,”¹⁰ the DEIR provides no information on the distribution, abundance, luminosity, and type of light fixtures that would be installed at the Project site. The DEIR merely states:

“Exterior lighting is proposed for the development for security and safe access. All outdoor exterior lighting, including lighting for the new park, would conform to City Council Policy 4-3: Outdoor Lighting on Private Developments and the Zoning Ordinance lighting requirements under Municipal Code Sections 20.40.530 and 20.40.540. No high intensity lights are proposed for evening sports activities.”¹¹

⁹ DEIR, Appendix A.

¹⁰ DEIR, p. 44.

¹¹ DEIR, p. 20.

The DEIR's failure to provide information on the Project's exterior lighting precludes the ability to assess impacts to wildlife resources in the Coyote Creek riparian corridor.

ENVIRONMENTAL SETTING

Wildlife Resources

The City has determined that noise, lighting, and glare associated with development projects can significantly impact wildlife habitat values in riparian corridors.¹² Although the Project would be located immediately adjacent to the Coyote Creek riparian corridor, the DEIR provides no information on the wildlife species that occur (or could occur) in the riparian corridor. Indeed, the site assessments that were conducted for the Project were confined to an evaluation of the natural resources present on the two Project parcels; no efforts were devoted to the riparian corridor.¹³ This deficiency precludes understanding of the wildlife resources that could be indirectly impacted by the Project.

The DEIR's failure to identify wildlife resources within the Coyote Creek riparian corridor is compounded by its failure to identify wildlife resources on the Project site. Although the DEIR provides a list of plant species observed during reconnaissance level surveys of the Project site,¹⁴ it does not list (or otherwise identify) the wildlife species that were observed during the surveys. This precludes understanding of the wildlife resources that could be directly impacted by the Project.

Burrowing Owl

The Biological Constraints Analysis that was prepared for the Project states that there is no potential for the burrowing owl to occur at the Project site because "the onsite fallow fields lack ground squirrel burrows and do not provide suitable habitat for this species."¹⁵ Although burrowing owls are commonly associated with ground squirrel burrows, they also use rock cavities, debris piles, culverts, and pipes for nesting and roosting.¹⁶ The Project site contains debris piles,¹⁷ which provide potential nesting and roosting habitat for burrowing owls. The Project site also contains fallow fields, which provide potential foraging habitat for burrowing owls.¹⁸ The Applicant's biological resources consultant, Johnson Marigot Consulting, did not conduct the surveys needed to determine presence (or absence) of burrowing owls.¹⁹ For these reasons, Project impacts on the burrowing owl remain potentially significant.

¹² City of San Jose. 1999 (rev.). Riparian Corridor Policy Study. Chapter 3.

¹³ DEIR, Appendix D, Biological Constraints Analysis, p. 1.

¹⁴ *Ibid*, Table 1.

¹⁵ *Ibid*, Table 3.

¹⁶ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. p. 21.

¹⁷ DEIR, Appendix D, Biological Constraints Analysis, p. 4.

¹⁸ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation.

¹⁹ See California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, Appendix D.

Golden Eagle

The California Department of Fish and Wildlife (“CDFW”) commented that the Project site could be within the home range of golden eagles that have a nest site approximately 2.5 miles from the Project site.²⁰ CDFW further commented that the Project site could potentially support golden eagle nesting and foraging habitat. Consequently, CDFW stated that the DEIR should include a thorough habitat assessment of potential golden eagle nesting and foraging habitat within the Project area and surrounding areas.²¹

The BRA states that the Project site does not provide the necessary habitat components for golden eagles because the site does not contain cliffs, tall structures, or large trees in open areas.²² This statement is inconsistent with the Arborist Report, which identifies the presence of several large trees at the Project site.²³ These trees provide potential nest substrates for golden eagles. In addition, much of the Project site is comprised of open areas that provide potential foraging habitat for golden eagles (Figure 5, below). As a result, the DEIR’s determination that “there is no probability of the golden eagle occurring at the project site as it lacks suitable habitat for hunting and nesting”²⁴ is inconsistent with the habitat conditions at the Project site.



Figure 5. Open areas (red polygon) that provide potential foraging habitat for golden eagles. The agricultural area (blue polygon) also may provide potential foraging habitat, depending on crop type and stage of development.

Crotch Bumble Bee

²⁰ DEIR, Appendix A, CDFW comments, p. 4.

²¹ *Ibid*, p. 5.

²² DEIR, Appendix D, Biological Resource Analysis, p. 10.

²³ See tree diameters reported in DEIR, Appendix C, Tree Assessment Forms.

²⁴ DEIR, p. 107.

Bumble bees occur in a wide variety of habitats with sufficient abundance and duration of flowers for nectar and pollen resources.²⁵ Based on the plant list provided in the BCA,²⁶ the Project site contains diverse floral resources that may be capable of supporting a bumble bee colony.

The BRA acknowledges the Project site provides potentially suitable habitat for the Crotch bumble bee,²⁷ which is a candidate for listing under the California Endangered Species Act (“CESA”) However, the BRA then states that the species is not expected to occur on or near the Project site because “the updated extent of occurrence [species range] is estimated to exclude much of the San Francisco Bay Area, including the City of San Jose.”²⁸ This statement is not supported by a scientific citation and is inconsistent with CDFW’s (2023) survey guidelines, which depict the Project site as being within the current range of the Crotch bumble bee.²⁹ In addition, the iNaturalist database has 12 “Research Grade”³⁰ records of the Crotch bumble bee occurring in Santa Clara County between 2019 and 2023.³¹ These occurrence records (two of which are within four miles of the Project site) provide substantial evidence that the Project site lies within the current range of the Crotch bumble bee.

Sensitive Natural Communities

The DEIR states: “[a]lthough oak trees are present on the project site, these would not be considered part of a sensitive natural community because they are not part of woodlands or forests, but rather are scattered within grassland communities and the existing structures on the project site.”³² The DEIR’s statement that the oak trees are not part of a woodland is inconsistent with the data provided in the Arborist Report, which indicates most of the oak trees on the Project site are clustered in the northwest corner of APN 097-15-033.³³ According to the membership rules in the Manual of California Vegetation, an area qualifies as a woodland if it has at least 10 percent canopy cover, and it qualifies as an oak woodland if oaks comprise 50% relative cover in the tree canopy.³⁴ The oaks in the northwest corner of APN 097-15-033 satisfy

²⁵ California Department of Fish and Wildlife. 2019. Evaluation of the Petition from the Xerces Society, Defenders of Wildlife, and the Center for Food Safety to List Four Species of Bumble Bees as Endangered Under the California Endangered Species Act. Report to the Fish and Game Commission.

²⁶ DEIR, Appendix D, Biological Constraints Analysis, Table 1.

²⁷ DEIR, Appendix D, Biological Resource Analysis, p. 10.

²⁸ *Ibid*, p. 11.

²⁹ California Department of Fish and Wildlife. 2023 Jun 6. Survey Considerations for California Endangered Species Act (CESA) Candidate Bumble Bee Species. Appendix 1.

³⁰ Research Grade observations have media, location, a date, and a community consensus on a precise identification. See <<https://www.inaturalist.org/pages/help#quality>>.

³¹ <https://www.inaturalist.org/observations?place_id=1250&subview=map&taxon_id=271451>.

³² DEIR, p. 110.

³³ DEIR, Appendix C, Tree Assessment Forms and Maps.

³⁴ California Native Plant Society. A Manual of California Vegetation Online. *Quercus agrifolia* Forest & Woodland Alliance. Available at: <<https://vegetation.cnps.org/alliance/78>>.

these conditions.³⁵ Therefore, the DEIR's conclusion that the Project will not have a significant impact on sensitive natural communities is unsupported.

PROJECT IMPACTS

Special-Status Bats

The DEIR determined that the Project would cause permanent impacts to trees and structures, which provide potentially suitable night roosting cover, maternity roost sites, and winter hibernacula for special-status bats.³⁶ The DEIR's analysis of these impacts is limited to the statement that: "[p]roject construction, including the removal of trees and building demolition could negatively impact roosting bat habitat if done during the maternity roosting season."³⁷ The Project's potentially significant impacts to special-status bats is not limited to removal of trees and buildings during the maternity season. Significant impacts also could occur if roost sites are removed when bats are hibernating because the metabolic cost of waking bats from hibernation can be very high and enough to reduce their energy supply to the point where survival is not possible.³⁸

Bats spend over half their lives at roosts. Roosts provide sites for mating, hibernation, and rearing young; they promote social interactions and the digestion of food; and they offer protection from adverse weather and predators.³⁹ Because bat species require roosts with specific traits, the availability of roosts is the limiting factor in the size and distribution of most bat populations.⁴⁰ Bats have low fecundity (typically one pup per year), longevity (individuals may live for over a decade), and exhibit high site fidelity from year to year.⁴¹ As a result, when bats are evicted from a roost (as proposed in the DEIR), recovery or recolonization is slow if it occurs at all.⁴² For these reasons, the greatest threat to bats in the south coast ecoregion is urban/suburban expansion and its associated impacts to roosts and foraging habitat.⁴³

The effects of urbanization on bats reach beyond the immediate developed areas. Indirect "edge effects" associated with urbanization include recreational activities, which increase disturbance to nearby natural roosts, and increased predation from human commensal animals, particularly

³⁵ See DEIR, Appendix C, p. 5: "Thirty-nine (39) coast live oaks were growing onsite ... The coast live oaks were amongst the largest trees onsite. The larger, established coast live oaks had vigorous, spreading crowns that often suppressed the trees growing in the understory."

³⁶ DEIR, p. 108.

³⁷ DEIR, p. 109.

³⁸ H.T. Harvey & Associates. 2004. California Bat Mitigation Techniques, Solutions, and Effectiveness. p. 30. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=10334>>.

³⁹ Kunz TH. 1982. Roosting Ecology of Bats. In: Kunz TH (ed.) Ecology of Bats. Springer, Boston, MA. pp. 1-55.

⁴⁰ *Ibid.* See also Western Bat Working Group. 2017. Western Bat Species [online species accounts]. Available at: <<http://wbwg.org/western-bat-species/>>.

⁴¹ Miner KL, Stokes DC. 2005. Bats in the south coast ecoregion: status, conservation issues, and research needs. USDA Forest Service Gen. Tech. Rep. PSW-GTR-195. Available at: <https://www.fs.usda.gov/psw/publications/documents/psw_gtr195/psw_gtr195_2_13_Miner.pdf>.

⁴² *Ibid.*

⁴³ *Ibid.*

domestic cats. These edge effects may be significant and result in a population “sink” (whereby mortality exceeds reproduction).⁴⁴

The DEIR provides no analysis of, or mitigation for, the Project’s direct and indirect impacts on habitat for special-status bats. As a result, the Project’s potentially significant impacts on habitat for special-status bats remain unmitigated.

Crotch Bumble Bee

Crotch bumble bees nest in thatched grasses, abandoned rodent burrows or bird nests, brush piles, rock piles, and logs.⁴⁵ At least some of these features occur at the Project site.⁴⁶ Consequently, ground disturbance activities associated with construction of the Project could destroy bumble bee nests, and they would remove floral resources needed for persistence of the bumble bee colony. These constitute potentially significant impacts that were not disclosed or analyzed in the DEIR, and for which the DEIR does not incorporate mitigation.

Wildlife Nursery Sites

The DEIR’s analysis of impacts to wildlife nursery sites is limited to the statement that “[t]he project site includes partially developed land and does not support native resident or wildlife species.”⁴⁷ This statement is inconsistent with the DEIR’s determination that the Project could support nesting birds protected under the Migratory Bird Treaty Act,⁴⁸ and that it could contain maternity (nursery) roosts of four special-status bat species.⁴⁹ Bird nests and bat roosts qualify as wildlife nursery sites. The permanent loss of these nursery (nest or roost) sites due to Project construction is a potentially significant impact that is not mitigated by the mitigation measures incorporated in the DEIR. In addition, the severity of the impact has not been disclosed to the public because no surveys were conducted to identify the bird and bat species that are using the Project area as a nursery site. As a result, the Project’s permanent impacts to wildlife nursery sites are not mitigated and remain potentially significant.

Lighting Impacts

Ecological light pollution has demonstrable effects on the behavioral and population ecology of organisms, with serious implications on community ecology.⁵⁰ For example, artificial night lighting of similar intensity to moonlight reduces activity and movement of many nocturnal

⁴⁴ *Ibid.*

⁴⁵ California Department of Fish and Wildlife. 2023 Jun 6. Survey Considerations for California Endangered Species Act (CESA) Candidate Bumble Bee Species. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=213150&inline>>.

⁴⁶ DEIR, Appendix D. Biological Constraints Analysis, pp. 4 and 5.

⁴⁷ DEIR, p. 111.

⁴⁸ The Migratory Bird Treaty Act does not apply to nonnative, human-introduced bird species.

⁴⁹ DEIR, p. 106. *See also*, DEIR, Appendix D, Biological Resource Assessment, p. 12: “Implementation of Mitigation Measure BIO-2, which requires preconstruction bat surveys as well as avoidance and monitoring of **nursery roosts** observed onsite until a qualified biologist determines that breeding is complete and young have reared, would minimize potential for adverse effects on roosting bats.” [emphasis added].

⁵⁰ Longcore T, Rich C. 2004. Ecological Light Pollution. *Frontiers in Ecology and the Environment* 2:191-198.

animals, particularly those that rely on concealment to reduce predation risk during nocturnal foraging.⁵¹ Although nocturnal animals can respond to bright moonlight by shifting foraging and ranging activities to darker conditions, this option is not available to animals experiencing artificially increased illumination throughout the night. Under these circumstances, unless they abandon the lighted area, nocturnal animals have only two choices. One is to accept the risk of predation by foraging under bright light. The other option is to continue to minimize predation risk even at the cost of loss of body mass.

The Project would introduce new sources of light and glare in the form of outdoor lighting and reflective surfaces.⁵² The DEIR determined the Project's lighting would have a less than significant impact on riparian habitat and wildlife movement because: (a) the Project would comply with relevant requirements of the City's Riparian Corridor Protection and Bird-Safe Design Policy; and (b) exterior lighting would be directed downward and away from the riparian corridor to the greatest extent feasible.⁵³

There are three reasons why the lighting measures described in the DEIR would not reduce impacts to less than significant levels:

First, shielding light fixtures and directing light downward greatly reduces (but does not eliminate) "astronomical light pollution" (whereby stars and other celestial bodies are washed out by light that is either directed or reflected upward), but it does not necessarily eliminate significant impacts associated with "ecological light pollution" (artificial light that alters the natural patterns of light and dark in ecosystems).⁵⁴ Furthermore, even with shielding, light reflects off the ground and scatters.⁵⁵ As a result, the amount of light pollution generated by a project is dependent on light intensity, which is a function of the number of lights, the luminosity of the bulbs, the height and angle of the light, and the substrate receiving the light. The DEIR provides no information on these variables, nor does it provide photometric analysis demonstrating the Project's lighting would not impact the riparian corridor.

Second, the DEIR does not analyze, or incorporate mitigation for, light pollution generated by indoor lighting. This light pollution would be substantial given the number of dwelling units (and glass windows) associated with the Project. In addition to contributing to sky glow, indoor lighting is known to attract migratory birds during their nocturnal migration. This attraction

⁵¹ Beier P. 2006. Effects of Artificial Night Lighting on Terrestrial Mammals. Chapter 2 in: Ecological Consequences of Artificial Night Lighting, Rich C and Longcore T, editors. Island Press, Washington, DC.

⁵² DEIR, p. 54.

⁵³ DEIR, p. 111.

⁵⁴ Longcore T, Rich C. 2004. Ecological Light Pollution. *Frontiers in Ecology and the Environment* 2:191-198.

⁵⁵ Longcore T, Rich C. 2016. Artificial night lighting and protected lands: Ecological effects and management approaches. Natural Resource Report NPS/NRSS/NSNS/NRR—2016/1213. National Park Service, Fort Collins, Colorado.

causes a large amount of mortality because birds either immediately collide with lighted buildings or become entrapped by the light before later dying of collision or exhaustion.⁵⁶

Third, the DEIR does not analyze, or incorporate mitigation for, light pollution generated by vehicles. Vehicle headlights can adversely affect animal behavior.⁵⁷ Several of the Project's roads are oriented toward the riparian corridor.⁵⁸ Headlights from vehicles traveling north on these roads would shine into the riparian corridor (unless shielded by landscaping). In addition, vehicles that use the at-grade parking area on the north side of the Affordable Apartment Building⁵⁹ would shine headlights into the riparian corridor (unless shielded by landscaping or other means).

Compliance with San Jose's Citywide Bird-Safe Design Standards and Guidelines

City Council Policy 6-34 provides bird-safe design guidelines for projects within 300 feet of a riparian corridor. In addition to City Council Policy 6-34, the City has adopted "citywide" design standards and guidelines for bird safety.⁶⁰ The DEIR states: "the project would comply with the City's Bird-Safe Design guidelines (City Council Policy 6-34) by avoiding mirrors and large areas of reflective glass; avoiding transparent glass skyways, walkways, or entryways, free-standing glass walls, and transparent building corners; and avoiding funneling open space to a building façade."⁶¹ However, the DEIR fails to address compliance with the bird safety measures in the Citywide Design Standards and Guidelines. As explained below, the Project does not comply with several of the Citywide Design Standards and Guidelines for bird safety.

Citywide Design Standards

Citywide Standard S4 states: "[u]se a *bird safety treatment* on transparent atria, free-standing glass features, and glass architectural elements that protrude from the primary building mass."⁶² The Project's buildings (Building A, B, and C) would have balconies with glass railings, which would protrude from the primary building mass.⁶³ The Project does not comply with Citywide Standard S4 because it does not incorporate a bird safety treatment on the glass railings.

⁵⁶ Loss SR, T Will, SS Loss, PP Marra. 2014. Bird-Building Collisions in the United States: Estimates of Annual Mortality and Species Vulnerability. *The Condor* 116:8–23. *See also* Evans Ogden LJ. 1996. *Collision Course: The Hazards of Lighted Structures and Windows to Migrating Birds*. World Wildlife Fund Canada and the Fatal Light Awareness Program, Toronto, ON, Canada. *See also* Evans Ogden LJ. 2002. *Summary Report on the Bird Friendly Building Program: Effect of Light Reduction on Collision of Migratory Birds*. Fatal Light Awareness Program, Toronto, ON, Canada.

⁵⁷ Longcore T, Rich C. 2016. *Artificial night lighting and protected lands: Ecological effects and management approaches*. Natural Resource Report NPS/NRSS/NSNS/NRR—2016/1213. National Park Service, Fort Collins, Colorado.

⁵⁸ DEIR, Figure 2-14.

⁵⁹ DEIR, p. 17.

⁶⁰ City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). *San Jose Citywide Design Standards and Guidelines*. Available at: <<https://www.sanjoseca.gov/home/showpublisheddocument/69148/638058310868170000>>.

⁶¹ DEIR, p. 108.

⁶² City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). *San Jose Citywide Design Standards and Guidelines*. p. 50.

⁶³ DEIR, Figures 2-7 through 2-9.

Citywide Standard S5 states: “[d]o not use mirrored glass or glazing with a reflective index above 20 percent.”⁶⁴ The Project does not comply with this standard because the DEIR does not incorporate mitigation requiring glazing with a reflective index less than 20 percent.

Citywide Standard S6 states: “[f]or *façades* with more than 20 percent glazing within 60 feet of grade and located within 300 feet from a body of water, including creeks and vegetated flood control channels; or within 100 feet of a *landscaped* area, open space, or park larger than one acre in size, apply a *bird safety treatment* to at least 90 percent of the glazed areas within 60 feet of grade.”⁶⁵ The Affordable Apartment Building, Building B, a portion of Building A, and some of the Townhomes would be located within 300 feet of Coyote Creek. Buildings A and B would have façades with more than 20 percent glazing within 60 feet of grade.⁶⁶ The DEIR does not provide a “material legend” for the figure depicting the Affordable Apartment Building,⁶⁷ however, it appears the Apartment Building also would have façades with more than 20 percent glazing within 60 feet of grade.⁶⁸ The DEIR fails to incorporate mitigation requiring a bird safety treatment to at least 90 percent of the glazed areas within 60 feet of grade.

Citywide Design Guidelines

Design Guideline G1 states: “[t]urn off decorative exterior lighting between 11:00 p.m. and 6:00 a.m. except during June, July, December, and January due to bird migration.”⁶⁹ The Project does not comply with this guideline because the DEIR does not incorporate mitigation requiring decorative exterior lighting to be turned off between 11:00 p.m. and 6:00 a.m.

Design Guideline G2 states: “[u]se a *bird safety treatment* on windows or other glazed areas in which trees, *landscaping*, water features, or the sky will be reflected.” Almost every type of architectural glass under the right conditions reflects the sky, clouds, or nearby trees and vegetation.⁷⁰ The Project includes the installation of trees and other landscaping in the immediate vicinity of windows.⁷¹ This circumstance, in conjunction with the Applicant’s proposal to construct relatively tall buildings (with windows) immediately adjacent to a riparian corridor, has the potential to be especially lethal to birds. The Project does not comply with Design Guideline G2 because the DEIR does not incorporate mitigation requiring a bird safety treatment on windows that would reflect trees, landscaping, or the sky.

⁶⁴ City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). San Jose Citywide Design Standards and Guidelines. p. 50.

⁶⁵ City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). San Jose Citywide Design Standards and Guidelines. p. 50.

⁶⁶ DEIR, Figures 2-7 through 2-9.

⁶⁷ DEIR, Figure 2-10.

⁶⁸ *Ibid.*

⁶⁹ City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). San Jose Citywide Design Standards and Guidelines. p. 50.

⁷⁰ San Francisco Planning Department (*and references therein*). 2011. Standards for Bird-Safe Buildings. 42 pp. Available at:

<https://sfplanning.org/sites/default/files/documents/reports/bird_safe_bldgs/Standards%20for%20Bird%20Safe%20Buildings%20-%202011-30-11.pdf>.

⁷¹ DEIR, Figures 2-7 through 2-11, and Figure 2-14.

Compliance with the General Plan and Riparian Corridor Policy Study

Policy ER-2.1 in the Envision San Jose 2040 General Plan states:

“Ensure that new public and private development adjacent to riparian corridors in San José are consistent with the provisions of the City’s Riparian Corridor Policy Study and any adopted Santa Clara Valley Habitat Conservation Plan/ Natural Communities Conservation Plan (HCP/NCCP).”⁷²

As described below, the Project is not consistent with guidelines 1A and 1C in the Riparian Corridor Policy Study.

Riparian Corridor Policy Study Guideline 1A: Orientation

Riparian Corridor Policy Study Guideline 1A states:

“Site activities should be oriented to draw activity away from the riparian corridor, for example, entrances, loading and delivery areas, noise generating activities and equipment, and activities requiring night lighting should be oriented toward non-riparian property edges. In particular, sites should be designed so that the portions of parking lots with minimum setbacks from the riparian edge are the least in demand, e.g., furthest from entrances. If these portions of the parking lots are not in demand for nighttime use, for example, lighting can be avoided in proximity to the corridor.”⁷³

The Project does not comply with Guideline 1A for the following reasons:

- The parking structure for Building B would be located on the north side of the building, adjacent to the riparian corridor.⁷⁴
- A 42-foot “residential loading zone” for Building B would be located near the northern property line, adjacent to the riparian corridor.⁷⁵
- Building B would have a storefront on the north side of the building, adjacent to the riparian corridor.⁷⁶
- The Affordable Apartment Building would have one level of at grade parking on the north side of the building, adjacent to the riparian corridor.⁷⁷
- The Project includes a walkway, landscaping, and potentially other amenities on the north side of Building B.⁷⁸ These features would draw activity toward the adjacent riparian corridor.

⁷² City of San Jose. 2011 (amended 2024). Envision San Jose 2040 General Plan. Chapter 3, p. 27. Available at: <<https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/citywide-planning/envision-san-jos-2040-general-plan>>.

⁷³ City of San Jose (1999 rev.). Riparian Corridor Policy Study. p. 30.

⁷⁴ DEIR, p. 17.

⁷⁵ DEIR, Figure 2-4.

⁷⁶ DEIR, Figure 2-8b.

⁷⁷ DEIR, p. 17.

⁷⁸ DEIR, Figure 2-14.

- The Project includes a paved walkway on the north side of the town homes located between Building B and Kimiko Lane.⁷⁹ This feature would draw activity toward the adjacent riparian corridor.

Guideline 1C: Setback Areas

Riparian Corridor Policy Study Guideline 1C states:

“All buildings, other structures (with the exception of bridges and minor interpretative node structures), impervious surfaces, outdoor activity areas (except for passive or intermittent activities) and ornamental landscaped areas should be separated a minimum of **100 feet** from the edge of the riparian corridor (or top of bank, whichever is greater).”⁸⁰

The Project does not comply with this guideline because it includes buildings, other structures (e.g., well equipment), impervious surfaces, and ornamental landscaped areas within 100 feet of the riparian corridor (or top of bank). The DEIR’s statement that only a new 4-foot-high wood and wire mesh fence would be located within 100 feet of the riparian corridor is based on measurements from the low flow channel, not the edge of the riparian corridor or top of bank.

Policy MS-21.9

Policy MS-21.9 in the Envision San Jose 2040 General Plan states:

“Where urban development occurs adjacent to natural plant communities (e.g., oak woodland, riparian forest), landscape plantings shall incorporate tree species native to the area and propagated from local sources (generally from within 5-10 miles and preferably from within the same watershed).”

The Project does not comply with this policy. According to the Project’s landscaping plan, only 14 native trees (all *Quercus agrifolia*) would be planted; the remaining 436 planted trees would be non-native species.⁸¹

Wildlife Corridors

The BRA determined that the Coyote Creek riparian corridor “certainly acts as a wildlife corridor.”⁸² According the DEIR, impacts to the wildlife corridor would be less than significant because “no direct disturbance would occur within Coyote Creek.”⁸³ The DEIR fails to recognize that wildlife movement along creek corridors is not confined to aquatic habitat; it also occurs along the creek banks and other adjacent terrestrial environs of the creek.⁸⁴

⁷⁹ DEIR, Figures 2-14 and 3-4b.

⁸⁰ City of San Jose (1999 rev.). Riparian Corridor Policy Study. p. 31.

⁸¹ DEIR Figure 2-14.

⁸² DEIR, Appendix D, Biological Resource Analysis, p. 15.

⁸³ DEIR, p. 111.

⁸⁴ City of San Jose (1999 rev.). Riparian Corridor Policy Study.

The DEIR assumes that the Project’s impacts on wildlife movement would be less than significant because the Project includes “avoidance of bright colors and glossy and/or glare producing building finishes on structures facing the riparian corridor and directing low-intensity exterior lighting downward and away from the riparian corridor to the greatest extent feasible.”⁸⁵ The DEIR does not address how noise and human activity associated with the Project would impact wildlife movement, nor does it analyze how lighting would affect wildlife movement in areas where it is not feasible to direct lighting away from the riparian corridor.

MITIGATION ISSUES

MM BIO-1: Nesting Birds

MM BIO-1 states:

“Prior to any tree removal, or approval of any grading or demolition permits (whichever occurs first), the project applicant shall schedule demolition and construction activities to avoid the nesting season. The nesting season for most birds, including most raptors in the San Francisco Bay area, extends from February 1 through September 15 (inclusive).”⁸⁶

This measure is incapable of implementation because, according to the DEIR, construction would begin in June 2024 (i.e., during the avian nesting season) and would occur continuously through October 2028 (i.e., during four additional nesting seasons).⁸⁷

MM BIO-1 then states:

“If construction activities cannot be scheduled to occur between September 16 and January 31, inclusive, pre-construction surveys for nesting birds and raptors shall be completed by a qualified ornithologist or biologist to ensure that no nests shall be disturbed during project implementation. The survey shall be completed no more than 14 days prior to the initiation of construction activities during the early part of the breeding season (February 1 through April 30 inclusive), and no more than 30 days prior to the initiation these activities during the late part of the breeding season (May1 through September 15 inclusive). During this survey, the qualified ornithologist/biologist shall inspect all suitable nesting habitat on the project site and within the zone of influence (the area immediately surrounding the Project site that supports suitable nesting habitat that could be impacted by the project due to visual or auditory disturbance associated with the removal of vegetation and construction activities scheduled to occur during the nesting season).”⁸⁸

MM BIO-1 fails to establish standards for the: (a) nest searching techniques, (b) minimum level of effort (i.e., survey hours per unit area), and (c) qualifications of the “qualified ornithologist or

⁸⁵ DEIR, p. 111.

⁸⁶ DEIR, p. 108.

⁸⁷ DEIR, Table 2-4.

⁸⁸ DEIR, p. 108.

biologist” conducting the survey. As explained below, the ability to successfully locate nests in the Project area is dependent on these three variables.

Many biologists that conduct pre-construction surveys fail to devote the level of effort needed to locate all bird nests. Locating all nests within the 22.8-acre Project site would require a considerable level of effort. For example, CDFW determined that a minimum of three surveys for active nests would be necessary, with two surveys conducted within 14 days prior to the beginning of Project construction, with a final survey conducted within 48 hours prior to construction.⁸⁹ To ensure all bird nests that may be affected by the Project are located, the City must establish standards for the survey effort (e.g., minimum number of surveys and survey hours).

The success of any nest-searching method depends on the surveyor’s knowledge of where birds nest, how nesting birds behave, and the best time of day to search for nests.⁹⁰ Attaining this knowledge requires training and experience.⁹¹ Because MM BIO-1 fails to establish standards for the “qualified ornithologist or biologist” conducting the nesting bird survey, it does not ensure the ornithologist or biologist would have the qualifications needed to successfully locate all nests within the Project area prior to construction.

Some bird species build a nest and initiate egg-laying in as little as 10 days.⁹² As a result, a nesting bird survey conducted up to 14 days prior to construction activities during the early part of the breeding season would be insufficient to avoid and minimize significant impacts to nesting birds. Allowing the nesting bird survey to be conducted up to 30 days prior to construction activities during the latter part of the breeding season (defined as May 1 through September 15 in MM BIO-1) would undoubtedly result in significant impacts to nesting birds because it fails to account for the fact that some species: (a) do not initiate nesting until after May 1; (b) will reinitiate nesting attempts later in the season if the first attempt fails; or (c) have two or more broods.

MM BIO-1 also states:

“If an active nest is found, the qualified ornithologist/biologist shall determine an appropriately sized species-specific buffer around the nest in which no work will be allowed until the young have successfully fledged. In general, buffer sizes of 200 feet for raptors and 50 feet for other birds should suffice to prevent disturbance to birds nesting in the urban environment, but these buffer sizes may be increased or decreased, as appropriate, depending on the bird species and the level of disturbance anticipated near the nest.”

The DEIR fails to provide evidence that the proposed buffer sizes, which are smaller than those

⁸⁹ DEIR, Appendix A, CDFW letter, p. 6.

⁹⁰ Winter M, Hawks SA, Shaffer JA, Johnson DH. 2003. Guidelines for Finding Nests of Passerine Birds in Tallgrass Prairie. *The Prairie Naturalist* 35(3):197-211.

⁹¹ *Ibid.* See also Martin TE, Geupel GR. 1993. Nest-Monitoring Plots: Methods for Locating Nests and Monitoring Success. *J. Field Ornithol.* 64(4):507-519.

⁹² Baicich PJ, CJ Harrison. 1997. *A guide to the nests, eggs, and nestlings of North American Birds.* 2nd ed. London: Academic Press.

specified in the BRA⁹³ and for other development projects in San Jose,⁹⁴ would be sufficient to prevent significant impacts to nesting birds. CDFW has determined that at a minimum, a 500-foot buffer is required to prevent significant construction-related impacts to raptor nests, while a 250-foot buffer is required for other nesting bird species.⁹⁵

MM BIO-2: Bats

Identification of Roosting Habitat

The DEIR determined that four special-status bat species have the potential to roost at the Project site: pallid bat, western mastiff bat, western red bat, and Townsend's big-eared bat.⁹⁶ In addition, the BRA states that the Project site provides potentially suitable roost sites for the long-eared myotis (a fifth special-status bat species).

Mitigation Measure BIO-2 states:

“If construction activities cannot be scheduled to occur between September 16 and April 30, a qualified bat specialist or wildlife biologist shall conduct site surveys to characterize bat utilization of roosting habitat on and immediately adjacent to the project site and potential bat species present prior to construction.”⁹⁷

MM BIO-2 fails to identify when the site surveys would be conducted in relation to construction activities or how the surveys should be conducted. As a result, the mitigation measure is too vague to ensure impacts to bat roosts are avoided.

Locating bat roosts is challenging because most species roost in inaccessible, concealed places. The Townsend's big-eared bat's habit of roosting pendant-like on open surfaces makes it readily detectable. However, roosts of the other four species that could occur at the Project site can be very difficult to detect (pallid bats, western mastiff bats, and long-eared myotis roost in relatively inaccessible places such as cracks, crevices, or beneath bark; western red bats roost hidden in the foliage of trees).⁹⁸ Consequently, visual searches are not an effective technique for locating roost sites occupied by these bat species.^{99,100} In addition, surveys conducted several days prior

⁹³ DEIR, Appendix D, Biological Resource Analysis, p. 22.

⁹⁴ *For example, see* City of San Jose. 2023 June. Initial Study / Mitigated Negative Declaration for 550 Piercy Road Industrial Development. p. 3 (identifying buffers of 250 feet for raptors and 100 feet for other birds).

⁹⁵ California Department of Fish and Wildlife. 2013. CDFW's Conservation Measures for Biological Resources That May Be Affected by Program-level Actions. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=73979&inline>>.

⁹⁶ DEIR, Appendix D, Biological Constraints Analysis, p. 11.

⁹⁷ DEIR, p. 109.

⁹⁸ Western Bat Working Group. 2005 (Update). Species Accounts. Available at: <<http://wbwg.org/western-bat-species/>>.

⁹⁹ Western Bat Working Group. 2017. Survey Matrix [online]. Available at: <<http://wbwg.org/matrices/survey-matrix/>>. (Accessed January 13, 2023).

¹⁰⁰ Weller TJ. 2007. Assessing population status of bats in forests: challenges and opportunities. *Bats in forests: conservation and management*, pp. 263-292. *See also* Flaquer C, Torre I, Arrizabalaga A. 2007. Comparison of sampling methods for inventory of bat communities. *Journal of Mammalogy* 88(2):526-533.

to the start of Project construction activities does not ensure avoidance of direct impacts to roosting bats because tree-roosting bat species may move among roosts nightly.¹⁰¹

Locating all bat roosts at the Project site would require implementation of special techniques, including acoustic surveys (i.e., bat detectors) and emergence surveys (which may require use of night vision equipment).¹⁰² Because MM BIO-2 does not require implementation of the techniques necessary to locate bats that roost in concealed locations, the Project's impacts on special-status bats remain potentially significant.

Roost Exclusion and Avoidance of Maternity Roosts

MM BIO-2 states:

“If a single bat and/or only adult bats are roosting, removal of trees or structures may proceed after the bats have been safely excluded from the roost ... If an active maternity roost is detected, avoidance is preferred. Work in the vicinity of the roost (buffer to be determined by qualified bat specialist or wildlife biologist) shall be postponed until the qualified bat specialist /wildlife biologist monitoring the roost determines that the young have fledged and are no longer dependent on the roost. The monitor shall ensure that all bats have left the area of disturbance prior to initiation of pruning and/or removal of trees that would disturb the roost.”¹⁰³

Whereas there are materials (e.g., expandable foam or one-way doors) that can be used to exclude bats from buildings or tree cavities, there are no effective techniques for excluding bats that roost in foliage (e.g., western red bat). This issue is compounded by the presumption that a qualified bat specialist would have the ability to determine that “all bats have left” the tree roost prior to disturbance. Due to the cryptic nature of tree-roosting bats, and because bats do not emerge from their roosts every night, it is impossible to determine with 100% certainty that bats are absent from a tree. As a result, minimizing impacts to tree-roosting bats requires “soft-felling,” whereby all potential bat roost features in trees are felled in one piece and carefully lowered to the ground by rope, then left in-situ on the ground for at least 24 hours before being removed.¹⁰⁴

Because MM BIO-2 does not require implementation of the techniques necessary to locate bats that roost in concealed locations, and because MM BIO-2 does not incorporate appropriate techniques to minimize impacts to tree-roosting bat species, the Project's impacts on special-status bats remain potentially significant.¹⁰⁵

¹⁰¹ Weller TJ. 2007. Assessing population status of bats in forests: challenges and opportunities. Pages 263–291 *in* Lacki MJ, Hayes JP, Kurta A, editors. *Bats in forests: conservation and management*. The Johns Hopkins University Press, Baltimore, Maryland, USA.

¹⁰² See Johnston D. 2018 Mar 21. Recent Advances in Effective Bat Mitigation [video file]. <https://www.youtube.com/watch?v=Pr9WBpuotZo> (1:42:20-1:53:10).

¹⁰³ DEIR, p. 110.

¹⁰⁴ See AECOM. n.d. Bat Exclusion in Trees. Available at: <<https://cdn.bats.org.uk/uploads/images/26.-Appendix-C-Exclusion-of-bats-from-trees.pdf?v=1617789476>>.

¹⁰⁵ See Western Bat Working Group. 2017. Survey Matrix. Available at: <<https://wbwg.org/matrices/survey-matrix/>>.

Significance of Project Impacts After Implementation of MM BIO-1 and MM BIO-2

The CEQA significance threshold adopted in the DEIR is whether the Project would have a “substantial adverse effect, either directly *or through habitat modifications*, on any species identified as a candidate, sensitive, or special status species ...”¹⁰⁶ The DEIR makes the following determination in this regard: “[w]ith implementation of the mitigation measures MM BIO-1 and MM BIO-2, the project’s impact to nesting birds and raptors would be less than significant.”^{107,108} A fundamental flaw with the DEIR’s reasoning is that neither mitigation measure addresses the Project’s permanent impacts to habitat, which is the primary threat to most bird and bat populations.¹⁰⁹ Indeed, because habitat loss has a permanent (negative) effect on population recruitment, the Project’s permanent impacts to habitat are much more significant than its impacts to bird nests or bat roosts during an individual reproductive cycle. For this reason, Project impacts to habitat for special-status bat species and migratory birds remain potentially significant.

This concludes my comments on the DEIR.

Sincerely,



Scott Cashen, M.S.
Senior Biologist

¹⁰⁶ DEIR, p. 107. [emphasis added].

¹⁰⁷ DEIR, p. 110.

¹⁰⁸ The DEIR does not make a CEQA determination regarding the significance of Project impacts to bats.

¹⁰⁹ Rosenberg KV, Dokter AM, Blancher PJ, Sauer JR, Smith AC, Smith PA, Stanton JC, Panjabi A, Helft L, Parr M, Marra PP. 2019. Decline of the North American avifauna. *Science*. 366(6461):120-4. *See also* Western Bat Working Group. 2005 (Update). Species Accounts. Available at: <<http://wbwg.org/western-bat-species/>>.

Scott Cashen, M.S. **Senior Wildlife Biologist**

Scott Cashen has 28 years of professional experience in natural resources management. During that time he has worked as a field biologist, forester, environmental consultant, and instructor of Wildlife Management. Mr. Cashen focuses on CEQA/NEPA compliance issues, endangered species, scientific field studies, and other topics that require a high level of scientific expertise.

Mr. Cashen has knowledge and experience with numerous taxa, ecoregions, biological resource issues, and environmental regulations. As a biological resources expert, Mr. Cashen is knowledgeable of the various agency-promulgated guidelines for field surveys, impact assessments, and mitigation. Mr. Cashen has led field investigations on several special-status species, including ones focusing on the yellow-legged frog, red-legged frog, desert tortoise, steelhead, burrowing owl, California spotted owl, northern goshawk, willow flycatcher, Peninsular bighorn sheep, red panda, and various forest carnivores.

Mr. Cashen is a recognized expert on the environmental impacts of renewable energy development. He has been involved in the environmental review process of over 100 solar, wind, biomass, and geothermal energy projects. Mr. Cashen's role in this capacity has encompassed all stages of the environmental review process, from initial document review through litigation support. Mr. Cashen provided expert witness testimony on several of the Department of the Interior's "fast-tracked" renewable energy projects. His testimony on those projects helped lead agencies develop project alternatives and mitigation measures to reduce environmental impacts associated with the projects.

Mr. Cashen was a member of the independent scientific review panel for the Quincy Library Group project, the largest community forestry project in the United States. As a member of the panel, Mr. Cashen was responsible for advising the U.S. Forest Service on its scientific monitoring program, and for preparing a final report to Congress describing the effectiveness of the Herger-Feinstein Forest Recovery Act of 1998.

AREAS OF EXPERTISE

- CEQA, NEPA, and Endangered Species Act compliance issues
- Comprehensive biological resource assessments
- Endangered species management
- Renewable energy development
- Scientific field studies, grant writing and technical editing

EDUCATION

M.S. Wildlife and Fisheries Science - The Pennsylvania State University (1998)

Thesis: *Avian Use of Restored Wetlands in Pennsylvania*

B.S. Resource Management - The University of California, Berkeley (1992)

PROFESSIONAL EXPERIENCE

Litigation Support / Expert Witness

Mr. Cashen has served as a biological resources expert for over 125 projects subject to environmental review under the California Environmental Quality Act (CEQA) and/or the National Environmental Policy Act (NEPA). As a biological resources expert, Mr. Cashen reviews CEQA/NEPA documents and provides his clients with an assessment of biological resource issues. He then submits formal comments on the scientific and legal adequacy of the project's environmental documents (e.g., Environmental Impact Report). If needed, Mr. Cashen conducts field studies to generate evidence for legal testimony, or he can obtain supplemental testimony from his deep network of species-specific experts. Mr. Cashen has provided written and oral testimony to the California Energy Commission, California Public Utilities Commission, and U.S. district courts. His clients have included law firms, non-profit organizations, and citizen groups.

REPRESENTATIVE EXPERIENCE

Solar Energy

- Abengoa Mojave Solar Project
- Avenal Energy Power Plant
- Beacon Solar Energy Project
- Blythe Solar Power Project
- Calico Solar Project
- California Flats Solar Project
- Calipatria Solar Farm II
- Carrizo Energy Solar Farm
- Catalina Renewable Energy
- Fink Road Solar Farm
- Genesis Solar Energy Project
- Heber Solar Energy Facility
- Imperial Valley Solar Project
- Ivanpah Solar Electric Generating
- Maricopa Sun Solar Complex
- McCoy Solar Project
- Mt. Signal and Calexico Solar
- Panoche Valley Solar
- San Joaquin Solar I & II
- San Luis Solar Project
- Stateline Solar Project
- Solar Gen II Projects
- SR Solis Oro Loma
- Vestal Solar Facilities
- Victorville 2 Power Project
- Willow Springs Solar

Geothermal Energy

- Casa Diablo IV Geothermal
- East Brawley Geothermal
- Mammoth Pacific 1 Replacement
- Orni 21 Geothermal Project
- Western GeoPower Plant

Wind Energy

- Catalina Renewable Energy
- Ocotillo Wind Energy Project
- SD County Wind Energy
- Searchlight Wind Project
- Shu'luuk Wind Project
- Tres Vaqueros Repowering Project
- Tule Wind Project
- Vasco Winds Relicensing Project

Biomass Facilities

- CA Ethanol Project
- Colusa Biomass Project
- Tracy Green Energy Project

Other Development Projects

- Cal-Am Desalination Project
- Carnegie SVRA Expansion Project
- Lakeview Substation Project
- Monterey Bay Shores Ecoresort
- Phillips 66 Rail Spur
- Valero Benecia Crude By Rail
- World Logistics Center

Project Management

Mr. Cashen has managed several large-scale wildlife, forestry, and natural resource management projects. Many of the projects have required hiring and training field crews, coordinating with other professionals, and communicating with project stakeholders. Mr. Cashen's experience in study design, data collection, and scientific writing make him an effective project manager, and his background in several different natural resource disciplines enable him to address the many facets of contemporary land management in a cost-effective manner.

REPRESENTATIVE EXPERIENCE

Wildlife Studies

- Peninsular Bighorn Sheep Resource Use and Behavior Study: (CA State Parks)
- "KV" Spotted Owl and Northern Goshawk Inventory: (USFS, Plumas NF)
- Amphibian Inventory Project: (USFS, Plumas NF)
- San Mateo Creek Steelhead Restoration Project: (Trout Unlimited and CA Coastal Conservancy, Orange County)
- Delta Meadows State Park Special-Status Species Inventory: (CA State Parks, Locke)

Natural Resources Management

- Mather Lake Resource Management Study and Plan – (Sacramento County)
- Placer County Vernal Pool Study – (Placer County)
- Weidemann Ranch Mitigation Project – (Toll Brothers, Inc., San Ramon)
- Ion Communities Biological Resource Assessments – (Ion Communities, Riverside and San Bernardino Counties)
- Del Rio Hills Biological Resource Assessment – (The Wyro Company, Rio Vista)

Forestry

- Forest Health Improvement Projects – (CalFire, SD and Riverside Counties)
- San Diego Bark Beetle Tree Removal Project – (SDG&E, San Diego Co.)
- San Diego Bark Beetle Tree Removal Project – (San Diego County/NRCS)
- Hillslope Monitoring Project – (CalFire, throughout California)

Biological Resources

Mr. Cashen has a diverse background with biological resources. He has conducted comprehensive biological resource assessments, habitat evaluations, species inventories, and scientific peer review. Mr. Cashen has led investigations on several special-status species, including ones focusing on the foothill yellow-legged frog, mountain yellow-legged frog, desert tortoise, steelhead, burrowing owl, California spotted owl, northern goshawk, willow flycatcher, Peninsular bighorn sheep, red panda, and forest carnivores.

REPRESENTATIVE EXPERIENCE

Biological Assessments/Biological Evaluations (“BA/BE”)

- Aquatic Species BA/BE – Reliable Power Project (*SFPUC*)
- Terrestrial Species BA/BE – Reliable Power Project (*SFPUC*)
- Management Indicator Species Report – Reliable Power Project (*SFPUC*)
- Migratory Bird Report – Reliable Power Project (*SFPUC*)
- Terrestrial and Aquatic Species BA – Lower Cherry Aqueduct (*SFPUC*)
- Terrestrial and Aquatic Species BE – Lower Cherry Aqueduct (*SFPUC*)
- Terrestrial and Aquatic Species BA/BE – Public Lands Lease Application (*Society for the Conservation of Bighorn Sheep*)
- Terrestrial and Aquatic Species BA/BE – Simon Newman Ranch (*The Nature Conservancy*)
- Draft EIR (Vegetation and Special-Status Plants) - Wildland Fire Resiliency Program (*Midpeninsula Regional Open Space District*)

Avian

- Study design and Lead Investigator - Delta Meadows State Park Special-Status Species Inventory (*CA State Parks: Locke*)
- Study design and lead bird surveyor - Placer County Vernal Pool Study (*Placer County: throughout Placer County*)
- Surveyor - Willow flycatcher habitat mapping (*USFS: Plumas NF*)
- Surveyor - Tolay Creek, Cullinan Ranch, and Guadacanal Village restoration projects (*Ducks Unlimited/USGS: San Pablo Bay*)
- Study design and Lead Investigator - Bird use of restored wetlands research (*Pennsylvania Game Commission: throughout Pennsylvania*)
- Study design and surveyor - Baseline inventory of bird species at a 400-acre site in Napa County (*HCV Associates: Napa*)
- Surveyor - Baseline inventory of bird abundance following diesel spill (*LFR Levine-Fricke: Suisun Bay*)

- Study design and lead bird surveyor - Green Valley Creek Riparian Restoration Site (*City of Fairfield: Fairfield, CA*)
- Surveyor - Burrowing owl relocation and monitoring (*US Navy: Dixon, CA*)
- Surveyor - Pre-construction burrowing owl surveys (*various clients: Livermore, San Ramon, Rio Vista, Napa, Victorville, Imperial County, San Diego County*)
- Surveyor - Backcountry bird inventory (*National Park Service: Eagle, Alaska*)
- Lead surveyor - Tidal salt marsh bird surveys (*Point Reyes Bird Observatory: throughout Bay Area*)
- Surveyor – Pre-construction surveys for nesting birds (*various clients and locations*)

Amphibian

- Crew Leader - Red-legged frog, foothill yellow-legged frog, and mountain yellow-legged frog surveys (*USFS: Plumas NF*)
- Surveyor - Foothill yellow-legged frog surveys (*PG&E: North Fork Feather River*)
- Surveyor - Mountain yellow-legged frog surveys (*El Dorado Irrigation District: Desolation Wilderness*)
- Crew Leader - Bullfrog eradication (*Trout Unlimited: Cleveland NF*)

Fish and Aquatic Resources

- Surveyor - Hardhead minnow and other fish surveys (*USFS: Plumas NF*)
- Surveyor - Weber Creek aquatic habitat mapping (*El Dorado Irrigation District: Placerville, CA*)
- Surveyor - Green Valley Creek aquatic habitat mapping (*City of Fairfield: Fairfield, CA*)
- GPS Specialist - Salmonid spawning habitat mapping (*CDFG: Sacramento River*)
- Surveyor - Fish composition and abundance study (*PG&E: Upper North Fork Feather River and Lake Almanor*)
- Crew Leader - Surveys of steelhead abundance and habitat use (*CA Coastal Conservancy: Gualala River estuary*)
- Crew Leader - Exotic species identification and eradication (*Trout Unlimited: Cleveland NF*)

Mammals

- Principal Investigator – Peninsular bighorn sheep resource use and behavior study (*California State Parks: Freeman Properties*)

- Scientific Advisor – Study on red panda occupancy and abundance in eastern Nepal (*The Red Panda Network: CA and Nepal*)
- Surveyor - Forest carnivore surveys (*University of CA: Tahoe NF*)
- Surveyor - Relocation and monitoring of salt marsh harvest mice and other small mammals (*US Navy: Skagg's Island, CA*)
- Surveyor – Surveys for Monterey dusky-footed woodrat. Relocation of woodrat houses (*Touré Associates: Prunedale*)

Natural Resource Investigations / Multiple Species Studies

- Scientific Review Team Member – Member of the scientific review team assessing the effectiveness of the US Forest Service's implementation of the Herger-Feinstein Quincy Library Group Act.
- Lead Consultant - Baseline biological resource assessments and habitat mapping for CDF management units (*CDF: San Diego, San Bernardino, and Riverside Counties*)
- Biological Resources Expert – Peer review of CEQA/NEPA documents (*various law firms, non-profit organizations, and citizen groups*)
- Lead Consultant - Pre- and post-harvest biological resource assessments of tree removal sites (*SDG&E: San Diego County*)
- Crew Leader - T&E species habitat evaluations for Biological Assessment in support of a steelhead restoration plan (*Trout Unlimited: Cleveland NF*)
- Lead Investigator - Resource Management Study and Plan for Mather Lake Regional Park (*County of Sacramento: Sacramento, CA*)
- Lead Investigator - Biological Resources Assessment for 1,070-acre Alfaro Ranch property (*Yuba County, CA*)
- Lead Investigator - Wildlife Strike Hazard Management Plan (*HCV Associates: Napa*)
- Lead Investigator - Del Rio Hills Biological Resource Assessment (*The Wyro Company: Rio Vista, CA*)
- Lead Investigator – Ion Communities project sites (*Ion Communities: Riverside and San Bernardino Counties*)
- Surveyor – Tahoe Pilot Project: Validation of California's Wildlife Habitat Relationships (CWHR) Model (*University of California: Tahoe NF*)

Forestry

Mr. Cashen has five years of experience working as a consulting forester on projects throughout California. Mr. Cashen has consulted with landowners and timber operators on forest management practices; and he has worked on a variety of forestry tasks including selective tree marking, forest inventory, harvest layout, erosion control, and supervision of logging operations. Mr. Cashen's experience with many different natural resources enable him to provide a holistic approach to forest management, rather than just management of timber resources.

REPRESENTATIVE EXPERIENCE

- Lead Consultant - CalFire fuels treatment projects (*SD and Riverside Counties*)
- Lead Consultant and supervisor of harvest activities – San Diego Gas and Electric Bark Beetle Tree Removal Project (*San Diego*)
- Crew Leader - Hillslope Monitoring Program (*CalFire: throughout California*)
- Consulting Forester – Forest inventories and timber harvest projects (*various clients throughout California*)

Grant Writing and Technical Editing

Mr. Cashen has prepared and submitted over 50 proposals and grant applications. Many of the projects listed herein were acquired through proposals he wrote. Mr. Cashen's clients and colleagues have recognized his strong scientific writing skills and ability to generate technically superior proposal packages. Consequently, he routinely prepares funding applications and conducts technical editing for various clients.

PERMITS

U.S. Fish and Wildlife Service Section 10(a)(1)(A) Recovery Permit for the Peninsular bighorn sheep

PROFESSIONAL ORGANIZATIONS / ASSOCIATIONS

The Wildlife Society

Cal Alumni Foresters

Mt. Diablo Audubon Society

OTHER AFFILIATIONS

Scientific Advisor and Grant Writer – *The Red Panda Network*

Scientific Advisor – *Mt. Diablo Audubon Society*

Grant Writer – *American Conservation Experience*

TEACHING EXPERIENCE

Instructor: Wildlife Management - The Pennsylvania State University, 1998

Teaching Assistant: Ornithology - The Pennsylvania State University, 1996-1997

PUBLICATIONS

Gutiérrez RJ, AS Cheng, DR Becker, S Cashen, et al. 2015. Legislated collaboration in a conservation conflict: a case study of the Quincy Library group in California, USA. Chapter 19 *in*: Redpath SR, et al. (eds). *Conflicts in Conservation: Navigating Towards Solutions*. Cambridge Univ. Press, Cambridge, UK.

Cheng AS, RJ Gutiérrez RJ, S Cashen, et al. 2016. Is There a Place for Legislating Place-Based Collaborative Forestry Proposals?: Examining the Herger-Feinstein Quincy Library Group Forest Recovery Act Pilot Project. *Journal of Forestry*.

EXHIBIT B



794 Sawnee Bean Road
Thetford Center VT 05075

Norman Marshall, President
(802) 356-2969

nmarshall@smartmobility.com

February 29, 2024

Ariana Abedifard
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080

Subject: Seely Ave Mixed Use Project

Dear Ms. Abedifard,

I have reviewed vehicle miles traveled (VMT) impacts and traffic impacts of the City of San Jose Seely Avenue Mixed-Use Project Draft Environmental Impact Report ("DEIR"). I make the following findings:

- 1) The proposed mitigation is insufficient to fully mitigate the VMT impacts. The DEIR's assertion that the mitigation is sufficient is based on an overestimate of the reduction that would result from a "Voluntary Travel Behavior Change Program."
- 2) The County of Santa Clara Roads and Airports Department is on record of opposing a new signalized intersection at Seely Avenue due to the limited distance between those intersections and adjacent intersections. The DEIR analysis shows that there will be some blockage of upstream intersections during the AM peak hour.
- 3) The Santa Clara Valley Transportation Authority has recommended that the project close pedestrian gaps along Montague Expressway and these closures are not included in the project.

The Proposed Mitigation is Insufficient to Fully Mitigate the VMT Impact

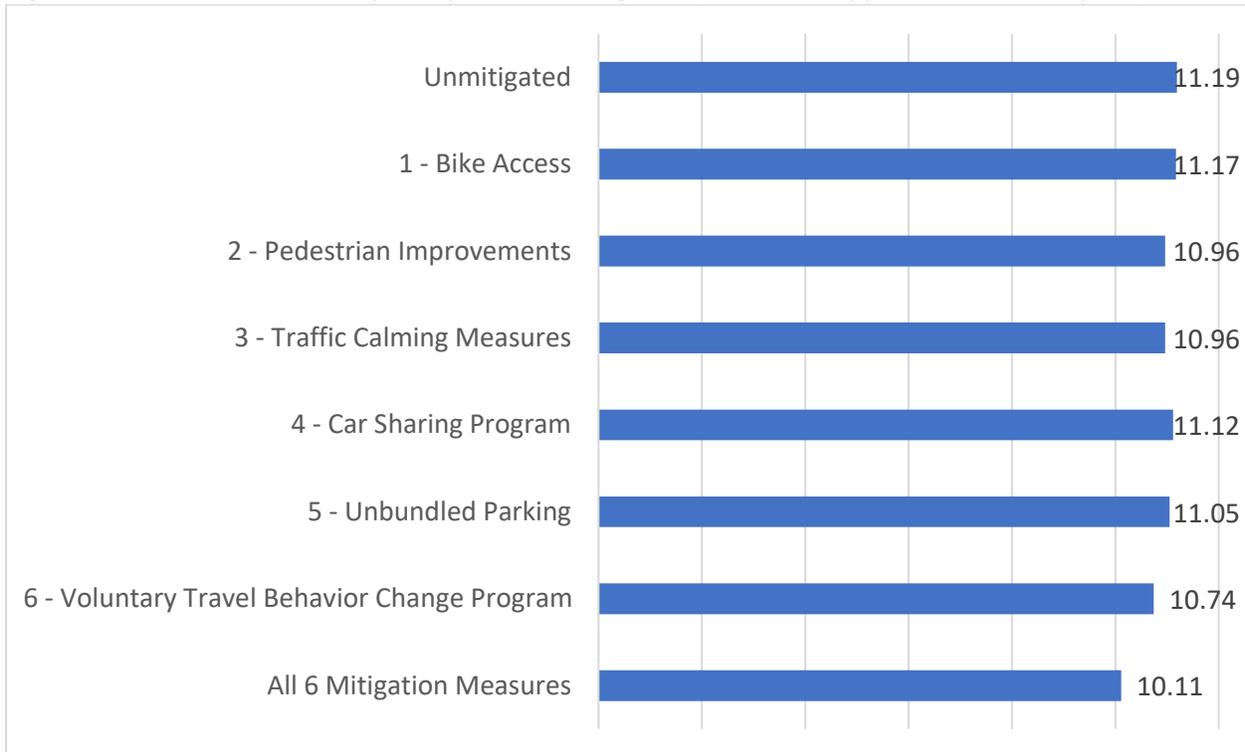
The DEIR states the project will cause a significant VMT impact. Specifically, the DEIR states: “The residential component of the project would generate vehicle miles traveled (VMT) of 11.19 per capita, which would exceed the City’s relevant residential VMT threshold of 10.12 VMT per capita.” (DEIR, p. xiv)

The DEIR then states:

Based on the City’s VMT Evaluation Tool, implementing the multimodal infrastructure improvements and TDM measures described above would lower the project VMT to 10.11 per capita, which would reduce the project impact to less than significant (i.e., below the City’s threshold of 10.12 VMT per capita). (DEIR, p. 241)

The stated reduction results from a combination of six different mitigation measures. As shown in Figure 1, the largest share of the calculated mitigation is from “Voluntary Travel Behavior Change Program.”

Figure 1: DEIR Calculated VMT per Capita After Mitigation (from DEIR Appendix P, Table 4, p. 26)



Mitigation measures 1, 2, 3, 4 and 5 are all described in both the City’s VMT Tool and the California Air Pollution Control Officers Association (CAPCOA) Handbook for Analyzing Greenhouse Gas Emission Reductions, Assessing Climate Vulnerabilities, and Advancing Health and Equity. The Handbook provides guidance for how these measures are to be applied.

A key issue with applying this measure is the need to estimate a participation percentage. The Policy Brief summarizes VMT reductions among “participants” and implies that participations may have been a small portion of the total population. The Policy Brief states:

Personalized feedback is often based on analysis of travel diaries and surveys that participants complete during the program. This analysis not only serves as a tool for providing feedback, but also as a means of evaluating program effectiveness. By analyzing diary and survey information, changes in vehicle miles traveled (VMT), emission reductions, or use of alternative transportation modes can be examined through before and after comparisons of travel behavior.

A travel diary requirement severely limits participation. In today's survey-resistant climate, travel diaries are seen as so onerous now that they have been eliminated from the long-running National Household Travel Survey ("NHTS"), beginning with the 2022 Survey.

Additionally, a written travel diary was not provided to respondents to take with them on their assigned travel day. This reflects a change in the current state of practice in household travel surveys but is expected to significantly change comparability with the 1995 NPTS and 2001, 2009, and 2017 NHTS travel data. The expected decline in trip rates from this change amounts to 20%.¹

The NHTS planners decided that it was more important to increase the survey participation rate than to maintain consistency with past surveys, and abandoned travel diaries.

I have been unable to find any recent voluntary travel reduction programs with travel diaries documented anywhere in the United States.

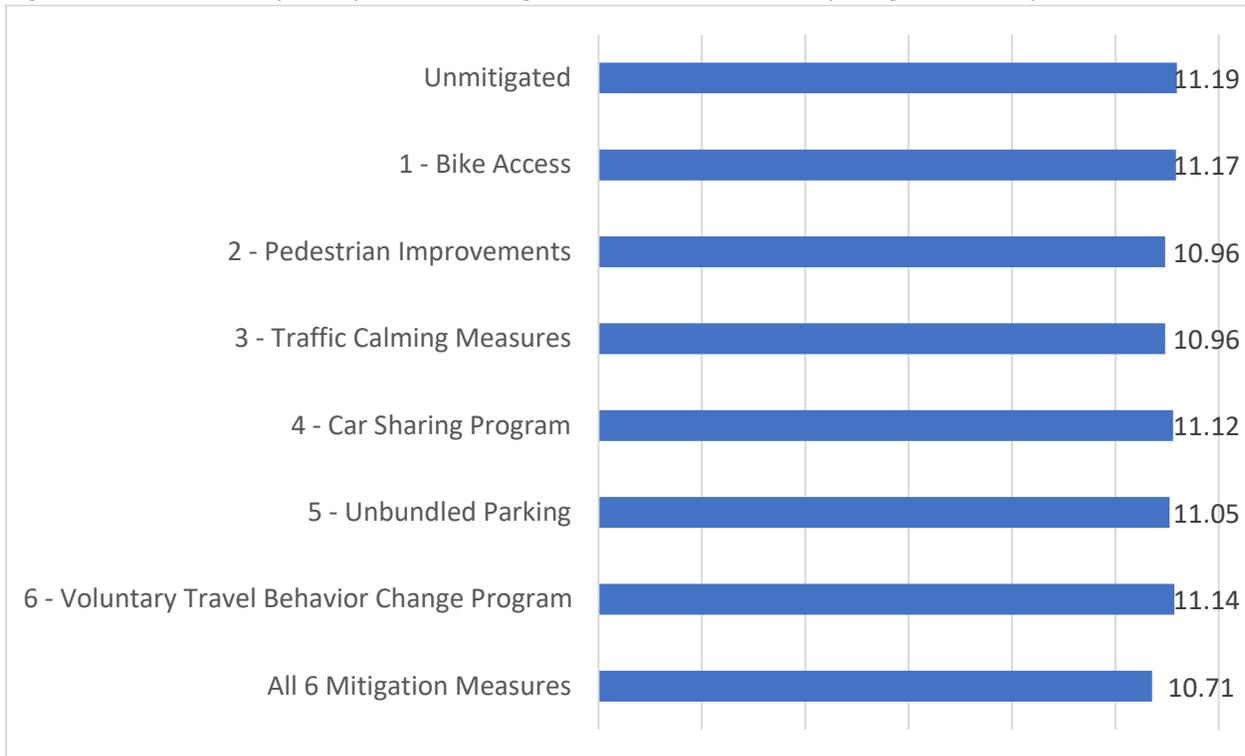
In the City's Tool, the DEIR assumes 100% participation which equates to a 4% reduction in VMT per capita. The DEIR claims this 4% reduction would be achieved by:

All residents/households would be provided with the information/tools necessary to fully participate in the Voluntary Travel Behavior Change program. (DEIR Appendix P., p. 24)

Just providing information will not result in 100% participation. A more realistic participation rate is 10%, with the VMT reduction reduced proportionally to 0.4% as shown in Figure 12. The resulting VMT per capita with all six measures would be 10.71, i.e., 5.8% higher than the City's threshold of 10.12.

¹<https://nhts.ornl.gov/assets/2022/doc/2022%20NextGen%20NHTS%20Technical%20Release%20Notes%20V1.pdf>

Figure 2: Revised VMT per Capita After Mitigation With 10% Voluntary Program Participation



Another VMT mitigation measure targeted at workplaces is T-5: Commute Trip Reduction Program (Voluntary). The Handbook states that:

Voluntary CTR programs must include the following elements to apply the VMT reductions reported in literature.

- Employer-provided services, infrastructure, and incentives for alternative modes such as ridesharing (Measure T-8), discounted transit (Measure T-9), bicycling (Measure T-10), vanpool (Measure T-11), and guaranteed ride home.
- Information, coordination, and marketing for said services, infrastructure, and incentives (Measure T-7).

These Voluntary CTR measures have a significant cost. The Handbook states:

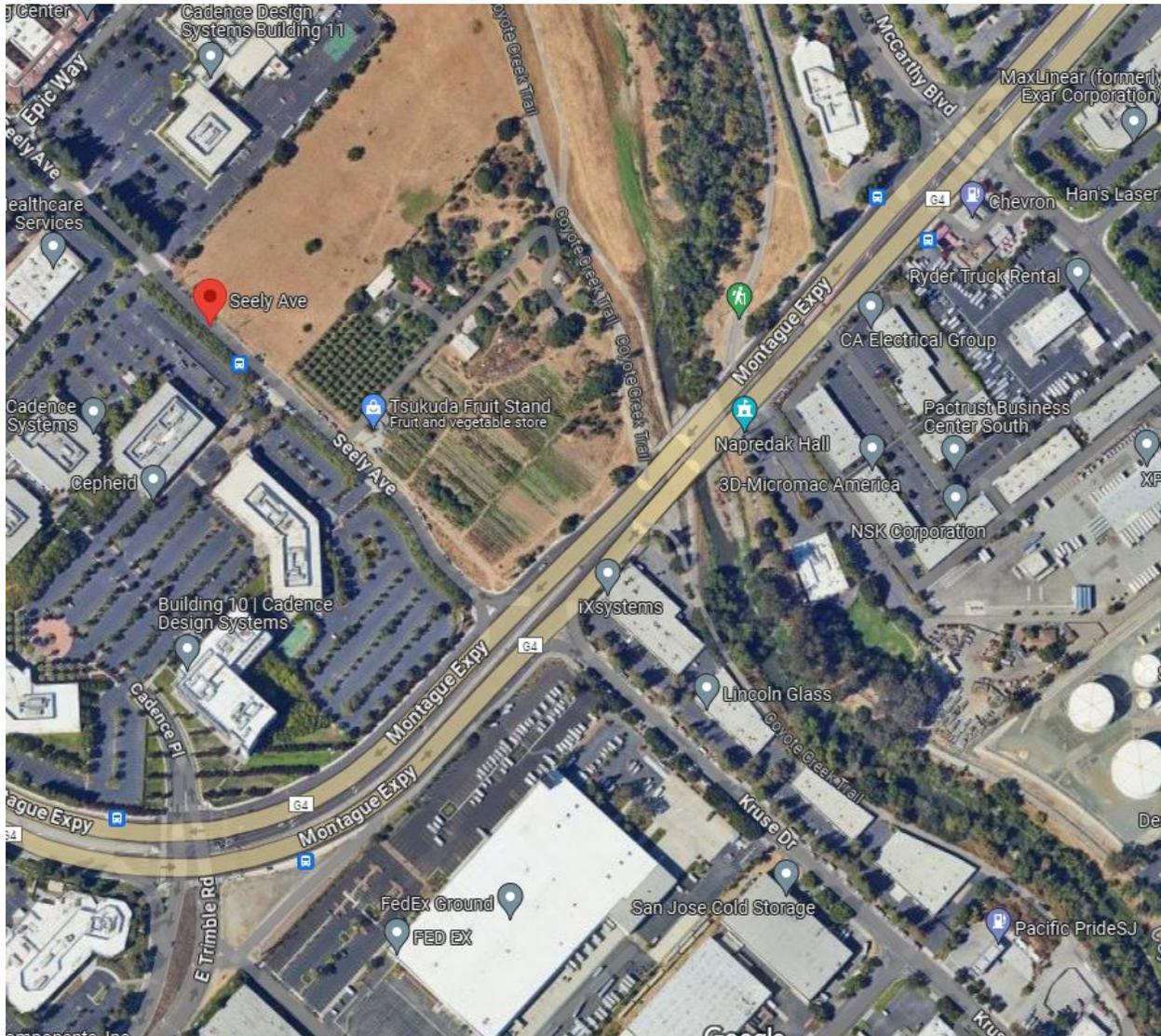
Employer costs may include recurring costs for transit subsidies capital and maintenance costs for the alternative transportation infrastructure, and labor costs for staff to manage the program. Where the local municipality has a VMT reduction ordinance, costs may include the labor costs for government staff to track the efficacy of the program.

The Handbook states that the combination of all these measures will result in a maximum 4% VMT reduction. Simply Providing information to residents will not result in a 4% VMT reduction. Therefore, the mitigation proposed is not sufficient to reduce the significant VMT impact.

Traffic Impacts

The County of Santa Clara Roads and Airports Department letter of March 25, 2022 on the project’s Notice of Preparation (“NOP”) reiterates “. . . our objection to the proposed signalization of Seely Ave and Montague Expressway because the proposed signal location is too close to the existing signals at Trimble Rd and McCarthy Blvd.” (DEIR, Appendix A p. 32 of 43) The locations of these intersections are shown in Figure 3.

Figure 3: Existing Conditions Along Montague Expressway (Google Maps)



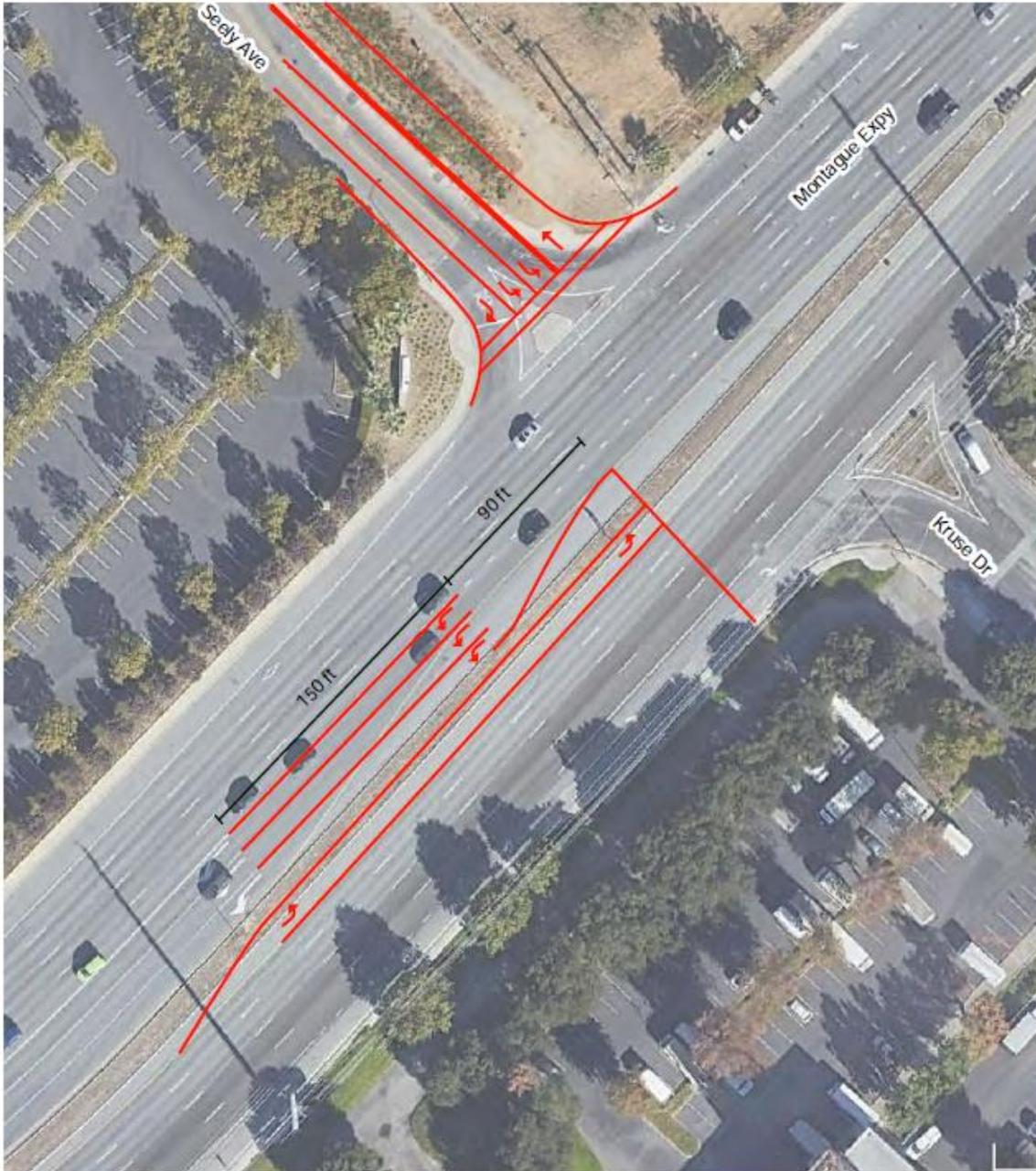
The DEIR response acknowledges that:

“A new traffic signal at Seely Avenue and Montague Expressway would require coordination with City and County staff.” (DEIR, Appendix P, p. vii)

The intersection design proposed in the DEIR is reproduced here as Figure 4. Currently, the intersection provides only right in – right out access to Seely Avenue. The proposed design adds two exiting left turn

lanes from Seely Avenue and one left turn lane into Seely Avenue. It also extends the triple left turn lanes extending from the Montague Expressway intersection with East Trimble Road.

Figure 4: DEIR Seely Avenue/Montague Expressway Intersection Conceptual Design (DEIR Appendix P, p. 216 of 516)



Not to Scale

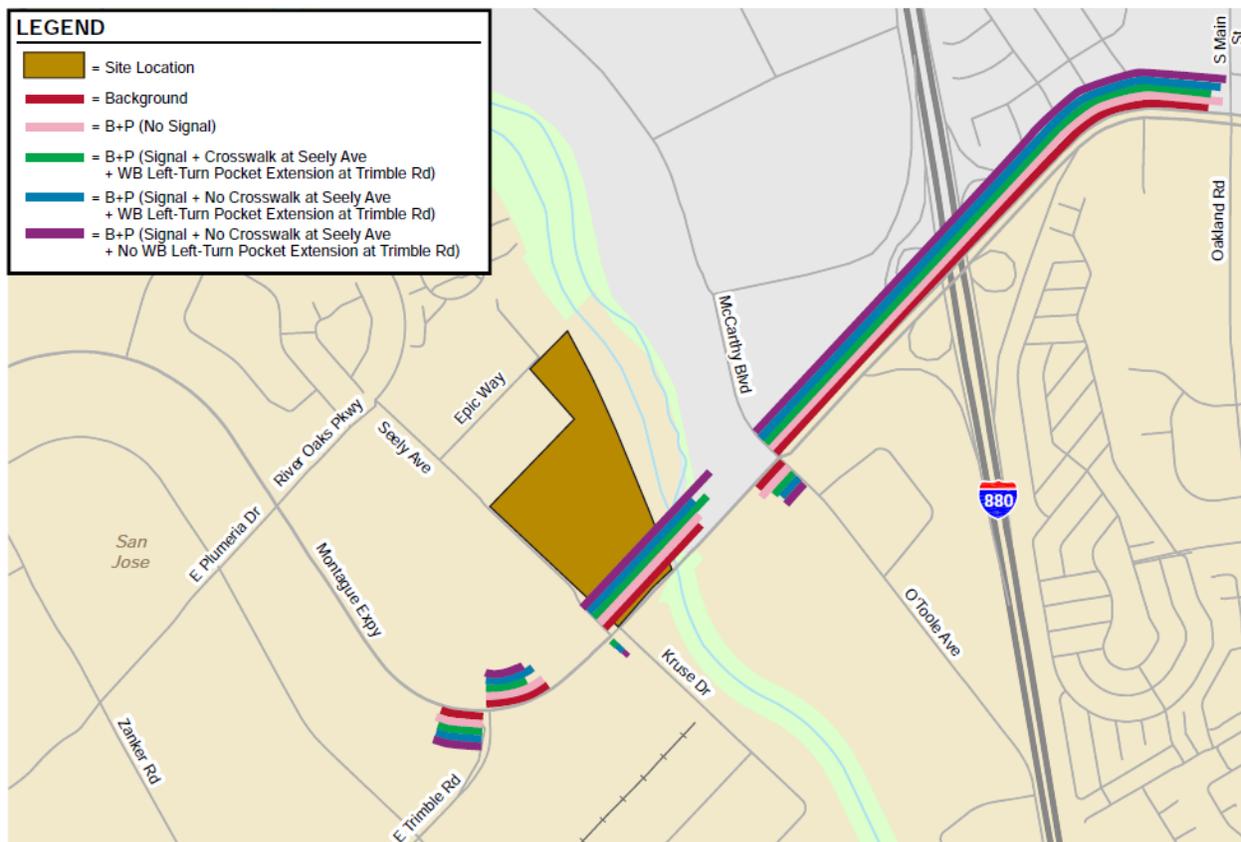
Figure 1
Conceptual Intersection Improvements

The DEIR states:

The detailed Synchro/SimTraffic analysis is contained in Appendix E. The Synchro/SimTraffic analysis shows that a new traffic signal at Seely Avenue/Montague Expressway that does not include adding a crosswalk across Montague Expressway but does include extending the westbound triple left-turn pocket at Montague Expressway/Trimble Road would have the least impact on traffic operations along Montague Expressway when compared to the other project scenarios that were analyzed. However, including a crosswalk across Montague Expressway would not substantially worsen traffic operations so long as the westbound triple left-turn pocket extension at Trimble Road is included. The new signal would allow for adequate progression of vehicles in both directions of travel along Montague Expressway and is expected to operate at an acceptable level of service based on the 2000 Highway Capacity Manual (HCM) method for signalized intersections. (DEIR, Appendix P, p. 42)

The DEIR documents significant congestion on Montague Expressway Figure 5 shows the long westbound average AM peak hour queues presented in the DEIR.

Figure 5: Montague Average Queues (DEIR Appendix P, p. 223 of 516)



This graphic is misleading in that it shows the two alternatives without a Seely Avenue signal (“Background” and “B+P (No Signal)” – where “P” refers to project traffic) with queues backing up from the nonexistent Seely Avenue signal. Those queues should be shown as continuous from the East Trimble Rd signal and therefore would not extend as close to McCarthy Boulevard as shown.

Figure 5 shows average queues. SimTraffic also estimates 95 percentile queues. With the proposed project and DEIR intersection design, the DEIR estimates that queues would extend into the upstream intersection during the AM peak hour including:

- Upstream of East Trimble Road 5% of the time (App. P, p. 309 of 516)
- Upstream of new Seely Avenue signal 2% of the time (App. P, 310 of 516)

The Project therefore will result in traffic blockages.

The Santa Clara Valley Transportation Authority commented on the NOP in a letter dated March 25, 2022. This letter states:

. . . VTA again recommends the project install a sidewalk/trail from the cul-de-sac at the south end of the project site that connects to Montague Expressway. In addition, VT recommends the project close the sidewalk gap on the north side of Montague Expressway near the Coyote Creek Trail. The development should widen the sidewalk with a landscape strip and pedestrian scale lighting. As the sidewalk along Montague Expressway will be the primary access point to the Coyote Creek Trail and to VTA bus stops along Montague Expressway, pedestrians and bicycles should be considered. (DEIR, Appendix A, p. 40 of 43)

The DEIR states:

The project would provide a direct connection to the Coyote Creek multi-use trail (Class I bikeway) that runs along both sides of Coyote Creek. (DEIR, p. 237)

The DEIR does not address the VTA recommendations for closing the pedestrian gaps along Montague Expressway.

Sincerely,



Norman L. Marshall

Resume

NORMAN L. MARSHALL, PRESIDENT

nmarshall@smartmobility.com

EDUCATION:

Master of Science in Engineering Sciences, Dartmouth College, Hanover, NH, 1982

Bachelor of Science in Mathematics, Worcester Polytechnic Institute, Worcester, MA, 1977

PROFESSIONAL EXPERIENCE: (33 Years, 19 at Smart Mobility, Inc.)

Norm Marshall helped found Smart Mobility, Inc. in 2001. Prior to this, he was at RSG for 14 years where he developed a national practice in travel demand modeling. He specializes in analyzing the relationships between the built environment and travel behavior and doing planning that coordinates multi-modal transportation with land use and community needs.

Regional Land Use/Transportation Scenario Planning

Portland Area Comprehensive Transportation System (PACTS) – the Portland Maine Metropolitan Planning Organization. Updating regional travel demand model with new data (including AirSage), adding a truck model, and multiclass assignment including differentiation between cash toll and transponder payments.

Loudoun County Virginia Dynamic Traffic Assignment – Enhanced subarea travel demand model to include Dynamic Traffic Assignment (Cube). Model being used to better understand impacts of roadway expansion on induced travel.

Vermont Agency of Transportation-Enhanced statewide travel demand model to evaluate travel impacts of closures and delays resulting from severe storm events. Model uses innovative Monte Carlo simulations process to account for combinations of failures.

California Air Resources Board – Led team including the University of California in \$250k project that reviewed the ability of the new generation of regional activity-based models and land use models to accurately account for greenhouse gas emissions from alternative scenarios including more compact walkable land use and roadway pricing. This work included hands-on testing of the most complex travel demand models in use in the U.S. today.

Climate Plan (California statewide) – Assisted large coalition of groups in reviewing and participating in the target setting process required by Senate Bill 375 and administered by the California Air Resources Board to reduce future greenhouse gas emissions through land use measures and other regional initiatives.

Chittenden County (2060 Land use and Transportation Vision Burlington Vermont region) – led extensive public visioning project as part of MPO's long-range transportation plan update.

Flagstaff Metropolitan Planning Organization – Implemented walk, transit and bike models within regional travel demand model. The bike model includes skimming bike networks including on-road and off-road bicycle facilities with a bike level of service established for each segment.

Chicago Metropolitan Plan and Chicago Metropolitan Freight Plan (6-county region)— developed alternative transportation scenarios, made enhancements in the regional travel demand model, and used the enhanced

model to evaluate alternative scenarios including development of alternative regional transit concepts. Developed multi-class assignment model and used it to analyze freight alternatives including congestion pricing and other peak shifting strategies.

Municipal Planning

City of Grand Rapids – Michigan Street Corridor – developed peak period subarea model including non-motorized trips based on urban form. Model is being used to develop traffic volumes for several alternatives that are being additionally analyzed using the City’s Synchro model

City of Omaha - Modified regional travel demand model to properly account for non-motorized trips, transit trips and shorter auto trips that would result from more compact mixed-use development. Scenarios with different roadway, transit, and land use alternatives were modeled.

City of Dublin (Columbus region) – Modified regional travel demand model to properly account for non-motorized trips and shorter auto trips that would result from more compact mixed-use development. The model was applied in analyses for a new downtown to be constructed in the Bridge Street corridor on both sides of an historic village center.

City of Portland, Maine – Implemented model improvements that better account for non-motorized trips and interactions between land use and transportation and applied the enhanced model to two subarea studies.

City of Honolulu – Kaka’ako Transit Oriented Development (TOD) – applied regional travel demand model in estimating impacts of proposed TOD including estimating internal trip capture.

City of Burlington (Vermont) Transportation Plan – Led team that developing Transportation Plan focused on supporting increased population and employment without increases in traffic by focusing investments and policies on transit, walking, biking and Transportation Demand Management.

Transit Planning

Regional Transportation Authority (Chicago) and Chicago Metropolis 2020 – evaluated alternative 2020 and 2030 system-wide transit scenarios including deterioration and enhance/expand under alternative land use and energy pricing assumptions in support of initiatives for increased public funding.

Capital Metropolitan Transportation Authority (Austin, TX) Transit Vision – analyzed the regional effects of implementing the transit vision in concert with an aggressive transit-oriented development plan developed by Calthorpe Associates. Transit vision includes commuter rail and BRT.

Bus Rapid Transit for Northern Virginia HOT Lanes (Breakthrough Technologies, Inc and Environmental Defense.) – analyzed alternative Bus Rapid Transit (BRT) strategies for proposed privately-developing High Occupancy Toll lanes on I-95 and I-495 (Capital Beltway) including different service alternatives (point-to-point services, trunk lines intersecting connecting routes at in-line stations, and hybrid).

Roadway Corridor Planning

I-30 Little Rock Arkansas – Developed enhanced version of regional travel demand model that integrates TransCAD with open source Dynamic Traffic Assignment (DTA) software, and used to model I-30 alternatives. Freeway bottlenecks are modeled much more accurately than in the base TransCAD model.

South Evacuation Lifeline (SELL) – In work for the South Carolina Coastal Conservation League, used Dynamic Travel Assignment (DTA) to estimate evaluation times with different transportation alternatives in coastal South Carolina including a new proposed freeway.

Hudson River Crossing Study (Capital District Transportation Committee and NYSDOT) – Analyzing long term capacity needs for Hudson River bridges which a special focus on the I-90 Patroon Island Bridge where a microsimulation VISSIM model was developed and applied.

PUBLICATIONS AND PRESENTATIONS (partial list)

DTA Love: Co-leader of workshop on Dynamic Traffic Assignment at the June 2019 Transportation Research Board Planning Applications Conference.

Forecasting the Impossible: The Status Quo of Estimating Traffic Flows with Static Traffic Assignment and the Future of Dynamic Traffic Assignment. *Research in Transportation Business and Management* 2018.

Assessing Freeway Expansion Projects with Regional Dynamic Traffic Assignment. Presented at the August 2018 Transportation Research Board Tools of the Trade Conference on Transportation Planning for Small and Medium Sized Communities.

Vermont Statewide Resilience Modeling. With Joseph Segale, James Sullivan and Roy Schiff. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

Assessing Freeway Expansion Projects with Regional Dynamic Traffic Assignment. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

Pre-Destination Choice Walk Mode Choice Modeling. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

A Statistical Model of Regional Traffic Congestion in the United States, presented at the 2016 Annual Meeting of the Transportation Research Board.

MEMBERSHIPS/AFFILIATIONS

Associate Member, Transportation Research Board (TRB)

Member and Co-Leader Project for Transportation Modeling Reform, Congress for the New Urbanism (CNU)

EXHIBIT C

MENLO SCIENTIFIC ACOUSTICS, INC.

Consultants in Acoustics and Communication Technologies

29 February 2024

Ms. Ariana Abedifard
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd., Suite 1000
South San Francisco, CA 94080

Subject: **Seely Avenue Mixed-Use Project**
 DEIR SCH No. 2022020565– Acoustic Review

Dear Ms. Abedifard,

Menlo Scientific Acoustics, Inc., reviewed the Draft Environmental Impact Report^a, Appendix O – Noise and Vibration Analysis^b, and other documents in regards to the subject project, concerning the proposed development comprised of “1,472 residential units, 18,965 square feet of general neighborhood retail space, and a 2.5-acre public park. The residential development would consist of a mix of three-story townhomes and six- to seven-story apartment buildings, which would include affordable apartments. The project would also include the construction of a domestic water well and onsite water pipes to serve the local municipal water system. Other offsite improvements would include widening of Seely Avenue to accommodate multi-directional traffic, installation of a Class II bike lane and sidewalks, and intersection improvements at Seely Avenue and Montague Expressway to accommodate project-generated traffic. The project would include 1,967 parking spaces for the residential and retail components. Parking for both the residential and retail components would be provided in a mix of three surface parking lots as well as multi-level parking in the residential buildings.” (DEIR, pg. xii).

OVERVIEW

Our review of these documents finds errors of such magnitude as to call into question the findings contained in Appendix O and thus the DEIR. Specifically, we make the following findings:

- 1) The DEIR and Appendix fail to analyze the noise impacts from Project construction on new residents introduced as part of the Project.
- 2) The calculation of construction noise levels fails to account for the actual amount of equipment used for the project, resulting in an underestimation of noise levels.
- 3) The proposed mitigation measures for the Project’s construction noise impacts are insufficient.
- 4) There is insufficient information to support the measurements taken for the Project’s existing and future noise levels.
- 5) The measures proposed to reduce interior noise levels are insufficient.
- 6) The Appendix incorrectly interprets the Maximum Noise Level.
- 7) The Appendix uses an arbitrary noise threshold.

^a Draft Environmental Impact Report Seely Avenue Mixed-Use Project State Clearinghouse No. 2022020565 File Number: PDC21-035/PD22-002/ER21-284

^b Appendix O Noise/Vibration Assessment - 0 Seely Avenue Mixed-Use Project Noise And Vibration Assessment

SPECIFIC ITEMS OF CONCERN

1. No Analysis of Impacts on Project Residents

Per DEIR Table 2-4, the Townhouse phase of the project will be completed in April 2026 and ready for tenants while Building A, the Affordable Housing building, and Building B are under construction until October 2026, September 2026, and October 2027, respectively. Similarly, Building A and the Affordable Housing building will be ready for tenants on October 2026 and September 2026, respectively, while Building B is under construction. Lastly, Building B will be ready for tenants in October 2027 while Building C is under construction from October 2026 until October 2028. The note to Table 2-4 describes the schedule as the most aggressive feasible.

A visual presentation of this project timeline and relevant overlap is shown in **Attachment A**—a Gantt chart prepared using the schedule in DEIR Table 2-4.

The Appendix also notes:

“The nearest sensitive receptors to the project site are the residents of the existing apartment building about 60 feet northwest of the project site, as well as workers and customers at the existing commercial/office buildings located about 150 feet to the west of the site.”

The Appendix and DEIR fail to identify the newly added residents that will be living on the Project site while other construction is still occurring as sensitive receptors. The Project can have a significant impact on these new residents as construction will be ongoing and, as described below, the construction noise levels will be significant and insufficiently mitigated. Therefore, the impact of the project on phases that will be complete when construction on other phase is still in progress is not addressed.

2. Inaccurate Calculation of Significant Construction Noise Levels

Appendix Table 8 (Construction Equipment 50-Foot Noise Emission Limits), page 37, and Table 9 (Typical Ranges of Construction Noise Levels at 50 Feet, L_{eq} (dBA)), page 38, demonstrate how loud the various construction equipment that will be used for the Project can be.

Table 10, Construction Noise Levels – Project Infrastructure, page 39, shows that the proposed noise levels at 50 feet, which would include the existing residences, will be loud, even when the construction is at “the acoustic center of the project.” How loud the impact will be can be seen looking at these calculated levels with respect to the common sounds presented in Table 2.

In fact, as stated by the Appendix, these levels result in a significant impact. Page 36 of the Appendix notes there are no noise level thresholds for construction activities in the SJMC. It then proposes:

“As an alternative, this analysis uses the noise limits established by the Federal Transit Administration (FTA) to identify the potential for impacts due to substantial temporary construction noise. The FTA identifies construction noise limits in the Transit Noise and

Vibration Impact Assessment Manual.¹ During daytime hours, an exterior threshold of 80 dBA Leq shall be enforced at residential land uses, an exterior threshold of 85 dBA Leq shall be enforced at commercial land uses, and 90 dBA Leq shall be enforced at industrial land uses.”

Notably, while the Appendix proposes this as a threshold, the DEIR does not mention these numeric FTA thresholds. However, Table 10 and 11 of the Appendix show that the construction will exceed these thresholds. As summarized by the Appendix, “Construction noise levels would exceed the exterior threshold of 80 dBA Leq at residential land uses to the west when activities occur within about 90 feet.” (page 41). Because these thresholds were not included in the DEIR, the DEIR fails to identify this significant impact.

Even if these levels are already deemed significant as is, these construction noise levels are underestimated. The noise levels will be even greater than analyzed in Table 10 and 11. This is because these tables erroneously show calculated levels for only two pieces of equipment. While the tables describe the total quantity of construction equipment for each phase, its calculation explicitly is only “from operation of *Two Loudest Pieces of Construction Equipment*.” A project of this scope will have more than just two noisy pieces of equipment in use at one time; the Tables themselves show this. For example, as shown in Table 10, the Site Preparation phase will use a total of 13 pieces of equipment, and in Table 11, the Paving phase will use 5 pieces of equipment. The noise levels presented are therefore underestimated.

Ultimately, the construction noise levels presented, whether underestimated or not, are a significant impact. As described below in Section 3, the mitigation measures proposed to reduce the significance of this impact are inadequate. But given that the impact will be even greater than analyzed due to the quantity of equipment which will be used, the resulting mitigation is more ineffective.

3. Inadequate Mitigation Measures

Page 12 – EC-1.7 notes “The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would:

- Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months.”

Since the Project construction will last for several years (according to the Project Timeline demonstrated in DEIR Table 2-4), the Project meets this criteria and is a significant impact as defined by the General Plan Policy EC-1.7. Therefore, mitigation to reduce the significant impact must be thorough. As can be seen below, the mitigation plan is inadequate.

The DEIR presents Mitigation Measure NSE-1 (pg. 203). Part of the mitigation measure is to “Construct solid plywood fences or similar along the northwest boundary of the site adjacent to residences to shield adjacent residential land uses from ground-level construction equipment and activities. The temporary 8-foot noise barrier shall be solid over the face and at the base of the barrier in order to provide a 5 dBA noise reduction.”

The purported 5 dBA noise reduction may only be achieved when the barrier actually blocks the line of sight between the noise source and the receiver. Some sources may have their acoustic source higher than the barrier height. For sensitive receivers above the barrier height, for example the upper floors of the existing sensitive receivers, the proposed fence will not provide any noise reduction. There is no fence proposed for, when complete, the upper floors of the Townhomes, Building A, and Building B.

The construction noise impact is significant for the existing sensitive receivers and for the project phase that will be complete as the construction on other project phase continue. Although MM NSE-1 calls for other noise-reducing components, these additional measures do not compensate for the lack of effectiveness of the plywood fences. Barrier effectiveness is a function of the noise frequency^c. Barriers are more effective for higher frequency noises and less effective for low frequency noises, such as engine noise and exhaust noise. Accordingly, the significant noise impact will not be adequately mitigated.

4. Lack of Information to Support Existing and Future Noise Measurements

According to the Appendix (pg.13), to measure the Existing Noise Environment, a noise monitoring survey was conducted to document ambient noise levels at the site and in the surrounding area. The survey included three long-term measurements and four short-term measurements. Appendix Page 13 addresses the results these measurements, shown in Figure 1, Noise Measurement Locations. Table 4, Summary of Short-Term Noise Measurement Data, November 22, 2021, presents several measured noise levels – L10, L50, L90, and L_{eq} in dBA, as well what is called the “Calculated DNL, dBA*”, where the asterisk notes “*DNL levels calculated through comparison between short-term and long-term noise levels.”

The comparison technique is not disclosed, and for both the short term and long term measurements, neither is the setting of the sound level meters used (for example fast or slow weighting applied to the signal), the height of the microphone, the make and model of the equipment used for the measurements, the date of the equipment’s latest calibration record, and if a field calibrator was used (with its latest calibration record) prior to and at the end of each measurement.

The disclosure of this information is standard practice as noted in, for example, ASTM E1686-16, Standard Guide for Applying Environmental Noise Measurement Methods and Criteria,^d and ASA/ANSI S12.18, American National Standard Procedures for Outdoor Measurement of Sound Pressure Level.^e

Accordingly, the measured noise data is not able to be verified and is unsupported.

^c https://www.fhwa.dot.gov/environment/noise/noise_barriers/design_construction/design/design03.cfm Section 3.4

^d <https://www.astm.org/e1686-16.html>

^e

https://global.ihs.com/doc_detail.cfm?&csf=ASA&item_s_key=00217910&item_key_date=760017&input_doc_number=&input_doc_title=&org_code=ASA&seg_code=S12

The data for future noise levels is also unverifiable. The Appendix, on page 26, presents Table 5, Calculated Future Exterior Noise Levels at Proposed Outdoor Use Areas.

The SoundPLAN program output for the future levels is not presented to support the noise levels in the chart nor is how the model was validated, noted on page 25.

5. Insufficient Interior Noise Reduction Measures

The Appendix then goes on to show the calculated interior noise levels in Table 7 (page 28) and assumes that the windows provide 15 dBA and 25 dBA “noise level reductions” in the open and closed positions, respectively. No data or description of the windows used, such as the OITC test report, nor are the calculation sheets from SoundPLAN.

Table 7 notes the 45 dBA interior noise criteria is exceeded for the Affordable Building Southeast, Southwest, and Northeast units for all units no matter what floor. Specifically:

- For Building 1 (which is either DEIR Building B or C) Southeast units, the 45 dBA interior noise criteria is exceeded for all floors and is exceeded for units on floors 6 and 7 on the Northeast.
- For Building 2 (which appears to be DEIR Building A) the 45 dBA interior noise criteria is exceeded for all units facade on all floors for the Southeast, Southwest, and Northeast facades.
- For Building 3 (which is either DEIR Building C or B) the 45 dBA interior noise criteria is exceeded on floors 5, 6, and 7 on the Southwest façade.

Page 32 of the Appendix discusses proposed mitigation to lower the level in units where Table 7 indicates the interior noise levels will exceed the 45 dBA criteria. The Appendix states in the second paragraph from the bottom on page 32:

“Assuming a calculated maximum exterior noise exposure of 75 dBA DNL and a 30% window-to-wall area ratio, the southeast façade of the Affordable Building would require windows with an STC rating of 32 or greater to reduce interior noise levels to 45 dBA DNL or less. Standard windows would provide the necessary noise reduction for residences located along other façades of the Affordable Building.”

However, a standard dual-pane glass window carries an STC rating of around 27 or 28.^f A window comprised of 1/8” glass with a 1/4” airspace and another 1/8” sheet of glass has an STC of 28, and normal voice levels can still be heard and distinguished.

Thus the statement quoted above is incorrect and does not provide the level of isolation required to meet the 45 dBA interior noise criteria.

Additionally, the Appendix states in the last paragraph on page 32:

^f https://www.jeld-wen.com/en-us/discover/reference/acoustic_performance_in_windows

“Assuming a calculated maximum exterior noise exposure of 81 dBA DNL and a 30% window-to-wall area ratio, residential units along the southeastern façade of Building 2 would require windows with an STC rating of 38 or greater to reduce interior noise levels to 45 dBA DNL or less. Alternatively, incorporating additional sound-rated construction

methods into the exterior walls (e.g., adding resilient channels) could increase the STC rating of the wall to a value of about 57. With this additional measure, the southeastern façade of Building 2 would require windows with an STC rating of 35 or greater to reduce interior noise levels to 45 dBA DNL or below. With typical stucco exterior wall construction and day-night average noise levels reaching up to 74 dBA DNL at other Building 2 façades, standard windows would suffice to reduce interior noise levels to levels not exceeding 45 dBA DNL.”

Again, there is no calculation shown to support the mitigation noted above. The STC^g rating is a single number calculated from the individual one-third-octave band transmission loss data from measurement in a test lab.. The DNL is a single number metric calculated from the 24 one-hour L_{eq} (NHL) levels, with a penalty for the night-time levels. Per standard and customary practice, to predict the interior level, the calculation should include the exterior unweighted one-third octave band L_{eq} (1 hour) sound levels for the peak hour, the one-third octave transmission loss (TL) from the test report for the STC rated window said to be being sufficient to meet the 45 dBA interior noise level, a calculation of the difference between the one-third octave band noise levels and the window one-third octave band TLs, then apply the one-third octave band A-weighting to resulting A-weighted level to the difference, and then calculating the overall A-weighted level from the A-weighted one-third octave band difference levels^h.

Further, on page 33, the Appendix provides the following recommendation:

“Preliminary calculations indicate that residential units along the southeastern façade of Building 2 would require windows and doors with a minimum rating of 38 STC, or with a minimum rating of 35 STC and addition sound-rated wall construction methods resulting in a wall STC of 57 or greater, with adequate forced-air mechanical ventilation to meet the interior noise threshold of 45 dBA DNL.”

Once again, there is no backup to support the proposed mitigation.

6. Incorrect Interpretation of Noise Level

The DEIR and Appendix O cite a maximum of 60 dBA L_{DN} dBA from the City of San Jose Table EC-1, Land Use Compatibility Guideline for Community Noise in San Jose, 1. Residential, Hotels and Motels, Hospitals and Residential Care, Exterior Noise Exposure (DNL in Decibels (dBA)).ⁱ

^g <https://www.astm.org/e0413-22.html> - Classification for Rating Sound Insulation

<https://www.astm.org/e0090-09r16.html> - Standard Test Method for Laboratory Measurement of Airborne Sound Transmission Loss of Building Partitions and Elements

^h <https://sengpielaudio.com/calculator-spl30.htm>

ⁱ Envision San Jose 2040 General Plan, Adopted November 1, 2011, as amend on May 16, 2019

This table is repeated as Table 3-26 in section 3.13.12, Regulatory Framework in the Noise and Vibration section of the DEIR.

The City of San Jose Municipal Code Section 20.30.700^j Table 20-85 Noise Standards which specifies “55 dB” as the “Maximum Noise Level in Decibels at Property Line for Any Residential or non-residential use.” One assumes this sound level is A-weighted decibels. The procedure for taking measurements is not specified.

ANSI/ASA S1.1, definition 3.13, defines “maximum sound level” as the “Greatest frequency-weighted and exponential-time-weighted sound level within a stated time interval. Unit, decibel (dB); abbreviation for F time weighting and A frequency weighting, for example, is MXFA; symbol L_{AFmx} (or C and S).^k The Fast, F, time constant is 1 second.

This is in contrast to L_{eq} , used extensively in the Appendix and the DEIR, which per ANSI/ASA S1.1 section 3.15, is “the time-averaged sound level; equivalent continuous sound level. Ten times the logarithm to the base ten of the ratio of time-mean-square frequency-weighted sound pressure signal, during a stated time interval T , to the square of the reference value for sound pressure. Unit, decibel (dB); respective abbreviations, TAV and TEQ; examples of symbols, L_{AT} and L_{AeqT} , where the subscript A would be replaced if another frequency weighting is applied.”

For time varying noise, a 1 second average sound level is higher than a maximum sound level over a longer time period, such as 1 minute, 15 minutes, or 1 hour. As such, many of the levels presented in the Appendix using the L_{AeqT} metric for the 1, 15, and 60 minute time periods will exceed the 1 second L_{AFmx} levels, and so any finding of less than significant impact is incorrect.

7. Arbitrary Selection of Construction Noise Threshold

Page 36 of the Appendix notes there are no noise level thresholds for construction activities in the SJMC. It then proposes:

“As an alternative, this analysis uses the noise limits established by the Federal Transit Administration (FTA) to identify the potential for impacts due to substantial temporary construction noise. The FTA identifies construction noise limits in the Transit Noise and Vibration Impact Assessment Manual.¹ During daytime hours, an exterior threshold of 80 dBA Leq shall be enforced at residential land uses, an exterior threshold of 85 dBA Leq shall be enforced at commercial land uses, and 90 dBA Leq shall be enforced at industrial land uses.”

When a criteria is not included in a code, any criteria that does address any noise limits for the activity or zoning is the default. In this case it would be the criteria for zoning. The proposed construction noise limits appear to an attempt for carte blanche in regards to construction noise. Table 2, Typical Noise Levels in the Environment, shows how loud these proposed limits can be.

^j San Jose Municipal Code Volume I with 2024 Supplement 43 Update 4, and current through November 28, 2024

^k ANSI/ASA S1.1 -2013 (R2020) Acoustical Terminology, 3 Levels,

CONCLUSION

Due to the errors in the analysis as described above, the conclusion that the project impact is less than significant is unsupported.

Sincerely,
MENLO SCIENTIFIC ACOUSTICS, INC.

Neil A. Shaw

Neil A. Shaw, FASA, FAES

NAS:sk

RESUME - NEIL A. SHAW

- Education: University of California, Los Angeles
B. S. Engineering, 1977, cum laude
M. S. Engineering, 1977
- Cooper Union, New York, 1968 - 1970
- Honors: Kenward S. Oliphant Memorial Fellowship in Acoustical Engineering (awarded by Consulting Engineers Association of California)
Tau Beta Pi
- Experience: Menlo Scientific Acoustics, Inc., Topanga
- Designer and manager for acoustic design projects including audio-visual systems, sound reinforcement systems, television and radio production systems, architectural room acoustics, electromagnetic compatibility system design and criteria development, electroacoustic and electronic signal processing equipment product performance criteria development, product design and development, environmental noise surveys and analysis, noise and vibrations control, sound isolation, and machine noise control.
1992 to present.
Principal.
- University of Southern California, Thornton School of Music
2008 - 2010.
- Southern California Institute of Architecture, Los Angeles
2003.
- WEAL, Santa Monica
- Design and construction services for sound reinforcement systems, television systems, A/V systems, paging systems, and masking noise systems for various production facilities, convention centers, airport terminals, auditoriums, places of worship, concert halls, athletic facilities, courtrooms, multipurpose rooms, gymnasiums, museums, banquet halls, lecture rooms and other facilities. Transportation ambient noise surveys and analysis, construction site noise measurements, and field STC and NIC measurements per ASTM E 336-84. Lead member of team to install, run and maintain database manager computer software for company projects and clients. Part of design, implementation and enhancement team for computer controlled laboratory data acquisition and processing for laboratory tests performed per ASTM E 90-85 and ASTM C 423-84a.
1975 to 1992.
- Aero-acoustics Laboratory, UCLA
- Responsibilities include computer programming, aero-acoustic measurements, acoustic measurements, database search and statistical processing, A/D anti-aliasing filter design and prototyping, multi-channel data acquisition and processing, post processing and display.
1978 to 1984.

Affiliations:

Fellow, Acoustical Society of America
Chairman, Los Angeles Chapter, 1991 to 2001.
Organizer and Co-Chair, Joint ASA/ASJ meeting 1996, Auralization Special Session.
Organizer and Chair, ASA meeting, 1997, Engineering Acoustics Special Session.
Organizer and Co-Chair, ASA meeting, 1999, Engineering Acoustics Special Session.
Organizer and Co-Chair, ASA meeting, 2000, Student Loudspeaker Design Competition.
Chairman, ASA meeting, 2001, Architectural Acoustics Modeling and Imaging Special Session.
Organizer and Chair, ASA meeting, 2001, Architectural Acoustics Cruise Ship Acoustics Special Session.
Tutorial on Architectural Acoustics, Joint ASA/ICA/MCA Cancun meeting, December 2002.
Invited Paper, November 2003 ASA meeting, "Sound Quality and Loudspeakers," Special Session on Sound Quality - When Sound is the Essential Quality.
Organizer and Co-Chair, ASA meeting, 2004, Special Session on the Bell Laboratories and Acoustics.
Invited Paper, June 2004 ASA meeting, "Textbooks on Acoustics," On the Occasion of His 90th Birthday, To Honor the Contributions of Leo L. Beranek to Acoustics and Teaching Special Session sponsored by all the Technical Committees and ASA Committees.
Chairman, June 2004 ASA meeting, General Topics in Architectural Acoustics
Invited Paper, June 2005 ASA meeting, "Barnum Hall - The Continuing Renovation of a Streamline Moderne Theater," Special Session on Preserving Acoustical Integrity in the Course of Renovation.
Invited Paper, Winter 2007 ASA meeting, "Sound Systems for Large Scale Venues," with John Monitto, Special session on Sound Systems in Large Rooms and Stadia
Member, Technical Committee on Architectural Acoustics, 1996 - 2010
Member, Technical Committee on Engineering Acoustics, 1998 - 2010
Member, Technical Committee on Physical Acoustics, 2000 - 2010
Member, Books+ Committee, 1996 - present

Fellow, Audio Engineering Society
Member, Technical Committee on Acoustics and Sound Reinforcement, 1988 to 2005.
Chairman, Large Array Systems Session and Special JAES issue, 1987
Chairman, Workshop on Auralization, 1993
Co-Chairman, Workshop on Weather-Related Issues in Outdoor Sound Reinforcement, 1998
Tutorial on Loudness, Los Angeles Chapter, March 2003

Senior Member, Institute of Electrical and Electronic Engineers

Member, Society of Motion Picture and Television Engineers
Member, Standards Community TC-20F Film, TC-20F-30 WG Film Audio, TC-20F-40 Theatrical Projection, ST-SG Theater B-chain
1990 to present.

Member, Institute of Noise Control Engineering

Licenses: Electrical Contractor's License, CA #342710
EIT, CA #37673

Publications: Preface to the Reprint Edition, "Principles and Applications of Room Acoustics", Lothar Cremer and Helmut A. Muller (translated by Theodore J. Shultz), Peninsula Publishers, Los Altos Hills, CA, reprint edition, to be re-published.

Patent reviews, Journal of the Acoustical Society of America, 2004 -present.

Shaw, Neil A, "Up in Knudsen's Attic: Some Private papers of Vern O. Knudsen," Acoustics Today, 7(1), 29ff, January 2011

Shaw, Neil A., "Seeing, Hearing & Listening - Part II", Live Sound International, 17(4), 58ff, April 2008

Shaw, Neil A., "Seeing, Hearing & Listening - Part I", Live Sound International, 17(3), 12ff, March 2008

Shaw, Neil A., "The Pre-history and Early History of Loudspeakers", part 4 of 4, Live Sound International, 16(8), 66ff, August 2007

Shaw, Neil A., "The Pre-history and Early History of Loudspeakers", part 3 of 4, Live Sound International, 16(7), 54ff, July 2007

Shaw, Neil A., "The Pre-history and Early History of Loudspeakers", part 2 of 4, Live Sound International, 15(12), 12ff, December 2006

Shaw, Neil A., "An Early History of Modern Power Amplifiers," Live Sound International, 15(2), 10ff, February 2006

Shaw, Neil A., "The Pre-history and Early History of Loudspeakers", part 1 of 4, Live Sound International, 14(4), 38ff, November 2005

"Audio" monthly column, Club System International magazine, 2000 - 2003.

Shaw, Neil A., "The Pre-History and Early History of Loudspeakers", Sound and Communications, 41(4), 118ff, April 1995.

Shaw, Neil A., "Acoustical Design and Auralization", Sound and Communications, 40(8), 44ff, August 1994.

Shaw, Neil A., Klapholz, Jesse and Gander, Mark R., "Books and Acoustics, Especially Wallace Clement Sabine's Collected Papers on Acoustics," Proceedings of the Sabine Centennial Symposium, Acoustical Society of America, Cambridge, MA, June 1994.

Shaw, Neil A., "Digital Delays, Part Three - Real World Applications for Real World Delay Units," Sound and Communications, 39(10), 16ff, October 1993.

Shaw, Neil A., "Digital Delays, Part Two - Testing Specific Products for Specific Uses," Sound and Communications, 39(5), 62ff, May 1993.

Shaw, Neil A., "Digital Delays, Part One - Reviewing the Basics," Sound and Communications, 393(4), 96ff, March 1993.

Meecham, W. C. and Shaw, Neil, "Increase in Disease Mortality Rates Due to Aircraft Noise", Proceedings of the International Symposium on Noise and Disease, Berlin, 1991

Meecham, W. C. and Shaw, Neil, "Increase in Disease Mortality Rates Due to Aircraft Noise," Proceedings of the 5th International Congress on Noise as a Public Health Problem, Stockholm, 351-356, 1988

Shaw, Neil A., "A Historical Profile: Stereophonic Sound Systems, Part Two," Sound and Communications, 33(7), 24ff, July 1987.

Shaw, Neil A., "A Historical Profile: Stereophonic Sound Systems, Part One," Sound and Communications, 33(6), 22ff, June 1987.

Shaw, Neil A., "Exhibit Hall and Theater Sound Reinforcement Systems at the Metro Toronto Convention Center," Proceedings 12th International Congress of Acoustics, E9-5.1 - E9-5.2, 1986.

Meecham, W. C. and N. A. Shaw, "Jet Plane Noise Effects on Mortality Rates," Proceedings Internoise 86 Progress in Noise Control, Volume II, 1451-1455, 1986.

Shaw, N. A., "Effects of Jet Noise on Mortality Rates," Los Angeles County Department of Health, The Effects of Aircraft Noise on Health, June, 1981

Meecham, W. C. and N. A. Shaw, "Effects of Jet Noise On Mortality Rates," British Journal of Audiology, 13, 77-80, 1979.

Book Reviews:

"Acoustical Engineering," Harry F. Olson - Journal of the Audio Engineering Society, Vol. 40, No. 5, May 1992, Sound and Communications, Vol. 38, No. 4, April 27, 1992.

"Concert Sound - Tours, Technologies and Techniques," David Trubitt - Journal of the Audio Engineering Society.

"Hearing - An Introduction to Psychological and Physiological Acoustics," Stanley A. Gelfand - Sound and Communications, Vol. 37, No. 3, March 22, 1991.

"Room Acoustics," Henrich Kuttruff - Sound and Communications, Vol. 38, No. 2, February 28, 1992.

"The Science of Sound," Thomas D. Rossing - Sound and Communications, Vol. 37, No. 10, October 22, 1991.

"AIP Handbook of Condenser Microphones," George S. K. Wong and Tony F. W. Embleton, Editors - Journal of the Audio Engineering Society, Vol. 43, No. 6, June 1995.

"The ASA Edition of Speech and Hearing in Communication", Harvey Fletcher - Sound and Communication, Vol. 41, No. 9, September 25, 1995.

"The Nature and Technology of Acoustic Space", Mikio Tohyama, Hideo Suzuki and Yoichi Ando - Journal of the Audio Engineering Society, Vol. 44, No. 3, March 1996.

"Concert and Opera Halls - How They Sound", Leo Beranek - Journal of the Audio Engineering Society, Vol. 44, No. 9, September 1996.

"Acoustics and Noise Control Handbook for Architects and Builders", Leland K. Irvine and Roy L. Richards - Journal of the Audio Engineering Society, Vol. 46, No. 5, May 1998.

"Encyclopedia of Acoustics", Edited by Malcolm J. Crocker - Journal of the Audio Engineering Society, Vol. 46, No. 9, September 1998.

"The New Stereo Soundbook, Ron Streicher and Alton Everest - Journal of the Acoustical Society of America, Vol. 105, No. 6, June 1999.

"Introduction to Electroacoustics and Audio Amplifier Design," W. Marshall Leach, Jr. - Journal of the Audio Engineering Society, Vol. 47, No. 7/8, July/August 1999, Sound and Communications, Vol. 45, No. 9, September 20, 1999.

"Architectural Acoustics - Principles and Design," Madan Mehta, Jim Johnson, and Jorge Rocafort - Journal of the Audio Engineering Society, Vol. 47, No. 10, October 1999.

"Architectural Acoustics: Blending Sound Sources, Sound Fields, and Listening," Yoichi Ando - Journal of the Audio Engineering Society, Vol. 48, No. 1/2, January/February 2000.

"Fundamental of Physical Acoustics," David T. Blackstock - Journal of the Audio Engineering Society, Vol. 48, No. 9, September 2000.

"The Science and Applications of Acoustics," Daniel R. Raichel - Journal of the Audio Engineering Society, Vol. 48, No. 10, October 2000.

"Sounds of Our Times," Robert T. Beyer - Journal of the Audio Engineering Society, Vol. 48, No. 11, November 2000.

"Acoustics: Basic Physics, Theory and Methods," Paul Filippi, Dominique Habalt, Jean-Pierre Lefebvre and Aime Bergassoli - Journal of the Audio Engineering Society, Vol. 49, No. 1+2, January/February 2001.

"Active Noise Control Primer," Scott D. Snyder - Journal of the Audio Engineering Society, Vol. 49, No. 5, May 2001.

"The Microphone Book," John Eargle - Sound & Communications, November 2001.

"Computer Speech Recognition, Compression, Synthesis," Manfred R. Schroeder - Journal of the Audio Engineering Society, Vol. 49, No. 12, December 2001.

"Audio Engineering For Sound Reinforcement," John Eargle and Chris Foreman - Journal of the Audio Engineering Society. Vol. 50, No. 12,

December 2002.

“Pro Audio Reference,” Dennis Bohn - Journal of the Audio Engineering Society, Vol. 51, No. 7/8, July/August 2003.

“Concert Halls and Opera Houses - Music, Acoustics, and Architecture,” Leo L. Beranek - Journal of the Audio Engineering Society, Vol. 52, No. 5, May 2004

“Acoustic Absorbers and Diffusers - Theory, Design and Application,” Trevor J. Cox and Peter D’Antonio - Journal of the Audio Engineering Society, Volume 53, No. 10, October 2005

“Formulas of Acoustics,” F. P. Mechel - Journal of the Audio Engineering Society, Volume 53, No. 12, December 2005

“Communication Acoustics,” Jens Blauert (editor) - Journal of the Audio Engineering Society, Volume 54, No. 1/2, January/February 2006

“Acoustics and Psychoacoustics,” David M. Howard and Jamie Angus - Journal of the Audio Engineering Society, Volume 54, No. 11, November 2006

“Pro Audio Reference,” Second Edition, Dennis Bohn, Journal of the Audio Engineering Society - Journal of the Audio Engineering Society, Volume 54, No. 4, April 2007

“Worship, Acoustics, and Architecture,” Ettore Cirillo and Francesco Martellotta - Journal of the Audio Engineering Society, Journal of the Audio Engineering Society, Volume 55, No. 11, November 2007

“Sound FX Unlocking the Creative Potential of Recording Studio Effects,” Alexander U. Case - Journal of the Audio Engineering Society, Volume 55, No. 12, December 2007

“Surround Sound Up and Running,” Tomlinson Holman - Journal of the Audio Engineering Society, Volume 56, No. 9, September 2008

“Sound Reproduction Loudspeakers and Rooms,” Floyd E. Toole - Journal of the Audio Engineering Society, Volume 57, No. 1/2, January/February 2009

“Handbook for Sound Engineers,” 4th Edition, Glenn Ballou - Journal of the Audio Engineering Society, Volume 57, No. 7/8, July/August 2009

“Acoustics and the Performance of Music Manual for Acousticians, Audio Engineers, Musicians, Architects and Musical Instrument Makers,” 5th Edition Jürgen Meyer (translated by Uwe Hanson) - Journal of the Audio Engineering Society, Volume 58, No. 3, March 2010

“Sound for Film and Television” 3rd Edition, Tomlinson Holman - Journal of the Audio Engineering Society, Volume 58, No. 11, November 2010

“The Acoustics of Performance Halls Spaces for Music from Carnegie Hall to the Hollywood Bowl,” J. Christopher Jaffe - Journal of the Audio Engineering Society, Volume 59, No. 4, April 2011

“Acoustics and Audio Technology,” Mendel Kleiner - Journal of the Audio Engineering Society, to be published

“Grounds for Grounding,” Elya B. Joffee and Kai-Sang Lock - Journal of the Audio Engineering Society, to be published

Selected Product Development Projects - Neil A. Shaw

Aura Systems	1992 - 2005 Technical support for audio projects using inherently shielded neodymium speakers.
Peavey	1995 - 1997 Loudspeaker engineering for professional woofers and compression drivers, out-sourcing of electronics and speaker manufacturing, joint venture liaison.
Armstrong World Industries	1999 - 2002 Conception and product definition for active acoustic initiative. Product definition and development of ceiling tile speaker, and other projects.
Microsoft	1999 - 2000 Headset and headset element design for voice recognition product.
Cisco	1999 - 2000 Telephone and speaker-phone design for Internet telephone.
Intel	2000 Internet appliance sound system product
RPG	2001 - 2020 Technical and marketing support for this vendor of acoustical devices for architectural spaces.
Bohlender-Graebener	2001 - 2004 Technical support and loudspeaker engineering for planar diaphragm loudspeaker products.
Johns Manville	2002 Strategic product and market research and analysis.
Tri-path	2002 - 2006 Technical support and system engineering for digital audio power amplifiers.
Extron	2002 - 2003 Technical and material support for loudspeaker development and research.
Microsoft	2003 - 2006 Anechoic chamber design. Electroacoustic product testing protocol development.
University of Illinois	2008 - 2009 Transducer and power amplifier design and selection for food industry processing equipment.
Microsoft	2008 - 2009 Anechoic chamber design. Electroacoustic product testing protocol development.
KLA-Tencor	2010 Vibration isolation engineering for scanning electron microscope semiconductor wafer inspection equipment.
Microsoft	2011 Acoustic measurement and analysis for Kinect manufacturing end-of-line 100% test chamber.
ETC	2011 Noise analysis and noise control for electrically operated variable speed theater hoist equipment.

Selected Projects - Neil A. Shaw:

Arcadia City Council Chambers	Arcadia, California
Grossmont Civic Auditorium	El Cajon, California
Center for Faith and Life, Luther College	Decorah, Iowa
Concert Hall, University of Kentucky	Lexington, Kentucky
Swimming Pool, University of Riyadh	Riyad, Saudi Arabia
Oakland-Piedmont Municipal Courts	Oakland, California
2500 seat Auditorium, 700 seat Auditorium, 250 seat Library Hall, Mosque and Minaret, Gymnasium, Fine Arts Recital Hall, 100 seat Museum Hall, 500 seat Lecture Rooms, 250 seat Lecture Rooms, 1000 seat Banquet Hall, 200 seat Meeting Rooms, 100 seat Meeting Rooms, University of Riyadh	Riyad, Saudi Arabia
Des Moines Civic Auditorium	Des Moines, Iowa
California School For the Blind	Hayward, California
South Coast Air Quality Management District Hearing Room	El Monte, California
First United Methodist Church	Santa Monica, California
George R. Moscone Convention Center	San Francisco, California
H. J. Kaiser Convention Center	Oakland, California
Carson Community Center	Carson, California
LAX Terminal One	Los Angeles, California
Crocker Bank Auditorium	Los Angeles, California
Wilshire Auditorium, Fullerton College	Fullerton, California
Salt Palace Convention Center Expansion	Salt Lake City, Utah
Metro Toronto Convention Center and Theater	Toronto, Ontario
Orpheum Theater Restoration	Davenport, Iowa
Athanaeum, Claremont College	Claremont, California
San Jose Federal Office Building	San Jose, California
Fairmont Hotel	San Jose, California
LAX Terminal Five	Los Angeles, California
First Presbyterian Church	Upland, California
Royal Saudi Air Force Hush Houses	Saudi Arabia
NCO Training Facility, March AFB	Riverside, California
Veterans Administration Out Patient Clinic	Los Angeles, California
Lied Center for the Performing Arts, University of Nebraska	Lincoln, Nebraska
MaMaison Hotel	Los Angeles, California
Escondido City Council Chambers	Escondido, California
Mercy Hospital	San Diego, California
Mercy Hospital	Sacramento, California
Jain Bhavan Worship Center	Santa Ana, California
Ojai Valley Inn	Ojai, California
Simon Wiesenthal Center and Holocaust Museum	Los Angeles, California
New Otani Hotel	Los Angeles, California
Oceanside City Council Chambers	Oceanside, California
Santa Monica Beach Hotel	Santa Monica, California
Greenwood Racetrack	Toronto, Ontario
Woodbine Racetrack	Toronto, Ontario
Mohawk Racetrack	Campbellville, Ontario
Toyota Training Center	Torrance, California
Fresno Art Center	Fresno, California
McLaren Children's Center	Los Angeles, California

Lindbergh Field West Terminal Expansion
 Richard M. Nixon Presidential Library
 Carnation Headquarters
 Los Angeles County Bar Association
 Los Angeles Federal Office Building
 Intercontinental Hotel
 Lake Avenue Congregational Church
 Hewlett Packard Presentation Center
 Dance Recital Hall and Auditorium,
 California State University
 Inyo County Superior Court
 Adele Platt Conference Center,
 City of Hope Medical Center
 Los Angeles County Emergency Operation Center
 Antonio B Won Pat International Airport
 Temple Adat Sholam
 Sound Stage 29/30, Paramount Pictures
 Executive Screening Room, Theater,
 Dubbing Theater, Metro-Goldwyn-Mayer
 Lakeview Terrace Rehabilitation
 Facility, Phoenix House of Los Angeles
 Physiological Acoustics Research
 Facility, UCLA Medical Center
 Performing Arts Center
 Crystal Harmony, Crystal Cruise Lines
 Integrated Service Facility,
 NASA/Dryden Research Facility
 Theater, Metro-Goldwyn-Mayer
 Santa Ana Theater
 Sammy Davis Jr. Festival Plaza
 City Hall, Council Chamber
 Video Conference Facility, Sony Music
 Legend of the Seas, Royal Caribbean Cruise Lines
 Orange County Branch Library
 Screening Room, Warner Brothers Animation
 Screening Room, Turner Feature Animation
 Las Vegas Motor Speedway
 Large Screening Room, Metro-Goldwyn-Mayer
 Japanese American National Museum
 Carson City Courthouse
 St. Mel Parish Center
 Congregation Ner Tamid
 Old Town Temecula Streetscape
 Grandeur of the Seas, Royal Caribbean Cruise Lines
 Disney Magic, Disney Cruise Lines
 Coral Sky Amphitheater
 First Chinese Baptist Church
 St. Mark Coptic Orthodox Church
 C-17 Assembly Facility, Douglas Aircraft
 Division, The Boeing Corporation
 Crisci's Restaurant
 JamSync Studios
 New Standard Post
 Media Artists, Pty
 The Lobster

San Diego, California
 Yorba Linda, California
 Glendale, California
 Los Angeles, California
 Los Angeles, California
 Los Angeles, California
 Pasadena, California
 North Hollywood, California

Long Beach, California
 Independence, California

Duarte, California
 Los Angeles, California
 Tamuning, Guam
 Westwood, California
 Hollywood, California

Santa Monica, California

Lakeview Terrace, California

Westwood, California
 Lancaster, California
 Los Angeles, California

Edwards, California
 New York, New York
 Santa Ana, California
 Las Vegas, Nevada
 Santa Monica, California
 New York, New York
 Miami, Florida
 Aliso Viejo, California
 Glendale, California
 Glendale, California
 North Las Vegas, Nevada
 Santa Monica, California
 Los Angeles, California
 Carson City, Nevada
 Woodland Hills, California
 Rancho Palos Verdes, California
 Temecula, California
 Miami, Florida
 Orlando, Florida
 West Palm Beach, Florida
 Los Angeles, California
 Los Angeles, California

Long Beach, California
 Brooklyn, New York
 Nashville, Tennessee
 Hollywood, California
 Madras, India
 Santa Monica, California

International Rectifier
Antelope Valley Courthouse
Fe Bland Forum, Santa Barbara City College
Arizona Humane Society
Cartoon Network
Santa Monica High School
Malibu High School
Barnum Hall Auditorium
Sobrato High School
Temple Beth El
Sacramento East End Project
Gold Circle Films
Denver City Hall Extension
Fullerton City Hall
Union Station Improvement
Intimate Theater, California State University
San Diego Convention Center, Sails Pavilion
Temple Shir Ha-Ma'A Lot
United States Courthouse
Department of Education Office Complex,
State of California
MGM Constellation Headquarters
Ketchum Advertising
Orange County Register
28th Church of Christ, Scientist
Temple Solel
NT Audio Mixing and QC Rooms
River Cats Restaurant
Caltrans District 7 Headquarters
1221 Ocean Avenue
Memorial Assembly Hall
City of Manhattan Beach Annex
Twohy Building
Widget Post Production
1st Church of Christ, Scientist
Sunrise Assisted Living
Sunrise Assisted Living
Sunrise Assisted Living
Academy of Motion Picture Arts and
Sciences Boardroom
Getty Villa Outdoor Amphitheater
Ressler Residence
American Honda
Community Baptist Church
Bernard Hodes Agency
Houston's Restaurant
Café R&D
Getty Center Auditorium
Mid-City Police Station
College of Humanities, Arts, and Social Sciences
Instruction and Research Facility,
University of California
Genomics Research Facility,
University of California
Panasonic Hollywood Laboratory

Tijuana, Baja California, Mexico
Lancaster, California
Santa Barbara, California
Phoenix, Arizona
Glendale, California
Santa Monica, California
Malibu, California
Santa Monica, California
Morgan Hill, California
Aliso Viejo, California
Sacramento, California
Beverly Hills, California
Denver, Colorado
Fullerton, California
Los Angeles, California
Los Angeles, California
San Diego, California
Irvine, California
Fresno, California

Sacramento, California
Century City, California
Venice, California
Santa Ana, California
Westwood, California
Escondido, California
Santa Monica, California
Sacramento, California
Los Angeles, California
Santa Monica, California
Manhattan Beach, California
Manhattan Beach, California
San Jose, California
Culver City, California
Beverly Hills, California
Pacific Palisades, California
Santa Monica, California
Woodland Hills, California

Beverly Hills, California
Los Angeles, California
Beverly Hills, California
Torrance, California
Manhattan Beach, California
Marina Del Ray, California
Santa Monica, California
Newport Beach, California
Los Angeles, California
Los Angeles, California

Riverside, California

Riverside, California
Universal City, California

Sports Spectrum Club	Pacific Palisades, California
Sunrise Assisted Living	Simi Valley, California
Rose Bowl	Pasadena, California
First Presbyterian Church	Santa Monica, California
Los Angeles Fire Department Headquarters	Los Angeles, California
New York City Transit No. 7 Line Extension	New York, New York
Los Angeles County Metropolitan Transportation Authority Goldline	Los Angeles, California
South Lawn Project, University of Virginia	Charlottesville, Virginia
Shangri-La Hotel	Santa Monica, California
Pacific Star, Princess Cruise Lines	Santa Clarita, California
Allied Post	Santa Monica, California
Jet Propulsion Laboratory von Karman Auditorium	Pasadena, California
Self Realization Fellowship	Los Angeles, California
Temple Beth Am	Los Angeles, California
Broome Library, California State University, Channel Islands	Camarillo, California
California High-Speed Train Project	State of California
Morongo Band of Mission Indians Administrative Complex	Banning, California
The Buddy Group	Irvine, California
Café R&D	Santa Monica, California
Club 7969	West Hollywood, California
Brent's Deli	Westlake Village, California
Santa Cruz County Criminal Justice Complex	Nogales, Arizona
Porto's Bakery	Burbank, California
Microsoft Hardware Group Audio Test Laboratories	Redmond, Washington
University of California, Irvine, Arts Building	Irvine, California
Los Angeles Unified School District High School No. 9	South Gate, California
Notre Dame High School	Sherman Oaks, California
St. Mark Presbyterian Church	Newport Beach, California
Fame Academy Poly High School	Sun Valley, California
FAA Sonic Boom Simulator (with the Pennsylvania State University)	State College, Pennsylvania
Metropolitan Transit District Hearing Room	Los Angeles, California
St. Peter and St. Paul Coptic Church	Santa Monica, California
Lifehouse Properties	Pacific Palisades, California
Wilson Well No.2	San Gabriel, California
Habitat for Humanity Lynwood Housing	Lynwood, California
Whole Foods Plaza	Malibu, California
Habitat for Humanity Burbank Housing	Burbank, California
The Cork	Los Angeles, California
Cove Way Residence	Beverly Hills, California
Habitat for Humanity Lawndale Housing	Lawndale, California
Forest Lawn Chapel	Cypress, California
Rodney Bay and Gros Islet Villages	St. Lucia
Panasonic Avionics	Lake Forest, California
Capitol Records	Hollywood, California
Art of Living Foundation	Los Angeles, California
Conexant Corporation	Newport Beach, California
University of California, Santa Barbara Faculty Center	Santa Barbara, California
Bill and Melinda Gates Foundation	Seattle, Washington
J Restaurant and Lounge	Los Angeles, California
Newcom	Santa Monica, California

American School in Vietnam	Hanoi, Vietnam
Apple Yellowstone Anechoic Chamber Facility	Cupertino, California
Barnum Hall Continuing Renovation	Santa Monica, California
Malibu High School Auditorium Renovation	Malibu, California
John Adams Middle School Auditorium Renovation	Santa Monica, California
Westminster Presbyterian Church	Newbury Park, California
American School in Bombay	Mumbai, India
Temple Judea	Tarzana, California
Holy Angel Church	San Marino, California
Kroc Institute for Peace and Justice	
University of San Diego	San Diego, California

7 June 2012

EXHIBIT D

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

aabedifard@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

ARIANA ABEDIFARD
KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARION N. JOHNSTON
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

March 5, 2024

Via Email and Overnight Delivery

Mr. Chris Burton
Director of Planning
City of San Jose
200 E. Santa Clara Street, Tower 3rd
Floor
San Jose, CA 95113
Email: cburton@sanjoseca.gov

Ms. Toni Taber
City Clerk
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113
Email: Toni.Taber@sanjoseca.gov

Via Email Only

Bethelhem Telahun, Planner
Email: Bethelhem.Telahun@sanjoseca.gov

**Re: Request to Restart the Public Review and Comment Period for
the Draft Environmental Impact Report – Seely Avenue Mixed-
Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565)**

Dear Ms. Taber, Mr. Burton, and Ms. Telahun:

On behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”), we respectfully request that City of San Jose (“City”) restart the public review and comment period for the Draft Environmental Impact Report (“DEIR”) prepared for the Seely Avenue Mixed-Use Project, PDC21-035, PD22-002, ER21-284, SCH# 2022020565, (“Project”) proposed by The Hanover Company (“Applicant”). **The current public comment period ends on March 11, 2024.** We are continuing to review the DEIR and appendices that have been made available to date by the City. However, we cannot prepare meaningful comments on the adequacy of the DEIR until the City provides complete and accurate versions of the operative DEIR and supporting appendices.

As demonstrated in this letter, a restart of the 45-day comment period is necessary under the California Environmental Quality Act (“CEQA”)¹ because the City failed to make available all DEIR documents, as required by CEQA.² **We request that the City restart the 45-day public review and comment period on the DEIR to ensure the public is properly informed about the Project.**

We expressly reserve the right to file comments on the DEIR at a later date, and to supplement these comments at any later hearings and proceedings related to this Project following our receipt and review of the documents referenced in the DEIR.³

I. The DEIR Was Not Properly Uploaded to the State Clearinghouse Website

The Project’s DEIR and its appendices can be viewed both on the State Clearinghouse website⁴ and through the City’s website.⁵ Because members of the public can access either website, it’s crucial that both platforms accurately and uniformly present this information. Any discrepancies would result in an unequal distribution of information, leaving some members of the public insufficiently informed, which, as demonstrated herein and further below, is precisely what occurred here.

On February 29, 2024, just days before the comment deadline, the City asked the State Clearinghouse to “add the Draft Environmental Impact Report to the documents” uploaded on the State Clearinghouse site because “[t]he document was not uploaded correctly by the submitter.”⁶ There is no further explanation of this issue, making it unclear whether the DEIR was not uploaded to the State Clearinghouse site at all, an incorrect version of the DEIR was uploaded, or otherwise. This means that members of the public relying on the State Clearinghouse website may not have had proper access to the DEIR. The State Clearinghouse’s re-upload of the DEIR should have prompted a restart of the

¹ Public Resources Code (“PRC”) §21000 et seq.; California Code of Regulations (“CCR”), Title 14, Division 6, Chapter 3, Sections 15000 et seq.

² PRC § 21092(b)(1); 14 CCR § 15087(c)(5).

³ See *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1118-21.

⁴ Available at: <https://ceqanet.opr.ca.gov/2022020565/2>

⁵ Available at: <https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/environmental-planning/environmental-review/active-eirs/0-seely-ave-mixed-use-project>

⁶ Letter from Christopher Burton, City to State Clearinghouse, re: “Update Documents for Published Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project” (February 29, 2024), available at: <https://files.ceqanet.opr.ca.gov/276489-2/attachment/so4O7OYL5ZlmuJ2mHbQeSHnzsUmrBZ-PGgOFMG5d11vmlGEqbZbJtZcgI-8KcVvDAdN5lHt0gTXkLB-0>

comment period because members of the public were unable to view the proper DEIR on the State Clearinghouse website for almost the entirety of the review and comment period. The City should restart the comment period now to ensure all members of the public have proper access to the DEIR.

II. The State Clearinghouse and City's Websites Provide Conflicting Appendices

CEQA requires that “all documents referenced” – and the CEQA Guidelines require that “all documents incorporated by reference” – in a draft environmental impact report shall be “readily accessible to the public during the lead agency’s normal working hours” during the entire public comment period.⁷ Further, an EIR may not rely on hidden studies or documents that are not provided to the public.⁸ The City is in violation of these requirements because the City has failed to provide Silicon Valley Residents and the public with access to the DEIR’s correct appendices.

For example, two different versions of Appendix D, the Biological Resources Evaluation, appear on the City's webpage and the State Clearinghouse website. On the City's website, it is a 106-page document titled "Biological Resource Analysis, 0 Seely Avenue Mixed-Use Project" by Johnson Marigot Consulting, LLC.⁹ However, on the State Clearinghouse site, it is a 26-page document titled "Revised Brief Biological Constraints Analysis, 681 E Trimble Road Property" by the same consultant.¹⁰ It is unclear which document is the correct biological resource evaluation that the DEIR relied on. This also means that some members of the public relied on one Appendix D while others relied on an entirely different one. It is imperative that the City clarify which document is the correct Appendix D and the public needs adequate time to review the appropriate document.

Additionally, several appendices are incompletely uploaded, depending on which website is viewed. Specifically, Appendix B, the Air Quality Assessment, and Appendix P, the Transportation Analysis, are both missing their own appendices/attachments on the State Clearinghouse website. On the State

⁷ Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15072(g)(4); see *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

⁸ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).

⁹ See Appendix D uploaded on the City’s website at:

<https://www.sanjoseca.gov/home/showpublisheddocument/109310/638441364765770000> (last accessed March 5, 2024).

¹⁰ See Appendix D uploaded on the State Clearinghouse website at:

<https://ceqanet.opr.ca.gov/2022020565/2/Attachment/LPAEnB> (last accessed March 5, 2024).

Clearinghouse page, Appendix B (Air Quality Assessment) only includes Attachment 1, but the Assessment also refers to Attachments 2, 3, 4 and 5, which are not provided.¹¹ Similarly, Appendix P (Transportation Analysis) is missing all of its appendices on the State Clearinghouse site.¹² The Table of Contents specifies that there are several appendices for the Transportation Analysis, Appendices A through G,¹³ but the document contains only cover pages for each appendix and does not provide the content.¹⁴ After identifying these issues for the City,¹⁵ Appendix B and P were reuploaded *on the City's website*, but remain incomplete on the State Clearinghouse webpage. Further, the City never notified the general public of the re-uploaded documents. Thus, not only do many members of the public remain unaware of the document changes, but the deficiencies persist on the State Clearinghouse webpage.

Furthermore, since our last notification to the City about the incomplete appendices, we have identified additional inconsistencies. First, like Appendices B and P, Appendix E (Historical Resources Evaluation) does not include any of its appendices on the State Clearinghouse website.¹⁶ Second, Appendix K (Phase I, Parcel 1 ESA) is not the same document between the State Clearinghouse website and City's website. On the State Clearinghouse website, it is 3,443 pages, dated July 12, 2021, and, per the Executive Summary, is based on parcel number 097-15-034.¹⁷ However, on the City's website, the document is 3,070 pages, dated March 8,

¹¹ See Appendix B uploaded on the State Clearinghouse website at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/Jjf-I2OPDn4Y912-0LqpxJgF7NzuV0gS7y7JA6TaMoonvUcxanJKirG8uSXQbajtRg0MtoNh8_u7DM10 (last accessed March 5, 2024).

¹² See Appendix P uploaded on the State Clearinghouse website at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/xyNIhGGSkS85iA8iqVQsmas6epdpfkpF9PrwrNBd5QGNPMTz4S9_WX3bRO5lfysk5FO7i13MCEqHm5E0 (last accessed March 5, 2024).

¹³ Appendix P, as uploaded on the State Clearinghouse website, pg. ii.

¹⁴ Appendix P, as uploaded on the State Clearinghouse website PDF pp. 98-105.

¹⁵ **Exhibit A:** Email from Janet Laurain, Adams, Broadwell, Joseph & Cardozo ("ABJC") to City re: "0 Seely Avenue Project - Appendix B and missing attachments" (February 1, 2024, 1:43 PM);

Exhibit B: Email from Janet Laurain, ABJC to City re: "0 Seely Avenue Project by Hanover Company (5905)" (February 21, 2024, 8:09 AM)

¹⁶ The Appendix E on the City's webpage is 186 pages long and includes its own Appendices A and B after page 83. See Appendix E on the City's website here:

<https://www.sanjoseca.gov/home/showpublisheddocument/109312/638441364788870000> (last accessed March 5, 2024). However, Appendix E on the State Clearinghouse website is only 90 pages and only has cover pages for its Appendices A and B. See Appendix E on the State Clearinghouse's webpage here: <https://ceqanet.opr.ca.gov/2022020565/2/Attachment/KKZoqq> (last accessed March 5, 2024).

¹⁷ See Appendix K uploaded on the State Clearinghouse website at: https://ceqanet.opr.ca.gov/2022020565/2/Attachment/eAdF_J (last accessed March 5, 2024). See Executive Summary, pg. 1.

2021, and is regarding a different parcel number (097-15-033).¹⁸ Third, on February 29, 2024, the City requested that Appendixes G and H be made confidential on the State Clearinghouse website.¹⁹ This means that the public had access to those appendices if viewing the DEIR on the State Clearinghouse website, but not if viewing via the City's webpage for the Project. The City ultimately needs to address these discrepancies and ensure the completeness and consistency of all documents across both platforms.

Without access to these critical DEIR reference documents, the public is unable to fully evaluate the DEIR's analysis, conclusions, and mitigation measures which rely on these studies and documents. Silicon Valley Residents and other members of the public are precluded from having the meaningful opportunity to review and comment on the DEIR, as required by CEQA. Indeed, because of the inconsistencies described above, different members of the public and state agencies may not even be reviewing and commenting on the same Project documents.

The courts have held that the failure to provide even a few pages of a CEQA documents for a portion of the CEQA review period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.²⁰ It is also well settled that an EIR may not rely on hidden studies or documents that are not provided to the public.²¹ By failing to make all documents referenced in the DEIR "readily available" during the current comment period, the City is violating the clear procedural mandates of CEQA, to the detriment of East Bay Residents and other members of the public who wish to meaningfully review and comment on the DEIR.

Accordingly, we request that the City provide immediate access to the correct DEIR reference documents, as required by CEQA, and restart the public review and comment period on the DEIR for at least 45 days from the date on which the City releases all correct reference documents for public review.

¹⁸ See Appendix K uploaded on the City's website at:

<https://www.sanjoseca.gov/home/showpublisheddocument/109314/638441364852470000> (last accessed March 5, 2024). See Executive Summary, pg. 1.

¹⁹ Letter from Christopher Burton, City to State Clearinghouse, re: "Update Documents for Published Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project" (February 29, 2024), available at: <https://files.ceqanet.opr.ca.gov/276489-2/attachment/so4O7OYL5ZlmuJ2mHbQeSHnzsUmrBZ-PGgOFMG5d11vmlGEqbZbJtZcgI-8KcVvDAdN5lHt0gTXkLB-0>

²⁰ *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

²¹ *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

III. The City's One-Week Extension is Not Sufficient

On February 26, 2024, the City requested that the State Clearinghouse extend the public review period by one week, from March 4, 2024 to March 11, 2024 (referred to on the State Clearinghouse website as “Notice to Extend Review Period”).²² The State Clearinghouse then released a Memorandum stating that the lead agency added “additional information,” noting that one can refer to the City’s Notice to Extend Review Period for more details.²³ However, the City’s letter provides no information on why the review period was extended and what specific additional information was provided.²⁴

Nevertheless, for the reasons mentioned above, the one-week extension is not adequate to provide the public with time to meaningfully review the DEIR and its appendices. As it stands, some members of the public have completed a different review than others due to the inconsistent breadth of information provided between the State Clearinghouse and the City’s website. As demonstrated above, the missing documents are substantial; some members of the public have missed out on hundreds of pages of analysis that were incorporated in the DEIR. The City must restart the review period to ensure that the public has an equal opportunity to review and comment.

IV. Conclusion

Silicon Valley Residents respectfully requests that the City restart the public review and comment period on the DEIR for at least 45 days from the date on which the City releases all complete DEIR reference documents for public review.

²² Letter from Christopher Burton, City to State Clearinghouse, re: “Extend Circulation Period, Draft EIR (SCH Number 2022020565): Seely Avenue Mixed-Use Project” (February 26, 2024), available at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/sNoLG_7EtOIBTlbV_PmKv8IeALAbDqeQt3S711-uIXoeACJcabyVZzGbC8fFwdoKQXMMJK9xrKIzemSJ0

²³ Memorandum from Samuel Assefa, Director, California Governor’s Office of Planning and Research, State Clearinghouse and Planning Unit to All Reviewing Agencies, RE: SCH # 2022020565 Seely Avenue Mixed-Use Project (February 27, 2024), available at: https://files.ceqanet.opr.ca.gov/276489-2/attachment/t0rvhrccAtP11Km3Ron8mx220V_c8WeegrkNCxwBzl68wzkegTnDTbYAZ3hKhmDTtFHSwRWmE8XiUQP-0.

²⁴ See footnote 21. The entire body of the letter merely reads: “The City of San José is requesting that the State Clearinghouse extend the public review period to end on March 11, 2024.”

March 5, 2024
Page 7

Given the limited time left in the DEIR public comment period, we respectfully request a response to this letter by close of business on Wednesday, March 6, 2024.

Sincerely,



Ariana Abedifard

Attachments
AA:acp

EXHIBIT A

From: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Sent: Friday, February 2, 2024 3:23 PM
To: Janet M. Laurain <jlaurain@adamsbroadwell.com>
Subject: RE: 0 Seely Avenue Project - Appendix B and missing attachments

Good Afternoon,

Thanks for pointing that error out. I have updated the Appendix to the full version. Here's the link:

<https://www.sanjoseca.gov/home/showpublisheddocument/108775/638424838390837159>

Best,

Bethelhem Telahun

Planner | Environmental Review

From: Janet M. Laurain <jlaurain@adamsbroadwell.com>
Sent: Thursday, February 1, 2024 1:43 PM
To: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Subject: 0 Seely Avenue Project - Appendix B and missing attachments

[External Email]

You don't often get email from jlaurain@adamsbroadwell.com. [Learn why this is important](#)

Hi Telahun,

In reviewing the DEIR for the 0 Seely Avenue Project, we found that Appendix B (Air Quality Assessment) is missing several attachments. It only includes Attachment 1, but the Assessment mentions Attachments 2, 3, 4 and 5. Can you please send those to me?

Thank you.

Janet Laurain

Janet M. Laurain, Paralegal
Adams Broadwell Joseph & Cardozo
(650) 589-1660
jlaurain@adamsbroadwell.com

This e-mail may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

EXHIBIT B

From: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Sent: Wednesday, February 21, 2024 6:31 PM
To: Janet M. Laurain <jlaurain@adamsbroadwell.com>
Cc: Alexandra E. Stukan <astukan@adamsbroadwell.com>
Subject: RE: 0 Seely Avenue Project by Hanover Company (5905)

Hi Janet,

Thank you for pointing that out! I have updated the Transportation Analysis that was posted.

Best,
Bethelhem Telahun
Planner | Environmental Review

From: Janet M. Laurain <jlaurain@adamsbroadwell.com>
Sent: Wednesday, February 21, 2024 8:09 AM
To: Telahun, Bethelhem <Bethelhem.Telahun@sanjoseca.gov>
Cc: Alexandra E. Stukan <astukan@adamsbroadwell.com>
Subject: 0 Seely Avenue Project by Hanover Company (5905)

[External Email]

You don't often get email from jlaurain@adamsbroadwell.com. [Learn why this is important](#)

Good Morning Bethelhem,

In reviewing the DEIR for the 0 Seely Avenue Project, we found that Appendix P (Transportation Analysis) is missing all of its appendices. The Table of Contents specifies that there are several appendices for the Transportation Analysis: Appendices A through G (see pg.

ii). PDF Pages 98-105 all contain cover pages for each appendix but don't provide the content. Can you please provide us with the full Appendix P, including all of its appendices?

Thank you.

Janet Laurain
Janet M. Laurain, Paralegal
Adams Broadwell Joseph & Cardozo
(650) 589-1660
jlaurain@adamsbroadwell.com

This e-mail may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Response to Comment Letter C-3: Adams Broadwell (Dated March 11, 2024)**Response C-3.1:**

The commenter states that the comment letter is written on behalf of Silicon Valley Residents for Responsible Development to provide comments on the DEIR prepared for the Project. The commenter summarizes that the Project proposes demolition of existing residential and agricultural buildings and removal of 584 trees (261 ordinance-size trees and 323 non-ordinance size trees) for development of 1,472 residential units consisting of a mix of three-story townhomes and six- to seven-story apartment buildings, 18,965 square feet of general neighborhood retail space, a 2.5-acre public park, and the dedication of approximately 0.11 acres for the development of a domestic water well.

In response to the commenter, the Project description is accurate and consistent with what was analyzed in the DEIR. The comment does not raise any issues regarding the adequacy of the DEIR. Therefore, no further response is necessary.

Response C-3.2:

The commenter states that based on their review of the DEIR and all supporting documents, the DEIR fails to comply with the requirements of CEQA. Specifically, the commenter notes that the DEIR lacks an adequate environmental baseline, fails to disclose and analyze the Project's significant impacts, and fails to include substantial evidence supporting conclusions that mitigation measures will reduce to the Project's impacts to less than significant levels. The commenter notes that the City may not approve the Project until the DEIR is revised and the aforementioned deficiencies are addressed.

In response to the commenter, Comment C-3.2 does not identify any specific deficiencies with the DEIR, the environmental baseline used, or the analysis of Project impacts and the effectiveness of the mitigation measures prescribed therein. In accordance with Section 15125 of the CEQA Guidelines, the existing physical environmental conditions as they exist at the time the notice of preparation ("NOP") is published, or at the time environmental analysis is commenced, generally constitute the baseline for the environmental impact analysis. As noted in the CEQA Guidelines, an agency has the discretion to decide the baseline that could be realistically measured, and supported by substantial evidence. The baseline conditions for this Project are discussed under each environmental subject's "Existing Conditions" subsection in the DEIR. Further, for each of the environmental factors identified in Appendix G of the CEQA Guidelines, the DEIR includes a discussion of the relevant environmental setting as well as the Project's reasonably foreseeable impacts and – for potentially significant environmental impacts – associated mitigation measures (refer to Section 3, Environmental Setting, Impacts and Mitigation, of the DEIR). Therefore, no further response is necessary.

Response C-3.3:

The commenter states that the review of the DEIR and applicable documents was completed with the assistance of the biological resources' expert Scott Cashen, transportation expert Normal Marshall, and vibration expert Neil Shaw. The commenter also notes that the City must respond to the expert's comments separately and fully.

In response to commenter, CEQA Guidelines Sections 15088(a) and (c) do not require a lead agency to respond to expert comments "separately and fully". Written responses to comments need only describe the disposition of significant environmental issues raised, and where the Lead Agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. The issues raised by the commenter's third-party experts have been summarized where appropriate, and the main points of the disagreement (i.e., variance) summarized and the lead agency's choice of expert opinions explained, as required by Section CEQA Guidelines Sections 15064(f)(7) and 15151. Additionally, see Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate. Further, Comment C-3.3 does not raise any issues regarding the adequacy of the DEIR. Therefore, no further response is necessary.

Response C-3.4:

The commenter states that Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential environmental impacts associated with the Project's development. These include individuals who live and work in the City, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, as well as their members and their families. The commenter notes that some of these members may also work on the Project itself and will be the first to be exposed to any health and safety hazards that exist on-site. Additionally, the commenter notes that environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses to expand in the region.

In response to the commenter, the EIR addresses the commenter's concerns regarding potential impacts to future individuals and workers, including those related to any health and safety hazards that may exist on-site. The DEIR extensively evaluated potential impacts to individuals and workers, including those related to exposure to criteria air pollutants and toxic air contaminants (pages 78-91 of the DEIR); geological and soil-related conditions (pages 145-148 of the DEIR), hazards and hazardous materials (pages 167-170 of the DEIR), noise and vibration exposure (pages 199-207 of the DEIR), geometric design features and incompatible land uses (page 243 of the DEIR), inadequate emergency access (page 244 of the DEIR), and wildfire (pages 264-265 of the DEIR). With implementation of MM AQ-1, MM HAZ-1.1, MM HAZ-1.2, MM HAZ-2, MM HAZ-3, and MM NSE-1, the DEIR concluded that all potentially significant

impacts to individuals and workers (including those who may work on the Project itself) related to reactive organic gas (“ROG”) emissions, removal of storage tanks, contaminated soil and soil vapor, and construction noise will be reduced to a less than significant level.

Regarding the commenter’s concerns about potential impacts to labor organizations or the loss of future jobs, these would be considered economic or social effects. Effects under CEQA must be related to a physical change in the environment. Economic and social effects are not considered environmental effects under CEQA unless they relate to physical changes, and these physical changes need only be evaluated if they will lead to an environmental effect.⁸

Comment C-3.4 does not argue that any of the unsubstantiated assertions regarding the adverse effects on labor organizations or possible loss of jobs as a result of the Project will result in an environmental effect. Further, Comment C-3.4 does not raise any issues regarding the adequacy of the DEIR. Therefore, no further response is necessary.

Response C-3.5:

The commenter summarizes the legal background of CEQA and its two primary purposes, which include informing decision makers and the public about the potential significant environmental effects of a project, and requiring public agencies to avoid or reduce environmental damage when “feasible” by requiring the consideration of environmentally superior alternatives and the adoption of all feasible mitigation measures. The comment concludes with an explanation of the “abuse of discretion” standard applied to EIRs.

The City, as the lead agency, has prepared this in compliance with the CEQA Guidelines Sections 15060-15064 and Section 15081. In response to the commenter, Comment C-3.5 does not raise any issues regarding the adequacy of the DEIR. Therefore, no further response is necessary.

Response C-3.6:

The commenter notes that CEQA requires a lead agency to make all documents referenced in the DEIR available for review for the entirety of the public comment period and that courts have held that failing to do so invalidates the entire CEQA review process. The commenter adds that the City failed to make all referenced documents in the DEIR readily available, and as a result Silicon Valley Residents have been unable to fully analyze the DEIR and its supporting documents. In a letter dated March 5, 2024, the commenter requested that the City restart the public comment period due to its failure to provide access to all of the documents referenced in the DEIR. The commenter states that the inconsistencies include conflicting versions of the DEIR posted on the State Clearinghouse and City website and inconsistent appendices posted on both

⁸ Authority cited: Section 21083, Public Resources Code; Reference: Sections 21001(e) and (g), 21002, 21002.1, 21060.5, 21068, 21080.1, 21083(c), and 21100, Public Resources Code; Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184).

websites. The commenter concludes that the City never responded to their request on March 5, 2024, and as such have not been able to fully evaluate the accuracy of the City's impact analysis.

In response to the commenter, see Topical Response 1 – Circulation of DEIR, regarding the submittal and circulation process of the DEIR. The City received the document referenced request on January 19, 2024, and a response was provided on January 26, 2024. No further response is necessary.

Response C-3.7:

The commenter summarizes that the existing environmental setting is the starting point from which the environmental analysis should be conducted. The commenter states that the EIR fails to accurately describe the Project's environmental baseline in regard to the extent of wildlife that exists on the Project site, and the levels of ambient noise at the Project site. The commenter concludes that this results in an inaccurate assessment of the Project's impacts to biological resources and noise.

In response to the commenter's concerns regarding the DEIR's description of baseline biological conditions, see Responses C-3.8 through C-3.13. In response to the commenter's concerns regarding the DEIR's description of the existing noise environment, see Response C-3.15. Additionally, see Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate. As Comment C-3.7 does not identify any specific deficiencies regarding the environmental baseline and how it affected the impact analysis in the DEIR regarding biological resources and noise, no further response is necessary.

Response C-3.8:

The commenter notes that the DEIR fails to accurately disclose the environmental baseline conditions related to the Project's biological impacts; specifically, the nature of existing wildlife on the Project site and notes that the DEIR lacks the necessary baseline needed to measure the Project's environmental impacts.

In response to the commenter, it is noted that the existing conditions at the Project site as relates to biological resources, including the nature of existing wildlife, is discussed in Section 3.4.1.2, Existing Conditions, of the DEIR. Further, the nature of existing wildlife on the Project site was extensively characterized in Appendix D, the BRA, of the DEIR, and therefore the DEIR had the necessary information with which to conduct its analysis. It is typical and an accepted practice for technical reports to contain more detail than an EIR. As Comment C-3.8 does not identify any specific deficiencies regarding the disclosure of the environmental baseline conditions as it relates to biological resources, no further response is necessary.

Response C-3.9:

The commenter defers to the assessment provided by biological resource expert Scott Cashen, who notes that, while the DEIR provides a list of plant species observed during site

reconnaissance, it does not list the wildlife species that were observed during the surveys, nor does it include a list of potential species that may occur in the Coyote Creek riparian corridor. The commenter states that this prevents any understanding of potential indirect impacts on existing wildlife species.

In response to the commenter, lists of plant species are provided within Appendix D, the BRA, of the DEIR, to provide site description information regarding land cover and vegetation communities present on the site. The onsite land cover types and vegetation communities are sufficiently static that the site description provided in the 2022 BRA appropriately conveys current conditions such that one can assess 1) the presence of special-status vegetation communities; and 2) the suitability for onsite vegetation communities/habitats to support special-status plant and wildlife species. These descriptions are the industry standard in describing habitat conditions specifically because of the mobile nature of wildlife. Habitat descriptions are utilized to identify potential for wildlife species to occur on a site, with follow up presence/absence surveys often conducted following identification of appropriate habitat conditions, or identification of new distribution data.

As noted in Appendix D, the BRA, page 4, of the DEIR, wildlife species present on the site at any point may be cryptic, generally difficult to detect, transient, nocturnal, or migratory, such that they may only occur within the Project site for short or fleeting time periods. Accordingly, wildlife lists associated with land cover types and vegetation communities would not be considered inclusive of all species that do or could occur on the site that could be impacted by implementation of a Project. Further, common species not protected by local, state, or federal law are not considered in a CEQA analysis, as outlined in CEQA Guidelines Section 15380, which focuses on species listed or qualifying for listing under endangered species acts unless they have special local significance or the Project may cause a significant environmental impact.

Neither the commenter nor the cited portion of the Scott Cashen letter draw a specific connection as to how the omission of a speculative wildlife species list renders the analysis of potential impacts on the Coyote Creek corridor inadequate. It is further noted that the Project does not propose any construction or development within or adjacent to the Coyote Creek corridor, which is segregated from the Project site by an existing easement and trail, thus precluding any direct impacts to the corridor. The commenter's concerns regarding indirect impacts to the Coyote Creek corridor are addressed in Responses C-3.24, C-3.25, and C-3.26. Additionally, as discussed in Topical Response 5 – Disagreement among Experts, disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate. Therefore, no further response is required.

Response C-3.10:

The commenter states that the necessary surveys to determine whether burrowing owls are present on the Project site are not included in Appendix D, the BRA, of the DEIR and instead it dismisses the potential presence of burrowing owls due to the absence of ground squirrel

burrows. The commenter notes that this overlooks alternative nesting and roosting habitats, which could include debris piles that could support burrowing owl populations.

In response to the commenter, as stated on page 4 of Appendix C, Biological Resources RTC Memorandum, of this FEIR and on page 5 of Appendix D, BRA, of the DEIR, all components of the onsite land cover types and vegetation communities, including the woody debris piles present on the Project site in 2021, were assessed for the potential to support special-status species, such as burrowing owls. The site visits conducted by qualified wildlife biologist Sadie McGarvey in February and October 2021 were consistent with the initial steps of the habitat assessment and survey guidelines provided by the California Department of Fish and Wildlife (“CDFW”) within the 2012 Staff Report on Burrowing Owl Mitigation (i.e., Habitat Assessment Data Collection and Reporting). During these site visits, no ground squirrel burrows were observed on the Project site, and the onsite wooden debris piles were partially vegetated with tall vegetation and did not appear to provide openings of sufficient size to act as an alternative nesting site for burrowing owls. No evidence of occupation by burrowing owls was observed within or near these debris piles (e.g., molted feathers, white-wash [excrement] or pellet piles, or eggshell fragments on the ground or woody debris near a potential entrance). Since this 2021 assessment presented within the BRA, these debris piles appear to have become entirely overgrown with ruderal species and will continue to be unsuitable nesting habitat for burrowing owls.

Follow-on surveys for burrowing owls are recommended whenever burrowing owl habitat or sign is encountered on or adjacent to (within 150 meters) a Project site. Consistent with CDFW’s staff report, as no suitable nesting habitat and no sign of burrowing owl occupation was detected onsite during the habitat assessment, follow-up surveys were not recommended. While the onsite fallow fields provide suitable foraging habitat for burrowing owls, suitable foraging habitat is not a protected resource if burrowing owls are not nesting therein, and its presence alone does not equate to the presence of burrowing owls.

Further, impacts to nesting birds and raptors will be avoided through implementation of MM BIO-1, which includes preconstruction nesting bird and raptor surveys and implementation of a non-disturbance buffer if nesting birds or raptors are observed on the Project site and/or within the zone of influence of Project activities. Please see Section 3.4.2.2, Project Impacts, pages 108 and 109 of the DEIR for a detailed description of MM BIO-1. Therefore, both the DEIR and the BRA sufficiently address the potential for burrowing owl presence on the site, and no further response is necessary. Additionally, see Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency’s experts and third-party experts do not in itself render an EIR inadequate.

Response C-3.11:

The commenter states that the DEIR dismisses the presence of Golden Eagles because the Project site does not provide the necessary habitat for Golden Eagles. The commenter defers to information provided by Scott Cashen who states that Appendix C, the Arborist Report and Tree

Mitigation Memorandum, of the DEIR, prepared by HortScience | Bartlett Consulting, dated October 29, 2021, identifies several large trees at the Project site and that information from the CDFW supports that there is potential for Golden Eagle nesting and foraging within the Project area.

In response to the commenter, as stated on page 5 of Appendix C, Biological Resources RTC Memorandum, of the FEIR, golden eagles construct large platform nests on cliffs or in large trees with unobstructed views over large open areas, typically avoiding nesting near urban habitat. Pairs will often use and enlarge the same nest each year, with one or more alternative nests within their breeding territory.⁹ The Project site is an urban infill site. Accordingly, while the fallow field and the adjacent Coyote Creek expanded engineered floodplain provide small areas of potentially suitable foraging habitat, they are unlikely to represent sufficiently large open spaces necessary to support golden eagles. Further, these small areas of undeveloped land in the middle of urban San José do not sufficiently buffer the Project site from urban disturbances that deter golden eagles from nesting in such locations.

As golden eagles build large platform nests, averaging 5-6 feet wide, that are often reused year after year, a golden eagle nest would have been visible at the time of S. McGarvey's site visits. No raptor nests of any kind were observed onsite. Further, impacts to all nesting raptors will be avoided through implementation of MM BIO-1, which includes preconstruction nesting raptor surveys and implementation of a non-disturbance buffer if nesting raptors are observed on the Project site and/or within the zone of influence of Project activities. Please see Section 3.4.2.2, Project Impacts, pages 108 and 109 of the DEIR for a detailed description of MM BIO-1. Therefore, both the EIR and the BRA sufficiently address the potential for golden eagle presence on the site. Additionally, see Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.12:

The commenter notes that the assertion made in the DEIR that the Crotch bumble bee is unlikely to occur at the Project site contradicts available evidence. The commenter refers to information provided by Scott Cashen, which indicates that recent occurrence records contradict this assertion and that CDFW guidelines contradict the assertion made in the DEIR, as well.

In response to the commenter, Appendix D, the BRA, of the DEIR, included an assertion that the current extant range of Crotch bumble bee does not overlap with urban San José based on the Change in Extent of Occurrence for Crotch bumble bee presented in the 2014 *IUCN Assessments for North American Bombus spp. for the North American IUCN Bumble Bee Specialist Group*, the

⁹ U.S. Fish and Wildlife Service. 2010. Interim Golden Eagle Inventory and Monitoring Protocols; and Other Recommendations. Available: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83940>. Accessed June 2024.

2018 listing petition for Crotch bumble bee, and lack of extant occurrences in the region documented within the California Natural Diversity Database (an inventory maintained by CDFW and partners regarding the status and locations of rare plants and animals in California). To date, the California Natural Diversity Database (“CNDDDB”) documents a single historic record (from 1903) for Crotch bumble bee occurrences within 10 miles of the Project site.

In June of 2023 (6 months after the 2022 BRA, included as Appendix D, the BRA, of the DEIR, was prepared), CDFW released Survey Considerations for California Endangered Species Act (“CESA”) Candidate Bumble Bee Species (2023 Survey Considerations) identifying an expanded maximum current geographic extent for this species. It is of note, however, that upon review of the metadata associated with the range polygon cited therein, this range is reported to include 1) a 10km buffer surrounding occurrences used in map preparation, and 2) areas not currently occupied by the species. As such, inclusion of the Project site within the newly developed range map does not inherently mean that the species occurs onsite.

Mr. Cashen cites iNaturalist for species occurrence data regarding locally occurring Crotch bumble bee records dating back to 2019. All of the local observations cited in iNaturalist are foraging records in areas where this species is not generally expected to occur and sustained populations are not feasible (i.e., highly developed and/or intensely managed areas, surrounded by urban development, several occurring immediately adjacent to the San Francisco Bay). As acknowledged in CDFW’s 2023 Survey Considerations, iNaturalist is a citizen science platform, which includes data that may or may not be verified by expert taxonomists and is not considered a “reliable data source.” As documented within Appendix D, the BRA, of the DEIR, and herein, multiple reliable data sources were used to develop determinations on the likelihood of Crotch bumble bee to occur onsite.

Crotch Bumble Bee are known to inhabit warm and dry open grassland and scrub habitats in California; however, little is known about the key habitat components required for this species. Mr. Cashen’s assertion that Crotch’s bumble bee nesting habitat components occur onsite is an erroneous interpretation of data presented within the 2023 Survey Considerations that explicitly state that there is little data describing the nesting of Crotch Bumble Bee.

Appendix D, the BRA, of the DEIR, identifies fallow fields on the Project site as potentially providing suitable habitat for Crotch Bumble Bee. The large majority of the onsite fallow fields are intensely managed (including routine disking), and do not provide suitable bumble bee foraging or nesting resources. Approximately 1.5 acres of areas originally identified as fallow field with interspersed trees along the eastern Project site boundary are less intensely managed (subjected to regular mowing) and provide potentially marginal habitat for Crotch Bumble Bee. While many flowering plants occur within the other vegetation communities on the Project site, urban ornamentals and row crops are not protected habitats for special-status species, and the potential use of these flowers as food sources does not indicate that the site is occupied by special-status bumble bees.

The onsite agricultural use of the site includes an apiary housing active honeybee hives. Research cited in the 2018 listing petition identifies the presence of honeybees as having a negative effect on native bee populations via competition for nectar and pollen resources, change in plant community use, and disease transmission, stating that honeybees are regularly using, and depleting, the most abundant resources in the surrounding environment.

Given the reasons stated above, the assertion made in Section 4.4.2.2, Species Range Does Not Overlap with the Project Site, in Appendix D, the BRA, of the DEIR that Crotch Bumble Bees are not likely to occur on or near the Project site is adequately supported by information collected by Johnson Marigot Consulting, LLC (now Integral Consulting Inc) staff biologists using information and methodologies that are consistent with current industry standards, including CDFW's 2023 Survey Considerations. Therefore, no further response is necessary. See Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.13:

The commenter states that the DEIR's assertion that oak trees on the Project site are not part of a sensitive natural community is not correct. The commenter includes information from Scott Cashen, which suggests that the clustering of oak trees indicates a woodland classification and, therefore, the DEIR's conclusion that the Project will not have a significant impact on sensitive natural communities is unsupported.

In response to the commenter, Appendix C, Biological Resources RTC Memorandum, of the FEIR, describes the trees present within the northwestern corner of APN 097-15-033 include coast live oaks (*Quercus agrifolia*) and California black walnut (*Juglans hindsii*) interspersed within remnant orchard and rural residential fruiting species (e.g., apple, pear, almond, and chestnut) and invasive species (e.g., tree of heaven [*Ailanthus altissima*] and privet [*Ligustrum lucidum*]). These trees are clustered around the abandoned residential structures and abandoned antique farm equipment that remain onsite. As noted in Appendix C, Arborist Report and Tree Mitigation Memorandum, of the DEIR, the oak trees comprise a minor component of this area (roughly 30 percent of the individual trees mapped onsite, including several oaks with trunk diameters of 1 inch).

The *Quercus agrifolia* Forest & Woodland Alliance, as defined within the Manual of California Vegetation, includes coast live oak as a dominant species, co-occurring with *Acer macrophyllum*, *Arbutus menziesii*, *Juglans californica*, *Quercus douglasii*, *Quercus engelmannii*, *Quercus kelloggii*, *Quercus lobata* and *Umbellularia californica*. Membership within this alliance requires a minimum of 10 percent canopy cover, with coast live oak comprising a minimum of 50 percent of the canopy. While canopy cover within the northwestern corner of APN 097-15-033 exceeds 10 percent, the onsite clustering of trees is not dominated by coast live oak co-occurring with other native upland woodland species. Accordingly, the plant community associated with the *Quercus agrifolia* Forest & Woodland does not occur onsite as described in Section 3.4.1.2,

Existing Conditions, of the DEIR. Additionally, see. Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency’s experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.14:

The commenter asserts that the DEIR’s inadequate disclosure of existing wildlife and sensitive natural communities results in an unreliable baseline to evaluate potential environmental impacts.

In response to the commenter, see Responses C-3.8 through C-3.13 above. Further, the commenter fails to identify any specific deficiencies with the disclosure of existing wildlife and sensitive natural communities in the DEIR, and therefore no further response is necessary.

Response C-3.15:

The commenter notes that the DEIR fails to adequately describe the environmental baseline conditions regarding noise on the Project site. The commenter defers to information provided by Neil Shaw who identified shortcomings in the methodology used to calculate existing noise levels. These shortcomings include the lack of details regarding sound level meter settings, microphone height, equipment specifications, calibration records and the use of field calibrators. The commenter notes that, without this information, the data regarding existing noise levels is unverifiable.

In response to the commenter, Appendix O, the Noise and Vibration Assessment of the DEIR, dated August 31, 2023, records the field noise study that was conducted between November 22, 2021, and November 24, 2021, by Illingworth and Rodkin staff members to document ambient noise levels at the site and in the surrounding area . The ambient noise levels for the Project were captured by following the recommended noise measurement procedures presented in the California Department of Transportation’s Technical Noise Supplement (“TeNS Manual”).¹⁰ Per, the TeNS Manual Abstract, “This manual contains Caltrans noise analysis procedures, practices, and other useful technical background information related to the analysis and reporting of highway and construction noise impacts and abatement. Except for some Caltrans-specific methods and procedures, most methods and procedures recommended in this document are in conformance with industry standards and practices. This document can be used as a stand-alone guide for highway noise training purposes or as a reference for technical concepts, methodology, and terminology needed to acquire a basic understanding of highway noise and construction noise-related issues.”

Noise measurements were made with Larson Davis Model 820 and LxT1 Integrating Sound Level Meters (“SLMs”) set at “slow” response. The SLMs were equipped with free field, prepolarized

¹⁰ Caltrans. 2013. Technical Noise Supplement. September. Sacramento, CA: Environmental Program, Noise, Air Quality, and Hazardous Waste Management Office. Sacramento, CA.

condenser microphones fitted with windscreens. The SLMs were calibrated prior to the noise measurements using a Larson Davis Model CAL200 acoustical calibrator. The response of the system was checked after each measurement session and was always found to be within 0.2 dBA. No calibration adjustments were made to the measured sound levels. The SLMs for the long-term noise measurements were secured to utility poles or trees at heights of 10-12 feet above the ground. The short-term noise measurements were made at a height of five feet above the ground. All instrumentation used during the noise survey met the requirements of the American National Standards Institute SI 4-1983 for Type I use. Calibration records of the equipment used during the noise survey are presented in Appendix O, Noise and Vibration Assessment, of the DEIR. Additionally, a supplemental memorandum, Appendix B, Noise RTC Memorandum, of the FEIR, has been prepared by Illingworth & Rodkin, Inc in response to comments received during circulation regarding noise that speaks to specific commenter concerns and affirms the conclusions of the DEIR and Noise and Vibration Study. This memorandum, dated April 15, 2024, has been added to the administrative record.

See Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency’s experts and third-party experts does not by itself render an EIR inadequate. It is also noted that technical reports typically contain more detail than an EIR. The DEIR relied on the information provided in Appendix O, Noise and Vibration Assessment to support its conclusions; therefore, the DEIR had the necessary information with which to conduct its analysis. For the reasons outlined above, the City does not find any compelling reason to follow Neil Shaw’s conclusions that the DEIR fails to adequately describe the environmental baseline conditions regarding noise on the Project site, and therefore, no further response is necessary.

Response C-3.16:

The commenter first provides a summary of the requirements of CEQA as regards the disclosure of potentially significant impacts, the implementation of all feasible mitigation to reduce impacts to less than significant levels, and the basis for significance determinations. The commenter goes on to describe the requirement to include all information and address all subjects required by CEQA for EIRs, and that failure to do so is subject to a less deferential standard than the substantial evidence standard. Lastly, the commenter points out that even when the substantial evidence standard is applicable, courts are not required to uncritically rely on every study and analysis, and that inadequate or unsupported studies are entitled to no judicial deference. The commenter closes with an assertion that the DEIR fails to properly analyze, disclose, and mitigate the Project’s impacts on biological resources, transportation, and noise.

In response to the commenter, with the exception of the commenter’s broad assertion that the DEIR fails to properly analyze, disclose, and mitigate the Project’s impacts on biological resources, transportation, and noise, the commenter does not raise any issues regarding the adequacy of the DEIR. Impacts to biological resources, noise, and transportation were analyzed,

disclosed, and mitigated in Sections 3.4, 3.13, and 3.17, of the DEIR, respectively. These sections were based, in part, on technical studies prepared by experts in the associated fields, provided as appendices of the DEIR, including an Arborist Report and Tree Mitigation Memorandum (Appendix C) prepared by HortScience|Bartlett Consulting, dated October 2021, a BRA (Appendix D) prepared by Johnson Marigot Consulting, dated December 2022, LLC (now Integral Consulting Inc), a Noise and Vibration Assessment (Appendix O) prepared by Illingworth & Rodkin, dated August 2023, and a Transportation Analysis (Appendix P) prepared by Hexagon Transportation Consultants, dated September 2023. Therefore, the DEIR did in fact properly analyze, disclose, and mitigate the Project's impacts on biological resources, transportation, and noise. Further, the commenter fails to identify any specific deficiencies with the analysis, disclosure, and mitigation of impacts to biological resources, transportation, and noise, and therefore no further response is necessary.

Response C-3.17:

The commenter reviewed the DEIR with the assistance of several third-party experts, including Scott Cashen, a biological resources expert. The commenter notes that it is Scott Cashen's opinion that the DEIR falls short in assessing the Project's impacts on biological resources (including wildlife resources and riparian habitat), and that the proposed mitigation measures are insufficient to address the potential adverse effects of the Project.

In response to the commenter, the assessment of the Project's impacts was based on multiple technical studies, provided as appendices of the DEIR, including an Arborist Report and Tree Mitigation Memorandum (Appendix C), and a BRA (Appendix D). These studies assessed the Project (as described in Section 2, Project Description, of the DEIR, and affirmed in the commenter's previous comment C-3.1) and its potential impacts to biological resources, including wildlife and riparian habitat, and determined that with adherence to the measures prescribed therein (incorporated into the DEIR as MM BIO-1 and MM BIO-2) that the Project will have less than significant impacts to biological resources. Additionally, a supplemental memorandum, as Appendix C, Biological Resources RTC Memorandum, of the FEIR, has been prepared in response to comments received during circulation regarding biological resources. Appendix C, of the FEIR, speaks to the commenter's specific concerns about Coyote Creek, Wildlife Present on the Project site, burrowing owls, golden eagles, Crotch bumble bee, oak trees, bats, habitat loss, nursery sites, nesting birds, and birdy safety design and affirms the conclusions of the DEIR and Appendix D, the BRA, of the DEIR. This memorandum, dated April 29, 2024, has been added to the administrative record.

The commenter does not identify any specific deficiencies with the assessment of the Project's impact on biological resources and proposed mitigation measures in the DEIR but does highlight disagreements between the experts who supported preparation of the DEIR and the commenter's own third-party expert. As discussed in Topical Response 5 – Disagreement among Experts, a disagreement among experts does not solely make an EIR inadequate, so long as the Lead Agency summarizes the main point or points of disagreement and explains its choice of

expert opinions. In the absence of any specific deficiencies raised by the commenter regarding the adequacy of the aforementioned technical studies, the City does not find any compelling reason to follow Scott Cashen's conclusions regarding the adequacy of the assessment of the Project's impact on biological resources and proposed mitigation measures in the DEIR, and therefore, no further response is necessary.

Response C-3.18:

The commenter notes that the DEIR identifies a potentially significant impact on roosting bat habitat but asserts that the Project could have a significant impact on special-status bats beyond what is discussed in the DEIR. Additionally, the commenter argues that the Project could have an impact on the candidate species Crotch bumble bee, and that the DEIR did not identify or address this potentially significant impact.

In response to commenter, see Response C-3.12, which addresses the Project's potential impacts on Crotch bumble bees, and Response C-3.19, which addresses potential impacts on habitat for special-status bat species. As Comment C-3.18 does not identify any specific deficiencies regarding the Project's potential impacts on roosting bat habitat and the Crotch bumble bee, no further response is necessary.

Response C-3.19:

The commenter, citing third-party expert Scott Cashen, notes the importance of considering the full extent of direct and indirect impacts on special-status bats, especially as regards the loss of habitat. Comment C-3.19 closes with an assertion that the DEIR fails to consider the impacts of evicting bats outside of the maternity reproductive season when bats are in hibernation.

In response to the commenter, it is noted that both the DEIR (see Section 3.4.2.2, checklist question a), pages 107-110) and the BRA (see Appendix D, Section 4.5.3, of the DEIR) explicitly considered the impacts of removal of potential special-status bat species and their habitat, and prescribed mitigation (see MM BIO-2, pages 109-110, of the DEIR) that is consistent with roosting bat protections for other development Projects in San José and CDFW guidance on bat surveys. Nonetheless, as an act of good faith, Section 3.4.2.2, Project Impacts, checklist question a), page 109, MM BIO-2 has been revised to require surveys year-round. However, this revision was not necessary to reduce the Project's potential effects on special-status bat species to a less than significant level. There was no change to the level of significance for this impact and under CEQA Guidelines Section 15073.5, recirculation of the DEIR is not required.

Standard practice for bat surveys includes conducting daytime and evening acoustic surveys in addition to extensive visual surveys of potential habitat for special-status bats between 7 and 30 days prior to initiation of Project activities. Further, recent CDFW recommendations for removal of potential roosting refugia does not include "soft-felling" techniques for minimizing impacts to bats, but rather the two-stage removal methodology prescribed below.

For all Project activities planned in or adjacent to potential bat roosting habitat, a qualified biologist shall conduct daytime and evening acoustic surveys in addition to extensive visual surveys of potential habitat for special-status bats no more than 30 days prior to initiation of Project activities.

To ensure that special-status bats have left potential roosting refugia, work shall occur over the course of two days. On the first day, smaller limbs or items from the identified trees or structures shall be brushed back or modified in the late afternoon. This disturbance should cause any potential roosting bats to seek other roosts during their nighttime foraging. The remainder of the refugia item can then be further limbed or removed as needed on the second day as late in the afternoon as feasible.

Given the reasons provided above, and consistent with what is stated in Section 3.4.2.2, Project Impacts, of the DEIR, adherence with MM BIO-2 would reduce potential impacts to special-status bats species and their habitat to a less than significant level, and no further response is necessary. Additionally, see Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency’s experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.20:

The commenter, citing third-party expert Scott Cashen, notes that the DEIR fails to address and mitigate any potentially significant impacts on the Crotch bumble bee species, which is currently a candidate for listing under the California Endangered Species Act (“CESA”). The commenter defers to information provided by Scott Cashen, who states that some of the ecological features inhabited by the Crotch Bumble Bee occur at the Project site. Mr. Cashen also notes that ground disturbance activities could destroy Crotch Bumblebee nests and remove floral resources needed to sustain a bee colony.

In response to the commenter, see Response C-3.12, which discusses the potential for the Crotch bumble bee to occur on the Project site. Additionally, see Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency’s experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.21:

The commenter states that, based on Scott Cashen’s analysis (see Comments C-3.9 through C-3.13 and Comments C-3.17 through C-3.20), the DEIR failed to support with substantial evidence its conclusions concerning special-status bats and the Crotch bumble bee, and that a more comprehensive analysis is needed.

In response to the commenter, per Topical Response 5 – Disagreement among Experts, disagreement among experts concerning the significance of a proposed Project’s environmental effect does not require a lead agency to follow alternative evidence nor does a disagreement among experts render an EIR inadequate, so long as the main points of the disagreement are

summarized and the lead agency's choice of expert opinions is explained. Responses C-3.9 through C-3.13 and C-3.17 through C-3.20 provide detailed explanations of the disagreement between the DEIR and associated technical studies with Scott Cashen's analysis, and the DEIR has been amended as needed to rectify any deficiencies, or a refutation of Scott Cashen's analysis and the Lead Agency's deference to the DEIR and associated technical studies has been explained. Revisions to the DEIR are documented in Section 3.0 EIR Text Revisions, of the DEIR; no need for further analysis has been identified, and no revisions that will require recirculation of the DEIR are proposed.

Response C-3.22:

The commenter states that the DEIR's conclusions pertaining to whether the implementation of the Project would impede the use of native wildlife nursery sites, are inconsistent with other determinations made in the DEIR, specifically pertaining to the determination that the Project site could support nesting birds protected by the Migratory Bird Treaty Act, and that it could contain suitable roosting habitat for four special status bat species. Mr. Cashen asserts that bird nests and bat roosts qualify as wildlife nursery sites and that the loss of these nursery sites is a potentially significant impact. The commenter notes that this means that the Project's potentially significant impacts to wildlife nursery sites remains unmitigated and potentially significant.

In response to the commenter, as identified in Appendix D, the BRA, of the DEIR, a nursery site is an area where juveniles occur at higher densities, avoid predation more successfully, or grow faster there than in a different habitat. While the Project site does provide suitable nesting and roosting habitat, the presence of suitable nesting and roosting habitat alone does not render the Project site or a vegetation community therein as a nursery site. Suitable nesting habitat for birds occurs in and on areas that are suboptimal for survival and avoidance of predation, including urban backyards, office buildings, and construction equipment left idling over a weekend. Similarly, bats are known to roost in chimneys and attics in urban homes. As an urban infill site, subject to high levels of regular disturbance, the Project site is not buffered from the adjacent urban landscape, and does not provide enhanced protection, foraging habitat, or nesting/roosting substrates that would be components of nursery sites.

Furthermore, impacts to nesting birds and roosting bats will be avoided through implementation of MM BIO-1 and MM BIO-2, which includes preconstruction nesting bird and raptor surveys and preconstruction bat surveys, respectively, with non-disturbance buffers if nesting birds and raptors are observed on the Project site and/or within the zone of influence of Project activities, and avoidance measures if bat roosts are observed onsite. Please see Section 3.4.2.2, Project Impacts, pages 108-110, of the DEIR for a detailed description of MM BIO-1 and MM BIO-2.

As discussed in Topical Response 5 – Disagreement among Experts, a disagreement among experts does not solely make an EIR inadequate, so long as the Lead Agency summarizes the main point or points of disagreement and explains its choice of expert opinions. Based on the

above rationale, the City does not find any compelling reason to follow Scott Cashen's conclusions regarding the adequacy of the assessment of the Project's impact on biological resources and proposed mitigation measures in the DEIR, and therefore, no further response is necessary.

Response C-3.23:

The commenter states that because the DEIR fails to identify and address the presence of wildlife nursery sites on the Project site, the DEIR's conclusion that impacts to wildlife nursery sites are less than significant is not supported by substantial evidence.

In response to the commenter, see Response C-3.22, which addresses the Project's potential impacts to wildlife nursery sites.

Response C-3.24:

The commenter first notes that Coyote Creek, which is adjacent to the Project site, is designated critical habitat for the Central California Coast Steelhead. Additionally, the commenter notes that the riparian corridor along the banks of Coyote Creek is a sensitive natural community that includes wetlands. The commenter also cites comments provided by the CDFW in response to the Notice of Preparation ("NOP") that noted the operation of the proposed well could result in diversion of water from Coyote Creek, which could alter surface or subsurface flow and riparian resources, and requested a hydrological analysis be prepared for the Project. The commenter notes that no hydrological analysis was prepared for the Project and asserts that the EIR's conclusion that the proposed well would have a less than significant impact on riparian habitat and no impact on surface/subsurface flows is unsubstantiated.

The commenter also points out that the DEIR and the BRA direct readers to Section 3.10 (and Appendix Q, the WSA, of the DEIR, that Section 3.10 was based on) in support of the assertion that the well will not draw water nor have any impact on surface or subsurface flow in and from Coyote Creek. The commenter again points out that no hydrology analysis was prepared to support this finding, and notes that Section 3.10 and Appendix Q, the WSA, of the DEIR, is silent on the topic of the well and how it would impact surface/subsurface flow in and from Coyote Creek. For these reasons, the commenter concludes that the DEIR lacks any support for its conclusions regarding the Project's groundwater well's surface and subsurface flow impacts and asserts that the DEIR needs to be revised to adequately analyze and assess how the well will impact Coyote Creek and related riparian habitat. Separate from these comments, the commenter points out several typos in the DEIR, including the misidentification of the WSA as Appendix M and an incorrect date for the WSA.

In response to the commenter, as stated in Appendix D, Hydrology RTC Memorandum, of this FEIR, impacts to Coyote Creek and related surface water-dependent ecosystems, including critical habitat for the Central California Coast Steelhead, are not anticipated due to the geological and hydrogeological characteristics of the subsurface formations in the vicinity of the proposed well site and the engineering specifications of the well itself. Further, the proposed

well will be designed with specialized components, such as annular seals, intermediate seals, and depth-specific screened intervals to prevent any hydraulic connectivity and maintain hydraulic isolation between surface water, the Shallow Aquifer, and the deeper, confined Principal Aquifer targeted for drinking water supply. These design features will also manage the artesian conditions in the target aquifer, ensuring that there is no upward migration of fluids or pressure that could impact surface or near-surface water resources. A hydraulic analysis is conducted when a proposed project has the potential to significantly affect hydrology and water quality to assess the impact of the Project on water flow, water bodies, and flood risks. Therefore, due to the hydraulic separation no hydraulic analysis was required.

The commenter is correct that both the DEIR and Appendix D, the BRA, of the DEIR, erroneously crossed referenced Section 3.10 of the DEIR and Appendix Q, the WSA, of the DEIR. The conclusion in the BRA regarding the potential impact of the proposed well was in fact based on the response from Scott Lewis, P.G., of Luhdorff & Scalmanini to the NOP comments from CDFW (dated November 2, 2022). The email stated that the well will not draw water from or have any impact on surface or subsurface flows in/from Coyote Creek, since the well will 1) designed to target the deep aquifer; 2) the walls of the well will be designed and constructed with cement annular seals that prevent the well bore from acting as a conduit between the aquifer zones; and 3) the shallow and deep aquifers are segregated by thick intervals of fine grained clay materials that separate the two distinct aquifer zones. This email has been added to the administrative record, and Section 3.4.2.2, Project Impacts, checklist question a), page 107 of the DEIR, Section 3.10.2.2, Project Impacts, Checklist question b), page 179 of the DEIR and Section 11, References, page 312 of the DEIR have been revised accordingly to appropriately reference the source of the substantial evidence in support of the finding that the proposed well will not impact surface or subsurface flows in/from Coyote Creek. Additionally, a supplemental Technical Memorandum, Appendix D, Hydrology RTC Memorandum, of the FEIR, has been prepared by Luhdorff & Scalmanini (dated April 18, 2024) and added to the administrative record that specifically addresses the commenter's concerns regarding potential impacts of the proposed well on Coyote Creek and water dependent ecosystems and has found that the proposed well will not impact these resources. The substantial evidence in support of this conclusion is described in detail below.

According to Appendix D, Hydrology RTC Memorandum, of the FEIR, the location of the proposed well is within the Santa Clara Valley Subbasin ("Subbasin"). The Subbasin encompasses the structural trough between the Diablo Range to the east of the Santa Clara Valley, by the Santa Cruz Mountains to the west, the Coyote Narrows to the south, and San Francisco on the north. Multiple studies have characterized the hydrogeology of the Subbasin as being divided into an upper unconfined to leaky confined aquifer zone and a lower confined aquifer zone separated by an essentially impermeable clay cap. Recharge to the upper, unconfined aquifer zones is primarily from surface and creek infiltration. Recharge to the deep confined aquifer is primarily from the alluvial fan facies in the upland areas of the subbasin. The 2010 Revised Final Ground Water Vulnerability Study, Santa Clara County, California prepared by Todd Engineers

and Kennedy Jenks Consultants for Valley Water refers to the upper unconfined to leaky confined aquifer zone as the Shallow Aquifer and the lower confined aquifer zone as the Principal Aquifer. The clay cap that separates the two aquifers is a laterally extensive, regional aquitard that is typically encountered at a depth of 75 feet to 160 feet below ground surface (“bgs”). The 2010 Todd/Kennedy Jenks report assessed Principal Aquifer vulnerability and sensitivity (the relative ease that surface or near surface contaminants can migrate into the deeper, confined aquifer).¹¹ The report stated that the two aquifers are hydraulically separated due to the presence of a confining layer and that recharge from the Shallow Aquifer and creeks/streams into the Principal Aquifer does not occur.

In the northern end of subbasin, artesian conditions (water level above ground surface) exist in the Principal Aquifer. Artesian pressures result in groundwater movement from the Principal Aquifer into the Shallow Aquifer and to the surface if a conduit between upper and lower aquifers and the surface exists.

Because of the efforts of Valley Water to maintain groundwater levels within the basin above a certain threshold to maintain groundwater storage and prevent land subsidence, artesian conditions in the Principal Aquifer are expected to persist in the area of the proposed well.

Community supply wells in the subbasin typically target the Principal Aquifer because the quality of the groundwater in the Shallow Aquifer generally does not meet community drinking water quality standards without treatment. Community supply wells within the subbasin are generally designed with redundant cement seals to depths more than 200 feet below ground surface to maintain hydraulic isolation between the Principal Aquifer and the Shallow Aquifer.

The lateral separation at the ground surface between wells targeting the Principal Aquifer and surface water features, such as Coyote Creek, is not a concern when the wells are designed and constructed with deep seals that maintain hydraulic isolation between aquifers. Many community supply wells in the Subbasin that target the Principal Aquifer are constructed in close proximity to streams and creeks without concern regarding hydraulic connection to surface waters. These wells are permitted for use by Valley Water, Santa Clara County, and the State Water Quality Control Board, Division of Drinking Water.

Several community supply wells are located approximately one mile north and south of the proposed well location. Each of those wells are constructed with cement seals to at least 220 feet bgs, which extend below the bottom of the confining clay layer at approximately 150 feet bgs.

It is reasonable to expect that the confining clay layer will extend to 150 feet bgs at the proposed well site. The design of the proposed well will have a deep seal similar to the nearby

¹¹ Todd Engineers and Kennedy/Jenks Consultants. 2010. *Revised Final Groundwater Vulnerability Study Santa Clara County, California*. October 2010. Available: <https://www.valleywater.org/sites/default/files/2018-02/Groundwater%20Vulnerability%20Study.pdf>. Accessed June 2024.

community supply wells (200+ feet bgs). The actual seal depth and overall well design will be based on a site-specific investigation (test hole drilling) conducted to characterize the nature and depth of the subsurface materials at the Project site. The information collected will be used to design a well with a deep cementitious seal(s) that will maintain the hydraulic isolation between the target aquifer and shallow and surface water features.

Several community supply wells are located approximately one mile north and south of the proposed well location. Each of those wells are constructed with cement seals to at least 220 feet below ground surface (“bgs”) which extend below the bottom of the confining clay layer at approximately 150 feet bgs.

Based on the rationale provided above, the City does not find any compelling reason to follow Scott Cashen’s conclusions that the proposed well could result in diversion of water from Coyote Creek, which could alter surface or subsurface flow and riparian resources, and therefore, no further response is necessary. Additionally, see Topical Response 5 – Disagreement among Experts for an explanation as to why disagreements between a lead agency’s experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.25:

The commenter states that the DEIR’s conclusions that the Project will have a less than significant impact on riparian habitats is unsupported because there was no hydrology study conducted to determine the scope of impacts to Coyote Creek’s riparian habitat. The comment applies specifically to hydrological impacts to the riparian habitat.

In response to the commenter, see Response C-3.24, which clarifies the analysis that was performed in the DEIR, and concluded that there is no hydrologic impact to Coyote Creek. As stated in Appendix D, Hydrology RTC Memorandum, of the FEIR, the two aquifers are hydraulically separated due to the presence of a confining layer and that recharge from the Shallow Aquifer and creeks/streams, into the Principal Aquifer does not occur. Therefore, there is no hydrologic impact to riparian habitat within Coyote Creek, and no further response is necessary.

Response C-3.26:

The commenter begins with an assertion that, in contrast to the analysis provided in the DEIR and the BRA (Appendix D of the DEIR), the Project will not comply with the 100-foot riparian setback requirement set forth in the City’s Riparian Corridor Protection and Bird-Safe Design Policy. Based on this assertion, the commenter argues that compliance with the other applicable measures of the City’s Riparian Corridor Protection and Bird-Safe Design Policy will not, by themselves, ensure a less than significant impact.

The commenter also notes that directing low-intensity exterior lighting downward and away from the riparian corridor to the greatest extent feasible (as required by the City’s Riparian Corridor Protection and Bird-Safe Design Policy) only reduces “astronomical light pollution”

(whereby stars and other celestial bodies are washed out by light that is either directed or reflected upward), but does not reduce ecological light pollution (artificial light that alters the natural patterns of light and dark in ecosystems) associated with light reflected off the ground, or from light pollution from indoor sources and vehicles.

Finally, the commenter makes an assertion that because no hydrology study was done, the City's conclusions are unsupported.

In response to the commenter, specifically the assertion that the Project does not meet the 100-foot setback prescribed in the Riparian Corridor policy, the term "riparian" generally refers to the transition zone between wetlands and uplands, often referring to the primarily woody vegetation associated with both lentic and lotic systems. The CDFW defines riparian vegetation as "native vegetation occurring naturally along banks or margins of lakes or streams. The USFWS further defines riparian areas as "plant communities contiguous to and affected by surface and subsurface hydrologic features of perennial or intermittent lotic and lentic water bodies (rivers, streams, lakes, or drainage ways)" that exhibit "distinctly different vegetative species than adjacent areas and/or "species similar to adjacent areas but exhibiting more vigorous or robust growth forms".

The aerial photo of the Coyote Creek corridor included in Mr. Cashen's letter appears to have erroneously identified the flooded condition of the expanded engineered floodplain as the flowline of Coyote Creek. The aerial photo utilized by Mr. Cashen is dated February 22, 2017; this photo was taken four days following an historic storm event that caused a breach of the Anderson Dam in San José and resulted in widescale flooding of neighborhoods along Coyote Creek. The 2017 flood event overtopped and overflowed the top of the bank elevation of Coyote Creek. While this event did overtop the banks of Coyote Creek, it was contained within the engineered floodplain, behind the flood control levy, as visible in the photo provided by Mr. Cashen. Flooding events severe enough to cause upstream dam failures do not define the limits of the riparian corridor, nor do they define the top of the bank. This erroneous identification of the creek's flowline is further demonstrated by Mr. Cashen's interpretation that the edge of riparian vegetation shown in the Appendix D, Biological Resources Analysis, of the DEIR, occurs on the east side of Coyote Creek (when it in fact is mapped on the west side of the creek).

An aquatic resource delineation was not conducted for the site-adjacent portion of Coyote Creek or the expanded engineered floodplain. The extent of the Coyote Creek riparian corridor was preliminarily mapped as the top of bank or the outer dripline of riparian vegetation (whichever was greater at the time of the February 2021 assessment). The engineered floodplain occurs outside of the riparian corridor and was created to receive channel overflows during rare episodic flood events. This area is dominated by upland grasses and appears to potentially support seasonal wetlands and/or seasonal wetland swales. The expanded engineered floodplain would not be considered a linear feature with a bed, bank, or channel, and does not support riparian vegetation. Accordingly, the initial estimate of the extent of top of

bank or riparian vegetation was properly mapped, and the 100-foot riparian setback has been properly measured.

In response to the commenter's second assertion that Project lighting would impact wildlife behavior within Coyote Creek, the commenter again cites the letter from Mr. Cashen, who does not argue that the Project fails to comply with the lighting standards within the City's Riparian Corridor Protection and Bird-Safe Design policy (City Council Policy 6-34). Mr. Cashen instead argues that adherence with the lighting provisions of City Council Policy 6-34, specifically the requirement to shield or direct lighting downward, does not adequately protect wildlife due to shielded light potentially scattering off the ground. The efficacy of the lighting measures prescribed in City Council Policy 6-34 were previously evaluated in the City's Riparian Corridor Policy Study, and found to be sufficient in minimizing impacts to wildlife movement within riparian habitat.¹² Therefore, the Project's compliance with these policies supports the EIR's conclusion of a less than significant impact to biological resources.

Another part of Mr. Cashen's argument, cited by the commenter, is that the EIR did not study lighting that was not feasible to direct away from the riparian corridor. Mr. Cashen is simply responding to the words "where feasible" in the Riparian Corridor Policy, rather than citing actual circumstances where the Riparian Corridor Policy is being violated. The Project's Lighting Plan does not include any external lights pointed at the corridor. As such, these violating circumstances do not exist. Further, the argument that indoor and exterior lighting could impact the wildlife corridor ignores the fact that widespread residential and commercial development already exists on both sides of the Coyote Creek Corridor between Montague Expressway and Highway 237.

Mr. Cashen also argues that "several of the Project's roads are oriented towards the riparian corridor" and the vehicle headlights on these roads would disrupt Coyote Creek wildlife activity. Mr. Cashen ignores that most of these Project roads face toward buildings that would block any headlights oriented in the direction of the corridor. Within the multifamily project(s), there is only one alley (no roads) that a) points towards the corridor, and b) does not terminate at a building (which would block the headlights): the driveway between Building A and the Affordable Building. The alley is only for move ins and trash pickup (which wouldn't occur at night).

On the townhome side, there are three alleys and one loop that faces the corridor, and is not blocked by buildings. However, (i) on the western side of the site the riparian corridor is even further away, and (ii) the only traffic on these alleys would be residents of the townhomes themselves, as there is no street parking and only individual garage access off these alleys/loop.

The development standards and requirements outlined in City Council Policy 6-34, which include measures such as setbacks, lighting standards, and material selection, are designed to minimize

¹² City of San José. *Riparian Corridor Policy Study*. Approved by City Council, May 17, 1994, and revised March 1999.

glare and lighting impacts on riparian corridors such as the Coyote Creek. The efficacy of these standards and requirements are supported by the City's Riparian Corridor Policy Study. As discussed above, the project is consistent with the Policy's 100-foot setback requirement, and by the commenter's own admission, the project is consistent with the lighting policies outlined in Policy 6-34. Furthermore, Mr. Cashen notes that nocturnal animals are impacted by "... artificial increased illumination throughout the night." The intermittent nature of any temporary vehicle lighting on the riparian corridor, which would already be significantly minimized by the distance between the project site and the corridor, would not increase illumination throughout the night and would be so limited in duration that it is not reasonably foreseeable that increased predation would occur.

Mr. Cashen goes on to cite both Council Policy 6-34 and the Citywide Design Standards and Guidelines in reference to the Project's impacts to bird safety. Council Policy 6-34 applies bird safety guidelines to the area along Coyote Creek north of Highway 237, designated as a "Bird Safe Building Design Area" shown in Figure 1 below. However, as shown in Figure 1 below, the Project site is located 1.6 miles south of Highway 237 and is therefore well outside of the Bird Safe Building Design Area.

Figure 1 City of San José Bird Safe Building Design Area

Regarding the Citywide Design Standards and Guidelines, all glass on buildings within 300 feet of the Riparian Corridor will be low emissivity glass with a reflexive index below the 20 percent reflective index standard. The Project does not include any transparent atria or free-standing glass features. The Project will include balconies with steel railings and glass railings in compliance with the Citywide Design Standards and Guidelines. As such, no additional mitigation measures with respect to bird safety are warranted.

Response C-3.27:

The commenter notes that analysis provided by Scott Cashen indicates that the DEIR proposed mitigation measures, specifically MM BIO-1 and MM BIO-2 fail to address potentially significant impacts to nesting birds and roosting bats. The commenter specifies that MM BIO-1 fails to establish standards for nest searching techniques, minimum survey efforts, and the qualifications of the surveyors. The commenter questions that the estimated construction schedule has a start date within the nesting season and then spans over another four nesting seasons. The commenter adds that the proposed buffer sizes for active nests are smaller than those identified by the City's consultants in the BRA and that the DEIR does not provide evidence that MM BIO-1 will reduce impacts to a less than significant level.

In response to the commenter, MM BIO-1 calls for construction activities to be limited to the non-nesting season, and if that is not possible, it secondarily calls for preconstruction surveys (determined and conducted by a qualified biologist/ornithologist) for nesting birds prior to initiation of construction activities. Additional avoidance measures will be implemented if nesting birds or raptors are observed on the Project site and/or within the zone of influence of Project activities, including the creation of a non-disturbance buffer. The construction start date is subject to permit approvals and once the construction has begun, so long as there is not a significant pause in activities (based on the recommendation of a qualified biologist), the nesting bird surveys would not need to be reevaluated during each nesting season. Consistent with MM BIO-1, a significant pause would include pausing construction during the nesting season for more than 14 days in the early part of the season or for more than 30 days in the later part of the season. It should also be noted that a resurvey after a "significant pause" would only be needed if the existing trees/buildings were still present on the project site. As stated within MM BIO-1, a sufficient non-disturbance buffer size to prevent disturbance to birds nesting in the urban environment is generally considered to be 200 feet for raptors and 50 feet for other birds. Discussion of MM BIO-1 can be found in Section 3.4.2.2, Project Impacts, page 108 of the DEIR. While these proposed buffers vary slightly from the typical buffers described within the 2022 BRA, the prescription includes the caveat that these buffer sizes may be increased or decreased, as determined by the qualified ornithologist/biologist, depending on the bird species and the level of disturbance anticipated near an occupied nest. Therefore, this mitigation measure is sufficient to avoid impacts to nesting birds/raptors and is consistent with nesting bird protections for other development projects in San José.

In response to the commenter's concerns regarding MM BIO-2 and potential impacts to roosting bats, see Response C-3.19. Additionally, see Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.28:

The commenter states that MM BIO-2 does not require techniques that are necessary to identify bats that are roosting in concealed locations and fails to identify when required site surveys will take place in relation to construction activities or prescribe how the surveys will be conducted. The commenter additionally notes that MM BIO-2 does not include "soft felling" techniques and as such the mitigation measure fails to minimize potentially significant impacts on special status bat species.

In response to the commenter, see Response C-3.19, which addresses the topic of roosting bats and MM BIO-2, including why the use of "soft felling" techniques was not incorporated into the mitigation. Additionally, see Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.29:

The commenter states that neither MM BIO-1 nor MM BIO-2 adequately reduces Project's permanent impacts on the species habitat. The commenter defers to information provided by Scott Cashen who notes that habitat loss is the primary threat to most bird and bat populations. The commenter requests that these mitigation measures be revised to address permanent impacts to these species including the potential loss of suitable habitat.

In response to the commenter, Project plans include the replacement of the 584 trees removed from the Project site by either 1) planting of 803 trees either onsite or at a City-approved offsite location; or 2) payment of Off-Site Tree Replacement Fee(s) to the City to be used by the City to plant trees at alternative site in accordance with the City's Tree Removal Policy. In addition to habitat replacement as part of Project implementation, impacts to nesting birds and roosting bats will be avoided through implementation of MM BIO-1 and MM BIO-2, which includes preconstruction nesting bird and raptor surveys and preconstruction bat surveys, respectively, with non-disturbance buffers if nesting birds/raptors are observed on the Project site and/or within the zone of influence of Project activities, and avoidance measures if bat roosts are observed onsite.

Therefore, the tree replacement, habitat replacement and implementation of MM BIO-1 and MM BIO-2 is adequate to reduce impacts to a less than significant level, and no further response is necessary. Discussion of MM BIO-1 and MM BIO-2 can be found in Section 3.4.2.2, Project Impacts, pages 108 to 110, of the DEIR. Additionally, see Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.30:

The commenter states that Appendix P, Transportation Analysis, of the DEIR fails to accurately describe and address the Project's transportation impacts. Specifically, the comment notes that the DEIR overestimates the efficacy of MM TR-1.1, which is attributed as having the most significant reduction in VMT. The comment includes analysis conducted by Norman Marshall that indicates the inclusion of a Voluntary Travel Behavior Change Program ("VTBCP") will decrease participation due to the "burdensome nature of travel diaries." Mr. Marshall states that this requirement is uncommon and has not been observed in other voluntary travel reduction programs anywhere in the United States. Additionally, Mr. Marshall indicates that providing information to residents or employers will not yield the projected 4 percent reduction as stated in the DEIR and that a more realistic projection of the participation rate is 10 percent with a VMT reduction of 0.4 percent. The comment concludes that for these reasons, the DEIR lacks substantial evidence to support the conclusion that the proposed mitigation measures will reduce transportation impacts to a less than significant level and that the DEIR should be revised to accurately disclose the Project's VMT impacts and all feasible mitigation measures.

In response to the commenter, Topical Response 5 – Disagreement among Experts discusses a disagreement among experts does not solely make an EIR inadequate, so long as the Lead Agency summarizes the main point or points of disagreement and explains its choice of expert opinions.

The commenter is incorrect that MM TR-1.1 requires travel diaries; as documented by the commenter's own citation (Citation 92) the VTBCP does not include language requiring travel diaries, but instead lists them as a possible element of a VTBCP (VTBCPs include mass communication campaigns and travel feedback programs, such as travel diaries or feedback on calories burned from alternative modes of travel). As such, travel diaries are not a requirement of a VTBCP, only one example of many options available as part of a VTBCP.

Furthermore, consistent with San José's and VTA's VTBCP descriptions, MM TR-1.1 calls for the Project applicant to "Provide a voluntary travel behavior change program that targets individual attitudes and behaviors towards travel and helps individuals analyze and alter their travel choice and behavior." This means a program is presented, promoted, and communicated to all (100 percent) occupants as they are considered participants in the Project's commuter program (regardless of whether they opt for an alternative mode or show up for a commuter fair). All residents will receive travel behavior change information designed to encourage the use of alternative transportation.

TDM programs include many options to promote alternative transportation and are presented to all residents. A TDM plan is a package of measures, and VTBCP is just one measure that complements and leverages other measures to achieve a trip reduction goal of a TDM plan. VTBCP "contributes" to the ultimate participation percentage, which is the number of residents who use alternative transportation and reduce VMT.

It is further noted that the percentage reduction for this TDM measure comes from the City of San José's VMT Evaluation Tool, which has been adopted and used extensively by San José to determine appropriate trip reduction measures (i.e., TDM measures) and the reductions associated with each measure. The VMT reductions used by the model are based on real-world data and published studies. CEQA explicitly provides lead agencies with discretion on how to choose the most appropriate methodology to evaluate a Project's VMT, and specifically allows the use of models to estimate a Project's VMT, so long as any assumptions used to estimate VMT and any revisions to model outputs are documented.¹³ The methodology used to evaluate the Project's VMT impacts are summarized in the DEIR (refer to pages 234-235 and 239-243) and described in detail in the Transportation Analysis (refer to pages 9-10 and 22-29 of Appendix P of the DEIR). Additionally, CEQA does not require the analysis leading to the determination of significance to be perfect or to even assume a worst-case scenario; instead CEQA Guidelines Section 15151, Standards for Adequacy of an EIR, states, "... the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible... The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at disclosure."¹⁴

A supplemental memorandum, Appendix A, Transportation RTC Memorandum, of the FEIR, has been prepared in response to comments received during circulation regarding transportation that speaks to specific commenter concerns and affirms the conclusions of the DEIR and BRA.

Based on the above, the City finds that there is substantial evidence that the VTBCP, in conjunction with other TDM measures, will result in a reduction in VMT, and that no revisions to the DEIR or additional analysis is required in to render the DEIR adequate.

Response C-3.31:

The commenter notes that the DEIR concludes that the Project will not increase hazards due to a geometric design and then defers to analysis provided by Mr. Marshall who indicates that the Project will result in hazards due to a dangerous signalized intersection that will result in traffic extending into the upstream intersection during the AM peak hour and will result in traffic blockages. The commenter then asserts that the DEIR analyze, disclose, and mitigate the risks described by Mr. Marshall.

In response to the commenter, please see Topical Response 2 – Traffic Signal. Moreover, Mr. Marshall incorrectly assumes that a traffic signal will be part of the Project. The commenter is claiming that the previously considered traffic signal at Montague Expressway and Seely Avenue

¹³ Authority cited: Sections 21083 and 21099, Public Resources Code. Reference: Sections 21099 and 21100, Public Resources Code; Cleveland National Forest Foundation v. San Diego Association of Governments (2017) 17 Cal.App.5th 413; Ukiah Citizens for Safety First v. City of Ukiah (2016) 248 Cal.App.4th 256; California Clean Energy Committee v. City of Woodland (2014) 225 Cal. App. 4th 173.

¹⁴ Section 21083, Public Resources Code; Reference: Sections 21061 and 21100, Public Resources Code; San Francisco Ecology Center v. City and County of San Francisco, (1975) 48 Cal. App. 3d 584; Communities for a Better Environment v. South Coast Air Quality Management District (2010) 48 Cal.4th 310.

would qualify as a “dangerous intersection” due to vehicle queues. The Project is no longer proposing a new traffic signal at this intersection. Therefore, the vehicle queuing described in this comment will not occur, because there would be nothing obstructing the flow of traffic through the Montague Expressway and Seely Avenue intersection (i.e. a pedestrian crossing or a signalized intersection). Additionally, see Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency’s experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.32:

The commenter asserts that the analysis provided by Neil Shaw indicates that the DEIR insufficiently analyzes the Projects noise impacts by failing to consider new sensitive receptors on the Project site. The commenter notes that the DEIR fails to account for noise impacts on new sensitive receptors that will be introduced as the Project progresses through its phased development process.

In response to the commenter, it is not customary to evaluate temporary construction noise on new sensitive receptors introduced during early phases of the Project while the remaining phases of the Project are completed. Per CEQA Guidelines Section 15126.4(a)(1)(D), temporary construction noise impacts are addressed through specific mitigation measures, such as MM NSE-1 (Section 3.13.2.2 Project Impacts, page 203 to 204, of the DEIR), that differ from those for long-term operational impacts. Early phase residents will be fully aware of the potential for annoyance due to temporary construction noise during later phases of the Project, but this would not be considered a significant impact under CEQA as construction noise is temporary and would terminate once construction is complete. Further, early phase residents would experience the noise relief associated with implementation of NSE-1. The applicable CEQA checklist question related to this comment is, “Will the Project result in the generation of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the Project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?” The phrase, “in the vicinity of the Project” means the area that is close to or around the Project site and does not mean the area encompassing the Project site itself. Therefore, temporary construction noise was not evaluated at new sensitive receptors on the Project site, but rather, the evaluation was limited to off-site receptors that were close to or around the Project site following the CEQA guidance.

Furthermore, per *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, Case No. S213478, CEQA does not require an evaluation of the environment’s impact on a project. Per the Court: “In light of CEQA’s text, statutory structure, and purpose, we conclude that agencies generally subject to CEQA are not required to analyze the impact of existing environmental conditions on a project’s future users or residents. But when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users. In those specific instances, it is the Project’s impact on the environment – and not the

environment's impact on the Project – that compels an evaluation of how future residents or users could be affected by exacerbated conditions.” Notwithstanding “special CEQA requirements [that] apply to certain airport, school and housing construction projects[,]” the Court held “that ordinary CEQA analysis is concerned with a project's impact on the environment, rather than with the environment's impact on a projects and its users or residents.”

Based on the rationale provided above, no further response is necessary. Additionally, see Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.33:

The commenter, citing third-party expert Neil Shaw, asserts that the proposed mitigation measure for construction noise impacts is inadequate. The commenter states that the noise barrier proposed in the DEIR is insufficient to reduce noise levels to acceptable levels due to its limited effectiveness, especially for upper floors of existing buildings. The commenter also claims that the DEIR underestimates construction noise levels by only considering the two loudest pieces of equipment operating concurrently, which further diminishes the effectiveness of the proposed mitigation measure.

In response to the commenter, the intent of the measure requiring the construction of an eight-foot noise barrier along the northwest boundary of the site adjacent to residences was to reduce noise levels as much as reasonable outdoors where residents will be expected to congregate. Other common outdoor activity areas of adjacent residential land uses are located in well shielded courtyards or within well shielded paseos. While the eight-foot noise barriers would not reduce noise levels at the upper stories of the apartments facing the site, it was assumed that interior noise levels would be controlled by closing the windows. As discussed in Section 3.13.3, Non-CEQA Effects, pages 210 and 211, of the DEIR, standard construction with the windows closed provides approximately 20 to 25 dBA of noise reduction in interior spaces. The commenter restates that an eight-foot noise barrier would achieve 5 dBA of noise reduction when the barrier effectively blocks the line of sight between the noise source and the receiver. This condition will occur when the noise source (i.e., heavy construction equipment) and receptor are located at the ground level. In the case of the credible worst-case noise levels predicted as part of the analysis, these noise level estimates assume the operation of the two loudest pieces of heavy construction equipment operating at the ground level. Heavy construction equipment will not operate at the upper floors of the Townhomes, Building A, or Building B. At the upper floors of these buildings, smaller and substantially less noisy tools will be used resulting in lower noise levels than those predicted in the noise and vibration assessment. . With respect to the construction noise levels calculated as part of the noise and vibration assessment, presented in Section 3.13.2.2 Project Impacts, Table 3-30, Table 3-31, and Table 3-32, pages 200 to 202, of the DEIR, both the noise levels from the “two loudest pieces of

equipment per phase scenario” operating simultaneously and the “all equipment per phase scenario” were calculated. The construction noise levels predicted under each of these scenarios discussed in Section 3.13.2.2, Project Impacts, pages 199 and 200, in the DEIR, were reviewed and compared and were found to be within 0 to 1 dBA of each other in all cases but one. In the one case where noise levels varied, (i.e., the site preparation phase during the construction of Project infrastructure), the difference in noise levels between the scenario involving the two loudest pieces of equipment per phase and all equipment per phase was up to 6 dBA (i.e., 84 dBA at 50 feet vs. 90 dBA at 50 feet). This unusual difference in predicted noise levels resulted because this phase will utilize up to 13 pieces of construction equipment. However, it is unreasonable to assume all 13 pieces of construction equipment could physically operate at a distance of 50 feet from a receptor in such close proximity to one another and simultaneously for Project infrastructure as that is not a localized construction activity. A more reasonable construction scenario is that the construction equipment during this particular phase is distributed throughout the entire site, thus leaving the noise from the closest construction equipment as the dominant noise source. The “two loudest pieces of equipment scenario” discussed above credibly represents construction noise levels emanating from the site and is a more accurate method for calculating construction noise levels, consistent with FTA guidance for assessing construction -related noise¹⁵.

For the reasons outlined above, the City does not find any compelling reason to follow Neil Shaw’s conclusion that the proposed mitigation measure for construction noise impacts (NSE-1) in the DEIR is inadequate, and therefore no further response is necessary. Additionally, see Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency’s experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.34:

The commenter asserts that the DEIR fails to establish construction noise level significance thresholds, as required by CEQA. The commenter expresses that the DEIR omits quantitative thresholds required by CEQA for noise levels. The commenter urges the City to revise the DEIR to include absolute noise limits and evaluate the impact of increased noise levels attributable to the Project 's construction and operations.

In response to the commenter, as discussed in Section 3.13.1, Environmental Setting, of the DEIR and Appendix O, Noise and Vibration Assessment, of the DEIR the City does not have established noise thresholds for construction activities. As an alternative, Appendix O, Noise and Vibration Assessment, page 36, of the DEIR, describes how the noise analysis uses the noise limits established by the Federal Transit Administration to identify the potential for impacts due

¹⁵ Federal Transit Administration (FTA). 2006. Transit Noise and Vibration Impact Assessment, Final Report FTA-VA-90-1003-06. May.

to substantial temporary construction noise. The City's Envision San José 2040 General Plan does have Policy EC-1.7 that requires all construction activities to use best available noise suppression devices and techniques when construction occurs within 500 feet of a residential land use. Moreover, the City considers significant construction impacts to occur if a Project that is located within 500 feet of residential uses or 200 feet of commercial or office uses involves substantial noise-generating activities for more than 12 months.

The commenter also incorrectly cites to *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814 and *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmr.*, 91 Cal.App.4th 1344 both of which are distinguishable from the analysis in the DEIR. *King & Gardiner Farms* related to operational noise, not temporary construction noise, and *Berkeley Jets* very specifically related to noise guidance associated only with airport operations.

Section 3.13.2.2, Project Impacts, of the DEIR, discusses the impacts of operational noise (refer to pages 204-205). Noise sources associated with Project operation would consist of low speed on-site vehicular noise and mechanical equipment (e.g., heating, ventilation, and air conditioning units and lift station equipment), which would not be notable at the nearest residences opposite Epic Way. Noise levels associated with the public park, outdoor rooftop decks, and emergency generator would all be below the City's criteria of 65 dBA DNL and 60 dBA DNL for neighborhood parks residential outdoor uses, respectively, and would not affect other nearby land uses offsite.

In accordance with Policy EC-1.7, the DEIR correctly concluded that the Project's temporary construction impact is considered potentially significant and MM NSE-1 is included to reduce the construction impact to less than significant by requiring the preparation and implementation of a Construction Noise Logistics Plan. The City's lack of a bright-line construction impact threshold does not minimize or omit the analysis of the Project's construction noise. The DEIR's analysis is thorough and carefully details the level of construction noise that will result from the Project, as well as explains the impact the construction noise will have on neighboring residential homes. Consequently, the DEIR "sets forth sufficient information to foster informed public participation and enable the decision makers to consider the environmental factors necessary to make a reasoned decision." *Berkeley Jets* 91 Cal. App. 4th 1344, 1356.

Based on the above rationale, the City does not find any compelling reason to follow Neil Shaw's conclusions that the noise thresholds used in the DEIR are inadequate, and therefore, no further response is necessary. Additionally, see Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.35:

The commenter states that the DEIR fails to adequately disclose, analyze and mitigate the Project's impact to public services in the City, specifically regarding the City's park resources. The commenter notes that since the Project is proposing to add new residents, it will be

required to comply with the City's PDO and PIO. The commenter indicates that the DEIR incorrectly asserts that the proposed 2.5-acre park is sufficient to satisfy PDO and PIO requirements and does not require the construction of additional park space, but the 2.5-acre parkland dedication is less than 20 percent of what is required by the City's PDO and PIO. The commenter then states that the DEIR does not include discussion as to whether the public park will include features that will allow the Project to take advantage of Private Recreation Credits that may reduce required parkland obligations. The commenter concludes that because of the reasons previously stated, the DEIR's conclusion that the Project would result in no significant impact is not supported by substantial evidence.

In response to the commenter, the PDO and PIO requires the Project to offset its impacts to local parks in accordance with the Quimby Act through: a) a dedication of parkland, b) payment of in-lieu fees, or c) a combination of both. The Project has coordinated with SJPRNS to offset its park impact through 1) the dedication of 2.5 acres for a public park, 2) construction of a turnkey public park on the dedicated acreage, and 3) payment of the applicable park impact in-lieu fees to cover the balance of the Project's impact. The commenters letter incorrectly states that the Project is only dedicating land. As stated under Section 3.16.2.2, Project Impacts, and Section 4.1.15, Public Services, of the DEIR, the Project would comply with all required in lieu and fair share impact fees which would include the PDO and PIO.

In response to the commenters point regarding the applicability of Private Recreation credits to reduce required parkland obligations, the Project would be applicable for credits. Credits that lowers a project's parkland obligation are not a CEQA issue but are captured within a Parkland Agreement. Per the PDO/PIO, a fully executed Parkland Agreement is required prior to the issuance of a Final Map. Payment of park fees is due prior to the issuance of Building Permit. Certification of an EIR occurs long before a Parkland Agreement, Final Map, and Building Permits are issued. It is speculative to state in a CEQA document the amount of credits that will be determined in compliance with City regulations. Private Recreation Credits are provided when on-site amenities comply with Resolution No. 73587. Affordable Housing credits are provided after the Housing Department has approved a Housing Compliance Plan and verifies that the units meet deed restrictions and other regulatory requirements.

The City is in the process of negotiating a Turnkey Parkland Agreement with the applicant. The amount of Private Recreation Credits and Affordable Housing credits has not been determined. The City Council has to approve a Turnkey Parkland Agreement. Therefore, the amount of credits applied to the project will be publicly available once the agreement is scheduled to be considered by the City Council.

The EIR appropriately analyzes the Recreation impact, as confirmed by SJPRNS. The applicant intends to fulfill the PDO/PIO obligation by dedicating 2.5 acres of improved and by paying any remaining in-lieu fees. This will prevent the proposed Project from substantially increasing the use of existing parks and other recreational facilities, thus avoiding any substantial physical

deterioration. The City will decide how to use funds from in-lieu fees for parks and that would be subject to CEQA review, as it is speculative to analyze them now.

The PIO/PDO (San José Municipal Code 14.25 and 19.38) requires new residential projects to dedicate land for park purposes, provide recreational turnkey improvements, pay an in-lieu fee, or complete combination of these options. Compliance with the PDO/PIO ensures that a new residential development has fulfilled the requirements and procedures as set forth in municipal code requirements, General Plan, Activate SJ policies consistent with the Quimby Act.

Compliance with the PDO/PIO satisfies the increase usage and demand for neighborhood parks, thus resulting in less than significant impact as adequately stated in the DEIR.

Additionally, SJPRNS states that the EIR adequately discloses the existing recreational facilities near the Project site. Iris Chang Park (2.69 acres) and River Oaks Park (5.46 acres). The Coyote Creek trail system runs north to south above the eastern edges of the Project. This trail system provides connectivity and additional recreational benefits.

The Project site is located within half a mile of an area (west of the Project site) that is underserved (without parks) and that cannot access a park within a ten-minute walk. The Project site is also within less than a mile of underserved areas to the south of the Project. Those areas also do not have parkland nor do those areas have access to a park within a ten-minute walk. The proposed public park will help close those gaps and will also support funding future off-site public park projects within three miles of the site which will also lessen the impacts to the existing park system.

Therefore, the EIR accurately states that compliance with the PDO/PIO will ensure that the Project will not increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated.

Lastly, Municipal Code Chapters/Sections 14.25.320 and 19.38.305(C) state, "Land to be dedicated shall not be of such size, shape or location as to make the development of the subdivision unfeasible and shall permit the balance of the subdivision to be developed in an orderly and efficient manner."

Given the existing built environment and the population and development density of the area, it is not reasonable to acquire and develop the amount of land needed to meet the 12.85 required acreage. The Development site is 22 acres. If the City were to require the development to build to the required acreage, it would remove more than half of the developable area to provide a public park. This would make the proposed development Project unfeasible.

Projects can fulfill their obligation by dedicating land, paying fees, and/or entering into a Parkland Agreement with the City for the construction of park facilities, recreational facilities and/or pay fees. The City does not collect an improvement fee but can apply park fees to support paying for public recreational facilities. This supports providing built recreational improvements that lessen impacts on existing facilities.

In addition to dedicating and improving 2.5 acres of land for public park purposes, the Project shall fulfill any remaining PDO/PIO obligation through the payment of in-lieu fees. Those fees will support the much-needed funding to fill service level gaps within 0.75 to three miles of the Project site.

Response C-3.36:

The commenter states that the Project fails to comply with the City's inclusionary housing ordinance ("IHO"). Specifically, the commenter notes that the number of affordable housing units included in the Project is not consistent with the requirements of the IHO and that there is no indication that the Project will pay the required in-lieu fees to make up the difference between the number of affordable housing units included in the Project, and the number required by the IHO.

In response to the commenter, the Project will comply with the City's IHO under Section 5.08.520 (In Lieu Fee) through payment of an affordable in lieu fee for the townhomes and under 5.08.590 (Partnership for Clustered Housing) through the provision of a standalone affordable apartment community within the Project to fulfill the IHO obligations of the apartments. The Project's compliance with the IHO is governed through an Affordable Compliance Plan and Affordable Housing Agreement, which has been approved by the San José Housing Department but is not yet in effect. The Project's compliance and the affordable housing agreement need to be executed against the entire property before being approved for a building permit.

Response C-3.37:

The commenter suggests that the proposed inclusionary housing units may not fully meet the standards discussed in the IHO. The commenter expresses concern that the affordable units deviate from market-rate units in terms of bedroom count and ratio, as the affordable options offer fewer variations. The commenter notes that the DEIR misses detailed information regarding the comparability of square footage between affordable and market-rate units.

In response to the commenter, the IHO requires all Project applicants to submit an Affordable Housing Compliance Plan that details the Project's method(s) of compliance and any requested waivers from strict compliance with the IHO, in exchange for greater affordability. The Project's Affordable Housing Compliance Plan is approved by the City's Housing Department staff. The Project's compliance and the affordable housing agreement itself is not a CEQA issue. Additionally, see Response C-3.36 for more information on IHO compliance.

Response C-3.38:

The commenter raises concerns about the DEIR's lack of description regarding the Project's compliance with the IHO's "Partnership for Clustered Units" requirements. The commenter emphasizes the importance for the DEIR to address and analyze the Project's compliance to

specific criteria outlined in the ordinance, such as location, financing, and affordability for clustered rental affordable housing.

In response to the commenter, see Responses C-3.36 and C-3.37.

Response C-3.39:

The commenter asserts that the City cannot approve the Project because it fails to meet the requirements outlined in the Vesting Tentative Subdivision Map and Planned Development Permit. The commenter discusses how the Project's impacts, particularly on transportation, noise, and biological resources, are not adequately disclosed, analyzed, or mitigated in the DEIR. The commenter contends that the Project will have an unacceptable negative effect on adjacent properties, as even insignificant impacts under CEQA can be deemed unacceptable.

In response to the commenter's concerns regarding the disclosure, analysis, and mitigation of biological, noise, and transportation impacts, see Responses C-3.7 through 3.34. The comments regarding the requirements of the Vesting Tentative Subdivision Map and a Planned Development Permit do not raise any issues regarding the adequacy of the DEIR. The Project as proposed and mitigated would not result in any significant impacts to the environment with the exception of significant and unavoidable impacts to cultural resources (historic). According to the CEQA Guidelines Section 15092, the decision-making body for this Project, the City Council, must review, consider, and certify the FEIR prior to Project approval. The Project would only be approved after it has been determined that the FEIR has been completed in compliance with CEQA.

Response C-3.40:

The commenter raises concerns about inconsistencies between the Project's impacts and the Envision San José 2040 General Plan policies, specifically policies TR-1.1, TR-1.2, TR-1.4, TR-5.3, TR-9.1, TR-9.2, and TR-9.3. These include goals and policies related to reducing VMT and promoting alternative transportation modes. The commenter asserts that the DEIR inadequately addresses the Project's transportation impacts and suggests insufficient mitigation measures, thus undermining the City's efforts to promote sustainable transportation and mobility.

In response to the commenter, see Topical Response 4 – Project Consistency with Envision San José 2040 General Plan, which includes an evaluation of the Project against the referenced policies and, as warranted, explains why any inconsistencies will not result in significant environmental impacts.

Response C-3.41:

The commenter notes discrepancies between the DEIR's analysis and the Project's impacts with Envision San José 2040 General Plan policies regarding biological resources, specifically ER-2.1, ER-2.2, ER-2.3, ER-2.4, ER-2.5, ER-4.1, ER-4.4, and ER-5.2. The commenter states that the DEIR fails to address the Project's impacts on riparian corridors and special-status species, which does not align with several critical Envision San José 2040 General Plan goals and policies. The

commenter notes that the Project fails to comply with riparian setback requirements and lacks sufficient mitigation measures for impacts on wildlife habitats. Overall, the commenter asserts that the DEIR's deficiencies undermine the City's efforts to preserve biodiversity and protect natural habitats.

In response to the commenter, please see Topical Response 4 – Project Consistency with Envision San José 2040 General Plan. See Responses C-3.25 and C-3.26 for a discussion about riparian setback and potential impacts to riparian corridors and Responses C-3.19, C-3.27 and C-3.29 regarding the effectiveness of MM BIO-1 and MM BIO-2.

Response C-3.42:

The commenter highlights concerns about the DEIR's handling of noise impacts, asserting discrepancies with Envision San José 2040 General Plan policies, specifically EC-1.1, EC-1.2, EC-1.6, and EC-1.7. The commenter argues that the DEIR fails to adequately address noise standards for both interior and exterior levels. The commenter further states that MM NSE-1 is insufficient and potentially violate policies aimed at minimizing noise impacts on sensitive land uses. Overall, the commenter suggests that the DEIR's discussion of noise impacts may not align with key Envision San José 2040 General Plan goals.

In response to the commenter, see Responses C-3.15, C-3.32, C-3.33, and C-3.34. Please see Topical Response 4 – Project Consistency with Envision San José 2040 General Plan, which discusses the standards and guidelines for interior and exterior noise levels and an evaluation of the Project against the referenced policies and, as warranted, explains why any inconsistencies will not result in significant environmental impacts. Additionally, see Topical Response 5 – Disagreement among Experts, which addresses why disagreements between a lead agency's experts and third-party experts does not by itself render an EIR inadequate.

Response C-3.43:

The commenter notes that the Project's failure to comply with the IHO conflicts with Envision San José 2040 General Plan Policy H-2.1, which is aimed at promoting the production of affordable housing. The commenter suggests that these inconsistencies could hinder the City's ability to issue permits, as the Project may not align with applicable Envision San José 2040 General Plan policies.

In response to the commenter, see Topical Response 4 – Project Consistency with Envision San José 2040 General Plan, and Responses C-3.36 and C-3.37.

Response C-3.44:

The commenter states that the DEIR for the Project falls short of CEQA requirements due to insufficient analysis and mitigation of significant impacts. The commenter would like the DEIR to be revised and recirculated for further public review before approval. The commenter requests inclusion of their comments in the Project 's record.

In response to the commenter, specifically in regard to their request for revision and recirculation of the DEIR, see Topical Response 1 – Circulation of DEIR. A copy of the commenter’s response to the DEIR has been included as Comment Letter C-3: Adams Broadwell in the record. Lastly, the commenter’s assertion that the DEIR for the Project falls short of CEQA requirements due to insufficient analysis and mitigation of significant impacts fails to provide any substantial evidence to that effect, and therefore no further response is necessary.

From: Garg, Tina <Tina.Garg@sanjoseca.gov>
Sent: Wednesday, March 20, 2024 8:14 AM
To: Juliet Martin; Audrey Zagazeta
Cc: Telahun, Bethelhem
Subject: FW: NOTICE OF CEQA POSTING: 0 Seely Avenue Mixed Use Project (ER21-284) - Restart Public Review Period

Comment received on the Restarted EIR review

From: Ed Ketchum <aerieways@aol.com>
Sent: Tuesday, March 19, 2024 10:54 PM
To: Garg, Tina <Tina.Garg@sanjoseca.gov>
Subject: Re: NOTICE OF CEQA POSTING: 0 Seely Avenue Mixed Use Project (ER21-284) - Restart Public Review Period

[External Email]

You don't often get email from aerieways@aol.com. [Learn why this is important](#)

Hello Tina,

C-4.1 | Per previous agreements this area is presently represented by Muwekma Tribal Band. Please contact their representatives.

Ed Ketchum

Sent from my iPad

On Mar 19, 2024, at 12:04 PM, Garg, Tina <Tina.Garg@sanjoseca.gov> wrote:

**NOTICE OF AVAILABILITY OF
A DRAFT ENVIRONMENTAL IMPACT REPORT (EIR) AND PUBLIC COMMENT
PERIOD
(SCH# 2022020565)**

A Draft Environmental Impact Report (Draft EIR) for the Seely Avenue Mixed-Use Project is now available for public review and comment. The project is a Planned Development Rezoning to an Industrial Park IP(PD) Planned Development Zoning District and a Planned Development Permit to allow demolition of existing residential and agricultural buildings and removal of 584 trees (261 ordinance-size trees and 323 non-ordinance-size trees) for the development of 1,472 residential units consisting of a mix of three-story townhomes and six- to seven-story apartment buildings, 18,965 square feet of general neighborhood retail space, and a 2.5-acre public park. The project also includes the dedication of an approximately 0.11-acre site to the San Jose Municipal Water System for the development of a domestic water well.

Location: The project site is bounded by Seely Avenue to the west, Montague Expressway to the south, Coyote Creek to the East, and Epic Way and existing commercial properties to the north.

APNs: 097-15-033, 097-15-034, and 097-66-004

Council District: 4

File No.: PDC21-035, PD22-002, and ER21-284

The proposed project will have potentially significant environmental effects to air quality, biological resources, cultural resources, hazardous materials, noise, and transportation. The California Environmental Quality Act (CEQA) requires this notice to disclose whether any listed toxic sites are present at the project location. The project location is contained on a list of hazardous materials sites maintained by the State in accordance with California Public Resources Code Section 65962.5.

The Draft EIR and documents referenced in the Draft EIR are available for review online at the City of San José's "Active EIRs" website at www.sanjoseca.gov/activeeirs and are also available at the following locations:

Department of Planning,
Building, and Code
Enforcement
200 East Santa Clara St., 3rd
Floor San José, CA 95113
(408) 535-3555

Dr. MLK Jr. Main Library 150 E.
San Fernando St.,
San José, CA 95112
(408) 277-4822

West Valley Branch Library
1772 Educational Park Dr.,
San José, CA 95133
(408) 808-3073

This Draft EIR was originally circulated for public review between January 18, 2024 and March 11, 2024. The City is now restarting the public review period for 45 days to ensure the general public and all interested agencies are properly informed and have time to provide comments regarding the adequacy of the analyses in the Draft EIR. **No changes to the project description, technical analysis, and mitigation measures have occurred since the previous circulation of the Draft EIR.** The public review period for this Draft EIR is from **March 19, 2024, through May 3, 2024.** Written comments must be received at the Planning Department by **5:00 p.m. on May 3, 2024,** to be addressed as part of the formal EIR review process.

Comments and questions should be referred to Bethelhem Telahun in the Department of Planning, Building and Code Enforcement via e-mail at Bethelhem.Telahun@sanjoseca.gov, or by regular mail at the following mailing address:

Department of Planning, Building, and Code Enforcement 200 E. Santa Clara Street, 3rd Floor
Attn: Bethelhem Telahun
San José, CA 95113

For the official record, **please email or mail your written comment letter and reference File No. PDC21-035/PD22-002.**

Following the close of the public review period, the Director of Planning, Building, and Code Enforcement will prepare a Final Environmental Impact Report that will include responses to comments received during the review period. At least ten days prior to the public hearing on the EIR, the City's responses to comments received during the public review period will be available for

review and will be sent to those who have commented in writing on the Draft EIR during the public review period.

Thank you.

Tina Garg

Supervising Planner | Planning, Building & Code Enforcement

City of San José | 200 East Santa Clara Street

Email: tina.garg@sanjoseca.gov

Work: (408)-535-7895

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Response to Comment Letter C-4: Ed Ketchum (Dated March 19, 2024)**Response C-4.1:**

The commenter states that the area is represented by the Muwekma Tribal Band, and that their representatives should be contacted regarding comments on the Project.

In response to the commenter, as stated in Section 3.18.1.2, Existing Conditions, of the DEIR, in 2017 the City sent a letter to tribal representatives in the area to welcome participation in consultation process for all ongoing, proposed, or future projects within the City's Sphere of Influence. As stated in Section 3.18.2.2, Project Impacts, page 252 of the DEIR, the City sent an Early Notice request for interest to consult on the project in January 2022. No formal letter response was received. In addition, the tribal representatives for tribes known to have traditional lands within the City were sent the NOP for the Project in March 2022. No responses to the NOP were received. The comment letter did not raise any concerns with regard to the DEIR analysis.

RE: The Farmland on Montequ Expwy Propossal ...

Meiners, Laura <Laura.Meiners@sanjoseca.gov>

Mon 3/18/2024 1:32 PM

To:cscoff@sbcglobal.net <cscoff@sbcglobal.net>

Cc:McNaughton, Kora <Kora.McNaughton@sanjoseca.gov>

Craig,

Thank you for your email. I am copying the project manager who is filling in for Alec on this project, Kora McNaughton. She will be able to let you know more about the project schedule, including when it will be scheduled for hearing, and how to join and participate in the hearing when it occurs.

We appreciate your input.

Laura Meiners

Planner IV / Supervising Planner

City of San Jose

Planning, Building, and Code Enforcement (PBCE) Department

200 East Santa Clara Street, Tower 3rd floor

San Jose, CA 95113

(408) 535-7869 / laura.meiners@sanjoseca.gov

From: cscoff@sbcglobal.net <cscoff@sbcglobal.net>

Sent: Monday, March 18, 2024 9:09 AM

To: Meiners, Laura <Laura.Meiners@sanjoseca.gov>

Subject: Fw: The Farmland on Montequ Expwy Propossal ...

[External Email]

You don't often get email from cscoff@sbcglobal.net. [Learn why this is important](#)

----- Forwarded Message -----

From: cscoff@sbcglobal.net <cscoff@sbcglobal.net>

To: alec.atienza@sanjoseca.gov <alec.atienza@sanjoseca.gov>

Sent: Monday, March 18, 2024 at 09:01:10 AM PDT

Subject: The Farmland on Montequ Expwy Propossal ...

Greetings Laura,

C-5.1 | The property in question, with the assigned project file # PDC21 - 035 and the proposed development by an entity calling itself the Seely Dev. Partners, I would like to know, if this property's development is imminent or not ?

C-5.1
Cont.

The reason being, is that I think, this farmland should be preserved, to remain a functioning source of healthy food production, and, with expanded space under production, be a source of employment therapy for those in our community with great needs (the recently homeless, perhaps recently discharged prisoners without violent convictions, maybe even those with mental disabilities, as another group in need of the therapy that the work of farming would provide).

I feel that there is such a tragic shortage of remaining farmland in Santa Clara Valley, and there is certainly no shortage of parking lots and already empty retail space, that the opportunity for various land trusts and farmland protection non profits, should be allowed to raise the funds to match, the 10 to 12 million dollar sales price that I believe is still on the table. The father of the two women who are the current owners, who I've learned about, from having befriended their step brother, who currently care takes the property, I feel would have most certainly approved of this land be protected, as farmland, into perpetuity.

Thank you so much Laura, for any information you can provide.

- Craig Scoffone
San Jose, Ca.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Response to Comment Letter C-5: Craig Scoffone (Dated March 19, 2024)**Response C-5.1:**

The commenter first asks as to whether the development of the Project is imminent. The commenter then states that the farmland should be preserved as a functioning source of healthy food production and be a source of employment therapy for those in our community with great needs. The commenter expresses that there is a shortage of remaining farmland in Santa Clara Valley. The commenter then expresses that various land trusts and farmland protection nonprofits should be allowed to raise the funds to match the sales price for the land. The commenter concludes that that the original owners would approve of the land being protected in perpetuity.

In response to the commenter, potential impacts to farmlands were evaluated in Section 3.2, Agriculture and Forestry Resources. As stated in Section 3.2.1.2, Existing Conditions, of the DEIR, “agricultural” land is defined as Prime Farmland, Farmland of Statewide Importance, or Unique Farmland as defined by the US Department of Agriculture land inventory and monitoring criteria. The Project site is designated as Farmland of Local Importance and is not designated as Farmland, Farmland of Statewide Importance, or Unique Farmland. As stated in Section 3.2.2.2, Project Impacts, of the DEIR, Farmlands of Local Importance typically consist of undeveloped lands that do not currently meet the criteria of Prime Farmlands, Farmlands of Statewide Importance, or Unique Farmlands but have been previously mapped as such. The Project site is designated Industrial Park within a TERO zone in the City’s General Plan Land Use Map. TERO allows for mixed-use development combining residential, commercial, and employment uses near transit hubs to create walkable, transit-oriented communities. Therefore, there would be no impact to Prime Farmlands, Farmlands of Statewide Importance, or Unique Farmlands.

Additionally, please Topical Response 4 – Project Consistency with Envision San José 2040 General Plan regarding the Project’s consistency with the City of San José’s farmland policies.

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

astukan@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

ARIANA ABEDIFARD
KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARION N. JOHNSON
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

April 2, 2024

Via Email and U.S. Mail

David Keyon
Planning Department
City of San Jose
200 E. Santa Clara St.
Tower, 3rd Floor
San José, CA 95113
Email: David.Keyon@sanjosecagov;
ZoningQuestions@sanjoseca.gov

Toni Taber, City Clerk
Office of the City Clerk
City of San Jose
200 E. Santa Clara St.
Tower 14th Floor
San José, CA 95113
Email: city.clerk@Sanjoseca.gov

Via Email Only

Bethelhem Telahun, Planner
Email: Bethelhem.Telahun@sanjoseca.gov

Via Online Portal

[https://sanjoseca.govqa.us/WEBAPP/rs/\(S\(1zaxrut0y4nnjib2dvy11ijo\)\)/supporthome.aspx](https://sanjoseca.govqa.us/WEBAPP/rs/(S(1zaxrut0y4nnjib2dvy11ijo))/supporthome.aspx)

Re: Public Records Act Request – 0 Seely Avenue Project (PDC21-035, PD22-002, PT22-003 & ER21-284)

Dear Mr. Keyon, Ms. Taber, and Ms. Telahun:

We are writing on behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”) to request a copy of the water quality assessment prepared by Luhdorff and Scalmanini Consulting Engineers, dated March 2022, referenced on page 172 of the Draft Environmental Impact Report (“DEIR”) for the 0 Seely Avenue Project (PDC21-035,PD22-002, PT22-003 & ER21-284) (“Project”) proposed by The Hanover Company (“Applicant”).

We also request any and all public records referring to or related to the Project since the date of our last request on January 19, 2024. This request includes, but is not limited to, any and all file materials, applications,

5905-007j

C-6.1

April 2, 2024

Page 2

correspondence, resolutions, memos, notes, analysis, email messages, files, maps, charts, and any other documents related to the Project.

This request *excludes* the DEIR prepared for the Project and any appendices made available on the State Clearinghouse website and City's website.

This request is made pursuant to the **California Public Records Act** (Government Code §§ 7920.000, *et seq.*). This request is also made pursuant to Article I, section 3(b) of the California Constitution, which provides a Constitutional right of access to information concerning the conduct of government. Article I, section 3(b) provides that any statutory right to information shall be broadly construed to provide the greatest access to government information and further requires that any statute that limits the right of access to information shall be narrowly construed.

We request access to the above records in their original form, as maintained by the agency.¹ Pursuant to Government Code Section 7922.570, if the requested documents are in electronic format, please upload them to a file hosting program such as Dropbox, NextRequest or a similar program. Alternatively, if the electronic documents are 10 MB or less (or can be easily broken into sections of 10 MB or less), they may be emailed to me as attachments.

We will pay for any direct costs of duplication associated with filling this request up to \$200.² However, please contact me with a cost estimate before copying/scanning the materials.

Please use the following contact information for all correspondence:

U.S. Mail

Alex Stukan
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080-7037

Email

astukan@adamsbroadwell.com

¹ Gov. Code § 7922.570; *Sierra Club v. Super. Ct.* (2013) 57 Cal. 4th 157, 161-62.

² Gov. Code §§ 7922.530, 7922.575; *North County Parents v. Dept. of Education* (1994) 23 Cal.App.4th 144; *County of Los Angeles v. Super. Ct.* (2000) 82 Cal.App.4th 819, 826.
5905-007j

C-6.1
Cont.

April 2, 2024
Page 3

If you have any questions, please call me at (650) 589-1660 or email me at the address above. Thank you for your assistance with this matter.

Sincerely,

A handwritten signature in blue ink that reads "Alex Stukan". The signature is written in a cursive, flowing style.

Alex Stukan
Paralegal

AES:ljl

Response to Comment Letter C-6: Adams Broadwell (Dated April 2, 2024)**Response C-6.1:**

The commenter requests a copy of the Water Quality Assessment, dated March 2022, prepared by Luhdorff and Scalmanini Consulting Engineers for the Project as well as all public records related to the Project since their last request on January 19, 2024. This request is made pursuant to the California Public Records Act. The commenter notes that this request excludes the DEIR, and any appendices made available on the State Clearinghouse website and the City's website.

In response to the commenter, the documents referenced in the DEIR were provided to the commenter by email on January 24, 2024.

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

aabedifard@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

ARIANA ABEDIFARD
KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARION N. JOHNSTON
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

May 2, 2024

Via Email and Overnight Mail

Mr. Chris Burton
Director of Planning
City of San Jose
200 E. Santa Clara Street, 3rd Floor
San Jose, CA 95113
christopher.burton@sanjoseca.gov

Via Email Only

Bethelhem Telahun, Planner,
Bethelhem.Telahun@sanjoseca.gov

Re: Comments on Draft Environmental Impact Report for the 0 Seely Ave Mixed-Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565)

We are writing on behalf of Silicon Valley Residents for Responsible Development (“Silicon Valley Residents”) to comment on the Draft Environmental Impact Report (“DEIR”)¹ prepared by the City of San Jose (“City”) for the 0 Seely Ave Mixed-Use Project (PDC21-035, PD22-002, ER21-284, SCH# 2022020565) (“Project”) proposed by The Hanover Company (“Applicant”). We reserve the right to supplement these comments at later hearings and proceedings on the Project.²

The Project proposes demolition of existing residential and agricultural buildings and removal of 584 trees (261 ordinance-size trees and 323 non-ordinance-size trees) for development of 1,472 residential units consisting of a mix of three-story townhomes and six- to seven-story apartment buildings, 18,965 square feet of general neighborhood retail space, and a 2.5-acre public park. The Project also

¹ Silicon Valley Residents submitted comments on the Project DEIR originally released on January 18, 2024. This comment letter addresses the revised DEIR that was released for public review and comment on March 19, 2024.

² Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

C-7.1

C-7.1
Cont. includes the dedication of an approximately 0.11-acre site to the San Jose Municipal Water System for the development of a domestic water well.

C-7.2 Based on our review of the DEIR and available supporting documentation, we conclude that the DEIR fails to comply with the requirements of the California Environmental Quality Act (“CEQA”).³ The DEIR lacks an adequate Project baseline, fails to adequately disclose and analyze the Project’s significant impacts, and fails to include substantial evidence supporting conclusions that mitigation measures will reduce the Project’s impacts to less than significant levels, as required by CEQA. The City may not approve the Project until it revises the DEIR to adequately analyze and mitigate the Project’s significant impacts and incorporate all feasible mitigation measures to avoid or minimize these impacts to the greatest extent feasible.

C-7.3 We reviewed the DEIR, its technical appendices, and available reference documents with the assistance of biological resources expert Scott Cashen,⁴ transportation expert Norman Marshall,⁵ and noise and vibration expert Neil Shaw.⁶ The City must respond to the expert comments separately and fully.⁷

I. STATEMENT OF INTEREST

C-7.4 Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential environmental impacts associated with Project development. Silicon Valley Residents includes San Jose resident Jeremy Malave, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families, and other individuals that live and/or work in the City of San Jose.

Individual members of Silicon Valley Residents and its member organizations live, work, recreate, and raise their families in the City and surrounding

³ Pub. Resources Code §§ 21000 et seq.; 14 Cal. Code Regs (“CEQA Guidelines”) §§ 15000 et seq. (“CEQA Guidelines”).

⁴ See April 27, 2024 letter from Scott Cashen to Ariana Abedifard re “Comments on the Draft Environmental Impact Report for the Seely Avenue Mixed-Use Project” (“Cashen Comments”) and Scott Cashen’s curriculum vitae, attached hereto as Exhibit A.

⁵ See February 29, 2024 letter from Norman Marshall to Ariana Abedifard re “Seely Ave Mixed Use Project” (“Marshall Comments”) and Norman Marshall’s resume, attached hereto as Exhibit B.

⁶ See February 29, 2024 letter from Neil Shaw to Ariana Abedifard re “Seely Avenue Mixed-Use Project DEIR SCH No. 2022020565– Acoustic Review” (“Shaw Comments”) and Neil Shaw’s resume, attached hereto as Exhibit C.

⁷ 14 Cal. Code Regs. (“CCR”) §§ 15088(a), (c).

communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

C-7.4
Cont.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA requires public agencies to analyze the potential environmental impacts of their proposed actions in an EIR.⁸ “The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”⁹

C-7.5

CEQA has two primary purposes. First, CEQA is designed to inform decisionmakers and the public about the potential significant environmental effects of a project.¹⁰ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”¹¹ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹² As the CEQA Guidelines explain, “[t]he

⁸ PRC § 21100.

⁹ *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 390 (internal quotations omitted).

¹⁰ Pub. Resources Code § 21061; CEQA Guidelines §§ 15002(a)(1); 15003(b)-(e); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 517 (“*Sierra Club*”) (“[T]he basic purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect [that] a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”).

¹¹ *Citizens of Goleta Valley*, 52 Cal.3d at p. 564 (quoting *Laurel Heights I*, 47 Cal.3d at 392).

¹² *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; see also *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”) (purpose of EIR is to inform the public and officials of environmental consequences of their decisions *before* they are made).

C-7.5
Cont.

EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected.”¹³

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring consideration of environmentally superior alternatives and adoption of all feasible mitigation measures.¹⁴ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”¹⁵ If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment” to the greatest extent feasible and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹⁶

While courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.’”¹⁷ As the courts have explained, a prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process.”¹⁸ “The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”¹⁹

¹³ CEQA Guidelines § 15003(b).

¹⁴ CEQA Guidelines § 15002(a)(2), (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at p. 564.

¹⁵ CEQA Guidelines § 15002(a)(2).

¹⁶ PRC § 21081(a)(3), (b); CEQA Guidelines §§ 15090(a), 15091(a), 15092(b)(2)(A), (B); *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

¹⁷ *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (emphasis added) (quoting *Laurel Heights I*, 47 Cal.3d at 391, 409, fn. 12).

¹⁸ *Berkeley Jets*, 91 Cal.App.4th at p. 1355; *see also San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 (error is prejudicial if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process); *Galante Vineyards*, 60 Cal.App.4th at p. 1117 (decision to approve a project is a nullity if based upon an EIR that does not provide decision-makers and the public with information about the project as required by CEQA); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 (prejudicial abuse of discretion results where agency fails to comply with information disclosure provisions of CEQA).

¹⁹ *Sierra Club*, 6 Cal.5th at p. 516 (quoting *Laurel Heights I*, 47 Cal.3d at 405).

III. THE DEIR FAILS TO ADEQUATELY DESCRIBE THE EXISTING BASELINE

C-7.6

The existing environmental setting is the starting point from which the lead agency must measure whether a proposed project may cause a significant environmental impact.²⁰ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.²¹ Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the Project is critical to an accurate, meaningful evaluation of environmental impacts. The courts have clearly stated that “[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined.”²²

Here, the DEIR fails to accurately describe the baseline conditions against which it must measure the Project’s environmental impacts. Specifically, it fails to identify the extent of wildlife on the Project site and the baseline ambient noise at the Project site, therefore resulting in an incomplete and inaccurate assessment of the Project’s biological resources and noise impacts.

A. The DEIR Fails to Fully Disclose The Extent Of Wildlife Species At The Project Site

C-7.7

The DEIR fails to accurately disclose the baseline environmental conditions related to the Project’s biological impacts; namely, the state of wildlife resources at the Project site. As a result, the DEIR lacks the necessary baseline information against which to measure the Project’s environmental impacts on biological resources.

C-7.8

First, as Mr. Cashen explains, “Although the DEIR provides a list of plant species observed during reconnaissance level surveys of the Project site, it does not list (or otherwise identify) the wildlife species that were observed during the surveys. This precludes understanding of the wildlife resources that could be directly impacted by the Project.”²³ Similarly, the DEIR also does not provide any

²⁰ See, e.g., *Communities for a Better Env’t v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 316.

²¹ CEQA Guidelines § 15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.

²² *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

²³ Cashen Comments, pg. 7.

C-7.8 information on the wildlife species that occur or could occur in the adjacent Coyote Creek riparian corridor, thus precluding any understanding of potential indirect Project impacts on wildlife.²⁴

C-7.9 Second, the DEIR's Biological Resources Analysis²⁵ ("BRA") did not conduct the surveys needed to determine presence of burrowing owls. Instead, it erroneously dismisses the potential presence of burrowing owls due to the absence of ground squirrel burrows.²⁶ However, this overlooks alternative nesting and roosting habitats such as debris piles within the Project site, which could support burrowing owl populations.²⁷

C-7.10 Third, the DEIR dismisses the presence of golden eagle because it states that the Project doesn't provide the necessary habitat for golden eagles. However, as Mr. Cashen states, that conclusion is inconsistent with the Arborist Report²⁸ prepared for the DEIR, which identifies the presence of several large trees at the Project site.²⁹ The California Department of Fish & Wildlife ("CDFW") also commented on the potential for golden eagle nesting and foraging habitat within the Project area.³⁰ Thus, the DEIR overlooks the habitat suitability and viability for golden eagles, thereby potentially missing potential impacts to the species.

C-7.11 Fourth, the DEIR's assertion that the Crotch Bumble Bee is unlikely to occur at the Project site contradicts available evidence. As highlighted by Mr. Cashen, despite the BRA's claim that the species' range excludes the Project area, recent occurrence records and CDFW survey guidelines suggest otherwise.³¹

C-7.12 Finally, the DEIR's characterization that oak trees on the site are not part of a sensitive natural community is flawed. Mr. Cashen points out data from the Arborist Report that indicates clustering of oak trees that meet the criteria for woodland classification.³² Therefore, the DEIR's conclusion that the Project will not have a significant impact on sensitive natural communities is unsupported.

²⁴ *Id.*

²⁵ DEIR, Appendix D.

²⁶ *See id.*; *see also* Appendix D: Biological Resources Analysis, Table 3.

²⁷ Cashen Comments, pg. 7.

²⁸ DEIR, Appendix C.

²⁹ Cashen Comments, pg. 8; *see also* Appendix C: Arborist Report and Tree Mitigation Memorandum.

³⁰ *Id.*

³¹ Cashen Comments, pg. 9.

³² Cashen Comments, pp. 9-10.

C-7.13 | In summary, the DEIR's inadequate and inaccurate disclosure of the presence of wildlife species and sensitive natural communities results in an unreliable baseline against which to evaluate environmental impacts.

B. The DEIR Fails to Properly Document Baseline Ambient Noise Measurements

C-7.14 | The DEIR fails to accurately disclose the baseline environmental conditions regarding noise. Mr. Shaw identified significant shortcomings in the methodology used to calculate existing noise levels, including the lack of details regarding sound level meter settings, microphone height, equipment specifications, calibration records, and the use of field calibrators.³³ This information is critical and must be disclosed according to standard practices outlined in guides such as ASTM's Standard Guide for Applying Environmental Noise Measurement Methods and Criteria.³⁴ Without such information, the data regarding existing ambient noise levels are unverifiable.³⁵ Thus, the City's noise analysis fails to support the measured data for existing noise levels. As a result, the DEIR lacks the necessary baseline information against which to measure the Project's environmental impacts with regard to noise impacts.

IV. THE DEIR FAILS TO DISCLOSE, ANALYZE AND MITIGATE POTENTIALLY SIGNIFICANT IMPACTS

C-7.15 | An EIR must fully disclose all potentially significant impacts of a project and implement all feasible mitigation to reduce those impacts to less than significant levels. The lead agency's significance determination with regard to each impact must be supported by accurate scientific and factual data.³⁶ An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.³⁷

Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.³⁸ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than

³³ Shaw Comments, pg. 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 14 CCR § 15064(b).

³⁷ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

³⁸ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

challenges to an agency's factual conclusions.³⁹ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will 'determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements.'⁴⁰

Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'⁴¹

Here, the DEIR fails to properly analyze, disclose, and mitigate the Project's impacts on biological resources, transportation, and noise.

A. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project's Biological Resources Impacts

As explained by biological resources expert Scott Cashen, the DEIR falls short in adequately assessing the Project's impacts on biological resources, including wildlife resources and riparian habitat. Moreover, the proposed mitigation measures are insufficient to address the Project's potential adverse effects.

1. The DEIR Fails to Identify Potentially Significant Impacts To Special-Status Bats and Crotch Bumble Bee

In answering whether the Project would have a substantial adverse effect on any species identified as a candidate, sensitive, or special status species, the DEIR identifies a potentially significant impact on roosting bat habitat.⁴² However, as described below, the Project could have a significant impact on special-status bats beyond what is discussed in the DEIR. Furthermore, the Project could have an impact on the candidate species Crotch Bumble Bee, but the DEIR did not identify or address this potentially significant impact.

First, with respect to the DEIR's analysis on special-status bats, Mr. Cashen underscores the importance of considering the full extent of direct and indirect impacts on special-status bats, beyond the DEIR's limited focus on habitat during

³⁹ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁴⁰ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁴¹ *Berkeley Jets*, 91 Cal.App.4th at 1355.

⁴² DEIR, pp. 107-108.

C-7.18
Cont. maternity roosting seasons.⁴³ As Mr. Cashen states, “Significant impacts also could occur if roost sites are removed when bats are hibernating because the metabolic cost of waking bats from hibernation can be very high and enough to reduce their energy supply to the point where survival is not possible.”⁴⁴ Because bats spend over half their lives at roosts, and when bats are evicted from a roost (as proposed in the DEIR), recovery or recolonization is slow if it occurs at all.⁴⁵ Indeed, as Mr. Cashen points out, the greatest threat to bats in the south coast ecoregion is urban/suburban expansion and its associated impacts to roosts and foraging habitat.⁴⁶

Ultimately, the DEIR provides no analysis of, or mitigation for, the Project’s direct and indirect impacts on habitat for special-status bats. As a result, the Project’s potentially significant impacts on habitat for special-status bats remain unmitigated.

C-7.19 Similarly, the DEIR fails to address and mitigate potentially significant impacts to Crotch Bumble Bee, which is a candidate for listing under the California Endangered Species Act (“CESA”).⁴⁷ As Mr. Cashen explains, at least some of the ecological features that Crotch Bumble Bee inhabit occur at the Project site.⁴⁸ Consequently, ground disturbance activities associated with construction of the Project could destroy bumble bee nests, and they would remove floral resources needed for persistence of the bumble bee colony.⁴⁹ Despite these concerns, the DEIR fails to address or mitigate these potentially significant impacts.

C-7.20 In summary, Mr. Cashen’s analysis sheds light on the DEIR’s failure to support with substantial evidence its conclusions concerning special-status bats and the Crotch Bumble Bee, emphasizing the need for a more comprehensive assessment of these impacts.

C-7.21 **2. The DEIR Fails to Identify A Potentially Significant Impact to Wildlife Nursery Sites**

In answering whether the Project would impede the use of native wildlife nursery sites, the DEIR concludes that “[t]he project site includes partially

⁴³ Cashen Comments, pg. 10.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Cashen Comments, pg. 9.

⁴⁸ Cashen Comments, pg. 11.

⁴⁹ *Id.*

developed land and does not support native resident or wildlife species.”⁵⁰ However, as Mr. Cashen points out,

[T]his statement is inconsistent with the DEIR’s determination that the Project could support nesting birds protected under the Migratory Bird Treaty Act, and that it could contain maternity (nursery) roosts of four special-status bat species. Bird nests and bat roosts qualify as wildlife nursery sites. The permanent loss of these nursery (nest or roost) sites due to Project construction is a potentially significant impact that is not mitigated by the mitigation measures incorporated in the DEIR. In addition, the severity of the impact has not been disclosed to the public because no surveys were conducted to identify the bird and bat species that are using the Project area as a nursery site. As a result, the Project’s permanent impacts to wildlife nursery sites are not mitigated and remain potentially significant.⁵¹

Because the DEIR fails to adequately identify and address the presence of wildlife nursery sites, the DEIR’s conclusion that impacts to wildlife nursery sites are less than significant are unsupported.

3. The DEIR’s Conclusions Regarding Impacts On Coyote Creek and Its Associated Riparian Habitat are Unsupported

The Project proposes a domestic well that would pump groundwater supply directly for the Project.⁵² Coyote Creek, a river adjacent to the Project, has been designated as critical habitat for the steelhead Central California Coast Evolutionary Significant Unit (ESU).⁵³ Additionally, Coyote Creek’s riparian corridor is a sensitive natural community⁵⁴ and includes wetlands.⁵⁵ In their comments on the Notice of Preparation (NOP) of the DEIR, the California Department of Fish & Wildlife (“CDFW”) commented that the Project’s well operation could result in diversion of water from Coyote Creek, thereby potentially adversely affecting surface or subsurface flow or riparian resources in Coyote

⁵⁰ DEIR, p. 111.

⁵¹ Cashen Comments, pg. 11.

⁵² DEIR, pg. 19.

⁵³ Appendix D: Biological Resource Analysis, pg. 14.

⁵⁴ Appendix D: Biological Resource Analysis, pg. 16 (“riparian habitat is generally identified as a sensitive natural community by [the California Department of Fish & Wildlife]”).

⁵⁵ See National Wetlands Inventory Wetlands Mapper, classifying 10.5 acres of land along Coyote Creek as wetlands, with the code “R3UBH”, available at:

<https://fwsprimary.wim.usgs.gov/wetlands/apps/wetlands-mapper/>.

Creek.⁵⁶ CDFW highlighted the need for the DEIR to include a hydrological analysis to evaluate impacts of the well on Coyote Creek and its surrounding habitat, with a written report of results.⁵⁷ However, the City failed to do so. The DEIR concludes that the well will have a less than significant impact on riparian habitat⁵⁸ and no impact on the surface/subsurface flow of Coyote Creek.⁵⁹ No study was done to confirm these conclusions and, as demonstrated below, the DEIR fails to provide any substantial evidence supporting these conclusions. Accordingly, the DEIR's conclusions that the impacts on Coyote Creek will be less than significant are unsupported.

a. Impacts on Coyote Creek Surface and Subsurface Flow

The DEIR concludes there would be a less than significant impact on state or federally protected wetlands in part because the well will not draw water nor have any impact on surface or subsurface flow in and from Coyote Creek.⁶⁰ This conclusion is unsupported because no hydrology analysis was completed for the Project. In support for this statement, the DEIR merely states a general directive to “see Section 3.10.” However, nothing in Section 3.10 addresses the impact of the well or Project generally on the surface or subsurface flow of Coyote Creek. The only time Coyote Creek is mentioned in Section 3.10 is when the DEIR addresses the flood runoff potential to Coyote Creek.⁶¹

Further, the BRA states, “Luhdorff and Scalmanini Consulting Engineers prepared a Water Supply Assessment for the Project and concluded that the installation and use of the proposed well would not draw water from or have any impact on surface or subsurface flow in/from Coyote Creek.”⁶² However, nowhere in the Water Supply Assessment is this issue discussed. The Water Supply Assessment simply demonstrates the projected Project demand and supply from the proposed well.⁶³ Indeed, the purpose of the Water Supply Assessment as a whole is

⁵⁶ Shannon Hill, California Department of Fish and Wildlife (“CDFW”), “Re: 0 Seely Avenue Mixed-Use Project, Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2022020565, City of San José, Santa Clara County” (April 4, 2022) pg. 8, available in Appendix A: NOP Comments [“CDFW NOP Comments”].

⁵⁷ CDFW NOP Comments, pg. 8.

⁵⁸ DEIR, pg. 110-11.

⁵⁹ DEIR, pg. 111.

⁶⁰ DEIR, pg. 111.

⁶¹ See DEIR, pg. 180 (“The project site is adjacent to Coyote Creek. Although the creek is bordered by an engineered levee, runoff could flow into the Creek, degrading water quality.”) & pg. 182 (discussing whether the Project would impede or redirect flood flows).

⁶² Appendix D: Biological Resource Analysis, pg. 16.

⁶³ See Appendix Q: Water Supply Assessment, pg. 14.

to “assess whether the total projected water supplies available for a project . . . will meet the projected water demand associated with the proposed project.”⁶⁴ The Assessment does not have any analysis regarding the impacts of the well on the nearby Coyote Creek and therefore no support for the conclusion that the proposed well would not have a significant impact. The DEIR lacks any support for its conclusions regarding the Project’s groundwater well’s surface and subsurface flow impacts. This lack of analysis and disclosure directly contravenes CEQA’s fundamental purpose of disclosure and transparency.

C-7.23
Cont.

The DEIR should be revised to adequately analyze and disclose how the well will impact Coyote Creek and related riparian habitat.

b. Impacts on Coyote Creek Riparian Habitat

The DEIR concludes the Project would have a less than significant impact on riparian habitat.⁶⁵ The conclusion is unsupported for several reasons. First, as with the conclusions regarding Coyote Creek’s surface and subsurface flow, no hydrology study was done to determine the scope of impacts on Coyote Creek’s riparian habitat.

C-7.24

Second, the DEIR concludes that compliance with the City’s Riparian Corridor Protection and Bird-Safe Design Policy would ensure a less than significant impact.⁶⁶ However, as demonstrated by Mr. Cashen’s comments, these measures will not be sufficient because the Project does not actually comply with these policies.⁶⁷ Most notably, the Project fails to comply with the policies’ 100-foot riparian setback requirement.⁶⁸ As Mr. Cashen demonstrates, considerably more of the Project would lie within the 100-foot setback if the setback is properly measured in accordance with the terms of the Riparian Corridor Protection and Bird-Safe Design Policy.⁶⁹ Mr. Cashen explains, “This is important because a setback (buffer) of *at least* 100 feet is needed to protect water quality, riparian biotic communities, and habitat values of riparian corridors—larger buffers are needed in areas with steep slopes or high intensity land uses.”⁷⁰

C-7.25

⁶⁴ *Id.* at pg. 1.

⁶⁵ DEIR, pp.110-11.

⁶⁶ DEIR, pg. 111.

⁶⁷ *See* Cashen Comments, pp. 13-16.

⁶⁸ Cashen Comments, pp. 2-6.

⁶⁹ *Id.*

⁷⁰ Cashen Comments, pg. 3.

C-7.25
Cont.

Third, the DEIR claims that “project plans would include measures to reduce impacts to the riparian corridor from on-site structures and site occupation, including avoidance of bright colors and glossy and/or glare producing building finishes on structures facing the riparian corridor and directing low-intensity exterior lighting downward and away from the riparian corridor to the greatest extent feasible.”⁷¹ However, these measures are ineffective in reducing impacts to the corridor, as demonstrated by Mr. Cashen’s analysis.⁷² Namely, these measures do not eliminate significant impacts associated with ecological light pollution and do not address indoor lighting pollution and vehicle-generated light pollution.⁷³ Further, the DEIR “does [not] analyze how lighting would affect wildlife movement in areas where it is not feasible to direct lighting away from the riparian corridor.”⁷⁴

Because no hydrology study was done and because the measures delineated do not mitigate the potential impact discussed above, the City has failed to adequately support its conclusions. A revised and recirculated DEIR is necessary to fully disclose, analyze and mitigate impacts of the Project’s potentially significant impacts to Coyote Creek and associated riparian habitat.

4. The DEIR’s Proposed Mitigation Measures are Insufficient to Reduce Biological Resource Impacts

Mr. Cashen’s analysis reveals that the DEIR’s proposed mitigation measures, Mitigation Measure (“MM”) BIO-1 and MM BIO-2, fail to adequately address the Project’s potential impacts on nesting birds and bats.

C-7.26

First, MM BIO-1, which calls for avoiding construction during nesting season, is incapable of implementation because construction would begin in June 2024 (i.e., during the avian nesting season) and would occur continuously through October 2028 (i.e., during four additional nesting seasons).⁷⁵ Further, MM BIO-1 fails to establish standards for nest searching techniques, minimum survey effort, and qualifications of surveyors, rendering it incapable of ensuring the identification and protection of all nests.⁷⁶ Additionally, MM BIO-1’s proposed buffer sizes for active nests are smaller than those specified by the City’s consultants in the BRA and for other development projects in San Jose, as well as CDFW guidance.⁷⁷ Accordingly, the DEIR lacks evidence to support that MM BIO-1 will reduce impacts to a less

⁷¹ DEIR, pg. 111.

⁷² Cashen Comments, pp. 11-13.

⁷³ *Id.*

⁷⁴ Cashen Comments, pg. 17.

⁷⁵ DEIR, Table 2-4.

⁷⁶ Cashen Comments, pp. 17-18.

⁷⁷ Cashen Comments, pp. 18-19.

C-7.26
Cont. | than significant level.

C-7.27 | Second, MM BIO-2, which addresses bats, does not require implementation of the techniques necessary to locate bats that roost in concealed locations.⁷⁸ It also fails to identify when the site surveys would be conducted in relation to construction activities or how the surveys should be conducted. As a result, the mitigation measure is too vague to ensure impacts to bat roosts are avoided.⁷⁹ Further, MM BIO-2 doesn't implement the proper technique to minimize impacts to tree-roosting bats. As Mr. Cashen explains, "minimizing impacts to tree-roosting bats requires 'soft-felling,' whereby all potential bat roost features in trees are felled in one piece and carefully lowered to the ground by rope, then left in-situ on the ground for at least 24 hours before being removed."⁸⁰ Because MM BIO-2 fails to do so, the mitigation measure is inadequate and the Project's impacts on special-status bats remain potentially significant.

C-7.28 | The DEIR concludes that both mitigation measures would reduce the impacts on the species' habitats. However, neither mitigation measure addresses the Project's permanent impacts on habitat (i.e., habitat loss). As Mr. Cashen points out, habitat loss is the primary threat to most bird and bat populations.⁸¹ "Indeed, because habitat loss has a permanent (negative) effect on population recruitment, the Project's permanent impacts to habitat are much more significant than its impacts to bird nests or bat roosts during an individual reproductive cycle."⁸² Therefore, it is imperative that the mitigation measures properly address the Project's permanent destruction of bird and bat habitat, an impact that the DEIR is required to evaluate and mitigate.⁸³ For this reason, Project impacts to habitat for special-status bat species and migratory birds remain potentially significant.

C-7.29 | **B. The DEIR Fails to Adequately Disclose, Analyze And Mitigate The Project's Transportation Impacts**

The DEIR's transportation impacts analysis fails to accurately describe and address the Project's impacts, most notably with respect to the Project's vehicle miles traveled ("VMT") impacts.

⁷⁸ Cashen Comments, pg. 19.

⁷⁹ *Id.*

⁸⁰ Cashen Comments, pg. 20.

⁸¹ Cashen Comments, pg. 21.

⁸² *Id.*

⁸³ See DEIR, pg. 107 (answering whether the Project would have a "substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species ...")

1. The DEIR's Transportation Analysis Fails to Analyze or Disclose the Project's True Significant and Unmitigated VMT Levels

As explained in detail in transportation expert Norman Marshall's comments, the DEIR's VMT analysis contains a crucial flaw that led to an underestimation of the Project's significant impacts.

The DEIR acknowledges that the Project would lead to a significant VMT impact, with projected VMT per capita exceeding the city's established threshold.⁸⁴ To mitigate this impact, the DEIR proposes MM TR-1.1, which would implement a series of mitigation measures, with the most significant reduction attributed to the "Voluntary Travel Behavior Change Program."⁸⁵

However, Mr. Marshall highlights why the DEIR overestimates the efficacy of this mitigation strategy. In short, the assumption of 100% participation in the Voluntary Travel Behavior Change Program is flawed. First, Mr. Marshall highlights that the Voluntary Travel Behavior Change Program's travel diary requirement⁸⁶ will decrease participation due to the burdensome nature of travel diaries.⁸⁷ Mr. Marshall emphasizes how uncommon such a requirement is, stating that he has been unable to find any recent voluntary travel reduction programs with travel diaries documented anywhere in the United States.⁸⁸ Second, Mr. Marshall points out that simply providing information to residents or employers will not yield the projected 4% reduction in VMT as assumed in the DEIR.⁸⁹ Instead, "A more realistic participation rate is 10%, with the VMT reduction reduced proportionally to 0.4% as shown in Figure 12. **The resulting VMT per capita with all six measures would be 10.71, i.e., 5.8% higher than the City's threshold of 10.12.**"⁹⁰

In light of these findings, the DEIR lacks substantial evidence supporting the conclusion that the proposed mitigation measures will mitigate the Project's VMT impacts to less than significant levels. The analysis provided by Mr. Marshall calls into question the accuracy of the projected reductions and highlights the need for a more realistic and comprehensive analysis that addresses the significant VMT

⁸⁴ DEIR, pg. 241.

⁸⁵ DEIR, pp. 241-242.

⁸⁶ See DEIR, pg. 242 ("Voluntary Travel Behavior Change programs include mass communication campaigns and travel feedback programs, *such as travel diaries* or feedback on calories burned from alternative modes of travel." (emphasis added)).

⁸⁷ Marshall Comments, pg. 3.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

C-7.29
Cont

impact associated with the Project. Indeed, if the analysis was done accurately, the DEIR would have identified a significant VMT impact. Therefore, the DEIR should be revised to accurately disclose the Project's VMT, and to include all feasible mitigation.

2. The DEIR Fails to Adequately Analyze and Address the Project's Traffic Hazards

C-7.30

The DEIR concludes that the Project would not substantially increase hazards due to a geometric design feature (such as dangerous intersections).⁹¹ However, as demonstrated by Mr. Marshall, the Project will indeed result in hazards due to a dangerous intersection.⁹² As Mr. Marshall explains, "With the proposed project and DEIR intersection design, the DEIR estimates that queues would extend into the upstream intersection during the AM peak hour . . . The Project therefore will result in traffic blockages."⁹³ Therefore, it is imperative that the DEIR analyze, disclose and mitigate the risks made evident in the DEIR's own traffic analysis.

C. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project's Noise Impacts

C-7.31

Noise and vibration expert Neil Shaw's analysis shows that the DEIR inadequately addresses the Project's noise impacts by failing to consider new sensitive receptors introduced by the Project, proposing insufficient mitigation measures, underestimating construction noise levels, and failing to provide a quantitative significance threshold. Accordingly, the DEIR must be revised and recirculated to fully analyze and mitigate the Project's noise impacts.

1. The DEIR Fails to Account for Noise Impacts on New Sensitive Receptors as a Result of the Project

According to the DEIR's Project Phasing timeline, residents will move into some of the completed buildings while the other buildings are still being constructed.⁹⁴ For example, occupancy for the Townhomes begins in January 2026, but all other buildings will still be under construction until October 2026, 2027, and

⁹¹ DEIR, pg. 243.

⁹² Marshall Comments, pp. 5-8.

⁹³ Marshall Comments, pg.8.

⁹⁴ See Table 2-4, Project Phasing, DEIR, pg. 35.

C-7.31
Cont.

2028.⁹⁵ Therefore, the Project will be introducing new sensitive receptors—the new residents living in direct proximity to all other Project construction. However, the DEIR did not account for these new sensitive receptors; instead, the DEIR’s noise analysis only identified sensitive receptors *near* the Project site, not within it.⁹⁶ But as Mr. Shaw explains, “the Project can have a significant impact on these new residents as construction will be ongoing and . . . the construction noise levels will be significant and insufficiently mitigated.”⁹⁷ Therefore, the DEIR must analyze how ongoing construction noise levels will impact the sensitive receptors introduced as part of the Project. The failure to do so is a violation of CEQA and requires that the DEIR be revised and recirculated.

2. The Proposed Mitigation Measure is Insufficient to Mitigate Significant Noise Impacts

C-7.32

The DEIR concludes that because construction could last longer than 12 months and would require work on Saturdays, the Project would result in a potentially significant temporary construction noise impact.⁹⁸ To reduce the potentially significant construction impact to less than significant, the DEIR includes MM NSE-1.⁹⁹ However, as detailed by Mr. Shaw, MM NSE-1 is not sufficient to adequately mitigate this significant noise impact. Further, the calculated construction noise impact is understated; without an accurate understanding of the construction noise, the effectiveness of MM NSE-1 is further diminished.

a. Mitigation Measure NSE-1 Is Insufficient

The proposed mitigation measure outlined in the DEIR is insufficient to address the Project’s anticipated significant construction noise impacts. MM NSE-1 proposes a Construction Noise Logistics Plan, which would include construction of solid 8-foot plywood fences or similar barriers along the northwest boundary of the site adjacent to existing adjacent residences to shield them from ground-level construction equipment and activities.¹⁰⁰ The DEIR claims the 8-foot noise barrier

⁹⁵ *Id.*; see also Shaw Comments, Attachment A, pg. 9 (visual demonstration of the construction periods)

⁹⁶ See Appendix O: Noise and Vibration Study, pg. 26 (“The nearest sensitive receptors to the project site are the residents of the existing apartment building about 60 feet northwest of the project site, as well as workers and customers at the existing commercial/office buildings located about 150 feet to the west of the site.”); see also Shaw Comments, pg. 2.

⁹⁷ Shaw Comments, pg. 2.

⁹⁸ DEIR, pg. 203.

⁹⁹ DEIR, pg. 203.

¹⁰⁰ DEIR, pg. 204.

would result in a 5 dBA noise reduction.¹⁰¹ However, as demonstrated by Mr. Shaw, this measure is not adequate to reduce the noise levels to less than significant levels.

Specifically, the purported 5 dBA noise reduction may only be achieved when the barrier effectively blocks the line of sight between the noise source and the receiver.¹⁰² However, certain sources have their acoustic source higher than the barrier height, and the barrier will be ineffective for sensitive receivers located above the barrier height, such as the upper floors of existing sensitive receivers or the upper floors of the Townhomes, Building A, and Building B, for which no fence is proposed.¹⁰³ Additionally, barrier effectiveness is contingent upon noise frequency, with barriers being more effective for higher frequency noises and less effective for low-frequency noises such as engine and exhaust noise.¹⁰⁴ Therefore, the reduction anticipated from the noise barriers included in the Construction Noise Logistics Plan is inaccurate and inadequate.

Further, despite the Construction Noise Logistics Plan calling for other noise-reducing components beyond the 8-foot barriers, these measures fail to compensate for the lack of effectiveness of the barriers.¹⁰⁵ Consequently, the proposed mitigation measures are inadequate to adequately mitigate the significant construction noise impacts associated with the Project.

b. The DEIR Underestimates Construction Noise Levels, Further Undermining the Proposed Mitigation Measures

As highlighted by Mr. Shaw, the construction noise levels identified in the DEIR are underestimated due to a crucial oversight in the calculations. Mr. Shaw points out that the Noise Analysis only considers the noise generated by the two loudest pieces of construction equipment, disregarding the higher quantity of equipment actually anticipated to be used during Project construction.¹⁰⁶ As Mr. Shaw explains:

A project of this scope will have more than just two noisy pieces of equipment in use at one time; the Tables themselves show this. For example, as shown in Table 10, the Site Preparation phase will use a total of 13 pieces of

¹⁰¹ *Id.*

¹⁰² Shaw Comments, pg. 4.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Shaw Comments, pg. 3.

C-7.32
Cont.

equipment, and in Table 11, the Paving phase will use 5 pieces of equipment. The noise levels presented are therefore underestimated.¹⁰⁷

C-7.32
Cont.

In summary, as elucidated by Mr. Shaw, the construction noise levels presented in the DEIR are underestimated due to the omission of multiple pieces of equipment from the noise calculation, resulting in a failure to accurately assess the true noise impacts. This oversight undermines the effectiveness of the proposed mitigation measure and underscores the need for a more comprehensive evaluation and response to mitigate the adverse effects of the Project's construction noise.

3. The DEIR Fails to Identify Construction Noise Level Significance Thresholds

In evaluating the Project's construction noise levels, the DEIR fails to identify any noise thresholds against which it purports to measure the Project's impacts. In answering whether the Project would "result in generation of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies"¹⁰⁸ the DEIR notes that "[t]he City does not currently have an established quantitative noise standard for construction noise."¹⁰⁹ However, the threshold question allows standards from other agencies. Indeed, the City's Noise and Vibration Study (Appendix O) relied on noise limits established by the Federal Transit Administration (FTA).¹¹⁰ But the DEIR failed to do the same. As explained by Mr. Shaw:

C-7.33

Notably, while the Appendix proposes this as a threshold, the DEIR does not mention these numeric FTA thresholds. However, Table 10 and 11 of the Appendix show that the construction will exceed these thresholds. As summarized by the Appendix, "Construction noise levels would exceed the exterior threshold of 80 dBA Leq at residential land uses to the west when activities occur within about 90 feet." (page 41). Because these thresholds were not included in the DEIR, the DEIR fails to identify this significant impact.¹¹¹

The DEIR's failure to include any quantitative threshold is a blatant violation of CEQA. CEQA requires agencies to conduct noise analyses for projects

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ DEIR, pg. 199 (emphasis added).

¹⁰⁹ DEIR, pg. 203.

¹¹⁰ Appendix O: Noise and Vibration Study, pg. 36.

¹¹¹ Shaw Comments, pp. 2-3.

that consider both the absolute noise levels expected, and the degree to which noise levels are expected to increase. Here, the DEIR does neither.

In *King & Gardiner Farms, LLC v. County of Kern*, the Court of Appeal held that an agency cannot simply rely on compliance with local noise regulations to conclude there will be no significant noise impacts without considering the impacts of increases in noise.¹¹² The County approved an EIR for proposed zoning amendments to streamline oil and gas permitting.¹¹³ The EIR included an analysis of noise impacts that determined significance based solely on whether the 65 decibel day-night average (“dBA DNL”) threshold in the County General Plan would be exceeded.¹¹⁴ The Court of Appeal reasoned that the County General Plan did not conclude that all increases in the magnitude of noise are insignificant until the 65 dBA DNL threshold is exceeded, so the General Plan “does not constitute substantial evidence that the magnitude of an increase in ambient noise is irrelevant.”¹¹⁵ Rather, an EIR’s noise analysis should consider both the increase in noise level and the absolute noise level associated with a project in determining the significance of the project’s noise impacts.¹¹⁶ The Court of Appeal concluded that an agency cannot exclusively rely on “a single cumulative DNL metric for determining the significance of the project’s noise impacts” while deciding “the magnitude of the increase in ambient noise is irrelevant.”¹¹⁷

In *Berkeley Jets*, the Court of Appeal invalidated the Port of Oakland’s EIR for expansion of the Oakland Airport because of its reliance on an improper noise standard.¹¹⁸ The EIR evaluated the significance of noise impacts based on whether the estimated level of sound would exceed 65 dB Community Noise Equivalent Level (“CNEL”).¹¹⁹ However, as the Court of Appeal explained, the CNEL metric—which averages noise over the course of a day—could not be the sole indicator of significant effects from noise because it does not provide a meaningful analysis of the “degree single overflights will create noise levels over and above the existing ambient noise level at a given location, and the community reaction to aircraft

¹¹² *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894.

¹¹³ *Id.* at 829.

¹¹⁴ *Id.* at 830, 889.

¹¹⁵ *Id.* at 894.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Berkeley Jets*, 91 Cal.App.4th at 1381–1382.

¹¹⁹ *Id.* at 1373.

noise, including sleep disturbance.”¹²⁰ Therefore, the Court concluded, a revised EIR with additional study of noise impacts from flights was necessary.¹²¹

Here, the DEIR lacks any quantitative noise thresholds—either absolute or ambient-based—against which the Project’s construction noise impacts can be evaluated. The City ignores the suggestion by its own noise consultants that it utilize the noise limits established by the FTA. This omission is especially glaring since the DEIR’s analysis shows that construction noise levels would exceed those thresholds. The City must revise the DEIR to address compliance with absolute noise limits, such as those set by the FTA, and include an evaluation of the impact of increased noise levels attributable to Project construction and operations.

D. The DEIR Fails To Adequately Disclose, Analyze And Mitigate The Project’s Public Services Impacts

Under the DEIR’s analysis of public services impacts, in answering whether the Project would result in substantial adverse physical impacts associated with the need for new or physically altered governmental facilities in order to maintain acceptable service ratios, response times or other performance objectives for Parks, the DEIR states:

*The project will add more residents, which may increase demand on local parks. However, the project includes a new 2.5-acre City-owned public park on the project site. The City’s [Parkland Dedication Ordinance] and [Park Impact Ordinance] require residential developers to dedicate public park land or pay in-lieu fees (or both) to compensate for the increase in demand for neighborhood parks. The amount of proposed development represents a small fraction of the total growth identified in the 2040 General Plan. However, because the project would add more residents that would utilize park services, the applicant is required to comply with the PDO/PIO. The project, by itself, would not require the construction of new or expanded parks, resulting in less than significant impact. Less Than Significant Impact.*¹²²

The DEIR incorrectly asserts that the Project’s proposed 2.5-acre park is sufficient so as to not require any more construction of parkland or trigger any other parkland obligations. To the contrary, since the Project will be proposing

¹²⁰ *Id.* at 1381–1382.

¹²¹ *Id.* at 1382.

¹²² DEIR, pp. 222-223 (emphasis added).

C-7.33
Cont.

C-7.34

parkland less than what the City itself has deemed necessary to meet demand, it is likely to cause a significant impact.

The City's Parkland Dedication Ordinance ("PDO")¹²³ and Park Impact Ordinance ("PIO")¹²⁴ require new residential housing construction projects to address the impact residents will have on existing park facilities and provide new facilities to future residents.¹²⁵ This is referred to as a "parkland obligation." The parkland obligation is calculated by using the estimated occupancy per housing unit (based on U.S. Census housing types/data), the number of new units, and the obligation to dedicate three acres of land for every 1,000 new residents.¹²⁶ Accordingly, the amount of land to be dedicated shall be determined pursuant to the following formula: Minimum acreage dedication = .003 acres × Number of dwelling units × Average number of persons per dwelling unit.¹²⁷ Residential projects can comply with this obligation through land dedication, paying an in-lieu fee, developing parkland, improving existing recreational facilities, or a combination of these methods.¹²⁸

As the DEIR states that the Project will have an average of 2.91 persons per household, the parkland obligation would be calculated as: .003 x 1472 x 2.91 = **12.85 acres. But the Project is only proposing to construct 2.5 acres of parkland, less than 20% of what is required under the PIO/PDO.**¹²⁹ Thus, the Project is inconsistent with the required parkland obligation set by the City.

There is also no discussion as to whether the Applicant plans to take advantage of credits that may reduce the parkland obligation. Projects with deed restricted residential units that meet the City's affordable housing guidelines qualify for a 50% credit towards park impact fees.¹³⁰ Additionally, projects can

¹²³ San Jose Municipal Code ("SJMC"), chapter 19.38.

¹²⁴ SJMC, chapter 14.25

¹²⁵ City of San Jose, Developers Page, Parkland Obligation, available at:

<https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/in-the-works/developers-page#obl> ["San Jose Developers Page"].

¹²⁶ *Id.*; see also SJMC § 14.25.300.

¹²⁷ SJMC § 19.38.310.

¹²⁸ See <https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/in-the-works/fees-that-support-parkland-development> & <https://www.sanjoseca.gov/your-government/departments-offices/parks-recreation-neighborhood-services/general-information/policies-reports/developers>.

¹²⁹ DEIR, pg. xii.

¹³⁰ San Jose City Council Resolution No. 75540, available at:

<https://records.sanjoseca.gov/Resolutions/RES75540.PDF>; San Jose City Council Resolution No. 79369, available at: <https://records.sanjoseca.gov/Resolutions/RES79369.pdf>; San Jose City Council Resolution No. 79913, available at: <https://records.sanjoseca.gov/Resolutions/RES79913.pdf>

obtain Private Recreation Credits to receive up to 50% credit towards the required parkland obligation by providing a variety of public and private residential on-site amenities as part of the project.¹³¹ This includes children play lots, picnic areas, hard game courts, turf playing fields, publicly accessible plazas and gardens, pet yards, swimming pools, community and recreational rooms—all with specific design guidelines.¹³²

C-7.34
Cont.

The DEIR provides no discussion as to whether its recreational facilities will meet these guidelines such that it can qualify for a Private Recreation Credit. Additionally, as described below in Section VI, the Project does not comply with the City’s affordable housing guidelines and therefore cannot qualify for the 50% credit from providing affordable housing. Consequently, the DEIR’s conclusion that the Project, by itself, would not require the construction of new or expanded parks, resulting in less than significant impact, is unsupported by any analysis or evidence.

Based on the information set forth in the DEIR, the Project clearly does not meet the City’s parkland requirements and the conclusion of no significant impact is completely without support. The DEIR should be revised to adequately disclose, analyze and mitigate the impact on local parks.

V. THE PROJECT FAILS TO COMPLY WITH THE CITY’S AFFORDABLE HOUSING ORDINANCE

The City has a city-wide inclusionary housing ordinance (“IHO”) that sets a series of requirements for affordable housing in San Jose.¹³³ As the Project proposes more than 10 dwelling units, it is subject to the IHO.¹³⁴ Indeed, one of the Project’s stated objectives is to “[d]eliver affordable housing consistent with the goals set forth in the City’s recently amended Inclusionary Housing Ordinance.”¹³⁵ However, as demonstrated below, the Project fails to demonstrate compliance with the IHO’s requirements.

CEQA Guidelines section 15125(d) requires that an environmental impact report “discuss any inconsistencies between the proposed project and applicable

¹³¹ San Jose Developers page, *supra* n. 131.

¹³² San Jose City Council Resolution No. 73587, available at: <https://records.sanjoseca.gov/Resolutions/RES73587.PDF> ; See Design Guidelines here: <https://www.sanjoseca.gov/home/showpublisheddocument/88757/637965184122970000>

¹³³ SJMC, chapter 5.08.

¹³⁴ *Id.*

¹³⁵ DEIR, pg. 39.

C-7.35

general plans, specific plans and regional plans,” which includes regional housing plans.¹³⁶ Therefore, the Project’s inconsistency with affordable housing goals, objectives, and policies is a violation of CEQA.

A. The Project Does Not Propose A Sufficient Number Of Affordable Housing Units

According to the DEIR, the Project aims to build 178 affordable units out of a total of 1,472 residential units, representing 12 percent of the housing designated as affordable.¹³⁷ This percentage is too low to comply with the IHO, which requires a minimum of **15 percent** of residential units built on-site to be affordable, or pay an in lieu fee.¹³⁸ The Project’s 12 percent allocation is insufficient, and the DEIR does not describe any plans to take advantage of an in-lieu fee so as to make up for the 3% difference. The Project is therefore inconsistent with the IHO and its own stated objective.

B. The Proposed Inclusionary Units Are Not Comparable To The Market Rate Units

The IHO requires all inclusionary housing units to have a comparable square footage and the same bedroom count and bedroom count ratio as the Market Rate Units.¹³⁹ The affordable housing building are proposed to consist of Studio, 1-bedroom, and 2-bedroom units, while all the Market Rate buildings contain Studio, 1-bedroom, 2-bedroom, and 3-bedroom units.¹⁴⁰ Consequently, the bedroom count and ratio between the two types of units are inherently mismatched. Furthermore, the DEIR lacks detailed information on the individual square footage of the units and whether they would be comparable to the market rate units.

C. The DEIR Does Not Describe How The Project Will Comply The IHO’s Partnership For Clustered Units Requirements

The IHO, through its “Partnership for Clustered Units” requirement, allows construction of clustered rental affordable housing on the site of the Residential Development in lieu of constructing the affordable units *within* the Residential

¹³⁶ See also *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal. App. 5th 467, 543.

¹³⁷ Table 2-1, DEIR, pg. 16.

¹³⁸ SJMC § 5.08.400.

¹³⁹ SJMC § 5.08.470(F).

¹⁴⁰ Table 2-3, DEIR, pg. 17-18.

C-7.35
Cont.

C-7.36

C-7.37

C-7.37
Cont.

Development, so long as the project meets certain conditions.¹⁴¹ Because the Project is not proposing affordable housing within the residential buildings but rather is constructing a distinct affordable housing building, the Project must comply with the Partnership for Clustered Units requirements. The IHO delineates specific criteria concerning location/proximity, financing, percentage of inclusionary Units and affordability, among others, for this type of inclusionary housing plan.¹⁴² The DEIR fails to lay out these policies in its Regulatory Background and analyze whether the Project will comply with these key requirements. The DEIR must be revised to discuss and analyze its compliance with the IHO.

VI. THE CITY CANNOT MAKE THE REQUISITE FINDINGS TO APPROVE THE PROJECT

C-7.38

The Project requires that the City issue discretionary approvals, including a Vesting Tentative Subdivision Map and a Planned Development Permit.¹⁴³ Under SJMC section 19.13.010, the Vesting Tentative Map must be consistent with the General Plan.¹⁴⁴ Similarly, the Planned Development Permit requires that the City make certain findings, including that the permit as issued complies with all applicable General Plan policies.¹⁴⁵ The City must also find that “[t]he environmental impacts of the project, including, but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, *even if insignificant for purposes of the California Environmental Quality Act (CEQA)*, will not have an unacceptable negative effect on adjacent property or properties.”¹⁴⁶

As an initial matter, the City may not make the required finding for the Planned Development Permit that the Project will not result in unacceptable negative environmental impacts. As demonstrated above, the DEIR fails to disclose, analyze or effectively mitigate the Project’s potentially significant impacts on transportation, noise, and biological resources. Accordingly, the Project will have an unacceptable negative effect on adjacent property, since even “insignificant” impacts under CEQA can be deemed so.

¹⁴¹ SJMC § 5.08.590. The clustered Inclusionary Units must comply with the standards established by SJMC § 5.08.470, with the same percentages and levels of affordability as required by the IHO for on-site rental units.

¹⁴² SJMC § 5.08.590

¹⁴³ DEIR, pg. 39.

¹⁴⁴ SJMC § 19.13.010.

¹⁴⁵ SJMC § 20.100.940 (A)(1).

¹⁴⁶ SJMC § 20.100.940 (A)(5) (emphasis added).

These impacts also create inconsistencies with the General Plan policies which the DEIR fails to disclose and mitigate. The Project’s inadequate affordable housing also results in inconsistency with the General Plan. Specifically, our analysis of the DEIR reflected in these comments show that the Project fails to comply with several key goals and policies in the Envision San José 2040 General Plan,¹⁴⁷ including the following.

Transportation

C-7.39

TR-1.1	Accommodate and encourage use of non-automobile transportation modes to achieve San José’s mobility goals and reduce vehicle trip generation and vehicle miles traveled (VMT)
TR-1.2	Consider impacts on overall mobility and all travel modes when evaluating transportation impacts of new developments or infrastructure projects
TR-1.4	Through the entitlement process for new development, projects shall be required to fund or construct needed transportation improvements for all transportation modes giving first consideration to improvement of bicycling, walking and transit facilities and services that encourage reduced vehicle travel demand. . . Development proposals shall be reviewed for their impacts on all transportation modes through the study of Vehicle Miles Traveled (VMT), Envision San José 2040 General Plan policies, and other measures enumerated in the City Council Transportation Analysis Policy and its Local Transportation Analysis. Projects shall fund or construct proportional fair share mitigations and improvements to address their impacts on the transportation systems
TR-5.3	Development projects’ effects on the transportation network will be evaluated during the entitlement process and will be required to fund or construct improvements in proportion to their impacts on the transportation system. Improvements will prioritize multimodal improvements that reduce VMT over automobile network improvements
TR-9.1	Enhance, expand and maintain facilities for walking and bicycling to provide neighborhoods with safe and direct access to transit and key destinations, a particularly to provide neighborhoods with safe and direct access to transit and key destinations, a complete alternative transportation network that facilitates non-automobile trips, and enjoyable outdoor open space.

¹⁴⁷ Available at:
<https://www.sanjoseca.gov/home/showpublisheddocument/22359/637928744399330000>

TR-9.2	Serve as a model city for VMT reduction by implementing programs and policies that reduce VMT for City of San José employees
TR-9.3	Enhance the overall travel experience of transit riders, pedestrians, bicyclists, and shared micromobility users to encourage mode shift.

C-7.39
Cont.

The DEIR's inadequate disclosure and analysis of the Project's transportation impacts directly conflict with the General Plan policies. For example, policies such as TR-1.1, TR-1.4, TR-5.3, and TR-9.2 underscore the City's commitment to reducing VMT, a goal undermined by the DEIR's flawed VMT analysis and proposed insufficient mitigation measures highlighted by Mr. Marshall's analysis. By failing to accurately assess and address the significant VMT impact and traffic hazards associated with the Project, the DEIR falls short of meeting these critical General Plan policies, undermining the city's efforts to reduce VMT and promote sustainable transportation and mobility.

Biological Resources

C-7.40

Goal ER-2	Preserve, protect, and restore the City's riparian resources in an environmentally responsible manner to protect them for habitat value and recreational purposes.
ER-2.1	Ensure that new public and private development adjacent to riparian corridors in San José are consistent with the provisions of the City's Riparian Corridor Policy Study and any adopted Santa Clara Valley Habitat Conservation Plan/ Natural Communities Conservation Plan (HCP/NCCP).
ER-2.2	Ensure that a 100-foot setback from riparian habitat is the standard to be achieved in all but a limited number of instances, only where no significant environmental impacts would occur
ER-2.3	Design new development to protect adjacent riparian corridors from encroachment of lighting, exotic landscaping, noise and toxic substances into the riparian zone.
ER-2.4	When disturbances to riparian corridors cannot be avoided, implement appropriate measures to restore, and/or mitigate damage and allow for fish passage during construction.
ER-2.5	Restore riparian habitat through native plant restoration and removal of nonnative/invasive plants along riparian corridors and adjacent areas.
ER-4.1	Preserve and restore, to the greatest extent feasible, habitat areas that support special-status species. Avoid development in such habitats unless no feasible alternatives exist and mitigation is provided of equivalent value.

ER-4.4	Require that development projects incorporate mitigation measures to avoid and minimize impacts to individuals of special-status species
ER-5.2	Require that development projects incorporate measures to avoid impacts to nesting migratory birds.

The DEIR's deficient analysis and mitigation strategies concerning the Project's biological resources impacts directly contradict several critical General Plan policies aimed at preserving and protecting San Jose's natural habitats and wildlife. For example, the General Plan includes a general goal aimed at the preservation of riparian resources (Goal ER-2) that includes several policies that underscore the importance of maintaining and restoring ecological balance in riparian corridors (such as ER-2.1, ER-2.2, ER-2.3, and ER-2.4). However, the DEIR's minimal analysis and mitigation of the impacts of the Project on the nearby riparian corridor fail to comply with these policies. Notably, as Mr. Cashen pointed out, the Project fails to comply with the 100-foot riparian setback, thereby directly contravening Policy ER-2.2.

Moreover, the DEIR's shortcomings in identifying and mitigating impacts on special-status species and habitats directly conflict with policies aimed at protecting wildlife species and their habitats, such as ER-4.1, which mandates the preservation, to the greatest extent feasible, habitat areas that support special-status species. Furthermore, because the proposed mitigation measures (MM BIO-1 and MM BIO-2) are insufficient, the Project is inconsistent with policies requiring the incorporation of effective measures to mitigate impacts on special-status species and nesting birds (ER-4.4, ER-5.2).

Overall, the DEIR's failure to adequately disclose, analyze, and mitigate the Project's biological resources impacts undermines and violates several key General Plan policies aimed at preserving the City's biodiversity.

Noise

EC-1.1	<p>Locate new development in areas where noise levels are appropriate for the proposed uses. Consider federal, state and City noise standards and guidelines as a part of new development review. Applicable standards and guidelines for land uses in San José include:</p> <p><u>Interior Noise Levels</u></p> <p>The City's standard for interior noise levels in residences, hotels, motels, residential care facilities, and hospitals is 45 dBA DNL. Include appropriate site and building design, building construction and noise attenuation techniques in new development to meet this standard. For</p>
--------	---

C-7.40
Cont.

C-7.41

C-7.41
Cont.

	<p>sites with exterior noise levels of 60 dBA DNL or more, an acoustical analysis following protocols in the City-adopted California Building Code is required to demonstrate that development projects can meet this standard. The acoustical analysis shall base required noise attenuation techniques on expected Envision General Plan traffic volumes to ensure land use compatibility and General Plan consistency over the life of this plan.</p> <p><u>Exterior Noise Levels</u></p> <p>The City’s acceptable exterior noise level objective is 60 dBA DNL or less for residential and most institutional land uses (refer to Table EC-1 in the General Plan. Residential uses are considered “normally acceptable” with exterior noise exposures of up to 60 dBA DNL and “conditionally compatible” where the exterior noise exposure is between 60 and 75 dBA DNL such that the specified land use may be permitted only after detailed analysis of the noise reduction requirements and needed noise insulation features are included in the design.</p>
EC-1.2	<p>Minimize the noise impacts of new development on land uses sensitive to increased noise levels (Land Use Categories 1, 2, 3 and 6 in Table EC-1 in the General Plan by limiting noise generation and by requiring use of noise attenuation measures such as acoustical enclosures and sound barriers, where feasible. The City considers significant noise impacts to occur if a project would: Cause the DNL at noise sensitive receptors to increase by five dBA DNL or more where the noise levels would remain “Normally Acceptable”; or Cause the DNL at noise sensitive receptors to increase by three dBA DNL or more where noise levels would equal or exceed the “Normally Acceptable” level.</p>
EC-1.6	<p>Regulate the effects of operational noise from existing and new industrial and commercial development on adjacent uses through noise standards in the City’s Municipal Code.</p>
EC-1.7	<p>Require construction operations within San José to use best available noise suppression devices and techniques and limit construction hours near residential uses per the City’s Municipal Code. The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would: Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months. For such large or complex projects, a construction noise logistics plan that specifies hours of construction, noise and vibration minimization measures, posting or notification of construction schedules, and designation of a noise</p>

C-7.41
Cont.

	disturbance coordinator who would respond to neighborhood complaints will be required to be in place prior to the start of construction and implemented during construction to reduce noise impacts on neighboring residents and other uses.
--	--

The DEIR's failure to adequately address noise impacts from the Project directly contradicts several key General Plan policies aimed at safeguarding against adverse noise effects. Specifically, EC-1.1 mandates the location of new development in areas with appropriate noise levels and requires adherence to noise standards, such as for interior and exterior noise levels. However, as Mr. Shaw's comments explain, the Project will exceed the 45 dBA interior noise limit, and the DEIR fails to include measures that will adequately reduce these levels.¹⁴⁸ Further, as Mr. Shaw highlights, the calculated future exterior noise levels are unsupported, and therefore the DEIR fails to demonstrate that the Project meets the policy's exterior noise limit.¹⁴⁹

Moreover, the proposed mitigation measure, Mitigation Measure NSE-1, fails to adequately reduce noise impacts as required by EC-1.2, which aims to minimize noise impacts on sensitive land uses. In summary, the DEIR's inadequate analysis and mitigation of noise impacts demonstrate a clear inconsistency with the General Plan's policies aimed at protecting against adverse noise impacts.

Affordable Housing

C-7.42

H-2.1	Facilitate the production of extremely low-, very low-, low-, and moderate-income housing by maximizing use of appropriate policies and financial resources at the federal, state, and local levels; and various other programs.
-------	--

The Project's failure to comply with the City's affordable housing ordinance (the IHO) directly contradicts this General Plan policy, which aims to facilitate the production of affordable housing by maximizing the use of appropriate policies, such as the IHO. As demonstrated above, the Project falls short of meeting the IHO requirements in several ways, thereby undermining the goals of affordable housing outlined in the General Plan.

As a result of the Project's inconsistencies with these policies, the City is precluded from making required findings pursuant to SJMC sections 19.13.010 (for

¹⁴⁸ Shaw Comments, pp. 5-6.

¹⁴⁹ Shaw Comments, pg. 5.

C-7.42
Cont. | issuance of a Vesting Tentative Map) and 20.100.940(A)(1) (for issuance of a
Planned Development Permit) because it cannot find that the Project complies with
and is consistent with applicable General Plan policies.

VII. CONCLUSION

C-7.43 | For the reasons discussed above, the DEIR for the Project is wholly
inadequate under CEQA. It must be revised to provide legally adequate analysis of,
and mitigation for, all of the Project's potentially significant impacts. These
revisions will necessarily require that the DEIR be recirculated for additional public
review and comment. Until the DEIR has been revised and recirculated, the City
may not lawfully approve the Project.

Thank you for your consideration of these comments. Please include them in
the record of proceedings for the Project.

Sincerely,



Ariana Abedifard

Attachments
AA:acp

EXHIBIT A

April 27, 2024

Ms. Ariana Abedifard
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080

**Subject: Comments on the Draft Environmental Impact Report for the Seely Avenue
Mixed-Use Project**

Dear Ms. Abedifard:

This letter contains my comments on the Draft Environmental Impact Report (“DEIR”) prepared by the City of San Jose (“City”) for the Seely Avenue Mixed-Use Project (“Project”). The Hanover Company (Applicant) proposes development of 1,472 residential units, 18,965 square feet of general neighborhood retail space, a 2.5-acre public park, and a domestic water well on 22 acres of land in the City of San Jose. The project site is north of Montague Expressway, east of Seely Avenue, and west of the Coyote Creek riparian corridor.

I am an environmental biologist with 30 years of professional experience in wildlife biology and natural resources management. I have served as a biological resources expert for over 200 projects in California. My experience and scope of work in this regard has included assisting various clients with evaluations of biological resource issues; preparation and peer review of environmental compliance documents prepared pursuant to the California Environmental Quality Act (“CEQA”) and the National Environmental Policy Act (“NEPA”); and preparation of written comments that address deficiencies with CEQA and NEPA documents. My work has included written and oral testimony for the California Energy Commission, California Public Utilities Commission, and Federal courts. My educational background includes a B.S. in Resource Management from the University of California at Berkeley, and a M.S. in Wildlife and Fisheries Science from the Pennsylvania State University. A copy of my current curriculum vitae is attached hereto.

The comments herein are based on my review of the environmental documents prepared for the Project, a review of scientific literature pertaining to biological resources known to occur in the Project area, and the knowledge and experience I have acquired during my 30-year career in the field of natural resources management.

The following bullet points summarize my main conclusions pertaining to the adequacy of the DEIR:

- The DEIR fails to provide an adequate description of Project lighting.
- The DEIR fails to provide information on the wildlife resources that occur on the Project site and in the adjacent riparian corridor. This precludes understanding of the wildlife resources that would be directly and indirectly impacted by the Project.
- The DEIR improperly concludes that there is no potential for the Crotch bumble bee, burrowing owl, or golden eagle to occur at the Project site.
- Although the DEIR determined the Project site could contain maternity or winter roosts for several special-status bat species, no bat surveys were conducted. This precludes understanding of the severity of Project impacts (on bats) and the adequacy of the proposed mitigation in reducing impacts to less-than-significant levels.
- The 100-foot riparian corridor setback was not measured properly.
- The Project, as currently proposed, would significantly degrade the ecological functions and values of the Coyote Creek riparian corridor.
- The Project, as currently proposed, does not comply with Citywide design standards and guidelines for bird safety, nor does the DEIR incorporate mitigation requiring adherence to Citywide design standards and guidelines.
- Through failure to comply with Citywide bird safety standards, the Project represents a significant collision hazard to birds. The DEIR fails to incorporate mitigation to reduce the hazard.
- The Project would have significant impacts in the form of habitat loss and degradation. The DEIR fails to incorporate mitigation for these impacts.
- The two biological resource mitigation measures proposed in the DEIR are vague and do not ensure significant impacts to nesting birds and roosting bats would be minimized.

PROJECT DESCRIPTION

Compliance with the Riparian Setback Requirement

The City's Riparian Corridor Protection and Bird-Safe Design Policy establishes 100 feet as the minimum setback for new buildings, roads, and parking facilities. The setback is measured from the outside dripline of the Riparian Corridor vegetation or top-of-bank, whichever is greater.¹ The City's policy is consistent with the Santa Clara Valley Habitat Plan ("SCVHP"), which requires a 100-foot stream setback (measured from the top of bank) for projects in the Urban Service Area.²

¹ DEIR, p. 105.

² ICF International. 2012. Final Santa Clara Valley Habitat Plan. Table 6-7. Available at: <<https://www.scv-habitatagency.org/178/Santa-Clara-Valley-Habitat-Plan>>.

The Riparian Corridor Policy Study provides the following definitions of “riparian” and “riparian corridor:”

“pertaining to the banks and other adjacent terrestrial (as opposed to aquatic) environs of freshwater bodies, watercourses, estuaries, and surface-emergent aquifers (springs, seeps, oases), whose transported freshwaters provide soil moisture sufficiently in excess of that otherwise available through local precipitation to potentially support growth of mesic vegetation ... For purposes of this study, a riparian corridor includes any defined channels including the area up to the bank full-flow line, as well as all riparian (streamside) vegetation in contiguous adjacent uplands.”³

According to the DEIR:

“The riparian canopy and/or low-flow channel of the site-adjacent segment of Coyote Creek range between 90 and 350 feet east of the northeastern project boundary ... A small portion of the project site overlaps with the 100-foot setback boundary of the top of the bank of the Coyote Creek Riparian Corridor. Although there is a slight overlap, the proposed development has been designed so that no new buildings would be placed within the 100-foot setback as shown in Figure 3-9. The overlap sliver currently contains undeveloped land and a chain link fence separating the project site from Coyote Creek Trail. As part of the project, the existing chain link fence would be replaced with a new 4-foot-high wood and wire mesh fence. No other development would occur within this sliver.”⁴

The measurements that were taken to make the determination that only a sliver of the Project overlaps with the 100-foot setback are flawed because they were taken from either the low flow channel or riparian tree canopy along the eastern side of the Coyote Creek corridor⁵—not the top of bank or edge of riparian vegetation (whichever is greater) on the west side of the corridor (Figures 1 through 3, below). As illustrated in Figure 4 (below), considerably more of the Project would lie within the 100-foot setback if the setback is measured in accordance with the terms of the Riparian Corridor Protection and Bird-Safe Design Policy and SCVHP. This is important because a setback (buffer) of *at least* 100 feet is needed to protect water quality, riparian biotic communities, and habitat values of riparian corridors—larger buffers are needed in areas with steep slopes or high intensity land uses.⁶

³ City of San Jose (1999 rev.). Riparian Corridor Policy Study. p. 3.

⁴ DEIR, pp. 110 and 111.

⁵ See DEIR, Figure 3-10.

⁶ City of San Jose. 1999 (rev.). Riparian Corridor Policy Study. Chapter 3. See also McElfish JM Jr, Kihslinger RL, Nichols S. 2008. Setting Buffer Sizes for Wetlands. National Wetlands Newsletter 30(2):6-17.

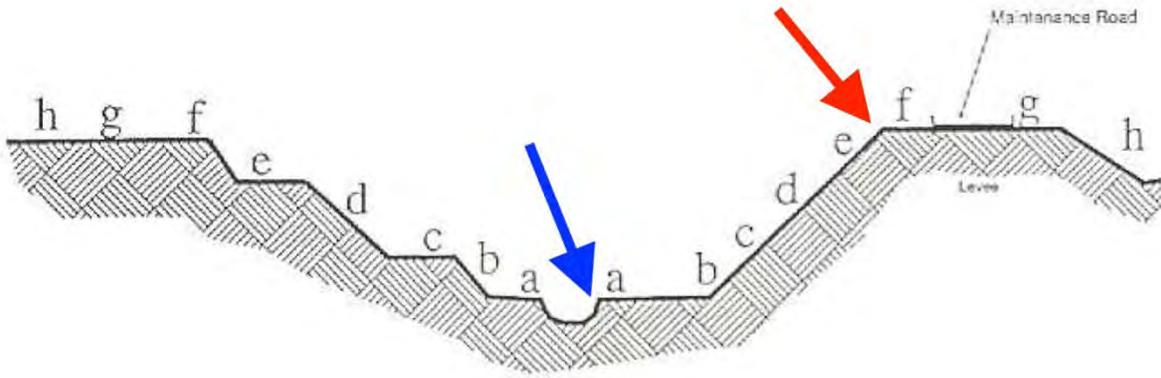


Figure 1. Stream profile. Blue arrow points to edge of low flow channel; red arrow points to top of bank. One-hundred-foot setback should have been measured from the top of bank (red arrow) but was instead measured from the low flow channel (blue arrow).



Figure 2. Project site (yellow line) in relation to water level (red line) on February 22, 2017. The “top of bank” coincides with, or is west of, the water line. The riparian corridor setback measurements provided in the DEIR were taken from the blue line (derived from DEIR Figure 3-10).



Figure 3. Project site (yellow line) in relation to edge of riparian vegetation (red arrows) on the west bank of Coyote Creek. The green color tone of the vegetation indicates it receives soil moisture sufficiently in excess of that otherwise available through local precipitation, and thus the vegetation qualifies as “riparian.” The riparian corridor setback measurements provided in the DEIR were taken from the blue line (derived from DEIR Figure 3-10). Imagery dated 10 March 2022.



Figure 4. Project boundary (yellow line) in relation to 100-foot setback (red line). Setback was measured from the water line, which coincides with, or is east of, the top of bank.

Lighting

The Sierra Club Loma Prieta Chapter and the Santa Clara Valley Audubon Society submitted a comment letter in response to the Project’s Notice of Preparation. The comment letter asked the City to: “describe lighting on the site in detail that is sufficient for the public to review and comment, and analyze compliance with Council Policy 6-34, Citywide Design Guidelines and standards, and General Plan policies.”⁷ The DEIR fails to satisfy this request. Although the DEIR acknowledges the Project includes exterior lighting in an area that currently has “no substantial sources of outdoor light,”⁸ the DEIR provides no information on the distribution, abundance, luminosity, and type of light fixtures that would be installed at the Project site. The DEIR merely states:

“Exterior lighting is proposed for the development for security and safe access. All outdoor exterior lighting, including lighting for the new park, would conform to City Council Policy 4-3: Outdoor Lighting on Private Developments and the Zoning Ordinance lighting requirements under Municipal Code Sections 20.40.530 and 20.40.540. No high intensity lights are proposed for evening sports activities.”⁹

⁷ DEIR, Appendix A.

⁸ DEIR, p. 44.

⁹ DEIR, p. 20.

The DEIR's failure to provide information on the Project's exterior lighting precludes the ability to assess impacts to wildlife resources in the Coyote Creek riparian corridor.

ENVIRONMENTAL SETTING

Wildlife Resources

The City has determined that noise, lighting, and glare associated with development projects can significantly impact wildlife habitat values in riparian corridors.¹⁰ Although the Project would be located immediately adjacent to the Coyote Creek riparian corridor, the DEIR provides no information on the wildlife species that occur (or could occur) in the riparian corridor. This deficiency precludes understanding of the wildlife resources that could be indirectly impacted by the Project.

The DEIR's failure to identify wildlife resources within the Coyote Creek riparian corridor is compounded by its failure to identify wildlife resources on the Project site. Although the DEIR provides a list of plant species observed during reconnaissance level surveys of the Project site,¹¹ it does not list (or otherwise identify) the wildlife species that were observed during the surveys. This precludes understanding of the wildlife resources that could be directly impacted by the Project.

Burrowing Owl

The Biological Resources Analysis ("BRA") that was prepared for the Project states that the Project site does not provide necessary habitat components for the burrowing owl because the site does not contain dry open herbaceous habitats with friable soils and ground squirrel burrows.¹² In the San Francisco Bay Area, the burrowing owl is primarily a grassland species, but it persists and even thrives in some landscapes highly altered by human activity (e.g., certain agricultural and urban environments). The overriding characteristics of suitable habitat are burrows for roosting and nesting, and relatively short vegetation with only sparse shrubs or taller vegetation.¹³ Although burrowing owls are commonly associated with ground squirrel burrows, they also use rock cavities, debris piles, culverts, and pipes for nesting and roosting.¹⁴ The Project site contains debris piles,¹⁵ which provide potential nesting and roosting habitat for burrowing owls. The Project site also contains fallow fields, which provide potential foraging habitat for burrowing owls.¹⁶ The Applicant's biological resources consultant, Johnson Marigot

¹⁰ City of San Jose. 1999 (rev.). Riparian Corridor Policy Study. Chapter 3.

¹¹ *Ibid*, Table 1.

¹² BRA, p. 10.

¹³ Gervais JA, Rosenberg DK, Comrack LA. 2008. Burrowing Owl (*Athene cunicularia*). Pages 218-226 *In*: Shuford WD, T Gardali, editors. California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California. Studies of Western Birds 1. Western Field Ornithologists, Camarillo, California, and California Department of Fish and Game, Sacramento.

¹⁴ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. p. 21.

¹⁵ BRA p. 5.

¹⁶ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation.

Consulting, did not conduct the surveys needed to determine presence (or absence) of burrowing owls.¹⁷ For these reasons, Project impacts on the burrowing owl remain potentially significant.

Golden Eagle

The California Department of Fish and Wildlife (“CDFW”) commented that the Project site could be within the home range of golden eagles that have a nest site approximately 2.5 miles from the Project site.¹⁸ CDFW further commented that the Project site could potentially support golden eagle nesting and foraging habitat. Consequently, CDFW stated that the DEIR should include a thorough habitat assessment of potential golden eagle nesting and foraging habitat within the Project area and surrounding areas.¹⁹

The BRA states that the Project site does not provide the necessary habitat components for golden eagles because the site does not contain cliffs, tall structures, or large trees in open areas.²⁰ This statement is inconsistent with the Arborist Report, which identifies the presence of several large trees at the Project site.²¹ These trees provide potential nest substrates for golden eagles. In addition, much of the Project site is comprised of open areas that provide potential foraging habitat for golden eagles (Figure 5, below). As a result, the DEIR’s determination that “there is no probability of the golden eagle occurring at the project site as it lacks suitable habitat for hunting and nesting”²² is inconsistent with the habitat conditions at the Project site.

¹⁷ See California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, Appendix D.

¹⁸ DEIR, Appendix A, CDFW comments, p. 4.

¹⁹ *Ibid*, p. 5.

²⁰ DEIR, Appendix D, Biological Resource Analysis, p. 10.

²¹ See *tree diameters reported in* DEIR, Appendix C, Tree Assessment Forms.

²² DEIR, p. 107.



Figure 5. Open areas (red polygon) that provide potential foraging habitat for golden eagles. The agricultural area (blue polygon) also may provide potential foraging habitat, depending on crop type and stage of development.

Crotch Bumble Bee

Bumble bees occur in a wide variety of habitats with sufficient abundance and duration of flowers for nectar and pollen resources.²³ Based on the BRA’s description of plants at the Project site, the site contains diverse floral resources that may be capable of supporting a bumble bee colony.

The BRA acknowledges the Project site provides potentially suitable habitat for the Crotch bumble bee,²⁴ which is a candidate for listing under the California Endangered Species Act (“CESA”) However, the BRA then states that the species is not expected to occur on or near the Project site because “the updated extent of occurrence [species range] is estimated to exclude much of the San Francisco Bay Area, including the City of San Jose.”²⁵ This statement is not supported by a scientific citation and is inconsistent with CDFW’s (2023) survey guidelines, which depict the Project site as being within the current range of the Crotch bumble bee.²⁶ In

²³ California Department of Fish and Wildlife. 2019. Evaluation of the Petition from the Xerces Society, Defenders of Wildlife, and the Center for Food Safety to List Four Species of Bumble Bees as Endangered Under the California Endangered Species Act. Report to the Fish and Game Commission.

²⁴ DEIR, Appendix D, Biological Resource Analysis, p. 10.

²⁵ *Ibid*, p. 11.

²⁶ California Department of Fish and Wildlife. 2023 Jun 6. Survey Considerations for California Endangered Species Act (CESA) Candidate Bumble Bee Species. Appendix 1.

addition, the iNaturalist database has 12 “Research Grade”²⁷ records of the Crotch bumble bee occurring in Santa Clara County between 2019 and 2023.²⁸ These occurrence records (two of which are within four miles of the Project site) provide substantial evidence that the Project site lies within the current range of the Crotch bumble bee.

Sensitive Natural Communities

The DEIR states: “[a]lthough oak trees are present on the project site, these would not be considered part of a sensitive natural community because they are not part of woodlands or forests, but rather are scattered within grassland communities and the existing structures on the project site.”²⁹ The DEIR’s statement that the oak trees are not part of a woodland is inconsistent with the data provided in the Arborist Report, which indicates most of the oak trees on the Project site are clustered in the northwest corner of APN 097-15-033.³⁰ According to the membership rules in the Manual of California Vegetation, an area qualifies as a woodland if it has at least 10 percent canopy cover, and it qualifies as an oak woodland if oaks comprise 50% relative cover in the tree canopy.³¹ The oaks in the northwest corner of APN 097-15-033 satisfy these conditions.³² Therefore, the DEIR’s conclusion that the Project will not have a significant impact on sensitive natural communities is unsupported.

PROJECT IMPACTS

Special-Status Bats

The DEIR determined that the Project would cause permanent impacts to trees and structures, which provide potentially suitable night roosting cover, maternity roost sites, and winter hibernacula for special-status bats.³³ The DEIR’s analysis of these impacts is limited to the statement that: “[p]roject construction, including the removal of trees and building demolition could negatively impact roosting bat habitat if done during the maternity roosting season.”³⁴ The Project’s potentially significant impacts to special-status bats is not limited to removal of trees and buildings during the maternity season. Significant impacts also could occur if roost sites are removed when bats are hibernating because the metabolic cost of waking bats from hibernation can be very high and enough to reduce their energy supply to the point where survival is not possible.³⁵

²⁷ Research Grade observations have media, location, a date, and a community consensus on a precise identification. See <<https://www.inaturalist.org/pages/help#quality>>.

²⁸ <https://www.inaturalist.org/observations?place_id=1250&subview=map&taxon_id=271451>.

²⁹ DEIR, p. 110.

³⁰ DEIR, Appendix C, Tree Assessment Forms and Maps.

³¹ California Native Plant Society. A Manual of California Vegetation Online. *Quercus agrifolia* Forest & Woodland Alliance. Available at: <<https://vegetation.cnps.org/alliance/78>>.

³² See DEIR, Appendix C, p. 5: “Thirty-nine (39) coast live oaks were growing onsite ... The coast live oaks were amongst the largest trees onsite. The larger, established coast live oaks had vigorous, spreading crowns that often suppressed the trees growing in the understory.”

³³ DEIR, p. 108.

³⁴ DEIR, p. 109.

³⁵ H.T. Harvey & Associates. 2004. California Bat Mitigation Techniques, Solutions, and Effectiveness. p. 30. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=10334>>.

Bats spend over half their lives at roosts. Roosts provide sites for mating, hibernation, and rearing young; they promote social interactions and the digestion of food; and they offer protection from adverse weather and predators.³⁶ Because bat species require roosts with specific traits, the availability of roosts is the limiting factor in the size and distribution of most bat populations.³⁷ Bats have low fecundity (typically one pup per year), longevity (individuals may live for over a decade), and exhibit high site fidelity from year to year.³⁸ As a result, when bats are evicted from a roost (as proposed in the DEIR), recovery or recolonization is slow if it occurs at all.³⁹ For these reasons, the greatest threat to bats in the south coast ecoregion is urban/suburban expansion and its associated impacts to roosts and foraging habitat.⁴⁰

The effects of urbanization on bats reach beyond the immediate developed areas. Indirect “edge effects” associated with urbanization include recreational activities, which increase disturbance to nearby natural roosts, and increased predation from human commensal animals, particularly domestic cats. These edge effects may be significant and result in a population “sink” (whereby mortality exceeds reproduction).⁴¹

The DEIR provides no analysis of, or mitigation for, the Project’s direct and indirect impacts on habitat for special-status bats. As a result, the Project’s potentially significant impacts on habitat for special-status bats remain unmitigated.

Crotch Bumble Bee

Crotch bumble bees nest in thatched grasses, abandoned rodent burrows or bird nests, brush piles, rock piles, and logs.⁴² At least some of these features occur at the Project site.⁴³ Consequently, ground disturbance activities associated with construction of the Project could destroy bumble bee nests, and they would remove floral resources needed for persistence of the bumble bee colony. These constitute potentially significant impacts that were not disclosed or analyzed in the DEIR, and for which the DEIR does not incorporate mitigation.

Wildlife Nursery Sites

The DEIR’s analysis of impacts to wildlife nursery sites is limited to the statement that “[t]he project site includes partially developed land and does not support native resident or wildlife

³⁶ Kunz TH. 1982. Roosting Ecology of Bats. In: Kunz TH (ed.) Ecology of Bats. Springer, Boston, MA. pp. 1-55.

³⁷ *Ibid.* See also Western Bat Working Group. 2017. Western Bat Species [online species accounts]. Available at: <<http://wbwg.org/western-bat-species/>>.

³⁸ Miner KL, Stokes DC. 2005. Bats in the south coast ecoregion: status, conservation issues, and research needs. USDA Forest Service Gen. Tech. Rep. PSW-GTR-195. Available at: <https://www.fs.usda.gov/psw/publications/documents/psw_gtr195/psw_gtr195_2_13_Miner.pdf>.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² California Department of Fish and Wildlife. 2023 Jun 6. Survey Considerations for California Endangered Species Act (CESA) Candidate Bumble Bee Species. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=213150&inline>>.

⁴³ BRA, p. 5.

species.”⁴⁴ This statement is inconsistent with the DEIR’s determination that the Project could support nesting birds protected under the Migratory Bird Treaty Act,⁴⁵ and that it could contain maternity (nursery) roosts of four special-status bat species.⁴⁶ Bird nests and bat roosts qualify as wildlife nursery sites. The permanent loss of these nursery (nest or roost) sites due to Project construction is a potentially significant impact that is not mitigated by the mitigation measures incorporated in the DEIR. In addition, the severity of the impact has not been disclosed to the public because no surveys were conducted to identify the bird and bat species that are using the Project area as a nursery site. As a result, the Project’s permanent impacts to wildlife nursery sites are not mitigated and remain potentially significant.

Lighting Impacts

Ecological light pollution has demonstrable effects on the behavioral and population ecology of organisms, with serious implications on community ecology.⁴⁷ For example, artificial night lighting of similar intensity to moonlight reduces activity and movement of many nocturnal animals, particularly those that rely on concealment to reduce predation risk during nocturnal foraging.⁴⁸ Although nocturnal animals can respond to bright moonlight by shifting foraging and ranging activities to darker conditions, this option is not available to animals experiencing artificially increased illumination throughout the night. Under these circumstances, unless they abandon the lighted area, nocturnal animals have only two choices. One is to accept the risk of predation by foraging under bright light. The other option is to continue to minimize predation risk even at the cost of loss of body mass.

The Project would introduce new sources of light and glare in the form of outdoor lighting and reflective surfaces.⁴⁹ The DEIR determined the Project’s lighting would have a less than significant impact on riparian habitat and wildlife movement because: (a) the Project would comply with relevant requirements of the City’s Riparian Corridor Protection and Bird-Safe Design Policy; and (b) exterior lighting would be directed downward and away from the riparian corridor to the greatest extent feasible.⁵⁰

There are three reasons why the lighting measures described in the DEIR would not reduce impacts to less than significant levels:

First, shielding light fixtures and directing light downward greatly reduces (but does not eliminate) “astronomical light pollution” (whereby stars and other celestial bodies are washed out by light that is either directed or reflected upward), but it does not necessarily eliminate

⁴⁴ DEIR, p. 111.

⁴⁵ The Migratory Bird Treaty Act does not apply to nonnative, human-introduced bird species.

⁴⁶ DEIR, p. 106. *See also*, DEIR, Appendix D, Biological Resource Assessment, p. 12: “Implementation of Mitigation Measure BIO-2, which requires preconstruction bat surveys as well as avoidance and monitoring of **nursery roosts** observed onsite until a qualified biologist determines that breeding is complete and young have reared, would minimize potential for adverse effects on roosting bats.” [emphasis added].

⁴⁷ Longcore T, Rich C. 2004. Ecological Light Pollution. *Frontiers in Ecology and the Environment* 2:191-198.

⁴⁸ Beier P. 2006. Effects of Artificial Night Lighting on Terrestrial Mammals. Chapter 2 *in*: *Ecological Consequences of Artificial Night Lighting*, Rich C and Longcore T, editors. Island Press, Washington, DC.

⁴⁹ DEIR, p. 54.

⁵⁰ DEIR, p. 111.

significant impacts associated with “ecological light pollution” (artificial light that alters the natural patterns of light and dark in ecosystems).⁵¹ Furthermore, even with shielding, light reflects off the ground and scatters.⁵² As a result, the amount of light pollution generated by a project is dependent on light intensity, which is a function of the number of lights, the luminosity of the bulbs, the height and angle of the light, and the substrate receiving the light. The DEIR provides no information on these variables, nor does it provide photometric analysis demonstrating the Project’s lighting would not impact the riparian corridor.

Second, the DEIR does not analyze, or incorporate mitigation for, light pollution generated by indoor lighting. This light pollution would be substantial given the number of dwelling units (and glass windows) associated with the Project. In addition to contributing to sky glow, indoor lighting is known to attract migratory birds during their nocturnal migration. This attraction causes a large amount of mortality because birds either immediately collide with lighted buildings or become entrapped by the light before later dying of collision or exhaustion.⁵³

Third, the DEIR does not analyze, or incorporate mitigation for, light pollution generated by vehicles. Vehicle headlights can adversely affect animal behavior.⁵⁴ Several of the Project’s roads are oriented toward the riparian corridor.⁵⁵ Headlights from vehicles traveling north on these roads would shine into the riparian corridor (unless shielded by landscaping). In addition, vehicles that use the at-grade parking area on the north side of the Affordable Apartment Building⁵⁶ would shine headlights into the riparian corridor (unless shielded by landscaping or other means).

Compliance with San Jose’s Citywide Bird-Safe Design Standards and Guidelines

City Council Policy 6-34 provides bird-safe design guidelines for projects within 300 feet of a riparian corridor. In addition to City Council Policy 6-34, the City has adopted “citywide” design standards and guidelines for bird safety.⁵⁷ The DEIR states: “the project would comply with the City’s Bird-Safe Design guidelines (City Council Policy 6-34) by avoiding mirrors and large areas of reflective glass; avoiding transparent glass skyways, walkways, or entryways, free-standing glass walls, and transparent building corners; and avoiding funneling open space to a

⁵¹ Longcore T, Rich C. 2004. Ecological Light Pollution. *Frontiers in Ecology and the Environment* 2:191-198.

⁵² Longcore T, Rich C. 2016. Artificial night lighting and protected lands: Ecological effects and management approaches. Natural Resource Report NPS/NRSS/NSNS/NRR—2016/1213. National Park Service, Fort Collins, Colorado.

⁵³ Loss SR, T Will, SS Loss, PP Marra. 2014. Bird-Building Collisions in the United States: Estimates of Annual Mortality and Species Vulnerability. *The Condor* 116:8–23. *See also* Evans Ogden LJ. 1996. *Collision Course: The Hazards of Lighted Structures and Windows to Migrating Birds*. World Wildlife Fund Canada and the Fatal Light Awareness Program, Toronto, ON, Canada. *See also* Evans Ogden LJ. 2002. Summary Report on the Bird Friendly Building Program: Effect of Light Reduction on Collision of Migratory Birds. Fatal Light Awareness Program, Toronto, ON, Canada.

⁵⁴ Longcore T, Rich C. 2016. Artificial night lighting and protected lands: Ecological effects and management approaches. Natural Resource Report NPS/NRSS/NSNS/NRR—2016/1213. National Park Service, Fort Collins, Colorado.

⁵⁵ DEIR, Figure 2-14.

⁵⁶ DEIR, p. 17.

⁵⁷ City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). San Jose Citywide Design Standards and Guidelines. Available at: <<https://www.sanjoseca.gov/home/showpublisheddocument/69148/638058310868170000>>.

building façade.”⁵⁸ However, the DEIR fails to address compliance with the bird safety measures in the Citywide Design Standards and Guidelines. As explained below, the Project does not comply with several of the Citywide Design Standards and Guidelines for bird safety.

Citywide Design Standards

Citywide Standard S4 states: “[u]se a *bird safety treatment* on transparent atria, free-standing glass features, and glass architectural elements that protrude from the primary building mass.”⁵⁹ The Project’s buildings (Building A, B, and C) would have balconies with glass railings, which would protrude from the primary building mass.⁶⁰ The Project does not comply with Citywide Standard S4 because it does not incorporate a bird safety treatment on the glass railings.

Citywide Standard S5 states: “[d]o not use mirrored glass or glazing with a reflective index above 20 percent.”⁶¹ The Project does not comply with this standard because the DEIR does not incorporate mitigation requiring glazing with a reflective index less than 20 percent.

Citywide Standard S6 states: “[f]or *façades* with more than 20 percent glazing within 60 feet of grade and located within 300 feet from a body of water, including creeks and vegetated flood control channels; or within 100 feet of a *landscaped* area, open space, or park larger than one acre in size, apply a *bird safety treatment* to at least 90 percent of the glazed areas within 60 feet of grade.”⁶² The Affordable Apartment Building, Building B, a portion of Building A, and some of the Townhomes would be located within 300 feet of Coyote Creek. Buildings A and B would have façades with more than 20 percent glazing within 60 feet of grade.⁶³ The DEIR does not provide a “material legend” for the figure depicting the Affordable Apartment Building;⁶⁴ however, it appears the Apartment Building also would have façades with more than 20 percent glazing within 60 feet of grade.⁶⁵ The DEIR fails to incorporate mitigation requiring a bird safety treatment to at least 90 percent of the glazed areas within 60 feet of grade.

Citywide Design Guidelines

Design Guideline G1 states: “[t]urn off decorative exterior lighting between 11:00 p.m. and 6:00 a.m. except during June, July, December, and January due to bird migration.”⁶⁶ The Project does not comply with this guideline because the DEIR does not incorporate mitigation requiring decorative exterior lighting to be turned off between 11:00 p.m. and 6:00 a.m.

Design Guideline G2 states: “[u]se a *bird safety treatment* on windows or other glazed areas in which trees, *landscaping*, water features, or the sky will be reflected.” Almost every type of architectural glass under the right conditions reflects the sky, clouds, or nearby trees and

⁵⁸ DEIR, p. 108.

⁵⁹ City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). San Jose Citywide Design Standards and Guidelines. p. 50.

⁶⁰ DEIR, Figures 2-7 through 2-9.

⁶¹ City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). San Jose Citywide Design Standards and Guidelines. p. 50.

⁶² *Ibid.*

⁶³ DEIR, Figures 2-7 through 2-9.

⁶⁴ DEIR, Figure 2-10.

⁶⁵ *Ibid.*

⁶⁶ City of San Jose. 2021 Feb 23 (amended 2022 Oct 4). San Jose Citywide Design Standards and Guidelines. p. 50.

vegetation.⁶⁷ The Project includes the installation of trees and other landscaping in the immediate vicinity of windows.⁶⁸ This circumstance, in conjunction with the Applicant’s proposal to construct relatively tall buildings (with windows) immediately adjacent to a riparian corridor, has the potential to be especially lethal to birds. The Project does not comply with Design Guideline G2 because the DEIR does not incorporate mitigation requiring a bird safety treatment on windows that would reflect tress, landscaping, or the sky.

Compliance with the General Plan and Riparian Corridor Policy Study

Policy ER-2.1 in the Envision San Jose 2040 General Plan states:

“Ensure that new public and private development adjacent to riparian corridors in San José are consistent with the provisions of the City’s Riparian Corridor Policy Study and any adopted Santa Clara Valley Habitat Conservation Plan/ Natural Communities Conservation Plan (HCP/NCCP).”⁶⁹

As described below, the Project is not consistent with guidelines 1A and 1C in the Riparian Corridor Policy Study.

Riparian Corridor Policy Study Guideline 1A: Orientation

Riparian Corridor Policy Study Guideline 1A states:

“Site activities should be oriented to draw activity away from the riparian corridor, for example, entrances, loading and delivery areas, noise generating activities and equipment, and activities requiring night lighting should be oriented toward non-riparian property edges. In particular, sites should be designed so that the portions of parking lots with minimum setbacks from the riparian edge are the least in demand, e.g., furthest from entrances. If these portions of the parking lots are not in demand for nighttime use, for example, lighting can be avoided in proximity to the corridor.”⁷⁰

The Project does not comply with Guideline 1A for the following reasons:

- The parking structure for Building B would be located on the north side of the building, adjacent to the riparian corridor.⁷¹
- A 42-foot “residential loading zone” for Building B would be located near the northern property line, adjacent to the riparian corridor.⁷²

⁶⁷ San Francisco Planning Department (*and references therein*). 2011. Standards for Bird-Safe Buildings. 42 pp. Available at: <https://sfplanning.org/sites/default/files/documents/reports/bird_safe_bldgs/Standards%20for%20Bird%20Safe%20Buildings%20-%202011-30-11.pdf>.

⁶⁸ DEIR, Figures 2-7 through 2-11, and Figure 2-14.

⁶⁹ City of San Jose. 2011 (amended 2024). Envision San Jose 2040 General Plan. Chapter 3, p. 27. Available at: <<https://www.sanjoseca.gov/your-government/departments-offices/planning-building-code-enforcement/planning-division/citywide-planning/envision-san-jos-2040-general-plan>>.

⁷⁰ City of San Jose (1999 rev.). Riparian Corridor Policy Study. p. 30.

⁷¹ DEIR, p. 17.

⁷² DEIR, Figure 2-4.

- Building B would have a storefront on the north side of the building, adjacent to the riparian corridor.⁷³
- The Affordable Apartment Building would have one level of at grade parking on the north side of the building, adjacent to the riparian corridor.⁷⁴
- The Project includes a walkway, landscaping, and potentially other amenities on the north side of Building B.⁷⁵ These features would draw activity toward the adjacent riparian corridor.
- The Project includes a paved walkway on the north side of the town homes located between Building B and Kimiko Lane.⁷⁶ This feature would draw activity toward the adjacent riparian corridor.

Guideline 1C: Setback Areas

Riparian Corridor Policy Study Guideline 1C states:

“All buildings, other structures (with the exception of bridges and minor interpretative node structures), impervious surfaces, outdoor activity areas (except for passive or intermittent activities) and ornamental landscaped areas should be separated a minimum of **100 feet** from the edge of the riparian corridor (or top of bank, whichever is greater).”⁷⁷

The Project does not comply with this guideline because it includes buildings, other structures (e.g., well equipment), impervious surfaces, and ornamental landscaped areas within 100 feet of the riparian corridor (or top of bank). The DEIR’s statement that only a new 4-foot-high wood and wire mesh fence would be located within 100 feet of the riparian corridor is based on measurements from the low flow channel, not the edge of the riparian corridor or top of bank.

Policy MS-21.9

Policy MS-21.9 in the Envision San Jose 2040 General Plan states:

“Where urban development occurs adjacent to natural plant communities (e.g., oak woodland, riparian forest), landscape plantings shall incorporate tree species native to the area and propagated from local sources (generally from within 5-10 miles and preferably from within the same watershed).”

The Project does not comply with this policy. According to the Project’s landscaping plan, only 14 native trees (all *Quercus agrifolia*) would be planted; the remaining 436 planted trees would be non-native species.⁷⁸

Wildlife Corridors

⁷³ DEIR, Figure 2-8b.

⁷⁴ DEIR, p. 17.

⁷⁵ DEIR, Figure 2-14.

⁷⁶ DEIR, Figures 2-14 and 3-4b.

⁷⁷ City of San Jose (1999 rev.). Riparian Corridor Policy Study. p. 31.

⁷⁸ DEIR Figure 2-14.

The BRA determined that the Coyote Creek riparian corridor “certainly acts as a wildlife corridor.”⁷⁹ According the DEIR, impacts to the wildlife corridor would be less than significant because “no direct disturbance would occur within Coyote Creek.”⁸⁰ The DEIR fails to recognize that wildlife movement along creek corridors is not confined to aquatic habitat; it also occurs along the creek banks and other adjacent terrestrial environs of the creek.⁸¹

The DEIR assumes that the Project’s impacts on wildlife movement would be less than significant because the Project includes “avoidance of bright colors and glossy and/or glare producing building finishes on structures facing the riparian corridor and directing low-intensity exterior lighting downward and away from the riparian corridor to the greatest extent feasible.”⁸² The DEIR does not address how noise and human activity associated with the Project would impact wildlife movement, nor does it analyze how lighting would affect wildlife movement in areas where it is not feasible to direct lighting away from the riparian corridor.

MITIGATION ISSUES

MM BIO-1: Nesting Birds

MM BIO-1 states:

“Prior to any tree removal, or approval of any grading or demolition permits (whichever occurs first), the project applicant shall schedule demolition and construction activities to avoid the nesting season. The nesting season for most birds, including most raptors in the San Francisco Bay area, extends from February 1 through September 15 (inclusive).”⁸³

This measure is incapable of implementation because, according to the DEIR, construction would begin in June 2024 (i.e., during the avian nesting season) and would occur continuously through October 2028 (i.e., during four additional nesting seasons).⁸⁴

MM BIO-1 then states:

“If construction activities cannot be scheduled to occur between September 16 and January 31, inclusive, pre-construction surveys for nesting birds and raptors shall be completed by a qualified ornithologist or biologist to ensure that no nests shall be disturbed during project implementation. The survey shall be completed no more than 14 days prior to the initiation of construction activities during the early part of the breeding season (February 1 through April 30 inclusive), and no more than 30 days prior to the initiation these activities during the late part of the breeding season (May1 through September 15 inclusive). During this survey, the qualified ornithologist/biologist shall inspect all suitable nesting habitat on the

⁷⁹ DEIR, Appendix D, Biological Resource Analysis, p. 15.

⁸⁰ DEIR, p. 111.

⁸¹ City of San Jose (1999 rev.). Riparian Corridor Policy Study.

⁸² DEIR, p. 111.

⁸³ DEIR, p. 108.

⁸⁴ DEIR, Table 2-4.

project site and within the zone of influence (the area immediately surrounding the Project site that supports suitable nesting habitat that could be impacted by the project due to visual or auditory disturbance associated with the removal of vegetation and construction activities scheduled to occur during the nesting season).”⁸⁵

MM BIO-1 fails to establish standards for the: (a) nest searching techniques, (b) minimum level of effort (i.e., survey hours per unit area), and (c) qualifications of the “qualified ornithologist or biologist” conducting the survey. As explained below, the ability to successfully locate nests in the Project area is dependent on these three variables.

Many biologists that conduct pre-construction surveys fail to devote the level of effort needed to locate all bird nests. Locating all nests within the 22.8-acre Project site would require a considerable level of effort. For example, CDFW determined that a minimum of three surveys for active nests would be necessary, with two surveys conducted within 14 days prior to the beginning of Project construction, with a final survey conducted within 48 hours prior to construction.⁸⁶ To ensure all bird nests that may be affected by the Project are located, the City must establish standards for the survey effort (e.g., minimum number of surveys and survey hours).

The success of any nest-searching method depends on the surveyor’s knowledge of where birds nest, how nesting birds behave, and the best time of day to search for nests.⁸⁷ Attaining this knowledge requires training and experience.⁸⁸ Because MM BIO-1 fails to establish standards for the “qualified ornithologist or biologist” conducting the nesting bird survey, it does not ensure the ornithologist or biologist would have the qualifications needed to successfully locate all nests within the Project area prior to construction.

Some bird species build a nest and initiate egg-laying in as little as 10 days.⁸⁹ As a result, a nesting bird survey conducted up to 14 days prior to construction activities during the early part of the breeding season would be insufficient to avoid and minimize significant impacts to nesting birds. Allowing the nesting bird survey to be conducted up to 30 days prior to construction activities during the latter part of the breeding season (defined as May 1 through September 15 in MM BIO-1) would undoubtedly result in significant impacts to nesting birds because it fails to account for the fact that some species: (a) do not initiate nesting until after May 1; (b) will reinitiate nesting attempts later in the season if the first attempt fails; or (c) have two or more broods.

MM BIO-1 also states:

⁸⁵ DEIR, p. 108.

⁸⁶ DEIR, Appendix A, CDFW letter, p. 6.

⁸⁷ Winter M, Hawks SA, Shaffer JA, Johnson DH. 2003. Guidelines for Finding Nests of Passerine Birds in Tallgrass Prairie. *The Prairie Naturalist* 35(3):197-211.

⁸⁸ *Ibid.* See also Martin TE, Geupel GR. 1993. Nest-Monitoring Plots: Methods for Locating Nests and Monitoring Success. *J. Field Ornithol.* 64(4):507-519.

⁸⁹ Baicich PJ, CJ Harrison. 1997. *A guide to the nests, eggs, and nestlings of North American Birds.* 2nd ed. London: Academic Press.

“If an active nest is found, the qualified ornithologist/biologist shall determine an appropriately sized species-specific buffer around the nest in which no work will be allowed until the young have successfully fledged. In general, buffer sizes of 200 feet for raptors and 50 feet for other birds should suffice to prevent disturbance to birds nesting in the urban environment, but these buffer sizes may be increased or decreased, as appropriate, depending on the bird species and the level of disturbance anticipated near the nest.”

The DEIR fails to provide evidence that the proposed buffer sizes, which are smaller than those specified in the BRA⁹⁰ and for other development projects in San Jose,⁹¹ would be sufficient to prevent significant impacts to nesting birds. CDFW has determined that at a minimum, a 500-foot buffer is required to prevent significant construction-related impacts to raptor nests, while a 250-foot buffer is required for other nesting bird species.⁹²

MM BIO-2: Bats

Identification of Roosting Habitat

The DEIR determined that five special-status bat species have the potential to roost at the Project site: pallid bat, long-eared myotis, western mastiff bat, western red bat, and Townsend’s big-eared bat.⁹³ In addition, the BRA states that the Project site provides potentially suitable roost sites for the long-eared myotis (a fifth special-status bat species).

Mitigation Measure BIO-2 states:

“If construction activities cannot be scheduled to occur between September 16 and April 30, a qualified bat specialist or wildlife biologist shall conduct site surveys to characterize bat utilization of roosting habitat on and immediately adjacent to the project site and potential bat species present prior to construction.”⁹⁴

MM BIO-2 fails to identify when the site surveys would be conducted in relation to construction activities or how the surveys should be conducted. As a result, the mitigation measure is too vague to ensure impacts to bat roosts are avoided.

Locating bat roosts is challenging because most species roost in inaccessible, concealed places. The Townsend’s big-eared bat’s habit of roosting pendant-like on open surfaces makes it readily detectable. However, roosts of the other four species that could occur at the Project site can be very difficult to detect (pallid bats, western mastiff bats, and long-eared myotis roost in relatively inaccessible places such as cracks, crevices, or beneath bark; western red bats roost hidden in the

⁹⁰ DEIR, Appendix D, Biological Resource Analysis, p. 22.

⁹¹ For example, see City of San Jose. 2023 June. Initial Study / Mitigated Negative Declaration for 550 Piercy Road Industrial Development. p. 3 (identifying buffers of 250 feet for raptors and 100 feet for other birds).

⁹² California Department of Fish and Wildlife. 2013. CDFW’s Conservation Measures for Biological Resources That May Be Affected by Program-level Actions. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=73979&inline>>.

⁹³ DEIR, p. 106 and BRA, p. 11.

⁹⁴ DEIR, p. 109.

foliage of trees).⁹⁵ Consequently, visual searches are not an effective technique for locating roost sites occupied by these bat species.^{96,97} In addition, surveys conducted several days prior to the start of Project construction activities does not ensure avoidance of direct impacts to roosting bats because tree-roosting bat species may move among roosts nightly.⁹⁸

Locating all bat roosts at the Project site would require implementation of special techniques, including acoustic surveys (i.e., bat detectors) and emergence surveys (which may require use of night vision equipment).⁹⁹ Because MM BIO-2 does not require implementation of the techniques necessary to locate bats that roost in concealed locations, the Project's impacts on special-status bats remain potentially significant.

Roost Exclusion and Avoidance of Maternity Roosts

MM BIO-2 states:

“If a single bat and/or only adult bats are roosting, removal of trees or structures may proceed after the bats have been safely excluded from the roost ... If an active maternity roost is detected, avoidance is preferred. Work in the vicinity of the roost (buffer to be determined by qualified bat specialist or wildlife biologist) shall be postponed until the qualified bat specialist /wildlife biologist monitoring the roost determines that the young have fledged and are no longer dependent on the roost. The monitor shall ensure that all bats have left the area of disturbance prior to initiation of pruning and/or removal of trees that would disturb the roost.”¹⁰⁰

Whereas there are materials (e.g., expandable foam or one-way doors) that can be used to exclude bats from buildings or tree cavities, there are no effective techniques for excluding bats that roost in foliage (e.g., western red bat). This issue is compounded by the presumption that a qualified bat specialist would have the ability to determine that “all bats have left” the tree roost prior to disturbance. Due to the cryptic nature of tree-roosting bats, and because bats do not emerge from their roosts every night, it is impossible to determine with 100% certainty that bats are absent from a tree. As a result, minimizing impacts to tree-roosting bats requires “soft-felling,” whereby all potential bat roost features in trees are felled in one piece and carefully lowered to the ground by rope, then left in-situ on the ground for at least 24 hours before being removed.¹⁰¹

⁹⁵ Western Bat Working Group. 2005 (Update). Species Accounts. Available at: <<http://wbwg.org/western-bat-species/>>.

⁹⁶ Western Bat Working Group. 2017. Survey Matrix [online]. Available at: <<http://wbwg.org/matrices/survey-matrix/>>. (Accessed January 13, 2023).

⁹⁷ Weller TJ. 2007. Assessing population status of bats in forests: challenges and opportunities. Bats in forests: conservation and management. Pages 263–291 in Lacki MJ, Hayes JP, Kurta A, editors. Bats in forests: conservation and management. The Johns Hopkins University Press, Baltimore, Maryland, USA. *See also* Flaquer C, Torre I, Arrizabalaga A. 2007. Comparison of sampling methods for inventory of bat communities. *Journal of Mammalogy* 88(2):526-533.

⁹⁸ *Ibid.*

⁹⁹ *See* Johnston D. 2018 Mar 21. Recent Advances in Effective Bat Mitigation [video file]. <https://www.youtube.com/watch?v=Pr9WBpuotZo> (1:42:20-1:53:10).

¹⁰⁰ DEIR, p. 110.

¹⁰¹ *See* AECOM. n.d. Bat Exclusion in Trees. Available at: <<https://cdn.bats.org.uk/uploads/images/26.-Appendix-C-Exclusion-of-bats-from-trees.pdf?v=1617789476>>.

Because MM BIO-2 does not require implementation of the techniques necessary to locate bats that roost in concealed locations, and because MM BIO-2 does not incorporate appropriate techniques to minimize impacts to tree-roosting bat species, the Project's impacts on special-status bats remain potentially significant.¹⁰²

Significance of Project Impacts After Implementation of MM BIO-1 and MM BIO-2

The CEQA significance threshold adopted in the DEIR is whether the Project would have a “substantial adverse effect, either directly *or through habitat modifications*, on any species identified as a candidate, sensitive, or special status species ...”¹⁰³ The DEIR makes the following determination in this regard: “[w]ith implementation of the mitigation measures MM BIO-1 and MM BIO-2, the project's impact to nesting birds and raptors would be less than significant.”^{104,105} A fundamental flaw with the DEIR's reasoning is that neither mitigation measure addresses the Project's permanent impacts to habitat, which is the primary threat to most bird and bat populations.¹⁰⁶ Indeed, because habitat loss has a permanent (negative) effect on population recruitment, the Project's permanent impacts to habitat are much more significant than its impacts to bird nests or bat roosts during an individual reproductive cycle. For this reason, Project impacts to habitat for special-status bat species and migratory birds remain potentially significant.

This concludes my comments on the DEIR.

Sincerely,



Scott Cashen, M.S.
Senior Biologist

¹⁰² See Western Bat Working Group. 2017. Survey Matrix. Available at: <<https://wbwg.org/matrices/survey-matrix/>>.

¹⁰³ DEIR, p. 107. [emphasis added].

¹⁰⁴ DEIR, p. 110.

¹⁰⁵ The DEIR does not make a CEQA determination regarding the significance of Project impacts to bats.

¹⁰⁶ Rosenberg KV, Dokter AM, Blancher PJ, Sauer JR, Smith AC, Smith PA, Stanton JC, Panjabi A, Helft L, Parr M, Marra PP. 2019. Decline of the North American avifauna. *Science*. 366(6461):120-4. See also Western Bat Working Group. 2005 (Update). Species Accounts. Available at: <<http://wbwg.org/western-bat-species/>>.

Scott Cashen, M.S.

Senior Wildlife Biologist

Scott Cashen has 28 years of professional experience in natural resources management. During that time he has worked as a field biologist, forester, environmental consultant, and instructor of Wildlife Management. Mr. Cashen focuses on CEQA/NEPA compliance issues, endangered species, scientific field studies, and other topics that require a high level of scientific expertise.

Mr. Cashen has knowledge and experience with numerous taxa, ecoregions, biological resource issues, and environmental regulations. As a biological resources expert, Mr. Cashen is knowledgeable of the various agency-promulgated guidelines for field surveys, impact assessments, and mitigation. Mr. Cashen has led field investigations on several special-status species, including ones focusing on the yellow-legged frog, red-legged frog, desert tortoise, steelhead, burrowing owl, California spotted owl, northern goshawk, willow flycatcher, Peninsular bighorn sheep, red panda, and various forest carnivores.

Mr. Cashen is a recognized expert on the environmental impacts of renewable energy development. He has been involved in the environmental review process of over 100 solar, wind, biomass, and geothermal energy projects. Mr. Cashen's role in this capacity has encompassed all stages of the environmental review process, from initial document review through litigation support. Mr. Cashen provided expert witness testimony on several of the Department of the Interior's "fast-tracked" renewable energy projects. His testimony on those projects helped lead agencies develop project alternatives and mitigation measures to reduce environmental impacts associated with the projects.

Mr. Cashen was a member of the independent scientific review panel for the Quincy Library Group project, the largest community forestry project in the United States. As a member of the panel, Mr. Cashen was responsible for advising the U.S. Forest Service on its scientific monitoring program, and for preparing a final report to Congress describing the effectiveness of the Herger-Feinstein Forest Recovery Act of 1998.

AREAS OF EXPERTISE

- CEQA, NEPA, and Endangered Species Act compliance issues
- Comprehensive biological resource assessments
- Endangered species management
- Renewable energy development
- Scientific field studies, grant writing and technical editing

EDUCATION

M.S. Wildlife and Fisheries Science - The Pennsylvania State University (1998)

Thesis: *Avian Use of Restored Wetlands in Pennsylvania*

B.S. Resource Management - The University of California, Berkeley (1992)

PROFESSIONAL EXPERIENCE

Litigation Support / Expert Witness

Mr. Cashen has served as a biological resources expert for over 125 projects subject to environmental review under the California Environmental Quality Act (CEQA) and/or the National Environmental Policy Act (NEPA). As a biological resources expert, Mr. Cashen reviews CEQA/NEPA documents and provides his clients with an assessment of biological resource issues. He then submits formal comments on the scientific and legal adequacy of the project's environmental documents (e.g., Environmental Impact Report). If needed, Mr. Cashen conducts field studies to generate evidence for legal testimony, or he can obtain supplemental testimony from his deep network of species-specific experts. Mr. Cashen has provided written and oral testimony to the California Energy Commission, California Public Utilities Commission, and U.S. district courts. His clients have included law firms, non-profit organizations, and citizen groups.

REPRESENTATIVE EXPERIENCE

Solar Energy

- Abengoa Mojave Solar Project
- Avenal Energy Power Plant
- Beacon Solar Energy Project
- Blythe Solar Power Project
- Calico Solar Project
- California Flats Solar Project
- Calipatria Solar Farm II
- Carrizo Energy Solar Farm
- Catalina Renewable Energy
- Fink Road Solar Farm
- Genesis Solar Energy Project
- Heber Solar Energy Facility
- Imperial Valley Solar Project
- Ivanpah Solar Electric Generating
- Maricopa Sun Solar Complex
- McCoy Solar Project
- Mt. Signal and Calexico Solar
- Panoche Valley Solar
- San Joaquin Solar I & II
- San Luis Solar Project
- Stateline Solar Project
- Solar Gen II Projects
- SR Solis Oro Loma
- Vestal Solar Facilities
- Victorville 2 Power Project
- Willow Springs Solar

Geothermal Energy

- Casa Diablo IV Geothermal
- East Brawley Geothermal
- Mammoth Pacific 1 Replacement
- Orni 21 Geothermal Project
- Western GeoPower Plant

Wind Energy

- Catalina Renewable Energy
- Ocotillo Wind Energy Project
- SD County Wind Energy
- Searchlight Wind Project
- Shu'luuk Wind Project
- Tres Vaqueros Repowering Project
- Tule Wind Project
- Vasco Winds Relicensing Project

Biomass Facilities

- CA Ethanol Project
- Colusa Biomass Project
- Tracy Green Energy Project

Other Development Projects

- Cal-Am Desalination Project
- Carnegie SVRA Expansion Project
- Lakeview Substation Project
- Monterey Bay Shores Ecoresort
- Phillips 66 Rail Spur
- Valero Benecia Crude By Rail
- World Logistics Center

Project Management

Mr. Cashen has managed several large-scale wildlife, forestry, and natural resource management projects. Many of the projects have required hiring and training field crews, coordinating with other professionals, and communicating with project stakeholders. Mr. Cashen's experience in study design, data collection, and scientific writing make him an effective project manager, and his background in several different natural resource disciplines enable him to address the many facets of contemporary land management in a cost-effective manner.

REPRESENTATIVE EXPERIENCE

Wildlife Studies

- Peninsular Bighorn Sheep Resource Use and Behavior Study: (CA State Parks)
- "KV" Spotted Owl and Northern Goshawk Inventory: (USFS, Plumas NF)
- Amphibian Inventory Project: (USFS, Plumas NF)
- San Mateo Creek Steelhead Restoration Project: (Trout Unlimited and CA Coastal Conservancy, Orange County)
- Delta Meadows State Park Special-Status Species Inventory: (CA State Parks, Locke)

Natural Resources Management

- Mather Lake Resource Management Study and Plan – (Sacramento County)
- Placer County Vernal Pool Study – (Placer County)
- Weidemann Ranch Mitigation Project – (Toll Brothers, Inc., San Ramon)
- Ion Communities Biological Resource Assessments – (Ion Communities, Riverside and San Bernardino Counties)
- Del Rio Hills Biological Resource Assessment – (The Wyro Company, Rio Vista)

Forestry

- Forest Health Improvement Projects – (CalFire, SD and Riverside Counties)
- San Diego Bark Beetle Tree Removal Project – (SDG&E, San Diego Co.)
- San Diego Bark Beetle Tree Removal Project – (San Diego County/NRCS)
- Hillslope Monitoring Project – (CalFire, throughout California)

Biological Resources

Mr. Cashen has a diverse background with biological resources. He has conducted comprehensive biological resource assessments, habitat evaluations, species inventories, and scientific peer review. Mr. Cashen has led investigations on several special-status species, including ones focusing on the foothill yellow-legged frog, mountain yellow-legged frog, desert tortoise, steelhead, burrowing owl, California spotted owl, northern goshawk, willow flycatcher, Peninsular bighorn sheep, red panda, and forest carnivores.

REPRESENTATIVE EXPERIENCE

Biological Assessments/Biological Evaluations (“BA/BE”)

- Aquatic Species BA/BE – Reliable Power Project (*SFPUC*)
- Terrestrial Species BA/BE – Reliable Power Project (*SFPUC*)
- Management Indicator Species Report – Reliable Power Project (*SFPUC*)
- Migratory Bird Report – Reliable Power Project (*SFPUC*)
- Terrestrial and Aquatic Species BA – Lower Cherry Aqueduct (*SFPUC*)
- Terrestrial and Aquatic Species BE – Lower Cherry Aqueduct (*SFPUC*)
- Terrestrial and Aquatic Species BA/BE – Public Lands Lease Application (*Society for the Conservation of Bighorn Sheep*)
- Terrestrial and Aquatic Species BA/BE – Simon Newman Ranch (*The Nature Conservancy*)
- Draft EIR (Vegetation and Special-Status Plants) - Wildland Fire Resiliency Program (*Midpeninsula Regional Open Space District*)

Avian

- Study design and Lead Investigator - Delta Meadows State Park Special-Status Species Inventory (*CA State Parks: Locke*)
- Study design and lead bird surveyor - Placer County Vernal Pool Study (*Placer County: throughout Placer County*)
- Surveyor - Willow flycatcher habitat mapping (*USFS: Plumas NF*)
- Surveyor - Tolay Creek, Cullinan Ranch, and Guadacanal Village restoration projects (*Ducks Unlimited/USGS: San Pablo Bay*)
- Study design and Lead Investigator - Bird use of restored wetlands research (*Pennsylvania Game Commission: throughout Pennsylvania*)
- Study design and surveyor - Baseline inventory of bird species at a 400-acre site in Napa County (*HCV Associates: Napa*)
- Surveyor - Baseline inventory of bird abundance following diesel spill (*LFR Levine-Fricke: Suisun Bay*)

- Study design and lead bird surveyor - Green Valley Creek Riparian Restoration Site (*City of Fairfield: Fairfield, CA*)
- Surveyor - Burrowing owl relocation and monitoring (*US Navy: Dixon, CA*)
- Surveyor - Pre-construction burrowing owl surveys (*various clients: Livermore, San Ramon, Rio Vista, Napa, Victorville, Imperial County, San Diego County*)
- Surveyor - Backcountry bird inventory (*National Park Service: Eagle, Alaska*)
- Lead surveyor - Tidal salt marsh bird surveys (*Point Reyes Bird Observatory: throughout Bay Area*)
- Surveyor – Pre-construction surveys for nesting birds (*various clients and locations*)

Amphibian

- Crew Leader - Red-legged frog, foothill yellow-legged frog, and mountain yellow-legged frog surveys (*USFS: Plumas NF*)
- Surveyor - Foothill yellow-legged frog surveys (*PG&E: North Fork Feather River*)
- Surveyor - Mountain yellow-legged frog surveys (*El Dorado Irrigation District: Desolation Wilderness*)
- Crew Leader - Bullfrog eradication (*Trout Unlimited: Cleveland NF*)

Fish and Aquatic Resources

- Surveyor - Hardhead minnow and other fish surveys (*USFS: Plumas NF*)
- Surveyor - Weber Creek aquatic habitat mapping (*El Dorado Irrigation District: Placerville, CA*)
- Surveyor - Green Valley Creek aquatic habitat mapping (*City of Fairfield: Fairfield, CA*)
- GPS Specialist - Salmonid spawning habitat mapping (*CDFG: Sacramento River*)
- Surveyor - Fish composition and abundance study (*PG&E: Upper North Fork Feather River and Lake Almanor*)
- Crew Leader - Surveys of steelhead abundance and habitat use (*CA Coastal Conservancy: Gualala River estuary*)
- Crew Leader - Exotic species identification and eradication (*Trout Unlimited: Cleveland NF*)

Mammals

- Principal Investigator – Peninsular bighorn sheep resource use and behavior study (*California State Parks: Freeman Properties*)

- Scientific Advisor –Study on red panda occupancy and abundance in eastern Nepal (*The Red Panda Network: CA and Nepal*)
- Surveyor - Forest carnivore surveys (*University of CA: Tahoe NF*)
- Surveyor - Relocation and monitoring of salt marsh harvest mice and other small mammals (*US Navy: Skagg's Island, CA*)
- Surveyor – Surveys for Monterey dusky-footed woodrat. Relocation of woodrat houses (*Touré Associates: Prunedale*)

Natural Resource Investigations / Multiple Species Studies

- Scientific Review Team Member – Member of the scientific review team assessing the effectiveness of the US Forest Service's implementation of the Herger-Feinstein Quincy Library Group Act.
- Lead Consultant - Baseline biological resource assessments and habitat mapping for CDF management units (*CDF: San Diego, San Bernardino, and Riverside Counties*)
- Biological Resources Expert – Peer review of CEQA/NEPA documents (*various law firms, non-profit organizations, and citizen groups*)
- Lead Consultant - Pre- and post-harvest biological resource assessments of tree removal sites (*SDG&E: San Diego County*)
- Crew Leader - T&E species habitat evaluations for Biological Assessment in support of a steelhead restoration plan (*Trout Unlimited: Cleveland NF*)
- Lead Investigator - Resource Management Study and Plan for Mather Lake Regional Park (*County of Sacramento: Sacramento, CA*)
- Lead Investigator - Biological Resources Assessment for 1,070-acre Alfaro Ranch property (*Yuba County, CA*)
- Lead Investigator - Wildlife Strike Hazard Management Plan (*HCV Associates: Napa*)
- Lead Investigator - Del Rio Hills Biological Resource Assessment (*The Wyro Company: Rio Vista, CA*)
- Lead Investigator – Ion Communities project sites (*Ion Communities: Riverside and San Bernardino Counties*)
- Surveyor – Tahoe Pilot Project: Validation of California's Wildlife Habitat Relationships (CWHR) Model (*University of California: Tahoe NF*)

Forestry

Mr. Cashen has five years of experience working as a consulting forester on projects throughout California. Mr. Cashen has consulted with landowners and timber operators on forest management practices; and he has worked on a variety of forestry tasks including selective tree marking, forest inventory, harvest layout, erosion control, and supervision of logging operations. Mr. Cashen's experience with many different natural resources enable him to provide a holistic approach to forest management, rather than just management of timber resources.

REPRESENTATIVE EXPERIENCE

- Lead Consultant - CalFire fuels treatment projects (*SD and Riverside Counties*)
- Lead Consultant and supervisor of harvest activities – San Diego Gas and Electric Bark Beetle Tree Removal Project (*San Diego*)
- Crew Leader - Hillslope Monitoring Program (*CalFire: throughout California*)
- Consulting Forester – Forest inventories and timber harvest projects (*various clients throughout California*)

Grant Writing and Technical Editing

Mr. Cashen has prepared and submitted over 50 proposals and grant applications. Many of the projects listed herein were acquired through proposals he wrote. Mr. Cashen's clients and colleagues have recognized his strong scientific writing skills and ability to generate technically superior proposal packages. Consequently, he routinely prepares funding applications and conducts technical editing for various clients.

PERMITS

U.S. Fish and Wildlife Service Section 10(a)(1)(A) Recovery Permit for the Peninsular bighorn sheep

PROFESSIONAL ORGANIZATIONS / ASSOCIATIONS

The Wildlife Society

Cal Alumni Foresters

Mt. Diablo Audubon Society

OTHER AFFILIATIONS

Scientific Advisor and Grant Writer – *The Red Panda Network*

Scientific Advisor – *Mt. Diablo Audubon Society*

Grant Writer – *American Conservation Experience*

TEACHING EXPERIENCE

Instructor: Wildlife Management - The Pennsylvania State University, 1998

Teaching Assistant: Ornithology - The Pennsylvania State University, 1996-1997

PUBLICATIONS

Gutiérrez RJ, AS Cheng, DR Becker, S Cashen, et al. 2015. Legislated collaboration in a conservation conflict: a case study of the Quincy Library group in California, USA. Chapter 19 *in*: Redpath SR, et al. (eds). *Conflicts in Conservation: Navigating Towards Solutions*. Cambridge Univ. Press, Cambridge, UK.

Cheng AS, RJ Gutiérrez RJ, S Cashen, et al. 2016. Is There a Place for Legislating Place-Based Collaborative Forestry Proposals?: Examining the Herger-Feinstein Quincy Library Group Forest Recovery Act Pilot Project. *Journal of Forestry*.

EXHIBIT B



794 Sawnee Bean Road
Thetford Center VT 05075

Norman Marshall, President
(802) 356-2969

nmarshall@smartmobility.com

February 29, 2024

Ariana Abedifard
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080

Subject: Seely Ave Mixed Use Project

Dear Ms. Abedifard,

I have reviewed vehicle miles traveled (VMT) impacts and traffic impacts of the City of San Jose Seely Avenue Mixed-Use Project Draft Environmental Impact Report ("DEIR"). I make the following findings:

- 1) The proposed mitigation is insufficient to fully mitigate the VMT impacts. The DEIR's assertion that the mitigation is sufficient is based on an overestimate of the reduction that would result from a "Voluntary Travel Behavior Change Program."
- 2) The County of Santa Clara Roads and Airports Department is on record of opposing a new signalized intersection at Seely Avenue due to the limited distance between those intersections and adjacent intersections. The DEIR analysis shows that there will be some blockage of upstream intersections during the AM peak hour.
- 3) The Santa Clara Valley Transportation Authority has recommended that the project close pedestrian gaps along Montague Expressway and these closures are not included in the project.

The Proposed Mitigation is Insufficient to Fully Mitigate the VMT Impact

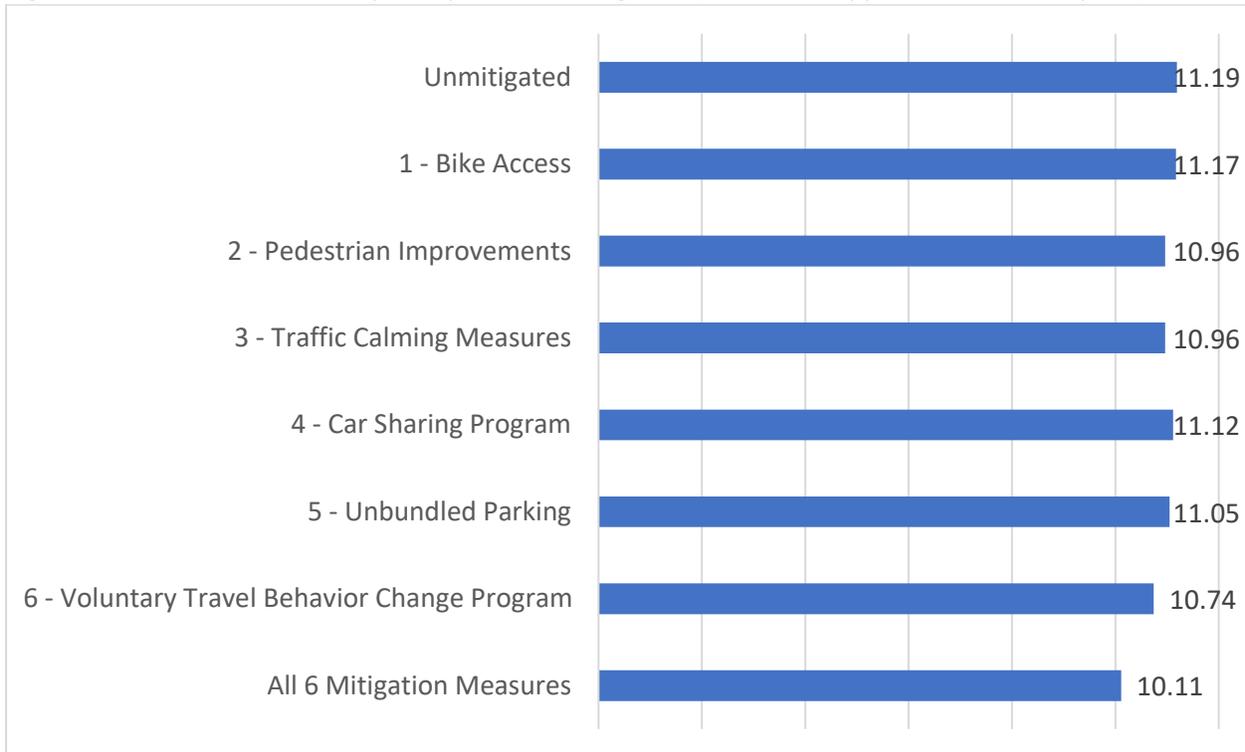
The DEIR states the project will cause a significant VMT impact. Specifically, the DEIR states: “The residential component of the project would generate vehicle miles traveled (VMT) of 11.19 per capita, which would exceed the City’s relevant residential VMT threshold of 10.12 VMT per capita.” (DEIR, p. xiv)

The DEIR then states:

Based on the City’s VMT Evaluation Tool, implementing the multimodal infrastructure improvements and TDM measures described above would lower the project VMT to 10.11 per capita, which would reduce the project impact to less than significant (i.e., below the City’s threshold of 10.12 VMT per capita). (DEIR, p. 241)

The stated reduction results from a combination of six different mitigation measures. As shown in Figure 1, the largest share of the calculated mitigation is from “Voluntary Travel Behavior Change Program.”

Figure 1: DEIR Calculated VMT per Capita After Mitigation (from DEIR Appendix P, Table 4, p. 26)



Mitigation measures 1, 2, 3, 4 and 5 are all described in both the City’s VMT Tool and the California Air Pollution Control Officers Association (CAPCOA) Handbook for Analyzing Greenhouse Gas Emission Reductions, Assessing Climate Vulnerabilities, and Advancing Health and Equity. The Handbook provides guidance for how these measures are to be applied.

A key issue with applying this measure is the need to estimate a participation percentage. The Policy Brief summarizes VMT reductions among “participants” and implies that participations may have been a small portion of the total population. The Policy Brief states:

Personalized feedback is often based on analysis of travel diaries and surveys that participants complete during the program. This analysis not only serves as a tool for providing feedback, but also as a means of evaluating program effectiveness. By analyzing diary and survey information, changes in vehicle miles traveled (VMT), emission reductions, or use of alternative transportation modes can be examined through before and after comparisons of travel behavior.

A travel diary requirement severely limits participation. In today's survey-resistant climate, travel diaries are seen as so onerous now that they have been eliminated from the long-running National Household Travel Survey ("NHTS"), beginning with the 2022 Survey.

Additionally, a written travel diary was not provided to respondents to take with them on their assigned travel day. This reflects a change in the current state of practice in household travel surveys but is expected to significantly change comparability with the 1995 NPTS and 2001, 2009, and 2017 NHTS travel data. The expected decline in trip rates from this change amounts to 20%.¹

The NHTS planners decided that it was more important to increase the survey participation rate than to maintain consistency with past surveys, and abandoned travel diaries.

I have been unable to find any recent voluntary travel reduction programs with travel diaries documented anywhere in the United States.

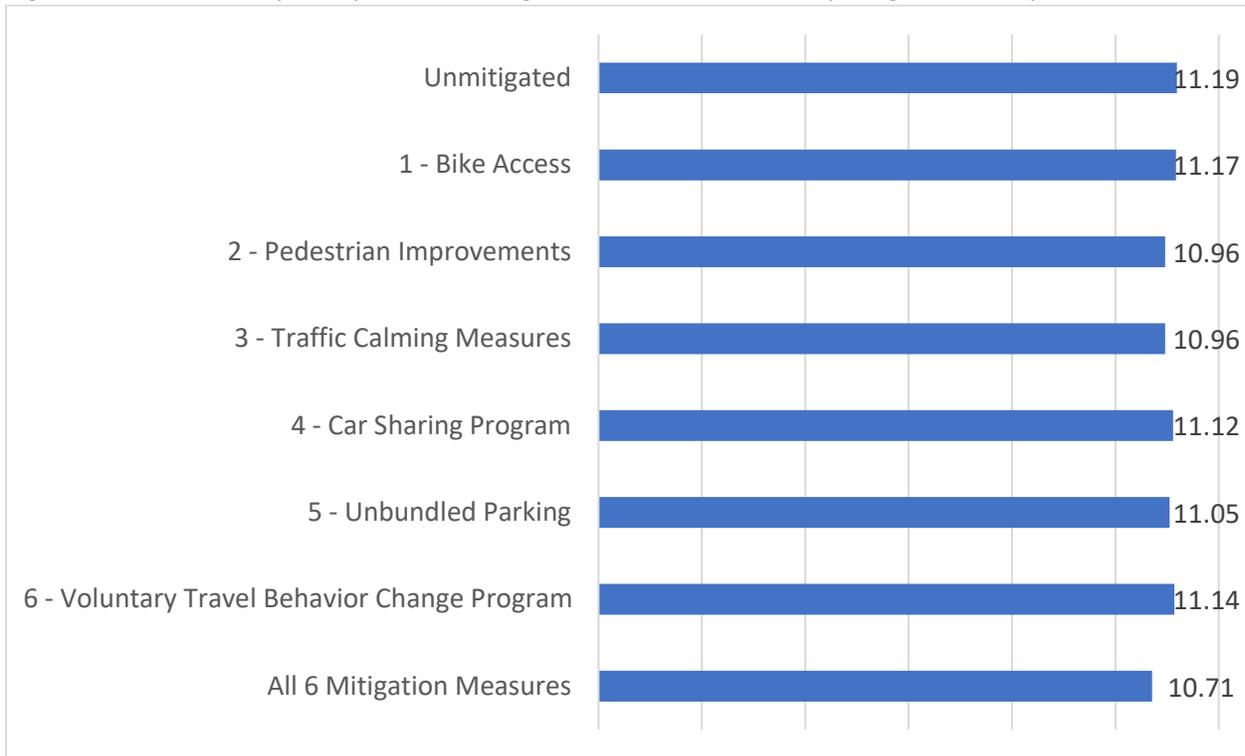
In the City's Tool, the DEIR assumes 100% participation which equates to a 4% reduction in VMT per capita. The DEIR claims this 4% reduction would be achieved by:

All residents/households would be provided with the information/tools necessary to fully participate in the Voluntary Travel Behavior Change program. (DEIR Appendix P., p. 24)

Just providing information will not result in 100% participation. A more realistic participation rate is 10%, with the VMT reduction reduced proportionally to 0.4% as shown in Figure 12. The resulting VMT per capita with all six measures would be 10.71, i.e., 5.8% higher than the City's threshold of 10.12.

¹<https://nhts.ornl.gov/assets/2022/doc/2022%20NextGen%20NHTS%20Technical%20Release%20Notes%20V1.pdf>

Figure 2: Revised VMT per Capita After Mitigation With 10% Voluntary Program Participation



Another VMT mitigation measure targeted at workplaces is T-5: Commute Trip Reduction Program (Voluntary). The Handbook states that:

Voluntary CTR programs must include the following elements to apply the VMT reductions reported in literature.

- Employer-provided services, infrastructure, and incentives for alternative modes such as ridesharing (Measure T-8), discounted transit (Measure T-9), bicycling (Measure T-10), vanpool (Measure T-11), and guaranteed ride home.
- Information, coordination, and marketing for said services, infrastructure, and incentives (Measure T-7).

These Voluntary CTR measures have a significant cost. The Handbook states:

Employer costs may include recurring costs for transit subsidies capital and maintenance costs for the alternative transportation infrastructure, and labor costs for staff to manage the program. Where the local municipality has a VMT reduction ordinance, costs may include the labor costs for government staff to track the efficacy of the program.

The Handbook states that the combination of all these measures will result in a maximum 4% VMT reduction. Simply Providing information to residents will not result in a 4% VMT reduction. Therefore, the mitigation proposed is not sufficient to reduce the significant VMT impact.

Traffic Impacts

The County of Santa Clara Roads and Airports Department letter of March 25, 2022 on the project’s Notice of Preparation (“NOP”) reiterates “. . . our objection to the proposed signalization of Seely Ave and Montague Expressway because the proposed signal location is too close to the existing signals at Trimble Rd and McCarthy Blvd.” (DEIR, Appendix A p. 32 of 43) The locations of these intersections are shown in Figure 3.

Figure 3: Existing Conditions Along Montague Expressway (Google Maps)



The DEIR response acknowledges that:

“A new traffic signal at Seely Avenue and Montague Expressway would require coordination with City and County staff.” (DEIR, Appendix P, p. vii)

The intersection design proposed in the DEIR is reproduced here as Figure 4. Currently, the intersection provides only right in – right out access to Seely Avenue. The proposed design adds two exiting left turn

lanes from Seely Avenue and one left turn lane into Seely Avenue. It also extends the triple left turn lanes extending from the Montague Expressway intersection with East Trimble Road.

Figure 4: DEIR Seely Avenue/Montague Expressway Intersection Conceptual Design (DEIR Appendix P, p. 216 of 516)



Not to Scale

Figure 1
Conceptual Intersection Improvements

The DEIR states:

The detailed Synchro/SimTraffic analysis is contained in Appendix E. The Synchro/SimTraffic analysis shows that a new traffic signal at Seely Avenue/Montague Expressway that does not include adding a crosswalk across Montague Expressway but does include extending the westbound triple left-turn pocket at Montague Expressway/Trimble Road would have the least impact on traffic operations along Montague Expressway when compared to the other project scenarios that were analyzed. However, including a crosswalk across Montague Expressway would not substantially worsen traffic operations so long as the westbound triple left-turn pocket extension at Trimble Road is included. The new signal would allow for adequate progression of vehicles in both directions of travel along Montague Expressway and is expected to operate at an acceptable level of service based on the 2000 Highway Capacity Manual (HCM) method for signalized intersections. (DEIR, Appendix P, p. 42)

The DEIR documents significant congestion on Montague Expressway Figure 5 shows the long westbound average AM peak hour queues presented in the DEIR.

Figure 5: Montague Average Queues (DEIR Appendix P, p. 223 of 516)



This graphic is misleading in that it shows the two alternatives without a Seely Avenue signal (“Background” and “B+P (No Signal)” – where “P” refers to project traffic) with queues backing up from the nonexistent Seely Avenue signal. Those queues should be shown as continuous from the East Trimble Rd signal and therefore would not extend as close to McCarthy Boulevard as shown.

Figure 5 shows average queues. SimTraffic also estimates 95 percentile queues. With the proposed project and DEIR intersection design, the DEIR estimates that queues would extend into the upstream intersection during the AM peak hour including:

- Upstream of East Trimble Road 5% of the time (App. P, p. 309 of 516)
- Upstream of new Seely Avenue signal 2% of the time (App. P, 310 of 516)

The Project therefore will result in traffic blockages.

The Santa Clara Valley Transportation Authority commented on the NOP in a letter dated March 25, 2022. This letter states:

. . . VTA again recommends the project install a sidewalk/trail from the cul-de-sac at the south end of the project site that connects to Montague Expressway. In addition, VT recommends the project close the sidewalk gap on the north side of Montague Expressway near the Coyote Creek Trail. The development should widen the sidewalk with a landscape strip and pedestrian scale lighting. As the sidewalk along Montague Expressway will be the primary access point to the Coyote Creek Trail and to VTA bus stops along Montague Expressway, pedestrians and bicycles should be considered. (DEIR, Appendix A, p. 40 of 43)

The DEIR states:

The project would provide a direct connection to the Coyote Creek multi-use trail (Class I bikeway) that runs along both sides of Coyote Creek. (DEIR, p. 237)

The DEIR does not address the VTA recommendations for closing the pedestrian gaps along Montague Expressway.

Sincerely,



Norman L. Marshall

Resume

NORMAN L. MARSHALL, PRESIDENT

nmarshall@smartmobility.com

EDUCATION:

Master of Science in Engineering Sciences, Dartmouth College, Hanover, NH, 1982

Bachelor of Science in Mathematics, Worcester Polytechnic Institute, Worcester, MA, 1977

PROFESSIONAL EXPERIENCE: (33 Years, 19 at Smart Mobility, Inc.)

Norm Marshall helped found Smart Mobility, Inc. in 2001. Prior to this, he was at RSG for 14 years where he developed a national practice in travel demand modeling. He specializes in analyzing the relationships between the built environment and travel behavior and doing planning that coordinates multi-modal transportation with land use and community needs.

Regional Land Use/Transportation Scenario Planning

Portland Area Comprehensive Transportation System (PACTS) – the Portland Maine Metropolitan Planning Organization. Updating regional travel demand model with new data (including AirSage), adding a truck model, and multiclass assignment including differentiation between cash toll and transponder payments.

Loudoun County Virginia Dynamic Traffic Assignment – Enhanced subarea travel demand model to include Dynamic Traffic Assignment (Cube). Model being used to better understand impacts of roadway expansion on induced travel.

Vermont Agency of Transportation-Enhanced statewide travel demand model to evaluate travel impacts of closures and delays resulting from severe storm events. Model uses innovative Monte Carlo simulations process to account for combinations of failures.

California Air Resources Board – Led team including the University of California in \$250k project that reviewed the ability of the new generation of regional activity-based models and land use models to accurately account for greenhouse gas emissions from alternative scenarios including more compact walkable land use and roadway pricing. This work included hands-on testing of the most complex travel demand models in use in the U.S. today.

Climate Plan (California statewide) – Assisted large coalition of groups in reviewing and participating in the target setting process required by Senate Bill 375 and administered by the California Air Resources Board to reduce future greenhouse gas emissions through land use measures and other regional initiatives.

Chittenden County (2060 Land use and Transportation Vision Burlington Vermont region) – led extensive public visioning project as part of MPO's long-range transportation plan update.

Flagstaff Metropolitan Planning Organization – Implemented walk, transit and bike models within regional travel demand model. The bike model includes skimming bike networks including on-road and off-road bicycle facilities with a bike level of service established for each segment.

Chicago Metropolitan Plan and Chicago Metropolitan Freight Plan (6-county region)— developed alternative transportation scenarios, made enhancements in the regional travel demand model, and used the enhanced

model to evaluate alternative scenarios including development of alternative regional transit concepts. Developed multi-class assignment model and used it to analyze freight alternatives including congestion pricing and other peak shifting strategies.

Municipal Planning

City of Grand Rapids – Michigan Street Corridor – developed peak period subarea model including non-motorized trips based on urban form. Model is being used to develop traffic volumes for several alternatives that are being additionally analyzed using the City’s Synchro model

City of Omaha - Modified regional travel demand model to properly account for non-motorized trips, transit trips and shorter auto trips that would result from more compact mixed-use development. Scenarios with different roadway, transit, and land use alternatives were modeled.

City of Dublin (Columbus region) – Modified regional travel demand model to properly account for non-motorized trips and shorter auto trips that would result from more compact mixed-use development. The model was applied in analyses for a new downtown to be constructed in the Bridge Street corridor on both sides of an historic village center.

City of Portland, Maine – Implemented model improvements that better account for non-motorized trips and interactions between land use and transportation and applied the enhanced model to two subarea studies.

City of Honolulu – Kaka’ako Transit Oriented Development (TOD) – applied regional travel demand model in estimating impacts of proposed TOD including estimating internal trip capture.

City of Burlington (Vermont) Transportation Plan – Led team that developing Transportation Plan focused on supporting increased population and employment without increases in traffic by focusing investments and policies on transit, walking, biking and Transportation Demand Management.

Transit Planning

Regional Transportation Authority (Chicago) and Chicago Metropolis 2020 – evaluated alternative 2020 and 2030 system-wide transit scenarios including deterioration and enhance/expand under alternative land use and energy pricing assumptions in support of initiatives for increased public funding.

Capital Metropolitan Transportation Authority (Austin, TX) Transit Vision – analyzed the regional effects of implementing the transit vision in concert with an aggressive transit-oriented development plan developed by Calthorpe Associates. Transit vision includes commuter rail and BRT.

Bus Rapid Transit for Northern Virginia HOT Lanes (Breakthrough Technologies, Inc and Environmental Defense.) – analyzed alternative Bus Rapid Transit (BRT) strategies for proposed privately-developing High Occupancy Toll lanes on I-95 and I-495 (Capital Beltway) including different service alternatives (point-to-point services, trunk lines intersecting connecting routes at in-line stations, and hybrid).

Roadway Corridor Planning

I-30 Little Rock Arkansas – Developed enhanced version of regional travel demand model that integrates TransCAD with open source Dynamic Traffic Assignment (DTA) software, and used to model I-30 alternatives. Freeway bottlenecks are modeled much more accurately than in the base TransCAD model.

South Evacuation Lifeline (SELL) – In work for the South Carolina Coastal Conservation League, used Dynamic Travel Assignment (DTA) to estimate evaluation times with different transportation alternatives in coastal South Carolina including a new proposed freeway.

Hudson River Crossing Study (Capital District Transportation Committee and NYSDOT) – Analyzing long term capacity needs for Hudson River bridges which a special focus on the I-90 Patroon Island Bridge where a microsimulation VISSIM model was developed and applied.

PUBLICATIONS AND PRESENTATIONS (partial list)

DTA Love: Co-leader of workshop on Dynamic Traffic Assignment at the June 2019 Transportation Research Board Planning Applications Conference.

Forecasting the Impossible: The Status Quo of Estimating Traffic Flows with Static Traffic Assignment and the Future of Dynamic Traffic Assignment. *Research in Transportation Business and Management* 2018.

Assessing Freeway Expansion Projects with Regional Dynamic Traffic Assignment. Presented at the August 2018 Transportation Research Board Tools of the Trade Conference on Transportation Planning for Small and Medium Sized Communities.

Vermont Statewide Resilience Modeling. With Joseph Segale, James Sullivan and Roy Schiff. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

Assessing Freeway Expansion Projects with Regional Dynamic Traffic Assignment. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

Pre-Destination Choice Walk Mode Choice Modeling. Presented at the May 2017 Transportation Research Board Planning Applications Conference.

A Statistical Model of Regional Traffic Congestion in the United States, presented at the 2016 Annual Meeting of the Transportation Research Board.

MEMBERSHIPS/AFFILIATIONS

Associate Member, Transportation Research Board (TRB)

Member and Co-Leader Project for Transportation Modeling Reform, Congress for the New Urbanism (CNU)

EXHIBIT C

MENLO SCIENTIFIC ACOUSTICS, INC.

Consultants in Acoustics and Communication Technologies

29 February 2024

Ms. Ariana Abedifard
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd., Suite 1000
South San Francisco, CA 94080

Subject: **Seely Avenue Mixed-Use Project**
DEIR SCH No. 2022020565– Acoustic Review

Dear Ms. Abedifard,

Menlo Scientific Acoustics, Inc., reviewed the Draft Environmental Impact Report^a, Appendix O – Noise and Vibration Analysis^b, and other documents in regards to the subject project, concerning the proposed development comprised of “1,472 residential units, 18,965 square feet of general neighborhood retail space, and a 2.5-acre public park. The residential development would consist of a mix of three-story townhomes and six- to seven-story apartment buildings, which would include affordable apartments. The project would also include the construction of a domestic water well and onsite water pipes to serve the local municipal water system. Other offsite improvements would include widening of Seely Avenue to accommodate multi-directional traffic, installation of a Class II bike lane and sidewalks, and intersection improvements at Seely Avenue and Montague Expressway to accommodate project-generated traffic. The project would include 1,967 parking spaces for the residential and retail components. Parking for both the residential and retail components would be provided in a mix of three surface parking lots as well as multi-level parking in the residential buildings.” (DEIR, pg. xii).

OVERVIEW

Our review of these documents finds errors of such magnitude as to call into question the findings contained in Appendix O and thus the DEIR. Specifically, we make the following findings:

- 1) The DEIR and Appendix fail to analyze the noise impacts from Project construction on new residents introduced as part of the Project.
- 2) The calculation of construction noise levels fails to account for the actual amount of equipment used for the project, resulting in an underestimation of noise levels.
- 3) The proposed mitigation measures for the Project’s construction noise impacts are insufficient.
- 4) There is insufficient information to support the measurements taken for the Project’s existing and future noise levels.
- 5) The measures proposed to reduce interior noise levels are insufficient.
- 6) The Appendix incorrectly interprets the Maximum Noise Level.
- 7) The Appendix uses an arbitrary noise threshold.

^a Draft Environmental Impact Report Seely Avenue Mixed-Use Project State Clearinghouse No. 2022020565 File Number: PDC21-035/PD22-002/ER21-284

^b Appendix O Noise/Vibration Assessment - 0 Seely Avenue Mixed-Use Project Noise And Vibration Assessment

SPECIFIC ITEMS OF CONCERN

1. No Analysis of Impacts on Project Residents

Per DEIR Table 2-4, the Townhouse phase of the project will be completed in April 2026 and ready for tenants while Building A, the Affordable Housing building, and Building B are under construction until October 2026, September 2026, and October 2027, respectively. Similarly, Building A and the Affordable Housing building will be ready for tenants on October 2026 and September 2026, respectively, while Building B is under construction. Lastly, Building B will be ready for tenants in October 2027 while Building C is under construction from October 2026 until October 2028. The note to Table 2-4 describes the schedule as the most aggressive feasible.

A visual presentation of this project timeline and relevant overlap is shown in **Attachment A**—a Gantt chart prepared using the schedule in DEIR Table 2-4.

The Appendix also notes:

“The nearest sensitive receptors to the project site are the residents of the existing apartment building about 60 feet northwest of the project site, as well as workers and customers at the existing commercial/office buildings located about 150 feet to the west of the site.”

The Appendix and DEIR fail to identify the newly added residents that will be living on the Project site while other construction is still occurring as sensitive receptors. The Project can have a significant impact on these new residents as construction will be ongoing and, as described below, the construction noise levels will be significant and insufficiently mitigated. Therefore, the impact of the project on phases that will be complete when construction on other phase is still in progress is not addressed.

2. Inaccurate Calculation of Significant Construction Noise Levels

Appendix Table 8 (Construction Equipment 50-Foot Noise Emission Limits), page 37, and Table 9 (Typical Ranges of Construction Noise Levels at 50 Feet, L_{eq} (dBA)), page 38, demonstrate how loud the various construction equipment that will be used for the Project can be.

Table 10, Construction Noise Levels – Project Infrastructure, page 39, shows that the proposed noise levels at 50 feet, which would include the existing residences, will be loud, even when the construction is at “the acoustic center of the project.” How loud the impact will be can be seen looking at these calculated levels with respect to the common sounds presented in Table 2.

In fact, as stated by the Appendix, these levels result in a significant impact. Page 36 of the Appendix notes there are no noise level thresholds for construction activities in the SJMC. It then proposes:

“As an alternative, this analysis uses the noise limits established by the Federal Transit Administration (FTA) to identify the potential for impacts due to substantial temporary construction noise. The FTA identifies construction noise limits in the Transit Noise and

Vibration Impact Assessment Manual.¹ During daytime hours, an exterior threshold of 80 dBA Leq shall be enforced at residential land uses, an exterior threshold of 85 dBA Leq shall be enforced at commercial land uses, and 90 dBA Leq shall be enforced at industrial land uses.”

Notably, while the Appendix proposes this as a threshold, the DEIR does not mention these numeric FTA thresholds. However, Table 10 and 11 of the Appendix show that the construction will exceed these thresholds. As summarized by the Appendix, “Construction noise levels would exceed the exterior threshold of 80 dBA Leq at residential land uses to the west when activities occur within about 90 feet.” (page 41). Because these thresholds were not included in the DEIR, the DEIR fails to identify this significant impact.

Even if these levels are already deemed significant as is, these construction noise levels are underestimated. The noise levels will be even greater than analyzed in Table 10 and 11. This is because these tables erroneously show calculated levels for only two pieces of equipment. While the tables describe the total quantity of construction equipment for each phase, its calculation explicitly is only “from operation of *Two Loudest Pieces of Construction Equipment*.” A project of this scope will have more than just two noisy pieces of equipment in use at one time; the Tables themselves show this. For example, as shown in Table 10, the Site Preparation phase will use a total of 13 pieces of equipment, and in Table 11, the Paving phase will use 5 pieces of equipment. The noise levels presented are therefore underestimated.

Ultimately, the construction noise levels presented, whether underestimated or not, are a significant impact. As described below in Section 3, the mitigation measures proposed to reduce the significance of this impact are inadequate. But given that the impact will be even greater than analyzed due to the quantity of equipment which will be used, the resulting mitigation is more ineffective.

3. Inadequate Mitigation Measures

Page 12 – EC-1.7 notes “The City considers significant construction noise impacts to occur if a project located within 500 feet of residential uses or 200 feet of commercial or office uses would:

- Involve substantial noise generating activities (such as building demolition, grading, excavation, pile driving, use of impact equipment, or building framing) continuing for more than 12 months.”

Since the Project construction will last for several years (according to the Project Timeline demonstrated in DEIR Table 2-4), the Project meets this criteria and is a significant impact as defined by the General Plan Policy EC-1.7. Therefore, mitigation to reduce the significant impact must be thorough. As can be seen below, the mitigation plan is inadequate.

The DEIR presents Mitigation Measure NSE-1 (pg. 203). Part of the mitigation measure is to “Construct solid plywood fences or similar along the northwest boundary of the site adjacent to residences to shield adjacent residential land uses from ground-level construction equipment and activities. The temporary 8-foot noise barrier shall be solid over the face and at the base of the barrier in order to provide a 5 dBA noise reduction.”

The purported 5 dBA noise reduction may only be achieved when the barrier actually blocks the line of sight between the noise source and the receiver. Some sources may have their acoustic source higher than the barrier height. For sensitive receivers above the barrier height, for example the upper floors of the existing sensitive receivers, the proposed fence will not provide any noise reduction. There is no fence proposed for, when complete, the upper floors of the Townhomes, Building A, and Building B.

The construction noise impact is significant for the existing sensitive receivers and for the project phase that will be complete as the construction on other project phase continue. Although MM NSE-1 calls for other noise-reducing components, these additional measures do not compensate for the lack of effectiveness of the plywood fences. Barrier effectiveness is a function of the noise frequency^c. Barriers are more effective for higher frequency noises and less effective for low frequency noises, such as engine noise and exhaust noise. Accordingly, the significant noise impact will not be adequately mitigated.

4. Lack of Information to Support Existing and Future Noise Measurements

According to the Appendix (pg.13), to measure the Existing Noise Environment, a noise monitoring survey was conducted to document ambient noise levels at the site and in the surrounding area. The survey included three long-term measurements and four short-term measurements. Appendix Page 13 addresses the results these measurements, shown in Figure 1, Noise Measurement Locations. Table 4, Summary of Short-Term Noise Measurement Data, November 22, 2021, presents several measured noise levels – L10, L50, L90, and L_{eq} in dBA, as well what is called the “Calculated DNL, dBA*”, where the asterisk notes “*DNL levels calculated through comparison between short-term and long-term noise levels.”

The comparison technique is not disclosed, and for both the short term and long term measurements, neither is the setting of the sound level meters used (for example fast or slow weighting applied to the signal), the height of the microphone, the make and model of the equipment used for the measurements, the date of the equipment’s latest calibration record, and if a field calibrator was used (with its latest calibration record) prior to and at the end of each measurement.

The disclosure of this information is standard practice as noted in, for example, ASTM E1686-16, Standard Guide for Applying Environmental Noise Measurement Methods and Criteria,^d and ASA/ANSI S12.18, American National Standard Procedures for Outdoor Measurement of Sound Pressure Level.^e

Accordingly, the measured noise data is not able to be verified and is unsupported.

^c https://www.fhwa.dot.gov/environment/noise/noise_barriers/design_construction/design/design03.cfm Section 3.4

^d <https://www.astm.org/e1686-16.html>

^e

https://global.ihs.com/doc_detail.cfm?&csf=ASA&item_s_key=00217910&item_key_date=760017&input_doc_number=&input_doc_title=&org_code=ASA&seg_code=S12

The data for future noise levels is also unverifiable. The Appendix, on page 26, presents Table 5, Calculated Future Exterior Noise Levels at Proposed Outdoor Use Areas.

The SoundPLAN program output for the future levels is not presented to support the noise levels in the chart nor is how the model was validated, noted on page 25.

5. Insufficient Interior Noise Reduction Measures

The Appendix then goes on to show the calculated interior noise levels in Table 7 (page 28) and assumes that the windows provide 15 dBA and 25 dBA “noise level reductions” in the open and closed positions, respectively. No data or description of the windows used, such as the OITC test report, nor are the calculation sheets from SoundPLAN.

Table 7 notes the 45 dBA interior noise criteria is exceeded for the Affordable Building Southeast, Southwest, and Northeast units for all units no matter what floor. Specifically:

- For Building 1 (which is either DEIR Building B or C) Southeast units, the 45 dBA interior noise criteria is exceeded for all floors and is exceeded for units on floors 6 and 7 on the Northeast.
- For Building 2 (which appears to be DEIR Building A) the 45 dBA interior noise criteria is exceeded for all units facade on all floors for the Southeast, Southwest, and Northeast facades.
- For Building 3 (which is either DEIR Building C or B) the 45 dBA interior noise criteria is exceeded on floors 5, 6, and 7 on the Southwest façade.

Page 32 of the Appendix discusses proposed mitigation to lower the level in units where Table 7 indicates the interior noise levels will exceed the 45 dBA criteria. The Appendix states in the second paragraph from the bottom on page 32:

“Assuming a calculated maximum exterior noise exposure of 75 dBA DNL and a 30% window-to-wall area ratio, the southeast façade of the Affordable Building would require windows with an STC rating of 32 or greater to reduce interior noise levels to 45 dBA DNL or less. Standard windows would provide the necessary noise reduction for residences located along other façades of the Affordable Building.”

However, a standard dual-pane glass window carries an STC rating of around 27 or 28.^f A window comprised of 1/8” glass with a 1/4” airspace and another 1/8” sheet of glass has an STC of 28, and normal voice levels can still be heard and distinguished.

Thus the statement quoted above is incorrect and does not provide the level of isolation required to meet the 45 dBA interior noise criteria.

Additionally, the Appendix states in the last paragraph on page 32:

^f https://www.jeld-wen.com/en-us/discover/reference/acoustic_performance_in_windows

“Assuming a calculated maximum exterior noise exposure of 81 dBA DNL and a 30% window-to-wall area ratio, residential units along the southeastern façade of Building 2 would require windows with an STC rating of 38 or greater to reduce interior noise levels to 45 dBA DNL or less. Alternatively, incorporating additional sound-rated construction

methods into the exterior walls (e.g., adding resilient channels) could increase the STC rating of the wall to a value of about 57. With this additional measure, the southeastern façade of Building 2 would require windows with an STC rating of 35 or greater to reduce interior noise levels to 45 dBA DNL or below. With typical stucco exterior wall construction and day-night average noise levels reaching up to 74 dBA DNL at other Building 2 façades, standard windows would suffice to reduce interior noise levels to levels not exceeding 45 dBA DNL.”

Again, there is no calculation shown to support the mitigation noted above. The STC^g rating is a single number calculated from the individual one-third-octave band transmission loss data from measurement in a test lab.. The DNL is a single number metric calculated from the 24 one-hour L_{eq} (NHL) levels, with a penalty for the night-time levels. Per standard and customary practice, to predict the interior level, the calculation should include the exterior unweighted one-third octave band L_{eq} (1 hour) sound levels for the peak hour, the one-third octave transmission loss (TL) from the test report for the STC rated window said to be being sufficient to meet the 45 dBA interior noise level, a calculation of the difference between the one-third octave band noise levels and the window one-third octave band TLs, then apply the one-third octave band A-weighting to resulting A-weighted level to the difference, and then calculating the overall A-weighted level from the A-weighted one-third octave band difference levels^h.

Further, on page 33, the Appendix provides the following recommendation:

“Preliminary calculations indicate that residential units along the southeastern façade of Building 2 would require windows and doors with a minimum rating of 38 STC, or with a minimum rating of 35 STC and addition sound-rated wall construction methods resulting in a wall STC of 57 or greater, with adequate forced-air mechanical ventilation to meet the interior noise threshold of 45 dBA DNL.”

Once again, there is no backup to support the proposed mitigation.

6. Incorrect Interpretation of Noise Level

The DEIR and Appendix O cite a maximum of 60 dBA L_{DN} dBA from the City of San Jose Table EC-1, Land Use Compatibility Guideline for Community Noise in San Jose, 1. Residential, Hotels and Motels, Hospitals and Residential Care, Exterior Noise Exposure (DNL in Decibels (dBA)).ⁱ

^g <https://www.astm.org/e0413-22.html> - Classification for Rating Sound Insulation

<https://www.astm.org/e0090-09r16.html> - Standard Test Method for Laboratory Measurement of Airborne Sound Transmission Loss of Building Partitions and Elements

^h <https://sengpielaudio.com/calculator-spl30.htm>

ⁱ Envision San Jose 2040 General Plan, Adopted November 1, 2011, as amend on May 16, 2019

This table is repeated as Table 3-26 in section 3.13.12, Regulatory Framework in the Noise and Vibration section of the DEIR.

The City of San Jose Municipal Code Section 20.30.700^j Table 20-85 Noise Standards which specifies “55 dB” as the “Maximum Noise Level in Decibels at Property Line for Any Residential or non-residential use.” One assumes this sound level is A-weighted decibels. The procedure for taking measurements is not specified.

ANSI/ASA S1.1, definition 3.13, defines “maximum sound level” as the “Greatest frequency-weighted and exponential-time-weighted sound level within a stated time interval. Unit, decibel (dB); abbreviation for F time weighting and A frequency weighting, for example, is MXFA; symbol L_{AFmx} (or C and S).^k The Fast, F, time constant is 1 second.

This is in contrast to L_{eq} , used extensively in the Appendix and the DEIR, which per ANSI/ASA S1.1 section 3.15, is “the time-averaged sound level; equivalent continuous sound level. Ten times the logarithm to the base ten of the ratio of time-mean-square frequency-weighted sound pressure signal, during a stated time interval T , to the square of the reference value for sound pressure. Unit, decibel (dB); respective abbreviations, TAV and TEQ; examples of symbols, L_{AT} and L_{AeqT} , where the subscript A would be replaced if another frequency weighting is applied.”

For time varying noise, a 1 second average sound level is higher than a maximum sound level over a longer time period, such as 1 minute, 15 minutes, or 1 hour. As such, many of the levels presented in the Appendix using the L_{AeqT} metric for the 1, 15, and 60 minute time periods will exceed the 1 second L_{AFmx} levels, and so any finding of less than significant impact is incorrect.

7. Arbitrary Selection of Construction Noise Threshold

Page 36 of the Appendix notes there are no noise level thresholds for construction activities in the SJMC. It then proposes:

“As an alternative, this analysis uses the noise limits established by the Federal Transit Administration (FTA) to identify the potential for impacts due to substantial temporary construction noise. The FTA identifies construction noise limits in the Transit Noise and Vibration Impact Assessment Manual.¹ During daytime hours, an exterior threshold of 80 dBA Leq shall be enforced at residential land uses, an exterior threshold of 85 dBA Leq shall be enforced at commercial land uses, and 90 dBA Leq shall be enforced at industrial land uses.”

When a criteria is not included in a code, any criteria that does address any noise limits for the activity or zoning is the default. In this case it would be the criteria for zoning. The proposed construction noise limits appear to an attempt for carte blanche in regards to construction noise. Table 2, Typical Noise Levels in the Environment, shows how loud these proposed limits can be.

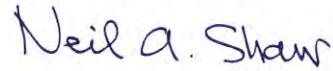
^j San Jose Municipal Code Volume I with 2024 Supplement 43 Update 4, and current through November 28, 2024

^k ANSI/ASA S1.1 -2013 (R2020) Acoustical Terminology, 3 Levels,

CONCLUSION

Due to the errors in the analysis as described above, the conclusion that the project impact is less than significant is unsupported.

Sincerely,
MENLO SCIENTIFIC ACOUSTICS, INC.

A handwritten signature in blue ink that reads "Neil A. Shaw".

Neil A. Shaw, FASA, FAES

NAS:sk

RESUME - NEIL A. SHAW

- Education: University of California, Los Angeles
B. S. Engineering, 1977, cum laude
M. S. Engineering, 1977
- Cooper Union, New York, 1968 - 1970
- Honors: Kenward S. Oliphant Memorial Fellowship in Acoustical Engineering (awarded by Consulting Engineers Association of California)
Tau Beta Pi
- Experience: Menlo Scientific Acoustics, Inc., Topanga
- Designer and manager for acoustic design projects including audio-visual systems, sound reinforcement systems, television and radio production systems, architectural room acoustics, electromagnetic compatibility system design and criteria development, electroacoustic and electronic signal processing equipment product performance criteria development, product design and development, environmental noise surveys and analysis, noise and vibrations control, sound isolation, and machine noise control.
1992 to present.
Principal.
- University of Southern California, Thornton School of Music
2008 - 2010.
- Southern California Institute of Architecture, Los Angeles
2003.
- WEAL, Santa Monica
- Design and construction services for sound reinforcement systems, television systems, A/V systems, paging systems, and masking noise systems for various production facilities, convention centers, airport terminals, auditoriums, places of worship, concert halls, athletic facilities, courtrooms, multipurpose rooms, gymnasiums, museums, banquet halls, lecture rooms and other facilities. Transportation ambient noise surveys and analysis, construction site noise measurements, and field STC and NIC measurements per ASTM E 336-84. Lead member of team to install, run and maintain database manager computer software for company projects and clients. Part of design, implementation and enhancement team for computer controlled laboratory data acquisition and processing for laboratory tests performed per ASTM E 90-85 and ASTM C 423-84a.
1975 to 1992.
- Aero-acoustics Laboratory, UCLA
- Responsibilities include computer programming, aero-acoustic measurements, acoustic measurements, database search and statistical processing, A/D anti-aliasing filter design and prototyping, multi-channel data acquisition and processing, post processing and display.
1978 to 1984.

Affiliations:

Fellow, Acoustical Society of America
Chairman, Los Angeles Chapter, 1991 to 2001.
Organizer and Co-Chair, Joint ASA/ASJ meeting 1996, Auralization Special Session.
Organizer and Chair, ASA meeting, 1997, Engineering Acoustics Special Session.
Organizer and Co-Chair, ASA meeting, 1999, Engineering Acoustics Special Session.
Organizer and Co-Chair, ASA meeting, 2000, Student Loudspeaker Design Competition.
Chairman, ASA meeting, 2001, Architectural Acoustics Modeling and Imaging Special Session.
Organizer and Chair, ASA meeting, 2001, Architectural Acoustics Cruise Ship Acoustics Special Session.
Tutorial on Architectural Acoustics, Joint ASA/ICA/MCA Cancun meeting, December 2002.
Invited Paper, November 2003 ASA meeting, "Sound Quality and Loudspeakers," Special Session on Sound Quality - When Sound is the Essential Quality.
Organizer and Co-Chair, ASA meeting, 2004, Special Session on the Bell Laboratories and Acoustics.
Invited Paper, June 2004 ASA meeting, "Textbooks on Acoustics," On the Occasion of His 90th Birthday, To Honor the Contributions of Leo L. Beranek to Acoustics and Teaching Special Session sponsored by all the Technical Committees and ASA Committees.
Chairman, June 2004 ASA meeting, General Topics in Architectural Acoustics
Invited Paper, June 2005 ASA meeting, "Barnum Hall - The Continuing Renovation of a Streamline Moderne Theater," Special Session on Preserving Acoustical Integrity in the Course of Renovation.
Invited Paper, Winter 2007 ASA meeting, "Sound Systems for Large Scale Venues," with John Monitto, Special session on Sound Systems in Large Rooms and Stadia
Member, Technical Committee on Architectural Acoustics, 1996 - 2010
Member, Technical Committee on Engineering Acoustics, 1998 - 2010
Member, Technical Committee on Physical Acoustics, 2000 - 2010
Member, Books+ Committee, 1996 - present

Fellow, Audio Engineering Society
Member, Technical Committee on Acoustics and Sound Reinforcement, 1988 to 2005.
Chairman, Large Array Systems Session and Special JAES issue, 1987
Chairman, Workshop on Auralization, 1993
Co-Chairman, Workshop on Weather-Related Issues in Outdoor Sound Reinforcement, 1998
Tutorial on Loudness, Los Angeles Chapter, March 2003

Senior Member, Institute of Electrical and Electronic Engineers

Member, Society of Motion Picture and Television Engineers
Member, Standards Community TC-20F Film, TC-20F-30 WG Film Audio, TC-20F-40 Theatrical Projection, ST-SG Theater B-chain
1990 to present.

Member, Institute of Noise Control Engineering

Licenses: Electrical Contractor's License, CA #342710
EIT, CA #37673

Publications: Preface to the Reprint Edition, "Principles and Applications of Room Acoustics", Lothar Cremer and Helmut A. Muller (translated by Theodore J. Shultz), Peninsula Publishers, Los Altos Hills, CA, reprint edition, to be re-published.

Patent reviews, Journal of the Acoustical Society of America, 2004 -present.

Shaw, Neil A, "Up in Knudsen's Attic: Some Private papers of Vern O. Knudsen," Acoustics Today, 7(1), 29ff, January 2011

Shaw, Neil A., "Seeing, Hearing & Listening - Part II", Live Sound International, 17(4), 58ff, April 2008

Shaw, Neil A., "Seeing, Hearing & Listening - Part I", Live Sound International, 17(3), 12ff, March 2008

Shaw, Neil A., "The Pre-history and Early History of Loudspeakers", part 4 of 4, Live Sound International, 16(8), 66ff, August 2007

Shaw, Neil A., "The Pre-history and Early History of Loudspeakers", part 3 of 4, Live Sound International, 16(7), 54ff, July 2007

Shaw, Neil A., "The Pre-history and Early History of Loudspeakers", part 2 of 4, Live Sound International, 15(12), 12ff, December 2006

Shaw, Neil A., "An Early History of Modern Power Amplifiers," Live Sound International, 15(2), 10ff, February 2006

Shaw, Neil A., "The Pre-history and Early History of Loudspeakers", part 1 of 4, Live Sound International, 14(4), 38ff, November 2005

"Audio" monthly column, Club System International magazine, 2000 - 2003.

Shaw, Neil A., "The Pre-History and Early History of Loudspeakers", Sound and Communications, 41(4), 118ff, April 1995.

Shaw, Neil A., "Acoustical Design and Auralization", Sound and Communications, 40(8), 44ff, August 1994.

Shaw, Neil A., Klapholz, Jesse and Gander, Mark R., "Books and Acoustics, Especially Wallace Clement Sabine's Collected Papers on Acoustics," Proceedings of the Sabine Centennial Symposium, Acoustical Society of America, Cambridge, MA, June 1994.

Shaw, Neil A., "Digital Delays, Part Three - Real World Applications for Real World Delay Units," Sound and Communications, 39(10), 16ff, October 1993.

Shaw, Neil A., "Digital Delays, Part Two - Testing Specific Products for Specific Uses," Sound and Communications, 39(5), 62ff, May 1993.

Shaw, Neil A., "Digital Delays, Part One - Reviewing the Basics," Sound and Communications, 393(4), 96ff, March 1993.

Meecham, W. C. and Shaw, Neil, "Increase in Disease Mortality Rates Due to Aircraft Noise", Proceedings of the International Symposium on Noise and Disease, Berlin, 1991

Meecham, W. C. and Shaw, Neil, "Increase in Disease Mortality Rates Due to Aircraft Noise," Proceedings of the 5th International Congress on Noise as a Public Health Problem, Stockholm, 351-356, 1988

Shaw, Neil A., "A Historical Profile: Stereophonic Sound Systems, Part Two," Sound and Communications, 33(7), 24ff, July 1987.

Shaw, Neil A., "A Historical Profile: Stereophonic Sound Systems, Part One," Sound and Communications, 33(6), 22ff, June 1987.

Shaw, Neil A., "Exhibit Hall and Theater Sound Reinforcement Systems at the Metro Toronto Convention Center," Proceedings 12th International Congress of Acoustics, E9-5.1 - E9-5.2, 1986.

Meecham, W. C. and N. A. Shaw, "Jet Plane Noise Effects on Mortality Rates," Proceedings Internoise 86 Progress in Noise Control, Volume II, 1451-1455, 1986.

Shaw, N. A., "Effects of Jet Noise on Mortality Rates," Los Angeles County Department of Health, The Effects of Aircraft Noise on Health, June, 1981

Meecham, W. C. and N. A. Shaw, "Effects of Jet Noise On Mortality Rates," British Journal of Audiology, 13, 77-80, 1979.

Book Reviews:

"Acoustical Engineering," Harry F. Olson - Journal of the Audio Engineering Society, Vol. 40, No. 5, May 1992, Sound and Communications, Vol. 38, No. 4, April 27, 1992.

"Concert Sound - Tours, Technologies and Techniques," David Trubitt - Journal of the Audio Engineering Society.

"Hearing - An Introduction to Psychological and Physiological Acoustics," Stanley A. Gelfand - Sound and Communications, Vol. 37, No. 3, March 22, 1991.

"Room Acoustics," Henrich Kuttruff - Sound and Communications, Vol. 38, No. 2, February 28, 1992.

"The Science of Sound," Thomas D. Rossing - Sound and Communications, Vol. 37, No. 10, October 22, 1991.

"AIP Handbook of Condenser Microphones," George S. K. Wong and Tony F. W. Embleton, Editors - Journal of the Audio Engineering Society, Vol. 43, No. 6, June 1995.

"The ASA Edition of Speech and Hearing in Communication", Harvey Fletcher - Sound and Communication, Vol. 41, No. 9, September 25, 1995.

"The Nature and Technology of Acoustic Space", Mikio Tohyama, Hideo Suzuki and Yoichi Ando - Journal of the Audio Engineering Society, Vol. 44, No. 3, March 1996.

"Concert and Opera Halls - How They Sound", Leo Beranek - Journal of the Audio Engineering Society, Vol. 44, No. 9, September 1996.

"Acoustics and Noise Control Handbook for Architects and Builders", Leland K. Irvine and Roy L. Richards - Journal of the Audio Engineering Society, Vol. 46, No. 5, May 1998.

"Encyclopedia of Acoustics", Edited by Malcolm J. Crocker - Journal of the Audio Engineering Society, Vol. 46, No. 9, September 1998.

"The New Stereo Soundbook, Ron Streicher and Alton Everest - Journal of the Acoustical Society of America, Vol. 105, No. 6, June 1999.

"Introduction to Electroacoustics and Audio Amplifier Design," W. Marshall Leach, Jr. - Journal of the Audio Engineering Society, Vol. 47, No. 7/8, July/August 1999, Sound and Communications, Vol. 45, No. 9, September 20, 1999.

"Architectural Acoustics - Principles and Design," Madan Mehta, Jim Johnson, and Jorge Rocafort - Journal of the Audio Engineering Society, Vol. 47, No. 10, October 1999.

"Architectural Acoustics: Blending Sound Sources, Sound Fields, and Listening," Yoichi Ando - Journal of the Audio Engineering Society, Vol. 48, No. 1/2, January/February 2000.

"Fundamental of Physical Acoustics," David T. Blackstock - Journal of the Audio Engineering Society, Vol. 48, No. 9, September 2000.

"The Science and Applications of Acoustics," Daniel R. Raichel - Journal of the Audio Engineering Society, Vol. 48, No. 10, October 2000.

"Sounds of Our Times," Robert T. Beyer - Journal of the Audio Engineering Society, Vol. 48, No. 11, November 2000.

"Acoustics: Basic Physics, Theory and Methods," Paul Filippi, Dominique Habalt, Jean-Pierre Lefebvre and Aime Bergassoli - Journal of the Audio Engineering Society, Vol. 49, No. 1+2, January/February 2001.

"Active Noise Control Primer," Scott D. Snyder - Journal of the Audio Engineering Society, Vol. 49, No. 5, May 2001.

"The Microphone Book," John Eargle - Sound & Communications, November 2001.

"Computer Speech Recognition, Compression, Synthesis," Manfred R. Schroeder - Journal of the Audio Engineering Society, Vol. 49, No. 12, December 2001.

"Audio Engineering For Sound Reinforcement," John Eargle and Chris Foreman - Journal of the Audio Engineering Society. Vol. 50, No. 12,

December 2002.

“Pro Audio Reference,” Dennis Bohn - Journal of the Audio Engineering Society, Vol. 51, No. 7/8, July/August 2003.

“Concert Halls and Opera Houses - Music, Acoustics, and Architecture,” Leo L. Beranek - Journal of the Audio Engineering Society, Vol. 52, No. 5, May 2004

“Acoustic Absorbers and Diffusers - Theory, Design and Application,” Trevor J. Cox and Peter D’Antonio - Journal of the Audio Engineering Society, Volume 53, No. 10, October 2005

“Formulas of Acoustics,” F. P. Mechel - Journal of the Audio Engineering Society, Volume 53, No. 12, December 2005

“Communication Acoustics,” Jens Blauert (editor) - Journal of the Audio Engineering Society, Volume 54, No. 1/2, January/February 2006

“Acoustics and Psychoacoustics,” David M. Howard and Jamie Angus - Journal of the Audio Engineering Society, Volume 54, No. 11, November 2006

“Pro Audio Reference,” Second Edition, Dennis Bohn, Journal of the Audio Engineering Society - Journal of the Audio Engineering Society, Volume 54, No. 4, April 2007

“Worship, Acoustics, and Architecture,” Ettore Cirillo and Francesco Martellotta - Journal of the Audio Engineering Society, Journal of the Audio Engineering Society, Volume 55, No. 11, November 2007

“Sound FX Unlocking the Creative Potential of Recording Studio Effects,” Alexander U. Case - Journal of the Audio Engineering Society, Volume 55, No. 12, December 2007

“Surround Sound Up and Running,” Tomlinson Holman - Journal of the Audio Engineering Society, Volume 56, No. 9, September 2008

“Sound Reproduction Loudspeakers and Rooms,” Floyd E. Toole - Journal of the Audio Engineering Society, Volume 57, No. 1/2, January/February 2009

“Handbook for Sound Engineers,” 4th Edition, Glenn Ballou - Journal of the Audio Engineering Society, Volume 57, No. 7/8, July/August 2009

“Acoustics and the Performance of Music Manual for Acousticians, Audio Engineers, Musicians, Architects and Musical Instrument Makers,” 5th Edition Jürgen Meyer (translated by Uwe Hanson) - Journal of the Audio Engineering Society, Volume 58, No. 3, March 2010

“Sound for Film and Television” 3rd Edition, Tomlinson Holman - Journal of the Audio Engineering Society, Volume 58, No. 11, November 2010

“The Acoustics of Performance Halls Spaces for Music from Carnegie Hall to the Hollywood Bowl,” J. Christopher Jaffe - Journal of the Audio Engineering Society, Volume 59, No. 4, April 2011

“Acoustics and Audio Technology,” Mendel Kleiner - Journal of the Audio Engineering Society, to be published

“Grounds for Grounding,” Elya B. Joffe and Kai-Sang Lock - Journal of the Audio Engineering Society, to be published

Selected Product Development Projects - Neil A. Shaw

Aura Systems	1992 - 2005 Technical support for audio projects using inherently shielded neodymium speakers.
Peavey	1995 - 1997 Loudspeaker engineering for professional woofers and compression drivers, out-sourcing of electronics and speaker manufacturing, joint venture liaison.
Armstrong World Industries	1999 - 2002 Conception and product definition for active acoustic initiative. Product definition and development of ceiling tile speaker, and other projects.
Microsoft	1999 - 2000 Headset and headset element design for voice recognition product.
Cisco	1999 - 2000 Telephone and speaker-phone design for Internet telephone.
Intel	2000 Internet appliance sound system product
RPG	2001 - 2020 Technical and marketing support for this vendor of acoustical devices for architectural spaces.
Bohlender-Graebener	2001 - 2004 Technical support and loudspeaker engineering for planar diaphragm loudspeaker products.
Johns Manville	2002 Strategic product and market research and analysis.
Tri-path	2002 - 2006 Technical support and system engineering for digital audio power amplifiers.
Extron	2002 - 2003 Technical and material support for loudspeaker development and research.
Microsoft	2003 - 2006 Anechoic chamber design. Electroacoustic product testing protocol development.
University of Illinois	2008 - 2009 Transducer and power amplifier design and selection for food industry processing equipment.
Microsoft	2008 - 2009 Anechoic chamber design. Electroacoustic product testing protocol development.
KLA-Tencor	2010 Vibration isolation engineering for scanning electron microscope semiconductor wafer inspection equipment.
Microsoft	2011 Acoustic measurement and analysis for Kinect manufacturing end-of-line 100% test chamber.
ETC	2011 Noise analysis and noise control for electrically operated variable speed theater hoist equipment.

Selected Projects - Neil A. Shaw:

Arcadia City Council Chambers	Arcadia, California
Grossmont Civic Auditorium	El Cajon, California
Center for Faith and Life, Luther College	Decorah, Iowa
Concert Hall, University of Kentucky	Lexington, Kentucky
Swimming Pool, University of Riyadh	Riyad, Saudi Arabia
Oakland-Piedmont Municipal Courts	Oakland, California
2500 seat Auditorium, 700 seat Auditorium, 250 seat Library Hall, Mosque and Minaret, Gymnasium, Fine Arts Recital Hall, 100 seat Museum Hall, 500 seat Lecture Rooms, 250 seat Lecture Rooms, 1000 seat Banquet Hall, 200 seat Meeting Rooms, 100 seat Meeting Rooms, University of Riyadh	Riyad, Saudi Arabia
Des Moines Civic Auditorium	Des Moines, Iowa
California School For the Blind	Hayward, California
South Coast Air Quality Management District Hearing Room	El Monte, California
First United Methodist Church	Santa Monica, California
George R. Moscone Convention Center	San Francisco, California
H. J. Kaiser Convention Center	Oakland, California
Carson Community Center	Carson, California
LAX Terminal One	Los Angeles, California
Crocker Bank Auditorium	Los Angeles, California
Wilshire Auditorium, Fullerton College	Fullerton, California
Salt Palace Convention Center Expansion	Salt Lake City, Utah
Metro Toronto Convention Center and Theater	Toronto, Ontario
Orpheum Theater Restoration	Davenport, Iowa
Athanaeum, Claremont College	Claremont, California
San Jose Federal Office Building	San Jose, California
Fairmont Hotel	San Jose, California
LAX Terminal Five	Los Angeles, California
First Presbyterian Church	Upland, California
Royal Saudi Air Force Hush Houses	Saudi Arabia
NCO Training Facility, March AFB	Riverside, California
Veterans Administration Out Patient Clinic	Los Angeles, California
Lied Center for the Performing Arts, University of Nebraska	Lincoln, Nebraska
MaMaison Hotel	Los Angeles, California
Escondido City Council Chambers	Escondido, California
Mercy Hospital	San Diego, California
Mercy Hospital	Sacramento, California
Jain Bhavan Worship Center	Santa Ana, California
Ojai Valley Inn	Ojai, California
Simon Wiesenthal Center and Holocaust Museum	Los Angeles, California
New Otani Hotel	Los Angeles, California
Oceanside City Council Chambers	Oceanside, California
Santa Monica Beach Hotel	Santa Monica, California
Greenwood Racetrack	Toronto, Ontario
Woodbine Racetrack	Toronto, Ontario
Mohawk Racetrack	Campbellville, Ontario
Toyota Training Center	Torrance, California
Fresno Art Center	Fresno, California
McLaren Children's Center	Los Angeles, California

Lindbergh Field West Terminal Expansion
 Richard M. Nixon Presidential Library
 Carnation Headquarters
 Los Angeles County Bar Association
 Los Angeles Federal Office Building
 Intercontinental Hotel
 Lake Avenue Congregational Church
 Hewlett Packard Presentation Center
 Dance Recital Hall and Auditorium,
 California State University
 Inyo County Superior Court
 Adele Platt Conference Center,
 City of Hope Medical Center
 Los Angeles County Emergency Operation Center
 Antonio B Won Pat International Airport
 Temple Adat Sholam
 Sound Stage 29/30, Paramount Pictures
 Executive Screening Room, Theater,
 Dubbing Theater, Metro-Goldwyn-Mayer
 Lakeview Terrace Rehabilitation
 Facility, Phoenix House of Los Angeles
 Physiological Acoustics Research
 Facility, UCLA Medical Center
 Performing Arts Center
 Crystal Harmony, Crystal Cruise Lines
 Integrated Service Facility,
 NASA/Dryden Research Facility
 Theater, Metro-Goldwyn-Mayer
 Santa Ana Theater
 Sammy Davis Jr. Festival Plaza
 City Hall, Council Chamber
 Video Conference Facility, Sony Music
 Legend of the Seas, Royal Caribbean Cruise Lines
 Orange County Branch Library
 Screening Room, Warner Brothers Animation
 Screening Room, Turner Feature Animation
 Las Vegas Motor Speedway
 Large Screening Room, Metro-Goldwyn-Mayer
 Japanese American National Museum
 Carson City Courthouse
 St. Mel Parish Center
 Congregation Ner Tamid
 Old Town Temecula Streetscape
 Grandeur of the Seas, Royal Caribbean Cruise Lines
 Disney Magic, Disney Cruise Lines
 Coral Sky Amphitheater
 First Chinese Baptist Church
 St. Mark Coptic Orthodox Church
 C-17 Assembly Facility, Douglas Aircraft
 Division, The Boeing Corporation
 Crisci's Restaurant
 JamSync Studios
 New Standard Post
 Media Artists, Pty
 The Lobster

San Diego, California
 Yorba Linda, California
 Glendale, California
 Los Angeles, California
 Los Angeles, California
 Los Angeles, California
 Pasadena, California
 North Hollywood, California

Long Beach, California
 Independence, California

Duarte, California
 Los Angeles, California
 Tamuning, Guam
 Westwood, California
 Hollywood, California

Santa Monica, California

Lakeview Terrace, California

Westwood, California
 Lancaster, California
 Los Angeles, California

Edwards, California
 New York, New York
 Santa Ana, California
 Las Vegas, Nevada
 Santa Monica, California
 New York, New York
 Miami, Florida
 Aliso Viejo, California
 Glendale, California
 Glendale, California
 North Las Vegas, Nevada
 Santa Monica, California
 Los Angeles, California
 Carson City, Nevada
 Woodland Hills, California
 Rancho Palos Verdes, California
 Temecula, California
 Miami, Florida
 Orlando, Florida
 West Palm Beach, Florida
 Los Angeles, California
 Los Angeles, California

Long Beach, California
 Brooklyn, New York
 Nashville, Tennessee
 Hollywood, California
 Madras, India
 Santa Monica, California

International Rectifier
 Antelope Valley Courthouse
 Fe Bland Forum, Santa Barbara City College
 Arizona Humane Society
 Cartoon Network
 Santa Monica High School
 Malibu High School
 Barnum Hall Auditorium
 Sobrato High School
 Temple Beth El
 Sacramento East End Project
 Gold Circle Films
 Denver City Hall Extension
 Fullerton City Hall
 Union Station Improvement
 Intimate Theater, California State University
 San Diego Convention Center, Sails Pavilion
 Temple Shir Ha-Ma'A Lot
 United States Courthouse
 Department of Education Office Complex,
 State of California
 MGM Constellation Headquarters
 Ketchum Advertising
 Orange County Register
 28th Church of Christ, Scientist
 Temple Solel
 NT Audio Mixing and QC Rooms
 River Cats Restaurant
 Caltrans District 7 Headquarters
 1221 Ocean Avenue
 Memorial Assembly Hall
 City of Manhattan Beach Annex
 Twohy Building
 Widget Post Production
 1st Church of Christ, Scientist
 Sunrise Assisted Living
 Sunrise Assisted Living
 Sunrise Assisted Living
 Academy of Motion Picture Arts and
 Sciences Boardroom
 Getty Villa Outdoor Amphitheater
 Ressler Residence
 American Honda
 Community Baptist Church
 Bernard Hodes Agency
 Houston's Restaurant
 Café R&D
 Getty Center Auditorium
 Mid-City Police Station
 College of Humanities, Arts, and Social Sciences
 Instruction and Research Facility,
 University of California
 Genomics Research Facility,
 University of California
 Panasonic Hollywood Laboratory

Tijuana, Baja California, Mexico
 Lancaster, California
 Santa Barbara, California
 Phoenix, Arizona
 Glendale, California
 Santa Monica, California
 Malibu, California
 Santa Monica, California
 Morgan Hill, California
 Aliso Viejo, California
 Sacramento, California
 Beverly Hills, California
 Denver, Colorado
 Fullerton, California
 Los Angeles, California
 Los Angeles, California
 San Diego, California
 Irvine, California
 Fresno, California

Sacramento, California
 Century City, California
 Venice, California
 Santa Ana, California
 Westwood, California
 Escondido, California
 Santa Monica, California
 Sacramento, California
 Los Angeles, California
 Santa Monica, California
 Manhattan Beach, California
 Manhattan Beach, California
 San Jose, California
 Culver City, California
 Beverly Hills, California
 Pacific Palisades, California
 Santa Monica, California
 Woodland Hills, California

Beverly Hills, California
 Los Angeles, California
 Beverly Hills, California
 Torrance, California
 Manhattan Beach, California
 Marina Del Ray, California
 Santa Monica, California
 Newport Beach, California
 Los Angeles, California
 Los Angeles, California

Riverside, California

Riverside, California
 Universal City, California

Sports Spectrum Club	Pacific Palisades, California
Sunrise Assisted Living	Simi Valley, California
Rose Bowl	Pasadena, California
First Presbyterian Church	Santa Monica, California
Los Angeles Fire Department Headquarters	Los Angeles, California
New York City Transit No. 7 Line Extension	New York, New York
Los Angeles County Metropolitan Transportation Authority Goldline	Los Angeles, California
South Lawn Project, University of Virginia	Charlottesville, Virginia
Shangri-La Hotel	Santa Monica, California
Pacific Star, Princess Cruise Lines	Santa Clarita, California
Allied Post	Santa Monica, California
Jet Propulsion Laboratory von Karman Auditorium	Pasadena, California
Self Realization Fellowship	Los Angeles, California
Temple Beth Am	Los Angeles, California
Broome Library, California State University, Channel Islands	Camarillo, California
California High-Speed Train Project	State of California
Morongo Band of Mission Indians Administrative Complex	Banning, California
The Buddy Group	Irvine, California
Café R&D	Santa Monica, California
Club 7969	West Hollywood, California
Brent's Deli	Westlake Village, California
Santa Cruz County Criminal Justice Complex	Nogales, Arizona
Porto's Bakery	Burbank, California
Microsoft Hardware Group Audio Test Laboratories	Redmond, Washington
University of California, Irvine, Arts Building	Irvine, California
Los Angeles Unified School District High School No. 9	South Gate, California
Notre Dame High School	Sherman Oaks, California
St. Mark Presbyterian Church	Newport Beach, California
Fame Academy Poly High School	Sun Valley, California
FAA Sonic Boom Simulator (with the Pennsylvania State University)	State College, Pennsylvania
Metropolitan Transit District Hearing Room	Los Angeles, California
St. Peter and St. Paul Coptic Church	Santa Monica, California
Lifehouse Properties	Pacific Palisades, California
Wilson Well No.2	San Gabriel, California
Habitat for Humanity Lynwood Housing	Lynwood, California
Whole Foods Plaza	Malibu, California
Habitat for Humanity Burbank Housing	Burbank, California
The Cork	Los Angeles, California
Cove Way Residence	Beverly Hills, California
Habitat for Humanity Lawndale Housing	Lawndale, California
Forest Lawn Chapel	Cypress, California
Rodney Bay and Gros Islet Villages	St. Lucia
Panasonic Avionics	Lake Forest, California
Capitol Records	Hollywood, California
Art of Living Foundation	Los Angeles, California
Conexant Corporation	Newport Beach, California
University of California, Santa Barbara Faculty Center	Santa Barbara, California
Bill and Melinda Gates Foundation	Seattle, Washington
J Restaurant and Lounge	Los Angeles, California
Newcom	Santa Monica, California

American School in Vietnam	Hanoi, Vietnam
Apple Yellowstone Anechoic Chamber Facility	Cupertino, California
Barnum Hall Continuing Renovation	Santa Monica, California
Malibu High School Auditorium Renovation	Malibu, California
John Adams Middle School Auditorium Renovation	Santa Monica, California
Westminster Presbyterian Church	Newbury Park, California
American School in Bombay	Mumbai, India
Temple Judea	Tarzana, California
Holy Angel Church	San Marino, California
Kroc Institute for Peace and Justice	
University of San Diego	San Diego, California

7 June 2012

Response to Comment Letter C-7: Adams Broadwell (Dated May 2, 2024)**Response C-7.1:**

The commenter states that the comment letter is written on behalf of Silicon Valley Residents for Responsible Development to provide comments on the DEIR prepared for the Project. The commenter summarizes that the Project proposes demolition of existing residential and agricultural buildings and removal of 584 trees (261 ordinance-size trees and 323 non-ordinance size trees) for development of 1,472 residential units consisting of a mix of three-story townhomes and six- to seven-story apartment buildings, 18,965 square feet of general neighborhood retail space, a 2.5-acre public park, and the dedication of approximately 0.11 acres for the development of a domestic water well.

In response to the commenter, it is noted that this comment is identical to Comment C-3.1. Please refer to Response C-3.1.

Response C-7.2:

The commenter states that based on their review of the DEIR and all supporting documents, the DEIR fails to comply with the requirements of CEQA. Specifically, the commenter notes that the DEIR lacks an adequate environmental baseline, fails to disclose and analyze the Project's significant impacts, and fails to include substantial evidence supporting conclusions that mitigation measures will reduce to the Projects impacts to less than significant levels. The commenter notes that the City may not approve the Project until the DEIR is revised, and the aforementioned deficiencies are addressed.

In response to the commenter, it is noted that this comment is identical to Comment C-3.2. Please refer to Response C-3.2.

Response C-7.3:

The commenter states that the review of the DEIR and applicable documents was completed with the assistance of the biological resources' expert Scott Cashen, transportation expert Normal Marshall, and vibration expert Neil Shaw. The commenter also notes that the City must respond to the expert's comments separately and fully.

In response to the commenter, it is noted that this comment is identical to Comment C-3.3. Please refer to Response C-3.3.

Response C-7.4:

The commenter states that Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential environmental impacts associated with the Project's development. These include individuals who live and work in the City, the International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, as well as their members and their families. The commenter notes that some of these members

may also work on the Project itself and will be the first to be exposed to any health and safety hazards that exist on-site. Additionally, the commenter notes that environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses to expand in the region.

In response to the commenter, it is noted that this comment is identical to Comment C-3.4. Please refer to Response C-3.4.

Response C-7.5:

The commenter summarizes the legal background of CEQA and its two primary purposes, which include informing decision makers and the public about the potential significant environmental effects of a project, and requiring public agencies to avoid or reduce environmental damage when “feasible” by requiring the consideration of environmentally superior alternatives and the adoption of all feasible mitigation measures. The comment concludes with an explanation of the “abuse of discretion” standard applied to EIRs.

In response to the commenter, it is noted that this comment is identical to Comment C-3.5. Please refer to Response C-3.5.

Response C-7.6:

The commenter summarizes that the existing environmental setting is the starting point from which the environmental analysis should be conducted. The commenter states that the DEIR fails to accurately describe the Project’s environmental baseline in regard to the extent of wildlife that exists on the Project site, and the levels of ambient noise at the Project site. The commenter concludes that this results in an inaccurate assessment of the Project’s impacts to biological resources and noise.

In response to the commenter, it is noted that this comment is identical to Comment C-3.7. Please refer to Response C-3.7.

Response C-7.7:

The commenter notes that the DEIR fails to accurately disclose the environmental baseline conditions related to the Project’s biological impacts; specifically, the nature of existing wildlife on the Project site and notes that the DEIR lacks the necessary baseline needed to measure the Project’s environmental impacts.

In response to the commenter, it is noted that this comment is identical to Comment C-3.8. Please refer to Response C-3.8.

Response C-7.8:

The commenter defers to the assessment provided by biological resource expert Scott Cashen, who notes that, while the DEIR provides a list of plant species observed during site reconnaissance, it does not list the wildlife species that were observed during the surveys, nor

does it include a list of potential species that may occur in the Coyote Creek riparian corridor. The commenter states that this prevents any understanding of potential indirect impacts on existing wildlife species.

In response to the commenter, it is noted that this comment is identical to Comment C-3.9. Please refer to Response C-3.9.

Response C-7.9:

The commenter states that the necessary surveys to determine whether burrowing owls are present on the Project site are not included in Appendix D, the BRA, of the DEIR and instead it dismisses the potential presence of burrowing owls due to the absence of ground squirrel burrows. The commenter notes that this overlooks alternative nesting and roosting habitats, which could include debris piles that could support burrowing owl populations.

In response to the commenter, it is noted that this comment is identical to Comment C-3.10. Please refer to Response C-3.10.

Response C-7.10:

The commenter states that the DEIR dismisses the presence of Golden Eagles because the Project site does not provide the necessary habitat for Golden Eagles. The commenter defers to information provided by Scott Cashen who states that Appendix C, the Arborist Report and Tree Mitigation Memorandum, of the DEIR, prepared by HortScience | Bartlett Consulting, dated October 29, 2021, identifies several large trees at the Project site and that information from the CDFW supports that there is potential for Golden Eagle nesting and foraging within the Project area.

In response to the commenter, it is noted that this comment is identical to Comment C-3.3. Please refer to Response C-3.11.

Response C-7.11:

The commenter notes that the assertion made in the DEIR that the Crotch bumble bee is unlikely to occur at the Project site contradicts available evidence. The commenter refers to information provided by Scott Cashen, which indicates that recent occurrence records contradict this assertion and that CDFW guidelines contradict the assertion made in the DEIR, as well.

In response to the commenter, it is noted that this comment is identical to Comment C-3.12. Please refer to Response C-3.12.

Response C-7.12:

The commenter states that the DEIR's assertion that oak trees on the Project site are not part of a sensitive natural community is not correct. The commenter includes information from Scott Cashen, which suggests that the clustering of oak trees indicates a woodland classification and,

therefore, the DEIR's conclusion that the Project will not have a significant impact on sensitive natural communities is unsupported.

In response to the commenter, it is noted that this comment is identical to Comment C-3.13. Please refer to Response C-3.13.

Response C-7.13:

The commenter asserts that the DEIR's inadequate disclosure of existing wildlife and sensitive natural communities results in an unreliable baseline to evaluate potential environmental impacts.

In response to the commenter, it is noted that this comment is identical to Comment C-3.14. Please refer to Response C-3.14.

Response C-7.14:

The commenter notes that the DEIR fails to adequately describe the environmental baseline conditions regarding noise on the Project site. The commenter defers to information provided by Neil Shaw who identified shortcomings in the methodology used to calculate existing noise levels. These shortcomings include the lack of details regarding sound level meter settings, microphone height, equipment specifications, calibration records and the use of field calibrators. The commenter notes that, without this information, the data regarding existing noise levels is unverifiable.

In response to the commenter, it is noted that this comment is identical to Comment C-3.15. Please refer to Response C-3.15.

Response C-7.15:

The commenter first provides a summary of the requirements of CEQA as regards the disclosure of potentially significant impacts, the implementation of all feasible mitigation to reduce impacts to less than significant levels, and the basis for significance determinations. The commenter goes on to describe the requirement to include all information and address all subjects required by CEQA for EIRs, and that failure to do so is subject to a less deferential standard than the substantial evidence standard. Lastly, the commenter points out that even when the substantial evidence standard is applicable, courts are not required to uncritically rely on every study and analysis, and that inadequate or unsupported studies are entitled to no judicial deference. The commenter closes with an assertion that the DEIR fails to properly analyze, disclose, and mitigate the Project's impacts on biological resources, transportation, and noise.

In response to the commenter, it is noted that this comment is identical to Comment C-3.16. Please refer to Response C-3.16.

Response C-7.16:

The commenter reviewed the DEIR with the assistance of several third-party experts, including Scott Cashen, a biological resources expert. The commenter notes that it is Scott Cashen's opinion that the DEIR falls short in assessing the Project's impacts on biological resources (including wildlife resources and riparian habitat), and that the proposed mitigation measures are insufficient to address the potential adverse effects of the Project.

In response to the commenter, it is noted that this comment is identical to Comment C-3.17. Please refer to Response C-3.17.

Response C-7.17:

The commenter notes that the DEIR identifies a potentially significant impact on roosting bat habitat but asserts that the Project could have a significant impact on special-status bats beyond what is discussed in the DEIR. Additionally, the commenter argues that the Project could have an impact on the candidate species Crotch bumble bee, and that the DEIR did not identify or address this potentially significant impact.

In response to the commenter, it is noted that this comment is identical to Comment C-3.18. Please refer to Response C-3.18.

Response C-7.18:

The commenter, citing third-party expert Scott Cashen, notes the importance of considering the full extent of direct and indirect impacts on special-status bats, especially as regards the loss of habitat. Comment C-3.19 closes with an assertion that the DEIR fails to consider the impacts of evicting bats outside of the maternity reproductive season when bats are in hibernation.

In response to the commenter, it is noted that this comment is identical to Comment C-3.19. Please refer to Response C-3.19.

Response C-7.19:

The commenter, citing third-party expert Scott Cashen, notes that the DEIR fails to address and mitigate any potentially significant impacts on the Crotch bumble bee species, which is currently a candidate for listing under CESA. The commenter defers to information provided by Scott Cashen, who states that some of the ecological features inhabited by the Crotch Bumble Bee occur at the Project site. Mr. Cashen also notes that ground disturbance activities could destroy Crotch Bumblebee nests and remove floral resources needed to sustain a bee colony.

In response to the commenter, it is noted that this comment is identical to Comment C-3.20. Please refer to Response C-3.20.

Response C-7.20:

The commenter states that, based on Scott Cashen's analysis (see Comments C-7.8 through C-7.12 and Comments C-7.16 through C-7.19), the DEIR failed to support with substantial evidence

its conclusions concerning special-status bats and the Crotch bumble bee, and that a more comprehensive analysis is needed.

In response to the commenter, it is noted that this comment is identical to Comment C-3.21. Please refer to Response C-3.21.

Response C-7.21:

The commenter states that the DEIR's conclusions pertaining to whether the implementation of the Project would impede the use of native wildlife nursery sites, are inconsistent with other determinations made in the DEIR, specifically pertaining to the determination that the Project site could support nesting birds protected by the Migratory Bird Treaty Act, and that it could contain suitable roosting habitat for four special status bat species. Mr. Cashen asserts that bird nests and bat roosts qualify as wildlife nursery sites and that the loss of these nursery sites is a potentially significant impact. The commenter notes that this means that the Project's potentially significant impacts to wildlife nursery sites remains unmitigated and potentially significant.

In response to the commenter, it is noted that this comment is identical to Comment C-3.22. Please refer to Response C-3.22.

Response C-7.22:

The commenter states that because the DEIR fails to identify and address the presence of wildlife nursery sites on the Project site, the DEIR's conclusion that impacts to wildlife nursery sites are less than significant is not supported by substantial evidence.

In response to the commenter, it is noted that this comment is identical to Comment C-3.23. Please refer to Response C-3.23.

Response C-7.23:

The commenter first notes that Coyote Creek, which is adjacent to the Project site, is designated critical habitat for the Central California Coast Steelhead. Additionally, the commenter notes that the riparian corridor along the banks of Coyote Creek is a sensitive natural community that includes wetlands. The commenter also cites comments provided by the CDFW in response to the NOP that noted the operation of the proposed well could result in diversion of water from Coyote Creek, which could alter surface or subsurface flow and riparian resources, and requested a hydrological analysis be prepared for the Project. The commenter notes that no hydrological analysis was prepared for the Project and asserts that the DEIR's conclusion that the proposed well would have a less than significant impact on riparian habitat and no impact on surface/subsurface flows is unsubstantiated.

In response to the commenter, it is noted that this comment is identical to Comment C-3.24. Please refer to Response C-3.24.

Response C-7.24:

The commenter states that the DEIR's conclusions that the Project will have a less than significant impact on riparian habitats is unsupported because there was no hydrology study conducted to determine the scope of impacts to Coyote Creek's riparian habitat. The comment applies specifically to hydrological impacts to the riparian habitat.

In response to the commenter, it is noted that this comment is identical to Comment C-3.25. Please refer to Response C-3.25.

Response C-7.25:

The commenter begins with an assertion that, in contrast to the analysis provided in the DEIR and the BRA (Appendix D of the DEIR), the Project will not comply with the 100-foot riparian setback requirement set forth in the City's Riparian Corridor Protection and Bird-Safe Design Policy. Based on this assertion, the commenter argues that compliance with the other applicable measures of the City's Riparian Corridor Protection and Bird-Safe Design Policy will not, by themselves, ensure a less than significant impact.

The commenter also notes that directing low-intensity exterior lighting downward and away from the riparian corridor to the greatest extent feasible (as required by the City's Riparian Corridor Protection and Bird-Safe Design Policy) only reduces "astronomical light pollution" (whereby stars and other celestial bodies are washed out by light that is either directed or reflected upward), but does not reduce ecological light pollution (artificial light that alters the natural patterns of light and dark in ecosystems) associated with light reflected off the ground, or from light pollution from indoor sources and vehicles.

In response to the commenter, it is noted that this comment is identical to Comment C-3.26. Please refer to Response C-3.26.

Response C-7.26:

The commenter notes that analysis provided by Scott Cashen indicates that the DEIR proposed mitigation measures, specifically MM BIO-1 and MM BIO-2 fail to address potentially significant impacts to nesting birds and roosting bats. The commenter specifies that MM BIO-1 fails to establish standards for nest searching techniques, minimum survey efforts, and the qualifications of the surveyors. The commenter questions that the estimated construction schedule has a start date within the nesting season and then spans over another four nesting seasons. The commenter adds that the proposed buffer sizes for active nests are smaller than those identified by the City's consultants in the BRA and that the DEIR does not provide evidence that MM BIO-1 will reduce impacts to a less than significant level.

In response to the commenter, it is noted that this comment is identical to Comment C-3.27. Please refer to Response C-3.27.

Response C-7.27:

The commenter states that MM BIO-2 does not require techniques that are necessary to identify bats that are roosting in concealed locations and fails to identify when required site surveys will take place in relation to construction activities or prescribe how the surveys will be conducted. The commenter additionally notes that MM BIO-2 does not include “soft felling” techniques and as such the mitigation measure fails to minimize potentially significant impacts on special status bat species.

In response to the commenter, it is noted that this comment is identical to Comment C-3.28. Please refer to Response C-3.28.

Response C-7.28:

The commenter states that neither MM BIO-1 nor MM BIO-2 adequately reduces the Project’s permanent impacts on the species habitat. The commenter defers to information provided by Scott Cashen who notes that habitat loss is the primary threat to most bird and bat populations. The commenter requests that these mitigation measures be revised to address permanent impacts to these species including the potential loss of suitable habitat.

In response to the commenter, it is noted that this comment is identical to Comment C-3.29. Please refer to Response C-3.29.

Response C-7.29:

The commenter states that Appendix P, Transportation Analysis, of the DEIR fails to accurately describe and address the Project’s transportation impacts. Specifically, the comment notes that the DEIR overestimates the efficacy of MM TR-1.1, which is attributed as having the most significant reduction in VMT. The comment includes analysis conducted by Norman Marshall that indicates the inclusion of a VTBCP will decrease participation due to the “burdensome nature of travel diaries”. Mr. Marshall states that this requirement is uncommon and has not been observed in other voluntary travel reduction programs anywhere in the United States. Additionally, Mr. Marshall indicates that providing information to residents or employers will not yield the projected 4 percent reduction as stated in the DEIR and that a more realistic projection of the participation rate is 10 percent with a VMT reduction of 0.4 percent. The comment concludes that for these reasons, the DEIR lacks substantial evidence to support the conclusion that the proposed mitigation measures will reduce transportation impacts to a less than significant level and that the DEIR should be revised to accurately disclose the Project’s VMT impacts and all feasible mitigation measures.

In response to the commenter, it is noted that this comment is identical to Comment C-3.30. Please refer to Response C-3.30.

Response C-7.30:

The commenter notes that the DEIR concludes that the Project will not increase hazards due to a geometric design and then defers to analysis provided by Mr. Marshall who indicates that the Project will result in hazards due to a dangerous signalized intersection that will result in traffic extending into the upstream intersection during the AM peak hour and will result in traffic blockages. The commenter then asserts that the DEIR analyze, disclose, and mitigate the risks described by Mr. Marshall.

In response to the commenter, it is noted that this comment is identical to Comment C-3.31. Please refer to Response C-3.31.

Response C-7.31:

The commenter asserts that the analysis provided by Neil Shaw indicates that the DEIR insufficiently analyzes the Projects noise impacts by failing to consider new sensitive receptors on the Project site. The commenter notes that the DEIR fails to account for noise impacts on new sensitive receptors that will be introduced as the Project progresses through its phased development process.

In response to the commenter, it is noted that this comment is identical to Comment C-3.32. Please refer to Response C-3.32.

Response C-7.32:

The commenter, citing third-party expert Neil Shaw, asserts that the proposed mitigation measure for construction noise impacts is inadequate. The commenter states that the noise barrier proposed in the DEIR is insufficient to reduce noise levels to acceptable levels due to its limited effectiveness, especially for upper floors of existing buildings. The commenter also claims that the DEIR underestimates construction noise levels by only considering the two loudest pieces of equipment operating concurrently, which further diminishes the effectiveness of the proposed mitigation measure.

In response to the commenter, it is noted that this comment is identical to Comment C-3.33. Please refer to Response C-3.33.

Response C-7.33:

The commenter asserts that the DEIR fails to establish construction noise level significance thresholds, as required by CEQA. The commenter expresses that the DEIR omits quantitative thresholds required by CEQA for noise levels. The commenter urges the City to revise the DEIR to include absolute noise limits and evaluate the impact of increased noise levels attributable to the Project's construction and operations.

In response to the commenter, it is noted that this comment is identical to Comment C-3.34. Please refer to Response C-3.34.

Response C-7.34:

The commenter states that the DEIR fails to adequately disclose, analyze and mitigate the Project's impact to public services in the City, specifically regarding the City's park resources. The commenter notes that since the Project is proposing to add new residents, it will be required to comply with the City's PDO and PIO. The commenter indicates that the DEIR incorrectly asserts that the proposed 2.5-acre park is sufficient to satisfy PDO and PIO requirements and does not require the construction of additional park space, but the 2.5-acre parkland dedication is less than 20 percent of what is required by the City's PDO and PIO. The commenter then states that the DEIR does not include discussion as to whether the public park will include features that will allow the Project to take advantage of Private Recreation Credits that may reduce required parkland obligations. The commenter concludes that because of the reasons previously stated, the DEIR's conclusion that the Project would result in no significant impact is not supported by substantial evidence.

In response to the commenter, it is noted that this comment is identical to Comment C-3.35. Please refer to Response C-3.35.

Response C-7.35:

The commenter states that the Project fails to comply with the City's IHO. Specifically, the commenter notes that the number of affordable housing units included in the Project is not consistent with the requirements of the IHO and that there is no indication that the Project will pay the required in-lieu fees to make up the difference between the number of affordable housing units included in the Project, and the number required by the IHO.

In response to the commenter, it is noted that this comment is identical to Comment C-3.36. Please refer to Response C-3.36.

Response C-7.36:

The commenter suggests that the proposed inclusionary housing units may not fully meet the standards discussed in the IHO. The commenter expresses concern that the affordable units deviate from market-rate units in terms of bedroom count and ratio, as the affordable options offer fewer variations. The commenter notes that the DEIR misses detailed information regarding the comparability of square footage between affordable and market-rate units.

In response to the commenter, it is noted that this comment is identical to Comment C-3.37. Please refer to Response C-3.37.

Response C-7.37:

The commenter raises concerns about the DEIR's lack of description regarding the Project's compliance with the IHO's "Partnership for Clustered Units" requirements. The commenter emphasizes the importance for the DEIR to address and analyze the Project's compliance to

specific criteria outlined in the ordinance, such as location, financing, and affordability for clustered rental affordable housing.

In response to the commenter, it is noted that this comment is identical to Comment C-3.38. Please refer to Response C-3.38.

Response C-7.38:

The commenter asserts that the City cannot approve the Project because it fails to meet the requirements outlined in the Vesting Tentative Subdivision Map and Planned Development Permit. The commenter discusses how the Project's impacts, particularly on transportation, noise, and biological resources, are not adequately disclosed, analyzed, or mitigated in the DEIR. The commenter contends that the Project will have an unacceptable negative effect on adjacent properties, as even insignificant impacts under CEQA can be deemed unacceptable.

In response to the commenter, it is noted that this comment is identical to Comment C-3.39. Please refer to Response C-3.39.

Response C-7.39:

The commenter raises concerns about inconsistencies between the Project's impacts and the Envision San José 2040 General Plan policies, specifically policies TR-1.1, TR-1.2, TR-1.4, TR-5.3, TR-9.1, TR-9.2, and TR-9.3. These include goals and policies related to reducing VMT and promoting alternative transportation modes. The commenter asserts that the DEIR inadequately addresses the Project's transportation impacts and suggests insufficient mitigation measures, thus undermining the City's efforts to promote sustainable transportation and mobility.

In response to the commenter, it is noted that this comment is identical to Comment C-3.40. Please refer to Response C-3.40.

Response C-7.40:

The commenter notes discrepancies between the DEIR's analysis and the Project's impacts with Envision San José 2040 General Plan policies regarding biological resources, specifically ER-2.1, ER-2.2, ER-2.3, ER-2.4, ER-2.5, ER-4.1, ER-4.4, and ER-5.2. The commenter states that the DEIR fails to address the Project's impacts on riparian corridors and special-status species, which does not align with several critical Envision San José 2040 General Plan goals and policies. The commenter notes that the Project fails to comply with riparian setback requirements and lacks sufficient mitigation measures for impacts on wildlife habitats. Overall, the commenter asserts that the DEIR's deficiencies undermine the City's efforts to preserve biodiversity and protect natural habitats.

In response to the commenter, it is noted that this comment is identical to Comment C-3.41. Please refer to Response C-3.41.

Response C-7.41:

The commenter highlights concerns about the DEIR's handling of noise impacts, asserting discrepancies with Envision San José 2040 General Plan policies, specifically EC-1.1, EC-1.2, EC-1.6, and EC-1.7. The commenter argues that the DEIR fails to adequately address noise standards for both interior and exterior levels. The commenter further states that MM NSE-1 is insufficient and potentially violate policies aimed at minimizing noise impacts on sensitive land uses. Overall, the commenter suggests that the DEIR's discussion of noise impacts may not align with key Envision San José 2040 General Plan goals.

In response to the commenter, it is noted that this comment is identical to Comment C-3.42. Please refer to Response C-3.42.

Response C-7.42:

The commenter notes that the Project's failure to comply with the IHO conflicts with Envision San José 2040 General Plan Policy H-2.1, which is aimed at promoting the production of affordable housing. The commenter suggests that these inconsistencies could hinder the City's ability to issue permits, as the Project may not align with applicable Envision San José 2040 General Plan policies.

In response to the commenter, it is noted that this comment is identical to Comment C-3.43. Please refer to Response C-3.43.

Response C-7.43:

The commenter states that the DEIR for the Project falls short of CEQA requirements due to insufficient analysis and mitigation of significant impacts. The commenter would like the DEIR to be revised and recirculated for further public review before approval. The commenter requests inclusion of their comments in the Project's record.

In response to the commenter, it is noted that this comment is identical to Comment C-3.44. Please refer to Response C-3.44.

Telahun, Bethelhem

From: cscoff@sbcglobal.net
Sent: Tuesday, March 26, 2024 9:06 AM
To: Telahun, Bethelhem
Subject: Trying To Protect Farmland In North San Jose, Ca.
Attachments: Screen Shot 2024-03-24 at 10.55.37 PM.png; Screen Shot 2024-03-24 at 10.56.54 PM.png

[External Email]

You don't often get email from cscoff@sbcglobal.net. [Learn why this is important](#)

Hi Bethelhem,

Your colleague Kora had forwarded your email to me. I would very much like to see the farmland between Coyote Creek, Montague Expwy, and Seely Ave. be protected. I had reached out to many different preservationist organizations to see if they can send out a call for support from their donor lists to possibly step in and purchase the land for preservation. Is there still time, for this to occur, or has the owners signed a binding agreement to accept the existing sale that is pending ?

Any thougths on all of this would be so welcome to receive.

Thank you so much Bethelhem, I've attached the letter and the destinations the letter was sent to below.

- Craig

----- Forwarded Message -----

From: cscoff@sbcglobal.net <cscoff@sbcglobal.net>
Cc: "info@landtrustscv.org" <info@landtrustscv.org>; "info@lta.org" <info@lta.org>; "jgarretson@openspaceauthority.org" <jgarretson@openspaceauthority.org>; "info@cafarmtrust.org" <info@cafarmtrust.org>; "kerry@cafarmlink.org" <kerry@cafarmlink.org>; "agri-culture@sbcglobal.net" <agri-culture@sbcglobal.net>; "cnps@cnps.org" <cnps@cnps.org>; "auduboncalifornia@audubon.org" <auduboncalifornia@audubon.org>; "info@canopy.org" <info@canopy.org>; "siliconvalleynorth@citizensclimatelobby.org" <siliconvalleynorth@citizensclimatelobby.org>; "info@ecoact.org" <info@ecoact.org>; "info@evols.org" <info@evols.org>; "info@friendsoftheriver.org" <info@friendsoftheriver.org>; "info@greenfoothills.org" <info@greenfoothills.org>; "abrownstevens@greenbelt.org" <abrownstevens@greenbelt.org>; "info@grpg.org" <info@grpg.org>; "post@openspacetrust.org" <post@openspacetrust.org>; "education@savedbynature.org" <education@savedbynature.org>; "redwoods@sempervirens.org" <redwoods@sempervirens.org>; "loma.prieta.chapter@sierraclub.org" <loma.prieta.chapter@sierraclub.org>; "nanderson@svlg.org" <nanderson@svlg.org>; "california@tnc.org" <california@tnc.org>; "info@wildlandsconservancy.org" <info@wildlandsconservancy.org>; "info@railstotrails.org" <info@railstotrails.org>; "info@tpl.org" <info@tpl.org>; "info@veggielution.org" <info@veggielution.org>; "brad@wildernesslandtrust.org" <brad@wildernesslandtrust.org>; "info@wildnet.org" <info@wildnet.org>
Sent: Monday, March 25, 2024 at 10:35:10 AM PDT
Subject: Trying To Protect Farmland In North San Jose, Ca.

Greetings To The Various Organizations Dedicated To Protecting Greenbelts, Rural & Farmland Property,

I have befriended, the caretaker of a stunningly beautiful 11 acre piece of still functioning farmland located at the corner of Montague Expwy & Coyote Creek in Northern San Jose. His two step sisters, are the heirs and current owners of this property, and both live out of State. There has been an agreement to sell this property to a developer, that has identified itself as the Seely Development Partnership, and the project proposal on file with the City of San Jose's Planning Department, has been given the file # PPC21 - 035 .

I had reached out to that department to ask if the agreement to sell is only ' oral ', or is it somehow legally binding, and I'm currently waiting to hear back from someone. The proposal calls for high density, yet pretty unaffordable housing. I believe this valley has enough land under pavement at this point, and more housing should be made available on properties that have already been paved over. This precious piece of what is a tragically dwindling roster of open space / farmland in Santa Clara County, I feel, would serve the public in a much more meaningful way, if it were to be saved and become some kind of ' community farm '. Perhaps with some kind of limited housing for people to work the farm, and benefit from the healthy work that gardening provides. I visualize perhaps the recently homeless, and or the recently incarcerated or people with limited learning issues (anyone invited to be a part of this ' community ' would have to be screened prior, of course). But this is just one idea as to make the preservation of this farmland even more attractive a scenario to the local community, as a jobs training, therapy of working the land type of project, to help expand a possible donor base to purchase the land).

I was also hoping that if some kind of ' carve out ' of the tax due on the purchase (to a lower tax rate), in exchange for a lower selling price because of it's continued preservation into perpetuity, might be feasible as well. I'm wanting to gather the interest and efforts, of as many like minded organizations as possible, who's shared mission statement is the preservation / protection of both rural and farmland. My hope is that if each organization, was able to reach out their respective donor list, that enough money could be raised, to purchase, the property straight away, or perhaps just the ' development ' rights, in exchange for a lower purchase price to keep it as open space / farmland.

All of this is not my area of expertise, and I have little idea of how and if a coalition to save this farmland can even come together, and if so, if it would actually be successful, but I figured the first step, is to make as many organizations as possible, aware of the threat of more destruction of beautiful open space, and the possibility to save this particular parcel of open space.

Thank you all so much, for your time and consideration. Your thoughts on what could be done, would be so great to receive.

- Craig S.
San Jose, Ca.

Attached are aerial images of the property in question.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Response to Comment Letter C-8: Craig Scoffone (Dated March 26, 2024)**Response C-8.1:**

The commenter expressed a desire to protect the farmland between Coyote Creek, Montague Expressway, and Seely Ave. They have contacted various preservationist organizations to seek support and potentially purchase the land for preservation. They are inquiring if there is still time for these efforts to proceed or if the landowners have already signed a binding agreement for the pending sale.

In response to the commenter, the City appreciates the information provided by the comment, which does not raise any issues regarding the adequacy of the DEIR. Therefore, no further response is necessary.

Response C-8.2:

The commenter contacted the San José Planning Department to confirm if the sale agreement is binding. They oppose high-density housing on the land and propose preserving it as a community farm, potentially for job training and therapy, and suggest tax incentives for preservation. They seek support from organizations to raise funds for this cause.

In response to the commenter, the City appreciates the information provided by the comment, which does not raise any issues regarding the adequacy of the DEIR. Therefore, no further response is necessary.

3.0 DEIR TEXT REVISIONS

3.1 Introduction

This section describes specific revisions to the text of the Seely Avenue Mixed-Use Project (“Project”) DEIR by errata to amplify and clarify material in the DEIR, as required by CEQA.

Changes are organized by section and page number, as the text appears in the DEIR. An explanation of the change, including a cross-reference to where it is located in the document, is described and presented in italics. Page numbers correspond to the page numbers of the DEIR. Strikethrough text (i.e., ~~striking through~~) indicates text removed from the DEIR. Underlined text (i.e., underlined) indicates text added to the DEIR. The revisions to the DEIR derive from two sources: (1) comments raised in one or more of the comment letters received by the City on the DEIR; and (2) staff-initiated changes that correct minor inaccuracies, typographical errors or to clarify material found in the DEIR subsequent to its publication and circulation. Staff-initiated changes are noted as such. None of the changes or clarifications presented in this chapter significantly alters the conclusions or findings of the DEIR that would necessitate recirculation.

3.1.1 TEXT REVISIONS

Table of Contents

Page x:

Appendix D ~~Biological Resources Evaluation~~ Analysis

ES 4 Summary of Significant Impacts and Mitigation Measures

Page xv

Table ES-1 Summary of Impacts and Mitigation Measures

<p>Impact BIO-1: Project construction, including the removal of vegetation, shrubs/trees, and structures, that would occur during the migratory bird nesting season could result in a significant impact to nesting bird species.</p>	<p>MM BIO-1:</p> <ul style="list-style-type: none"> • Avoidance Prior to the issuance of any tree removal, grading, building or demolition permits (whichever comes first), the project applicant shall schedule all construction activities to avoid the nesting season. The nesting season for most birds, including most raptors in the San Francisco Bay area, extends from February 1 through August 31 (inclusive). Construction activities include any site disturbance such as, but not limited to,
--	--

	<p>tree trimming or removal, demolition, grading, and trenching.</p> <ul style="list-style-type: none">● Nesting Bird Surveys: If construction activities cannot be scheduled to occur between September 1 and January 31, pre-construction surveys for nesting birds and raptors shall be completed by a qualified ornithologist or biologist to ensure that no nests shall be disturbed during project implementation. The survey shall be completed no more than 14 days prior to the initiation of construction activities during the early part of the breeding season (February 1 through April 30 August 31 inclusive), and no more than 30 days prior to the initiation these activities during the late part of the breeding season (May 1 through August 31 inclusive). During this survey, the qualified ornithologist/biologist shall inspect all suitable nesting habitat on the project site and within the zone of influence (the area immediately surrounding the Project site that supports suitable nesting habitat that could be impacted by the project due to visual or auditory disturbance associated with the removal of vegetation and construction activities scheduled to occur during the nesting season).● Buffer Zone: If an active nest is found, the qualified ornithologist/biologist shall determine an appropriately sized species-specific buffer around the nest in which no work will be allowed until the young have successfully fledged. In general, buffer sizes of 200 feet for raptors and 50 feet for other birds should suffice to prevent disturbance to birds nesting in the urban environment, but these buffer sizes may be increased or decreased, as appropriate, depending on the bird species and the level of disturbance anticipated near the nest. The construction contractor shall establish a construction free buffer zone around the nest as determined by the qualified ornithologist/biologist to
--	---

	<p>ensure that migratory bird and raptor nests shall not be disturbed during project construction. This buffer shall remain in place until such a time as the young have been determined (by a qualified ornithologist/biologist) to have fledged. Any birds that begin nesting amid construction activities shall be assumed to be habituated.</p> <ul style="list-style-type: none"> ● Reporting: Prior to the initiation of any tree removal, or approval of any grading or demolition permits (whichever occurs first), the qualified ornithologist/biologist shall submit a report indicating the results of the survey and any designated buffer zones to the satisfaction of the Director of the Planning, Building, and Code Enforcement or the Director’s designee.
--	--

Page xvii

Table ES-1 Summary of Impacts and Mitigation Measures

<p>Impact BIO-2: Project construction, including the removal of trees and building demolition could negatively impact roosting bat habitat if done during the maternity roosting season (May 1 to September 15).</p>	<p>MM BIO-2:</p> <ul style="list-style-type: none"> ● Avoidance: Prior to the issuance of any tree removal, grading, building or demolition permits (whichever comes first), <u>for all project activities planned in or adjacent to potential bat roosting habitat, a qualified biologist shall conduct daytime and evening acoustic surveys in addition to extensive visual surveys of potential habitat for special-status bats no more than 30 days prior to initiation of project activities.</u> ● <u>To ensure that special-status bats have left potential roosting refugia, work shall occur over the course of two days. On the first day, smaller limbs or items from the identified trees or structures shall be brushed back or modified in the late afternoon. This disturbance should cause any potential roosting bats to seek other roosts during their nighttime foraging. The remainder of the refugia item can then be further limbed or removed as needed on the second day as late</u>
---	--

	<p>in the afternoon as feasible. Comparable demolition techniques shall be used to dismantle occupied structures on the Project site. the Project applicant shall schedule all construction activities to avoid the bat reproductive season (generally considered May 1 through September 15, inclusive). Construction activities include any site disturbance such as, but not limited to, tree trimming or removal, demolition, grading, and trenching. If construction activities cannot be scheduled to occur between September 16 and April 30, a qualified bat specialist or wildlife biologist shall conduct site surveys to characterize bat utilization of roosting habitat on and immediately adjacent to the Project site and potential bat species present prior to construction.</p> <p>Based on the results of these initial surveys, one or more of the following shall occur:</p>
--	---

Page xxxi

Table ES-1 Summary of Impacts and Mitigation Measures

<p>Impact TR-1: The residential component of the project would generate VMT of 11.19 per capita, which would exceed the City’s relevant residential VMT threshold of 10.12 VMT per capita.</p>	<p>MM TR-1.1: Prior to the issuance of any demolition, grading and/or building permits, the Project applicant shall prepare project construction plans that illustrate the design of the Project site enhancements, and shall coordinate with the City Parks, Recreation, & Neighborhood Services, Department of Transportation, and the Department of Public Works to incorporate the following:</p> <ul style="list-style-type: none"> • Bike Access Improvements: Construct a Class II bike lane along the opposite side of Seely Ave (southbound direction) and Class IV bike lanes on the frontage along Montague Expressway Seely Avenue. Coordination with the City would be needed to implement these<u>this</u> non-frontage bicycle network improvements. • Pedestrian Network Improvements: Construct a new crosswalk on Seely Avenue and Americans with Disabilities Act (ADA) compliant curb ramps (off-site pedestrian improvements). The project shall provide a trail connection between Building B and the townhomes.
---	---

	<p>Clear pedestrian paths between the trail connections and the proposed on-site public park shall be provided. Implementation of these improvements would require coordination with the City of San José Department of Parks, Recreation & Neighborhood Services (SJPRNS) to provide a connection between the public park and the Coyote Creek trail. An on-site public access easement would also be required.</p>
--	---

Section 2.0, Project Description

2.5 Project-Related Approvals, Permits, and Clearances

Page 39-40:

The City is the Lead Agency with responsibility for approving the Project. Valley Water is a responsible agency with the responsibility for approving the encroachment permit for work near the Coyote Creek levee. This EIR will be relied upon for, but not limited to, the following Project-specific discretionary approvals necessary to implement the Project as proposed:

- Planned Development Zoning – City of San José
- Planned Development Permit – City of San José
- Vesting Tentative Subdivision Map – City of San José
- Public Works Clearances (Grading Permit, Public Improvement Permit, Construction Agreement) – City of San José
- Final Subdivision Map – City of San José
- Parcel Map – City of San José
- Building and Demolition Permits – City of San José
- Parkland Agreement – City of San José
- Affordable Housing Agreement – City of San José
- Site Management Plan - SCCDEH
- Encroachment Permit - Army Corps of Engineers, Santa Clara Valley Water ~~Agency~~ District
- Removal Action Plan - DTSC
- Well Permit – Valley Water
- Water Supply Permit – State Water Resources Control Board, Division of Drinking Water

Section 3.0, Environmental Setting, Impacts, and Mitigation

3.4.1.1 Regulatory Framework

Page 105:

Table 3-15 Envision San José 2040 Relevant Biological Resource Policies

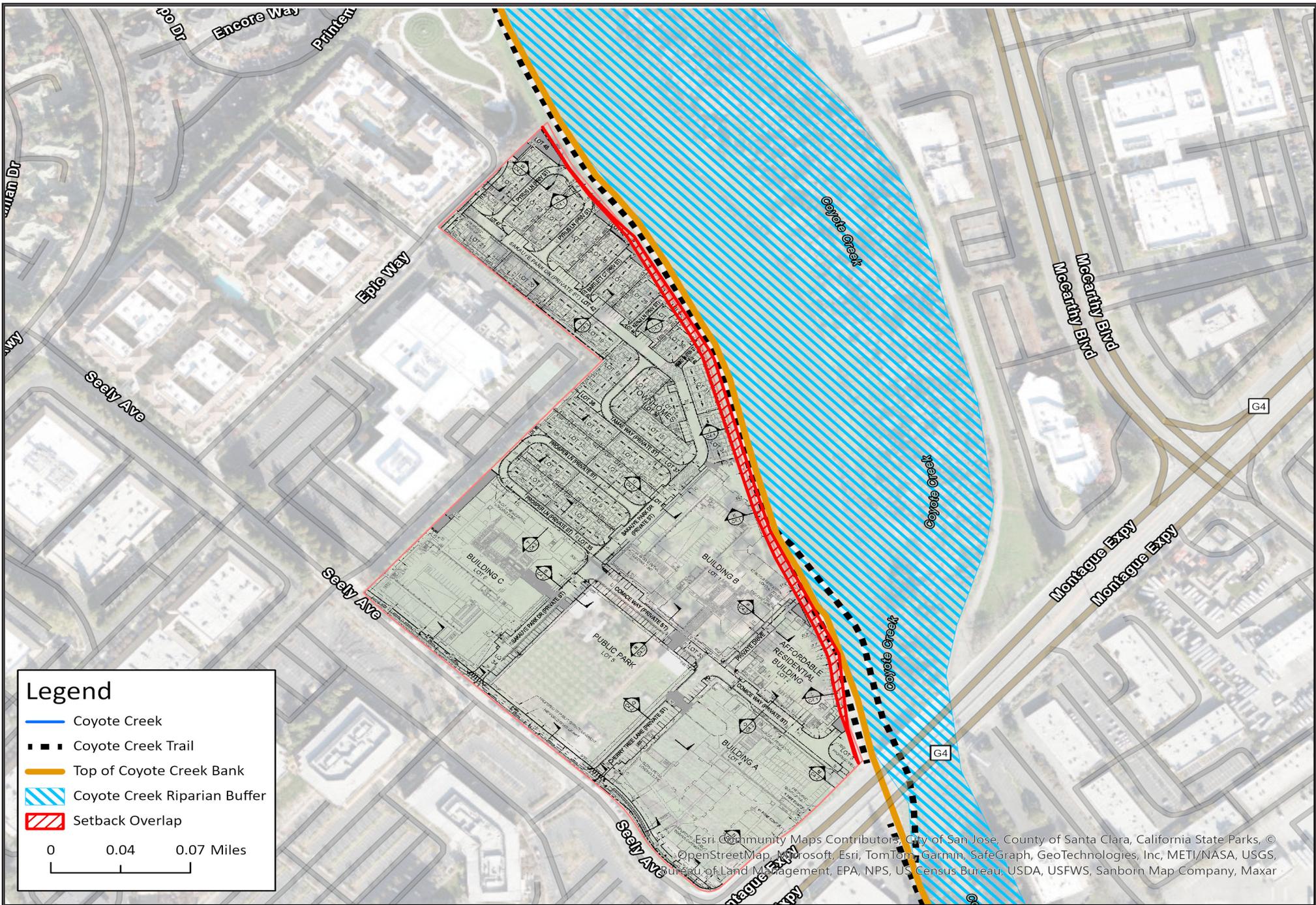
<u>Policy ER-2.4</u>	<u>When disturbances to riparian corridors cannot be avoided, implement appropriate measures to restore, and/or mitigate damage and allow for fish passage during construction.</u>
<u>Policy ER-2.5</u>	<u>Restore riparian habitat through native plant restoration and removal of nonnative/invasive plants along riparian corridors and adjacent areas.</u>

Source: San José, 2024.

3.4.2 Impacts and Mitigations

Page 114:

Figure 3-11 of the DEIR has been revised to be labeled as "Coyote Creek Riparian Corridor".



Coyote Creek Riparian Corridor

0 Seely Avenue Mixed-Use Project
Draft Environmental Impact Report

Figure
3-11

3.4.2.2 Project Impacts

Page 108 and 109, 4TH Paragraph

MM BIO-1 **Avoidance:** Prior to the issuance of any tree removal, grading, building or demolition permits (whichever comes first), the project applicant shall schedule all construction activities to avoid the nesting season. The nesting season for most birds, including most raptors in the San Francisco Bay area, extends from February 1 through September 15 (inclusive). Construction activities include any site disturbance such as, but not limited to, tree trimming or removal, demolition, grading, and trenching.

Nesting Bird Surveys: If construction activities cannot be scheduled to occur between September 16 and January 31, inclusive, pre-construction surveys for nesting birds and raptors shall be completed by a qualified ornithologist or biologist to ensure that no nests shall be disturbed during project implementation. The survey shall be completed no more than 14 days prior to the initiation of construction activities ~~during the early part of the breeding season (February 1 through April 30 August 31 inclusive), and no more than 30 days prior to the initiation these activities during the late part of the breeding season (May 1 through September 15 inclusive).~~ During this survey, the qualified ornithologist/biologist shall inspect all suitable nesting habitat on the project site and within the zone of influence (the area immediately surrounding the Project site that supports suitable nesting habitat that could be impacted by the project due to visual or auditory disturbance associated with the removal of vegetation and construction activities scheduled to occur during the nesting season).

Buffer Zone: If an active nest is found, the qualified ornithologist/biologist shall determine an appropriately sized species-specific buffer around the nest in which no work will be allowed until the young have successfully fledged. In general, buffer sizes of 200 feet for raptors and 50 feet for other birds should suffice to prevent disturbance to birds nesting in the urban environment, but these buffer sizes may be increased or decreased, as appropriate, depending on the bird species and the level of disturbance anticipated near the nest. The construction contractor shall establish a construction free buffer zone around the nest as determined by the qualified ornithologist/biologist to ensure that migratory bird and raptor nests shall not be disturbed during project construction. This buffer shall remain in place until such a time as the young have been determined (by a qualified ornithologist/biologist) to have fledged. Any birds that begin nesting amid construction activities shall be assumed to be habituated.

Reporting: Prior to the initiation of any tree removal, or approval of any grading or demolition permits (whichever occurs first), the qualified ornithologist/biologist shall submit a report indicating the results of the survey and any designated buffer zones to the satisfaction of the Director of the Planning, Building, and Code Enforcement or the Director's designee.

Page 109 and 110, 4TH Paragraph

MM BIO-2 **Avoidance:** Prior to the issuance of any tree removal, grading, building or demolition permits (whichever comes first), for all project activities planned in or adjacent to potential bat roosting habitat, a qualified biologist shall conduct daytime and evening acoustic surveys in addition to extensive visual surveys of potential habitat for special-status bats no more than 30 days prior to initiation of project activities.

To ensure that special-status bats have left potential roosting refugia, work shall occur over the course of two days. On the first day, smaller limbs or items from the identified trees or structures shall be brushed back or modified in the late afternoon. This disturbance should cause any potential roosting bats to seek other roosts during their nighttime foraging. The remainder of the refugia item can then be further limbed or removed as needed on the second day as late in the afternoon as feasible. Comparable demolition techniques shall be used to dismantle occupied structures on the Project site. the Project applicant shall schedule all construction activities to avoid the bat reproductive season (generally considered May 1 through September 15, inclusive). Construction activities include any site disturbance such as, but not limited to, tree trimming or removal, demolition, grading, and trenching. If construction activities cannot be scheduled to occur between September 16 and April 30, a qualified bat specialist or wildlife biologist shall conduct site surveys to characterize bat utilization of roosting habitat on and immediately adjacent to the Project site and potential bat species present prior to construction.

Based on the results of these initial surveys, one or more of the following shall occur:

No Detection: If it is determined that bats are not present on or adjacent to the Project site, no additional mitigation is required. If no bats are found roosting, bat exclusion devices will be installed to prevent bats from taking up occupancy of the vacant structures prior to the onset of construction.

Buffer Zone: If it is determined that bats are utilizing the Project site or adjacent trees and may be impacted by the Project, pre-construction

surveys shall be conducted within 50 feet of construction limits no more than 30 days prior to the start of construction. If, according to the bat specialist/wildlife biologist, no bats or bat signs are observed in the course of the pre-construction surveys, the qualified bat specialist /wildlife biologist shall determine if disturbance will jeopardize the roost (i.e., maternity, foraging, day, or night).

Roosting: If a single bat and/or only adult bats are roosting, removal of trees or structures may proceed after the bats have been safely excluded from the roost. Exclusion techniques shall be determined by the qualified bat specialist /wildlife biologist and would depend on roost type. If an active maternity roost is detected, avoidance is preferred. Work in the vicinity of the roost (buffer to be determined by qualified bat specialist or wildlife biologist) shall be postponed until the qualified bat specialist /wildlife biologist monitoring the roost determines that the young have fledged and are no longer dependent on the roost. The monitor shall ensure that all bats have left the area of disturbance prior to initiation of pruning and/or removal of trees that would disturb the roost. If a roost of bats is found in any of the existing structures, the bats shall be safely evicted under the direction of a qualified biologist. Eviction of bats will occur at night to decrease the likelihood of predation (compared to eviction during the day). Eviction will occur outside of the maternity season but will not occur during long periods of inclement or cold weather (as determined by the qualified biologist) when prey are not available or bats are in torpor. Eviction activities will be performed under the supervision of a qualified biologist.

Reporting: Prior to the issuance of any grading, building or demolition permits (whichever comes first), the qualified bat specialist/wildlife biologist shall submit a report indicating the results of the survey and any designated buffer zones to the satisfaction of the Director of the Planning, Building, and Code Enforcement or the Director's designee for the regionally known bat species with suitable on-site roosting habitat.

3.4.2.2 Project Impacts

Page 111, Threshold (c):

c) Would the Project have a substantial adverse effect on state or federally protected wetlands (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

The Project site includes partially developed land and is situated within an urban neighborhood, surrounded by developed/disturbed land uses to the north, west, and south, including existing

buildings, roadways, and paved parking lots. Although Coyote Creek is located to the east of the Project site, the biological constraints analysis prepared for the Project site indicated that state or federally protected wetlands do not occur within the boundaries of the Project site. Additionally, the installation and use of the proposed well would not draw water from or have any impact on surface or subsurface flow in/from Coyote Creek (see **Section 3.10**)²⁸. Therefore, the Project development would not have a substantial adverse effect on State or federally protected wetlands. **Less Than Significant Impact.**

²⁸ Scott Lewis, P.G, Luhdorff & Scalmanini Consulting Engineers. Email correspondence. RE: NOP Comments- Seely Ave EIR. November 2, 2022.

3.8.1.1 Regulatory Framework

Page 150, 2nd Paragraph:

Senate Bill 375 – California’s Regional Transportation and Land Use Planning Efforts

SB 375, signed in August 2008, requires sustainable community strategies (SCS) to be included in regional transportation plans to reduce emissions of GHGs. The MTC and ABAG adopted an SCS in July 2013 that meets GHG reduction targets. The Plan Bay Area is the SCS document for the Bay Area, which is a long-range plan that addresses climate protection, housing, healthy and safe communities, open space and agricultural preservation, equitable access, economic vitality, and transportation system effectiveness within the San Francisco Bay region (MTC 2013). The document is updated every four years, so the MTC and ABAG are currently developing the Plan Bay Area ~~2040~~ 2050.

3.9.2.2 Project Impacts

Page 167, 5th Paragraph

Mitigation Measures

- MM HAZ-1.1** Prior to the issuance of any grading, demolition, or building permits (whichever occurs first), the project applicant shall obtain proper permits from the Santa Clara County Department of Environmental Health (SCCDEH) and San José Fire Department prior to removal of the existing underground storage tank (UST) and aboveground storage tank (ASTs). Collect and analyze sampling beneath the tanks after the removals under the direction of the SCCDEH and provide confirmation of the UST removal to the City’s Planning, Building and Code Enforcement. If the SCCDEH has determined the storage tanks have leaked, the project applicant shall perform all subsequent investigation and remediation as required under SCCDEH oversight to meet regulatory requirements and ensure the project site is safe for the development.
- MM HAZ-1.2** Due to the site’s history and the presence of miscellaneous drums, aboveground storage tanks (ASTs), and debris, the project applicant shall

prepare a Soil Management Plan (SMP) to minimize health risks to construction workers and future residences and site occupants. The Site Management Plan (SMP) shall be prepared prior to issuance of any grading demolition or building permits (whichever occurs first) to establish appropriate management practices for handling impacted soil and/or groundwater, if encountered, and shall include the following at a minimum:

- A detailed discussion of the project site background;
- Management of stockpiles, including sampling, disposal, and dust and runoff control including implementation of a stormwater pollution prevention program;
- Procedures to follow, including regulatory notification, if evidence of an unknown historic release of hazardous materials is discovered during excavation or demolition; and
- A health and safety plan (HSP) for each contractor working at the project site, in an area below grade, that addresses the safety and health hazards of each site operation phase, including the requirements and procedures for employee protection. The HSP shall outline proper soil handling procedures and health and safety requirements to minimize work and public exposure to hazardous materials during construction.

3.9.2.2 Project Impacts

Page 169, 2nd Paragraph:

Decommissioning of Existing Wells

The Phase I Assessment indicated that there are ~~six~~ five on-site supply wells at the Project site. These wells would be decommissioned and removed to make way for the Project. The Project applicant would be required to obtain a permit from the SCVWD prior to decommissioning and removing the on-site wells.⁵⁸ Adherence to permitting requirements outlined by the SCVWD would ensure that decommissioning of the existing wells would not result in any impacts to groundwater. With the implementation of MM HAZ-1 through MM HAZ-3 and the standard permit conditions identified above, the Project would have a less than significant impact. Less Than Significant Impact with Mitigation.

3.10.1.1 Regulatory Framework

Page 173, 5th Paragraph:

California's Sustainable Groundwater Management Act

Valley Water has managed groundwater resources in Santa Clara County since 1929, and conditions have been sustainable for many decades due to our activities that protect and

augment groundwater supplies. In 2014, Governor Brown signed the SGMA to promote local, sustainable groundwater management.

For basins designated as medium and high priority by the state, SGMA requires local GSAs to develop and implement Groundwater Sustainability Plans (GSPs) or Alternatives to achieve sustainability. Valley Water is the GSA for the Santa Clara and Llagas Subbasins (the primary basins in the county) and the small portions of the North San Benito Subbasin in Santa Clara County.

Page 174, 1st Paragraph:

Municipal Regional Stormwater Permit

The San Francisco Bay RWQCB has issued a Municipal Regional Stormwater NPDES Permit, (Permit Order No. R2-2022-0018, NPDES Permit No. CAS612008), effective July 1, 2022, (MRP) to regulate stormwater discharges from municipalities and local agencies (co-permittees) in Alameda, Contra Costa, San Mateo, and Santa Clara Counties, and the cities of Fairfield, Suisun City, and Vallejo.

The City is required to operate under the MRP to discharge stormwater from the City's storm drain system to surface waters. The MRP mandates that the City use its planning and development review authority to require that stormwater management measures are included in new and redevelopment projects to minimize and properly treat stormwater runoff. Provision C.3 of the MRP regulates the following types of development projects:

- Projects that create or replace ~~10,000~~ 5,000 square feet or more of impervious surface.
- Special Land Use Categories that create or replace 5,000 square feet or more of impervious surface.

The Project would result in more than one acre of impervious surfaces compared to pre-project conditions. The MRP requires regulated projects to include Low Impact Development (LID) practices. These include site design features to reduce the amount of runoff requiring treatment and maintain or restore the Project site's natural hydrologic functions, source control measures to prevent stormwater from pollution, and stormwater treatment features to clean polluted stormwater runoff prior to discharge into the storm drain system. The MRP requires that stormwater treatment measures are properly installed, operated, and maintained.

3.10.1.2 Existing Conditions

Page 176, 5th Heading:

Flood Zone

The project site is located south of Coyote Creek (ranging from 90 to 350 feet along the northern boundary of the Project site). The FIRMs issued by FEMA indicate that the Project site is located

within Zone X – Shaded (Panel 06085C0068J, effective 2/19/2014). Zone X – Shaded is defined as an area where the annual flood risk is between 0.2 percent and one percent.

Page 177, 2nd Paragraph:

Water Quality

Water service to the Project would be provided by the San José Municipal Water System. ~~No existing potable water supply infrastructure is located within the Project site.~~ Five water supply wells provide potable water to the Project site. More information regarding the existing water supply can be found in Section 3.19, Utilities and Service Systems.

3.10.1.2 Existing Conditions

Page 177, 1st Paragraph:

ENGEO's geotechnical exploration reports for the Project site (Appendix I) include nearby records of depth to groundwater. These records indicate that while groundwater level was measured at 25 feet below ground surface, the depth to groundwater on the Project site may vary between ~~17 and 39~~ 10 to 20 feet below ground surface.

3.10.2.2 Project Impacts

Page 179, Threshold (b):

b) Would the project substantially decrease groundwater supplies or interfere substantially with groundwater recharge such that the Project may impede sustainable groundwater management of the basin?

The Project is located within the Santa Clara Subbasin and would be consistent with the goals and objectives of applicable groundwater management plans. The Project would result in the creation of new impervious surfaces on the Project site that is sparsely developed and could potentially impact groundwater recharge. As shown in Figure 2-1 of the 2021 Groundwater Management Plan for the Santa Clara and Llagas Subbasin, the Project site is located within the Santa Clara Plain confined area but is not located on or near the Santa Clara Plain recharge area. This means that subsurface geologic formations in the Project area restricts the vertical flow of groundwater. However, an increase in 716,060 square feet of impervious area could potentially impact groundwater because areas currently available for the infiltration of rainfall would be reduced. The Project would incorporate 226,592 square feet of pervious surface at the Project site consisting of landscaped areas and bioretention treatment areas. Thus, it is not anticipated that construction of the Project would decrease groundwater supplies or interfere substantially with groundwater recharge (such that the Project may impede sustainable groundwater management of the basin), because the Project would be on a developed site that is not recharging groundwater through injection well-related measures (e.g., infiltration trenches, infiltration galleries).

A new well would be constructed as part of the Project, which would result in additional use of groundwater within the Santa Clara and Llagas Subbasin. The depth of groundwater in the

Project site vicinity was measured at 25 feet below ground surface, but may range between ~~1712~~ feet and ~~3919~~ feet below ground surface. Municipal supply wells in the Santa Clara Subbasin are designed to target the deep aquifer, and average approximately 278 feet in depth. The proposed well will be at least 250 feet deep and would not impact recharge occurring in the shallow aquifer.⁶³ Additionally, wells penetrating shallow aquifers are constructed with cement to prevent intrusion of pollutants into the water.⁶⁴

Water required for operation of the Project would be provided by SJMW, whose water supplies would be augmented by the new well that would produce 1,452 acre feet per year (AFY) of potable water. As discussed in the WSA (Appendix Q), the Santa Clara subbasin has not been identified or projected to be in overdraft by the California Department of Water Resources. Groundwater within the subbasin is managed by Valley Water using ~~in-lieu recharge programs~~ recharge programs including, but not limited to, the Managed Recharge Program, In lieu Recharge Program, In-Stream Managed Recharge Program, Water Conservation Program, and Treated Groundwater Reinjection Program in addition to other recharge programs specified in Valley Water's 2021 Groundwater Management Plan that maintain adequate storage to meet annual water supply needs and provide a buffer against drought or other shortages. Because SJMW would own and operate the new well in compliance with all Valley Water's 2021 Groundwater Management Plan for the Santa Clara ~~and Llagas~~ subbasins, the additional use of groundwater would not impede sustainable groundwater management of the subbasin. **Less Than Significant Impact.**

⁶³~~California Department of Water Resources, 2004. California's Groundwater Bulletin 118. Available: https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Groundwater-Management/Bulletin-118/Files/2003-Basin-Descriptions/2_009_02_SantaClaraSubbasin.pdf~~
 Scott Lewis, P.G, Luhdorff & Scalmanini Consulting Engineers. Email correspondence. RE: NOP Comments- Seely Ave DEIR. November 2, 2022.

3.10.2.2 Project Impacts

Page 184, Threshold (e):

e) Would the Project conflict with or obstruct implementation of a water quality control plan or sustainable groundwater management plan?

The Project consists of development on an approximately 22-acre infill site. As discussed under **thresholds a) and b)** above, the Project would comply with the City's standard permit conditions, Policy 6-32, and the City's Grading Ordinance. The Project site is within the Santa Clara subbasin, which is managed by Valley Water. Valley Water has adopted the *Groundwater Management Plan for the Santa Clara and Las Llagas Subbasins* to manage the water quality of this basin.⁶⁸ The groundwater management plan includes various programs to protect groundwater quality within the basin, including the well ordinance program. The well ordinance program is intended to:

- Develop standards for the proper construction, maintenance, and destruction of wells and other deep excavations,
- Inform the public, including contractors, consultants and other government agencies about the Well Ordinance and the well standards,
- Verify that wells are properly constructed, maintained, and destroyed using a permitting and inspection mechanism,
- Take enforcement action against violators of the Well Ordinance, and
- Maintain a database and well mapping system to document information about well permitting, well construction and destruction details, a well's location, and well status.

The Project includes construction of a new well by SJMW to serve the Project and the surrounding area. The proposed well will be designed, owned, and operated by SJMW, in coordination with Valley Water and in accordance with the standards for construction and maintenance identified in the well ordinance program. As discussed in the WSA (Appendix Q), the Santa Clara subbasin has not been identified or projected to be in overdraft by the California Department of Water Resources. Groundwater within the subbasin is managed by Valley Water using ~~in-lieu recharge programs~~ recharge programs including, but not limited to, the Managed Recharge Program, In lieu Recharge Program, In-Stream Managed Recharge Program, Water Conservation Program, and Treated Groundwater Reinjection Program in addition to other recharge programs specified in Valley Water's 2021 Groundwater Management Plan that maintain adequate storage to meet annual water supply needs and provide a buffer against drought or other shortages. Because SJMW would own and operate the new well in compliance with Valley Water's 2021 Groundwater Management Plan for the Santa Clara and Llagas subbasins, the Project would not conflict with or obstruct implementation of a water quality control plan or sustainable groundwater management plan.

Less Than Significant Impact.

3.14.1.1 Regulatory Framework

Page 215, Heading 6:

Regional and Local

Final Plan Bay Area 2040 2050

Plan Bay Area ~~2040~~ 2050 is a long-range transportation, land-use, and housing plan intended to support a growing economy, provide more housing and transportation choices, and reduce transportation related pollution and GHG emissions in the Bay Area. Plan Bay Area ~~2040~~ 2050 promotes compact, mixed-use residential and commercial neighborhoods near transit, particularly within identified Priority Development Areas.

ABAG allocates regional housing needs to each city and county within the nine-county San Francisco Bay Area, based on statewide goals. ABAG also develops forecasts for population, households, and economic activity in the Bay Area. ABAG, the MTC, and local jurisdiction planning staff created the Regional Forecast of Jobs, Population, and Housing, which is an

integrated land use and transportation plan through the year ~~2040~~ 2050 (upon which Plan Bay Area ~~2040~~ 2050 is based).

3.16.2.2 Project Impacts

Page 226, Threshold (b):

The Project includes construction of a new 2.5-acre City-owned public park on the Project site. The exact features, amenities, and site design of the future park has not been determined at this time. However, the proposed park would not allow activities, such as concerts, and other live events, and would not contain any organized sports fields. Instead, the City will work with members of the community to help develop a park facility that best fits the needs of the community. The Project also proposes approximately 70,280 square feet of common open space for the residents' use, consisting of courtyards, roof decks, and other features. Since the common area open space would be private and contained on-site, it would only be used by residents and would not result in a significant impact to recreational facilities. In addition, the increase in park demand from the Project would not require the construction or expansion of recreational facilities that could have an adverse physical effect on the environment due to the proposed 2.5-acre City-owned public park and the size of the 1,472-unit residential project. **Less than Significant Impact.**

There is currently no connection from the Project site to Coyote Creek Trail. A pedestrian connection to Coyote Creek trail is dependent on coordination with City of San José Department of Parks, Recreation & Neighborhood Services and Valley Water for permitting and access, therefore it is not listed in Section 2, Project Description, of the EIR as a required feature of the Project. This Section only lists the proposed public park as an offset of the Project's impacts on recreational facilities, and a trail connection was not counted toward offsetting recreational impacts. A pedestrian connection to Coyote Creek is not included on the Project as an expansion of recreational facilities. The increase in park demand from the Project would not require the construction or expansion of recreational facilities that could have an adverse physical effect on the environment. Therefore, this would result in a less than significant impact. Less than Significant Impact.

3.17.1.1 Regulatory Framework

Page 228, Heading 6:

Regional and Local

Final Plan Bay Area ~~2040~~ 2050

The MTC and ABAG adopted the Final Plan Bay Area ~~2040~~ 2050 in ~~July 2017~~ October 2021. The Final Plan Bay Area ~~2040-2050~~ is an updated long-range Regional Transportation Plan and Sustainable Communities Strategy for the nine-county San Francisco Bay Area. This plan focuses on the following strategies:

- Forecasting transportation needs through the year ~~2040~~2050.
- Preserving the character of our diverse communities.

- Adapting to the challenges of future population growth.

This effort grew out of the California Sustainable Communities and Climate Protection Act of 2008 (California SB 375, Steinberg), which requires each of the state’s 18 metropolitan areas – including the Bay Area – to reduce GHG emissions from cars and light trucks. Plan Bay Area 2040 is a limited and focused update of the region’s previous integrated transportation and land use plan, Plan Bay Area, adopted in ~~2013~~2017.

Page 229

Table 3-40 Envision San José 2040 Relevant Transportation Policies

<u>Policy TR-9.2</u>	<u>Serve as a model city for VMT reduction by implementing programs and policies that reduce VMT for City of San José employees.</u>
<u>Policy TR-9.3</u>	<u>Enhance the overall travel experience of transit riders, pedestrians, bicyclists, and shared micromobility users to encourage mode shift.</u>

Source: San José, 2024.

3.17.2.3 Project Impacts

Page 237, Paragraph 5:

Pedestrian, Bicycle, Transit Impacts ***Pedestrian and Bicycle Facilities***

The Project ~~would~~ could provide a direct connection to the Coyote Creek multi-use trail (Class I bikeway) that runs along both sides of Coyote Creek. The Coyote Creek Trail extends from the northern extent of McCarthy Boulevard south to Zanker Road in San José. The trail passes under Montague Expressway and thus provides a safe and convenient pedestrian and bicycle connection between the Project site and areas south of Montague Expressway.

3.17.2.3 Project Impacts

Page 241, Paragraph 5:

Mitigation Measures ***MM TR-1.1***

- **Bike Access Improvements:** Construct a Class II bike lane along the opposite side of Seely Ave (southbound direction) ~~and Class IV bike lanes on the frontage along Montague Expressway Seely Avenue.~~ Coordination with the City would be needed to implement ~~these~~this non-frontage bicycle network improvements.
- **Pedestrian Network Improvements:** Construct a new crosswalk on Seely Avenue and Americans with Disabilities Act (ADA) compliant curb ramps (off-site pedestrian improvements). The project shall provide a trail connection between Building B and the

townhomes. Clear pedestrian paths between the trail connections and the proposed on-site public park shall be provided. ~~Implementation of these improvements would require coordination with the City of San José Department of Parks, Recreation & Neighborhood Services (SJPRNS) to provide a connection between the public park and the Coyote Creek trail. An on-site public access easement would also be required.~~

3.19.1.2 Existing Conditions

Page 256, Heading 5:

Existing Water Supply Systems

Under existing conditions, potable water on the Project site is provided by ~~six~~ five on-site groundwater wells.

3.19.2.2 Project Impacts

Page 260, Paragraph 3:

The Phase I Assessment indicated that there are ~~six~~ five on-site supply wells at the Project site. These wells would be decommissioned in conformance with the Santa Clara Valley Water Ordinance 90-1. However, the decommissioning would not require or result in the relocation or construction of new or expanded wastewater treatment, storm water drainage, electric power, natural gas, or telecommunications facilities.

3.19.2.2 Project Impacts

Page 261, Paragraph 2:

Condition of Approval

~~The permittee shall dedicate the 0.11-acre parcel to the San Jose Muni Water to allow for construction of a domestic water supply well at the project site in order to ensure that the proposed well meets the water demands of the project as determined by the Water Supply Assessment. The project applicant shall dedicate the 0.11-acre parcel to SJMW for dedication prior to issuance of the first building permit, as feasible. Prior to issuance of a grading permit, with the exception of a mass excavation and grading permit to allow for the completion of required soil remediation, the Permittee shall dedicate the approximately 0.11-acre well site to the City of San José.~~

Section 4.0, Cumulative Project Impacts

4.1.19.1 Water Supply

Page 276, Paragraph 1:

As discussed in the WSA (Appendix Q), the Santa Clara subbasin has not been identified or projected to be in overdraft by the California Department of Water Resources. Groundwater within the subbasin is managed by Valley Water using ~~in-lieu recharge programs~~ recharge programs including, but not limited to, the Managed Recharge Program, In lieu Recharge Program, In-Stream Managed Recharge Program, Water Conservation Program, and Treated Groundwater ReInjection Program in addition to other recharge programs specified in Valley Water's 2021 Groundwater Management Plan that maintain adequate storage to meet annual water supply needs and provide a buffer against drought or other shortages. Because SJMW would own and operate the new well in compliance with all Valley Water groundwater management requirements, the additional use of groundwater would not impede sustainable groundwater management of the subbasin. Therefore, SJMW would have sufficient water supplies available to serve the Project and reasonably foreseeable future development through normal, dry, and multiple dry years. **Less Than Significant Impact.**

Section 11, References

Page 312, 9th 10th, and 11th line:

Luhdorff and Scalmanini Consulting Engineers, Water Supply Assessment for the 681 East Trimble Project, March 2022.

Lewis, Scott. P.G, Luhdorff & Scalmanini Consulting Engineers, Email correspondence. RE: NOP Comments- Seely Ave EIR, November 2, 2022

Pacific Gas & Electric (PG&E), Clean energy solutions, 2021. Accessible at https://www.pge.com/en_US/about-pge/environment/what-we-are-doing/clean-energysolutions/clean-energy-solutions.page

4.0 MITIGATION, MONITORING, AND REPORTING PROGRAM

The MMRP is CEQA-required component of the EIR process for the Project. The results of the environmental analyses, including proposed mitigation measures, are documented in the DEIR.

CEQA requires that agencies adopting EIRs take affirmative steps to determine that approved mitigation measures are implemented subsequent to project approval.

As part of the CEQA environmental review procedures, Public Resources Code §21081.6 requires a public agency to adopt a monitoring and reporting program to ensure efficacy and enforceability of any mitigation measures applied to the proposed project. The lead agency must adopt an MMRP for mitigation measures incorporated into the Project or proposed as conditions of approval. The MMRP must be designed to ensure compliance during project implementation. As stated in Public Resources Code §21081.6 (a) (1):

“The public agency shall adopt a reporting or monitoring program for the changes made to the project or conditions of project approval, adopted in order to mitigate or avoid significant effects on the environment. The reporting or monitoring program shall be designed to ensure compliance during project implementation. For those changes which have been required to be incorporated into the project at the request of a responsible agency or a public agency having jurisdiction by law over natural resources affected by the project, that agency shall, if so requested by the lead agency or a responsible agency, prepare and submit a proposed reporting or monitoring program.”

Table 4-1 below is the MMRP for the Project. The table lists each of the mitigation measures proposed in the DEIR and specifies the agency responsible for implementation and time period of the mitigation measure.

The DEIR identified significant impacts that could not be reduced to less-than-significant levels because no feasible mitigation measures could be identified. The impact statements for such impacts are not included in the MMRP, as the purpose of the MMRP is to identify actionable mitigation measures to be implemented. Given this, the impact statement numbers presented in **Table 4-1** may not be in consecutive order.

Table 4-1 Mitigation, Monitoring, and Reporting Program

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
AIR QUALITY					
IMPACT AQ-1: Emissions from project operations would result in 54.82 pounds/day of ROG, which exceeds the BAAQMD threshold of 54 pounds/day.					
<p>MM AQ-1: Prior to the issuance of any grading, building or demolition permits, the project applicant shall develop and implement a construction monitoring and operations plan that demonstrates use of super-compliant volatile organic compound or “VOC” (i.e., reactive organic gases [ROG]) coatings, that are below current Bay Area Air Quality Management District (BAAQMD) requirements (i.e., Regulation 8, Rule 3: Architectural Coatings), for at least 90 percent of all residential and nonresidential interior paints and 80 percent of exterior paints. This includes all architectural coatings applied during both construction and reapplications throughout the project’s operational lifetime. At least 90 percent and 80 percent of coatings applied for interior and exterior, respectively, must meet a “super-compliant” VOC standard of less than 10 grams of VOC per liter of paint. For reapplication of coatings during the project’s operational lifetime, the Declaration of Covenants, Conditions, and Restrictions shall contain a stipulation for low VOC coatings to be used. Examples of “super-compliant” coatings are contained in the BAAQMD’s website. The plan shall be reviewed and approved by the Director of Planning, Building and Code</p>	<p>Prepare and implement a construction monitoring and operations plan. Submit a copy of the plan to the Director of Planning, Building and Code Enforcement or the Director’s designee.</p>	<p>Prepare and submit plan prior to issuance of any grading, building or demolition permits.</p> <p>Implement plan during construction and throughout operation.</p>	<p>Director of Planning, Building and Code Enforcement or the Director’s designee.</p>	<p>Review and approve the construction monitoring and operations plan.</p>	<p>Prior to the issuance of any grading, building or demolition permits.</p>

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
Enforcement or the Director’s designee prior to the issuance of any demolition, grading, or building permits (whichever occurs first). With implementation of MM AQ-1, the project’s operation ROG emissions of architectural coatings would be reduced by 9 percent to 49.22 pounds/day and would no longer approach exceedance of the single-source threshold.					
BIOLOGICAL RESOURCES					
IMPACT BIO-1: Project construction, including the removal of vegetation, shrubs/trees, and structures, that would occur during the migratory bird nesting season could result in a significant impact to nesting bird species.					
<p>MM BIO-1: Avoidance: Prior to the issuance of any tree removal, grading, building or demolition permits (whichever comes first), the project applicant shall schedule all construction activities to avoid the nesting season. The nesting season for most birds, including most raptors in the San Francisco Bay area, extends from February 1 through August 31 (inclusive). Construction activities include any site disturbance such as, but not limited to, tree trimming or removal, demolition, grading, and trenching.</p> <p>Nesting Bird Surveys: If construction activities cannot be scheduled to occur between September 1 and January 31, pre-construction surveys for nesting birds and raptors shall be completed by a qualified ornithologist or biologist to ensure that no nests shall be disturbed during project implementation. The survey shall be completed no more</p>	<p>Avoid vegetation removal between February 1 through September 15, inclusive.</p> <p>Conduct pre-construction nesting bird surveys 14 days prior to the start of construction activities.</p> <p>Establish a construction free buffer zone if an active nest is found close to the work site.</p> <p>Submit a report of the results of the nesting</p>	<p>Prior to issuance of any grading or demolition permits.</p>	<p>Director of Planning, Building and Code Enforcement or the Director’s designee.</p>	<p>Review the results of the nesting bird surveys and buffer zone plans.</p>	<p>Prior to issuance of any grading or demolition permits.</p>

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>than 14 days prior to the initiation of construction activities during the early part of the breeding season (February 1 through April 30 August 31 inclusive), and no more than 30 days prior to the initiation these activities during the late part of the breeding season (May 1 through August 31 inclusive). During this survey, the qualified ornithologist/biologist shall inspect all suitable nesting habitat on the project site and within the zone of influence (the area immediately surrounding the Project site that supports suitable nesting habitat that could be impacted by the project due to visual or auditory disturbance associated with the removal of vegetation and construction activities scheduled to occur during the nesting season).</p> <p>Buffer Zone: If an active nest is found, the qualified ornithologist/biologist shall determine an appropriately sized species-specific buffer around the nest in which no work will be allowed until the young have successfully fledged. In general, buffer sizes of 200 feet for raptors and 50 feet for other birds should suffice to prevent disturbance to birds nesting in the urban environment, but these buffer sizes may be increased or decreased, as appropriate, depending on the bird species and the level of disturbance anticipated near the nest. The construction contractor shall establish a construction free buffer zone around the nest as determined by the qualified ornithologist/biologist to ensure that migratory bird and</p>	<p>bird survey to the Director of Planning, Building and Code Enforcement or Director’s designee.</p>				

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>raptor nests shall not be disturbed during project construction. This buffer shall remain in place until such a time as the young have been determined (by a qualified ornithologist/biologist) to have fledged. Any birds that begin nesting amid construction activities shall be assumed to be habituated.</p> <p>Reporting: Prior to the initiation of any tree removal, or approval of any grading or demolition permits (whichever occurs first), the qualified ornithologist/biologist shall submit a report indicating the results of the survey and any designated buffer zones to the satisfaction of the Director of the Planning, Building, and Code Enforcement or the Director’s designee.</p>					
<p>IMPACT BIO-2: Project construction, including the removal of trees and building demolition could negatively impact roosting bat habitat if done during the maternity roosting season (May 1 to September 15).</p>					
<p>MM BIO-2:</p> <ul style="list-style-type: none"> Avoidance: Prior to the issuance of any tree removal, grading, building or demolition permits (whichever comes first), for all project activities planned in or adjacent to potential bat roosting habitat, a qualified biologist shall conduct daytime and evening acoustic surveys in addition to extensive visual surveys of potential habitat for special-status bats no more 	<p>Conduct site surveys to characterize bat utilization of roosting bat habitat on and adjacent to the Project site and potential bat species present prior to construction.</p>	<p>Prior to issuance of any grading, building or demolition permits.</p>	<p>Director of Planning, Building and Code Enforcement or the Director’s designee.</p>	<p>Review report indicating the results of the survey and any designated buffer zones.</p>	<p>Prior to issuance of any grading, building or demolition permits.</p>

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>than 30 days prior to initiation of project activities.</p> <ul style="list-style-type: none"> To ensure that special-status bats have left potential roosting refugia, work shall occur over the course of two days. On the first day, smaller limbs or items from the identified trees or structures shall be brushed back or modified in the late afternoon. This disturbance should cause any potential roosting bats to seek other roosts during their nighttime foraging. The remainder of the refugia item can then be further limbed or removed as needed on the second day as late in the afternoon as feasible. Comparable demolition techniques shall be used to dismantle occupied structures on the Project site. <p>Based on the results of these initial surveys, one or more of the following shall occur:</p> <ul style="list-style-type: none"> No Detection: If it is determined that bats are not present on or adjacent to the project site, no additional mitigation is required. If no bats are found roosting, bat exclusion devices will be installed to prevent bats from taking up occupancy of the vacant structures prior to the onset of construction. 					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<ul style="list-style-type: none"> Buffer Zone: If it is determined that bats are utilizing the project site or adjacent trees and may be impacted by the project, pre-construction surveys shall be conducted within 50 feet of construction limits no more than 30 days prior to the start of construction. If, according to the bat specialist/wildlife biologist, no bats or bat signs are observed in the course of the pre-construction surveys, the qualified bat specialist /wildlife biologist shall determine if disturbance will jeopardize the roost (i.e., maternity, foraging, day, or night). Roosting: If a single bat and/or only adult bats are roosting, removal of trees or structures may proceed after the bats have been safely excluded from the roost. Exclusion techniques shall be determined by the qualified bat specialist /wildlife biologist and would depend on roost type. If an active maternity roost is detected, avoidance is preferred. Work in the vicinity of the roost (buffer to be determined by qualified bat specialist or wildlife biologist) shall be postponed until the qualified bat specialist/wildlife biologist monitoring the roost determines that the young have fledged and are no longer dependent on the roost. The monitor shall ensure that all bats have 					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>left the area of disturbance prior to initiation of pruning and/or removal of trees that would disturb the roost. If a roost of bats is found in any of the existing structures, the bats shall be safely evicted under the direction of a qualified biologist. Eviction of bats will occur at night to decrease the likelihood of predation (compared to eviction during the day). Eviction will occur outside of the maternity season but will not occur during long periods of inclement or cold weather (as determined by the qualified biologist) when prey are not available or bats are in torpor. Eviction activities will be performed under the supervision of a qualified biologist.</p> <p>Reporting: Prior to the issuance of any grading, building or demolition permits (whichever comes first), the qualified bat specialist/wildlife biologist shall submit a report indicating the results of the survey and any designated buffer zones to the satisfaction of the Director of the Planning, Building, and Code Enforcement or the Director's designee for the regionally known bat species with suitable on-site roosting habitat.</p>					
Cultural Resources					
IMPACT CR-1: The Project includes the demolition of structures and site features that are collectively and individually eligible for listing under the California Register of Historical Resources ("CRHR") and the San José Historic Resources Inventory as a Candidate City Landmark. Therefore, the Project would have a significant impact to historic resources.					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>MM CR-1.1: Action Plan: Prior to issuance of any demolition permits or any other approval that would allow disturbance of the project site, the Permittee shall prepare and submit, for review and approval by the Director of Planning, Building and Code Enforcement or the Director’s designee in coordination with the City’s Historic Preservation Officer, a Historic Resources Mitigation Action Plan (Action Plan) demonstrating that the all required steps, actions, and documents identified within this EIR have been satisfied in accordance with the Action Plan. The Action Plan shall outline the roles and responsibilities of the Permittee, City staff, and outside individuals, groups, firms, and consultants and timelines in carrying out required mitigation measures MM CR-1.2 to MM CR-1.6.</p>	Preparation of Action Plan.	Prior to issuance of any grading, building or demolition permits.	Director of Planning, Building and Code Enforcement or Director’s designee.	Review and approve action plan	Prior to issuance of any grading, building or demolition permits.
<p>MM CR-1.2: Historic American Building Survey (“HABS”) Outline Format: Prior to the issuance of a demolition permit or any other approval that would allow ground disturbance on the project site, all contributing buildings, structures, and landscape features to the eligible historic district and individually significant buildings on the property shall be documented in accordance with the guidelines established for the Historic American Buildings Survey (HABS) and shall consist of the following components:</p> <ul style="list-style-type: none"> • Drawings – prepare sketch floor plans • Photographs – Digital photographic documentation of the interior, exterior and 	Preparation of HABS documentation.	Prior to issuance of any grading, building or demolition permits.	<p>City Historic Preservation Officer.</p> <p>Director of Planning, Building and Code Enforcement or Director’s designee.</p>	<p>Review and approve historical documentation.</p> <p>Receive historic resource documentation and receipt of submittal to History San José.</p>	Prior to issuance of any grading, building or demolition permits.

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>setting of the buildings in compliance with the National Register Photo Policy Factsheet. Photos must have a permanency rating of approximately 75 years.</p> <ul style="list-style-type: none"> Written data – HABS outline Format written documentation. <p>The Permittee shall retain a qualified historic resources consultant or equivalent professional meeting the Secretary of the Interior’s Professional Qualification Standards to preparation of the drawings, photographs and written data. The City of San José’s Historic Preservation Officer shall review and approve the documentation. After City review and approval, the Permittee shall submit the final documentation to the Director of Planning, Building and Code Enforcement or Director’s designee of the City, file the documentation with History San José and the California Room of the Martin Luther King Library, and submit proof of receipt by these entities to the City.</p>					
<p>MM CR-1.3: Three-Dimensional (“3D”) Laser Scanning. Prior to issuance of any grading, demolition, or building permits or any other approval that would allow disturbance of the project site, all individually significant and contributing buildings and structures to the eligible historic district shall be 3D laser scanned. The Permittee shall retain a qualified historic resources consultant or equivalent professional meeting the qualifications in the Secretary of the Interior’s Professional Qualification</p>	<p>Conduct professional 3D laser scanning of the “Sakauye House”.</p>	<p>Prior to issuance of any demolition permits.</p>	<p>City Historic Preservation Officer</p> <p>Director of Planning, Building and Code Enforcement or</p>	<p>Review and approve 3D Laser Scanning.</p> <p>Receive 3D Laser scanning documentation and receipt of</p>	<p>Prior to issuance of any demolition permits.</p>

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
Standards to perform 3D laser scanning. The laser scanning shall document the existing conditions of the property, utilizing 3D Laser Scanning techniques to capture the significant buildings and create a 3D point cloud model for digital archival purposes. A plan of the proposed procedures for the laser scanning shall be submitted as part of the required Action Plan (MM CR-1.1) prior to commencement. The documentation from the 3D Laser Scanning shall be reviewed and approved by the City’s Historic Preservation Officer. After City review and approval, the Permittee shall be submit the documentation to the Director of Planning, Building and Code Enforcement or Director’s designee of the City, file the documentation with History San José and the California Room of the Martin Luther King Library, and submit proof of receipt by these entities to the City.			Director’s designee.	submittal to History San José.	
<p>MM CR-1.4: Relocation and Salvage. Prior to issuance of any demolition permits or any other approval that would allow ground disturbance on the project site, the Permittee shall separately advertise the availability of all individually significant and contributing buildings, structures and site features to the eligible historic district for relocation and then salvage by a third party.</p> <p>Relocation. The Permittee shall advertise the availability of the buildings for relocation for a period of no less than 60 days. The advertisements must include a newspaper of general circulation, a website, and notice visible from the</p>	All contributing and individually significant buildings or structures would be separately advertised for relocation and then salvage.	Prior to issuance of any grading, building or demolition permits.	City Historic Preservation Officer.	Review and approve Signage and displays.	Prior to issuance of any grading, building or demolition permits.

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>public right-of-way on the project site. The Permittee must submit evidence (i.e., receipts, date and time stamped photographs, etc.) to the Director of Planning, Building and Code Enforcement or the Director’s designee that this condition has been met. If a third party agrees to relocate any of the buildings, the following measures must be followed:</p> <ol style="list-style-type: none"> 1. The City’s Director of Planning, Building and Code Enforcement or the Director’s designee, based on consultation with the City’s Historic Preservation Officer, must determine that the receiver site is suitable for the buildings. 2. Prior to relocation, the third party shall hire a qualified historic preservation architect and a qualified structural engineer to undertake an existing conditions study. The purpose of the study shall be to establish the baseline condition of the building/s prior to relocation. The documentation shall outline how to protect and preserve the buildings and their character-defining features from damage during the relocation process. The documentation shall be reviewed and approved by the City’s Historic Preservation Officer prior to relocation. 3. To protect the building during relocation, the third party shall engage a building mover who has experience moving historic structures. A qualified structural engineer shall also be engaged to determine if the building/s needs to be reinforced/stabilized before the move. 					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>4. Once relocated, the building/s shall be repaired and restored, as needed, by the third party in conformance with the Secretary of the Interior’s Standards for the Treatment of Historic Properties. In particular, the character-defining features shall be restored in a manner that preserves their historic integrity for long-term preservation. Upon completion of the work, a qualified historic resources consultant or equivalent professional meeting the qualifications in the Secretary of the Interior’s Professional Qualification Standards shall prepare a written report outlining how the work was conducted in conformance with the Secretary of the Interior’s Standards for the Treatment of Historic Properties and the Permittee shall submit the report to the City’s Historic Preservation Officer.</p> <p>Salvage. If at the end of the 60-day period minimum relocation advertisement period no third party relocates the significant buildings, the historic building materials shall be made available for salvage and reuse. The Permittee shall advertise the availability of the buildings for salvage for a period of no less than 30 days. The advertisements must include a newspaper of general circulation, a website, and notice visible from the public right-of-way on the project site. The Permittee shall submit evidence (i.e., receipts, date and time stamped photographs, etc.) to the City’s Director of Planning, Building and Code Enforcement or the Director’s designee that this condition has been met.</p>					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>MM CR-1.5: Commemoration and Public Interpretation Concepts. Prior to issuance of any building permits, the Permittee shall retain a qualified historic resources consultant or equivalent professional meeting the qualifications in the Secretary of the Interior’s Professional Qualification Standards to initiate the design development of a commemorative and interpretive program, exhibit, and/or display including, but not limited to interpretive text and historic photographs, art or sculpture, video, interactive media, and/or documentation of oral histories, that is integral to the project. The preliminary design concepts for commemoration and public interpretation shall be submitted to the City Historic Preservation Officer for review and approval.</p>	<p>Create historical display that shows interpretive text and historic photographs, art or sculpture, video, interactive media, or oral histories. The display shall be placed in a suitable publicly accessible location on the Project site.</p>	<p>Prior to issuance of any grading, building or demolition permits.</p>	<p>City Historic Preservation Officer.</p>	<p>Review and approve Signage and displays.</p>	<p>Prior to issuance of any grading, building or demolition permits.</p>
<p>MM CR-1.6: Commemoration and Public Interpretation Implementation. The specific design and details of the commemorative and interpretive program shall be fully developed in close coordination with the City as the project is implemented. The final design shall be reviewed and approved by the City’s Historic Preservation Officer prior to production. The commemoration and public interpretation program shall be completed and made accessible to the public. If the approved program includes a physical installation, it shall be placed in a suitable publicly accessible location on the project site as determined by the City and subject to the following timing:</p> <p>1) For commemoration and interpretation elements constructed within, on, or adjacent to an</p>	<p>Create historical display that shows interpretive text and historic photographs, art or sculpture, video, interactive media, or oral histories. The display shall be placed in a suitable publicly accessible location on the Project site.</p>	<p>Prior to issuance of a certificate of occupancy for that building, or prior to City acceptance of the public park.</p>	<p>City Historic Preservation Officer.</p>	<p>Review and approve Signage and displays.</p>	<p>Prior to issuance of a certificate of occupancy for that building, or prior to City acceptance of the public park.</p>

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
apartment building, prior to issuance of a certificate of occupancy for that building. 2) For commemoration and interpretation elements constructed by the Permittee within the City park, prior to City acceptance of the public park.					
IMPACT CR-2: The Project may impact Native American and historic-era archaeological deposits during excavation and construction activities.					
MM CR-2.1: Retention of a Qualified Archaeologist. Prior to issuance of any grading, building or demolition permits, the project applicant shall retain a qualified archaeologist meeting the Secretary of the Interior’s Professional Qualifications Standards for Archeology (codified in 36 Code of Federal Regulations [CFR] Part 61; 48 Federal Register [FR] 44738-44739) to oversee and ensure that all mitigation related to archaeological resources is carried out.	Retain qualified archaeologist.	Prior to the issuance of any grading, building and demolition permits.	Director of Planning, Building and Code Enforcement or the Director’s designee.	Ensure qualified archaeologist is present during construction activities to review and approve documentation and construction plans.	Prior to the issuance of any grading, building and demolition permits.
MM CR-2.2: Tribal Cultural Resources Awareness Training. Prior to issuance of any demolition or grading permits, whichever occurs first, the project applicant shall be required to submit evidence that conduct a Cultural Awareness Training has been provided to for construction personnel prior to ground disturbances. The training shall be facilitated by a qualified project archaeologist in collaboration with a Native American representative registered with the Native American Heritage Commission for the City of San José and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3. Documentation	Retain Native American Monitor.	Prior to the issuance of any grading, building and demolition permits.	Director of Planning, Building and Code Enforcement or the Director’s designee.	Ensure Native American Monitor is present during construction activities to review and approve documentation and construction plans.	Prior to the issuance of any grading, building and demolition permits.

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
verifying that Cultural Awareness Training has been conducted shall be submitted to the Director of Planning, Building and Code Enforcement or the Director’s designee.					
MM CR-2.3: Native American Monitoring. A qualified Native American Monitor, registered with the Native American Heritage Commission (NAHC) for the City of San José and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3, in collaboration with a qualified Archeologist shall also be present during applicable earthmoving activities such as, but not limited to, trenching, initial or full grading, boring on-site, or major landscaping.	Retain Native American Monitor.	Prior to issuance of any demolition, grading, or building permits.	Director of Planning, Building and Code Enforcement or the Director’s designee.	Ensure Native American Monitor is present during construction activities to review and approve documentation and construction plans.	Prior to the issuance of any demolition, grading, or building permits.
MM CR-2.4: Final Disposition of Cultural Materials. For any archaeological materials recovered from the project site during construction, the following shall apply: <ul style="list-style-type: none"> Disposition of Native American archaeological materials shall be determined through consultation with a Native American representative registered with the Native American Heritage Commission for the City of San José and that is traditionally and culturally affiliated with the geographic area as described in Public Resources Code Section 21080.3, the Director of Planning, Building and Code Enforcement or the Director's designee, and the 	Conduct Cultural Resources Awareness Training for construction personnel.	Prior to Construction.	Director of Planning, Building and Code Enforcement or the Director’s designee.	Verify documentation of Cultural Resources Awareness Training.	Prior to Construction.

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>qualified archaeologist. Disposition of human remains and associated grave goods shall be determined through consultation between the Most Likely Descendant and the landowner.</p> <ul style="list-style-type: none"> • Disposition of significant historic-era archaeological materials shall include the following options, in order of preference. Final disposition of these materials shall take into account input from descendant communities. <ul style="list-style-type: none"> ▪ Curation at a repository accredited by the American Association of Museums that meets the standards outlined in 36 Code of Federal Regulations (CFR) 79.9. ▪ Curation at a non-accredited repository as long as it meets the minimum standards set forth by 36 CFR 79.9. ▪ Donation of the collection to a public, non-profit institution with a research interest in the materials. ▪ Donation to a local school or historical society in the area for educational purposes. 					
HAZARDS AND HAZARDOUS MATERIALS					
IMPACT HAZ-1: The Project would result in a potentially significant impact from the removal of the existing heating oil underground/above-ground storage tanks.					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>MM HAZ-1.1: Prior to the issuance of any grading, demolition, or building permits (whichever occurs first), the project applicant shall obtain proper permits from the Santa Clara County Department of Environmental Health (SCCDEH) and San José Fire Department prior to removal of the underground storage tank (UST) and aboveground storage tank (ASTs). Collect and analyze sampling beneath the tanks after the removals under the direction of the SCCDEH and provide confirmation of the UST removal to the City’s Planning, Building and Code Enforcement. If the SCCDEH has determined the storage tanks have leaked, the project applicant shall perform all subsequent investigation and remediation as required under SCCDEH oversight to meet regulatory requirements and ensure the project site is safe for the development.</p>	<p>Obtain permits from the SCCDEH and San José Fire Department.</p> <p>Collect and analyze sampling beneath the tanks after the removals under the direction of the SCCDEH.</p>	<p>Prior to issuance of any grading, demolition, or building permits.</p>	<p>Director of Planning, Building and Code Enforcement or the Director’s designee.</p>	<p>Review permits from SCCDEH and San José Fire Department.</p>	<p>Prior to issuance of any grading, demolition, or building permits.</p>
<p>MM HAZ-1.2: Due to the site’s history and the presence of miscellaneous drums, aboveground storage tanks (ASTs), and debris, the project applicant shall prepare a Soil Management Plan (SMP) to minimize health risks to construction workers and future residences and site occupants. The Site Management Plan (SMP) shall be prepared prior to issuance of any grading demolition or building permits (whichever occurs first) to establish appropriate management practices for handling impacted soil and/or groundwater, if encountered, and shall include the following at a minimum:</p>	<p>Prepare SMP.</p>	<p>Prior to issuance of any grading, demolition, or building permits.</p>	<p>Director of Planning, Building and Code Enforcement or the Director’s designee.</p>	<p>Review SMP.</p>	<p>Prior to issuance of any grading, demolition, or building permits.</p>

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<ul style="list-style-type: none"> • A detailed discussion of the project site background; • Management of stockpiles, including sampling, disposal, and dust and runoff control including implementation of a stormwater pollution prevention program; • Procedures to follow, including regulatory notification, if evidence of an unknown historic release of hazardous materials is discovered during excavation or demolition; and • A health and safety plan (HSP) for each contractor working at the project site, in an area below grade, that addresses the safety and health hazards of each site operation phase, including the requirements and procedures for employee protection. The HSP shall outline proper soil handling procedures and health and safety requirements to minimize work and public exposure to hazardous materials during construction. 					
<p>Impact HAZ-2: The Project could result in a potentially significant impact from the potential for harmful vapors (benzene, vinyl chloride, and TCE) volatilizing from contaminated soil and migrating into structures, leading to possible adverse health impacts to residents.</p>					
<p>MM HAZ-2: In connection with the construction of each building on the project site (i.e., Building A, Building B, Building C, Townhomes, and Affordable Apartment Building), the project applicant shall, in accordance with</p>	Obtain regulatory oversight of the mitigation of contaminated soil from	Prior to issuance of any grading or demolition permits.	Director of Planning, Building and Code Enforcement or	Review and approve evidence of regulatory	Prior to issuance of any grading or demolition permits.

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
the SMP discussed in MM HAZ-1.2, obtain regulatory oversight with Santa Clara County Department of Environmental Health (SCCDEH) and determine if potential vapor intrusion risks exist from the identified VOCs and then, as necessary, evaluate and/or mitigate any such potential vapor intrusion risks through the installation of vapor mitigation measures. The project applicant shall comply with all applicable reporting, testing, mitigation, and/or operation & maintenance protocols documented in the SMP and Vapor Intrusion Mitigation System Pre-Occupancy Verification Monitoring Report (if required) and any other reports required by the SCCDEH. Prior to occupancy, the applicant shall submit to the City evidence of SCCDEH’s written approval of the SMP and the Vapor Intrusion Mitigation System Pre-Occupancy Verification Completion and Monitoring Report and other reports (if required).	the DTSC and enter into the SCCDEH’s Site Cleanup Program.		the Director’s designee.	oversight and approved plan(s).	
IMPACT HAZ-3: Due to the agricultural history on the shallow project site, the Project site soils contain elevated levels of lead and arsenic that exceed the applicable regulatory ESLs. If the identified soil impacts are not mitigated, construction of the Project could result in exposure of construction workers, adjacent properties, and future site occupants to pesticide contamination.					
MM HAZ-3: Prior to issuance of any demolition and/or grading permits, the project applicant shall enter the Santa Clara County Department of Environmental Health’s (SCCDEH) Site Cleanup Program, or the Department of Toxic Substances Control (DTSC) to obtain regulatory oversight of the mitigation of contaminated soil to ensure	Obtain regulatory oversight of the mitigation of contaminated soil from the DTSC and enter into	Prior to issuance of any grading or demolition permits.	Director of Planning, Building and Code Enforcement or the Director’s designee.	Review and approve evidence of regulatory oversight and approved plan(s).	Prior to issuance of any grading or demolition permits.

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>the project site is safe for construction workers and the public after development. A Removal Action Plan, Soil Management Plan (SMP) or other similarly titled report describing the remediation must be prepared and implemented to document the removal and/or capping of contaminated soil. All work and reports produced shall be performed under the applicable regulatory oversight and approval.</p> <p>Evidence of regulatory oversight, and approved plan(s) shall be submitted to the Director of Planning, Building and Code Enforcement or the Director’s designee and the Environmental Compliance Officer of the City for approval prior to the issuance of any grading permits.</p>	the SCCDEH’s Site Cleanup Program.				
Hydrology and Water Quality					
IMPACT HYD-1: Construction of the Project would require ground disturbing activities such as grading and excavation, which could result in accelerated erosion or siltation on work site by exposing soil to runoff, which could degrade water quality due to contaminants present.					
MM HAZ-3: Please refer to MM HAZ-3 above for a description.					
NOISE AND VIBRATION					
IMPACT NSE-1: Construction of the Project could last longer than 12 months and would require work on Saturday between 8:00 am and 5:00 pm which would result in potentially significant, temporary construction noise impacts.					
MM NSE-1: Construction Noise Logistics Plan. Prior to the issuance of any grading or building demolition permits, the Project applicant shall submit and implement a	Prepare and implement noise logistics plan. Submit a copy of the	Prior to issuance of any grading, building or demolition permits.	Director of Planning, Building and Code	Receive copy of noise logistics plan.	Prior to issuance of any grading, building

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>construction noise logistics plan that specifies hours of construction, noise and vibration minimization measures, posting and notification of construction schedules, equipment to be used, and designation of a noise disturbance coordinator. The noise disturbance coordinator shall respond to neighborhood complaints and shall be in place prior to the start of construction and implemented during construction to reduce noise impacts on neighboring residents and other uses. The noise logistic plan shall be submitted to the Director of Planning, Building and Code Enforcement or Director’s designee prior to the issuance of any grading or demolition permits. As a part of the construction noise logistics plan, construction activities for the proposed project shall include, at a minimum, the following best management practices:</p> <ul style="list-style-type: none"> • Prohibit pile driving. • Construction activities shall be limited to the hours between 7:00 AM and 7:00 PM, Monday through Friday, unless permission is granted with a development permit or other planning approval. No construction activities are permitted on the weekends at sites within 500 feet of a residence (San José Municipal Code Section 20.100.450). Construction outside of these hours may be approved through a development permit based on a site-specific “construction noise mitigation plan” and a finding by the Director of PBCE that 	<p>plan to the Director of Planning, Building and Code Enforcement.</p> <p>Comply with Policy EC-1.7 noise suppression measures</p>	<p>During construction</p>	<p>Enforcement or Director’s designee</p>	<p>Ensure compliance with noise suppression devices and techniques through review of documentation provided by applicant.</p>	<p>or demolition permits</p> <p>Documentation of compliance provided monthly during construction</p>

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>the construction noise mitigation plan is adequate to prevent noise disturbance of affected residential uses.</p> <ul style="list-style-type: none"> • Construct solid plywood fences or similar along the northwest boundary of the site adjacent to residences to shield adjacent residential land uses from ground-level construction equipment and activities. The temporary 8-foot noise barrier shall be solid over the face and at the base of the barrier in order to provide a 5 dBA noise reduction. • Equip all internal combustion engine-driven equipment with intake and exhaust mufflers that are in good condition and appropriate for the equipment. • Unnecessary idling of internal combustion engines shall be strictly prohibited. • Locate stationary noise-generating equipment such as air compressors or portable power generators as far as possible from sensitive receptors. Construct temporary noise barriers to screen stationary noise-generating equipment when located near adjoining sensitive land uses. • Utilize “quiet” air compressors and other stationary noise sources where technology exists. • Control noise from construction workers’ radios to a point where they are not audible at existing residences bordering the project site. 					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<ul style="list-style-type: none"> Notify all adjacent business, residences, and other noise-sensitive land uses of the construction schedule, in writing, and provide a written schedule of “noisy” construction activities to the adjacent land uses and nearby residences. Designate a "disturbance coordinator" who shall be responsible for responding to any complaints about construction noise. The disturbance coordinator shall determine the cause of the noise complaint (e.g., bad muffler, etc.) and require that reasonable measures be implemented to correct the problem. Conspicuously post a telephone number for the disturbance coordinator at the construction site and include it in the notice sent to neighbors regarding the construction schedule. 					
TRANSPORTATION					
IMPACT TR-1: The residential component of the Project would generate VMT of 11.19 per capita. The Project VMT, therefore, exceeds the residential threshold of 10.12 VMT per capita.					
MM TR-1.1: Prior to the issuance of any demolition, grading and/or building permits, the Project applicant shall prepare project construction plans that illustrate the design of the Project site enhancements, and shall coordinate with the City Parks, Recreation, & Neighborhood Services, Department of Transportation,	Provide an online kiosk with information regarding non-auto transportation alternatives.	Prior to issuance of any building permits.	Director of Planning, Building and Code Enforcement or the Director’s designee.	Review and approve TDM plan.	Prior to issuance of any building permits.

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>and the Department of Public Works to incorporate the following:</p> <ul style="list-style-type: none"> • Bike Access Improvements: Construct a Class II bike lane on the opposite side of Seely Avenue (southbound direction). Coordination with the City would be needed to implement this non-frontage bicycle network improvement. • Pedestrian Network Improvements: Construct a new crosswalk on Seely Avenue and Americans with Disabilities Act (ADA) compliant curb ramps (off-site pedestrian improvements). The project shall provide a trail connection between Building B and the townhomes. Clear pedestrian paths between the trail connections and the proposed on-site public park shall be provided. • Car Sharing Program: Provide either subsidies or promotions for a car sharing program (e.g., Zipcar, Car2Go, GetAround, etc.) for residents of the apartments upon request. Dedicated car share vehicle parking would also be provided at a preferential on-site location within each apartment building. All residents of the apartments (both market rate and affordable apartments) with a valid driver’s license would be eligible to participate in the car sharing program. 	<p>Provide a program that targets individual attitudes and behaviors or apartment residents towards travel and provides information and tools for residents to analyze and alter their travel behavior.</p> <p>Provide On-Site TDM Administration and Services.</p>				

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<ul style="list-style-type: none"> • Traffic Calming Measures: The Project would construct new bicycle facilities on both sides of Seely Avenue. As a result of these improvements, the existing travel lane widths along Seely Avenue would be narrowed. Narrowing travel lane widths results in reduced vehicle speeds. Providing traffic calming and safety measures such as narrowing travel lane widths and adding signalized pedestrian crossings creates a safer environment and promotes walking and biking as alternatives to driving. • Unbundled Parking: Provide 100 percent unbundled parking for the designated apartment spaces. Unbundled parking is separating the cost of parking from residential leases and allowing tenants to choose whether to lease a parking space. With this approach those tenants without a vehicle would not be required to pay for parking that they do not want or need. • Voluntary Travel Behavior Change Program: Provide a program that targets individual attitudes and behaviors of apartment residents towards travel and provides information and tools for residents to analyze and alter their travel behavior. Voluntary Travel Behavior Change programs include mass communication campaigns and travel feedback programs, such as travel diaries or feedback on calories burned from 					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<p>alternative modes of travel. This strategy encourages the use of shared ride modes, transit, walking, and biking, thereby reducing drive-alone vehicle trips and VMT. All residents/households would be provided with the information/tools necessary to fully participate in the Voluntary Travel Behavior Change program.</p> <ul style="list-style-type: none"> • On-Site Transportation Demand Management (TDM) Administration and Services: Designate a transportation coordinator who focuses on transportation issues and is responsible for implementing the TDM measures. The transportation coordinator would be a point of contact for residents should TDM-related questions arise and would be responsible for ensuring that residents are aware of all the transportation options available to them. The transportation coordinator would provide the following services and functions <ul style="list-style-type: none"> ○ Provide new tenants with information brochures at the time of move-in. The welcome brochures should include information about public transit services, transit passes, bicycle maps, and other rideshare/carpool options. 					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
<ul style="list-style-type: none"> ○ Assist with carpool matching. The transportation coordinator should help match residents interested in carpooling. ○ Be knowledgeable enough to answer residents' TDM program related questions. ● Information Board/Online Kiosk: Provide an online kiosk with information regarding non-auto transportation alternatives. The online kiosk shall update key transportation information included in the welcome brochures. Transportation news and commuter alerts should be posted online. The website shall be operational as soon as the new buildings are ready for leasing. ● Traffic Calming Measures: The project applicant shall be required to implement additional traffic calming measures following occupancy of the project if City staff determines that the increase in traffic volume could create safety-related issues along the northern segment of Seely Avenue near the residential neighborhoods north of the project site. If issues are identified following occupancy of the project, City staff will require a focused traffic operations study of Seely Avenue to determine the appropriate traffic calming measures that should be implemented by the project. Additional traffic 					

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
calming measures could include (but are not limited to) roadway striping, curb markings, enhanced crosswalks, signage, bulb-outs, chicanes, chokers, medians, and road bumps. Should the project ultimately be required to implement traffic calming measures, the cost of such improvements shall not exceed \$450,000.					
MM TR-1.2: Prior to the issuance of any building or occupancy permits for the apartment complex, the project applicant shall provide a draft Transportation Demand Management (TDM) plan prior to issuance of Planning Permit for review and approval. Prior to clearance for building occupancy, a final TDM Plan shall be submitted to the City for approval. After the project is constructed and occupied, the project applicant shall identify a transportation coordinator. The transportation coordinator would be responsible for implementing the ongoing TDM program. The TDM Plan would need to be re-evaluated annually for the life of the project. It is recommended that the designated transportation coordinator consult with City staff to ensure the monitoring and reporting meets the City’s expectations. The TDM Coordinator shall be responsible for submitting the monitoring reports to the Director of Department of Public Works or Director’s designee and Director of City Planning, Building and Code	Retain TDM coordinator and monitor.	Prior to issuance of any building or occupancy permits; during Operation.	Director of Planning, Building and Code Enforcement or the Director’s designee.	Review and approve TDM plan and monitoring reports.	Prior to issuance of any building or occupancy permits; During Operation.

MITIGATIONS	MONITORING AND REPORTING PROGRAM				
	Documentation of Compliance [Project Applicant/Proponent Responsibility]		Documentation of Compliance [Lead Agency Responsibility]		
	Method of Compliance Or Mitigation Action	Timing of Compliance	Oversight Responsibility	Actions/Reports	Monitoring Timing or Schedule
Enforcement Department or the Director’s designee for the life of the project.					